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(g) *Decision*. The Administrative Law Judge shall issue an initial decision on the application within 30 days after closing proceedings on the application.

(1) *For a decision involving a prevailing party:* 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 agency's position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust.

(2) *For a decision involving an excessive agency demand:* The decision shall include written findings and conclusions on the applicant's eligibility and an explanation of the reasons why the agency's demand was or was not determined to be substantially in excess of the decision of the adjudicative officer and was or was not unreasonable when compared with that decision. That decision shall be based upon all the facts and circumstances of the case. The decision shall also include, if at issue, findings on whether the applicant has committed a willful violation of law or otherwise acted in bad faith, or whether special circumstances make an award unjust.

(h) *Agency review*. Either the applicant or complaint counsel may seek review of the initial decision on the fee application by filing a notice of appeal under §3.52(a), or the Commission may decide to review the decision on its own initiative, in accordance with §3.53. If neither the applicant nor 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. Whether to review a decision is a matter within the discretion of the Commission. If review is taken, the Commission will issue a final decision on the application or remand the application to the Administrative Law Judge for further proceedings.

(i) *Judicial review*. Judicial review of final Commission decisions on awards may be sought as provided in 5 U.S.C. 503(c)(2).

(j) *Payment of award*. An applicant seeking payment of an award shall submit to the Secretary of the Commission a copy of the Commission's final decision granting the award, accompanied by a statement that the applicant will not seek review of the decision in the United States courts. The agency will pay the amount awarded to the applicant within 60 days, unless judicial review of the award or of the underlying decision of the adjudicative proceeding has been sought by the applicant or any party to the proceeding.

PART 4—MISCELLANEOUS RULES

Sec.

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AUTHORITY: 15 U.S.C. 46, unless otherwise noted.

§4.1 Appearances.

(a) *Qualifications*—(1) *Attorneys*. (i) U.S.-admitted. Members of the bar of a Federal court or of the highest court of any State or Territory of the United States are eligible to practice before the Commission.

(ii) European Community (EC)-qualified. Persons who are qualified to practice law in a Member State of the European Community and authorized to practice before The Commission of the European Communities in accordance with Regulation No. 99/63/EEC are eligible to practice before the Commission.

(iii) Any attorney desiring to appear before the Commission or an Administrative Law Judge may be required to

show to the satisfaction of the Commission or the Administrative Law Judge his or her acceptability to act in that capacity.

(2) *Others.* (i) Any individual or member of a partnership involved in any proceeding or investigation may appear on behalf or himself or of such partnership upon adequate identification. A corporation or association may be represented by a bona fide officer thereof upon a showing of adequate authorization.

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

(b) *Restrictions as to former members and employees*—(1) *General Prohibition.* Except as provided in this section, or otherwise specifically authorized by the Commission, no former member or employee (''former employee'' or ''employee'') of the Commission may communicate to or appear before the Commission, as attorney or counsel, or otherwise assist or advise behind-the-scenes, regarding a formal or informal proceeding or investigation[1] (except that a former employee who is disqualified solely under paragraph (b)(1)(ii) or paragraph (b)(1)(iv) of this section, is not prohibited from assisting or advising behind-the-scenes) if:

(i) The former employee participated personally and substantially on behalf of the Commission in the same proceeding or investigation in which the employee now intends to participate;

(ii) The participation would begin within two years after the termination of the former employee's service and, within a period of one year prior to the employee's termination, the proceeding or investigation was pending under the employee's official responsibility;

(iii) Nonpublic documents or information pertaining to the proceeding or investigation in question, and of the kind delineated in § 4.10(a), came to, or would be likely to have come to, the former employee's attention in the course of the employee's duties, (unless Commission staff determines that the nature of the documents or information is such that no present advantage could thereby be derived); or

(iv) The former employee's participation would begin within one year after the employee's termination and, at the time of termination, the employee was a member of the Commission or a ''senior employee'' as defined in 18 U.S.C. 207(c).

NOTE: Former Commissioners and certain former ''senior'' employees who were appointed to those positions on or after January 20, 1993 may be subject to a five year ban on participation in Commission matters pursuant to Executive Order 12834 (58 FR 5911–5916, January 22, 1993), 3 CFR 1993 Comp., p. 580).

(2) *Clearance Request Required.* Any former employee, before participating in a Commission proceeding or investigation (see footnote 1), whether through an appearance before a Commission official or behind-the-scenes assistance, shall file with the Secretary a request for clearance to participate, containing the information listed in § 4.1(b)(4) if:

(i) The proceeding or investigation was pending in the Commission while the former employee served;

(ii) A proceeding or investigation from which such proceeding or investigation directly resulted was pending

[1] It is important to note that a new ''proceeding or investigation'' may be considered the same matter as a seemingly separate ''proceeding or investigation'' that was pending during the former employee's tenure. This is because a ''proceeding or investigation'' may continue in another form or in part. In determining whether two matters are actually the same, the Commission will consider: the extent to which the matters involve the same or related facts, issues, confidential information and parties; the time elapsed; and the continuing existence of an important Federal interest. See 5 CFR 2637.201(c)(4). For example, where a former employee intends to participate in an investigation of compliance with a Commission order, submission of a request to reopen an order, or a proceeding with respect to reopening an order, the matter will be considered the same as the adjudicative proceeding or investigation that resulted in the order. A former employee who is uncertain whether the matter in which he seeks clearance to participate is wholly separate from any matter that was pending during his tenure should seek advice from the General Counsel or the General Counsel's designee before participating.

during the former employee's service; or

(iii) Nonpublic documents or information pertaining to the proceeding or investigation in question, and of the kind delineated in §4.10(a), came to or would likely have come to the former employee's attention in the course of the employee's duties, and the employee left the Commission within the previous three years.

NOTE: This requirement applies even to a proceeding or investigation that had not yet been initiated formally when the former employee terminated employment, if the employee had learned nonpublic information relating to the subsequently initiated proceeding or investigation.

(3) *Exceptions.* (i) Paragraphs (b) (1) and (2) of this section do not apply to:

(A) Making a pro se filing of any kind;

(B) Submitting a request or appeal under the Freedom of Information Act, the Privacy Act, or the Government in the Sunshine Act;

(C) Testifying under oath (except that a former employee who is subject to the restrictions contained in paragraph (b)(1)(i) of this section with respect to a particular matter may not, except pursuant to court order, serve as an expert witness for any person other than the United States in that same matter);

(D) Submitting a statement required to be made under penalty of perjury; or

(E) Appearing on behalf of the United States.

(ii) With the exception of subparagraph (b)(1)(iv), paragraphs (b) (1) and (2) of this section do not apply to participating in a Commission rulemaking proceeding, including submitting comments on a matter on which the Commission has invited public comment.

(iii) Paragraph (b)(1)(iv) of this section does not apply to submitting a statement based on the former employee's own special knowledge in the particular area that is the subject of the statement, provided that no compensation is thereby received, other than that regularly provided by law or by §4.5 for witnesses.

(iv) Paragraph (b)(2) of this section does not apply to filing a premerger notification form or participating in subsequent events concerning compliance or noncompliance with Section 7A of the Clayton Act, 15 U.S.C. 18a, or any regulation issued under that section.

(4) *Request Contents.* Clearance requests filed pursuant to §4.1(b)(2) shall contain:

(i) The name and matter number (if known) of the proceeding or investigation in question;

(ii) A description of the contemplated participation;

(iii) The name of the Commission office(s) or division(s) in which the former employee was employed and the position(s) the employee occupied;

(iv) A statement whether, while employed by the Commission, the former employee participated in any proceeding or investigation concerning the same company, individual, or industry currently involved in the matter in question;

(v) A certification that while employed by the Commission, the employee never participated personally and substantially in the same matter or proceeding;

(vi) If the employee's Commission employment terminated within the past two years, a certification that the matter was not pending under the employee's official responsibility during any part of the one year before the employee's termination;

(vii) If the employee's Commission employment terminated within the past three years, either a declaration that nonpublic documents or information pertaining to the proceeding or investigation in question, and of the kind delineated in §4.10(a), never came to the employee's attention, or a description of why the employee believes that such nonpublic documents or information could not confer a present advantage to the employee or to the employee's client in the proceeding or investigation in question; and

(viii) A certification that the employee has read, and understands, both the criminal conflict of interest law on post-employment activities (18 U.S.C. 207) and this Rule in their entirety.

(5) *Definitions.* The following definitions apply for purposes of this section:

(i) *Behind-the-scenes* participation includes any form of professional consultation, assistance, or advice to anyone about the proceeding or investigation in question, whether formal or informal, oral or written, direct or indirect.

(ii) *Communicate to or appear before* means making any oral or written communication to, or any formal or informal appearance before, the Commission or any of its members or employees on behalf of any person (except the United States) with the intent to influence.

(iii) *Directly resulted from* means that the proceeding or investigation in question emanated from an earlier phase of the same proceeding or investigation or from a directly linked, antecedent investigation. The existence of some attenuated connection between a proceeding or investigation that was pending during the requester's tenure and the proceeding or investigation in question does not constitute a direct result.

(iv) *Pending under the employee's official responsibility* means that the former employee had the direct administrative or operating authority to approve, disapprove, or otherwise direct official actions in the proceeding or investigation, irrespective of whether the employee's authority was intermediate or final, and whether it was exercisable alone or only in conjunction with others.

(v) *Personal and substantial participation.* A former employee participated in the proceeding or investigation personally if the employee either participated directly or directed a subordinate in doing so. The employee participated substantially if the involvement was significant to the matter or reasonably appeared to be significant. A series of peripheral involvements may be considered insubstantial, while a single act of approving or participating in a critical step may be considered substantial.

(vi) *Present advantage.* Whether exposure to nonpublic information about the proceeding or investigation could confer a present advantage to a former employee will be analyzed and determined on a case-by-case basis. Relevant factors include, *inter alia,* the nature and age of the information, its relation and current importance to the proceeding or investigation in question, and the amount of time that has passed since the employee left the Commission.

(vii) *Proceeding or investigation* shall be interpreted broadly and includes an adjudicative or other proceeding; the consideration of an application; a request for a ruling or other determination; a contract; a claim; a controversy; an investigation; or an interpretive ruling.

(6) *Advice as to Whether Clearance Request is Required.* A former employee may ask the General Counsel, either orally or in writing, whether the employee is required to file a request for clearance to participate in a Commission matter pursuant to paragraph (b)(2) of this section. The General Counsel, or the General Counsel's designee, will make any such determination within three business days.

(7) *Deadline for Determining Clearance Requests.* By the close of the tenth business day after the date on which the clearance request is filed, the General Counsel, or the General Counsel's designee, will notify the requester either that:

(i) the request for clearance has been granted;

(ii) the General Counsel or the General Counsel's designee has decided to recommend that the Commission prohibit the requester's participation; or

(iii) the General Counsel or the General Counsel's designee is, for good cause, extending the period for reaching a determination on the request by up to an additional ten business days.

