



UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
Bethesda, Maryland 20814

This document has been electronically
approved and signed.

Memorandum

Date: January 20, 2016

TO : The Commission
Todd A. Stevenson, Secretary

THROUGH: Stephanie Tsacoumis, General Counsel
Mary Boyle, Deputy General Counsel
Patricia Pollitzer, Assistant General Counsel

FROM : Ray M. Aragon, Special Attorney, OGC

SUBJECT : Notice of Proposed Rulemaking for Amendment of 16 C.F.R. Part 1025,
Rules of Practice for Adjudicative Proceedings

BALLOT VOTE: Due January 26, 2016

The Office of the General Counsel (“OGC”) is providing for Commission consideration the attached draft notice of proposed rulemaking (“NPR”) for publication in the *Federal Register*. The proposed rule would amend 16 C.F.R. part 1025, the Commission’s Rules of Practice for Adjudicative Proceedings (“Rules” or “Rules of Practice”), to align the Rules with the modern Federal Rules of Civil Procedure, and to reflect modern administrative and civil litigation practice.

OGC recommends that the Commission approve the draft NPR for amendment of the Rules of Practice.

Please indicate your vote on the following options:

- I. Approve publication of the attached document in the *Federal Register*, as drafted.

(Signature)

(Date)

THIS DOCUMENT HAS NOT BEEN REVIEWED
OR ACCEPTED BY THE COMMISSION.

CLEARED FOR PUBLIC RELEASE
UNDER CPSA 6(b)(1)

II. Approve publication of the attached document in the *Federal Register*, with changes.
(Please specify.)

(Signature)

(Date)

III. Do not approve publication of the attached document in the *Federal Register*.

(Signature)

(Date)

IV. Take other action. (Please specify.)

(Signature)

(Date)

Attachment: Draft *Federal Register* Notice: Amendment of 16 C.F.R. Part 1025, Rules of Practice for Adjudicative Proceedings



**UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814**

This document has been electronically
approved and signed.

Memorandum

Date: January 15, 2016

TO: The Commission
Todd A. Stevenson, Secretary

THROUGH: Stephanie Tsacoumis, General Counsel
Mary Boyle, Deputy General Counsel
Mary Murphy, Assistant General Counsel

FROM: Daniel Vice, Attorney, Division of Compliance, OGC

SUBJECT: Draft Notice of Proposed Rulemaking Updating 16 C.F.R. Part 1025 – Rules of Practice for Adjudicative Proceedings

EXECUTIVE SUMMARY

The Commission adopted its Rules of Practice for Adjudicative Proceedings (“Rules”) in 1980 and last amended the Rules in 1982. Since then, there have been significant changes in the Federal Rules of Civil Procedure (“Federal Rules”), on which the Commission’s Rules are based. In addition, in 2012, staff filed four administrative enforcement proceedings, three of which resulted in Consent Agreements and one of which resulted in a hearing before a Presiding Officer. Staff’s experience in litigating these four proceedings highlighted areas of the Rules that are ripe for revision. These proposed changes are based on staff’s experience in these four proceedings and a thorough review of the Federal Rules, and will make the Rules more efficient and in tune with new developments in litigation such as electronic filing and discovery.

In order to modernize the Rules, staff has prepared a Draft Notice of Proposed Rulemaking (NPR) to revise 16 C.F.R. Part 1025. The NPR seeks public comment on the changes to the Rules. The proposed changes bring the Rules closer to the current Federal Rules, including requirements for affirmative disclosures and sharing of facts and evidence by parties, rules requiring parties to cooperate in pre-discovery planning, and an earlier start to discovery. The proposed revisions to the Rules also adopt many of the provisions in the Federal Rules governing depositions, interrogatories, requests for production of documents and things, and requests for admission. The Rules also provide for electronic filing of documents and discovery of electronic documents, and eliminate inefficient requirements mandating multiple copies of paper filings.

Staff’s draft proposed changes to update 16 C.F.R. Part 1025 are attached in redline form.

PART 1025—RULES OF PRACTICE FOR ADJUDICATIVE PROCEEDINGS

Subpart A—Scope of Rules, Nature of Adjudicative Proceedings, Definitions

- 1025.1 Scope of rules.
- 1025.2 Nature of adjudicative proceedings.
- 1025.3 Definitions.

Subpart B—Pleadings, Form, Execution, Service of Documents

- 1025.11 Commencement of proceedings.
- 1025.12 Answer.
- 1025.13 Amendments and supplemental pleadings.
- 1025.14 Form and filing of pleadings and other documents.
- 1025.15 Time.
- 1025.16 Service.
- 1025.17 Intervention.
- 1025.18 Class actions.
- 1025.19 ~~Joinder~~-Consolidation of proceedings.

Subpart C—Prehearing Procedures, Motions, Interlocutory Appeals, Summary Judgments, Settlements

- 1025.21 Prehearing conferences.
- 1025.22 Prehearing briefs.
- 1025.23 Motions.
- 1025.24 Interlocutory appeals.
- 1025.25 Summary decisions and orders.
- 1025.26 Settlements.

Subpart D—Discovery, Compulsory Process

- 1025.31 General provisions governing discovery.
- 1025.32 Written interrogatories to parties.
- 1025.33 Production of documents and things, electronically stored information, and tangible things; access for inspection and other purposes.
- 1025.34 Requests for admission.
- 1025.35 ~~Depositions upon oral examination.~~
- 1025.36 Motions to compel discovery.
- 1025.37 Sanctions for failure to comply with discovery orders.
- 1025.38 Subpoenas.
- 1025.39 Orders requiring witnesses to testify or provide other information and granting immunity.

Subpart E—Hearings

- 1025.41 General rules.
- 1025.42 Powers and duties of Presiding Officer.
- 1025.43 Evidence.
- 1025.44 Expert witnesses.
- 1025.45 *In camera* materials.
- 1025.46 Proposed findings, conclusions, and order.
- 1025.47 Record.

- 1025.48 Official docket.
- 1025.49 Fees.

Subpart F—Decision

- 1025.51 Initial decision.
- 1025.52 Adoption of initial decision.
- 1025.53 Appeal from initial decision.
- 1025.54 Review of initial decision in absence of appeal.
- 1025.55 Final decision on appeal or review.
- 1025.56 Reconsideration.
- 1025.57 Effective date of order.
- 1025.58 Reopening of proceedings.

Subpart G—Appearances, Standards of Conduct

- 1025.61 Who may make appearances.
- 1025.62 Authority for representation.
- 1025.63 Written appearances.
- 1025.64 Attorneys.
- 1025.65 Persons not attorneys.
- 1025.66 Qualifications and standards of conduct.
- 1025.67 Restrictions as to former Commission members and employees.
- 1025.68 Prohibited *ex parte* communications.

Subpart H—Implementation of the Equal Access to Justice Act in Adjudicative Proceedings With the Commission

1025.70 General provisions.

- ~~1025.71 Information required from applicant.~~
- ~~1025.72 Procedures for considering applications.~~
- ~~Appendix I to Part 1025—Suggested Form of Final Prehearing Order~~

~~Authority: Consumer Product Safety Act (secs. 15, 20, 27 (15 U.S.C. 2064, 2069, 2076), the Flammable Fabrics Act (sec. 3, 5, 15 U.S.C. 1194),) the Federal Trade Commission Act (15 U.S.C. 45)), 15, unless otherwise noted.~~

~~Authority: 15 USC 45, 1192, 1194, 1197(b), 1274, 1473(c), 2064, 2066(b), 2076, 8003.~~

~~Source: 45 FR 29215, May 1, 1980, unless otherwise noted.~~

Subpart A—Scope of Rules, Nature of Adjudicative Proceedings, Definitions

§ 1025.1 Scope of rules.

The Rules in this part govern procedures in adjudicative proceedings relating to the provisions of sections 15(c), (d), and (f) and 17(b) of the Consumer Product Safety Act (15 U.S.C. 2064(c), (d), (f); 2066(b)), section 15 of the Federal Hazardous Substances Act (15 U.S.C. 1274), and sections 3 and 8(b) of the Flammable Fabrics Act (15 U.S.C. 1192, 1197(b)), Section 4(c) of the Poison Prevention Packaging Act (15 U.S.C. 1473(c)), and Section 1404 of the Virginia Graeme Baker Pool and Spa Act, (15 U.S.C. 8003), which are required by statute to be determined on the record after opportunity for a public hearing.

~~These rules will also govern adjudicative proceedings for the assessment of civil penalties under section 20(a) of the Consumer Product Safety Act (15 U.S.C. 2068(a)), except in those instances where the matter of a civil penalty is presented to a United States District Court in conjunction with an action by the Commission for injunctive or other appropriate relief. These Rules~~ This part 1025 may also be used ~~applied to~~ for such other adjudicative proceedings as the Commission, by order, shall designate. A basic intent of the Commission in the development of these ~~Rules~~ has been to promulgate a single set of procedural rules which can accommodate both simple matters and complex matters in adjudication. To accomplish this objective, broad discretion has been vested in the Presiding Officer who will hear a matter being adjudicated to allow him/her to alter time limitations and other procedural aspects of a case, as required by the complexity of the particular matter involved. A major concern of the Commission is that all matters in adjudication move forward in a timely manner, consistent with the Constitutional due process rights of all parties. ~~It is anticipated that in any adjudicative proceedings for the assessment of civil penalties there will be less need for discovery since most factual matters will already be known by the parties. Therefore, the Presiding Officer should, whenever appropriate, expedite the proceedings by setting shorter time limitations than those time limitations generally applicable under these Rules. For example, the time 150-day limitation for discovery, as provided in § 1025.31(gd), should~~ may be shortened, consistent with the extent of discovery reasonably necessary to prepare for the hearing. Except where stated otherwise, discovery matters shall be governed by the Federal Rules of Civil Procedure.

[45 FR 29215, May 1, 1980, as amended at 47 FR 46846, Oct. 21, 1982]

§ 1025.2 Nature of adjudicative proceedings.

Adjudicative proceedings shall be conducted in accordance with Title 5, United States Code, sections 551 through 559, and ~~these Rules~~ this part 1025. It is the policy of the Commission that adjudicative proceedings shall be conducted expeditiously and with due regard to the rights and interests of all persons affected and in locations chosen with due regard to the convenience of all parties. Therefore, the Presiding Officer and all parties shall make every effort at each stage of any proceedings to avoid unnecessary delay.

§ 1025.3 Definitions.

As used in this part:

(a) *Application* means an *ex parte* request by a party for an order that may be granted or denied without opportunity for response by any other party.

(b) *Commission* means the Consumer Product Safety Commission or a quorum thereof.

(c) *Commissioner* means a Commissioner of the Consumer Product Safety Commission.

(d) *Complaint Counsel* means counsel for the Commission's staff.

(e) *Electronically Stored Information* ("ESI") shall have the same meaning given to such term in the Federal Rules.

(f) *Ex parte communication* shall have the meaning set forth in § 1025.68.

(g) Federal Rules means the Federal Rules of Civil Procedure.

(eh) Motion means a request by a party for a ruling or order that may be granted or denied only after opportunity for responses by all other parties.

(lf) Party means any named person or any intervenor in any proceedings governed by this part 1025 these Rules.

(ig) Person means any individual, partnership, corporation, unincorporated association, public or private organization, or a federal, state or municipal governmental entity.

(kh) Petition means a written request, addressed to the Commission or the Presiding Officer, for some affirmative action.

(li) Presiding Officer means a person who conducts any adjudicative proceedings under this part, and may include an administrative law judge qualified under Title 5, United States Code, section 3105, but shall not include a Commissioner.

(mj) Respondent means any person against whom a complaint has been issued.

(nk) Secretary or Secretariat means the Secretariat of the Consumer Product Safety Commission.

(on) Staff means the staff of the Consumer Product Safety Commission.

Additional definitions relating to prohibited communications are in § 1025.68.

Subpart B—Pleadings, Form, Execution, Service of Documents

§ 1025.11 Commencement of proceedings.

(a) Notice of institution of enforcement proceedings. Any adjudicative proceedings under this part shall be commenced by the issuance of a complaint, authorized by the Commission, and signed by the Deputy General Counsel ~~the Associate Executive Director for Compliance and Enforcement.~~

(b) Form and content of complaint. The complaint shall contain the following:

(1) A statement of the legal authority for instituting the proceedings, including the specific sections of statutes, rules and regulations involved in each allegation; ~~and~~

(2) Identification of each respondent or class of respondents; ~~and~~

(3) A clear and concise statement of the charges, sufficient to inform each respondent with reasonable ~~definiteness~~ definitiveness of the factual basis or bases of the allegations of violation or hazard; ~~and~~ ~~A list and summary of documentary evidence supporting the charges shall be attached.~~

(4) A request for the relief which the staff believes is in the public interest; ~~and~~

(c) *Notice to the public.* Once issued, the complaint shall be submitted without delay to the FEDERAL REGISTER for publication.

§ 1025.12 Answer.

(a) *Time for filing.* A respondent shall have twenty (20) days after service of a complaint to file an answer.

(b) *Contents of answer.* The answer shall contain the following:

(1) A specific admission or denial of each allegation in the complaint. If a respondent is without knowledge or information sufficient to form a belief as to the truth of an allegation, the respondent shall so state. Such statement shall have the effect of a denial. Allegations that are not denied shall be deemed to have been admitted.

(2) A concise statement of the factual or legal defenses to each allegation of the complaint.

(c) *Default.* Failure of a respondent to file an answer within the time provided, unless extended, shall constitute a waiver of the right to appear and contest the allegations in the complaint, and the Presiding Officer may make such findings of fact and conclusions of law as are just and reasonable under the circumstances.

§ 1025.13 Amendments and supplemental pleadings.

The Presiding Officer may allow appropriate amendments and supplemental pleadings which do not unduly broaden the issues in the proceedings or cause undue delay. If the Presiding Officer determines that the amendments or supplemental pleadings do not fall within the scope of an authorized complaint, broaden the authority granted staff in a complaint, unduly broaden the issues in the proceedings, or would cause undue delay, the Presiding Officer shall refer such amendments or supplemental pleadings to the Commission for decision.

§ 1025.14 Form and filing of pleadings and other documents.

(a) *Filing.* ~~Except as otherwise provided in these Rules or by order of the Presiding Officer, all pleadings and documents submitted to the Commission or the Presiding Officer shall be addressed to, and electronically filed with, the Secretariat, and the Presiding Officer. If practicable, the Presiding Officer may shall maintain the official file for the adjudicative proceedings unless; if the Presiding Officer delegates to the Secretariat the responsibility for maintaining the official file. Pleadings and documents filed electronically may be filed in person or by mail and shall be deemed filed on the day of electronic filing; should the Presiding Officer permit by order an alternative method of filing, such order shall state the applicable date on which such filings are to be deemed filed.~~

(b) *Caption.* Every document shall contain a caption setting forth the name of the action, the docket number, and the title of the document.

(c) *Copies.* ~~An original and three (3) copies of all documents shall be~~ Unless otherwise ordered by the Presiding Officer, a single electronic copy must be filed with each of the Secretariat and the Presiding Officer. Each copy must be clear and legible.

(d) *Signature.*

(1) The original of each document filed shall be signed by a representative of record for the party or participant; or in the case of parties or participants not represented, by the party or participant; or by a partner, officer or other appropriate official of any corporation, partnership, or unincorporated association, who files an appearance on behalf of the party or participant. Documents electronically filed shall be signed electronically.

(2) By signing a document, the signer represents that the signer has read it and that to the best of the signer's knowledge, information and belief, the statements made in it are true and that it is not filed for purposes of delay.

(e) *Form.*

(1) All documents shall be dated and shall contain the electronic address and telephone number, and mailing address of the signer.

(2) Electronic text documents shall be filed in a format that prints on paper approximately 8½ x 11 inches in size. Print shall not be less than standard elite or in 12-point font and double spaced, and margins shall be one inch. —point type. Pages shall Electronic documents and files that cannot readily be fastened in printed, such as large spreadsheets, videos, or photographs, should be identified by format and the upper left corner program or along protocol required to review the left margin information.

(3) Documents that fail to comply with this section may be returned by the Secretariat or Presiding Officer. Electronic documents and files that cannot be opened or read may be returned by the Secretariat or Presiding Officer. For good cause shown, the Presiding Officer may allow deviation from the form prescribed in this section.

§ 1025.15 Time.

(a) Computation of days. In computing any time period of time prescribed or allowed by specified in this part 1025 these Rules or in any order filed in an adjudicatory proceeding subject to this part 1025 these rules, the day of the act, event, or default from which triggering the designated period of time begins to run shall not be included, but each calendar day thereafter shall be included. If the last day of the time period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs continues to run until the end of the next day which that is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this Rule, "legal holiday" includes New Year's Day, Martin Luther King, Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared as a holiday by the President or the Congress of the United States means any day designated as a legal public holiday in 5 U.S.C. § 6103.

(b) Additional time after service by mail. Whenever a party is required or permitted to do an act within a prescribed period after service of a document and the Presiding Officer permits service document is served by mail, three (3) days shall be added to the prescribed period.

(c) Extensions. For good cause shown, the Presiding Officer may extend any time limit prescribed or allowed by these rules this part 1025 or by order of the Commission or the Presiding Officer, except for those sections governing the filing of interlocutory appeals and

appeals from ~~Initial Decisions~~ decisions pursuant to § 1025.51 and those sections expressly requiring Commission action. Except as otherwise provided by law, the Commission, for good cause shown, may extend any time limit prescribed by ~~this part 1025 these Rules~~ or by order of the Commission or the Presiding Officer.

§ 1025.16 Service.

(a) *Mandatory service.* Every document filed with the Secretariat shall be served upon all parties to any proceedings, i.e., Complaint Counsel, respondent(s), and party intervenors, as well as the Presiding Officer. Every document filed with the Secretariat or Presiding Officer shall also be served upon each participant, if the Presiding Officer or the Commission so directs.

(b) *Service of complaint, ruling, petition for interlocutory appeal, order, or decision, ~~or subpoena~~.* A complaint, ruling, petition for interlocutory appeal, order, or decision, ~~or subpoena~~ shall be served ~~in one of the following ways~~ as follows:

~~(1)~~ (1) By electronic means. Service may be made by electronic means if ordered by the Presiding Officer or otherwise agreed by the parties.

~~(2)~~ (2) By registered mail, ~~or certified mail~~ or commercial carrier. A copy of the document shall be addressed to the person, partnership, corporation or unincorporated association to be served at his/her/its residence or principal office or place of business and sent by registered mail, ~~or certified mail,~~ or commercial carrier.

~~(3)~~ (3) By delivery to an individual or entity. A copy of the document may be delivered to the person to be served; or to a member of the partnership or limited liability company to be served; or to the president, secretary, or other executive officer, or a director of the corporation or unincorporated association to be served; or to an agent authorized by appointment or by law to receive service; or

~~(4)~~ (4) By delivery to an address. If the document is not to be served electronically and cannot be served in person or by mail as provided in paragraph (b)(~~1~~2) or (b)(~~3~~2) of this section, a copy of the document may be left at the principal office or place of business of the person, partnership, corporation, unincorporated association, or authorized agent with an officer or a managing or general agent; or it may be left with a person of suitable age and discretion residing therein, at the residence of the person or of a member of the partnership or of an executive officer, director, or agent of the corporation or unincorporated association to be served; or

~~(5)~~ (5) By publication in the Federal Register. A respondent that cannot be served by any of the methods already described in this section may be served by publication in the *Federal Register* and such other notice as may be directed by the Presiding Officer or the Commission, where a complaint has issued in a class action pursuant to § 1025.18.

(c) *Service of other documents.* Except as otherwise provided in paragraph (b) of this section, when service of a document starts the running of a prescribed period of time for the submission of a responsive document or the occurrence of an event, the document ~~may~~ shall be served as provided in paragraph (b) of this section by electronic means unless otherwise ordered by the Presiding Officer or otherwise agreed by the parties, ~~or by~~ by ordinary first-class mail, properly addressed, postage prepaid.

(d) *Service on a representative.* When a party has appeared by an attorney or other representative, service upon that attorney or other representative shall constitute service upon the party.

(e) *Certificate of service.* ~~The original of e~~Every document filed with the Commission and required to be served upon all parties to any proceedings, as well as participants if so directed by the Presiding Officer, shall be accompanied by a certificate of service signed by the party making service, stating that such service has been made upon each party and participant to the proceedings. Certificates of service may be in substantially the following form:

I hereby certify that I have served the attached document upon all parties and participants of record in these proceedings by ~~mailing, postage prepaid], (or [by delivering in person))]~~ emailing, mailing postage prepaid, or delivering in person, a copy to each on _____.

(Signature)

For _____

(f) *Date of service.* The date of service of a document shall be the date on which the document is sent electronically, deposited with the United States Postal Service, postage prepaid, or is delivered in person.

§ 1025.17 Intervention.

(a) *Participation as an intervenor.* Any person who desires to participate as a party in any proceedings subject to ~~these rules~~this part 1025 shall file a written petition for leave to intervene with the Secretariat~~y~~ and shall serve a copy of the petition on each party.

(1) A petition shall ordinarily be filed not later than the convening of the first prehearing conference. A petition filed after that time will not be granted unless the Presiding Officer determines that the petitioner has made a substantial showing of good cause for failure to file on time.

(2) A petition shall:

(i) Identify the specific aspect or aspects of the proceedings as to which the petitioner wishes to intervene;

(ii) Set forth the interest of the petitioner in the proceedings;

(iii) State how the petitioner's interest may be affected by the results of the proceedings; and

(iv) State any other reasons why the petitioner should be permitted to intervene as a party, with particular reference to the factors set forth in paragraph (d) of this section. Any petition relating only to matters outside the jurisdiction of the Commission shall be denied.

(3) Any person whose petition for leave to intervene is granted by the Presiding Officer shall be known as an "intervenor" and as such shall have the full range of litigating rights afforded to any other party.

(b) *Participation by a person not an intervenor.* Any person who desires to participate in the proceedings as a non-party shall file with the Secretariat a request to participate in the proceedings and shall serve a copy of such request on each party to the proceedings.

(1) A request shall ordinarily be filed not later than the commencement of the hearing. A petition filed after that time will not be granted unless the Presiding Officer determines that the person making the request has made a substantial showing of good cause for failure to file on time.

(2) A request shall set forth the nature and extent of the person's alleged interest in the proceedings. Any request relating only to matters outside the jurisdiction of the Commission shall be denied.

(3) Any person who files a request to participate in the proceedings as a non-party and whose request is granted by the Presiding Officer shall be known as a "Participant" and shall have the right to participate in the proceedings to the extent of making a written or oral statement of position, filing proposed findings of fact, conclusions of law and a post hearing brief with the Presiding Officer, and filing an appellate brief before the Commission if an appeal is taken by a party or review is ordered by the Commission in accordance with § 1025.53 or § 1025.54, as applicable, ~~of these rules.~~

(c) *Response to petition to intervene.* Any party may file a response to a petition for leave to intervene after the petition is filed with the Secretariat, with particular reference to the factors set forth in paragraph (d) of this section.

(d) *Ruling by Presiding Officer on petition.* In ruling on a petition for leave to intervene, the Presiding Officer shall consider, in addition to all other relevant matters, the following factors:

(1) The nature of the petitioner's interest, under the applicable statute governing the proceedings, to be made a party to the proceedings;

(2) The nature and extent of the petitioner's interest in protecting himself/herself/itself or the public against unreasonable risks of injury associated with consumer products;

(3) The nature and extent of the petitioner's property, financial or other substantial interest in the proceedings;

(4) Whether the petitioner would be aggrieved by any final order which may be entered in the proceedings;

(5) The extent to which the ~~petitioner's~~petitioner's intervention may reasonably be expected to assist in developing a sound record;

- (6) The extent to which the petitioner's interest will be represented by existing parties;
- (7) The extent to which the petitioner's intervention may broaden the issues or delay the proceedings; and
- (8) The extent to which the petitioner's interest can be protected by other available means.

If the Presiding Officer determines that a petitioner has failed to make a sufficient showing to be allowed to intervene as a party, the Presiding Officer shall view such petition to intervene as if it had been timely filed as a request to participate in the proceedings as a participant pursuant to paragraph (b) of this section.

(e) *Ruling by Presiding Officer on request.* In ruling on a request to participate as a participant, the Presiding Officer, in the exercise of his/her discretion, shall be mindful of the Commission's mandate under its enabling legislation (see 15 U.S.C. 2051 *et seq.*) and its affirmative desire to afford interested persons, including consumers and consumer organizations, as well as governmental entities, an opportunity to participate in the agency's regulatory processes, including adjudicative proceedings. The Presiding Officer shall consider, in addition to all other relevant matters, the following factors:

- (1) The nature and extent of the person's alleged interest in the proceedings;
- (2) The possible effect of any final order which may be entered in the proceedings on the person's interest; and
- (3) The extent to which the person's participation can be expected to assist the Presiding Officer and the Commission in rendering a fair and equitable resolution of all matters in controversy in the proceedings.

The Presiding Officer may deny a request to participate if he/she determines that the person's participation cannot reasonably be expected to assist the Presiding Officer or the Commission in rendering a fair and equitable resolution of matters in controversy in the proceedings or if he/she determines that the person's participation would unduly broaden the issues in controversy or unduly delay the proceedings.

(f) *Designation of single representative.* If the Presiding Officer determines that a petitioner pursuant to paragraph (a) of this section or a person requesting to participate pursuant to paragraph (b) of this section is a member of a class of prospective intervenors or participants, as applicable, who share an identity of interest, the Presiding Officer may limit such intervention or participation, as applicable, through designation of a single representative by the prospective intervenors or participants, as applicable, or, if they are unable to agree, by designation of the Presiding Officer.

§ 1025.18 Class actions.

(a) *Prerequisites to a class action.* One or more members of a class of respondents may be proceeded against as representative parties on behalf of all respondents if:

- (1) The class of respondents is so numerous or geographically dispersed that joinder of all members is impracticable;

- (2) There are questions of fact or issues of law common to the class;
- (3) The defenses of the representative parties are typical of the defenses of the class; and
- (4) The representative parties will fairly and adequately protect the interests of the class.

(b) *Composition of class.* A class may be composed of:

- (1) Manufacturers, distributors, or retailers, or a combination of them, of products which allegedly have the same defect, or
- (2) Manufacturers, distributors, or retailers, or a combination of them, of products which allegedly fail to conform to an applicable standard, regulation, or consumer product safety rule, or
- (3) Manufacturers, distributors, or retailers, or a combination of them, who have themselves allegedly failed to conform to an applicable standard, regulation, or consumer product safety rule.

When appropriate, a class may be divided into subclasses and each subclass shall be treated as a class.

(c) *Notice of Commencement.* A complaint issued under this section shall identify the class, the named respondents considered to be representative of the class, and the alleged defect or nonconformity common to the products manufactured, imported, distributed or sold by the members of the class. The complaint shall be served upon the parties in accordance with § 1025.16.

(d) *Proper class action determination.* Upon motion of Complaint Counsel and as soon as practicable after the commencement of any proceedings brought as a class action, the Presiding Officer shall determine by order whether the action is a proper class action. It is a proper class action if the prerequisites of paragraph (a) of this section are met and if the Presiding Officer finds that:

- (1) The prosecution of separate actions against individual members of the respondent class might result in (i) inconsistent or varying determinations with respect to individual members of the class which might produce incompatible or conflicting results, or (ii) determinations with respect to individual members of the class which would, as a practical matter, be dispositive of the interests of the other members who are not parties to the proceedings or would substantially impair or impede the ability of the absent members to protect their interests; or
- (2) The Commission has acted on grounds generally applicable to the class, thereby making appropriate an order directed to the class as a whole.

In reaching a decision, the Presiding Officer shall consider the interests of members of the class in individually controlling the defense of separate actions, the extent and nature of any proceedings concerning the controversy already commenced against members of the class, the desirability or undesirability of concentrating the litigation in one adjudication, and the difficulties likely to be encountered in the management of a class action, as well as the benefits expected to result from the maintenance of a class action.

(e) *Revision of class membership.* Upon motion of any party or any member of the class, or upon the Presiding Officer's own initiative, the Presiding Officer may revise the membership of the class.

(f) *Orders in conduct of class actions.* In proceedings to which this section applies, the Presiding Officer may make appropriate orders:

(1) Determining the course of the proceedings or prescribing measures to prevent undue repetition and promote the efficient presentation of evidence or argument;

(2) Requiring (for the protection of the members of the class, or otherwise for the fair conduct of the action) that notice be given, in such manner as the Presiding Officer may direct, of any step in the action, of the extent of the proposed order, or of the opportunity for members to inform the Presiding Officer whether they consider the representation to be fair and adequate, or of the opportunity for class members to intervene and present defenses;

(3) Requiring that the pleadings be amended to eliminate allegations concerning the representation of absent persons; or

(4) Dealing with other procedural matters.

The orders may be combined with a prehearing order under § 1025.21 of these rules and may be altered or amended as may be necessary.

(g) *Scope of final order.* In any proceedings maintained as a class action, any Decision and Order of the Presiding Officer or the Commission under § 1025.51 or § 1025.55, as applicable, whether or not favorable to the class, shall include and describe those respondents whom the Presiding Officer or the Commission finds to be members of the class.

(h) *Notice of results.* Upon the termination of any adjudication that has been maintained as a class action, the best notice practicable of the results of the adjudication shall be given to all members of the class in such manner as the Presiding Officer or the Commission directs.

§ 1025.19 ~~Joinder~~ Consolidation of proceedings.

~~(a) Consolidation of actions. When actions involving a common question of law or fact are pending before the Presiding Officer, the Commission or the Presiding Officer may order a consolidated hearing of any or all the matters in issue in the actions; the Commission or the Presiding Officer may order the actions consolidated for any purpose; and the Commission or the Presiding Officer may make such orders concerning such consolidated proceedings as may tend to avoid unnecessary cost or delay. Two or more matters which have been scheduled for adjudicative proceedings and which involve similar issues may be consolidated for the purpose of hearing or Commission review.~~

~~(b) Motions for consolidation. A motion for consolidation may be filed by any party to such proceedings not later than thirty (30) days prior to the hearing. Such motion shall be served upon all parties to any all-proceedings in which consolidation joinder is contemplated. The motion may include a request that the consolidated proceedings be maintained as a class action in accordance with § 1025.18 of these rules. The proceedings~~

may be consolidated to such extent and upon such terms as may be proper. Such consolidation may also be ordered upon the initiative of the Presiding Officer or the Commission. Single representatives may be designated by represented parties, intervenors, and participants with an Identity of Interests.

Subpart C—Prehearing Procedures, Motions, Interlocutory Appeals, Summary Judgments, Settlements

§ 1025.21 Prehearing conferences.

(a) Preliminary meeting of the parties. As early as practicable before the prehearing scheduling conference described in paragraph (b) of this section, but in no event later than five (5) days after the answer is due to be filed by the last answering respondent, counsel for the parties shall meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case. The parties shall also agree, if possible, on:

(1) A proposed discovery plan specifically addressing a schedule for depositions of fact witnesses, the production of documents and electronically stored information, and the timing of expert discovery. The parties' agreement regarding electronically stored information should include the scope of and a specified time period for the exchange of such information and the format for the discovery of such information;

(2) A preliminary estimate of the time required for the evidentiary hearing; and

(3) Any other matters to be determined at the prehearing conference.

(b) Initial prehearing conference. The Presiding Officer shall schedule a prehearing conference not later than ~~When held.~~ Except when the presiding officer determines that unusual circumstances would render it impractical or valueless, a prehearing conference shall be held in person or by conference telephone call within ~~fifty (50) days~~ after publication of the complaint in the Federal Register and upon ten (10) days' notice to all parties and participants. At the prehearing conference any or all of the following shall be considered:

(1) The factual and legal theories of the parties;

(2) The current status of any pending motions or petitions;

(3) A proposed date for the evidentiary hearing, and a schedule of proceedings that is consistent with the date of the evidentiary hearing;

(4) Steps taken to preserve evidence relevant to the issues raised by the claims and defenses;

(5) The scope of anticipated discovery, any limitations on discovery, and a proposed discovery plan, including the disclosure of electronically stored information;

(6) Issues that can be narrowed by agreement or by motion, suggestions to expedite the presentation of evidence at trial, and any request to bifurcate issues, claims or defenses; and

(7) Other possible agreements or steps that may aid in the just and expeditious disposition of the proceeding and to avoid unnecessary cost.

~~(1) Petitions for leave to intervene;~~

~~(2) Motions, including motions for consolidation of proceedings and for certification of class actions;~~

~~(3) Identification, simplification and clarification of the issues;~~

~~(4) Necessity or desirability of amending the pleadings;~~

~~(5) Stipulations and admissions of fact and of the content and authenticity of documents;~~

~~(6) Oppositions to notices of depositions;~~

~~(7) Motions for protective orders to limit or modify discovery;~~

~~(8) Issuance of subpoenas to compel the appearance of witnesses and the production of documents;~~

~~(9) Limitation of the number of witnesses, particularly to avoid duplicate expert witnesses;~~

~~(10) Matters of which official notice should be taken and matters which may be resolved by reliance upon the laws administered by the Commission or upon the Commission's substantive standards, regulations, and consumer product safety rules;~~

~~(11) Disclosure of the names of witnesses and of documents or other physical exhibits which are intended to be introduced into evidence;~~

~~(12) Consideration of offers of settlement;~~

~~(13) Establishment of a schedule for the exchange of final witness lists, prepared testimony and documents, and for the date, time and place of the hearing, with due regard to the convenience of the parties; and~~

~~(14) Such other matters as may aid in the efficient presentation or disposition of the proceedings.~~

(b~~c~~) Public notice. The Presiding Officer shall cause a notice of the first prehearing conference, including a statement of the issues, to be published in the Federal Register at least ten (10) days prior to the date scheduled for the conference.

~~(c)(d) Prehearing scheduling order.~~ Following the first prehearing conference, the Presiding Officer shall enter an order that sets forth the results of the conference and establishes a timeline for discovery, dates for the submission and hearing of motions, and other matters as appropriate.

~~(e) Additional conferences.~~ Additional prehearing conferences may be convened at the discretion of the Presiding Officer, upon notice to the parties, any participants, and to the public.

~~(f) Final prehearing conference.~~ As close to the commencement of the evidentiary hearing as practicable, the Presiding Officer shall hold a final prehearing conference, at which time deadlines for proposed stipulations as to law, fact, or admissibility of evidence, and the exchange of exhibit and witness lists shall be established. At this conference, the Presiding Officer shall also resolve any outstanding evidentiary matters or pending motions (except motions for summary decision) and establish a final schedule for the evidentiary hearing.

~~(d) Reporting.~~ Prehearing conferences shall be stenographically reported as provided in §1025.47 of these rules and shall be open to the public, unless otherwise ordered by the Presiding Officer or the Commission.

~~(e) Prehearing orders.~~ (g) Final prehearing order. The Presiding Officer shall issue a final prehearing order in each case after the conclusion of the final prehearing conference. The final prehearing order should contain, to the fullest extent possible at that time, all information which is necessary for controlling the course of the hearing. The Presiding Officer may require the parties to submit a jointly proposed final prehearing order, ~~such as in the format set forth in appendix I.~~

(h) Reporting. Prehearing conferences shall be stenographically reported as provided in § 1025.47 and shall be open to the public, unless otherwise ordered by the Presiding Officer or the Commission.

§ 1025.22 Prehearing briefs.

Not later than ten (10) days prior to the hearing, unless otherwise ordered by the Presiding Officer, the parties ~~may~~shall simultaneously serve and file prehearing briefs, which should set forth:

- (a) A statement of the facts expected to be proved and of the anticipated order of proof;
- (b) A statement of the issues and the legal arguments in support of the party's contentions with respect to each issue; and
- (c) A table of authorities relied upon.

§ 1025.23 Motions.

~~(a) Presentation and disposition.~~ During the time a matter in adjudication is before the Presiding Officer, all motions, whether oral or written, except those disqualification motions filed under § 1025.42(e), and motions or applications related to subpoenas under § 1025.38(c), shall be addressed to the Presiding Officer, who shall rule upon them promptly, after affording an opportunity for response.

(b) Written motions. All written motions shall state with particularity the order, ruling, or action desired and the reasons why the action should be granted. Memoranda, affidavits, or other documents supporting a motion shall be served and filed with the motion. All motions shall contain a proposed order setting forth the relief sought. All written motions shall be

filed with the Secretariat and served upon all parties, and all motions addressed to the Commission shall be in writing.

(c) ~~Opposition-Responses and replies to motions.~~ Within ~~fourteen~~ (14) days after service of any written motion or petition or within such longer or shorter time as may be designated by ~~this part 1025~~ these Rules or by the Presiding Officer or the Commission, any party who opposes the granting of the requested order, ruling or action may file a written response to the motion. Failure to respond to a written motion may, in the discretion of the Presiding Officer, be considered as consent to the granting of the relief sought in the motion. Replies to responses shall be filed within ten (10) days after service of the response. No additional replies or responses shall be permitted absent leave granted by the Presiding Officer or the Commission on good cause shown. Any additional replies or responses permitted by the Presiding Officer or the Commission shall be filed within five (5) days after service of the pleading to which the reply or response relates. Unless otherwise permitted by the Presiding Officer or the Commission, there shall be no reply to the response expressing opposition to the motion.

(d) *Rulings on motions for dismissal.* When a motion to dismiss a complaint or a motion for other relief is granted, with the result that the proceedings before the Presiding Officer are terminated, the Presiding Officer shall issue an Initial Decision and Order in accordance with the provisions of § 1025.51. If such a motion is granted as to all issues alleged in the complaint in regard to some, but not all, respondents or is granted as to any part of the allegations in regard to any or all respondents, the Presiding Officer shall enter an order on the record and consider the remaining issues in the Initial Decision. The Presiding Officer may elect to defer ruling on a motion to dismiss until the close of the case.

§ 1025.24 Interlocutory appeals.

(a) *General.* Rulings of the Presiding Officer may not be appealed to the Commission prior to the Initial Decision, except as provided in this section.

(b) *Exceptions.* (1) *Interlocutory appeals to Commission.* The Commission may, in its discretion, consider interlocutory appeals where a ruling of the Presiding Officer:

(i) Requires the production of records claimed to be confidential;

(ii) Requires the testimony of a supervisory official of the Commission other than one especially knowledgeable of the facts of the matter in adjudication that is the subject of a proceeding under this part 1025;

(iii) Excludes an attorney from participation in any proceedings pursuant to § 1025.42(b);

(iv) Denies or unduly limits a petition for intervention pursuant to the provisions of § 1025.17.

(2) *Procedure for interlocutory appeals.* Within ten (10) days of issuance of a ruling other than one ordering the production of records claimed to be confidential, any party may petition the Commission to consider an interlocutory appeal of a ruling in the categories enumerated above. The petition shall not exceed fifteen (15) pages. Any other party may file a response to the petition within ten (10) days of its service except where the order appealed from requires the production of records claimed to be confidential. The response

shall not exceed fifteen (15) pages. The Commission ~~shall~~ may decide the petition, or may request such further briefing or oral presentation as it deems necessary.

(3) If the Presiding Officer orders the production of records claimed to be confidential a petition for interlocutory appeal shall be filed within five (5) days of the entry of the order. Any opposition to the petition shall be filed within five (5) days of service of the petition. The order of the Presiding Officer shall be automatically stayed until five (5) days following the date of entry of the order to allow an affected party the opportunity to file a petition with the Commission for an interlocutory appeal pursuant to § 1025.24(b)(2). If an affected party files a petition with the Commission pursuant to § 1025.24(b)(2) within the 5-day period, the stay of the Presiding Officer's order is automatically extended until the Commission decides the petition.

(4) *Interlocutory appeals from all other rulings* —(i) *Grounds*. Interlocutory appeals from all other rulings by the Presiding Officer may proceed only upon motion to the Presiding Officer and a determination by the Presiding Officer in writing that the ruling involves a controlling question of law or policy as to which there is substantial ground for differences of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation, or that subsequent review will be an inadequate remedy. The Presiding Officer's certification shall state the reasons for the determination.

(ii) *Form*. If the Presiding Officer makes the determination described in paragraph (b)(4)(i) of this section, a petition for interlocutory appeal under this subparagraph may be filed in accordance with paragraph (b)(2) of this section.

(c) *Proceedings not stayed*. Except as otherwise provided under this section, a petition for interlocutory appeal shall not stay the proceedings before the Presiding Officer unless the Presiding Officer or the Commission so orders.

§ 1025.25 Summary decisions and orders.

(a) *Motion*. Any party may file a motion, with a supporting memorandum, for a Summary Decision and Order in its favor upon all or any of the issues in controversy. The motion shall be accompanied by a separate and concise statement of the material facts as to which the moving party contends there is no dispute. Complaint Counsel may file such a motion at any time after thirty (30) days following issuance of a complaint, and any other party may file a motion at any time after issuance of a complaint. Any such motion by any party shall be filed in accordance with prehearing orders issued by the Presiding Officer under and -§ 1025.21 of this part, and shall be filed no later than at least twenty (20)thirty (30) days after the close of discovery before the date fixed for the adjudicative hearing.

(b) *Response to motion*. Any other party may, within twenty (20) days after service of the motion, file a response with a supporting memorandum accompanied by a separate and concise statement of the material facts as to which the opposing party contends a genuine dispute exists.

(c) *Grounds*. A Summary Decision and Order shall be granted if the particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials-pleadings and any depositions, answers to interrogatories, admissions, or affidavits show that there is no genuine issue as

to any material fact and that the moving party is entitled to a Summary Decision and Order as a matter of law.

(d) *Legal effect.* A Summary Decision and Order upon all the issues being adjudicated shall constitute the Initial Decision of the Presiding Officer and may be appealed to the Commission in accordance with § 1025.53 of these rules. A Summary Decision, interlocutory in character, may be rendered on fewer than all issues and may not be appealed prior to issuance of the Initial Decision.

(e) *Case not fully adjudicated on motion.* A Summary Decision and Order that does not dispose of all issues shall include a statement of those material facts about which there is no substantial controversy and of those material facts that are actually and in good faith controverted. The Summary Order shall direct such further proceedings as are appropriate.

§ 1025.26 Settlements.

(a) *Availability.* Any party shall have the opportunity to submit an offer of settlement to the Presiding Officer.

(b) *Form.* Offers of settlement shall be filed *in camera* and in the form of a consent agreement and order, shall be signed by the respondent or respondent's representative, and may be signed by any other party. Each offer of settlement shall be accompanied by an *in camera* motion ~~to requesting that the Presiding Officer transmit the proposed consent agreement and order to the Commission.~~ The motion shall outline the substantive provisions of the proposed consent agreement, and state reasons why ~~it the consent agreement should be accepted by the Commission.~~ Motions Offers of settlement and accompanying motions not jointly submitted shall be served simultaneously on Complaint Counsel.

(c) *Contents.* ~~The proposed consent agreement and order which constitute the~~ An offer of settlement shall contain the following:

(1) An admission of all jurisdictional facts;

(2) An express waiver of further procedural steps and of all rights to seek judicial review or otherwise to contest the validity of the Commission order;

(3) ~~Provisions~~ A statement that the allegations of the complaint are resolved by the consent agreement and order;

(4) A description of the alleged hazard, noncompliance, or violation;

(5) ~~If~~ As appropriate, a listing of the acts or practices from which the respondent shall refrain and those acts or practices that the respondent shall affirmatively undertake; and

(6) ~~If~~ As appropriate, a detailed statement of the corrective action(s) which the respondent shall undertake. In proceedings arising under Section 15 of the Consumer Product Safety Act, 15 U.S.C. 2064, this statement shall contain all the elements of a "Corrective Action Plan," as outlined in the Commission's Interpretation, Policy, and Procedure for Substantial Product Hazards, 16 CFR part 1115.

(d) *Transmittal.* The Presiding Officer ~~shall~~ may transmit settlement offers that meet the requirements of paragraphs (b) and (c) of this section to the Commission for its consideration unless the Presiding Officer determines the decision all offers of settlement and accompanying memoranda that meet the requirements enumerated in paragraph (c) of this section. The Presiding Officer shall consider whether an offer of settlement offer is clearly frivolous, duplicative of offers previously made, and rejected by the Commission or contrary to established Commission policy. The Presiding Officer may, but need not, recommend acceptance of offers. Any party may object to the transmittal to the Commission of a proposed consent agreement an offer of settlement by filing a response opposing the motion.

(e) *Stay of proceedings.* When an offer of settlement has been agreed to by all parties and has been transmitted to the Commission, the proceedings shall be stayed until the Commission has ruled on the offer of settlement. When an offer of settlement has been made and transmitted to the Commission but has not been agreed to by all parties, the proceedings shall not be stayed pending Commission decision on the offer, unless otherwise ordered by the Presiding Officer or the Commission.

(f) *Commission ruling.* The Commission shall rule upon all transmitted offers of settlement. If the Commission accepts the offer, the Commission shall issue an appropriate order, which shall become effective upon issuance.

(g) *Commission rejection.* If the Commission rejects an offer of settlement, the ~~Secretariat, in writing,~~ shall give written notice of the Commission's decision to the parties and the Presiding Officer. If the proceedings have been stayed, the Presiding Officer shall promptly issue an order ~~notifying the parties of the resumption of~~ resuming the proceedings, ~~including with consideration to any modifications to the schedule resulting from~~ necessitated by the stay of the proceedings.

(h) *Effect of rejected offer.* Neither rejected offers of settlement, nor the fact of the proposal of offers of settlement are admissible in evidence.

Subpart D—Discovery, Compulsory Process

§ 1025.31 General provisions governing discovery.

(a) Unless otherwise provided by statute, the parties shall conduct discovery in accordance with and subject to Rule 26 of the Federal Rules, as specified in this part 1025. Unless specified below or provided for in this part 1025, the time frames set for all actions described in Rule 26 shall be set by the Presiding Officer.

(1) Initial disclosures of information required in Federal Rule 26(a)(1)(C) shall be produced no later than 5 days after the preliminary meeting of the parties as set forth in § 1025.21(a).

(2) Federal Rule 26(a)(2)(B) shall not apply.

(3) Federal Rule 26(c) shall apply with the following exceptions: Motions for protective orders shall be made to and decided by the Presiding Officer; Federal Rule 26(c)(3) shall not apply.

(4) Federal Rule 26(f) shall not apply. The conference of the parties and joint discovery planning required in Federal Rule 26(f) shall take place as set forth in § 1025.21 of this part, or as otherwise ordered by the Presiding Officer.

~~(a) *Applicability.* The discovery rules established in this subpart are applicable to the discovery of information among the parties in any proceedings. Parties seeking information from persons not parties may do so by subpoena in accordance with §1025.38 of these rules.~~

~~(b) *Discovery methods.* Parties may obtain discovery by one or more of the following methods:~~

~~(1) Written interrogatories;~~

~~(2) Requests for production of documents or things;~~

~~(3) Requests for admission; or~~

~~(4) Depositions upon oral examination.~~

~~Unless the Presiding Officer otherwise orders under paragraph (d) of this section, the frequency of use of these methods is not limited.~~

~~(c) *Scope of discovery.* The scope of discovery is as follows:~~

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

~~(2) *Privilege.* 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 (c)(4) of this section, a party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (c)(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 or consultant) 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 unique 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 Presiding Officer 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. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of paragraph (c)(1) of this section and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:~~

~~(i)(A) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify, and to provide a summary of the grounds for each opinion.~~

~~(B) Upon motion, the Presiding Officer may order further discovery by other means upon a showing of substantial cause and may exercise discretion to impose such conditions, if any, as are appropriate in the case.~~

~~(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 trial and who is not expected to be called as a witness at trial 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 Presiding Officer 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 for the time spent in responding to discovery.~~

~~(d) Protective orders. Upon motion by a party and for good cause shown, the Presiding Officer may make any order which justice requires to protect a party or person from annoyance, embarrassment, competitive disadvantage, oppression, or undue burden or expense, including one or more of the following:~~

~~(1) That the discovery shall not be had;~~

~~(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;~~

~~(3) That the discovery shall be had only by a method of discovery other than that selected by the party seeking discovery;~~

~~(4) That certain matters shall not be inquired into or that the scope of discovery shall be limited to certain matters;~~

~~(5) That discovery shall be conducted with no one present except persons designated by the Presiding Officer;~~

~~(6) That a trade secret or other confidential research, development, or commercial information shall not be disclosed or shall be disclosed only in a designated way or only to designated parties; and~~

~~(7) That responses to discovery shall be placed *in camera* in accordance with §1025.45 of these rules.~~

~~If a motion for a protective order is denied in whole or in part, the Presiding Officer may, on such terms or conditions as are appropriate, order that any party provide or permit discovery.~~

~~(e) *Sequence and timing of discovery.* Discovery may commence at any time after filing of the answer. Unless otherwise provided in these Rules or by order of the Presiding Officer, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.~~

~~(f) *Supplementation of responses.* A party who has responded to a request for discovery with a response that was complete when made is under a duty to supplement that response to include information later obtained.~~

~~(bg) *Completion of discovery.* All non-expert discovery shall be completed as soon as practical but in no case longer than one hundred fifty (150) days after issuance of a complaint, unless otherwise ordered by the Presiding Officer in exceptional circumstances and for good cause shown. All discovery demands shall be commenced made and served by a date which affords the party from whom discovery is sought the full response period provided by this part 1025 ~~these Rules~~. The Presiding Officer shall establish a time frame for the completion of expert discovery in accordance with § 1025.21.~~

~~(h) *Service and filing of discovery.* All discovery requests and written responses, and all notices of deposition, shall be filed with the Secretary and served on all parties and the Presiding Officer.~~

~~(i) *Control of discovery.* The use of these discovery procedures is subject to the control of the Presiding Officer, who may issue any just and appropriate order for the purpose of ensuring their timely completion.~~

§ 1025.32 Written interrogatories to parties.

This section shall be governed by Rule 33 of the Federal Rules.

~~(a) *Availability; procedures for use.* 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 or a partnership or unincorporated association or governmental entity, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of the Presiding Officer, be served upon any party after the filing of an answer.~~

~~(b) *Procedures for response.* Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. Each answer shall be submitted in double-spaced typewritten form and shall be immediately preceded by the interrogatory, in single-spaced typewritten form, to which the answer is responsive. The answers are to be signed by the person making them, and the objections signed by the person or representative 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 service of the interrogatories. The Presiding Officer may allow a shorter or longer time for response. The party submitting the~~

~~interrogatories may move for an order under §1025.36 of these rules with respect to any objection to, or other failure to answer fully, an interrogatory.~~

~~(c) *Scope of interrogatories.* Interrogatories may relate to any matters which can be inquired into under §1025.31(c), and the answers may be used to any extent permitted under these rules. An interrogatory otherwise proper is not objectionable merely because an answer to the interrogatory would involve an opinion or contention which relates to fact or to the application of law to fact, but the Presiding Officer may order that such an interrogatory need not be answered until a later time.~~

~~(d) *Option to produce business records.* Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served, or from an examination, audit, or inspection of such business records, or from a compilation, abstract, or summary of those records, and the burden of deriving the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to the 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.~~

§ 1025.33 Production of documents and things, electronically stored information, and tangible things; access for inspection and other purposes.

This section shall be governed by Rule 34 of the Federal Rules of Civil Procedure, with the following exception:

Requests for subpoenas shall be governed by § 1025.38 of this part.

~~(a) *Scope.* Any party may serve upon any other party a request:~~

~~(1) To produce and permit the party making the request, or someone acting on behalf of that party, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, phone records, and any other data compilation from which information can be obtained, translated, if necessary, by the party in possession through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of §1025.31(c) and which are in the possession, custody, or control of the party upon whom the request is served, or~~

~~(2) To permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection (including photographing), or sampling any designated object or operation within the scope of §1025.31(c).~~

~~(b) *Procedure for request.* The request may be served at any time after the filing of an answer without leave of the Presiding Officer. The request shall set forth the items to be inspected, either by individual item or by category, and shall describe each item or category with reasonable particularity. The request shall specify a reasonable time, place, and manner for making the inspection and performing the related acts.~~

~~(c) Procedure for response.~~ The party upon whom the request is served shall respond in writing within thirty (30) days after service of the request. The Presiding Officer may allow a shorter or longer time for response. The response shall state, with respect to each item or category requested, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to only part of an item or category, that part shall be specified. The party submitting the request may move for an order under §1025.36 with respect to any objection to or other failure to respond to the request or any part thereof, or to any failure to permit inspection as requested.

~~(d) Persons not parties.~~ This section does not preclude an independent action against a person not a party for production of documents and things.

§_1025.34 Requests for admission.

This section shall be governed by Rule 36 of the Federal Rules, except that Rule 37 award of expenses shall not apply.

~~(a) Procedure for request.~~ A party may serve upon any other party a written request for the admission, for the purposes of the pending proceedings only, of the truth of any matters within the scope of §1025.31(c) set forth in the request that relate to statements 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 made available for inspection and copying. The request may, without leave of the Presiding Officer, be served upon any party after filing of the answer. Each matter about which an admission is requested shall be separately set forth.

~~(b) Procedure for response.~~ The matter about which an admission is requested will be deemed admitted unless within thirty (30) days after service of the request, or within such shorter or longer time as the Presiding Officer may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or the party's representative and stating the reasons for the objections. The answer shall specifically admit or 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. When good faith requires that a party qualify an answer or deny only a part of the matter to which an admission is requested, the party shall specify the portion that 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 a fact unless the party states that he/she has made reasonable inquiry and that the information known or readily available to him/her is insufficient to enable him/her to admit or deny a fact. A party who considers that a matter to which an admission has been requested presents a genuine issue for hearing may not, on that ground alone, object to the request but may deny the matter or set forth reasons why the party cannot admit or deny it. The party who has requested an admission may move to determine the sufficiency of any answer or objection in accordance with §1025.36 of these Rules. If the Presiding Officer determines that an answer does not comply with the requirements of this section, he/she may order that the matter be deemed admitted or that an amended answer be served.

~~(c) Effect of admission.~~ Any matter admitted under this section is conclusively established unless the Presiding Officer on motion permits withdrawal or amendment of

~~such admission. The Presiding Officer may permit withdrawal or amendment when the presentation of the merits of the action will be served thereby and the party who obtained the admission fails to satisfy the Presiding Officer that withdrawal or amendment will prejudice that party in maintaining an action or defense on the merits. Any admission made by a party under this section is for the purposes of the pending adjudication only and is not an admission by that party for any other purposes, nor may it be used against that party in any other proceedings.~~

§ 1025.35 Depositions upon oral examination.

This section shall be governed by Rules 30-32 of the Federal Rules, with the following exceptions:

Requests for subpoenas shall be governed by § 1025.38; and Federal Rule 37 award of expenses shall not apply. ~~a) When depositions may be taken. At any time after the first prehearing conference, upon leave of the Presiding Officer and under such terms and conditions as the Presiding Officer may prescribe, any party may take the deposition of any other party, including the agents, employees, consultants, or prospective witnesses of that party at a place convenient to the deponent. The attendance of witnesses and the production of documents and things at the deposition may be compelled by subpoena as provided in §1025.38 of these rules.~~

~~(b) Notice of deposition—(1) Deposition of a party. A party desiring to take a deposition of another party to the proceedings shall, after obtaining leave from the Presiding Officer, serve written notice of the deposition on all other parties and the Presiding Officer at least ten (10) days before the date noticed for the deposition. The notice shall state:~~

~~(i) The time and place for the taking of the deposition;~~

~~(ii) The name and address of each person to be deposed, if known, or if the name is not known, a general description sufficient to identify him/her; and~~

~~(iii) The subject matter of the expected testimony. If a subpoena *duces tecum* is to be served on the person to be deposed, the designation of the materials to be produced, as set forth in the subpoena, shall be attached to or included in the notice of deposition.~~

~~(2) Deposition of a non-party. A party desiring to take a deposition of a person who is not a party to the proceedings shall make application for the issuance of a subpoena, in accordance with §1025.38 of these rules, to compel the attendance, testimony, and/or production of documents by such non-party. The party desiring such deposition shall serve written notice of the deposition on all other parties to the proceedings, after issuance of the subpoena. The date specified in the subpoena for the deposition shall be at least twenty (20) days after the date on which the application for the subpoena is made to the Presiding Officer.~~

~~(3) Opposition to notice. A person served with a notice of deposition may oppose, in writing, the taking of the deposition within five (5) days of service of the notice. The Presiding Officer shall rule on the notice and any opposition and may order the taking of all noticed depositions upon a showing of good cause. The Presiding Officer may, for good cause shown, enlarge or shorten the time for the taking of a deposition.~~

~~(c) Persons before whom depositions may be taken.~~ Depositions may be taken before any person who is authorized to administer oaths by the laws of the United States or of the place where the examination is held. No deposition shall be taken before a person who is a relative, employee, attorney, or representative of any party, or who is a relative or employee of such attorney or representative, or who is financially interested in the action.

~~(d) Taking of deposition—(1) Examination.~~ Each deponent shall testify under oath, and all testimony shall be recorded. All parties or their representatives may be present and participate in the examination. Evidence objected to shall be taken subject to any objection. Objections shall include the grounds relied upon. The questions and answers, together with all objections made, shall be recorded by the official reporter before whom the deposition is taken. The original or a verified copy of all documents and things produced for inspection during the examination of the deponent shall, upon a request of any party present, be marked for identification and made a part of the record of the deposition.