(8) *Participation of Partners or Associates of Former Employees.* (i) If a former employee is prohibited from participating in a proceeding or investigation by virtue of having worked on the matter personally and substantially while a Commission employee, no partner or legal or business associate of that individual may participate except after filing with the Secretary of the Commission an affidavit attesting that:

(A) The former employee will not participate in the proceeding or investigation in any way, directly or indirectly (and describing how the former

employee will be screened from participating);

(B) The former employee will not share in any fees resulting from the participation;

(C) Everyone who intends to participate is aware of the requirement that the former employee be screened;

(D) The client(s) have been informed; and

(E) The matter was not brought to the participant(s) through the active solicitation of the former employee.

(ii) If the Commission finds that the screening measures being taken are unsatisfactory or that the matter was brought to the participant(s) through the active solicitation of the former employee, the Commission will notify the participant(s) to cease the representation immediately.

(9) *Effect on Other Standards.* The restrictions and procedures in this section are intended to apply in lieu of restrictions and procedures that may be adopted by any state or jurisdiction, insofar as such restrictions and procedures apply to appearances or participation in Commission proceedings or investigations. Nothing in this section supersedes other standards of conduct applicable under paragraph (e) of this section. Requests for advice about this section, or about any matter related to other applicable rules and standards of ethical conduct, shall be directed to the Office of the General Counsel.

(c) *Public Disclosure.* Any request for clearance filed by a former member or employee pursuant to this section, as well as any written response, are part of the public records of the Commission, except for information exempt from disclosure under §4.10(a) of this chapter. Information identifying the subject of a nonpublic Commission investigation will be redacted from any request for clearance or other document before it is placed on the public record.

(d) *Notice of appearance.* Any attorney desiring to appear before the Commission or an Administrative Law Judge on behalf of a person or party shall file with the Secretary of the Commission a written notice of appearance, stating the basis for eligibility under this section and including the attorney's jurisdiction of admission/qualification, attorney identification number, if applicable, and a statement by the appearing attorney attesting to his/her good standing within the legal profession. No other application shall be required for admission to practice, and no register of attorneys will be maintained.

(e) *Standards of conduct; disbarment.* (1) All attorneys practicing before the Commission shall conform to the standards of ethical conduct required by the bars of which the attorneys are members.

(2) If for good cause shown, the Commission shall be of the opinion that any attorney is not conforming to such standards, or that he has been otherwise guilty of conduct warranting disciplinary action, the Commission may issue an order requiring such attorney to show cause why he should not be suspended or disbarred from practice before the Commission. The alleged offender shall be granted due opportunity to be heard in his own defense and may be represented by counsel. Thereafter, if warranted by the facts, the Commission may issue against the attorney an order of reprimand, suspension, or disbarment.

[32 FR 8456, June 13, 1967, as amended at 40 FR 15235, Apr. 4, 1975; 41 FR 16453, Apr. 19, 1976; 46 FR 26295, May 12, 1981; 48 FR 44767, Sept. 30, 1983; 50 FR 50781, Dec. 12, 1985; 50 FR 53306, Dec. 31, 1985; 56 FR 44139, Sept. 27, 1991; 58 FR 40737, July 30, 1993; 63 FR 15758, Apr. 1, 1998; 64 FR 14830, Mar. 29, 1999]

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

(a) *Filing.* (1) Except as otherwise provided, all documents submitted to the Commission, including those addressed to the Administrative Law Judge, shall be filed with the Secretary of the Commission; *Provided, however,* That in any instance informal applications or requests may be submitted directly to the official in charge of any office of the Commission or to the appropriate Director, Deputy Director, Associate Director in the Bureau of Consumer Protection, or Assistant Director in the Bureau of Competition or to the Administrative Law Judge. Copies of all documents filed with the Secretary of the Commission by parties in adjudicative proceedings shall, at or before the time of filing, be served by the

party filing the documents or person acting for that party on all other parties pursuant to § 4.4.

(2) Documents submitted to the Commission in response to a Civil Investigative Demand under section 20 of the FTC Act shall be filed with the custodian or deputy custodian named in the demand.

(b) *Title.* Documents shall clearly show the file or docket number and title of the action in connection with which they are filed.

(c) *Copies.* An original and twenty (20) copies of all documents before the Commission and motions for an Administrative Law Judge's certification of an interlocutory appeal pursuant to § 3.23(b) shall be filed; an original and ten (10) copies of all other documents before the Administrative Law Judge shall be filed; and an original and one (1) copy of compliance reports shall be filed. Only one (1) copy of admissions and answers thereto must be filed with the Secretary, the originals to be served on the opposing party as specified by § 3.32. With respect to motions under § 3.22, the moving party shall provide a copy of its motion to the Administrative Law Judge at the time the motion is filed with the Secretary.

(d) *Form.* (1) Documents filed with the Secretary of the Commission, other than briefs in support of appeals from initial decisions, shall be printed, typewritten, or otherwise processed in permanent form and on good unglazed paper. A motion or other paper filed in an adjudicative proceeding shall contain a caption setting forth the title of the case, the docket number, and a brief descriptive title indicating the purpose of the paper.

(2) Briefs filed on an appeal from an initial decision shall be in the form prescribed by § 3.52(e).

(3) If printed, documents shall be on good unglazed paper seven (7) inches by ten (10) inches. The type shall not be less than ten (10) point adequately leaded. Citations and quotations shall not be less than ten (10) point single leaded, and footnotes shall not be less than eight (8) point single leaded. The printed line shall not exceed four and three-quarter (4¾) inches in length.

(4) If typewritten, documents shall be on paper not less than eight (8) inches nor more than eight and one-half (8½) inches by not less than ten and one-half (10½) inches nor more than eleven (11) inches.

(5) All documents must be bound on the left side. Except for printed documents, the left margin of each page must be at least one and one-half (1½) inches and the right margin at least one (1) inch.

(e) *Signature.* (1) The original of each document filed shall have a hand signed signature by an attorney of record for the party, or in the case of parties not represented by counsel, by the party itself, or by a partner if a partnership, or by an officer of the party if it is a corporation or an unincorporated association. In addition, motions filed pursuant to § 3.22 shall include the name, address, and telephone number of counsel.

(2) Signing a document constitutes a representation by the signer that he has read it, that to the best of his knowledge, information, and belief, the statements made in it are true, and that it is not interposed for delay. If a document is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the proceeding may go forward as though the document had not been filed.

[32 FR 8456, June 13, 1967, as amended at 40 FR 59725, Dec. 30, 1975; 42 FR 30150, June 13, 1977; 45 FR 36344, May 29, 1980; 47 FR 7826, Feb. 23, 1982; 48 FR 41376, Sept. 15, 1983; 50 FR 28097, July 10, 1985; 61 FR 50650, Sept. 26, 1996]

§ 4.3 Time.

(a) *Computation.* Computation of any period of time prescribed or allowed by the rules in this chapter, by order of the Commission or an Administrative Law Judge, or by any applicable statute, shall begin with the first business day following that on which the act, event, or development initiating such period of time shall have occurred. When the last day of the period so computed is a Saturday, Sunday, or national holiday, or other day on which the office of the Commission is closed, the period shall run until the end of the next following business day. When such period of time, with the intervening Saturdays, Sundays, and national holidays counted, is seven (7)

days or less, each of the Saturdays, Sundays, and such holidays shall be excluded from the computation. When such period of time, with the intervening Saturdays, Sundays, and national holidays counted, exceeds seven (7) days, each of the Saturdays, Sundays, and such holidays shall be included in the computation.

(b) *Extensions.* For good cause shown, the Administrative Law Judge may, in any proceeding before him, extend any time limit prescribed or allowed by the rules in this chapter or by order of the Commission or the Administrative Law Judge, except those governing the filing of interlocutory appeals and initial decisions and those expressly requiring Commission action. Except as otherwise provided by law, the Commission, for good cause shown, may extend any time limit prescribed by the rules in this chapter or by order of the Commission or an Administrative Law Judge: *Provided, however,* That in a proceeding pending before an Administrative Law Judge, any motion on which he may properly rule shall be made to him. Notwithstanding the above, where a motion to extend is made after the expiration of the specified period, the Administrative Law Judge or the Commission may consider the motion where the untimely filing was the result of excusable neglect.

(c) *Additional time after service by mail.* Whenever a party in an adjudicative proceeding under part 3 of the rules is required or permitted to do an act within a prescribed period after service of a paper upon it and the paper is served by first-class mail pursuant to §4.4(a)(3) or §4.4(b), 3 days shall be added to the prescribed period.

[32 FR 8456, June 13, 1967, as amended at 42 FR 30150, June 13, 1977; 50 FR 28097, July 10, 1985; 50 FR 53306, Dec. 31, 1985]

§4.4 Service.

(a) *By the Commission.* (1) Service of complaints, initial decisions, final orders and other processes of the Commission under 15 U.S.C. 45 may be effected as follows:

(i) *By registered or certified mail.* A copy of the document shall be addressed to the person, partnership, corporation or unincorporated association to be served at his, her or its residence or principal office or place of business, registered or certified, and mailed; service under this provision is complete upon delivery of the document by the Post Office; or

(ii) *By delivery to an individual.* A copy thereof may be delivered to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation or unincorporated association to be served; service under this provision is complete upon delivery as specified herein; or

(iii) *By delivery to an address.* A copy thereof may be left at the principal office or place of business of the person, partnership, corporation, or unincorporated association, or it may be left at the residence of the person or of a member of the partnership or of an executive officer or director of the corporation, or unincorporated association to be served; service under this provision is complete upon delivery as specified herein.

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

(3) All documents served in adjudicative proceedings under part 3 of the Commission's Rules of Practice other than complaints and initial, interlocutory, and final decisions and orders may be served by personal delivery or by first-class mail and shall be deemed served on the day of personal delivery or the day of mailing.

(4) When a party has appeared in a proceeding by an attorney, service on that individual of any document pertaining to the proceeding other than a

complaint shall be deemed service upon the party. However, service of those documents specified in paragraph (a)(1) of this section shall first be attempted in accordance with the provision of paragraphs (a)(1) (i), (ii), and (iii) of this section.

(b) *By other parties.* Service of documents by parties other than the Commission shall be by delivering copies thereof as follows: Upon the Commission, by personal delivery or delivery by first-class mail to the Office of the Secretary of the Commission and, in adjudicative proceedings under part 3 of the Commission's Rules of Practice, to the Assistant Director in the Bureau of Competition, the Associate Director in the Bureau of Consumer Protection, or the Director of the Regional Office of complaint counsel. Upon a party other than the Commission or Commission counsel, service shall be by personal delivery or delivery by first-class mail. If the party is an individual or partnership, delivery shall be to such individual or a member of the partnership; if a corporation or unincorporated association, to an officer or agent authorized to accept service of process therefor. Personal service includes handling the document to be served to the individual, partner, officer, or agent; leaving it at his or her office with a person in charge thereof; or, if there is no one in charge or if the office is closed or if the party has no office, leaving it at his or her dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Documents served in adjudicative proceedings under part 3 of the Commission's Rules of Practice shall be deemed served on the day of personal service or the day of mailing. All other documents shall be deemed served on the day of personal service or on the day of delivery by the Post Office.

(c) *Proof of service.* In an adjudicative proceeding under part 3 of the Commission's Rules of Practice, papers presented for filing by a party respondent or intervenor shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the person served, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed.

[50 FR 28097, July 10, 1985]

§ 4.5 Fees.

(a) *Deponents and witnesses.* Any person compelled to appear in person in response to subpoena shall be paid the same fees and mileage as are paid witnesses in the courts of the United States.

(b) *Presiding officers.* Officers before whom depositions are taken shall be entitled to the same fees as are paid for like services in the courts of the United States.

(c) *Responsibility.* The fees and mileage referred to in this section shall be paid by the party at whose instance deponents or witnesses appear.

[32 FR 8456, June 13, 1967]

§ 4.6 Cooperation with other agencies.

It is the policy of the Commission to cooperate with other governmental agencies to avoid unnecessary overlapping or duplication of regulatory functions.

[32 FR 8456, June 13, 1967]

§ 4.7 Ex parte communications.

(a) *Definitions.* For purposes of this section, *ex parte communication* means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding.

(b) *Prohibited ex parte communications.* While a proceeding is in adjudicative status within the Commission, except to the extent required for the disposition of *ex parte* matters as authorized by law:

(1) No person not employed by the Commission, and no employee or agent of the Commission who performs investigative or prosecuting functions in adjudicative proceedings, shall make or knowingly cause to be made to any member of the Commission, or to the Administrative Law Judge, or to any other employee who is or who reasonably may be expected to be involved in the decisional process in the proceeding, an *ex parte* communciation

relevant to the merits of that or a factually related proceeding; and

(2) No member of the Commission, the Administrative Law Judge, or any other employee who is or who reasonably may be expected to be involved in the decisional process in the proceeding, shall make or knowingly cause to be made to any person not employed by the Commission, or to any employee or agent of the Commission who performs investigative or prosecuting functions in adjudicative proceedings, an *ex parte* communication relevant to the merits of that or a factually related proceeding.

(c) *Procedures.* A Commissioner, the Administrative Law Judge or any other employee who is or who may reasonably be expected to be involved in the decisional process who receives or who make or knowingly causes to be made, a communication prohibited by paragraph (b) of this section shall promptly provide to the Secretary of the Commission:

(1) All such written communications;

(2) Memoranda stating the substance of and circumstances of all such oral communications; and

(3) All written responses, and memoranda stating the substance of all oral responses, to the materials described in paragraphs (c) (1) and (2) of this section. The Secretary shall make relevant portions of any such materials part of the public record of the Commission, pursuant to §4.9, and place them in the docket binder of the proceeding to which it pertains, but they will not be considered by the Commission as part of the record for purposes of decision unless introduced into evidence in the proceeding. The Secretary shall also send copies of the materials to or otherwise notify all parties to the proceeding.

(d) *Sanctions.* (1) Upon receipt of an *ex parte* communication knowingly made or knowingly caused to be made by a party and prohibited by paragraph (b) of this section, the Commission, Administrative Law Judge, or other employee presiding over the proceeding may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the Commission, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation. The Commission may take such action as it considers appropriate, including but not limited to, action under §4.1(e)(2) and 5 U.S.C. 556(d).

(2) A person, not a party to the proceeding who knowingly makes or causes to be made an *ex parte* communication prohibited by paragraph (b) of this section shall be subject to all sanctions provided herein if he subsequently becomes a party to the proceeding.

(e) The prohibitions of this section shall apply in an adjudicative proceeding from the time the Commission votes to issue a complaint pursuant to §3.11, to conduct adjudicative hearings pursuant to §3.13, or to issue an order to show cause pursuant to §3.72(b), or from the time an order by a U.S. court of appeals remanding a Commission decision and order for further proceedings becomes effective, until the time the Commission votes to enter its decision in the proceeding and the time permitted by §3.55 to seek reconsideration of that decision has elapsed. For purposes of this section, an order of remand by a U.S. court of appeals shall be deemed to become effective when the Commission determines not to file a petition for a writ of *certiorari,* or when the time for filing such a petition has expired without a petition having been filed, or when such a petition has been denied. If a petition for reconsideration of a Commission decision is filed pursuant to §3.55, the provisions of this section shall apply until the time the Commission votes to enter an order disposing of the petition. In addition, the prohibitions of this section shall apply with respect to communications concerning an application for stay filed with the Commission pursuant to §3.56 from the time that the application is filed until its disposition.

(f) The prohibitions of paragraph (b) of this section do not apply to a communication occasioned by and concerning a nonadjudicative function of the Commission, including such functions as the initiation, conduct, or disposition of a separate investigation,

the issuance of a complaint, or the initiation of a rulemaking or other proceeding, whether or not it involves a party already in an adjudicative proceeding; preparations for judicial review of a Commission order; a proceeding outside the scope of § 3.2, including a matter in state or federal court or before another governmental agency; a nonadjudicative function of the Commission, including but not limited to an obligation under § 4.11 or a communication with Congress; or the disposition of a consent settlement under § 3.25 concerning some or all of the charges involved in a complaint and executed by some or all respondents. The Commission, at its discretion and under such restrictions as it may deem appropriate, may disclose to the public or to respondent(s) in a pending adjudicative proceeding a communication made exempt by this paragraph from the prohibitions of paragraph (b) of this section, however, when the Commission determines that the interests of justice would be served by the disclosure. The prohibitions of paragraph (b) of this section also do not apply to a communication between any member of the Commission, the Administrative Law Judge, or any other employee who is or who reasonably may be expected to be involved in the decisional process, and any employee who has been directed by the Commission or requested by an individual Commissioner or Administrative Law Judge to assist in the decision of the adjudicative proceeding. Such employee shall not, however, have performed an investigative or prosecuting function in that or a factually related proceeding.

[42 FR 43974, Sept. 1, 1977, as amended at 44 FR 40637, July 12, 1979; 46 FR 32435, June 23, 1981; 50 FR 53306, Dec. 31, 1985; 51 FR 36802, Oct. 16, 1986; 57 FR 10805, Mar. 31, 1992; 60 FR 37748, July 21, 1995; 60 FR 67325, Dec. 29, 1995]

§ 4.8 Costs for obtaining Commission records.

(a) *Definitions.* For the purpose of this section:

(1) The term *search* includes all time spent looking, manually or by automated means, for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents.

(2) The term *duplication* refers to the process of making a copy of a document in order to respond to a request for Commission records.

(3) The term *review* refers to the examination of documents located in response to a request to determine whether any portion of such documents may be withheld, and the reduction or other processing of documents for disclosure. Review does not include time spent resolving general legal or policy issues regarding the release of the document.

(4) The term *direct costs* means expenditures that the Commission actually incurs in processing requests. Not included in direct costs are overhead expenses such as costs of document review facilities or the costs of heating or lighting such a facility or other facilities in which records are stored. The direct costs of specific services are set forth in § 4.8(b)(6).

(b) *Fees.* User fees pursuant to 31 U.S.C. 483(a) and 5 U.S.C. 552(a) shall be charged according to this paragraph.

(1) *Commercial use requesters.* Commercial use requesters will be charged for the direct costs to search for, review, and duplicate documents. A commercial use requester is a requester who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made.

(2) *Educational requesters, non-commercial scientific institution requesters, and representative of the news media.* Requesters in these categories will be charged for the direct costs to duplicate documents, excluding charges for the first 100 pages. An *educational institution* is a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research. A *non-commercial scientific institution* is an institution that is not operated on a *commercial* basis as that term is referenced in paragraph (b)(1) of this section, and that is operated solely to

conduct scientific research the results of which are not intended to promote any particular product or industry. A *representative of the news media* is any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. *News* means information that is about current events or that would be of current interest to the public.

(3) *Other requesters.* Other requesters will be charged for the direct costs to search for and duplicate documents, except that the first 100 pages of duplication and the first two hours of search time shall be furnished without charge.

(4) *Waiver of small charges.* Notwithstanding the provisions of paragraphs (b)(1), (2), and (3) of this section, charges will be waived if the total chargeable fees for a request do not exceed $14.00.

(5) *Materials available without charge.* These provisions do not apply to recent Commission decisions and other materials that may be made available to all requesters without charge while supplies last.

(6) *Schedule of direct costs.* The following uniform schedule of fees applies to records held by all constituent units of the Commission:

Paper Fees:	
Paper copy (up to 8.5″ x 14″).	
Reproduced by Commission	$0.14 per page.
Reproduced by Requester	0.05 per page.
Microfiche Fees:	
Film Copy—Paper to 16mm film	0.04 per frame.
Fiche Copy—Paper to 105mm fiche	0.08 per frame.
Film Copy—Duplication of existing 100 ft. roll of 16mm film	9.50 per roll.
Fiche Copy—Duplication of existing 105mm fiche	0.26 per fiche.
Paper Copy—Converting existing 16mm film to paper (Conversion by Commission Staff).	0.26 per page.
Paper Copy—Converting existing 105mm fiche to paper (Conversion by Commission Staff).	0.23 per page.
Film Cassettes	2.00 per cassette.
Electronic Services:	
Converting paper into electronic format (scanning)	2.50 per page.
Computer programming	8.00 per qtr. hour.
Other Fees:	
Computer Tape	18.50 each.
Certification	10.35 each.
Express Mail	3.50 for first pound and 3.67 for each additional pound (up to $15.00).

Search and Review Fees

Agency staff is divided into three categories: clerical, attorney/economist, and other professional. Fees for search and review are assessed on a quarter-hourly basis, and are determined by identifying the category into which the staff member(s) conducting the search or review belong(s), determining the average quarter-hourly wages of all staff members within that category, and adding 16 percent to reflect the cost of additional benefits accorded to government employees. The exact fees are calculated and announced periodically and are available from the Consumer Response Center, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580; (202) 326–2222.

(c) *Information to determine fees.* Each request for records shall set forth whether the request is made for other than commercial purposes and whether the requester is an educational institution, a noncommercial scientific institution, or a representative of the news media. The Assistant General Counsel for Legal Counsel (Management & Access) or his or her designee initially, or the General Counsel on appeal, will use this information, any additional information provided by the requester, and

any other relevant information to determine the appropriate fee category in which to place the requester.

(d) *Agreement to pay fees.* (1) Each request that does not contain an application for a fee waiver shall specifically indicate the requester's willingness either:

(i) To pay, in accordance with § 4.8(b) of these rules, whatever fees may be charged for processing the request; or

(ii) A willingness to pay such fees up to a specified amount.

(2) Each request that contains an application for a fee waiver must specifically indicate:

(i) The requester's willingness to pay, in accordance with § 4.8(b) of the rules, whatever fees may be charged for processing the request;

(ii) The requester's willingness to pay fees up to a specified amount; or

(iii) That the requester is not willing to pay fees if the waiver is not granted.

(3) If the agreement required by this section is absent, and if the estimated fees exceed $25.00, the requester will be advised of the estimated fees and the request will not be processed until the requester agrees to pay such fees.

(e) *Public interest fee waivers*—(1) *Procedures.* A requester may apply for a waiver of fees. The requester shall explain why a waiver is appropriate under the standards set forth in this paragraph. The application shall also include a statement, as provided by paragraph (d) of this section, of whether the requester agrees to pay costs if the waiver is denied. The Assistant General Counsel for Legal Counsel (Management & Access) or his or her designee initially, or the General Counsel on appeal, will rule on applications for fee waivers.