~~(2) Motion to terminate or limit examination.~~ At any time during the deposition, upon motion of any party or of the deponent, and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the deponent or party, the Presiding Officer may order the party conducting the examination to stop the deposition or may limit the scope and manner of taking the deposition as provided in §1025.31(d) of these rules.

~~(3) Participation by parties not present.~~ In lieu of attending a deposition, any party may serve written questions in a sealed envelope on the party conducting the deposition. That party shall transmit the envelope to the official reporter, who shall unseal it and read the questions to the deponent.

~~(e) Transcription and filing of depositions—(1) Transcription.~~ Upon request by any party, the testimony recorded at a deposition shall be transcribed. When the testimony is fully transcribed, the deposition shall be submitted to the deponent for examination and signature and shall be read to or by the deponent, unless such examination and signature are waived by the deponent. Any change in form or substance which the deponent desires to make shall be entered upon the deposition by the official reporter with a statement of the reasons given by the deponent for making them. The deposition shall then be signed by the deponent, unless the deponent waives signature or is ill or cannot be found or refuses to sign. If the deposition is not signed by the deponent within thirty (30) days of its submission to him/her, the official reporter shall sign the deposition and state on the record the fact of the waiver of signature or of the illness or absence of the deponent or of the refusal to sign, together with a statement of the reasons therefor. The deposition may then be used as fully as though signed, in accordance with paragraph (i) of this section.

~~(2) Certification and filing.~~ The official reporter shall certify on the deposition that it was taken under oath and that the deposition is a true record of the testimony given and corrections made by the deponent. The official reporter shall then seal the deposition in an envelope endorsed with the title and docket number of the action and marked "Deposition of [name of deponent]" and shall promptly file the deposition with the Secretary. The Secretary shall notify all parties of the filing of the deposition and shall furnish a copy of the deposition to any party or to the deponent upon payment of reasonable charges.

~~(f) Costs of deposition.~~ The party who notices the deposition shall pay for the deposition. The party who requests transcription of the deposition shall pay for the transcription.

~~(g) Failure to attend or to serve subpoena; expenses. If a party who notices a deposition fails to attend or conduct the deposition, and another party attends in person or by a representative pursuant to the notice, the Presiding Officer may order the party who gave the notice to pay to the attending party the reasonable expenses incurred. If a party who notices a deposition fails to serve a subpoena upon the deponent and as a result the deponent does not attend, and if another party attends in person or by a representative because that party expects the deposition to be taken, the Presiding Officer may order the party who gave notice to pay to the attending party the reasonable expenses incurred.~~

~~(h) Deposition to preserve testimony—(1) When available. By leave of the Presiding Officer, a party may take the deposition of his/her own witness for the purpose of perpetuating the testimony of that witness. A party who wishes to conduct such a deposition shall obtain prior leave of the Presiding Officer by filing a motion. The motion shall include a showing of substantial reason to believe that the testimony could not be presented at the hearing. If the Presiding Officer is satisfied that the perpetuation of the testimony may prevent a failure of justice or is otherwise reasonably necessary, he/she shall order that the deposition be taken.~~

~~(2) Procedure. Notice of a deposition to preserve testimony shall be served at least fifteen (15) days prior to the deposition unless the Presiding Officer authorizes less notice when warranted by extraordinary circumstances. The deposition shall be taken in accordance with the provisions of paragraph (d) of this section. Any deposition taken to preserve testimony shall be transcribed and filed in accordance with paragraph (e) of this section.~~

~~(i) Use of depositions. At the hearing or upon a petition for interlocutory appeal, any part or all of a deposition may be used against any party who was present or represented at the deposition or who had reasonable notice of the deposition, in accordance with any of the following:~~

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

~~(2) The deposition of anyone who at the time of the taking of the deposition was an officer, director, managing agent, or person otherwise designated to testify on behalf of a public or private corporation, partnership or unincorporated association or governmental entity which is a party to the proceedings, may be used by any adverse party for any purpose.~~

~~(3) The deposition of a witness may be used by any party for any purpose if the Presiding Officer finds:~~

~~(i) That the witness is dead; or~~

~~(ii) That the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or~~

~~(iii) That the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or~~

~~(iv) That the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or~~

~~(v) That such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard for the importance of presenting the testimony of witnesses orally during the hearing, to allow the deposition to be used.~~

~~(4) If only part of a deposition is offered in evidence by a party, any other party may move to introduce any other part of the deposition.~~

§_1025.36 Motions to compel discovery.

If a party fails to respond to discovery, in whole or in part, the party seeking discovery may move within twenty (20) days for an order compelling an answer, or compelling inspection or production of documents, or otherwise compelling discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without action by the Presiding Officer. For purposes of this section, an evasive or incomplete response is to be treated as a failure to respond. When taking depositions, the discovering party shall continue the examination to the extent possible with respect to other areas of inquiry before moving to compel discovery.

§_1025.37 Sanctions for failure to comply with discovery orders.

If a party fails to obey an order to provide or permit discovery, the Presiding Officer may take such action as is just, including but not limited to the following:

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

(b) Order that for the purposes of the proceedings, the matters regarding which the order was made or any other designated facts shall be taken to be established in accordance with the claim of the party obtaining the order;

(c) Order that the party withholding discovery not introduce into evidence or otherwise rely, in support of any claim or defense, upon the documents or other evidence withheld;

(d) Order that the party withholding discovery not introduce into evidence, or otherwise use at the hearing, information obtained in discovery;

(e) Order that the party withholding discovery forfeit its right to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;

(f) Order that a pleading, or part of a pleading, or a motion or other submission by the party, concerning which the order was issued, be stricken, or that decision on the pleadings be rendered against the party, or both; and

(g) Exclude the party or representative from the proceedings, in accordance with § 1025.42(b) ~~of these rules.~~

Any such action may be taken by order at any point in the proceedings.

§ 1025.38 Subpoenas.

(a) *Availability.* A subpoena shall be addressed to any person not a party for the purpose of compelling attendance, testimony, and production of documents at a hearing or deposition, and may be addressed to any party for the same purposes.

(b) *Form.* A subpoena shall identify the action with which it is connected; shall specify the person to whom it is addressed and the date, time, and place for compliance with its provisions; and shall be issued by order of the Commission and signed by the Secretariat or by the Presiding Officer. A subpoena *duces tecum* shall specify the books, papers, documents, or other materials or data-compilations to be produced.

(c) *How obtained—(1) Content of application.* An application for the issuance of a subpoena, stating reasons, shall be submitted ~~in triplicate to the Presiding Officer, who shall forward~~ bring the application to the attention of the Commission, by forwarding it or by communicating its contents by any other means, e.g., by telephone, to the Commission.

(2) *Procedure for application.* ~~The original and two copies of the subpoena, marked "original," "duplicate" and "triplicate," shall accompany the application. The Commission shall rule upon an~~ the application for a subpoena ex parte, by issuing the subpoena or by issuing an order granting or denying the application.

(d) *Issuance of a subpoena.* The Commission shall issue a subpoena by authorizing the Secretariat or the Presiding Officer to sign and date each copy in the lower right hand corner. ~~The "duplicate" and "triplicate" copies of the approved subpoena shall for be transmitted to the applicant for service, in accordance with these Rules; the "original" shall be retained by, or be forwarded to, the Secretary for retention in the docket of the proceedings.~~

(e) *Service of a subpoena.* A subpoena issued by the Commission shall may be served upon the addressee in person or by registered or certified mail, return receipt requested, as provided in § 1025.16(b)(2)-(5) of these rules and upon all parties as provided in § 1025.16(b). ~~Service shall be made by delivery of the signed "duplicate" copy to the person named therein.~~

(f) *Return of service.* A person serving a subpoena shall promptly execute a return of service, stating the date, time, and manner of service upon the addressee. If service is effected by mail or commercial carrier, the signed return receipt or proof of delivery shall accompany the return of service. In case of failure to make service, a statement of the reasons for the failure shall be made. ~~The "triplicate" copy of the subpoena, bearing or accompanied by the return of service, shall be returned without delay to the Secretary after service has been completed.~~

(g) *Motion to quash or limit subpoena.* Within five (5) days ~~of~~ after receipt of a subpoena, the person to whom it is directed may file a motion to quash or limit the subpoena, setting forth the reasons why the subpoena should be withdrawn or why it should be limited in scope. Any such motion shall be answered within five (5) days ~~of~~ after service and shall be ruled on immediately by the Commission. The order shall specify the date, if any, for compliance with the specifications of the subpoena.

(h) *Consequences of failure to comply.* In the event of failure by a person to comply with a subpoena, the Presiding Officer may take any of the actions enumerated in § 1025.37 of these rules, or may order any other appropriate relief to compensate for the withheld testimony, documents, or other materials. If in the opinion of the Presiding Officer such relief is insufficient, the Presiding Officer shall certify to the Commission a request for judicial enforcement of the subpoena.

§ 1025.39 Orders requiring witnesses to testify or provide other information and granting immunity.

(a) *Applicability to Flammable Fabrics Act only.* This section applies only to proceedings arising under the Flammable Fabrics Act.

(b) *Procedure.* A party who desires the issuance of an order requiring a witness or deponent to testify or provide other information upon being granted immunity from prosecution under title 18, United States Code, section 6002, may make a motion to that effect. The motion shall be made and ruled on in accordance with § 1025.23 of these rules and shall include a showing:

(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 such information on the basis of that individual's privilege against self-incrimination.

(c) *Approval of the Attorney General.* If the Presiding Officer determines that the witness' testimony appears necessary and that the privilege against self-incrimination may be invoked, he/she may certify to the Commission a request that it obtain the approval of the Attorney General of the United States for the issuance of an order granting immunity.

(d) *Issuance of order granting immunity.* Upon application to and approval by the Attorney General of the United States, and after the witness has invoked the privilege against self-incrimination, the Presiding Officer shall issue the order granting immunity unless he/she determines that the privilege was improperly invoked.

(e) *Sanctions for failure to testify.* Failure of a witness to testify after a grant of immunity or after a denial of a motion for the issuance of an order granting immunity shall result in the imposition of appropriate sanctions as provided in § 1025.37 of these rules.

Subpart E—Hearings

§ 1025.41 General rules.

(a) *Public hearings.* All hearings conducted pursuant to this part 1025 ~~these Rules~~ shall be public unless otherwise ordered by the Commission or the Presiding Officer.

(b) *Prompt completion.* Hearings shall proceed with all reasonable speed and, insofar as practicable ~~and~~ with due regard to the convenience of the parties, shall be held at one location and continue without suspension until concluded, except in unusual circumstances or as otherwise provided in these Rules. The hearing should be limited to no more than 210

hours; provided that, the Presiding Officer, upon a showing of good cause, may extend the number of hours for the hearing.

(c) *Rights of parties.* Every party shall have the right of timely notice and all other rights essential to a fair hearing, including, but not limited to, the ~~rights~~right to present evidence, to conduct such cross-examination as may be necessary for a full and complete disclosure of the facts, and to be heard by objection, motion, brief, and argument.

(d) *Rights of participants.* Every participant shall have the right to make a written or oral statement of position and to file proposed findings of fact, conclusions of law, and a post hearing brief, in accordance with § 1025.17(b)~~of these Rules.~~

(e) *Rights of witnesses.* Any person compelled to testify in any proceedings in response to a subpoena may be accompanied, represented, and advised by legal counsel or other representative, and may purchase a transcript of his/her testimony.

§ 1025.42 Powers and duties of Presiding Officer.

(a) *General.* A Presiding Officer shall have the duty to conduct full, fair, and impartial hearings, to take appropriate action to avoid unnecessary delay in the disposition of proceedings, and to maintain order. He/she shall have all powers necessary to that end, including the following powers:

(1) To administer oaths and affirmations;

(2) To compel discovery and to impose appropriate sanctions for failure to make discovery;

(3) To rule upon offers of proof, and receive relevant, competent, and probative evidence;

(4) To regulate the course of the proceedings and the conduct of the parties and their representatives;

(5) To hold conferences for simplification of the issues, settlement of the proceedings, or any other proper purposes;

(6) To consider and rule, orally or in writing, upon all procedural, evidentiary, and other motions and issues appropriate in adjudicative proceedings;

(7) To issue Summary Decisions, Initial Decisions, Recommended Decisions, rulings, and orders, as appropriate;

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

(9) To take any action authorized by this part 1025 ~~these Rules~~ or the provisions of title 5, United States Code, sections 551-559.

(b) *Exclusion of parties by Presiding Officer.* A Presiding Officer shall have the authority, for good cause stated on the record, to exclude from participation in any proceedings any party, participant, or representative who violates the requirements of § 1025.66~~of these rules~~. Any party, participant or representative so excluded may appeal to the Commission in accordance with the provisions of § 1025.24~~of these rules~~. If the representative of a party

or participant is excluded, the hearing may be suspended for a reasonable time so that the party or participant may obtain another representative.

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

(d) *Interference.* In the performance of adjudicative functions, a Presiding Officer shall not be responsible to or subject to the supervision or direction of any Commissioner or any member of a Commissioner's staff or of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for the Commission. All directions by the Commission to a Presiding Officer concerning any adjudicative proceedings shall appear on and be made a part of the record.

(e) *Disqualification of Presiding Officer.* (1) When a Presiding Officer considers himself/herself disqualified to preside in any adjudicative proceedings, he/she shall withdraw by notice on the record and shall notify the Chief Administrative Law Judge and the Secretariat of such withdrawal.

(2) Whenever, for good and reasonable cause, any party considers the Presiding Officer to be disqualified to preside, or to continue to preside, in any adjudicative proceedings, that party may file with the Secretariat a motion to disqualify and remove, supported by affidavit(s) setting forth the alleged grounds for disqualification. A copy of the motion and supporting affidavit(s) shall be served by the Secretariat on the Presiding Officer whose removal is sought. The Presiding Officer shall have ten (10) days to respond in writing to such motion. However, the motion shall not stay the proceedings unless otherwise ordered by the Presiding Officer or the Commission. If the Presiding Officer does not disqualify himself/herself, the Commission shall determine the validity of the grounds alleged, either directly or on the report of another Presiding Officer appointed to conduct a hearing for that purpose and, in the event of disqualification, shall take appropriate action by assigning another Presiding Officer or requesting loan of another Administrative Law Judge through the U.S. Office of Personnel Management.

§ 1025.43 Evidence.

(a) *Applicability of Federal Rules of Evidence.* Unless otherwise provided by statute or this part 1025~~these rules~~, the Federal Rules of Evidence shall apply to all proceedings held pursuant to this part 1025~~these Rules~~. However, the Federal Rules of Evidence may be relaxed by the Presiding Officer if the ends of justice will be better served by so doing.

(b) *Burden of proof.* (1) Complaint counsel shall have the burden of sustaining the allegations of any complaint.

(2) Any party who is the proponent of a legal or factual proposition shall have the burden of sustaining that proposition.

(c) *Admissibility.* All relevant and reliable evidence is admissible, but may be excluded by the Presiding Officer if its probative value is substantially outweighed by unfair prejudice or confusion of the issues, or by considerations of undue delay, waste of time, immateriality, or needless presentation of cumulative evidence.

(d) *Official notice*—(1) *Definition*. Official notice means use by the Presiding Officer or the Commission of facts not appearing on the record and legal conclusions drawn from those facts. An officially noticed fact or legal conclusion must be one not subject to reasonable dispute in that it is either:

(i) Generally known within the jurisdiction of the Commission, or

(ii) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(2) *Method of taking official notice*. The Presiding Officer and/or the Commission may at any time take official notice upon motion of any party or upon its own initiative. The record shall reflect the facts and conclusions which have been officially noticed.

~~(e) [Reserved]~~

(~~e~~f) *Offer of proof*. When an objection to proffered testimony or documentary evidence is sustained, the sponsoring party may make a specific offer, either in writing or orally, of what the party expects to prove by the testimony or the document. When an offer of proof is made, any other party may make a specific offer, either in writing or orally, of what the party expects to present to rebut or contradict the offer of proof. Written offers of proof or of rebuttal, adequately marked for identification, shall accompany the record and be available for consideration by any reviewing authority.

§ 1025.44 Expert witnesses.

~~(a) *Definition*. An expert witness is one who, by reason of education, training, experience, or profession, has peculiar knowledge concerning the subject matter to which his/her testimony relates and from which he/she may draw inferences based upon hypothetically stated facts or offer opinions from facts involving scientific or technical knowledge.~~

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(1) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(2) the testimony is based on sufficient facts or data;

(3) the testimony is the product of reliable principles and methods; and

(4) the expert has reliably applied the principles and methods to the facts of the case.

~~(b) *Method of presenting testimony of expert witness*. In lieu of written testimony, Except as may otherwise be ordered by the tThe Presiding Officer, may order that the direct testimony of an expert witness shall be in writing and shall be filed on the record and exchanged between the parties no later than ten (10) days preceding the commencement of the hearing. TheSuch written testimony of an expert witness shall be incorporated into the record and shall constitute the direct testimony of that witness. Upon a showing of good cause, the party sponsoring the expert witness may be permitted to amplify the-any written direct testimony during the hearing.~~

(c) *Cross-examination and redirect examination of expert witness.* Cross-examination, redirect examination, and re-cross-examination of an expert witness shall proceed in due course based upon any ~~the~~ written testimony and any ~~amplifying~~ oral testimony.

(d) *Failure to file or exchange written testimony.* Failure to file or exchange written testimony of expert witnesses ~~if required by the Presiding Officer as provided in this section~~ shall deprive the sponsoring party of the use of the expert witness and of the conclusions which that witness would have presented, unless the opposing parties consent or the Presiding Officer otherwise orders in unusual circumstances.

§ 1025.45 *In camera* materials.

(a) *Definition.* *In camera* materials are documents, testimony, or other data which by order of the Presiding Officer or the Commission are kept confidential and excluded from the public record.

(b) *In camera treatment of documents and testimony.* The Presiding Officer or the Commission ~~shall have authority, when may for good cause is found on the record, to show~~ and based on the record, order documents or testimony offered in evidence, whether admitted or rejected, to be received and ~~preserve~~ preserved *in camera*. The order shall ~~specify the length of time for in camera treatment and~~ shall include:

(1) A description of the documents or testimony;

(2) The reasons for granting *in camera* treatment ~~for the specified length of time;~~ and

(3) The terms and conditions imposed by the Presiding Official, if any, limiting access to or use of the *in camera* material, including the length of time the documents or testimony will be held in camera.

(c) *Access and disclosure to parties.* (1) Commissioners and their staffs, Presiding Officers and their staffs, and Commission staff members concerned with judicial review shall have complete access to *in camera* materials. Any party to the proceedings may seek access only in accordance with paragraph (c)(2) of this section.

(2) Any party desiring access to, or disclosure of, *in camera* materials for the preparation and presentation of that party's case shall make a motion which sets forth its justification. The Presiding Officer or the Commission may grant such motion for good cause shown and shall enter a protective order prohibiting unnecessary disclosure and requiring any other necessary safeguards. The Presiding Officer or the Commission may examine the *in camera* materials and excise any portions prior to disclosure of the materials to the moving party.

(d) *Segregation of in camera materials.* *In camera* materials shall be segregated from the public record and protected from public view.

(e) *Public release of in camera materials.* *In camera* materials constitute a part of the confidential records of the Commission and shall not be released to the public until the expiration of any order granting in camera treatment.

(f) *Reference to in camera materials.* In the submission of proposed findings, conclusions, briefs, or other documents, all parties shall refrain from disclosing specific details of *in*

camera materials. However, such refraining shall not preclude general references to such materials. ~~To the extent that~~ If parties consider ~~necessary~~ the inclusion of specific details of *in camera* materials to be necessary, those references shall be incorporated into separate proposed findings, conclusions, briefs, or other documents marked "Confidential, Contains *In Camera* Material," which shall be ~~placed~~ filed in camera and become part of the *in camera* record. ~~These documents~~ Documents filed in camera shall be served only on parties accorded access to the *in camera* materials by this part 1025 ~~these rules~~, the Presiding Officer, or the Commission.

§ 1025.46 Proposed findings, conclusions, and order.

Within a reasonable time after the closing of the record and receipt of the transcript, all parties shall file, and participants may file, ~~simultaneously unless otherwise directed-ordered~~ by the Presiding Officer, post-hearing briefs, including proposed findings of fact and conclusions of law, as well as a proposed order. The Presiding Officer shall establish a date certain for the filing of the briefs, which shall not exceed fifty (50) days after the closing of the record except in unusual circumstances. The briefs shall be in writing and shall be served upon all parties. The briefs of all parties shall contain adequate references to the record and authorities relied upon. Replies, if permitted by the Presiding Officer, shall be filed within fifteen (15) days of the date for the filing of briefs unless otherwise established by the Presiding Officer. ~~The parties and participants may waive either or both submissions.~~

§ 1025.47 Record.

(a) *Reporting and transcription.* Hearings shall be recorded and transcribed by ~~the official a court reporter of the Commission,~~ under the supervision of the Presiding Officer. The original transcript shall be a part of the record of proceedings. Copies of transcripts are available from the reporter at a cost not to exceed the maximum rates fixed by contract between the Commission and the reporter. In accordance with Section 11 of the Federal Advisory Committee Act (Pub. L. 92-463, 5 U.S.C. ~~appendix I app. § 11~~), ~~copies of transcripts may be made by members of the public or by Commission personnel, when available, at the Office of the Secretariat~~ at reproduction costs as provided in § 1025.49.

(b) *Corrections.* Corrections of the official transcript may be made only when they involve errors affecting substance and then only in the manner described in this section. The Presiding Officer may order corrections, either on his/her own motion or on motion of any party. The Presiding Officer shall determine the corrections to be made and shall so order. Corrections shall be interlineated or otherwise inserted in the official transcript so as not to obliterate the original text.

§ 1025.48 Official docket.

The official docket in any adjudicatory proceedings ~~may shall be maintained in electronically by the Presiding Officer or Office of the Secretariat as set forth in § 1025.14- and shall be made available~~ to the public inspection during normal business hours of the Commission.

§ 1025.49 Fees.

(a) *Fees for deponents and witnesses.* Any person compelled to appear in person in response to a subpoena or notice of deposition shall be paid the same attendance and mileage fees as are paid witnesses in the courts of the United States, in accordance with

title 28, United States Code, section 1821. The fees and mileage referred to in this paragraph shall be paid by the party at whose instance deponents or witnesses appear. The parties may by agreement modify this provision.

(b) *Fees for production of records.* Fees charged for production or disclosure of records contained in the official docket shall be in accordance with the Commission's "Procedures for Disclosures or Production of Information Under the Freedom of Information Act," title 16, Code of Federal Regulations, §_1015.9.

Subpart F—Decision

§_1025.51 Initial decision.

(a) *When filed.* The Presiding Officer shall endeavor to file an Initial Decision with the Commission within sixty (60) days after the closing of the record or the filing of post-hearing briefs, whichever is later. If the Initial Decision cannot be filed within this time period, the Presiding Officer shall report in writing to the parties, participants, and the Commission on the status and expected date of the Initial Decision. The Presiding Officer shall submit reports on the status of the initial decision every 60 days thereafter until the Presiding Officer submits an initial decision to the Commission, but in no case shall the Presiding Officer submit an initial decision more than 180 days after the closing of the record of filing of post hearing briefs.

(b) *Content.* The Initial Decision shall be based upon a consideration of the entire record and shall be supported by reliable, probative, and substantial evidence. The Initial Decision shall include:

(1) Findings and conclusions, as well as the reasons or bases for such findings and conclusions, upon the material questions of fact, material issues of law, or discretion presented on the record, and should, where practicable, be accompanied by specific page citations to the record and to legal and other materials relied upon; and

(2) An appropriate order.

(c) *By whom made.* The Initial Decision shall be made and filed by the Presiding Officer who presided over the hearing, unless otherwise ordered by the Commission due to the disqualification of the Presiding Officer- pursuant to § 1025.42.

(d) *Reopening of proceedings by Presiding Officer; termination of jurisdiction.* (1) At any time prior to, or concomitant with, the filing of the Initial Decision, the Presiding Officer may reopen the proceedings for the reception of further evidence where the interests of justice so require.

(2) Except for the correction of clerical errors, or where the proceeding is reopened by an order under paragraph (d)(1) of this section, the jurisdiction of the Presiding Officer is terminated upon the filing of the Initial Decision, unless and until such time as the matter may be remanded to the Presiding Officer by the Commission.

§ 1025.52 Adoption of initial decision.

The Initial Decision and Order shall become the Final Decision and Order of the Commission forty (40) days after issuance unless an appeal is noted and perfected or unless review is ordered by the Commission. Upon the expiration of the fortieth day, the Secretary shall prepare, sign, and enter an order adopting the Initial Decision and Order, unless otherwise directed by the Commission.

§ 1025.53 Appeal from initial decision.

(a) ~~Who may file notice~~ Notices of intention appeal. Any party may appeal an Initial Decision to the Commission, ~~provided that by serving a notice of appeal within ten (10) days after issuance of the Initial Decision such party files and serves a notice of intention to appeal.~~

(b) *Appeal brief*. An appeal is perfected by filing a brief within forty (40) days after service of the Initial Decision. The appeal brief must be served upon all parties. The brief shall not exceed thirty (30) pages, excluding covers, indexes, table of contents, list of citations, and list of references. The appeal brief shall contain, in the order indicated, the following:

(1) A subject index of the matters in the brief, with page references, and a table of cases (alphabetically arranged), textbooks, statutes, and other material cited, with page references thereto;

(2) A concise statement of the case;

(3) A statement containing the reasons why the party believes the Initial Decision is incorrect;

(4) The Argument, presenting clearly the points of fact and law relied upon to support each reason why the Initial Decision is incorrect, with specific page references to the record and the legal or other material relied upon; and

(5) A proposed form of order for the Commission's consideration in lieu of the order contained in the Initial Decision.

(c) *Answering brief*. Within thirty (30) days after service of the appeal brief upon all parties, any party may file an answering brief, which shall contain a subject index, with page references, and a table of cases (alphabetically arranged), textbooks, statutes, and other material cited, with page references thereto. Such brief shall present clearly the points of fact and law relied upon in support of the reasons the party has for each position urged, with specific page references to the record and legal or other materials relied upon. An answering brief shall be subject to the same page limit as the appeal brief.

(d) *Participant's brief*. Within thirty (30) days after service of the appeal brief upon all parties, any participant may file a brief on appeal, presenting clearly the position urged.

(e) *Cross appeal*. If a timely notice of appeal is filed by a party, any other party may file a notice of cross appeal within ten (10) days of the date on which the first notice of appeal was filed. Cross appeals shall be included in the answering brief and shall conform to the requirements for form, content, and filing specified in paragraph (b) of this section for an appeal brief. If an appeal is noticed but not perfected, no cross appeal shall be permitted and the notice of cross appeal shall be deemed void.

(f) *Reply brief.* A reply brief shall be limited to rebuttal of matters presented in answering briefs, including matters raised in cross-appeals. A reply brief ~~shall~~ may be filed and served within fourteen (14) days after service of an answering brief and shall not exceed fifteen (15) pages, excluding covers, indexes, table of contents, list of citations, and list of references, ~~or on the day preceding the oral argument, whichever comes first.~~

(g) *Oral argument.* The purpose of an oral argument is to emphasize and clarify the issues. The Commission may order oral argument upon request of any party or upon its own initiative. A transcript of oral arguments shall be prepared. A Commissioner absent from an oral argument may participate in the consideration of and decision on the appeal.

§ 1025.54 Review of initial decision in absence of appeal.

The Commission may, by order, review a case not otherwise appealed by a party. Should the Commission so order, the parties shall, and participants may, file briefs in accordance with § 1025.53, except that the Commission may, in its discretion, establish a different briefing schedule in its order. The Commission shall issue its order within forty (40) days after issuance of the Initial Decision. The order shall set forth the issues which the Commission will review and may make provision for the filing of briefs. If the filing of briefs is scheduled by the Commission, the order shall designate which party or parties shall file the initial brief and which party or parties may thereafter file an answering brief, or the order may designate the simultaneous filing of briefs by the parties.

§ 1025.55 Final decision on appeal or review.

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

(b) *Rendering of final decision.* In rendering its decision, the Commission shall adopt, modify, or set aside the findings, conclusions, and order contained in the Initial Decision, and shall include in its Final Decision a statement of the reasons for its action and any concurring or dissenting opinions. The Commission shall issue an order reflecting its Final Decision.