(2) *Standards.* (i) The first requirement for a fee waiver is that disclosure will likely contribute significantly to public understanding of the operations or activities of the government. This requirement shall be met if:

(A) The subject matter of the requested information concerns the operations or activities of the Federal government;

(B) The disclosure is likely to contribute to an understanding of these operations or activities;

(C) The understanding to which disclosure is likely to contribute is the understanding of the public at large, as opposed to the understanding of the individual requester or a narrow segment of interested persons; and

(D) The likely contribution to public understanding will be significant.

(ii) The second requirement for a fee waiver is that the request not be primarily in the commercial interest of the requester. Satisfaction of this requirement shall be determined by considering:

(A) Whether the requester has a commercial interest that would be furthered by the requested disclosure; and

(B) If so, whether the public interest in disclosure is outweighed by the identified commercial interest of the requester so as to render the disclosure primarily in the requester's commercial interest.

(f) *Unsuccessful searches.* Charges may be assessed for search time even if the agency fails to locate any responsive records or if it locates only records that are determined to be exempt from disclosure.

(g) *Aggregating requests.* If the Assistant General Counsel for Legal Counsel (Management & Access) or his or her designee initially, or the General Counsel on appeal, reasonably believes that a requester, or a group of requesters acting in concert, is attempting to evade an assessment of fees by dividing a single request into a series of smaller requests, the requests may be aggregated and fees charged accordingly.

(h) *Advance payment.* If the Assistant General Counsel for Legal Counsel (Management & Access) or his or her designee initially, or the General Counsel on appeal, estimates or determines that allowable charges that a requester may be required to pay are likely to exceed $250.00, or if the requester has previously failed to pay a fee within 30 days of the date of billing, the requester may be required to pay some or all of the total estimated charge in advance. Further, the requester may be required to pay all unpaid bills, including accrued interest, prior to processing the request.

(i) *Means of payment.* Payment shall be made by check or money order payable to the Treasury of the United States.

(j) *Interest charges.* The Commission will begin assessing interest charges on an unpaid bill starting on the 31st day following the day on which the bill was sent. Interest will accrue from the date of the billing, and will be calculated at the rate prescribed in 31 U.S.C. 3717.

(k) *Effect of the Debt Collection Act of 1982 (Pub. L. 97–365)* The Commission may pursue repayment, where appropriate, by employing the provisions of the Debt Collection Act, Public Law 97–365), including disclosure to consumer reporting agencies and use of collection agencies.

[57 FR 10806, Mar. 31, 1992, as amended at 63 FR 45646, Aug. 26, 1998; 64 FR 3012, Jan. 20, 1999]

§4.9 The public record.

(a) *General.* (1) Materials on the public record of the Commission are available for public inspection and copying either routinely or upon request.

(2) Materials that are exempt from mandatory public disclosure, or are otherwise not available from the Commission's public record, may be made available for inspection and copying only upon request under the procedures set forth in §4.11 of this part, or as provided in §§4.10 (d) through (g), 4.13, and 4.15(b)(3) of this part, or by the Commission.

(3) *Location.* All of the public records of the Commission are available for inspection at the principal office of the Commission on each business day from 9 a.m. to 5 p.m., and copies of some of those records are available at the regional offices on each business day from 8:30 a.m. to 5 p.m. Copies of records that the Commission is required to make available to the public electronically, pursuant to 5 U.S.C. 552(a)(2), may be obtained in that format from the Commission's Web site on the Internet, WWW.FTC.GOV.

(4) *Copying of public records*—(i) *Procedures.* Reasonable facilities for copying public records are provided at each office of the Commission. Subject to appropriate limitations and the availability of facilities, any person may copy public records available for inspection at each of those offices. Further, the agency will provide copies to any person upon request. Written requests for copies of public records shall be addressed to the Supervisor, Consumer Response Center, and shall specify as clearly and accurately as reasonably possible the records desired. For records that cannot be specified with complete clarity and particularity, requesters shall provide descriptions sufficient to enable qualified Commission personnel to locate the records sought. In any instance, the Commission, the Supervisor of the Consumer Response Center, the General Counsel, the Assistant General Counsel for Legal Counsel (Management & Access), or the official in charge of each office may prohibit the use of Commission facilities to produce more than one copy of any public record, and may refuse to permit the use of such facilities for copying records that have been published or are publicly available at places other than the offices of the Commission.

(ii) *Costs; agreement to pay costs.* Requesters will be charged search and duplication costs prescribed by Rule 4.8 for requests under this section. All requests shall include a statement of the information needed to determine fees, as provided by §4.8(c), and an agreement to pay fees (or a statement that the requester will not pay fees if a fee waiver is denied), as provided by §4.8(d). Requests may also include an application for a fee waiver, as provided by §4.8(e). Advance payment may be required, as provided by §4.8(h).

(iii) *Records for sale at another government agency.* If requested materials are available for sale at a another government agency, the requester will not be provided with copies of the materials but will be advised to obtain them from the selling agency.

(b) *Categories.* Except to the extent material is confidential, as provided in paragraph (c) of this section, the public record of the Commission includes, but is not necessarily limited to:

(1) *Commission Organization and Procedures (16 CFR part 0 and §§4.14 through 4.15, 4.17).* (i) A current index of opinions, orders, statements of policy and interpretations, administrative staff manuals, general instructions and

other public records of the Commission;

(ii) A current record of the final votes of each member of the Commission in all matters of public record, including matters of public record decided by notational voting;

(iii) Descriptions of the Commission's organization, including descriptions of where, from whom, and how the public may secure information, submit documents or requests, and obtain copies of orders, decisions and other materials;

(iv) Statements of the Commission's general procedures and policies and interpretations, its nonadjudicative procedures, its rules of practice for adjudicative proceedings, and its miscellaneous rules, including descriptions of the nature and requirements of all formal and informal procedures available, and

(v) Reprints of the principal laws under which the Commission exercises enforcement or administrative responsibilities.

(2) *Industry Guidance (16 CFR 1.1–1.6).* (i) Any advice, advisory opinion or response given and required to be made public under §§1.4 and 2.41 (d) or (f) of this chapter (whether by the Commission or the staff), together with a statement of supporting reasons;

(ii) Industry guides, digests of advisory opinions and compliance advice believed to be of interest to the public generally and other administrative interpretations;

(iii) Transcripts of hearings in all industry guide proceedings, as well as written statements filed with or forwarded to the Commission in connection with these proceedings; and

(iv) Petitions filed with the Secretary of the Commission for the promulgation or issuance, amendment, or repeal of industry guides.

(3) *Rulemaking (16 CFR 1.7 through 1.26).* (i) Petitions filed with the Secretary of the Commission for the promulgation or issuance, amendment, or repeal of rules or regulations within the scope of §§1.7 and 1.21 of this chapter, and petitions for exemptions;

(ii) Notices and advance notices of proposed rulemaking and rules and orders issued in rulemaking proceedings; and

(iii) Transcripts of hearings of all rulemaking proceedings, as well as written statements filed with or forwarded to the Commission in connection with these proceedings.

(4) *Investigations (16 CFR 2.7).* (i) Petitions to limit or quash compulsory process and the rulings thereon, requests for review by the full Commission of those rulings, and Commission rulings on such requests; and

(ii) Closing letters in initial phase and full phase investigations.

(5) *Adjudicative proceedings, stay applications, requests to reopen, and litigated orders. (16 CFR 2.51, 3.1 through 3.24, 3.31 through 3.56, 3.71 through 3.72, 4.7)*—Except for transcripts of matters heard *in camera* pursuant to §3.45 and material filed *in camera* pursuant to §§3.22, 3.24, 3.45, 3.46, 3.51 and 3.52,

(i) The versions of pleadings and transcripts of prehearing conferences to the extent made available under §3.21(e), motions, certifications, orders, and the transcripts of hearings (including public conferences), testimony, oral arguments, and other material made a part thereof, and exhibits and material received in evidence or made a part of the public record in adjudicative proceedings;

(ii) Initial decisions of administrative law judges;

(iii) Orders and opinions in interlocutory matters;

(iv) Final orders and opinions in adjudications, and rulings on stay applications, including separate statements of Commissioners;

(v) Petitions for reconsideration, and answers thereto, filed pursuant to §3.55;

(vi) Applications for stay, answers thereto, and replies, filed pursuant to §3.56;

(vii) Petitions, applications, pleadings, briefs, and other records filed by the Commission with the courts in connection with adjudicative, injunctive, enforcement, compliance, and condemnation proceedings, and in connection with judicial review of Commission actions, and opinions and orders of the courts in disposition thereof;

(viii) Records of *ex parte* communications in adjudicative proceedings and stay applications;

(ix) Petitions to reopen proceedings and orders to determine whether orders should be altered, modified, or set aside in accordance with §2.51; and

(x) Decisions reopening proceedings, and orders to show cause under §3.72.

(6) *Consent Agreements (16 CFR 2.31 through 2.34, 3.25).* (i) Agreements containing orders, after acceptance by the Commission pursuant to §§2.34 and 3.25(f) of this chapter;

(ii) Comments and other materials filed or placed on the public record under §§2.34 and 3.25(f) concerning proposed consent agreements and related orders; and

(iii) Decisions and orders issued and served under §§2.34 and 3.25(f), including separate statements of Commissioners.

(7) *Compliance/Enforcement (16 CFR 2.33, 2.41).* (i) Reports of compliance filed pursuant to the rules in this chapter or pursuant to a provision in a Commission order and supplemental materials filed in connection with these reports, except for reports of compliance, and supplemental materials filed in connection with Commission orders requiring divestitures or establishment of business enterprises of facilities, which are confidential until the last divestiture or establishment of a business enterprise or facility, as required by a particular order, has been finally approved by the Commission, and staff letters to respondents advising them that their compliance reports do not warrant any further action. At the time each such report is submitted the filing party may request confidential treatment in accordance with paragraph (c) of this section and the General Counsel or the General Counsel's designee will pass upon such request in accordance with that paragraph;

(ii) Materials required to be made public under 16 CFR 2.41(f) in connection with applications for approval of proposed divestitures, acquisitions or similar transactions subject to Commission review under outstanding orders.

(8) *Access to Documents and Meetings (16 CFR 4.8, 4.11, 4.13, 4.15).* (i) Letters requesting access to Commission records pursuant to §4.11(a) of this chapter and the Freedom of Information Act, 5 U.S.C. 552, and letters granting or denying such requests (not including access requests and answers thereto from the Congress or other government agencies);

(ii) Announcements of Commission meetings as required under the Sunshine Act, 5 U.S.C. 552b, including records of the votes to close such meetings;

(iii) Summaries or other explanatory materials relating to matters to be considered at open meetings made available pursuant to §4.15(b)(3)

(iv) Commission minutes of open meetings, and, to the extent they are not exempt from mandatory public disclosure under the Sunshine Act or the Freedom of Information Act, portions of minutes or transcripts of closed meetings; and

(v) A guide for requesting records or information from the Commission, including an index of all major information systems, a description of major information and record locator systems maintained by the Commission, and a handbook for obtaining various types and categories of public information.

(9) *Standards of Conduct (16 CFR 5.5 through 5.6, 5.10 through 5.26, 5.31, 5.57 through 5.68).* (i) Memoranda to staff elaborating or clarifying standards described in administative staff manuals and part 5 of this subchapter.

(10) *Miscellaneous (Press Releases, Clearance Requests, Reports Filed by or with the Commission, Continuing Guaranties, Registered Identification Numbers).* (i) Releases by the Commission's Office of Public Affairs supplying information concerning the activities of the Commission;

(ii) Applications under §4.1(b)(2) of this chapter for clearance or authorization to appear or participate in a proceeding or investigation and of the Commission's responses thereto;

(iii) Continuing guaranties filed under the Wool, Fur, and Textile Acts;

(iv) Published reports by the staff or by the Commission on economic surveys and investigations of general interest;

(v) Filings by the Commission or by the staff in connection with proceedings before other federal agencies or state or local government bodies;

(vi) Registration statements and annual reports filed with the Commission by export trade associations, and bulletins, pamphlets, and reports with respect to such associations released by the Commission;

(vii) The identities of holders of registered identification numbers issued by the Commission pursuant to § 1.32 of this chapter;

(viii) The Commission's annual report submitted after the end of each fiscal year, summarizing its work during the year (available for inspection at each of the offices of the Commission with copies obtainable from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402) and any other annual reports made to Congress on activities of the Commission as required by law;

(ix) Records, as determined by the General Counsel or his or her designee, that have been released in response to a request made under the Freedom of Information Act, 5 U.S.C. 552, and which, because of the nature of the subject matter, have become or are likely to become the subject of subsequent requests for substantially the same records, except where some or all of those records would be exempt from disclosure under 5 U.S.C. 552 if requested by another party;

(x) A general index of the records referred to under paragraph (b)(10)(ix) of this section;

(xi) Grants of early termination of waiting periods published in accordance with the Hart-Scott-Rodino premerger notification provisions of the Clayton Act, 15 U.S.C. 18a(b)(2);

(xii) Reports on appliance energy consumption or efficiency filed with the Commission pursuant to § 305.8 of this chapter;

(xiii) Other documents that the Commission has determined to place on the public record; and

(xiv) Every amendment, revision, substitute, or repeal of any of the foregoing items listed in § 4.9(b)(1) through (10) of this section.

(c) *Confidentiality and in camera material.* (1) Persons submitting material to the Commission described in this section may designate that material or portions of it confidential and request that it be withheld from the public record. All requests for confidential treatment shall be supported by a showing of justification in light of applicable statutes, rules, orders of the Commission or its administrative law judges, orders of the courts, or other relevant authority. The General Counsel or the General Counsel's designee will act upon such request with due regard for legal constraints and the public interest. No such material or portions of material (including documents generated by the Commission or its staff containing or reflecting such material or portions of material) will be placed on the public record until the General Counsel or the General Counsel's designee has ruled on the request for confidential treatment and provided any prior notice to the submitter required by law.

(2) Motions seeking *in camera* treatment of material submitted in connection with a proceeding under part 3 of these rules, except stay applications under § 3.56, shall be filed with the Administrative Law Judge who is presiding over the proceeding. Requests for confidential treatment of material submitted in connection with a stay application shall be made in accordance with § 4.9(c)(1).

(3) To the extent that any material or portions of material otherwise falling within paragraph (b) of this section contain information that is not required to be made public under § 4.10 of this part, the General Counsel or the General Counsel's designee may determine, with due regard for legal constraints and the public interest, to withhold such materials from the public record.

[50 FR 50779, Dec. 12, 1985, as amended at 57 FR 10805, Mar. 31, 1992; 59 FR 34970, July 8, 1994; 60 FR 37749, July 21, 1995; 63 FR 18820, Apr. 16, 1998; 63 FR 32977, June 17, 1998; 63 FR 45647, Aug. 26, 1998; 64 FR 46269, Aug. 25, 1999]

§ 4.10 Nonpublic material.

(a) The following records and other material of the Commission are not required to be made public pursuant to 5 U.S.C. 552.

(1) Records, except to the extent required to be disclosed under other laws or regulations, related solely to the internal personnel rules and practices of

the Commission. This exemption applies to internal rules or instructions to Commission personnel which must be kept confidential in order to assure effective performance of the functions and activities for which the Commission is responsible and which do not affect members of the public.

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

(3) Interagency or intra-agency memoranda or letters which would not routinely be available by law to a private party in litigation with the Commission. This exemption preserves the existing freedom of Commission officials and employees to engage in full and frank communication with each other and with officials and employees of other governmental agencies. This exemption includes records of the deliberations of the Commission except for the record of the final votes of each member of the Commission in every agency proceeding. It includes intra-agency and interagency reports, memorandums, letters, correspondence, work papers, and minutes of meetings, as well as staff papers prepared for use within the Commission or between the Commission and other governmental agencies. It also includes information scheduled for public release, but as to which premature release would be contrary to the public interest;

(4) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy except to the extent such files or materials must be disclosed under other laws or regulations. This exemption applies to personnel and medical records and similar records containing private or personal information concerning any individual which, if disclosed to any person other than the individual concerned or his designated legal representative without his permission in writing, would constitute a clearly unwarranted invasion of personal privacy. Examples of files exempt from disclosure include, but are not limited to:

(i) The personnel records of the Commission;

(ii) Files containing reports, records or other material pertaining to individual cases in which disciplinary or other administrative action has been or may be taken, including records of proceedings pertaining to the conduct or performance of duties by Commission personnel;

(5) Records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information:

(i) Could reasonably be expected to interfere with enforcement proceedings;

(ii) Would deprive a person of a right to a fair trial or an impartial adjudication;

(iii) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(iv) Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution that furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;

(v) Would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(vi) Could reasonably be expected to endanger the life or physical safety of any individual.

(6) Information contained in or related to examination, operating, or

condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(7) Geological and geophysical information and data, including maps, concerning wells; and

(8) Material, as that term is defined in section 21(a) of the Federal Trade Commission Act, which is received by the Commission:

(i) In an investigation, a purpose of which is to determine whether any person may have violated any provision of the laws administered by the Commission; and

(ii) Which is provided pursuant to any compulsory process under the Federal Trade Commission Act, 15 U.S.C. 41, *et seq.*, or which is provided voluntarily in place of compulsory process in such an investigation. See section 21(f) of the Federal Trade Commission Act.

(9) Material, as that term is defined in section 21(a) of the Federal Trade Commission Act, which is received by the Commission pursuant to compulsory process in an investigation, a purpose of which is to determine whether any person may have violated any provision of the laws administered by the Commission. See section 21(b)(3)(C) of the Federal Trade Commission Act.

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

(11) Material in an investigation or proceeding that involves a possible violation of criminal law, when there is reason to believe that the subject of the investigation or proceeding is not aware of its pendency, and disclosure of the existence of the investigation could reasonably be expected to interfere with enforcement proceedings. When a request is made for records under § 4.11(a), the Commission may treat the records as not subject to the requirements of the Freedom of Information Act.

(b) With respect to information contained in transcripts of Commission meetings, the exemptions contained in paragraph (a) of this section, except for paragraphs (a)(3) and (a)(7) of this section, shall apply; in addition, such information will not be made available if it is likely to have any of the effects described in 5 U.S.C. 552b (c)(5), (c)(9), or (c)(10).

(c) Under section 10 of the Federal Trade Commission Act, any officer or employee of the Commission who shall make public any information obtained by the Commission, without its authority, unless directed by a court, shall be deemed guilty of a misdemeanor, and upon conviction thereof, may be punished by a fine not exceeding five thousand dollars ($5,000), or by imprisonment not exceeding 1 year, or by fine and imprisonment, in the discretion of the court.

(d) Except as provided in paragraphs (f) or (g) of this section, in § 4.11 (b), (c), or (d), or as contemplated by agreements under the International Antitrust Enforcement Assistance Act (15 U.S.C. 6201 *et seq.*), no material that is marked or otherwise identified as confidential and that is within the scope of § 4.10(a)(8), and no material within the scope of § 4.10(a)(9) that is not otherwise public, will be made available, without the consent of the person who produced the material, to any individual other than a duly authorized officer or employee of the Commission or a consultant or contractor retained by the Commission who has agreed in writing not to disclose the information. All other Commission records may be made available to a requester under the procedures set forth in § 4.11 or may be disclosed by the Commission except where prohibited by law.

(e) Except as provided in paragraphs (f) or (g) of this section, in § 4.11 (b), (c), or (d), or as contemplated by agreements under the International Antitrust Enforcement Assistance Act (15 U.S.C. 6201 *et seq.*), material not within the scope of § 4.10(a)(8) or § 4.10(a)(9) that is received by the Commission and is marked or otherwise identified as confidential may be disclosed only if it

is determined that the material is not within the scope of §4.10(a)(2), and the submitter is provided at least ten days' notice of the intent to disclose the material.

(f) Nonpublic material obtained by the Commission may be disclosed to persons other than the submitter in connection with the taking of oral testimony without the consent of the submitter only if the material or transcript is not within the scope of §4.10(a)(2). If the material is marked confidential, the submitter will be provided 10 days' notice of the intended disclosure or will be afforded an opportunity to seek an appropriate protective order.

(g) Material obtained by the Commission:

(1) Through compulsory process or voluntarily in lieu thereof, and protected by sections 21 (b) and (f) of the Federal Trade Commission Act, 15 U.S.C. 57b–2 (b), (f), and 4.10(d) of this part; or

(2) That is designated by the submitter as confidential, and protected by section 21(c) of the Federal Trade Commission Act, 15 U.S.C. 57b–2(c), and §4.10(e) of this part; or

(3) That is confidential commercial or financial information protected by section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(f), and §4.10(a)(2) of this part, may be disclosed in Commission administrative or court proceedings subject to Commission or court protective or *in camera* orders as appropriate. See §§1.18(b) and 3.45.

Prior to disclosure of such material in a proceeding, the submitter will be afforded an opportunity to seek an appropriate protective or *in camera* order. All other material obtained by the Commission may be disclosed in Commission administrative or court proceedings at the discretion of the Commission except where prohibited by law.

(15 U.S.C. 41 *et seq.*)

[38 FR 1731, Jan. 18, 1973, as amended at 40 FR 7629, Feb. 21, 1975; 40 FR 23278, May 29, 1975; 42 FR 13540, Mar. 11, 1977; 46 FR 26291, May 12, 1981; 49 FR 30166, July 27, 1984; 54 FR 7399, Feb. 21, 1989; 57 FR 10807, Mar. 31, 1992; 60 FR 37749, July 21, 1995; 63 FR 38473, July 17, 1998]

§4.11 Disclosure requests.

(a) *Freedom of Information Act requests*—(1) *Initial requests*—(i) *Form and contents; time of receipt.* (A) A request under the provisions of the Freedom of Information Act, 5 U.S.C. 552, as amended, for access to Commission records shall be in writing and addressed as follows: Freedom of Information Act Request, Assistant General Counsel for Legal Counsel, (Management & Access), Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

(B) Failure to mark the envelope and the request in accordance with paragraph (a)(1)(i)(A) of this section, or the filing of a request for expedited treatment under paragraph (a)(1)(i)(E) of this section, will result in the request (or requests, if expedited treatment has been requested) being treated as received on the date that the processing unit in the Office of General Counsel actually receives the request(s).