(c) Except as otherwise ordered by the Commission, the Commission shall endeavor to file its Decision within ninety (90) days after the filing of all briefs or after receipt of transcript of the oral argument, whichever is later.

§ 1025.56 Reconsideration.

Within twenty (20) days after issuance of a Final Decision and Order by the Commission, any party may file a petition for reconsideration of such decision or order, setting forth the relief desired and the grounds in support of the petition. Any petition filed under this section must be confined to new questions raised by the decision or order upon which the petitioner had no previous opportunity to argue. Any party desiring to oppose such a petition shall file an opposition to the petition within ten (10) days after ~~service~~ service of the petition. The filing of a petition for reconsideration shall not stay the effective date of the Final Decision

and Order or toll the running of any statutory time period affecting the Final Decision or Order unless specifically ordered by the Commission.

§ 1025.57 Effective date of order.

(a) *Orders in proceedings arising under the Consumer Product Safety Act.* An order of the Commission in adjudicative proceedings under this part 1025 that arise under the Consumer Product Safety Act becomes effective upon receipt by the respondent, unless otherwise ordered by the Commission.

(b) *Orders in proceedings arising under the Flammable Fabrics Act —(1) Consent orders.* An order in proceedings under this part 1025 that arise under the Flammable Fabrics Act, which has been issued following the Commission's acceptance of an offer of settlement in accordance with § 1025.26 ~~of these rules~~, becomes effective upon respondent's receipt of notice of Commission acceptance, unless otherwise ordered by the Commission.

(2) *Litigated Orders.* All other orders in proceedings under this part 1025 that arise under the Flammable Fabrics Act become effective upon the expiration of the statutory period for court review specified in section 5(~~g~~) of the Federal Trade Commission Act, title 15, United States Code, section 45(~~g~~), or, if a petition for review has been filed, upon a court's affirmance of the Commission's order.

(c) *Consequences of failure to comply with effective order.* A respondent against whom an order has been issued who is not in compliance with such order on or after the date the order becomes effective is in violation of such order and is subject to an immediate action for the civil or criminal penalties provided for in the applicable statute.

§ 1025.58 Reopening of proceedings.

(a) *General.* Any proceedings may be reopened by the Commission at any time, either on its own initiative or upon petition of any party to the proceedings.

(b) *Exception.* Proceedings arising under the Flammable Fabrics Act shall not be reopened while pending in a United States court of appeals on a petition for review after the transcript of the record has been filed, or while pending in the Supreme Court of the United States.

(c) *Commission-originated reopening —(1) Before effective date of order.* At any time before the effective date of a Commission order, the Commission may, upon its own initiative and without prior notice to the parties, reopen any proceedings and enter a new decision or order to modify or set aside, in whole or in part, the decision or order previously issued.

(2) *After effective date of order.* Whenever the Commission ~~is of the opinion~~ determines that changed conditions of fact or law or the public interest may require that a Commission decision or order be altered, modified, or set aside in whole or in part, the Commission shall serve upon all parties to the original proceedings an order to show cause, stating the changes the Commission proposes to make in the decision or order and the reasons such changes are deemed necessary. Within thirty (30) days after service of an order to show cause, any party to the original proceedings₇ may file a response. Any party not responding to the order to show cause within the time allowed shall be considered to have consented to the proposed changes.

(d) *Petition for reopening.* Whenever any person subject to a final order is of the opinion that changed conditions of fact or law require that the decision or order be altered, modified, or set aside, or that the public interest so requires, that person may petition the Commission to reopen the proceedings. The petition shall state the changes desired and the reasons those changes should be made, and shall include such supporting evidence and argument as will, in the absence of any opposition, provide the basis for a Commission decision on the petition. The petition shall be served upon all parties to the original proceedings. Within thirty (30) days after service of the petition, complaint counsel shall file a response. Any other party to the original proceedings also may file a response within that period.

(e) *Hearings* —(1) *Unopposed.* Where an order to show cause or petition to reopen is not opposed, or is opposed but the pleadings do not raise issues of fact to be resolved, the Commission, in its discretion, may decide the matter on the order to show cause or petition and responses, or it may serve upon the parties a notice of hearing containing the date when the matter will be heard. The proceedings normally will be limited to the filing of briefs but may include oral argument when deemed necessary by the Commission.

(2) *Factual issues.* When the pleadings raise substantial factual issues, the Commission may direct the Presiding Officer to conduct such additional hearings as it deems appropriate. Upon conclusion of the hearings, and after opportunity for the parties to file including the filing of post-hearing briefs containing proposed findings of fact and conclusions of law, as well as a proposed order, the Presiding Officer shall issue a Recommended Decision, including proposed findings and conclusions, and the reasons therefor, as well as a proposed Commission order. If the Presiding Officer recommends that the Commission's original order be reopened, the proposed order shall include appropriate provisions for the alteration, modification or setting aside of the original order. The record and the Presiding Officer's Recommended Decision shall be certified to the Commission for final disposition of the matter.

(f) *Commission disposition.* Where the Commission has ordered a hearing, upon receipt of the Presiding Officer's Recommended Decision, the Commission shall make a decision and issue an order based on the hearing record as a whole. If the Commission determines that changed conditions of fact or law or the public interest requires, it shall reopen the order previously issued; alter, modify, or set aside the order's provisions in whole or in part; and issue an amended order reflecting the alterations, modifications, or deletions. If the Commission determines that the original order should not be reopened, it shall issue an order affirming the original order. A decision stating the reasons for the Commission's order shall accompany the order.

Subpart G—Appearances, Standards of Conduct

§ 1025.61 Who may make appearances.

A party or participant may appear in person, or by a duly authorized officer, partner, regular employee, or other agent of the party or participant, or by counsel or other duly qualified representative, in accordance with § 1025.65.

§ 1025.62 Authority for representation.

Any individual acting in a representative capacity in any adjudicative proceedings may be required by the Presiding Officer or the Commission to show his/her authority to act in such

capacity. A regular employee of a party who appears on behalf of the party may be required by the Presiding Officer or the Commission to show his/her authority to so appear.

§ 1025.63 Written appearances.

(a) *Filing.* Any person who appears in any proceedings shall file a written notice of appearance ~~with the Secretary or deliver a written notice of appearance to the Presiding Officer at the hearing,~~ stating for whom the appearance is made and the name, electronic address, mailing address, and telephone number (including area code) of the person making the appearance and the date of the commencement of the appearance. ~~The written appearance shall be made a part of the record.~~

(b) *Withdrawal.* Any person who has previously appeared in any proceedings may withdraw his/her appearance by filing a written notice of withdrawal of appearance with the Secretariat. The notice of withdrawal of appearance shall state the name, electronic address, mailing address, and telephone number (including area code) of the person withdrawing the appearance, for whom the appearance was made, and the effective date of the withdrawal of the appearance. Such notice of withdrawal shall be filed within five (5) days of the effective date of the withdrawal of the appearance.

§ 1025.64 Attorneys.

Any attorney at law who is admitted to practice before any United States court or before the highest court of any State, the District of Columbia, or any territory or commonwealth of the United States, may practice before the Commission. An attorney's own representation that he/she is in good standing before any of such courts shall be sufficient proof thereof, unless otherwise directed by the Presiding Officer or the Commission.

§ 1025.65 Persons not attorneys.

(a) *Filing and approval of proof of qualifications.* Any person who is not an attorney at law may be admitted to appear in any adjudicative proceedings as a representative of any party or participant if that person ~~files~~provides proof to the satisfaction of the Presiding Officer that he/she possesses the necessary knowledge of administrative procedures, technical, or other qualifications to render valuable service in the proceedings and is otherwise competent to advise and assist in the presentation of matters in the proceedings. An application by a person not an attorney at law for admission to appear in any proceedings shall be submitted in writing to the Secretariat, not later than thirty (30) days prior to the hearing. The application shall set forth in detail the applicant's qualifications to appear in the proceedings.

(b) *Exception.* Any person who is not an attorney at law and whose application has not been approved shall not be permitted to appear in Commission proceedings. However, this provision shall not apply to any person who appears before the Commission on his/her own behalf or on behalf of any corporation, partnership, or unincorporated association of which the person is a partner or general officer.

§ 1025.66 Qualifications and standards of conduct.

(a) *Good faith transactions.* The Commission expects all persons appearing in proceedings before the Commission or the Presiding Officer to act with integrity, with respect, and in an

ethical manner. Business transacted before and with the Commission or the Presiding Officer shall be conducted in good faith.

(b) *Exclusion of parties, participants, or their representatives.* To maintain orderly proceedings, the Commission or the Presiding Officer may exclude parties, participants, or their representatives for refusal to comply with directions, continued use of dilatory tactics, refusal to adhere to reasonable standards of orderly and ethical conduct, failure to act in good faith, or violation of the prohibition in § 1025.68 against certain *ex parte* communications.

(c) *Exclusions from the record.* The Presiding Officer or the Commission may disregard and order the exclusion from the record of any written or oral submissions or representations which are not made in good faith or which are unfair, incomplete, or inaccurate.

(d) *Appeal by excluded party.* An excluded party, participant, or representative may petition the Commission to entertain an interlocutory appeal in accordance with § 1025.24 of these Rules. If, after such appeal, the representative of a party or participant is excluded, the hearing shall, at the request of the party or participant, be suspended for a reasonable time so that the party or participant may obtain another representative.

§ 1025.67 Restrictions as to former Commission members and employees.

(a) *Generally.* Except as otherwise provided in paragraph (b) of this section, the post-employee restrictions applicable to former Commission members and employees, including but not limited to those referenced at as set forth in the Commission's "Post Employment Restrictions Applicable to Former Commission Officers and Employees", 16 CFR part 1030.101, 5 CFR part § 2641, 18 U.S.C. § 207, and, as applicable, Executive Order 13490~~subpart E,~~ shall govern the activities of former Commission members and employees in adjudicative matters connected with their former duties and responsibilities.

(b) *Participation as witness.* A former member or employee of the Commission may testify in any proceeding subject to this part 1025 ~~these Rules~~ concerning his/her participation in any Commission activity. This section does not constitute a waiver by the Commission of any objection provided by law to testimony that would disclose privileged or confidential material. The provisions of 18 U.S.C. 1905 prohibiting the disclosure of trade secrets also applies to testimony by former members and employees.

(c) *Procedure for requesting authorization to appear.* In cases to which paragraph (a) of this section is applicable, a former member or employee of the Commission may request authorization to appear or participate in any proceedings or investigation by filing with the Secretariat a written application disclosing the following information:

- (1) The nature and extent of the former member's or employee's participation in, knowledge of, and connection with the proceedings or investigation during his/her service with the Commission;
- (2) Whether the files of the proceedings or investigation came to his/her attention;
- (3) Whether he/she was employed in the directorate, division, or other organizational unit within the Commission in which the proceedings or investigation is or has been pending;

(4) Whether he/she worked directly or in close association with Commission personnel assigned to the proceedings or investigation and, if so, with whom and in what capacity; and

(5) Whether during service with the Commission, he/she was engaged in any matter concerning the person involved in the proceedings or investigation.

(d) *Denial of request to appear.* The requested authorization shall not be given in any case:

(1) Where it appears that the former member or employee, during service with the Commission, participated personally and substantially in the proceedings or investigation; or

(2) Where the Commission is not satisfied that the appearance or participation will not involve any actual or apparent impropriety; or

(3) In any case which would result in a violation of title 18, United States Code, section 207.

§ 1025.68 Prohibited *ex parte* communications.

(a) *Applicability.* This section is applicable during the period commencing with the date of issuance of a complaint and ending upon final Commission action in the matter.

(1) This section prohibits *ex parte* communications relevant to the merits of an adjudication by any interested person not employed by the Commission to any decision-maker during the pendency of a proceeding under this part 1025.

(2) This section prohibits *ex parte* communications relevant to the merits of an adjudication by a decision-maker to any interested person not employed by the Commission. -

(b) *Definitions*—(1) *Decision-maker.* Those Commission personnel who render decisions in adjudicative proceedings under ~~these rules~~ this part 1025, or who advise officials who render such decisions, including:

(i) The Commissioners and their staffs;

(ii) The Administrative Law Judges and their staffs;

(iii) The General Counsel and his/her staff, unless otherwise designated by the General Counsel.

(2) *Ex parte communication.* (i) Any written communication concerning a matter that is the subject of proceedings under this part 1025 ~~in adjudication which that is made to a decision-maker by any person subject to these Rules~~, which is not served on all parties; or

(ii) Any oral communication concerning a matter in adjudication that is the subject of proceedings under this part 1025 ~~which that is made to a decision-maker by any person subject to these Rules~~, without advance notice to all parties to the proceedings and opportunity for them to be present.

(c) *Prohibited ex parte communications.* Any oral or written *ex parte* communication relative to the merits of any proceedings under this part 1025 ~~these Rules~~ is a prohibited *ex parte* communication, except as otherwise provided in paragraph (d) of this section.

(d) *Permissible ex parte communications.* The following communications shall not be prohibited under this section.

(1) *Ex parte* communications authorized by statute or by this part 1025 ~~these rules~~. (See, for example, § 1025.38 which governs applications for the issuance of subpoenas.)

(2) Any staff communication concerning judicial review or judicial enforcement in any matter pending before or decided by the Commission.

(3) This section does not apply to communications by any party to the Commission concerning a proposed settlement agreement that has been transmitted to the Commission.

(e) *Procedures for handling prohibited ex parte communication*—(1) *Prohibited written ex parte communication.* To the extent possible, a prohibited written *ex parte* communication received by any Commission employee shall be forwarded to the Secretariat or Presiding Officer, depending on who is maintaining the official file, rather than to a decision-maker. A prohibited written *ex parte* communication which reaches a decision-maker shall be forwarded by the decision-maker to the Secretariat or the Presiding Officer, as appropriate. If the circumstances in which a prohibited *ex parte* written communication was made are not apparent from the communication itself, a statement describing those circumstances shall be forwarded with the communication.

(2) *Prohibited oral ex parte communication.* (i) If a prohibited oral *ex parte* communication is made to a decision-maker, he/she shall advise the person making the communication that the communication is prohibited and shall terminate the discussion; and

(ii) In the event of a prohibited oral *ex parte* communication, the decision-maker shall forward to the Secretariat or the Presiding Officer, as appropriate, a signed and dated statement containing such of the following information as is known to him/her.

(A) The title and docket number of the proceedings;

(B) The name and address of the person making the communication and his/her relationship (if any) to the parties and/or participants to the proceedings;

(C) The date and time of the communication, its duration, and the circumstances (e.g., telephone call, personal interview, etc.) under which it was made;

(D) A brief statement of the substance of the matters discussed; and

(E) Whether the person making the communication persisted in doing so after being advised that the communication was prohibited.

(3) *Filing.* All communications and statements forwarded to the Secretariat under this section shall be placed in a public file which shall be associated with, but not made a part of, the record of the proceedings to which the communication or statement pertains.

(4) *Service on parties.* The Secretariat or the Presiding Officer, as appropriate, shall serve a copy of each communication and statement forwarded under this section on all parties to the proceedings. However, if the parties are numerous, or if ~~other circumstances make~~ satisfy the Secretary that or Presiding Officer, as appropriate, determine that service of the communication or statement would be unduly burdensome, he/she, in lieu of service, may notify all parties in writing that the communication or statement has been made and filed and that it is available for ~~in section~~ inspection and copying.

(5) *Service on maker.* The Secretariat or the Presiding Officer, as appropriate, shall forward to the person who made the prohibited *ex parte* communication a copy of each communication or statement filed under this section.

(f) *Effect of ex parte communications.* No prohibited *ex parte* communication shall be considered as part of the record for decision unless introduced into evidence by a party to the proceedings.

(g) *Sanctions.* A person ~~subject to these Rules~~ or party who makes, a prohibited *ex parte* communication, or who encourages or solicits another to make any such communication, may be subject to ~~any appropriate sanction or sanctions,~~ including but not limited to, exclusion from the proceedings and an adverse ruling on the issue which is the subject of the prohibited communication. A person, not a party to the proceeding, who makes or causes to be made an ex parte communication prohibited by paragraph (b) of this section shall be subject to all sanctions provided in this section if such person subsequently becomes a party to the proceeding.

Subpart H—Implementation of the Equal Access to Justice Act in Adjudicative Proceedings With the Commission

Authority: ~~Equal Access to Justice Act, Pub. L. 96-481, 94 Stat. 2325, 5 U.S.C. 504,~~ and the Administrative Procedure Act, 5 U.S.C. 551 et seq.

SOURCE: 47 FR 25513, June 14, 1982, unless otherwise noted.

§ 1025.70 General provisions.

(a) *Purpose of this rule.* The Equal Access to Justice Act, 5 U.S.C. 504 (called "the EAJA" in this subpart), provides for the award of attorney fees and other expenses to eligible persons who are parties to certain adversary adjudicative proceedings before the Commission. Applications for such fees and expenses may be made according to the EAJA, as interpreted by the federal courts and guidance provided by the U.S. Department of Justice. ~~An eligible party may receive an award when it prevails over Commission complaint counsel, unless complaint counsel's position in the proceeding was substantially justified or special circumstances make an award unjust. This subpart describes the parties eligible for awards and the proceedings covered. The rules also explain how to apply for awards and the procedures and standards that the Commission will use to make them.~~

(b) ~~When the EAJA applies.~~ the EAJA applies to any adversary adjudicative proceeding pending before the Commission at any time between October 1, 1981 and September 30, 1984. This includes proceedings commenced before October 1, 1981, if final Commission action has not been taken before that date, and proceedings pending on September 30, 1984, regardless of when they were initiated or when final Commission action occurs.

~~(c) Proceedings covered. (1) The EAJA and this rule apply to adversary adjudicative proceedings conducted by the Commission. These are adjudications under 5 U.S.C. 554 in which the position of the Commission or any component of the Commission is represented by an attorney or other representative who enters an appearance and participates in the proceeding. The rules in this subpart govern adversary adjudicative proceedings relating to the provisions of sections 15 (c), (d) and (f) and 17(b) of the Consumer Product Safety Act (15 U.S.C. 2064 (c) (d) and (f); 2066(b)), sections 3 and 8(b) of the Flammable Fabrics Act (15 U.S.C. 1192, 1197(b)), and section 15 of the Federal Hazardous Substances Act (15 U.S.C. 1274), which are required by statute to be determined on the record after opportunity for a public hearing. These rules will also govern administrative adjudicative proceedings for the assessment of civil penalties under section 20(a) of the Consumer Product Safety Act (15 U.S.C. 2068(a)). See 16 CFR 1025.1.~~

~~(2) The Commission may designate a proceeding not listed in paragraph (c)(1) of this section as an adversary adjudicative proceeding for purposes of the EAJA by so stating in an order initiating the proceeding or designating the matter for hearing. The Commission's failure to designate a proceeding as an adversary adjudicative proceeding shall not preclude the filing of an application by a party who believes the proceeding is covered by the EAJA. Whether the proceeding is covered will then be an issue for resolution in proceedings on the application.~~

~~(3) If a proceeding includes both matters covered by the EAJA and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.~~

~~(d) Eligibility of applicants. (1) To be eligible for an award of attorney fees and other expenses under the EAJA, the applicant must be a party to the adversary adjudication for which it seeks an award. The term "party" is defined in 5 U.S.C. 551(3) and 16 CFR 1025.3(f). The applicant must show that it meets all conditions of eligibility set out in this paragraph and in § 1025.71.~~

~~(2) The types of eligible applicants are:~~

~~(i) Individuals with a net worth of not more than \$1 million;~~

~~(ii) Sole owners of unincorporated businesses who have a net worth of not more than \$5 million including both personal and business interests, and not more than 500 employees;~~

~~(iii) charitable or other tax-exempt organizations described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) which have not more than 500 employees;~~

~~(iv) Any other partnership, corporation, association, or public or private organization with a net worth of not more than \$5 million and which have not more than 500 employees.~~

~~(3) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date the proceeding was initiated.~~

~~(4) An applicant who owns an unincorporated business will be considered as an "individual" rather than as a "sole owner of an unincorporated business" if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.~~

(5) The number of employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis.

(6) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. For this purpose, *affiliate* means (i) An individual, corporation or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or (ii) any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest. However, the Presiding Officer may determine that such treatment would be unjust and contrary to the purposes of the EAJA in light of the actual relationship between the affiliated entities. In addition, the Presiding Officer may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(7) An applicant that participates in a proceeding primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

(8) An applicant that represents himself/herself regardless of whether he is licensed to practice law may be awarded all such expenses and fees available to other prevailing eligible parties. See 16 CFR 1025.61 and 1025.65 of the Commission's rules.

(e) *Standards for awards.* (1) An eligible prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding, or in a significant and discrete substantive portion of the proceeding, unless the position of Commission complaint counsel over which the applicant has prevailed was substantially justified. Complaint counsel bear the burden of proof that an award should not be made to an eligible prevailing applicant. Complaint counsel may avoid the granting of an award by showing that its position was reasonable in law and fact.

(2) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding or if special circumstances make the award sought unjust.

(f) *Allowable fees and expenses.* (1) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(2) No award for the fee of an attorney or agent under these rules may exceed \$75 per hour. No award to compensate an expert witness may exceed the highest rate at which the Commission is authorized to pay expert witnesses. However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent or witness ordinarily charges clients separately for such expenses.

(3) In determining the reasonableness of the fee sought for an attorney, agent or expert witness, the Presiding Officer shall consider the following:

(i) If the attorney, agent or witness is in private practice, his or her customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;

(ii) The prevailing rate for similar services in the community in which the attorney, agent or witness ordinarily performs services;

~~(iii) The time actually spent in the representation of the applicant;~~

~~(iv) The time reasonably spent in light of the difficulty or complexity of the issues in the proceeding; and~~

~~(v) Such other factors as may bear on the value of the services provided.~~

~~(4) The reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on behalf of a party may be awarded, to the extent that the charge for the service does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of the applicant's case.~~

~~(5) Fees may be awarded to eligible applicants only for service performed after the issuance of a complaint and the commencement of the adjudicative proceeding in accordance with 16 CFR 1025.11(a).~~

~~(g) Rulemaking on maximum rates for attorney fees. (1) If warranted by an increase in the cost of living or by special circumstances, the Commission may adopt regulations providing that attorney fees may be awarded at a rate higher than \$75 per hour in some or all of the types of proceedings covered by this subpart. The Commission will conduct any rulemaking proceedings for this purpose under the informal rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. 533.~~

~~(2) Any person may file with the Commission a petition for rulemaking to increase the maximum rate for attorney fees, in accordance with the Administrative Procedure Act, 5 U.S.C. 553(e). The petition should identify the rate the petitioner believes the Commission should establish and the types of proceedings in which the rate should be used. The petition should also explain fully the reasons why the higher rate is warranted. The Commission will respond to the petition within a reasonable time after it is filed, by initiating a rulemaking proceeding, denying the petition, or taking other appropriate action.~~

~~(h) Presiding officer. The Presiding officer in a proceeding covered by this regulation is a person as defined in the Commission's Rules, 16 CFR 1025.3(i), who conducts an adversary adjudicative proceeding.~~

~~§ 1025.71 Information required from applicant.~~

~~(a) Contents of application. (1) An application for an award of fees and expenses under the EAJA shall identify the applicant and the proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of complaint counsel in the adjudicative proceeding that the applicant alleges was not substantially justified. Unless the applicant is an individual, the application shall also state the number of employees of the applicant and describe briefly the type and purpose of its organization or business.~~

~~(2) The application shall also include a verified statement that the applicant is an individual or entity qualifying as a party eligible to seek fees and other expenses under the EAJA, as set forth in 4 U.S.C. § 504(b)(1)(B)'s net worth does not exceed \$1 million (if an individual) or \$5 million (for all other applicants, including their affiliates). However, an applicant may omit this statement if it attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code or,~~

In the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under such section.

(3) The application shall state the amount of fees and expenses for which an award is sought.

(4) The application may also include any other matters that the applicant wishes the Commission to consider in determining whether and in what amount an award should be made.

(5) The application shall be signed by the applicant or an authorized officer or attorney of the applicant. It shall also contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application is true and correct.

(b) Net worth exhibit; confidential treatment. (1) Each applicant except a qualified tax-exempt organization or cooperative association must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in § 1025.70(d)(6) of this subpart) when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this subpart. The presiding officer may require an applicant to file additional information to determine its eligibility for an award.

(2) Ordinarily, the net worth exhibit will be included in the public record of the proceeding. However, an applicant that objects to public disclosure of information in any portion of the exhibit or to public disclosure of any other information submitted, and believes there are legal grounds for withholding it from disclosure, may move to have that information kept confidential and excluded from public disclosure in accordance with § section 1025.45 of the Commission Rules for *in camera* materials, 16 CFR 1025.45. This motion shall describe the information sought to be withheld and explain, in detail, why it falls within one or more of the specific exemptions from mandatory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(1) (9).

(3) Section 6(a)(2) of the Consumer Product Safety Act, 15 U.S.C. 2055(a)(2), provides that certain information which contains or relates to a trade secret or other matter referred to in section 1905 of title 18, United States Code, or subject to 5 U.S.C. 552(b)(4) shall not be disclosed. This prohibition is an Exemption 3 statute under the Freedom of Information Act, 5 U.S.C. 552(b)(3). Material submitted as part of an application for which *in camera* treatment is granted shall be available to other parties only in accordance with 16 CFR 1025.45(e) of the Commission Rules and, if applicable, section 6(a)(2) of the CPSA. If the Presiding Officer determines that the information should not be withheld from disclosure because it does not fall within section 6(a)(2) of the CPSA, he shall place the information in the public record but only after notifying the submitter of the information in writing of the intention to disclose such document at a date not less than 10 days after the date of receipt of notification. Otherwise, any request to inspect or copy the exhibit shall be disposed of in accordance with the Commission's established procedures under the Freedom of Information Act (see 16 CFR part 1015).

(c) Documentation of fees and expenses. The application shall be accompanied by full documentation of the fees and expenses, including the cost of any study, analysis, engineering report, test, project or similar matter, for which an award is sought. A separate

itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The Presiding Officer may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

~~(d) When an application may be filed. (1) An application may be filed whenever the applicant has prevailed in a proceeding covered by this subpart or in a significant and discrete substantive portion of the proceeding. However, an application must be filed no later than 30 days after the Commission's final disposition of such a proceeding.~~

~~(2) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy.~~

~~(3) If review or reconsideration is sought or taken of a decision as to which an applicant believes it has prevailed, proceedings for the award of fees shall be stayed pending final disposition of the underlying controversy.~~

~~(4) For purposes of this subpart, final disposition means the later of:~~

~~(i) The date on which an Initial Decision by the Presiding Officer becomes final, see 16 CFR 1025.52;~~

~~(ii) The date on which the Commission issues a final decision (See 16 CFR 1025.55);~~

~~(iii) The date on which the Commission issues an order disposing of any petitions for reconsideration of the Commission's final order in the proceeding (See 16 CFR 1025.56); or~~

~~(iv) Issuance of a final order or any other final resolution of a proceeding, such as a settlement or voluntary dismissal, which is not subject to a petition for reconsideration.~~

~~(e) Where an application must be filed. The application for award and expenses must be submitted to the Office of the Secretariat, Consumer Product Safety Commission, Washington, D.C. 202074330 East West Highway, Bethesda, MD 20814 in accordance with the application requirements of this section.~~

~~§1025.72 Procedures for considering applications:~~

~~(a) Filing and service of documents. Any application for an award or other pleading or document related to an application shall be filed and served on all parties to the proceeding in the same manner as provided in the Commission's Rules of Practice, section 16 CFR 1025.16(b) 1025.19.~~

~~(b) Answer to application. (1) Within 30 days after service of an application for an award of fees and expenses, complaint counsel in the underlying administrative proceeding upon which the application is based may file an answer to the application. Unless complaint counsel requests an extension of time for filing or files a statement of intent to negotiate~~

under paragraph (b)(2) of this section, failure to file an answer within the 30-day period may be treated as a consent to the award requested.