(C) *Costs; agreement to pay costs.* Requesters will be charged search and duplication costs prescribed by Rule 4.8 for requests under this section. All requests shall include a statement of the information needed to determine fees, as provided by §4.8(c), and an agreement to pay fees (or a statement that the requester will not pay fees if a fee waiver is denied), as provided by §4.8(d). Requests may also include an application for a fee waiver, as provided by §4.8(e). An advance payment may be required in appropriate cases as provided by §4.8(h).

(D) *Failure to agree to pay fees.* If a request does not include an agreement to pay fees, and if the requester is notified of the estimated costs pursuant to Rule 4.8(d)(3), the request will be deemed not to have been received until the requester agrees to pay such fees. If a requester declines to pay fees and is not granted a fee waiver, the request will be denied.

(E) *Expedited treatment.* Requests may include an application for expedited treatment. Where such an application is not included with an initial request for access to records under paragraph (a)(1) of this section, the application may be included in any appeal of that request filed under paragraph (a)(2) of

this section. Such application, which shall be certified by the requester to be true and correct to the best of such person's knowledge and belief, shall describe the compelling need for expedited treatment, including an explanation as to why a failure to obtain the requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual, or, with respect to a request made by a person primarily engaged in disseminating information, an explanation of the urgency to inform the public concerning actual or alleged Federal Government activity. The Assistant General Counsel for Legal Counsel (Management & Access) or his or her designee will, within 10 calendar days of receipt of a request for expedited treatment, notify the requester, in writing, of the decision to either grant or deny the request for expedited treatment, and, if the request is denied, advise the requester that this determination may be appealed to the General Counsel.

(F) *Records for sale at another government agency*. If requested materials are available for sale at another government agency, the requester will not be provided with copies of the materials but will be advised to obtain them from the selling agency.

(ii) *Identifiability*. (A) A request for access to Commission records must reasonably describe the records requested to enable Commission personnel to identify and locate them with a reasonable amount of effort. A request should be as specific as possible, and include, where known, information regarding dates, titles, file designations, location, and any other information which may assist the Commission in identifying and locating the records requested.

(B) A denial of a request may state that the description required by paragraph (a)(1)(ii)(A) of this section is insufficient to allow identification and location of the records.

(iii) *Time limit for initial determination*. (A) The Assistant General Counsel for Legal Counsel (Management & Access) or his or her designee will, within 20 working days of the receipt of a request, either grant or deny, in whole or in part, such request, unless the request has been granted expedited treatment in accordance with this section, in which case the request will be processed as soon as practicable.

(B) Except in exceptional circumstances as provided in paragraph (a)(1)(iii)(C) of this section, the Assistant General Counsel for Legal Counsel (Management & Access) or his or her designee may extend the time limit by not more than 10 working days if such extension is:

(*1*) Necessary for locating records or transferring them from physically separate facilities; or

(*2*) Necessary to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are sought in a single or series of closely related requests; or

(*3*) Necessary for consultation with another agency having a substantial interest in the determination, or for consultation among two or more components of the Commission having substantial subject matter interest therein.

(C) If the Assistant General Counsel for Legal Counsel (Management & Access) or his or her designee extends the time limit for initial determination pursuant to paragraph (a)(1)(iii)(B) of this section, the requester will be notified in accordance with 5 U.S.C. 552(a)(6)(B). In exceptional circumstances, when the request cannot be processed within the extended time limit, the requester will be so notified and provided an opportunity to limit the scope of the request so that it may be processed within such time limit, or to arrange an alternative time frame for processing the request or a modified request. ''Exceptional'' circumstances will not include delays resulting from a predictable workload of requests under this section. Unwillingness to make reasonable modifications in the scope of the request or to agree to an alternative time frame may be considered as factors in determining whether exceptional circumstances exist and whether the agency has exercised due diligence in responding to the request.

(D) If the Assistant General Counsel for Legal Counsel (Management & Access) or his or her designee reasonably believes that requests made by a requester, or a group of requesters acting

in concert, actually constitute a single request that would otherwise involve unusual circumstances, as specified in paragraph (a)(1)(iii)(B) of this section, and the requests involve clearly related matters, those multiple requests may be aggregated.

(E) If a request is not granted within the time limits set forth in paragraphs (a)(1)(iii) (A) and (B) of this section, the request shall be deemed to be denied and the requesting party may appeal such denial to the General Counsel in accordance with paragraph (a)(2) of this section.

(iv) *Initial determination.* (A) The Assistant General Counsel for Legal Counsel (Management & Access) or his or her designee will make reasonable efforts to search, using either manual or electronic means, for the requested records in electronic form or format, except when such efforts would significantly interfere with the operation of the Commission's automated information systems. Access will be granted to requested records, or any portions thereof, that must be made available under the Freedom of Information Act. Access will be denied to records that are exempt under the Freedom of Information Act, 5 U.S.C. 552(b), unless the Assistant General Counsel for Legal Counsel (Management & Access) or his or her designee determines that such records fall within a category the Commission or the General Counsel has previously authorized to be made available to the public as a matter of policy. Denials will set forth the reasons therefor and advise the requester that this determination may be appealed to the General Counsel if the requester believes either that the records are not exempt, or that the General Counsel should exercise discretion to release such records notwithstanding their exempt status. The Assistant General Counsel for Legal Counsel (Management & Access) or his or her designee will also provide a reasonable, good-faith estimate of the volume of any materials to which access is denied, unless providing such an estimate would harm an interest protected by an exemption in 5 U.S.C. 552(b) that was cited as a basis for withholding materials.

(B) The Assistant General Counsel for Legal Counsel (Management & Access) or his or her designee is deemed to be the sole official responsible for all denials of initial requests, except denials of access to materials contained in active investigatory files, in which case the Director or Deputy Director of the Bureau or the Director of the Regional Office responsible for the investigation will be the responsible official.

(C) Records to which access has been granted will be made available to the requester in any form or format specified by the requester, if the records are readily reproducible in that form or format, or can be converted to that form or format with a reasonable amount of effort, and they will remain available for inspection and copying for a period not to exceed 30 days from date of notification to the requester unless the requester asks for and receives the consent of the Assistant General Counsel for Legal Counsel (Management & Access) or his or her designee to a longer period. Records assembled pursuant to a request will remain available only during this period and thereafter will be refiled. Appropriate fees may be imposed for any new or renewed request for the same records.

(D) If a requested record cannot be located from the information supplied, or is known to have been destroyed or otherwise disposed of, the requester shall be so notified.

(2) *Appeals to the General Counsel from initial denials*—(i) *Form and contents; time of receipt.* (A)(1) If an initial request for expedited treatment is denied, the requester, at any time before the initial determination of the underlying request for records by the Assistant General Counsel for Legal Counsel (Management & Access) or his or her designee (or, if the request for expedited treatment was filed with any appeal filed under paragraph (a)(2)(i)(A)(2) of this section, at any time before the General Counsel's determination on such an appeal), may appeal the denial of expedited treatment to the General Counsel.

(2) If an initial request for records is denied in its entirety, the requester may, within 30 days of the date of the

determination, appeal such denial to the General Counsel. If an initial request is denied in part, the time for appeal will not expire until 30 days after the date of the letter notifying the requester that all records to which access has been granted have been made available.

(3) The appeal shall be in writing and should include a copy of the initial request and a copy of the response to that initial request, if any. The appeal shall be addressed as follows: Freedom of Information Act Appeal, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

(B) Failure to mark the envelope and the appeal in accordance with paragraph (a)(2)(i)(A) of this section will result in the appeal (and any request for expedited treatment filed with that appeal) being treated as received on the actual date of receipt by the Office of General Counsel.

(C) Each appeal to the General Counsel which requests him to exercise his discretion to release exempt records shall set forth the interest of the requester in the subject matter and the purpose for which the records will be used if the request is granted.

(ii) *Time limit for appeal.* (A)(1) Regarding appeals from initial denials of a request for expedited treatment, the General Counsel will either grant or deny the appeal expeditiously;

(2) Regarding appeals from initial denials of a request for records, the General Counsel will, within 20 working days of the receipt of such an appeal, either grant or deny it, in whole or in part, unless expedited treatment has been granted in accordance with this section, in which case the appeal will be processed as soon as practicable.

(B) The General Counsel may, by written notice to the requester in accordance with 5 U.S.C. 552(a)(6)(B), extend the time limit for deciding an appeal by not more than 10 working days pursuant to paragraph (a)(1)(iii)(B) of this section, provided that the amount of any extension utilized during the initial consideration of the request under that paragraph will be subtracted from the amount of additional time otherwise available. Where exceptional circumstances do not permit the processing of the appeal within the extended time limit, the notice and procedures set forth in paragraph (a)(1)(iii)(C) of this section shall apply.

(iii) *Determination of appeal.* (A) The General Counsel has the authority to grant or deny all appeals and to release as an exercise of discretion records exempt from mandatory disclosure under 5 U.S.C. 552(b). In unusual or difficult cases, the General Counsel may, in his or her sole discretion, refer an appeal to the Commission for determination. A denial of an appeal in whole or in part will set forth the basis for the denial; will include a reasonable, good-faith estimate of the volume of any materials to which access is denied, unless providing such an estimate would harm an interest protected by an exemption in 5 U.S.C. 552(b) that was cited as a basis for withholding materials; and will advise the requester that judicial review of the decision is available by civil suit in the district in which the requester resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia.

(B) The General Counsel shall be deemed solely responsible for all denials of appeals, except where an appeal is denied by the Commission. In such instances, the Commission shall be deemed solely responsible for the denial.

(b) *Requests from congressional committees and subcommittees.* Requests from congressional committees and subcommittees for nonpublic material shall be referred to the General Counsel for presentation to the Commission, subject to the provisions in 5 U.S.C. 552(c) and FTC Act 21(b) that neither the Freedom of Information Act, 5 U.S.C. 552, nor the Federal Trade Commission Act, 15 U.S.C. 41, *et seq.*, is authority to withhold information from Congress. Upon receipt of a request from a congressional committee or subcommittee, notice will be given to the submitter of any material marked confidential, or any material within the scope of § 4.10(a)(9), that is responsive to the request that the request has been received. No other notice need be provided prior to granting the request.

The Commission will inform the committee or subcommittee that the submitter considers such information confidential.

(c) *Requests from Federal and State law enforcement agencies.* Requests from law enforcement agencies of the Federal government for nonpublic records shall be addressed to the liaison officer for the requesting agency, or if there is none, to the General Counsel. Requests from State agencies for nonpublic records shall be addressed to the General Counsel. With respect to requests under this paragraph, the General Counsel, the General Counsel's designee, or the appropriate liaison officer is delegated the authority to dispose of them. Alternatively, the General Counsel may refer such requests to the Commission for determination, except that requests must be referred to the Commission for determination where the Bureau having the material sought and the General Counsel do not agree on the disposition. Prior to granting access under this section to any material submitted to the Commission, the General Counsel, the General Counsel's designee, or the liaison officer will obtain from the requester a certification that such information will be maintained in confidence and will be used only for official law enforcement purposes. The certificate will also describe the nature of the law enforcement activity and the anticipated relevance of the information to that activity. A copy of the certificate will be forwarded to the submitter of the information at the time the request is granted unless the agency requests that the submitter not be notified. Requests for material pursuant to compulsory process, or for voluntary testimony, in cases or matters in which the Commission is not a party will be treated in accordance with paragraph (e) of this section.