~~(2) If complaint counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate a settlement. The filing of this statement shall extend the time for filing an answer for an additional 30 days, and further extensions may be granted by the Presiding Officer upon request by complaint counsel and the applicant.~~

~~(3) The answer shall explain in detail any objections to the award requested and identify the facts relied on in support of Commission counsel's position. If the answer is based on any alleged facts not already in the record of the proceeding, complaint counsel shall include with the answer either supporting affidavits or a request for further proceedings under paragraph (f) of this section.~~

~~(c) Reply. Within 15 days after service of an answer, the applicant may file a reply. If the reply is based on any alleged facts not already in the record of the proceeding, the applicant shall include with the reply either supporting affidavits or a request for further proceedings under paragraph (f) of this section.~~

~~(d) Comments by other parties. Any party to a proceeding other than the applicant and complaint counsel may file comments on an application within 30 days after it is served or on an answer within 15 days after it is served. A commenting party may not participate further in proceedings on the application unless the Presiding Officer determines that the public interest requires such participation in order to permit full exploration of matters raised in the comments.~~

~~(e) Settlement. The applicant and complaint counsel may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying proceeding, or after the underlying proceeding has been concluded, in accordance with the Commission's standard settlement procedure (See 16 CFR 1115.20(b), 1118.20, and 1025.26, and 1605.3). If a prevailing party and complaint counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.~~

~~(f) Further proceedings. (1) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or complaint counsel, or on his or her own initiative, the Presiding Officer may order further proceedings. Such further proceedings shall be held only when necessary for full and fair resolution of the issues arising from the application, and shall be conducted as promptly as possible.~~

~~(2) A request that the Presiding Officer order further proceedings under this paragraph shall specifically identify the information sought or the disputed issues and shall explain why the additional proceedings are necessary to resolve the issues.~~

~~(g) Initial decision. The Presiding Officer shall endeavor to issue an initial decision on the application within 30 days after completion of proceedings on the application. The decision shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party, and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if at issue, findings on whether the complaint counsel's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust.~~

If the applicant has sought an award against more than one agency, the decision of this Commission will only address the allocable portion for which this Commission is responsible to the eligible prevailing party.

~~(h) Agency review. (1) Either the applicant or complaint counsel may seek review of the initial decision on the fee application, or the Commission may decide to review the decision on its own initiative, in accordance with 16 CFR 1025.54, 1025.55 and 1025.56.~~

~~(2) If neither the applicant nor Commission complaint counsel seeks review and the Commission does not take review on its own initiative, the initial decision on the application shall become a final decision of the Commission 30 days after it is issued.~~

~~(3) If an appeal from or review of an initial decision under this subpart is taken, the Commission shall endeavor to issue a decision on the application within 90 days after the filing of all briefs or after receipt of transcripts of the oral argument, whichever is later, or remand the application to the Presiding Officer for further proceedings.~~

~~(i) Judicial review. Judicial review of final Commission decisions on awards may be sought as provided in 5 U.S.C. 504(c)(2).~~

~~(j) Payment of award. An applicant seeking payment of an award shall submit to the Secretariat of the Commission a copy of the Commission's final decision granting the award, accompanied by a verified statement that the applicant will not seek review of the decision in the United States courts. (Office of the Secretariat, Consumer Product Safety Commission, Washington, D.C. 20207.) 4330 East West Highway, Bethesda, MD 20814.) The Commission will pay the amount awarded to the applicant within 60 days, unless judicial review of the award or of the underlying decision of the adversary adjudication proceeding has been sought by the applicant or any other party to the proceeding. Comments and accompanying material may be seen in or copies obtained from the Office of the Secretariat, Consumer Product Safety Commission, Washington, D.C. 20207 4330 East West Highway, Bethesda, MD 20814, during working hours Monday through Friday.~~

APPENDIX I TO PART 1025—SUGGESTED FORM OF FINAL PREHEARING ORDER

Case Caption

A final prehearing conference was held in this matter, pursuant to Rule 21 of the Commission's Rules of Practice for Adjudicative Proceedings (16 CFR 1025.21), on the _____ day of _____, 19____, at ____ o'clock, __ stm.

Counsel appeared as follows:

For the Commission staff:

For the Respondent(s):

Others:

1. Nature of Action and Jurisdiction. This is an action for _____ and the jurisdiction of the Commission is invoked under United States Code, Title _____, Section _____ and under the Code of Federal Regulations, Title _____, Section _____. The jurisdiction of the Commission is (not) disputed. The question of jurisdiction was decided as follows:

2. Stipulations and Statements. The following stipulation(s) and statement(s) were submitted, attached to, and made a part of this order:

(a) A comprehensive written stipulation or statement of all uncontested facts;

(b) A concise summary of the ultimate facts as claimed by each party. (Complaint Counsel must set forth the claimed facts, specifically; for example, if a violation is claimed, Complaint Counsel must assert specifically the acts of violation complained of; each respondent must reply with equal clarity and detail.)

(c) Written stipulation(s) or statement(s) setting forth the qualifications of the expert witnesses to be called by each party;

(d) Written list(s) of the witnesses whom each party will call, written list(s) of the additional witnesses whom each party may call, and a statement of the subject matter on which each witness will testify;

(e) An agreed statement of the contested issues of fact and of law, or separate statements by each party of any contested issues of fact and law not agreed to;

(f) A list of all depositions to be read into evidence and statements of any objections thereto;

(g) A list and brief description of any charts, graphs, models, schematic diagrams, and similar objects that will be used in opening statements or closing arguments but will not be offered in evidence. If any other such objects are to be used by any party, those objects will be submitted to opposing counsel at least three days prior to the hearing. If there is then any objection to their use, the dispute will be submitted to the Presiding Officer at least one day prior to the hearing;

(h) Written waivers of claims or defenses which have been abandoned by the parties.

The foregoing were modified at the pretrial conference as follows:

(To be completed at the conference itself. If none, recite "none".)

3. Complaint Counsel's Evidence. 3.1 The following exhibits were offered by Complaint Counsel, received in evidence, and marked as follows:

(Identification number and brief description of each exhibit)

The authenticity of these exhibits has been stipulated.

3.2 The following exhibits were offered by Complaint Counsel and marked for identification. There was reserved to the respondent(s) (and party intervenors) the right to object to their receipt in evidence on the grounds stated:

~~(Identification number and brief description of each exhibit. State briefly ground of objection, e.g., competency, relevancy, materiality)~~

~~4. Respondent's Evidence. 4.1 The following exhibits were offered by the respondent(s), received in evidence, and marked as herein indicated:~~

~~(Identification number and brief description of each exhibit)~~

~~The authenticity of these exhibits has been stipulated:~~

~~4.2 The following exhibits were offered by the respondent(s) and marked for identification. There was reserved to Complaint Counsel (and party intervenors) the right to object to their receipt in evidence on the grounds stated:~~

~~(Identification number and brief description of each exhibit. State briefly ground of objection, e.g., competency, relevancy, materiality)~~

~~5. Party Intervenor's Evidence. 5.1 The following exhibits were offered by the party intervenor(s), received in evidence, and marked as herein indicated:~~

~~(Identification number and brief description of each exhibit)~~

~~The authenticity of these exhibits has been stipulated:~~

~~5.2 The following exhibits were offered by the party intervenor(s) and marked for identification. There was reserved to Complaint Counsel and respondent(s) the right to object to their receipt in evidence on the grounds stated:~~

~~(Identification number and brief description of each exhibit. State briefly ground of objection, e.g., competency, relevancy, materiality)~~

~~Note:~~

~~If any other exhibits are to be offered by any party, such exhibits will be submitted to opposing counsel at least ten (10) days prior to hearing, and a supplemental note of evidence filed into this record.~~

~~6. Additional Actions. The following additional action(s) were taken:~~

~~(Amendments to pleadings, agreements of the parties, disposition of motions, separation of issues of liability and remedy, etc., if necessary)~~

~~7. Limitations and Reservations. 7.1 Each of the parties has the right to further supplement the list of witnesses not later than ten (10) days prior to commencement of the hearing by furnishing opposing counsel with the name and address of the witness and general subject matter of his/her testimony and by filing a supplement to this pretrial order. Thereafter, additional witnesses may be added only after application to the Presiding Officer, for good cause shown.~~

~~7.2 Rebuttal witnesses not listed in the exhibits to this order may be called only if the necessity of their testimony could not reasonably be foreseen ten (10) days prior to trial. If it appears to counsel at any time before trial that such rebuttal witnesses will be called, notice will immediately be given to opposing counsel and the Presiding Officer.~~

~~7.3 The probable length of hearing is ___ days. The hearing will commence on the _____ day of _____, 19___, at ___ o'clock ___ m. at _____.~~

~~7.4 Prehearing briefs will be filed not later than 5:00 p.m. on _____ (Insert date not later than ten (10) days prior to the hearing.) All anticipated legal questions, including those relating to the admissibility of evidence, must be covered by prehearing briefs.~~

~~This prehearing order has been formulated after a conference at which counsel for the respective parties appeared. Reasonable opportunity has been afforded counsel for corrections or additions prior to signing. It will control the course of the hearing, and it may not be amended except by consent of the parties and the Presiding Officer, or by order of the Presiding Officer to prevent manifest injustice.~~

~~Presiding Officer:~~

~~Dated:~~

~~Approved as to Form and Substance~~

~~Date:~~

~~Complaint Counsel:~~

~~Attorney for Respondent(s)~~

~~*Attorney for Intervenors~~

~~*Note: Where intervenors appear pursuant to 5-1025.17 of these Rules, the prehearing order may be suitably modified; the initial page may be modified to reflect the intervention.~~

~~_____~~

~~Source: (9/22/2015)~~

Billing Code 6355-01-P

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1025

[CPSC Docket No. 2015-00__]

Amendment of 16 CFR 1025, Rules of Practice for Adjudicative Proceedings

AGENCY: Consumer Product Safety Commission.

ACTION: Notice of proposed rulemaking.

SUMMARY: The United States Consumer Product Safety Commission (“Commission,” “CPSC,” or “we”) is issuing this notice of proposed rulemaking (“NPR”) to update the Commission’s Rules of Practice for Adjudicative Proceedings, (“Rules of Practice” or “Rules”). We are proposing to modernize the Rules of Practice to reflect changes in civil and administrative litigation since adoption of the Rules in 1980. Specifically, we propose changes to the Rules pertaining to discovery, electronic filing, the use of electronically stored information (“ESI”), and updates to the Federal Rules of Civil Procedure (“Federal Rules”), upon which our Rules are based. We also propose to update requirements for pleadings, motions, and motions for summary decisions, clarifications on the computation of time, and clarification on when amendments or supplemental pleadings require Commission approval. Additionally, we propose allowing a Presiding Officer to exercise discretion to avoid unnecessary delay or wasteful discovery and to consolidate cases in their entirety, or partially, for any purpose. We also propose to set deadlines for issuance of an Initial or Recommended Decision. Finally, we propose to remove outdated references to the Equal Access to Justice Act. We believe the proposed Rules will increase the efficiency of discovery, minimize the potential for delay in adjudicative proceedings, and ensure that, to the extent possible, Commission adjudicative

proceedings address and resolve crucial issues of consumer product safety in a fair and impartial manner. This notice seeks comments on the proposed changes to the Rules.

DATES: Submit comments by [**INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER**].

ADDRESSES: You may submit comments, identified by Docket No. CPSC 2015-00[___], electronically or in writing, by any of the following methods:

Electronic Submissions: Submit electronic comments to the Federal eRulemaking Portal at: <http://www.regulations.gov>. Follow the instructions for submitting comments. The Commission does not accept comments submitted by electronic mail (e-mail), except through www.regulations.gov. The Commission encourages you to submit electronic comments through the Federal eRulemaking Portal.

Written Submissions: Submit written submissions by mail/hand delivery/courier to: Office of the Secretariat, Consumer Product Safety Commission, Room 820, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504-7923.

Instructions: All submissions received must include the agency name and docket number for this proposed rulemaking. All comments received may be posted without change, including any personal identifiers, contact information, or other personal information provided, to: <http://www.regulations.gov>. Do not submit confidential business information, trade secret information, or other sensitive or protected information that you do not want to be available to the public. If furnished at all, such information should be submitted in writing.

Docket: For access to the docket to read background documents or comments received, go to: <http://www.regulations.gov>, and insert the docket number [CPSC-2015-00___], into the “Search” box, and follow the prompts.

FOR FURTHER INFORMATION CONTACT: Ray A. Aragon, Special Counsel,
U.S. Consumer Product Safety Commission, 4330 E. West Highway, Bethesda, MD 20814-
4408; email: raragon@cpsc.gov; telephone: (301) 504-6883.

SUPPLEMENTARY INFORMATION:

The Commission is proposing to amend the agency’s Rules of Practice for Adjudicative Proceedings. 16 CFR part 1025. The proposed rule reflects changes in civil and administrative litigation since adoption of the Rules in 1980.

Table of Contents

- I. Background and Statutory Authority
- II. Reasons for Revision of the Rules
- III. Section-by-Section Analysis of the Proposed Revisions of the Rules of Practice
- IV-VII. Environmental Issues, Regulatory Flexibility, Paperwork Reduction, Preemption
- VIII. Effective Date
- IX. Requests for Comments
- X. Proposed Revisions of the Rules of Practice

I. Background and Statutory Authority

a. Commission Adjudicative Proceedings

The Consumer Product Safety Act (15 U.S.C. 2064(c), (d), (f); 2076(b)) (“CPSA”), the Federal Hazardous Substances Act (*id.* 1274) (“FHSA”), the Flammable Fabrics Act (*id.* 1192, 1194, 1197(b)) (“FFA”), the Poison Prevention Packaging Act (*id.* 1473(c)) (“PPPA”), and the Virginia Graeme Baker Pool and Spa Act, (*id.* 8003) (“VGBA”) authorize the Commission to initiate and conduct adjudicative proceedings related to the safety of certain consumer products, and, based on the Commission’s findings, issue orders or take other action to protect the public.

Under the requirements of the cited statutes, such adjudicative proceedings must be determined on an administrative record after opportunity for a public hearing.

b. Procedural Rules Requirement

Under the Administrative Procedure Act (“APA”) (5 U.S.C. 500 *et seq.*), adjudications mandated by statute to be determined on the record after opportunity for a public hearing are subject to certain procedural requirements. These requirements include notice of the time, place and nature of the hearing, information about the legal authority under which the hearing is to be held, and information on the matters of fact and law asserted. (*Id.* 554(a)-(b)). The Commission adopted the Rules of Practice to govern adjudicative hearings under its enabling statutes and other administrative proceedings, as determined by the Commission.

c. History of the Rules of Practice

The Rules of Practice were first proposed by the Commission in 1974, for use on an interim basis. (39 FR 26848, July 23, 1974). In 1977, the Commission revised the Rules of Practice, publishing them for use on an interim basis and for public comment. (42 FR 31431 (interim rules); 42 FR 36818 (issuing correction)). In 1980, after considering public comments and the Commission’s experiences with the existing interim rules, the Commission adopted the Rules of Practice. (45 FR 29215, May 1, 1980). The Commission last amended the Rules of Practice in 1982 to make them applicable to hearings required by section 15 of the FHSA (47 FR 46845, Oct. 21, 1982).

On May 12, 2015, the Commission voted to direct staff to present for Commission consideration a revision of the Rules of Practice, with the goal of streamlining future adjudications and aligning the Rules of Practice with the Federal Rules of Civil Procedure.

II. Reasons for Proposed Revision of the Rules

a. Alignment with the Federal Rules of Civil Procedure

Since the 1980s, when the Commission last amended the Rules of Practice, the Commission's model, the Federal Rules, have been substantially revised. Among other things, these changes altered the pretrial process, providing new discovery standards intended to increase the speed and efficiency of litigation.

Prominent among these changes were detailed rules requiring parties to cooperate in pre-discovery and pre-trial planning. For example, the Federal Rules now require an affirmative pre-discovery disclosure by each party of information, documents, ESI, and other evidence that the party may use to support its claims or defenses. The Federal Rules also require participation by parties in pre-discovery and pretrial conferences, with the aim of focusing the issues to be adjudicated. Along with these changes have come new limits on formal discovery tools, including interrogatories, document requests, and depositions. In addition to proposing that our Rules of Practice follow the scope of discovery stated in Rule 26 of the Federal Rules, we are proposing to follow, with certain changes, the Federal Rule's procedures on mandatory disclosures of information and the Federal Rule's limits on formal discovery tools, by adhering to the Federal Rules on interrogatories, requests for documents and things, depositions, and requests for admission. We believe that changing our Rules of Practice to require affirmative pre-discovery disclosure, mandate participation in pre-discovery and prehearing conferences, and impose limits on wasteful discovery practices will streamline the adjudicative process, and thereby, advance our goal of establishing expeditious and fair proceedings.

Recent changes in the Federal Rules have also placed substantial focus on the discretionary powers of Presiding Officers. Under these rules, the judge or magistrate may limit

or expand discovery, and on motion, or on his or her own initiative, may tailor the pace of the adjudication and the scope and length of discovery based on the issues in each case. We are proposing to follow, with appropriate changes, the Federal Rules' emphasis on empowering the Presiding Officer to use his or her discretion to control the pace and progress of discovery. In our proposed Rules of Practice, the Presiding Officer would be an active participant in the discovery process, with powers to actively manage cases to avoid delays and forestall inefficient or wasteful discovery.

The Federal Rules provide substantial guidance on the discoverability and use of ESI because increasingly, information is stored in digital form. Our proposed Rules of Practice would largely follow the Federal Rules' guidance on the discoverability of electronic evidence.

b. Increasing the Efficiency of Adjudicative Proceedings

In addition to aligning our Rules of Practice with the Federal Rules, the changes we propose would increase the efficiency and decrease the burden of preparing for and litigating administrative hearings. For example, we propose to update our Rules of Practice on consolidating cases to allow the Presiding Officer to consolidate cases, fully or partially, for discovery and/or for hearing, on a party's motion, or at the Presiding Officer's discretion.

Additional proposed changes would adapt the Rules of Practice to the general needs of administrative litigation, based on the experiences of Commission staff in adjudicative proceedings. In each case, we propose to emphasize the discretion of the Presiding Officer to facilitate quick, fair, and efficient discovery and trial of adjudicative matters. Although we would vest significant discretion in the Presiding Officer, we would, nevertheless, seek to impose

timelines on the adjudicative proceeding and deadlines on the Presiding Officer, requiring initial decisions to be made within set time frames.

c. Updating CPSC's Rules of Practice to Conform to Current Administrative Practice

Another important reason for updating our Rules of Practice is to clarify the process for amending complaints authorized by the Commission. We propose to update our Rules of Practice to provide clearer guidance on when amendments require Commission consideration.

We also propose to revise our Rules of Practice to permit electronic filing and service of pleadings and documents and to discourage filing of paper documents. Likewise, we propose to revise the existing requirement that the Commission's Secretariat maintain an official paper file, a practice that is cumbersome and fails to reflect significant technological advancements. The proposed revisions to our Rules of Practice would allow the Presiding Officer to maintain official, electronic case files, if practicable, and would provide the Presiding Officer with the discretion to permit paper filing in certain cases. We also propose to revise our Rules of Practice regarding service of process to accommodate electronic service of most documents and pleadings and to recognize the use of common carriers in the delivery of paper documents. Likewise, we propose to clarify our Rules of Practice regarding motions for summary decisions, amending that section to follow more closely the Federal Rules.

III. Section-by-Section Analysis of the Proposed Revisions to the Rules of Practice

Subpart A—Scope of Rules, Nature of Adjudicative Proceedings, Definitions

Proposed Changes to Rule § 1025.1 (Scope of Rules)

The proposal would revise § 1025.1, Scope of rules, to clarify that, in addition to adjudicative proceedings related to the CPSA, the FHSA, and the FFA, the Commission also is empowered to conduct adjudications under the PPPA and the VGBA. Specifically, our proposed revision would clarify that the Commission may conduct adjudicative proceedings under Section 4(c) of the PPPA and Section 1404 of the VGBA. We propose to add appropriate references to these statutes and make additional minor changes for clarity in our Rules of Practice.

In addition, the proposal would revise § 1025.1 to remove the existing statement that the Rules of Practice govern adjudicative proceedings for the assessment of civil penalties under section 20(a) of the CPSA. Pursuant to a statutory change, such actions are now litigated in U. S. District Court, rather than before the Commission. Therefore, the current language in our Rules of Practice is unnecessary and inaccurate, as is a statement on the limited scope of discovery in civil penalty cases, which we also propose to remove.

As part of our goal of aligning the Rules of Practice with the updated Federal Rules, we also propose to add a statement to § 1025.1, indicating that, except where stated otherwise, parties shall follow the Federal Rules on certain discovery matters. We believe that following the Federal Rules on discovery matters would streamline the discovery process, and thereby introduce increased efficiencies to advance our goal of avoiding unnecessary delay. Through this change, we would redefine the scope of discovery to encompass Rule 26 of the Federal Rules, and would follow generally, with some stated exceptions discussed below, the Federal Rules' procedures on pretrial discovery, including interrogatories (Fed. R. Civ. P. 33); production of documents, electronically stored information, and tangible things (Fed. R. Civ. P. 34); requests for admission (Fed. R. Civ. P. 36); and depositions (Fed. R. Civ. P. 30-32). We would not follow the Federal Rules on subpoenas, which by statute, require Commission

approval. We also propose additional minor and non-substantive changes to the Rules of Practice for clarity.

Proposed Changes to § 1025.3 (Definitions)

One of our goals in revising our Rules of Practice is to update the Rules of Practice to reflect current litigation practices and advances in technology. To recognize that ESI, *i.e.*, information created, manipulated, communicated, stored, and best utilized in digital form, or requiring the use of computer software and hardware, has become a significant part of civil discovery, we propose in new § 1025.3(e) to follow the definition of ESI in the Federal Rules. We believe this definition would provide clarity and allow parties and participants to be guided by the developing case law and scholarship on electronic discovery.

We also propose several additional non-substantive changes, including a new § 1025.3(f) that would reference our rule on *ex parte* communications. We further propose to add a new § 1025.3(h) to clarify that references to the Federal Rules throughout this proposed rule refer to the Federal Rules of Civil Procedure. Because we propose additional paragraphs, we would also re-designate the paragraphs in this section to reflect these changes. Finally, we propose a clarified definition of CPSC’s “Secretariat” in current § 1025.3(k).

Subpart B—Pleadings, Form, Execution, Service of Documents

Proposed Changes to § 1025.11 (Commencement of Proceedings)

Section 1025.11 sets out requirements for the filing of a complaint in an adjudicative proceeding. In § 1025.11(a), we propose revisions to reflect organizational changes within the Commission since adoption of the current Rules of Practice. The Deputy General Counsel would

be authorized to sign a complaint following Commission approval, rather than the Assistant Executive Director for Compliance and Enforcement, as the current rule requires. When the Commission adopted the current Rules of Practice, the administrative litigation function was housed in the Office of Compliance and Field Operations (“Office of Compliance”).

Accordingly, the Rules of Practice required the director of the Office of Compliance to sign an authorized complaint. However, the Commission subsequently transferred the administrative litigation function, including complaint counsel and related staff, from the Office of Compliance to the Office of the General Counsel, making signature on the complaint more appropriately placed in the General Counsel’s office. We are proposing that the Deputy General Counsel, rather than the General Counsel, sign the complaint because the General Counsel advises the Commission on decisions related to the proceeding, and complaint counsel, pursuant to separation-of-function requirements, operates independently of the General Counsel throughout the adjudicative hearing process. To preserve this separation of function, we believe the Deputy General Counsel is the appropriate signatory on a complaint or an amended complaint.

Currently, § 1025.11(b)(3) requires that a complaint contain “[a] list and summary of documentary evidence supporting the charges.” We propose eliminating this requirement given the mandatory disclosures of evidence set forth in Federal Rule 26(a)(1)(A), which we propose following as part of § 1025.31, *General provisions governing discovery*, discussed below.

We also propose several additional minor and non-substantive changes in grammar throughout this subsection.

Proposed Changes to § 1025.13 (Amendments and Supplemental Pleadings)

Section 1025.13, titled, “Amendments and supplemental pleadings,” currently states: “The Presiding Officer may allow appropriate amendments and supplemental pleadings which do not unduly broaden the issues in the proceedings or cause undue delay.” Thus, under the current rule, the Presiding Officer is authorized to make the threshold determination of whether to allow an amendment or supplemental pleading, provided the amendment falls within the scope of the original complaint. In staff’s recent experience, however, some have suggested that all amendments should be approved by the Commission to avoid the Presiding Officer or complaint counsel inappropriately usurping the Commission function. In this view, because amendments could alter the charges originally authorized by the Commission, a decision on whether to allow any amendment requires Commission approval. We do not agree.

The Commission directly addressed this issue when the current Rules of Practice were adopted initially, specifically declining to make changes recommended by commenters who objected to the section authorizing the Presiding Officer to allow appropriate amendments and supplemental pleadings. Stating that the Rules “provide adequate procedures for the parties to argue their respective positions and an adequate framework for the exercise of the broad discretion vested in the Presiding Officer,” the Commission concluded that, under § 1025.13, “neither the Presiding Officer nor the Commission staff is usurping the Commission’s function.” 45 Fed. Reg. 29215 (May 1, 1980). We continue to believe that the Rules of Practice provide adequate safeguards against impermissible amendments and emphasize that the Presiding Officer may approve only amendments that come within the scope of the Commission’s authorized complaint. By permitting the Presiding Officer to approve such amendments, we are recognizing the separation of function that commences upon authorization of a complaint. Although the Commission remains the appropriate body to rule on amendments that broaden the authority

granted to staff to pursue a case, we believe that the Commission should not involve itself in decisions that fall within the scope of a complaint and that ultimately may be the subject of review by the Commission as the appellate body. Similarly, because staff engaged in the prosecuting functions of the agency may not participate in or advise the Commission on issues that are the subject of adjudication staff could not appropriately discuss with the Commission proposed amendments that fall within the scope of the complaint and may be the subject of a Commission decision. Therefore, we believe that decisions on issues that fall within the scope of a complaint reside appropriately with the Presiding Officer, and we also believe that § 1025.13 provides an adequate framework for such decisions. Moreover, as the Commission stated when the Rules of Practice were adopted originally, we intend to vest broad discretion with the Presiding Officer consistent with our goal of achieving efficient adjudication and avoiding undue delay.

Nevertheless, we are proposing to add language to § 1025.13 to clarify that the Presiding Officer may allow only amendments that fall within the scope of the Commission's authorized complaint and that amendments that broaden the authority granted staff require Commission approval. Thus, our proposed amendment to the Rules of Practice states: "If the Presiding Officer determines that the amendments or supplemental pleadings do not fall within the scope of an authorized complaint, broaden the authority granted staff in a complaint, unduly broaden the issues in the proceedings, or would cause undue delay, the Presiding Officer shall refer such amendments or supplemental pleadings to the Commission for decision."

Proposed Changes to § 1025.14 (Form and Filing of Documents)

As an initial matter, we are proposing to revise the title of this section to *Form and filing of pleadings and other documents* to clarify that the requirements of this section pertain to pleadings, as well as other documents. In § 1025.14 (a), we propose that all pleadings and documents shall be filed electronically with the Secretariat and the Presiding Officer, unless the Presiding Officer orders otherwise. We propose this change because the rule, as written, is outdated and does not reflect current practice for filing pleadings and evidence electronically, which has become the norm in most state and federal courts. Moreover, the current rule requires the Office of the Secretary to maintain the official file, in paper format, access to which is limited by the operational hours of the Commission. Thus, our proposed change would not only reflect current technological advances, but the change also would expand public access to the official file. The proposed rule would, however, allow the Presiding Officer discretion to permit exceptions to the electronic filing requirement so that paper documents may be filed if the Presiding Officer so orders.

We also propose that the Presiding Officer shall maintain the official file, if practicable, unless the Presiding Officer delegates such duty to the Secretariat. In our experience, because Presiding Officers may be located in different jurisdictions and work remotely from the Commission offices, they maintain an essentially duplicate record of the proceeding. Our proposed change would avoid such unnecessary duplication, where possible, but our proposal would still provide sufficient flexibility for the Secretariat to maintain the official docket if the Presiding Officer cannot do so or elects not to do so. Additionally, to emphasize our preference for electronic filing, we propose to omit existing language stating that documents “may be filed in person or by mail.” We also propose changes, consistent with our proposal on electronic filing, establishing the filing date for documents. Electronically filed documents would be

deemed filed on the date of the electronic filing; however, recognizing the broad discretion afforded the Presiding Officer, we propose adding language stating that the Presiding Officer may allow alternative methods of filing, by order, and that such order shall state the applicable date on which such pleadings or documents are deemed filed.

New language in proposed § 1025.14(c) would also eliminate our current requirement that three copies of pleadings be filed, a superfluous requirement in an era where digital copies are created easily. Under our proposed change, a single electronic copy must be filed with the Secretariat and the Presiding Officer; however, we propose to add language that acknowledges that the Presiding Officer may order paper filings.

In § 1025.14 (d), we would require that the original of each document that is filed electronically be signed electronically.