(d) *Requests from Federal and State agencies for purposes other than law enforcement.* Requests from Federal and State agencies for access to nonpublic records for purposes not related to law enforcement should be addressed to the General Counsel. The General Counsel or the General Counsel's designee is delegated the authority to dispose of requests under this paragraph. Disclosure of nonpublic information will be made consistent with sections 6(f) and 21 of the FTC Act. Requests under this section shall be subject to the fee and fee waiver provisions of §4.8. Requests for material pursuant to compulsory process, or for voluntary testimony, in cases or matters in which the Commission is not a party will be treated in accordance with paragraph (e) of this section.

(e) *Requests for testimony, pursuant to compulsory process or otherwise, and requests for material pursuant to compulsory process, in cases or matters to which the Commission is not a party.* (1) The procedures specified in this section will apply to compulsory process and requests for voluntary testimony directed to Commission employees, except special government employees, that relate in any way to the employees' official duties. These procedures will also apply to compulsory process and requests for voluntary testimony directed to former Commission employees or to current or former special government employees of the Commission that seek nonpublic materials or information acquired during Commission employment. The provisions of paragraph (e)(3) of this section will also apply when requests described above are directed to the Commission. For purposes of this section, the term *testimony* includes any written or oral statement by a witness, such as depositions, affidavits, declarations, and statements at a hearing or trial; the term *nonpublic* includes any material or information which, under §4.10, is not required to be made public; the term *employees,* except where otherwise specified, includes *special government employees* and other Commission employees; and the term *special government employees* includes consultants and other employees as defined by section 202 of title 18 of the United States Code.

(2) Any employee or former employee who is served with compulsory process shall promptly advise the General Counsel of its service, the nature of the material or information sought, and all relevant facts and circumstances. This notification requirement also applies to any employee or former employee

whose testimony is sought on a voluntary basis under the conditions set forth in paragraph (e)(1) of this section.

(3) A party who causes compulsory process to be issued to, or who requests testimony by, the Commission or any employee or former employee of the Commission shall furnish a statement to the General Counsel, unless, with respect to a request by a Federal or State agency, the General Counsel determines, as a matter of discretion, to waive this requirement. The statement shall set forth the party's interest in the case or matter, the relevance of the desired testimony or material, and a discussion of whether it is reasonably available from other sources. If testimony is desired, the statement shall also contain a general summary of the testimony and a discussion of whether Commission records could be produced and used in its place. Any authorization for testimony will be limited to the scope of the demand as summarized in such statement.

(4) Absent authorization from the General Counsel, the employee or former employee shall respectfully decline to produce requested material or to disclose requested information. The refusal should be based on this paragraph and on *United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951).

(5) The General Counsel will consider and act upon compulsory process and requests for voluntary testimony under this section with due regard for statutory restrictions, the Commission's rules and the public interest, taking into account such factors as the need to conserve the time of employees for conducting official business; the need to avoid spending the time and money of the United States for private purposes; the need to maintain impartiality between private litigants in cases where a substantial government interest is not involved; and the established legal standards for determining whether justification exists for the disclosure of confidential information and material.

(6) Invitations to testify before Congressional committees or subcommittees or to testify before other government bodies on the possible effects of legislative and regulatory proposals are not subject to paragraphs (e)(1) through (5) of this section.

(f) Requests by current or former employees to use nonpublic memoranda as writing samples shall be addressed to the General Counsel. The General Counsel or the General Counsel's designee is delegated the authority to dispose of such requests consistent with applicable nondisclosure provisions, including sections 6(f) and 21 of the FTC Act.

(g) Employees are encouraged to engage in teaching, lecturing, and writing that is not prohibited by law, Executive order, or regulation. However, an employee shall not use information obtained as a result of his Government employment, except to the extent that such information has been made available to the general public or will be made available on request, or when the General Counsel or the General Counsel's designee gives written authorization for the use of nonpublic information on the basis that the use is in the public interest.

(h) The General Counsel (or General Counsel's designee) may authorize a Commission member, other Commission official, or Commission staff to disclose an item or category of information from Commission records not currently available to the public for routine inspection and copying under Rule 4.9(b) where the General Counsel (or General Counsel's designee) determines that such disclosure would facilitate the conduct of official agency business and would not otherwise be prohibited by applicable law, order, or regulation. Requests for such determinations shall be set forth in writing and, in the case of staff requests, shall be forwarded to the General Counsel (or General Counsel's designee) through the relevant Bureau. In unusual or difficult cases, the General

Counsel may refer the request to the Commission for determination.

(15 U.S.C. 41 *et seq.*)

[40 FR 7629, Feb. 21, 1975, as amended at 42 FR 13820, Mar. 14, 1977; 43 FR 5802, Feb. 10, 1978; 46 FR 26292, May 12, 1981; 48 FR 4280, Jan. 31, 1983; 49 FR 20279, May 14, 1984; 49 FR 21048, May 18, 1984; 50 FR 53306, Dec. 31, 1985; 55 FR 29839, July 23, 1990; 57 FR 10807, Mar. 31, 1992; 58 FR 15764, Mar. 24, 1993; 60 FR 37750, July 21, 1995; 63 FR 32978, June 17, 1998; 63 FR 45647, Aug. 26, 1998; 64 FR 3013, Jan. 20, 1999; 64 FR 32180, June 16, 1999; 64 FR 35256, June 30, 1999]

§4.12 Disposition of documents submitted to the Commission.

(a) *Material submitted to the Commission.* (1) Any person who has submitted material to the Commission may obtain, on request, the return of material submitted to the Commission which has not been received into evidence:

(i) After the close of the proceeding in connection with which the material was submitted; or

(ii) When no proceeding in which the material may be used has been commenced within a reasonable time after completion of the examination and analysis of all such material and other information assembled in the course of the investigation.

(2) Such request shall be in writing, addressed to the custodian designated pursuant to §2.16 or the Secretary of the Commission in all other circumstances, and shall reasonably describe the material requested. A request for return of material may be filed at any time, but material will not be returned nor will commitments to return material be undertaken prior to the time described in this paragraph.

(b) *Commission-made copies of documents submitted to the Commission.* The Commission will not return to the submitter copies of documents made by the Commission unless, upon a showing of extraordinary circumstances, the Commission determines that return would be required in the public interest.

(c) *Disposition of material not returned.* Subsequent to the time prescribed in paragraph (a) of this section, the staff will examine all submitted material and Commission-made copies of documents located in a reasonable search of the Commission's files and will determine, consistent with the Federal Records Act, 44 U.S.C. 3301, which materials are appropriate for preservation as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Commission or because of the information value of data in them. The Commission will dispose of all material determined not to be appropriate for preservation in accordance with applicable regulations of the National Archives and Records Administration.

[46 FR 26292, May 12, 1981, as amended at 60 FR 37751, July 21, 1995]

§4.13 Privacy Act rules.

(a) *Purpose and scope.* (1) This section is promulgated to implement the Privacy Act of 1974 (Pub. L. 93–579, 5 U.S.C. 552a) by establishing procedures whereby an individual can, as to all systems of records maintained by the Commission except those set forth in §4.13(m) as exempt from disclosure, (i) Request notification of whether the Commission maintains a record pertaining to him in any system of records, (ii) request access to such a record or to an accounting of its disclosure, (iii) request that the record be amended or corrected, and (iv) appeal an initial adverse determination of any such request. This section also establishes those systems of records that are specifically exempt from disclosure and from other requirements.

(2) The procedures of this section apply only to requests by an individual as defined in §4.13(b). Except as otherwise provided, they govern only records containing personal information in systems of records for which notice has been published by the Commission in the FEDERAL REGISTER pursuant to section 552a(e)(4) of the Privacy Act of 1974 and which are neither exempt from the provisions of this section nor contained in government-wide systems of personnel records for which notice has been published in the FEDERAL REGISTER by the Office of Personnel Management. Requests for notification, access, and amendment of personnel records which are contained in a system of records for which notice has been given by the Office of Personnel

Management are governed by the Office of Personnel Management's notices, 5 CFR part 297. Access to records which are not subject to the requirements of the Privacy Act are governed by §§ 4.8 through 4.11.

(b) *Definitions.* The following definitions apply to this section only:

(1) *Individual* means a natural person who is a citizen of the United States or an alien lawfully admitted for permanent residence.

(2) *Record* means any item, collection, or grouping of personal information about an individual that is maintained by the Commission, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph, but does not include information concerning proprietorships, businesses, or corporations.

(3) *System of records* means a group of any records under the control of the Commission from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual, for which notice has been published by the Commission in the FEDERAL REGISTER pursuant to 5 U.S.C. 552a(e)(4).

(c) *Procedures for requests pertaining to individual records in a record system.* An individual may request access to his or her records or any information pertaining to that individual in a system of records, and notification of whether and to whom the Commission has disclosed a record for which an accounting of disclosures is required to be kept and made available to the individual, using the procedures of this section. Requests for the disclosure of records under this section or to determine whether a system of records contains records pertaining to an individual or to obtain an accounting of disclosures, shall be in writing and if mailed, addressed as follows:

Privacy Act Request, Assistant General Counsel for Legal Counsel (Management & Access), Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

If requests are presented in person at the Office of the General Counsel, the individual shall be required to execute a written request. All requests shall name the system of records that is the subject of the request, and shall include any additional information specified in the pertinent system notice as necessary to locate the records requested. If the requester wants another person to accompany him or her to review the records, the request shall so state. Nothing in this section will allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(d) *Times, places, and requirements for identification of individuals making requests.* Verification of identity of persons making written requests to the Assistant General Counsel for Legal Counsel (Management & Access) ordinarily will not be required. The signature on such requests will be deemed a certification by the signatory that he or she is the individual to whom the record pertains or is the parent or guardian of a minor or the legal guardian of the individual to whom the record pertains. The Assistant General Counsel for Legal Counsel (Management & Access) or his or her designee may require additional verification of a requester's identity when such information is reasonably necessary to assure that records are not improperly disclosed; provided, however, that no verification of identity will be required if the records sought are publicly available under the Freedom of Information Act.

(e) *Disclosure of requested information to individuals.* Within 10 working days of receipt of a request under § 4.13(c), the Assistant General Counsel for Legal Counsel (Management & Access) or his or her designee will acknowledge receipt of the request. Within 30 working days of the receipt of a request under § 4.13(c), the Assistant General Counsel for Legal Counsel (Management & Access) or his or her designee will inform the requester whether a system of records containing retrievable information pertaining to the requester exists, and if so, either that the request has been granted or that the requested records or information is exempt from disclosure pursuant to

§4.13(m). When, for good cause shown, the Assistant General Counsel for Legal Counsel (Management & Access) or his or her designee is unable to respond within 30 working days of the receipt of the request, that official will notify the requester and inform him or her approximately when a response will be made.

(f) *Special procedures: Medical records.* When the Assistant General Counsel for Legal Counsel (Management & Access) or his or her designee determines that disclosure of a medical or psychological record directly to a requesting individual could have an adverse effect on the individual, he or she will require the individual to designate a medical doctor to whom the record will be transmitted.