Section 1025.14 (e) currently anticipates filing of paper documents, and sets standards for such filings. We propose to amend this paragraph to establish requirements that address the electronic filing of pleadings and documents. In § 1025.14 (e)(1), we would require an electronic address in addition to a mailing address. Section 1025.14(e)(2) would require filing electronic text documents in a format that uses 12-point font with double spacing and prints on standard letter-sized paper with 1-inch margins; this paragraph also would include the requirement that electronic documents and files that cannot be readily printed, such as large spreadsheets, videos, or photographs, be identified by technical format and also include information on the program or protocol required to review the information. The font, spacing and margin requirements are consistent with Rule 32 of the Federal Rules of Appellate Procedure and Rule 102(a)(b) of the U.S. District Court for the District of Maryland.

We also propose to update § 1025.14 (e)(3), which currently states: “[d]ocuments that fail to comply with this section may be returned by the Secretary.” Under the proposed § 1025.14(e)(3), documents that do not meet the filing requirements, or electronic documents that cannot be opened or read, may be returned to the filer by the Secretariat or the Presiding Officer, a change that would reflect our proposed change allowing the Presiding Officer to maintain the official file. Lastly, we propose to add language to § 1025.14 (e)(3) to allow a Presiding Officer to permit deviation from the form prescribed in this section, for good cause shown, a change that underscores our goal of vesting broad discretion in the Presiding Officer to maximize efficiency and flexibility in how an adjudication proceeds.

Proposed Changes to § 1025.15 (Time)

In § 1025.15(a) we would make several non-substantive changes, including a clarification of the title to make clear that the computation of time refers to days. We also would make clear that “day” means calendar day. We further propose to clarify the existing language to state that the day on which the event triggering the period shall not be included in the calculation of time, but each calendar day thereafter shall; and that if the last day of the time period falls on a weekend or legal holiday, the time period shall be tolled until the next day that is not a weekend or a legal holiday. We also propose to update this section to delete references to specified legal holidays in the existing rule and refer instead to the legal public holidays identified in 5 U.S.C. 6103. This revision would include Martin Luther King, Jr.’s birthday as a holiday and would allow the Rules of Practice to reflect any changes to the list of legal public holidays made in the future.

We further propose to amend § 1025.15(b) to read: “Whenever a party is required or permitted to do an act within a prescribed period after service of a document and the Presiding Officer permits service by mail, three (3) days shall be added to the prescribed period.” This amendment recognizes that while electronic service is preferred, service by mail may be allowed by order of the Presiding Officer; if such service is made by mail, three additional days would be added to the date by which the recipient must perform a subsequent action.

In § 1025.15(c), regarding the extension of time limits, we propose to add language clarifying that initial decisions are decisions issued under § 1025.51 of the Rules of Practice.

Proposed Changes to § 1025.16 (Service)

We propose several changes to § 1025.16, titled, Service, to reflect current litigation practice and advancements in technology. First, we propose to revise § 1025.16 (a) to reflect proposed changes to § 1025.14 that would require the Presiding Officer to maintain the official file for an adjudicative proceeding, if practicable. Second, our proposed § 1025.16(b) would remove subpoenas from the service requirements of this section because we address those requirements in § 1025.28(e), discussed below. We would also propose a new § 1025.16(b)(1) that would allow service of a complaint, ruling, petition for interlocutory appeal, order, or decision to be made by electronic means if ordered by the Presiding Officer or by agreement of the parties. We also propose renumbering the subparagraphs of § 1025.16(b) to reflect this addition. Third, in proposed § 1025.16(b)(2), we would permit service by commercial carrier, a change that reflects common practice today.

We also propose in § 1025.16(b)(3) to add “a limited liability company” to the list of corporate entities that may be served, and would add “entity” in the title of the subsection, for

clarity. We propose this change to capture the types of legal entities that exist and may be the subject of an administrative complaint. Finally, we propose to add language in new § 1025.16(b)(4) that, recognizing the preference for electronic service of documents, clarifies the circumstances in which delivery of a document to an address is appropriate.

In § 1025.16(c), we would establish electronic service as the primary mode of service for other documents, unless otherwise ordered by the Presiding Officer or agreed to by the parties. Proposed changes to § 1025.16(e), which provides a form for certificates of service, and § 1025.16(f), which sets the date of service of documents, would provide for electronic filing. Consistent with the establishment of electronic filing, we propose to delete reference in § 1025.16(e) to “the original of every document,” and instead, require that “every document” be accompanied by a certificate of service.

Proposed Changes to § 1025.17 (Intervention)

We are proposing to revise § 1025.17(a), (b), and (c) to identify accurately the Secretariat of the Commission. We also propose to correct a typographical error in § 1025.17(c)(5). We do not intend these changes to be substantive.

Proposed Changes to § 1025.18 (Class Actions)

We are proposing to revise § 1025.18(a)(1) for clarity. The general word “class” would be replaced with the more specific phrase “class of respondents.”

Proposed Changes to § 1025.19 (Joinder of Proceedings)

We propose to revise the title of § 1025.19, currently *Joinder of proceedings*, to *Consolidation of proceedings* because the rule, modeled on Rule 19 of the Federal Rules,

actually describes consolidation, rather than joinder, a different legal concept. In addition, we propose new § 1025.19(a) to state that the Presiding Officer or the Commission may order the actions involving a common question of law or fact be consolidated for any purpose. This would change the current rule, which permits the Presiding Officer or the Commission to consolidate actions only “for the purpose of hearing or Commission review.” This proposed language expands the authority of the Presiding Officer to consolidate actions or portions of actions, as appropriate, a change that is consistent with our goal of assigning broad discretion to the Presiding Officer in the conduct of a proceeding. In practice, the current rule may lead to uncertainty about whether cases may be consolidated for limited purposes, such as discovery, where there are multiple respondents. Under the proposed rule, we make clear that the Presiding Officer may order partial consolidations on issues including, but not limited to, discovery, pretrial procedure, and/or hearing, if the Presiding Officer finds that consolidation will “tend to avoid unnecessary cost or delay.”

We propose to add a new § 1025.19(b), including insertion of a title, for clarity.

**Subpart C—Prehearing Procedures, Motions,
Interlocutory Appeals, Summary Judgments, Settlements**

Proposed Changes to § 1025.21 (Prehearing Conferences)

We propose changes to § 1025.21, *Prehearing conferences*, to reflect updated procedures in the Federal Rules. Specifically, the proposed changes would require a preliminary meeting of the parties before discovery commences, followed by an initial prehearing conference with the Presiding Officer. We believe these preliminary steps would streamline the process, focus the issues, and advance our goal of achieving a fair and expeditious proceeding.

Under proposed § 1025.21(a), the parties would be required to conduct a preliminary meeting no later than 5 days after the answer is due by the last answering party. At the preliminary meeting, the parties would be directed to discuss the nature and basis of their claims and defenses and the possibilities for settlement or resolution of the case. The proposed change also would require parties to attempt to agree on a proposed discovery plan with a schedule for depositions of fact witnesses, the production of documents and ESI, and the timing of expert discovery. In addition, the proposed revision would require the parties to seek agreement on the scope of electronic discovery, including specified time periods for which electronic information is sought, and agree on the format in which electronic discovery would be produced. The parties also would be required to develop a preliminary time estimate for the evidentiary hearing and to attempt to reach agreement on any other matters to be determined at the prehearing conference. We believe these changes would help expedite the process by setting an earlier deadline for a meeting of the parties and by having the parties resolve issues through mutual agreement.

Under proposed § 1025.21(b), which would be titled, *Initial prehearing conference*, we propose to modify the issues to be discussed at the prehearing conference to provide a more concise list of issues to be addressed. We believe a tailored agenda for the prehearing conference would maximize efficiency and concentrate focus on major issues. At the initial prehearing conference, the parties, with the guidance of the Presiding Officer, would address a range of issues, including their factual and legal theories, the current status of pending motions or petitions, the date for the evidentiary hearing, steps taken to preserve evidence, and the scope of anticipated discovery and a discovery plan. This list would be for illustrative purposes only and would not be intended to restrict the topics that could be discussed at the prehearing conference under the proposed revision to this section.

In § 1025.21 we also propose to re-designate existing paragraph (b), *Public notice*, as paragraph (c), and to re-designate existing paragraph (c), *Additional conferences*, as paragraph (e).

Under proposed § 1025.21(d), the Presiding Officer would be required to enter an order setting forth the results of the initial prehearing conference, establishing a timeline for discovery, motions, and any other appropriate matters. We make this proposal to address the inadequacy of the current requirement that the Presiding Officer issue a prehearing order only after the conclusion of the final prehearing conference, a point late in the process that does not provide sufficient time for potential resolution of issues. We believe that the parties and the Presiding Officer would benefit from establishing a schedule earlier in the proceedings, and we also trust that such a schedule would clarify issues and expedite the proceedings. In addition, in § 1025.21 we propose to re-designate existing paragraph (d), *Reporting*, as paragraph (h). In paragraph (e), which we propose to re-designate paragraph (g), we would revise the title to be *Final prehearing order*, for clarity. We also propose to remove references to the format set forth in Appendix I, because, as discussed below, we are proposing to delete the Appendix.

Under proposed § 1025.21(f), we would require a final prehearing conference as close to the evidentiary hearing as practicable. Under the current rules, it is not clear that such a conference should occur; our proposed change would make clear that such a conference would be mandatory. We believe that such a conference would benefit the parties and the Presiding Officer by focusing the issues before the hearing and resolving final evidentiary matters.

Proposed Changes to § 1025.22 (Prehearing Briefs)

We are proposing to revise this section to require the filing of prehearing briefs, which, under the current Rules, are discretionary. We believe that prehearing briefs should be mandatory because information contained in these briefs would set the necessary framework for the proceeding, clarifying the facts to be proven, the order of proof, and the issues to be decided.

Proposed Changes to § 1025.23 (Motions)

We propose to change this section to clarify rules governing the filing of motions. Under the current rule, all motions, except for disqualification motions, must be addressed to the Presiding Officer. Our proposed revision to § 1025.23(a) would add subpoena applications to the list of motions that would not be addressed to the Presiding Officer. We propose this change because subpoena applications follow distinct procedures set forth in § 1025.38(c), discussed below. In § 1025.23(b), we propose a minor, non-substantive clarification, changing “Secretary” to “Secretariat.” Proposed changes in § 1025.23(c) would include a revision of the title to *Response and Replies*, which reflects our proposed addition regarding reply briefs. We also would expand the time to respond to motions from 10 days to 14 days because, in staff’s experience, 10 days does not provide adequate time to respond to a motion, particularly when weekend days are considered in the computation. We believe the addition of 4 days to respond to a motion would provide sufficient time to prepare and submit a response without burdening the process with unnecessary delay. Additionally, this subsection would expressly permit replies, which currently are available only by leave of the Presiding Officer or the Commission. In our experience, replies are granted routinely, and this change merely recognizes that practice, eliminating the unnecessary step of seeking leave. This subsection also would permit the Presiding Officer (or the Commission, as the case may be), to authorize the filing of additional briefs, on good cause shown, a change that reflects our belief that the broad authority to

administer a proceeding should be vested with the Presiding Officer. We further propose that additional briefs, if permitted, must be filed within 5 days after service of the pleading to which the brief replies.

Proposed Changes to § 1025.24 (Interlocutory Appeals)

We propose to revise § 1025.24(b)(1)(ii) to clarify that nature of the proceeding from which an interlocutory appeal may be filed. We propose to revise § 1025.24(b)(2) to state that the Commission may decide a petition for an interlocutory appeal based on the existing record, or the Commission may request additional briefing and oral presentation. As written, the rule currently imposes an obligation on the Commission to decide the petition or request further briefing. Our proposed change makes clear that such a binary decision is not required and that the Commission has the option of deciding the petition based on the record, or the Commission may request further briefing or oral presentation.

Proposed Changes to § 1025.25 (Summary Decisions and Orders)

We are proposing changes to § 1025.25(a) to align our rule more closely with Rule 56 of the Federal Rules. Under our current Rules of Practice, the movant does not have to file a statement of material facts not in dispute, nor does the respondent have to file a statement of material facts that respondent contends are in dispute. The proposed change would require that motions and oppositions to motions be accompanied by separate statements of material facts about which the movant asserts there is no dispute and about which the opposing party contends there is a genuine dispute. We believe this change will enhance efficiency because filing statements of material fact would help pinpoint the primary issues in dispute. We also propose to revise § 1025.25(a) to conform to changes we propose to § 1025.21, discussed above, to state

that a summary decision motion be filed in accordance with any prehearing order issued by the Presiding Officer. The time for filing the motion would also be defined, providing that such motions to be filed up to thirty (30) days following the close of discovery. We are proposing this change because we believe this time period would afford the Presiding Officer sufficient time to carefully consider such motions, and would encourage resolution of part or all the matter well in advance of the scheduled hearing date.

We also propose to revise § 1025.25(b) to require that a response to a summary decision motion be accompanied by a statement of material facts that the opposing party contends are in dispute, a change that will enhance focus on the main issues in dispute. We also propose to modify § 1025.25(c) to add specific items in the record that should be considered by the Presiding Officer in resolving the motion, a change that mirrors Rule 56 of the Federal Rules.

Proposed Changes to § 1025.26 (Settlements)

We are proposing to revise § 1025.26(b) to clarify that motions that request that the Presiding Officer transmit a proposed consent agreement to the Commission must be filed *in camera*. In addition, we propose to amend this paragraph to state that offers of settlement shall be served on complaint counsel. Thus, the revised rule would ensure that complaint counsel would be apprised of any non-jointly submitted offers of settlement. Under the current rule, a party may submit any settlement offer to the Commission without notifying complaint counsel. Because we are proposing in this rule to remove the *ex parte* prohibition on communications in the context of settlement agreements, discussed in § 1025.68, we are proposing that complaint counsel be made aware of all such offers so that complaint counsel can communicate knowledgeably to the Commission about the substance of such offers.

In § 1025.26(c)(1) to (4), we propose a number of non-substantive editorial changes. In § 1025.26 (c)(5), we propose to add language that an offer of settlement should also include a list of “acts or practices that the respondent shall affirmatively undertake.” This addition acknowledges the authority of the Commission, after an opportunity for hearing, to order a firm to undertake certain actions pursuant to section 15(d) of the CPSA.

Under current § 1025.26(d), the Presiding Officer may transmit to the Commission offers of settlement that meet the requirements of form and content set forth in § 1025.26(c). We propose to revise this paragraph to require the Presiding Officer to transmit all non-frivolous, non-duplicative settlement offers to the Commission, removing the discretion provided to the Presiding Officer in the current rule. We propose this change because we believe the Commission should review all non-frivolous, non-duplicative settlements with the goal of advancing resolution of a matter, if possible. In addition, we propose that, to be transmitted, such an offer must comply with the requirements of § 1025.26(b), as well as § 1025.26(c).

We also are proposing non-substantive changes in § 1025.26(e) and (g).

Subpart D—Discovery, Compulsory Process

Proposed Changes to § 1025.31 (General Provisions Regarding Discovery)

The Commission proposes to revise § 1025.31(a) to require parties to conduct discovery in accordance with Rule 26 of the Federal Rules, with several exceptions, discussed below. Rule 26 imposes a number of requirements, such as requiring initial disclosures, prehearing conferences, scope of discovery, and limitations on the timing, frequency and extent of discovery. Rule 26 also sets forth provisions governing discovery of material prepared in anticipation of trial, expert discovery, and requests for protective orders. Under the current rule,

methods, sequence and scope of discovery are addressed in a general fashion. We believe that adopting the detailed procedures set forth in Rule 26 will achieve earlier and more meaningful coordination between the parties and will advance the efficient progress of an adjudicative proceeding.

Although we intend largely to follow Rule 26, we propose to depart from Rule 26 procedures in a number of ways. Specifically, regarding the time periods for discovery, we will not follow Rule 26 guidance and will instead allow schedules to be set at the discretion of the Presiding Officer, unless a specific time frame is set forth in our rules. We expect the Presiding Officer to set appropriate timelines as the facts may dictate or the comparative complexity of a matter requires. We also expect that, whenever possible, the Presiding Officer will shorten schedules, particularly where expedited hearings would serve the public interest, or where issues do not require expert discovery or lengthy evidentiary hearings.

In addition, in proposed § 1025.31(a), we would require that initial disclosure of information be produced no later than 5 days after the preliminary meeting of the parties. This proposed rule shortens the 14-day time frame for such disclosures that is afforded under the Federal Rule, a step that furthers coordination among the parties and encourages expeditious resolution of issues. We also propose that our proceedings not adhere to Rule 26 requirements that experts must produce a written report (Rule 26(a)(2)(B)) because such reports may not be practicable in adjudicative matters that proceed on an expedited schedule. We also adopt the provisions governing protective orders in Rule 26(c), but we have modified the Rule to recognize that in adjudicative proceedings under part 1025, such motions shall be made to and decided by the Presiding Officer. In addition, we propose that our proceedings not adhere to Rule 26(f) regarding conference timing, content, and discovery plan because such matters are governed by

the proposed revisions to § 1025.21, which allow the Presiding Officer to impose deadlines and shorten time frames, as necessary.

Additionally, we propose changes in newly designated § 1025.31(b), *Completion of discovery*, to state that the 150-day standard discovery period controls fact discovery but does not control expert discovery, which may extend beyond the 150-day limit. Moreover, our proposed revisions would vest the Presiding Officer with the discretion to establish a time frame for completion of expert discovery. We propose these changes because in our experience expert discovery is more efficient after fact discovery is completed and because we believe it is impracticable for expert discovery in complex matters to be completed within 150 days. For less complex matters, the Presiding Officer is vested with the discretion to shorten deadlines and time frames under § 1025.21 of this Rule. Because we are following Rule 26 in large part, we are proposing to omit current paragraphs (a),(b),(c),(d) (e),(f),(g),(h), and (i). We also note that, in following Rule 26, parties are not required to file discovery with the Secretariat and the Presiding Officer. Instead, parties would serve discovery responses on each other, thus relieving the Secretariat and the Presiding Officer of the burden of maintaining a voluminous amount of information.

Proposed Changes to § 1025.32 (Written Interrogatories to Parties)

We propose to revise this section to follow Rule 33 of the Federal Rules (*Interrogatories to Parties*), including the number, scope, and timing of interrogatories, the requirements of answers and objections, and the option to produce business records, so that we can maximize efficiency and reduce undue delay. Under the proposed change, for example, interrogatories would be limited to 25. The current rules do not impose any limits, thereby inviting overly

burdensome requests and potential abuse that could impede the progress of a matter. Adopting Rule 33 of the Federal Rules would allow the Presiding Officer to alter the limits on the frequency and extent of discovery pursuant to Rule 26(b).

Because we propose to follow the Federal Rules on interrogatories, we also propose to omit § 1025.32(a)-(d) of the current rules.

Proposed Changes to § 1025.33 (Production of Documents)

The Commission proposes to revise the title to *Production of documents, electronically stored information, and tangible things; access for inspection and other purposes*, to reflect the expanded types of information covered by this section. In addition, we propose to revise this section to follow, with one exception, Rule 34 of the Federal Rules (*Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes*). This provision governs the number, scope, and timing of information requests, the requirements of responses and objections, and Rule 34's treatment of production of ESI. We believe this proposed change would maximize efficiency because the proposed procedure would align our discovery practice with discovery under the Federal Rules and case law interpreting the Federal Rules, and would provide specific direction on the discovery of ESI, which is not specifically addressed in our current rules. However, we propose to depart from Rule 34 regarding requests for subpoenas, and propose instead that requests for subpoenas be governed by § 1025.38 of our Rules of Practice, as discussed below. Because we propose to follow the Federal Rules for the production of documents, we also propose to omit § 1025.33(a)-(d).

Proposed Changes to § 1025.34 (Requests for Admission)

We propose to revise this section to follow, with one exception, Rule 36 of the Federal Rules (*Requests for Admission*). We would not follow Rule 36 regarding the award of expenses under Rule 37 because expenses are not authorized under our Rules of Practice; rather, parties may follow the procedures set forth in § 1025.70 of the Rules of Practice. Because we propose to follow the Federal Rules, we also propose to omit § 1025.34(a)-(c).

Proposed Changes to § 1025.35 (Depositions)

For efficiency reasons and ease of practice, we propose largely to follow the Federal Rules on depositions, which are familiar to most practitioners. Specifically, the Commission proposes to revise this section to follow Rule 30 (*Depositions by Oral Examination*), Rule 31 (*Depositions by Written Questions*), and Rule 32 (*Using Depositions in Court Proceedings*) of the Federal Rules, with certain exceptions discussed below. We propose that requests for subpoenas continue to be governed by § 1025.38 of our Rules of Practice. We also propose that provisions in the Federal Rules governing award of attorney's fees and expenses shall not apply. Because we propose to follow the Federal Rules, we also propose to omit § 1025.35(a)-(h).

We propose these changes because the procedures set forth in Federal Rule 30, for example, would facilitate the noticing of depositions by the parties and encourage cooperation among the litigants during the discovery process. Under our current rule, parties are required to obtain leave of the Presiding Officer to notice all depositions, and there is no limit on the number of depositions that may be noticed. Federal Rule 30 allows parties to notice depositions without leave in most circumstances, including if the parties have stipulated to the deposition and the deposition would not result in more than 10 depositions being taken by each party. In addition, a party wishing to depose a nonparty under the current rule is required to apply for a subpoena;

Federal Rule 30 has no such requirement, which will expedite the discovery process. Our current rules also do not limit the length of a deposition, which can lead to protracted and costly depositions; Federal Rule 30, however, establishes a limit on the length of a deposition, limiting depositions to one 7- hour day, unless otherwise ordered by the court.

We also propose following Federal Rule 31, titled, *Depositions by Written Questions*, a practice not currently authorized by our Rules of Practice. We propose this addition because this discovery tool can be more efficient and less costly than an in-person deposition, and may facilitate a more streamlined use of additional discovery methods. We additionally propose following Federal Rule 32 titled, *Using Depositions in Court Proceedings* because the provisions of this rule address more comprehensively than § 1025.35, the appropriate uses of depositions, the objections to such use, and the form of presentation.

Proposed Changes to § 1025.36 (Motions to Compel Discovery)

The Commission proposes to revise this section to include a requirement that motions to compel discovery include a certification that the movant has, in good faith, conferred or attempted to confer with the person or party failing to make disclosure. This change is consistent with the requirements in the Federal Rules (see Federal Rule 37(a)(1)), and we believe this change would encourage resolution of the issues between parties, without intervention by the Presiding Officer.

Proposed Changes to § 1025.38 (Subpoenas)

We propose to update this section to make it consistent with our proposed changes on electronic filing, discussed above, and for clarity.

We would revise § 1025.38(b) to properly identify the Secretariat. In addition, we propose to amend § 1025.38(c) and (d) to clarify the content of, and application process for, subpoenas. Specifically, we propose to remove the paper filing requirement, eliminate the requirement that applications be submitted in triplicate, and delete other requirements related to paper filing.

Additionally, in § 1025.38(e), we propose to allow subpoena service to nonparties, as set forth in § 1025.16(b)(2)-(5), which allows for service by a variety of means, but does not permit electronic service. Because nonparties may not have verified electronic addresses, and certification of receipt is not required, service of a subpoena by the other specified methods is more reliable. For parties, we propose allowing for service in any of the methods set forth in § 1025.16(b)(1)-(5). We believe these proposed changes would increase the efficiency of subpoena service because the revisions allow for multiple methods of service, and, in particular, permit electronic service among parties, where the parties have agreed to such methods of service or the Presiding Officer has permitted these methods of service. Additionally, § 1025.38(f) would permit, in addition to mail carrier service, return of service of subpoenas by commercial carrier, a change that reflects common practice today. We also propose to eliminate the requirement that a copy of the subpoena be returned to the Secretary. We propose other minor and non-substantive changes in § 1025.38(g).

Subpart E— Hearings

Proposed Changes to § 1025.41 (Hearings; General rules)

The Commission proposes to revise § 1025.41(b) to clarify that adjudicative proceedings shall be held in one location, absent unusual circumstances. Based on staff experience and

common practice in other agencies, we also propose to limit the duration of a proceeding to no more than 210 hours, absent a showing of good cause. We believe this provides ample time for the proper conduct of most hearings, but allows flexibility to alter the time frame if circumstances warrant. We propose other minor, non-substantive changes in § 1025.41(c) for clarity.

Proposed Changes to § 1025.42 (Powers and Duties of Presiding Officer)

The Commission proposes to revise § 1025.42(a)(6) to state that, in addition to procedural motions, the Presiding Officer is empowered to consider and rule on evidentiary motions and other issues, as appropriate. We propose other minor, non-substantive changes in § 1025.42(a)(3) and (b), for clarity. In proposed § 1025.42(d), we make clear that, in addition to the Commission, a Presiding Officer shall not be responsible to, or subject to the supervision of, a Commissioner or a member of a Commissioner's staff in performance of the adjudicative function.

We propose other minor, non-substantive changes in § 1025.42(e).

Proposed Changes to § 1025.43 (Evidence)

We are proposing a minor, non-substantive change in § 1025.43(d)(i) for uniformity. We also propose to remove an unnecessary "reserved" paragraph in § 1025.43(e) and re-designate paragraph (f) as paragraph (e).

Proposed Changes to § 1025.44 (Expert Witnesses)

The Commission proposes to revise § 1025.44(a) to align our rule on experts more closely with the standard set forth in Rule 702 of the Federal Rules of Evidence (*Testimony by*

Expert Witnesses). We make this change to maximize efficiency by working within an evidentiary framework with which most practitioners are familiar and allowing the parties and Presiding Officer to be guided by case law interpreting the Federal Rules.

We also propose revising § 1025.44(b) to make clear that the Presiding Officer has the authority to order expert testimony to be in writing and filed on the record. In addition, we propose to clarify that the Presiding Officer has the discretion to allow live testimony in lieu of a written submission. This change would be in keeping with our goal of vesting broad discretion with the Presiding Officer in the conduct of a proceeding.

We propose to revise § 1025.44(c) and (d) to conform to our proposed revision in § 1025.44(b).

Proposed Changes to § 1025.45 (In Camera Materials)

We propose to revise § 1025.45(b) to correct typographical and grammatical errors, and to clarify the standard that applies to *in camera* treatment of documents and testimony. We also propose to move language related to the length of time for *in camera* treatment from § 1025.45(b) to § 1025.45(b)(3). Additionally, we propose adding language to § 1025.45(e) to make clear that *in camera* materials may not be released to the public until the order granting *in camera* treatment expires. We propose to revise § 1025.45(f) for clarity.

Proposed Changes to § 1025.46 (Proposed Findings, Conclusions, and Order)

The Commission proposes to revise this section to make the filing of post-hearing briefs mandatory. Under the current rule, parties may file post hearing briefs, but are not required to do so. Because we believe the public and the Presiding Officer would benefit from a concise but

comprehensive summary of the matter at issue, we propose that this filing be mandatory. We also propose to limit replies to the discretion of the Presiding Officer so that the pace of the adjudication at this juncture is not slowed unnecessarily by the filing of excessive briefing materials. We propose other non-substantive changes for clarity.

Proposed Changes to § 1025.47 (Record)

The Commission proposes to revise § 1025.47(a) of this section to delete the requirement for an “official court reporter of the Commission” because the Commission has no official court reporter. The revised language would require that a hearing shall be “recorded and transcribed by a court reporter under the supervision of the Presiding Officer.” We are proposing other non-substantive changes for clarity, including a revision to the appendix citation in the Federal Advisory Committee Act.

Proposed Changes to § 1025.48 (Official Docket)

The Commission proposes to revise this section to conform to our proposed revision of § 1025.14, which would permit the Presiding Officer or Secretariat to maintain the official docket in any adjudicatory proceeding. This revised section would also require that the official docket be maintained electronically, in keeping with changes we are proposing throughout our Rules of Practice to update our procedures to reflect advances in technology. We also propose to delete the statement that the docket would be available for inspection by the public during normal business hours as unnecessary because the docket would be available electronically. We propose other non-substantive changes for clarity.

Proposed Changes to § 1025.49 (Fees)

The Commission proposes to revise § 1025.49(a) to allow parties to modify this provision by agreement.

Subpart F--Decision

Proposed Changes to § 1025.51 (Initial Decision)

Under current § 1025.51(a), the Presiding Officer shall endeavor to file an Initial Decision within sixty (60) days after the record closes in a case, or after the filing of post-hearing briefs, whichever is later. The Commission proposes to revise § 1025.51(a) to require the Presiding Officer to file a written report with the Commission on the status of a case if an Initial Decision is not filed within the 60-day time frame. We also propose that the Presiding Officer be required to file an additional status report every 60 days thereafter, until the Presiding Officer submits an Initial Decision to the Commission; but in no case shall the Presiding Officer submit an Initial Decision later than 180 days after the closing of the record or the filing of post-hearing briefs. This change is consistent with the Commission's goal of avoiding unnecessary delay and ensuring that a matter progresses in a timely manner to serve the interests of justice.

We also propose to revise § 1025.51(c) to make clear that the Commission may order that an individual, other than the Presiding Officer, may make and file an Initial Decision, if the Presiding Officer is disqualified under § 1025.42(e).

We are proposing to revise § 1025.51 (d) to limit the authority of the Presiding Officer to reopen the proceedings to only those circumstances "where the interests of justice so require." We propose this change to emphasize the need for finality and to ensure timely disposition of a matter.

Proposed Changes to § 1025.52 (Adoption of Initial Decision)

We are proposing a minor, non-substantive change for consistency.

Proposed Changes to § 1025.53 (Appeal from Initial Decision)

The Commission proposes to revise the title of § 1025.53(a) to *Notices of appeal*, and we propose several additional changes for clarity.

In addition, we propose to revise § 1025.53(b) to limit appeal briefs to thirty (30) pages. Currently, the rule does not impose a page limit, and we believe parties should be encouraged to file concise pleadings. We also propose to amend § 1025.53(c) to impose the same 30-page restriction on answering briefs that applies to appeal briefs. In § 1025.53(f), we would clarify that reply briefs are not required, but if filed, they shall not exceed fifteen (15) pages.

Proposed Changes to § 1025.55 (Final Decision on Appeal or Review)

We are proposing a minor, non-substantive change in § 1025.55(a) for clarity.

Proposed Changes to § 1025.56 (Reconsideration)

We are proposing minor, non-substantive changes for clarity and to correct a typographical error.

Proposed Changes to § 1025.57 (Effective Date of Order)

The Commission proposes to revise § 1025.57(a) and (b) to clarify that Commission orders in adjudicative proceedings under the CPSA or the FFA become effective upon receipt by the Respondent.

In § 1025.57(b)(1), we propose an additional, non-substantive change for clarity. In § 1025.57(b)(2), we propose corrections for citation errors.

Proposed Changes to § 1025.58 (Reopening of Proceedings)

The Commission proposes to revise § 1025.58(c)(2) for clarity.

In proposed § 1025.58(e)(2), we make clear that the Commission may direct the Presiding Officer to conduct additional hearings if the pleadings raise substantial factual issues. We are proposing this change because as written it is unclear under whose auspices such a hearing would be conducted and recognize that such a hearing should be conducted by the Presiding Officer as the finder of fact. We further propose to clarify in this section, consistent with proposed changes to § 1025.46, to state that post hearing briefs are mandatory. We propose one other non-substantive change for clarity.

Subpart G--Appearances, Standards of Conduct

Proposed Changes to § 1025.63 (Written Appearances)

The Commission proposes to revise § 1025.63(a) and (b) to conform the requirement for the filing of a notice of appearance to our proposed electronic filing changes to § 1025.14 of the Rules of Practice.

In § 1025.63(b), we propose other minor, non-substantive changes for clarity.

Proposed Changes to § 1025.65 (Persons Not Attorneys)

The Commission proposes to revise § 1025.65(a) for clarity.

Proposed Changes to § 1025.66 (Qualifications and Standards of Conduct)

The Commission proposes to revise § 1025.66(d) for clarity.

Proposed Changes to § 1025.67 (Restrictions as to Former Members and Employees)

The Commission proposes to retitle this section to: *Restrictions as to former Commission members*, to align the title with the text in § 1025.67(a). We also would revise § 1025.67(a) to include additional statutory and regulatory restrictions and propose to revise § 1025.67(c) for clarity.

Proposed Changes to § 1025.68 (Prohibited Ex Parte Communications)

We propose to revise § 1025.68(a) to state that, except to the extent required for disposition of *ex parte* matters authorized by law or by this part, *ex parte* prohibitions apply to a number of circumstances. Specifically, new § 1025.68(a)(1) would prohibit *ex parte* communications relevant to the merits of an adjudication by any interested person not employed by the CPSC to any decision maker during the pendency of a proceeding under the Rules. Under the current rule, an *ex parte* communication is defined as a communication concerning a matter in adjudication made to a decision-maker by any person subject to the Rules of Practice. Our proposed change, which is consistent with the APA, would broaden the *ex parte* prohibition to include any “interested person not employed by the Commission.” Additionally, new proposed § 1025.68(a)(2) would prohibit any decision maker from making an *ex parte* communication to any interested party not employed by the Commission. To conform § 1025.68(b)(2)(i),(ii) with our proposed revisions to § 1025.68(a), we would omit language in those subparagraphs limiting the prohibition to persons subject to these Rules of Practice.

The Commission also proposes to revise § 1025.68(d) to add § 1025.68 (d)(3) to state that *ex parte* prohibitions do not apply to communications by any party to the Commission

concerning a proposed settlement agreement that has been transmitted to the Commission. We are proposing this change because we believe this would allow parties to communicate information to the Commission that might not otherwise be available to the Commission.

We also propose changes in § 1025.68(e) (1), (2)(ii), (4) and (5) to acknowledge that the Presiding Officer, as well as the Secretariat, may maintain the official file. We make other, non-substantive changes to § 1025.68(e), as well.

In § 1025.68(g), we propose changes to be consistent with the proposed changes to this section discussed above, and we also propose that sanctions shall apply to any person or party who makes or causes a prohibited *ex parte* communication to be made. As currently drafted, the provision allowing sanctions applies only to persons subject to the Rules of Practice. We propose language that would allow sanctions to be imposed on a person who, while not a party, makes a prohibited *ex parte* communication and subsequently becomes a party. The proposed language, which is consistent with the adjudicative rules adopted by Federal Trade Commission, would authorize the Presiding Officer to impose sanctions allowed under this section, if that person later becomes a party to the proceeding.

We propose other minor, non-substantive changes for clarity.

Subpart H—Implementation of the Equal Access to Justice Act in Adjudicative Proceedings with the Commission

Proposed Changes to § 1025.70 (General Provisions)

The Commission proposes to revise this section to remove outdated and confusing references to the Equal Access to Justice Act (“EAJA”). As written, the rule substantially re-

states EAJA requirements existing when the rule was adopted initially. Many elements of those requirements are no longer current. To avoid updating these rules each time an element of the EAJA is changed, we propose removing references to specific EAJA requirements and stating instead that the EAJA applies to certain adjudicative proceedings before the Commission. We propose stating generally that applications for fees and expenses may be made according to the EAJA, as interpreted by the federal courts and guidance provided by the U.S. Department of Justice (“DOJ”). Such interpretative case law and DOJ guidance provide ample direction for applicants, the Presiding Officer, and the Commission in the application for, and consideration of, a request for attorney’s fees and other expenses. We do not believe our proceedings warrant particularized requirements regarding EAJA and that the guidance provided by the DOJ, and as interpreted by federal courts, would be sufficient for applicants to proceed with an EAJA claim. We note too that other federal agencies, such as the CFPB, have adopted rules of practice without reference to EAJA. Because we believe DOJ and federal court guidance is sufficient, we propose to omit language in § 1025.70(a) and the entirety of § 1025.70(b)-(h). We are also proposing several minor, non-substantive changes for clarity.

Proposed Changes to 1025.71 (Information Required from Applicant)

Consistent with our goal of following DOJ and federal court guidance on EAJA, we propose omitting this section.

Proposed Changes to § 1025.72 (Procedures for Considering Applications)

Consistent with our goal of following DOJ and federal court guidance on EAJA, we propose omitting this section.

Proposed Changes to Appendix I to Part 1025 (Suggested Form of Final Prehearing Order)

We are proposing to omit this appendix, which contains a suggested form for a final prehearing order, given our proposed revisions to the requirements for prehearing conferences and orders, discussed above.

IV. Environmental Considerations

The Commission's regulations address whether the Commission is required to prepare an environmental assessment or an environmental impact statement. 16 CFR part 1021. These regulations provide a categorical exclusion for certain CPSC actions that normally have "little or no potential for affecting the human environment." 16 CFR 1021.5(c)(1). This proposed rule falls within the categorical exclusion.

V. Regulatory Flexibility Analysis

Under section 603 of the Regulatory Flexibility Act ("RFA"), when the APA requires an agency to publish a general notice of proposed rulemaking, the agency must prepare an initial regulatory flexibility analysis ("IRFA"), assessing the economic impact of the proposed rule on small entities. 5 U.S.C. 603(a). As noted, the Commission is proposing to update its Rules of Practice for Adjudicative Proceedings. Although the Commission is choosing to issue the rule through notice and comment procedures, the APA does not require a proposed rule when an agency issues rules of agency procedure and practice (5 U.S.C. 553(b)). Therefore, no IRFA is required under the RFA. Moreover, the proposed rule

would not establish any mandatory requirements and would not impose any obligations on small entities (or any other entity or party).

VI. Paperwork Reduction Act

The Paperwork Reduction Act (“PRA”) establishes certain requirements when an agency conducts or sponsors a “collection of information.” 44 U.S.C. 3501-3520. The proposed rule would amend the Commission's Rules of Practice to adopt modern adjudicative procedures. The proposed rule would not impose any information collection requirements. The existing Rules of Practice and the proposed revision do not require or request information from firms, but rather, explain procedures for adjudicatory hearings. Thus, the PRA is not implicated in this proposed rulemaking.

VII. Executive Order 12988 (Preemption)

According to Executive Order 12988 (February 5, 1996), agencies must state in clear language the preemptive effect, if any, of new regulations. Section 26 of the CPSA explains the preemptive effect of consumer product safety standards issued under the CPSA. 15 U.S.C. 2075. The proposed Rules of Practice do not set consumer product safety standards. Rather, the proposed Rules of Practice is an adoption of updated rules of agency procedure and practice. Therefore, section 26 of the CPSA would not apply to this rulemaking.

VIII. Effective Date

In accordance with the APA’s general requirement that the effective date of a rule be at least 30 days after publication of the final rule, the Commission proposes that the effective date be 30 days after the date of publication of a final rule in the Federal Register. 5 U.S.C. 553(d).

IX. Request for Comments

The Commission requests comments on all aspects of the proposed rule. Comments should be submitted in accordance with the instructions in the ADDRESSES section at the beginning of this notice. Written comments must be received by **[INSERT 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

List of Subjects in 16 CFR Part 1101

Administrative practice and procedure; Consumer protection.

X. Proposed Revisions of the Rules of Practice

For the reasons set forth in the Preamble, the Commission proposes to amend 16 C.F.R. part 1025 to read as follows:

PART 1025—RULES OF PRACTICE FOR ADJUDICATIVE PROCEEDINGS

1. The authority citation for part 1025 is revised to read as follows:

Authority: Authority: 15 U.S.C. 45, 1192, 1194, 1197(b), 1274, 1473(c), 2064, 2066(b), 2076, 8003.

2. Revise § 1025.1 to read as follows:

§ 1025.1 Scope of rules.

The Rules in this part govern procedures in adjudicative proceedings relating to the provisions of sections 15(c), (d), and (f) and 17(b) of the Consumer Product Safety Act (15 U.S.C. 2064(c), (d), (f); 2066(b)), section 15 of the Federal Hazardous Substances Act (15 U.S.C. 1274), sections 3 and 8(b) of the Flammable Fabrics Act (15 U.S.C. 1192, 1197(b)), section 4(c) of the Poison Prevention Packaging Act (15 U.S.C. 1473(c)), and section 1404 of the Virginia Graeme Baker Pool and Spa Act (15 U.S.C. 8003), which are required to be determined

on the record after opportunity for a public hearing. This part 1025 may also be applied to such other adjudicative proceedings as the Commission, by order, shall designate. A basic intent of the Commission in the development of these Rules has been to promulgate a single set of procedural rules which can accommodate both simple matters and complex matters in adjudication. To accomplish this objective, broad discretion has been vested in the Presiding Officer who will hear a matter being adjudicated to allow him/her to alter time limitations and other procedural aspects of a case, as required by the complexity of the particular matter involved. A major concern of the Commission is that all matters in adjudication move forward in a timely manner, consistent with the Constitutional due process rights of all parties. Therefore, the Presiding Officer should, whenever appropriate, expedite the proceedings by setting shorter time limitations than those time limitations generally applicable under this part 1025. For example, the time limitation for discovery, as provided in § 1025.31(d), may be shortened, consistent with the extent of discovery reasonably necessary to prepare for the hearing. Except where stated otherwise, discovery matters shall be governed by the Federal Rules of Civil Procedure.

§ 1025.2 [Amended]

3. Amend § 1025.2 by removing the words “these Rules” and adding, in their place, the words “this part 1025”.

§ 1025.3 [Amended]

4. Amend § 1025.3 by:

a. Redesignating paragraphs (e) through (l) as paragraphs (h) through (o);

b. Adding new paragraphs (e), (f), and (g); and

c. Revising redesignated paragraphs (i) and (n).

The additions and revisions read as follows:

§ 1025.3 Definitions.

* * * * *

(e) *Electronically Stored Information* (“ESI”) shall have the same meaning given to such term in the Federal Rules.

(f) *Ex parte communication* shall have the meaning set forth in § 1025.68.

(g) *Federal Rules* means the Federal Rules of Civil Procedure.

* * * * *

(i) *Party* means any named person or any intervenor in any proceedings governed by this part 1025.

* * * * *

(n) *Secretary or Secretariat* means the Secretariat of the Consumer Product Safety Commission.

* * * * *

5. Amend § 1025.11 by revising paragraphs (a) and (b)(3) to read as follows.

§ 1025.11 Commencement of proceedings.

(a) *Notice of institution of enforcement proceedings.* Any adjudicative proceedings under this part shall be commenced by the issuance of a complaint, authorized by the Commission, and signed by the Deputy General Counsel.

(b) * * *

(3) A clear and concise statement of the charges, sufficient to inform each respondent with reasonable definitiveness of the factual basis or bases of the allegations of violation or hazard; and

* * * * *

6. Revise § 1025.13 to read as follows:

§ 1025.13 Amendments and supplemental pleadings.

The Presiding Officer may allow appropriate amendments and supplemental pleadings which do not unduly broaden the issues in the proceedings or cause undue delay. If the Presiding Officer determines that the amendments or supplemental pleadings do not fall within the scope of an authorized complaint, broaden the authority granted staff in a complaint, unduly broaden the issues in the proceedings, or would cause undue delay, the Presiding Officer shall refer such amendments or supplemental pleadings to the Commission for decision.

7. Amend § 1025.14 by:

- a. Revising the heading of § 1025.14; and
- b. Revising paragraphs (a), (c), (d)(1), (e)(1), (e)(2), and (e)(3).

The additions and revisions read as follows:

§ 1025.14 Form and filing of pleadings and other documents.

(a) *Filing.* Except as otherwise provided by order of the Presiding Officer, all pleadings and documents submitted to the Commission or the Presiding Officer shall be addressed to, and electronically filed with, the Secretariat and the Presiding Officer. If practicable, the Presiding

Officer shall maintain the official file for the adjudicative proceedings unless the Presiding Officer delegates to the Secretariat the responsibility for maintaining the official file. Pleadings and documents filed electronically shall be deemed filed on the day of electronic filing; should the Presiding Officer permit by order an alternative method of filing, such order shall state the applicable date on which such filings are to be deemed filed.

* * * * *

(c) *Copies.* Unless otherwise ordered by the Presiding Officer, a single electronic copy must be filed with each of the Secretariat and the Presiding Officer. Each copy must be clear and legible.

(d) * * *

(1) The original of each document filed shall be signed by a representative of record for the party or participant; or in the case of parties or participants not represented, by the party or participant; or by a partner, officer or other appropriate official of any corporation, partnership, or unincorporated association, who files an appearance on behalf of the party or participant. Documents electronically filed shall be signed electronically.

* * * * *

(e) *Form.*

(1) All documents shall be dated and shall contain the electronic address, telephone number, and mailing address of the signer.

(2) Electronic text documents shall be filed in a format that prints on paper approximately $8\frac{1}{2} \times 11$ inches in size. Print shall be in 12-point font and double spaced, and margins shall be one inch. Electronic documents and files that cannot readily be printed, such as large

spreadsheets, videos, or photographs, should be identified by format and the program or protocol required to review the information.

(3) Documents that fail to comply with this section may be returned by the Secretariat or Presiding Officer. Electronic documents and files that cannot be opened or read may be returned by the Secretariat or Presiding Officer. For good cause shown, the Presiding Officer may allow deviation from the form prescribed in this section.

8. Revise § 1025.15 to read as follows:

§ 1025.15 Time.

(a) *Computation of days.* In computing any time period specified in this part 1025 or in any order filed in a proceeding subject to this part 1025, the day of the event triggering the period shall not be included, but each calendar day thereafter shall be included. If the last day of the time period is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday. When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this Rule, “legal holiday” means any day designated as a legal public holiday in 5 U.S.C. 6103.

(b) *Additional time after service by mail.* Whenever a party is required or permitted to do an act within a prescribed period after service of a document and the Presiding Officer permits service by mail, three (3) days shall be added to the prescribed period.

(c) *Extensions.* For good cause shown, the Presiding Officer may extend any time limit prescribed or allowed by this part 1025 or by order of the Commission or the Presiding Officer, except for those sections governing the filing of interlocutory appeals and appeals from initial

decisions pursuant to § 1025.51 and those sections expressly requiring Commission action.

Except as otherwise provided by law, the Commission, for good cause shown, may extend any time limit prescribed by this part 1025 or by order of the Commission or the Presiding Officer.

9. Revise § 1025.16 to read as follows:

§ 1025.16 Service.

(a) *Mandatory service.* Every document filed with the Secretariat shall be served upon all parties to any proceedings, i.e., Complaint Counsel, respondent(s), and party intervenors, as well as the Presiding Officer. Every document filed with the Secretariat or Presiding Officer shall also be served upon each participant, if the Presiding Officer or the Commission so directs.

(b) *Service of complaint, ruling, petition for interlocutory appeal, order, or decision.* A complaint, ruling, petition for interlocutory appeal, order, or decision shall be served as follows:

(1) *By electronic means.* Service may be made by electronic means if ordered by the Presiding Officer or otherwise agreed by the parties.

(2) *By registered mail, certified mail or commercial carrier.* A copy of the document shall be addressed to the person, partnership, corporation or unincorporated association to be served at his/her/its residence or principal office or place of business and sent by registered mail, certified mail, or commercial carrier.

(3) *By delivery to an individual or entity.* A copy of the document may be delivered to the person to be served; or to a member of the partnership or limited liability company to be served; or to the president, secretary, or other executive officer, or a director of the corporation or unincorporated association to be served; or to an agent authorized by appointment or by law to receive service; or

(4) *By delivery to an address.* If the document is not to be served electronically and cannot be served in person or by mail as provided in paragraph (b)(2) or (b)(3) of this section, a copy of the document may be left at the principal office or place of business of the person, partnership, corporation, unincorporated association, or authorized agent with an officer or a managing or general agent; or it may be left with a person of suitable age and discretion residing therein, at the residence of the person or of a member of the partnership or of an executive officer, director, or agent of the corporation or unincorporated association to be served; or

(5) *By publication in the Federal Register.* A respondent that cannot be served by any of the methods already described in this section may be served by publication in the *Federal Register* and such other notice as may be directed by the Presiding Officer or the Commission, where a complaint has issued in a class action pursuant to § 1025.18.

(c) *Service of other documents.* Except as otherwise provided in paragraph (b) of this section, when service of a document starts the running of a prescribed period of time for the submission of a responsive document or the occurrence of an event, the document shall be served by electronic means unless otherwise ordered by the Presiding Officer or otherwise agreed by the parties.

(d) *Service on a representative.* When a party has appeared by an attorney or other representative, service upon that attorney or other representative shall constitute service upon the party.

(e) *Certificate of service.* Every document filed with the Commission and required to be served upon all parties to any proceedings, as well as participants if so directed by the Presiding Officer, shall be accompanied by a certificate of service signed by the party making service,

stating that such service has been made upon each party and participant to the proceedings.

Certificates of service may be in substantially the following form:

I hereby certify that I have served the attached document upon all parties and participants of record in these proceedings by emailing, mailing postage prepaid, or delivering in person, a copy to each on_____.

(Signature)

For _____

(f) *Date of service.* The date of service of a document shall be the date on which the document is sent electronically, deposited with the United States Postal Service, postage prepaid, or is delivered in person.

§ 1025.17 [Amended]

10. Amend § 1025.17 by:

a. Removing the words “these Rules” in paragraph (a) and adding, in their place, the words “this part 1025”;

b. Removing the word “Secretary” in paragraphs (a), (b) and (c) and adding, in its place, the word “Secretariat”;

c. Removing the words “of these rules” in paragraph (b)(3); and

d. Removing the word “petitioner’s” in paragraph (d)(5) and adding, in its place, the word “petitioner’s” .

11. Amend § 1025.18 by revising paragraphs (a)(1) and (f)(4) to read as follows:

§ 1025.18 Class actions.

(a) * * *

(1) The class of respondents is so numerous or geographically dispersed that joinder of all members is impracticable;

* * * * *

(f) * * *

* * * * *

(4) Dealing with other procedural matters.

The orders may be combined with a prehearing order under § 1025.21 and may be altered or amended as may be necessary.

* * * * *

12. Revise § 1025.19 to read as follows:

§ 1025.19 Consolidation of proceedings.

(a) *Consolidation of actions.* When actions involving a common question of law or fact are pending before the Presiding Officer, the Commission or the Presiding Officer may order a consolidated hearing of any or all the matters in issue in the actions; the Commission or the Presiding Officer may order the actions consolidated for any purpose; and the Commission or the Presiding Officer may make such orders concerning such consolidated proceedings as may tend to avoid unnecessary cost or delay.

(b) *Motions for consolidation.* A motion for consolidation may be filed by any party not later than thirty (30) days prior to the hearing. Such motion shall be served upon all parties to any proceedings in which consolidation is contemplated. The motion may include a request that the consolidated proceedings be maintained as a class action in accordance with § 1025.18. The proceedings may be consolidated to such extent and upon such terms as may be proper. Such consolidation may also be ordered upon the initiative of the Presiding Officer or the Commission. Single representatives may be designated by represented parties, intervenors, and participants with an identity of interests.

13. Revise § 1025.21 to read as follows:

§ 1025.21 Prehearing conferences.

(a) *Preliminary meeting of the parties.* As early as practicable before the prehearing scheduling conference described in paragraph (b) of this section, but in no event later than five (5) days after the answer is due to be filed by the last answering respondent, counsel for the parties shall meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case. The parties shall also agree, if possible, on:

(1) A proposed discovery plan specifically addressing a schedule for depositions of fact witnesses, the production of documents and electronically stored information, and the timing of expert discovery. The parties' agreement regarding electronically stored information should include the scope of and a specified time period for the exchange of such information and the format for the discovery of such information;

(2) A preliminary estimate of the time required for the evidentiary hearing; and

(3) Any other matters to be determined at the prehearing conference.

(b) *Initial prehearing conference.* The Presiding Officer shall schedule a prehearing conference not later than 50 days after publication of the complaint in the Federal Register and upon ten (10) days' notice to all parties and participants. At the prehearing conference any or all of the following shall be considered:

- (1) The factual and legal theories of the parties;
- (2) The current status of any pending motions or petitions;
- (3) A proposed date for the evidentiary hearing, and a schedule of proceedings that is consistent with the date of the evidentiary hearing;
- (4) Steps taken to preserve evidence relevant to the issues raised by the claims and defenses;
- (5) The scope of anticipated discovery, any limitations on discovery, and a proposed discovery plan, including the disclosure of electronically stored information;
- (6) Issues that can be narrowed by agreement or by motion, suggestions to expedite the presentation of evidence at trial, and any request to bifurcate issues, claims or defenses; and
- (7) Other possible agreements or steps that may aid in the just and expeditious disposition of the proceeding and to avoid unnecessary cost.

(c) *Public notice.* The Presiding Officer shall cause a notice of the first prehearing conference, including a statement of the issues, to be published in the Federal Register at least ten (10) days prior to the date scheduled for the conference.

(d) *Prehearing scheduling order.* Following the first prehearing conference, the Presiding Officer shall enter an order that sets forth the results of the conference and establishes a timeline for discovery, dates for the submission and hearing of motions, and other matters as appropriate.

(e) *Additional conferences.* Additional prehearing conferences may be convened at the discretion of the Presiding Officer, upon notice to the parties, any participants, and to the public.

(f) *Final prehearing conference.* As close to the commencement of the evidentiary hearing as practicable, the Presiding Officer shall hold a final prehearing conference, at which time deadlines for proposed stipulations as to law, fact, or admissibility of evidence, and the exchange of exhibit and witness lists shall be established. At this conference, the Presiding Officer shall also resolve any outstanding evidentiary matters or pending motions (except motions for summary decision) and establish a final schedule for the evidentiary hearing.

(g) *Final prehearing order.* The Presiding Officer shall issue a final prehearing order in each case after the conclusion of the final prehearing conference. The final prehearing order should contain, to the fullest extent possible at that time, all information which is necessary for controlling the course of the hearing. The Presiding Officer may require the parties to submit a jointly proposed final prehearing order.

(h) *Reporting.* Prehearing conferences shall be stenographically reported as provided in § 1025.47 and shall be open to the public, unless otherwise ordered by the Presiding Officer or the Commission.

14. Revise § 1025.22 introductory text to read as follows:

§ 1025.22 Prehearing briefs.

Not later than ten (10) days prior to the hearing, unless otherwise ordered by the Presiding Officer, the parties shall simultaneously serve and file prehearing briefs, which should set forth:

* * * * *

15. Amend § 1025.23 by:

a. Removing the word “Secretary” from paragraph (b) and adding in its place the word “Secretariat”; and

b. Revising paragraphs (a) and (c) to read as follows:

§ 1025.23 Motions.

(a) *Presentation and disposition.* All motions, except disqualification motions filed under § 1025.42(e) and motions or applications related to subpoenas under § 1025.38(c), shall be addressed to the Presiding Officer, who shall rule upon them promptly, after affording an opportunity for response.

* * * * *

(c) *Responses and replies to motions.* Within fourteen (14) days after service of any written motion or petition or within such longer or shorter time as may be designated by this part 1025 or by the Presiding Officer or the Commission, any party who opposes the granting of the requested order, ruling or action may file a written response to the motion. Failure to respond to a written motion may, in the discretion of the Presiding Officer, be considered as consent to the granting of the relief sought in the motion. Replies to responses shall be filed within ten (10)

days after service of the response. No additional replies or responses shall be permitted absent leave granted by the Presiding Officer or the Commission on good cause shown. Any additional replies or responses permitted by the Presiding Officer or the Commission shall be filed within five (5) days after service of the pleading to which the reply or response relates.

* * * * *

§ 1025.24 [Amended]

16. Amend § 1025.24 by:

a. Adding the words “that is the subject of a proceeding under this part 1025” at the end of the existing text of § 1025.24(b)(1)(ii); and

b. Revising the last sentence of § 1025.24(b)(2) to read as follows: “The Commission may decide the petition, or may request such further briefing or oral presentation as it deems necessary.”

17. Amend § 1025.25 by revising paragraphs (a), (b), (c) and (d) to read as follows:

§ 1025.25 Summary decisions and orders.

(a) *Motion.* Any party may file a motion, with a supporting memorandum, for a Summary Decision and Order in its favor upon all or any of the issues in controversy. The motion shall be accompanied by a separate and concise statement of the material facts as to which the moving party contends there is no dispute. Complaint Counsel may file such a motion at any time after thirty (30) days following issuance of a complaint, and any other party may file a motion at any time after issuance of a complaint. Any such motion by any party shall be filed in accordance with prehearing orders issued by the Presiding Officer under § 1025.21 of this part, and shall be filed no later than thirty (30) days after the close of discovery.

(b) *Response to motion.* Any other party may, within twenty (20) days after service of the motion, file a response with a supporting memorandum accompanied by a separate and concise statement of the material facts as to which the opposing party contends a genuine dispute exists.

(c) *Grounds.* A Summary Decision and Order shall be granted if the particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials show that there is no genuine issue as to any material fact and that the moving party is entitled to a Summary Decision and Order as a matter of law.

(d) *Legal effect.* A Summary Decision and Order upon all the issues being adjudicated shall constitute the Initial Decision of the Presiding Officer and may be appealed to the Commission in accordance with § 1025.53. A Summary Decision, interlocutory in character, may be rendered on fewer than all issues and may not be appealed prior to issuance of the Initial Decision.

* * * * *

18. Revise § 1025.26 to read as follows:

§ 1025.26 Settlements.

(a) *Availability.* Any party shall have the opportunity to submit an offer of settlement to the Presiding Officer.

(b) *Form.* Offers of settlement shall be filed *in camera* in the form of a consent agreement and order, shall be signed by the respondent or respondent's representative, and may be signed by any other party. Each offer of settlement shall be accompanied by an *in camera*

motion requesting that the Presiding Officer transmit the proposed consent agreement and order to the Commission. The motion shall outline the substantive provisions of the proposed consent agreement, and state reasons why the consent agreement should be accepted by the Commission. Offers of settlement and accompanying motions not jointly submitted shall be served simultaneously on Complaint Counsel.

(c) *Contents.* An offer of settlement shall contain:

(1) An admission of all jurisdictional facts;

(2) An express waiver of further procedural steps and of all rights to seek judicial review or otherwise to contest the validity of the Commission order;

(3) A statement that the allegations of the complaint are resolved by the consent agreement and order;

(4) A description of the alleged hazard, noncompliance, or violation;

(5) As appropriate, a listing of the acts or practices from which the respondent shall refrain and those acts or practices that the respondent shall affirmatively undertake; and

(6) As appropriate, a detailed statement of the corrective action(s) which the respondent shall undertake. In proceedings arising under Section 15 of the Consumer Product Safety Act, 15 U.S.C. 2064, this statement shall contain all the elements of a “Corrective Action Plan,” as outlined in the Commission's Interpretation, Policy, and Procedure for Substantial Product Hazards, 16 CFR part 1115.

(d) *Transmittal.* The Presiding Officer shall transmit settlement offers that meet the requirements of paragraphs (b) and (c) of this section to the Commission for its consideration unless the Presiding Officer determines the settlement offer is clearly frivolous, duplicative of

offers previously made, or contrary to established Commission policy. The Presiding Officer may, but need not, recommend acceptance of offers. Any party may object to the transmittal to the Commission of an offer of settlement by filing a response opposing the motion.

(e) *Stay of proceedings.* When an offer of settlement has been agreed to by all parties and has been transmitted to the Commission, the proceedings shall be stayed until the Commission has ruled on the offer of settlement. When an offer of settlement has been made and transmitted to the Commission but has not been agreed to by all parties, the proceedings shall not be stayed pending Commission decision on the offer, unless otherwise ordered by the Presiding Officer or the Commission.

(f) *Commission ruling.* The Commission shall rule upon all transmitted offers of settlement. If the Commission accepts the offer, the Commission shall issue an appropriate order, which shall become effective upon issuance.

(g) *Commission rejection.* If the Commission rejects an offer of settlement, the Secretariat shall give written notice of the Commission's decision to the parties and the Presiding Officer. If the proceedings have been stayed, the Presiding Officer shall promptly issue an order resuming the proceedings, with consideration to any modifications to the schedule necessitated by the stay.

(h) *Effect of rejected offer.* Neither rejected offers of settlement, nor the fact of the proposal of offers of settlement are admissible in evidence.

19. Revise § 1025.31 to read as follows:

§ 1025.31 General provisions governing discovery.

(a) Unless otherwise provided by statute, the parties shall conduct discovery in accordance with and subject to Rule 26 of the Federal Rules, as specified in this part 1025. Unless specified below or provided for in this part 1025, the time frames set for all actions described in Rule 26 shall be set by the Presiding Officer.

(1) Initial disclosures of information required in Federal Rule 26(a)(1)(C) shall be produced no later than 5 days after the preliminary meeting of the parties as set forth in § 1025.21(a).

(2) Federal Rule 26(a)(2)(B) shall not apply.

(3) Federal Rule 26(c) shall apply with the following exceptions: Motions for protective orders shall be made to and decided by the Presiding Officer; Federal Rule 26(c)(3) shall not apply.

(4) Federal Rule 26(f) shall not apply. The conference of the parties and joint discovery planning required in Federal Rule 26(f) shall take place as set forth in § 1025.21 of this part, or as otherwise ordered by the Presiding Officer.

(b) Completion of discovery. All non-expert discovery shall be completed as soon as practical but in no case longer than one hundred fifty (150) days after issuance of a complaint, unless otherwise ordered by the Presiding Officer in exceptional circumstances and for good cause shown. All discovery demands shall be made and served by a date which affords the party from whom discovery is sought the full response period provided by this part 1025. The Presiding Officer shall establish a time frame for the completion of expert discovery in accordance with § 1025.21.

20. Revise § 1025.32 to read as follows:

§ 1025.32 Written interrogatories to parties.

This section shall be governed by Rule 33 of the Federal Rules.

21. Revise § 1025.33 to read as follows:

§ 1025.33 Production of documents, electronically stored information, and tangible things; access for inspection and other purposes.

This section shall be governed by Rule 34 of the Federal Rules, with the following exception: Requests for subpoenas shall be governed by § 1025.38 of this part.

22. Revise § 1025.34 to read as follows:

§ 1025.34 Requests for admission.

This section shall be governed by Rule 36 of the Federal Rules, except that Rule 37 award of expenses shall not apply.

23. Revise § 1025.35 to read as follows:

§ 1025.35 Depositions.

This section shall be governed by Rules 30-32 of the Federal Rules, with the following exceptions: Requests for subpoenas shall be governed by § 1025.38; and Federal Rule 37 award of expenses shall not apply.

24. Revise § 1025.36 to read as follows:

§ 1025.36 Motions to compel discovery.

If a party fails to respond to discovery, in whole or in part, the party seeking discovery may move within twenty (20) days for an order compelling an answer, or compelling inspection or production of documents, or otherwise compelling discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without action by the Presiding Officer. For purposes of this section, an evasive or incomplete response is to be treated as a failure to respond. When taking depositions, the discovering party shall continue the examination to the extent possible with respect to other areas of inquiry before moving to compel discovery.

25. Amend § 1025.37(g) by removing the words “of these rules”.

26. Revise § 1025.38 to read as follows:

§ 1025.38 Subpoenas.

(a) *Availability.* A subpoena shall be addressed to any person not a party for the purpose of compelling attendance, testimony, and production of documents at a hearing or deposition, and may be addressed to any party for the same purposes.

(b) *Form.* A subpoena shall identify the action with which it is connected; shall specify the person to whom it is addressed and the date, time, and place for compliance with its provisions; and shall be issued by order of the Commission and signed by the Secretariat or by the Presiding Officer. A subpoena *duces tecum* shall specify the books, papers, documents, or other materials or data-compilations to be produced.

(c) *How obtained*—(1) *Content of application*. An application for the issuance of a subpoena, stating reasons, shall be submitted to the Presiding Officer, who shall forward the application to the Commission.

(2) *Procedure for application*. The Commission shall rule upon the application for a subpoena *ex parte*, by issuing an order granting or denying the application.

(d) *Issuance of a subpoena*. The Commission shall issue a subpoena by authorizing the Secretariat or the Presiding Officer to sign and date the approved subpoena for transmittal to the applicant for service.

(e) *Service of a subpoena*. A subpoena issued by the Commission shall be served upon the addressee as provided in § 1025.16(b)(2)-(5) and upon all parties as provided in § 1025.16(b).

(f) *Return of service*. A person serving a subpoena shall promptly execute a return of service, stating the date, time, and manner of service upon the addressee. If service is effected by mail or commercial carrier, the signed return receipt or proof of delivery shall accompany the return of service. In case of failure to make service, a statement of the reasons for the failure shall be made.

(g) *Motion to quash or limit subpoena*. Within five (5) days after receipt of a subpoena, the person to whom it is directed may file a motion to quash or limit the subpoena, setting forth the reasons why the subpoena should be withdrawn or why it should be limited in scope. Any such motion shall be answered within five (5) days after service and shall be ruled on immediately by the Commission. The order shall specify the date, if any, for compliance with the specifications of the subpoena.

(h) *Consequences of failure to comply.* In the event of failure by a person to comply with a subpoena, the Presiding Officer may take any of the actions enumerated in § 1025.37, or may order any other appropriate relief to compensate for the withheld testimony, documents, or other materials. If in the opinion of the Presiding Officer such relief is insufficient, the Presiding Officer shall certify to the Commission a request for judicial enforcement of the subpoena.

§ 1025.39 [Amended]

27. Amend § 1025.39 by:

- a. Removing the words “of these rules” in paragraph (b); and
- b. Removing the words “of these rules” in paragraph (e).

28. Amend § 1025.41 by revising paragraphs (a), (b), (c), and (d) to read as follows:

§ 1025.41 General rules.

(a) *Public hearings.* All hearings conducted pursuant to this part 1025 shall be public unless otherwise ordered by the Commission or the Presiding Officer.

(b) *Prompt completion.* Hearings shall proceed with all reasonable speed and, insofar as practicable with due regard to the convenience of the parties, shall be held at one location and continue without suspension until concluded, except in unusual circumstances or as otherwise provided in these Rules. The hearing should be limited to no more than 210 hours; provided that the Presiding Officer, upon a showing of good cause, may extend the number of hours for the hearing.

(c) *Rights of parties.* Every party shall have the right of timely notice and all other rights essential to a fair hearing, including, but not limited to, the right to present evidence, to conduct

such cross-examination as may be necessary for a full and complete disclosure of the facts, and to be heard by objection, motion, brief, and argument.

(d) *Rights of participants.* Every participant shall have the right to make a written or oral statement of position and to file proposed findings of fact, conclusions of law, and a post hearing brief, in accordance with § 1025.17(b).

* * * * *

29. Amend § 1025.42 by:

a. Revising paragraphs (a)(3), (a)(6), (a)(9), (b), and (d) to read as follows:

§ 1025.42 Powers and duties of Presiding Officer.

(a) * * *

(3) To rule upon offers of proof, and receive relevant, competent, and probative evidence;

* * * * *

(6) To consider and rule, orally or in writing, upon all procedural, evidentiary, and other motions and issues appropriate in adjudicative proceedings;

* * * * *

(9) To take any action authorized by this part 1025 or the provisions of title 5, United States Code, sections 551-559.

(b) *Exclusion of parties by Presiding Officer.* A Presiding Officer shall have the authority, for good cause stated on the record, to exclude from participation in any proceedings any party, participant, or representative who violates the requirements of § 1025.66. Any party, participant or representative so excluded may appeal to the Commission in accordance with the

provisions of § 1025.24. If the representative of a party or participant is excluded, the hearing may be suspended for a reasonable time so that the party or participant may obtain another representative.

* * * * *

(d) *Interference.* In the performance of adjudicative functions, a Presiding Officer shall not be responsible to or subject to the supervision or direction of any Commissioner or any member of a Commissioner’s staff or of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for the Commission. All directions by the Commission to a Presiding Officer concerning any adjudicative proceedings shall appear on and be made a part of the record.

* * * * *

b. In addition to the amendments set forth above, in paragraphs (e)(1) and (e)(2) remove the word “Secretary” and add, in its place, the word “Secretariat”.

30. Amend § 1025.43 by:

- a. Revising paragraphs (a) and (d)(1)(i);
- b. Removing paragraph (e); and
- c. Redesignating paragraph (f) as paragraph (e).

The revisions read as follows:

§ 1025.43 Evidence.

(a) *Applicability of Federal Rules of Evidence.* Unless otherwise provided by statute or this part 1025, the Federal Rules of Evidence shall apply to all proceedings held pursuant to this

part 1025. However, the Federal Rules of Evidence may be relaxed by the Presiding Officer if the ends of justice will be better served by so doing.

* * * * *

(d) * * *

(1) * * *

(i) Generally known within the jurisdiction of the Commission; or

* * * * *

31. Revise § 1025.44 to read as follows:

§ 1025.44 Expert witnesses.

(a) *Definition.* A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (1) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (2) the testimony is based on sufficient facts or data;
- (3) the testimony is the product of reliable principles and methods; and
- (4) the expert has reliably applied the principles and methods to the facts of the case.

(b) *Method of presenting testimony of expert witness.* In lieu of written testimony, the Presiding Officer may order that the direct testimony of an expert witness be in writing and be filed on the record and exchanged between the parties no later than ten (10) days preceding the commencement of the hearing. Such written testimony shall be incorporated into the record and shall constitute the direct testimony of that witness. Upon a showing of good cause, the party

sponsoring the expert witness may be permitted to amplify any written direct testimony during the hearing.

(c) *Cross-examination and redirect examination of expert witness.* Cross-examination, redirect examination, and re-cross-examination of an expert witness shall proceed in due course based upon any written testimony and any oral testimony.

(d) *Failure to file or exchange written testimony.* Failure to file or exchange written testimony of expert witnesses if required by the Presiding Officer shall deprive the sponsoring party of the use of the expert witness and of the conclusions which that witness would have presented, unless the opposing parties consent or the Presiding Officer otherwise orders in unusual circumstances.

32. Amend § 1025.45 by revising paragraphs (b), (b)(2), (b)(3), (e), and (f) to read as follows:

§ 1025.45 *In camera* materials.

* * * * *

(b) *In camera treatment of documents and testimony.* The Presiding Officer or the Commission may for good cause shown and based on the record, order documents or testimony offered in evidence, whether admitted or rejected, to be received and preserved *in camera*. The order shall include:

(1) * * *

(2) The reasons for granting *in camera* treatment; and

(3) The terms and conditions imposed by the Presiding Official, if any, limiting access to or use of the *in camera* material, including the length of time the documents or testimony will be held *in camera*.

* * * * *

(e) *Public release of in camera materials.* *In camera* materials constitute a part of the confidential records of the Commission and shall not be released to the public until the expiration of any order granting *in camera* treatment.

(f) *Reference to in camera materials.* In the submission of proposed findings, conclusions, briefs, or other documents, all parties shall refrain from disclosing specific details of *in camera* materials. However, such refraining shall not preclude general references to such materials. If parties consider the inclusion of specific details of *in camera* materials to be necessary, those references shall be incorporated into separate proposed findings, conclusions, briefs, or other documents marked “Confidential, Contains *In Camera* Material,” which shall be filed *in camera* and become part of the *in camera* record. Documents filed *in camera* shall be served only on parties accorded access to the *in camera* materials by this part 1025, the Presiding Officer, or the Commission.

33. Revise § 1025.46 to read as follows:

§ 1025.46 Proposed findings, conclusions, and order.

Within a reasonable time after the closing of the record and receipt of the transcript, all parties shall file, and participants may file simultaneously unless otherwise ordered by the Presiding Officer, post-hearing briefs, including proposed findings of fact and conclusions of law, as well as a proposed order. The Presiding Officer shall establish a date certain for the filing

of the briefs, which shall not exceed fifty (50) days after the closing of the record except in unusual circumstances. The briefs shall be in writing and shall be served upon all parties. The briefs of all parties shall contain adequate references to the record and authorities relied upon. Replies, if permitted by the Presiding Officer, shall be filed within fifteen (15) days of the date for the filing of briefs unless otherwise established by the Presiding Officer.

34. Amend § 1025.47 by revising paragraph (a) to read as follows:

§ 1025.47 Record.

(a) *Reporting and transcription.* Hearings shall be recorded and transcribed by a court reporter, under the supervision of the Presiding Officer. The original transcript shall be a part of the record of proceedings. Copies of transcripts are available from the reporter at a cost not to exceed the maximum rates fixed by contract between the Commission and the reporter. In accordance with Section 11 of the Federal Advisory Committee Act (Pub. L. 92-463, 5 U.S.C. app. § 11), copies of transcripts may be made by members of the public or by Commission personnel, when available, at the Secretariat at reproduction costs as provided in § 1025.49.

* * * * *

35. Revise § 1025.48 to read as follows:

§ 1025.48 Official docket.

The official docket in any adjudicatory proceedings may be maintained electronically by the Presiding Officer or the Secretariat as set forth in § 1025.14 and shall be made available to the public.

§ 1025.49 [Amended]

36. Amend § 1025.49 by revising paragraph (a) to read as follows:

(a) *Fees for deponents and witnesses.* Any person compelled to appear in person in response to a subpoena or notice of deposition shall be paid the same attendance and mileage fees as are paid witnesses in the courts of the United States, in accordance with title 28, United States Code, section 1821. The fees and mileage referred to in this paragraph shall be paid by the party at whose instance deponents or witnesses appear. The parties may by agreement modify this provision.

* * * * *

37. Amend § 1025.51 by revising paragraphs (a), (c), and (d)(1) to read as follows:

§ 1025.51 Initial decision.

(a) *When filed.* The Presiding Officer shall endeavor to file an Initial Decision with the Commission within sixty (60) days after the closing of the record or the filing of post-hearing briefs, whichever is later. If the Initial Decision cannot be filed within this time period, the Presiding Officer shall report in writing to the parties, participants, and the Commission on the status and expected date of the Initial Decision. The Presiding Officer shall submit reports on the status of the initial decision every 60 days thereafter until the Presiding Officer submits an initial decision to the Commission, but in no case shall the Presiding Officer submit an initial decision more than 180 days after the closing of the record of filing of post hearing briefs.

(b) * * *

(c) *By whom made.* The Initial Decision shall be made and filed by the Presiding Officer who presided over the hearing, unless otherwise ordered by the Commission due to the disqualification of the Presiding Officer pursuant to § 1025.42.

(d) * * *

(1) At any time prior to, or concomitant with, the filing of the Initial Decision, the Presiding Officer may reopen the proceedings for the reception of further evidence where the interests of justice so require.

* * * * *

§ 1025.52 [Amended]

38. Amend § 1025.52 by removing the word “Secretary” and adding, in its place, the word “Secretariat”.

39. Amend § 1025.53 by revising paragraphs (a), (b), (c), and (f) to read as follows:

§1025.53 Appeal from initial decision.

(a) *Notices of appeal.* Any party may appeal an Initial Decision to the Commission by serving a notice of appeal within ten (10) days after issuance of the Initial Decision.

(b) *Appeal brief.* An appeal is perfected by filing a brief within forty (40) days after service of the Initial Decision. The appeal brief must be served upon all parties. The brief shall not exceed thirty (30) pages, excluding covers, indexes, table of contents, list of citations, and list of references. The appeal brief shall contain, in the order indicated, the following:

* * * * *

(c) *Answering brief.* Within thirty (30) days after service of the appeal brief upon all parties, any party may file an answering brief, which shall contain a subject index, with page references, and a table of cases (alphabetically arranged), textbooks, statutes, and other material cited, with page references thereto. Such brief shall present clearly the points of fact and law

relied upon in support of the reasons the party has for each position urged, with specific page references to the record and legal or other materials relied upon. An answering brief shall be subject to the same page limit as the appeal brief.

* * * * *

(f) *Reply brief.* A reply brief shall be limited to rebuttal of matters presented in answering briefs, including matters raised in cross-appeals. A reply brief may be filed and served within fourteen (14) days after service of an answering brief and shall not exceed fifteen (15) pages, excluding covers, indexes, table of contents, list of citations, and list of references.

* * * * *

§ 1025.55 [Amended]

40. Amend § 1025.55 by removing the comma following the words “in addition” in paragraph (a).

§ 1025.56 [Amended]

41. Amend § 1025.56 by:

- a. Removing the word “sevice” and adding, in its place, the word “service”; and
- b. Adding, in the last sentence, the word “Final” before the words “Decision or Order”.

42. Amend § 1025.57 by revising paragraphs (a), (b)(1) and (b)(2) to read as follows:

§ 1025.57 Effective date of order.

(a) *Orders in proceedings arising under the Consumer Product Safety Act.* An order of the Commission in adjudicative proceedings under this part 1025 that arise under the Consumer

Product Safety Act becomes effective upon receipt by the respondent, unless otherwise ordered by the Commission.

(b) * * *

(1) *Consent orders.* An order in proceedings under this part 1025 that arise under the Flammable Fabrics Act, which has been issued following the Commission's acceptance of an offer of settlement in accordance with § 1025.26, becomes effective upon respondent's receipt of notice of Commission acceptance, unless otherwise ordered by the Commission.

(2) *Litigated Orders.* All other orders in proceedings under this part 1025 that arise under the Flammable Fabrics Act become effective upon the expiration of the statutory period for court review specified in section 5(g) of the Federal Trade Commission Act, title 15, United States Code, section 45(g), or, if a petition for review has been filed, upon a court's affirmance of the Commission's order.

* * * * *

43. Amend § 1025.58 by revising paragraphs (c)(2) and (e)(2) to read as follows:

§ 1025.58 Reopening of proceedings.

* * * * *

(c) * * *

* * * * *

(2) *After effective date of order.* Whenever the Commission determines that changed conditions of fact or law or the public interest may require that a Commission decision or order be altered, modified, or set aside in whole or in part, the Commission shall serve upon all parties

to the original proceedings an order to show cause, stating the changes the Commission proposes to make in the decision or order and the reasons such changes are deemed necessary. Within thirty (30) days after service of an order to show cause, any party to the original proceedings may file a response. Any party not responding to the order to show cause within the time allowed shall be considered to have consented to the proposed changes.

* * * * *

(e) * * *

(2) *Factual issues.* When the pleadings raise substantial factual issues, the Commission may direct the Presiding Officer to conduct such additional hearings as it deems appropriate. Upon conclusion of the hearings, and including the filing of post-hearing briefs containing proposed findings of fact and conclusions of law, as well as a proposed order, the Presiding Officer shall issue a Recommended Decision, including proposed findings and conclusions, and the reasons therefor, as well as a proposed Commission order. If the Presiding Officer recommends that the Commission's original order be reopened, the proposed order shall include appropriate provisions for the alteration, modification or setting aside of the original order. The record and the Presiding Officer's Recommended Decision shall be certified to the Commission for final disposition of the matter.

* * * * *

44. Revise § 1025.63 to read as follows:

§ 1025.63 Written appearances.

(a) *Filing.* Any person who appears in any proceedings shall file a written notice of appearance, stating for whom the appearance is made and the name, electronic address, mailing

address, and telephone number of the person making the appearance and the date of the commencement of the appearance. The appearance shall be made a part of the record.

(b) *Withdrawal.* Any person who has previously appeared in any proceedings may withdraw his/her appearance by filing a written notice of withdrawal of appearance with the Secretariat. The notice of withdrawal of appearance shall state the name, electronic address, mailing address, and telephone number (including area code) of the person withdrawing the appearance, for whom the appearance was made, and the effective date of the withdrawal of the appearance. Such notice of withdrawal shall be filed within five (5) days of the effective date of the withdrawal of the appearance.

§ 1025.65 [Amended]

45. Amend § 1025.65 by:

a. Removing the word “files” from paragraph (a) and adding, in its place, the word “provides”; and

b. Removing the word “Secretary” in paragraph (a) and adding, in its place, the word “Secretariat”.

§ 1025.66 [Amended]

46. Amend § 1025.66 by removing the words “of these rules” from paragraph (d).

47. Amend § 1025.67 by:

a. Revising the heading of § 1025.67;

b. Revising paragraphs (a) and (b); and

c. Removing the word “Secretary” in paragraph (c) and adding, in its place, the word “Secretariat”.

The revisions read as follows:

§ 1025.67 Restrictions as to former Commission members and employees.

(a) *Generally.* Except as otherwise provided in paragraph (b) of this section, the post-employment restrictions applicable to former Commission members and employees, including but not limited to those referenced at 16 CFR part 1030.101, 5 CFR part 2641, 18 U.S.C. 207, and, as applicable, Executive Order 13490, shall govern the activities of former Commission members and employees in adjudicative matters connected with their former duties and responsibilities.

(b) *Participation as witness.* A former member or employee of the Commission may testify in any proceeding subject to this part 1025 concerning his/her participation in any Commission activity. This section does not constitute a waiver by the Commission of any objection provided by law to testimony that would disclose privileged or confidential material. The provisions of 18 U.S.C. 1905 prohibiting the disclosure of trade secrets also applies to testimony by former members and employees.

* * * * *

48. Revise § 1025.68 to read as follows:

§ 1025.68 Prohibited *ex parte* communications.

(a) *Applicability.* This section is applicable during the period commencing with the date of issuance of a complaint and ending upon final Commission action in the matter.

(1) This section prohibits *ex parte* communications relevant to the merits of an adjudication by any interested person not employed by the Commission to any decision-maker during the pendency of a proceeding under this part 1025.

(2) This section prohibits *ex parte* communications relevant to the merits of an adjudication by a decision-maker to any interested person not employed by the Commission.

(b) *Definitions*—(1) *Decision-maker*. Those Commission personnel who render decisions in adjudicative proceedings under this part 1025, or who advise officials who render such decisions, including:

(i) The Commissioners and their staffs;

(ii) The Administrative Law Judges and their staffs;

(iii) The General Counsel and his/her staff, unless otherwise designated by the General Counsel.

(2) *Ex parte communication*. (i) Any written communication concerning a matter that is the subject of proceedings under this part 1025 that is made to a decision-maker, which is not served on all parties; or

(ii) Any oral communication concerning a matter in that is the subject of proceedings under this part 1025 that is made to a decision-maker, without advance notice to all parties to the proceedings and opportunity for them to be present.

(c) *Prohibited ex parte communications*. Any oral or written *ex parte* communication relative to the merits of any proceedings under this part 1025 is a prohibited *ex parte* communication, except as otherwise provided in paragraph (d) of this section.

(d) *Permissible ex parte communications.* The following communications shall not be prohibited under this section.

(1) *Ex parte* communications authorized by statute or by this part 1025. (See, for example, § 1025.38 which governs applications for the issuance of subpoenas.)

(2) Any staff communication concerning judicial review or judicial enforcement in any matter pending before or decided by the Commission.

(3) This section does not apply to communications by any party to the Commission concerning a proposed settlement agreement that has been transmitted to the Commission.

(e) *Procedures for handling prohibited ex parte communication—*(1) *Prohibited written ex parte communication.* To the extent possible, a prohibited written *ex parte* communication received by any Commission employee shall be forwarded to the Secretariat or Presiding Officer, depending on who is maintaining the official file, rather than to a decision-maker. A prohibited written *ex parte* communication which reaches a decision-maker shall be forwarded by the decision-maker to the Secretariat or the Presiding Officer, as appropriate. If the circumstances in which a prohibited *ex parte* written communication was made are not apparent from the communication itself, a statement describing those circumstances shall be forwarded with the communication.

(2) *Prohibited oral ex parte communication.* (i) If a prohibited oral *ex parte* communication is made to a decision-maker, he/she shall advise the person making the communication that the communication is prohibited and shall terminate the discussion; and

(ii) In the event of a prohibited oral *ex parte* communication, the decision-maker shall forward to the Secretariat or the Presiding Officer, as appropriate, a signed and dated statement containing such of the following information as is known to him/her.

(A) The title and docket number of the proceedings;

(B) The name and address of the person making the communication and his/her relationship (if any) to the parties and/or participants to the proceedings;

(C) The date and time of the communication, its duration, and the circumstances (e.g., telephone call, personal interview, etc.) under which it was made;

(D) A brief statement of the substance of the matters discussed; and

(E) Whether the person making the communication persisted in doing so after being advised that the communication was prohibited.

(3) *Filing.* All communications and statements forwarded to the Secretariat under this section shall be placed in a public file which shall be associated with, but not made a part of, the record of the proceedings to which the communication or statement pertains.

(4) *Service on parties.* The Secretariat or the Presiding Officer, as appropriate, shall serve a copy of each communication and statement forwarded under this section on all parties to the proceedings. However, if the parties are numerous, or if the Secretary or Presiding Officer, as appropriate, determine that service of the communication or statement would be unduly burdensome, he/she, in lieu of service, may notify all parties in writing that the communication or statement has been made and filed and that it is available for inspection and copying.

(5) *Service on maker.* The Secretariat or the Presiding Officer, as appropriate, shall forward to the person who made the prohibited *ex parte* communication a copy of each communication or statement filed under this section.

(f) *Effect of ex parte communications.* No prohibited *ex parte* communication shall be considered as part of the record for decision unless introduced into evidence by a party to the proceedings.

(g) *Sanctions.* A person or party who makes a prohibited *ex parte* communication, or who encourages or solicits another to make any such communication, may be subject to sanctions including but not limited to exclusion from the proceedings and an adverse ruling on the issue which is the subject of the prohibited communication. A person, not a party to the proceeding, who makes or causes to be made an *ex parte* communication prohibited by paragraph (b) of this section shall be subject to all sanctions provided in this section if such person subsequently becomes a party to the proceeding.

49. The authority citation for part 1025, Subpart H is revised to read as follows:

Authority: 5 U.S.C. 504, 551 et seq.

50. Revise § 1025.70 to read as follows:

§ 1025.70 General provisions.

(a) *Purpose of this rule.* The Equal Access to Justice Act, 5 U.S.C. 504 (called “the EAJA” in this subpart), provides for the award of attorney fees and other expenses to eligible persons who are parties to certain adversary adjudicative proceedings before the Commission. Applications for such fees and expenses may be made according to the EAJA, as interpreted by the federal courts and guidance provided by the U.S. Department of Justice.

51. Remove § 1025.71.

52. Remove § 1025.72.

53. Remove APPENDIX I TO PART 1025-SUGGESTED FORM OF FINAL
PREHEARING ORDER.