(g) *Request for correction or amendment of record.* An individual to whom access to his records or any information pertaining to him in a system of records has been granted may request that any portion thereof be amended or corrected because he believes it is not accurate, relevant, timely, or complete. An initial request for correction or amendment of a record shall be in writing whether presented in person or by mail, and if by mail, addressed as in §4.13(c). In making a request under this subsection, the requesting party shall state the nature of the information in the record the individual believes to be inaccurate, irrelevant, untimely, or incomplete, the correction or amendment desired, and the reasons therefore.

(h) *Agency review of request for correction or amendment of record.* Whether presented in person or by mail, requests under §4.13(g) will be acknowledged by the Assistant General Counsel for Legal Counsel (Management & Access) or his or her designee within 10 working days of the receipt of the request if action on the request cannot be completed and the individual notified of the results within that time. Thereafter, the Assistant General Counsel for Legal Counsel (Management & Access) or his or her designee will promptly either make the requested amendment or correction or inform the requester of his refusal to make the amendment or correction, the reasons for the refusal, and the requester's right to appeal that refusal in accordance with §4.13(i).

(i) *Appeal of initial adverse agency determination.* (1) If an initial request filed under §4.13(c) or §4.13(g) is denied, the requester may appeal that denial to the General Counsel. The appeal shall be in writing and addressed as follows:

Privacy Act Appeal, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue, NW., Washington, DC 20580.

Within 30 working days of the receipt of the appeal, the General Counsel will notify the requester of the disposition of that appeal, except that the General Counsel may extend the 30-day period for good cause, in which case, the General Counsel will advise the requester of the approximate date on which review will be completed. In unusual or difficult cases, the General Counsel may, in his or her sole discretion, refer an appeal to the Commission for determination.

(2)(i) If the General Counsel refuses to amend or correct the record in accordance with a request under §4.13(g), the General Counsel will notify the requester of that decision and inform the requester of the right to file with the Assistant General Counsel for Legal Counsel (Management & Access) a concise statement setting forth the reasons for the requester's disagreement with the General Counsel's determination and the fact that the requester's statement will be treated as set forth in paragraph (i)(2)(ii) of this section. The General Counsel will also inform the requester that judicial review of the decision is available by a civil suit in the district in which the requester resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia.

(ii) If the individual files a statement disagreeing with the General Counsel's determination not to amend or correct a record, such disagreement will be clearly noted in the record involved and the individual's statement will be made available to anyone to whom the record has been disclosed after September 27, 1975, or is subsequently disclosed together with, if the General

Counsel deems it appropriate, a brief statement of his or her reasons for declining to amend the record.

(j) *Disclosure of record to person other than the individual to whom it pertains.* Except as provided by 5 U.S.C. 552a(b), the written request or prior written consent of the individual to whom a record pertains, or of his parent if a minor, or legal guardian if incompetent, shall be required before such record is disclosed. If the individual elects to inspect a record in person and desires to be accompanied by another person, the Assistant General Counsel for Legal Counsel (Management & Access) or his or her designee may require the individual to furnish a signed statement authorizing disclosure of his or her record in the presence of the accompanying named person.

(k) *Fees.* No fees will be charged for searching for a record, reviewing it, or for copies of records made by the Commission for its own purposes incident to granting access to a requester. Copies of records to which access has been granted under this section may be obtained by the requester from the Assistant General Counsel for Legal Counsel (Management & Access) or his or her designee on payment of the reproduction fees provided in § 4.8(b)(6).

(l) *Penalties.* Section 552a(i)(3) of the Privacy Act, 5 U.S.C. 552a(i)(3), makes it a misdemeanor, subject to a maximum fine of $5,000, to knowingly and willfully request or obtain any record concerning an individual under false pretenses. Sections 552a(i) (1) and (2) of the Privacy Act, 5 U.S.C. 552a(i) (1) and (2), provide penalties for violations by agency employees of the Privacy Act or regulations established thereunder. Title 18 U.S.C. 1001, Crimes and Criminal Procedures, makes it a criminal offense, subject to a maximum fine of $10,000 or imprisonment for not more than 5 years or both, to knowingly and willfully make or cause to be made any false or fraudulent statements or representations in any matter within the jurisdiction of any agency of the United States.

(m) *Specific exemptions.* (1) Pursuant to 5 U.S.C. 552a(j)(2), investigatory materials maintained by an agency component in connection with any activity relating to criminal law enforcement in the following systems of records are exempt from all subsections of 5 U.S.C. 552a, except (b), (c) (1) and (2), (e)(4) (A) through (F), (e) (6), (7), (9), (10), and (11), and (i), and from the provisions of this section, except as otherwise provided in 5 U.S.C. 552a(j)(2):

Office of Inspector General Investigative Files—FTC

(2) Pursuant to 5 U.S.C. 552a(k)(2), investigatory materials compiled for law enforcement purposes in the following systems of records are exempt from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f) of 5 U.S.C. 552a, and from the provisions of this section, except as otherwise provided in 5 U.S.C. 552a(k)(2):

Investigational, Legal, and Public Records—FTC
Disciplinary Action Investigatory Files—FTC
Clearance to Participate Applications and the Commission's Responses Thereto, and Related Documents—FTC
Management Information System—FTC
Office of the Secretary Control and Reporting System—FTC
Office of Inspector General Investigative Files—FTC
Stenographic Reporting Service Requests—FTC
Identity Theft Complaint Management System—FTC
Freedom of Information Act Requests and Appeals—FTC
Privacy Act Requests and Appeals—FTC
Information Retrieval and Indexing System—FTC

(3) Pursuant to 5 U.S.C. 552a(k)(5), investigatory materials compiled to determine suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information, but only where disclosure would reveal the identity of a confidential source of information, in the following systems of records are exempt from subsections (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f) of 5 U.S.C. 552a, and from the provisions of this section, except as otherwise provided in 5 U.S.C. 552a(k)(5):

Personnel Security File—FTC

[40 FR 40780, Sept. 3, 1975, as amended at 46 FR 26292, May 12, 1981; 48 FR 4280, Jan. 31, 1983; 55 FR 37700, Sept. 13, 1990; 55 FR 38801, Sept. 21, 1990; 57 FR 10808, Mar. 31, 1992; 58 FR 7047, Feb. 4, 1993; 63 FR 45648, Aug. 26, 1998; 64 FR 3014, Jan. 20, 1999; 64 FR 69397, Dec. 13, 1999]

§4.14 Conduct of business.

(a) Matters before the Commission for consideration may be resolved either at a meeting under §4.15 or by written circulation. Any Commissioner may direct that a matter presented for consideration be placed on the agenda of a Commission meeting.

(b) *Quorum.* A majority of the members of the Commission, constitutes a quorum for the transaction of business.

(c) Any Commission action, either at a meeting or by written circulation, may be taken only with the affirmative concurrence of a majority of the participating Commissioners, except where a greater majority is required by statute or rule or where the action is taken pursuant to a valid delegation of authority. No Commissioner may delegate the authority to determine his or her vote in any matter requiring Commission action, but authority to report a Commissioner's vote on a particular matter resolved either by written circulation, or at a meeting held in the Commissioner's absence, may be vested in a member of the Commissioner's staff.

[42 FR 13540, Mar. 11, 1977, as amended at 50 FR 53306, Dec. 31, 1985]

§4.15 Commission meetings.

(a) *In general.* (1) Meetings of the Commission, as defined in 5 U.S.C. 552b(a)(2), are held at the principal office of the Commission, unless otherwise directed.

(2) *Initial announcements of meetings.* For each meeting, the Commission shall announce:

(i) The time, place and subject matter of the meeting,

(ii) Whether the meeting will be open or closed to the public, and

(iii) The name and phone number of the official who will respond to requests for information about the meeting.

Such announcement shall be made at least one week before the meeting except that where the agency determines pursuant to 5 U.S.C. 552b(e)(1) to call the meeting on less than one week's notice, or where the agency determines to close the meeting pursuant to paragraph (c)(2) of this section, the announcement shall be made at the earliest practicable time.

(3) *Announcements of changes in meetings.* Following the announcement of a meeting, any change in the time, place or subject matter will be announced at the earliest practicable time, and, except with respect to meetings closed under paragraph (c)(2) of this section, any change in the subject matter or decision to open or close a meeting shall be made only as provided in 5 U.S.C. 552b(e)(2).

(4) *Deletions from announcements.* The requirements of paragraphs (a)(2) and (a)(3) of this section do not require the disclosure of any information pertaining to a portion of a closed meeting where such disclosure is likely to concern a matter within the scope of 5 U.S.C. 552b(c).

(5) *Dissemination of notices.* Notices required under paragraphs (a)(2) and (a)(3) of this section will be posted at the principal office of the Commission, recorded on a telephone message device, and, except as to notices of meetings closed under paragraph (c)(2) of this section, submitted to the FEDERAL REGISTER for publication. In addition, notices issued under paragraph (a)(2) of this section one week in advance of the meeting will be sent to all persons and organizations who have requested inclusion on a meeting notice mailing list, and will be issued as a press release to interested media.

(b) *Open meetings.* (1) Commission meetings shall be open to public observation unless the Commission determines that portions may be closed pursuant to 5 U.S.C. 552b(c).

(2) Any person whose interest may be directly affected if a portion of a meeting is open, may request that the Commission close that portion for any of the reasons described in 5 U.S.C. 552b(c). The Commission shall vote on such requests if at least one member desires to do so. Such requests shall be

in writing, filed at the earliest practicable time, and describe how the matters to be discussed will have any of the effects enumerated in 5 U.S.C. 552b(c). Requests shall be addressed as follows:

Closed Meeting Request, Office of the General Counsel, Federal Trade Commission, 6th Street and Pennsylvania Avenue NW., Washington, DC 20580.

(3) The Commissioner to whom a matter has been assigned for presentation to the Commission shall have the authority to make available to the public, prior to consideration of that matter at an open meeting, material sufficient to inform the public of the issues likely to be discussed in connection with that matter.

(c) *Closed meetings.* (1) Whenever the Commission votes to close a meeting or series of meetings under these rules, it shall make publicly available within one day notices both of such vote and the General Counsel's determination regarding certification under 5 U.S.C. 552b(f)(1). Such determination by the General Counsel shall be made prior to the Commission vote to close a meeting or series of meetings. Further, except with respect to meetings closed under paragraph (c)(2) of this section, the Commission shall make publicly available within one day a full written explanation of its action in closing any meeting, and a list specifying the names and affiliations of all persons expected to attend, except Commission employees and consultants and any stenographer or court reporter attending for the sole purpose of preparing a verbatim transcript. All Commission employees and consultants may attend nonadjudicative portions of any closed meeting and members of Commissioners' personal staffs, the General Counsel and his staff, and the Secretary and his staff may attend the adjudicative portions of any closed meeting except to the extent the notice of a particular closed meeting otherwise specifically provides. Stenographers or court reporters may attend any closed meeting at which their services are required by the Commission.

(2) If a Commission meeting, or portions thereof, may be closed pursuant to 5 U.S.C. 552b(c)(10), the Commission may, by vote recorded at the beginning of the meeting, or portion thereof, close the portion or portions of the meeting so exempt.

(3) Closed meeting transcripts or minutes required by 5 U.S.C. 552b(f)(1) will be released to the public insofar as they contain information that either is not exempt from disclosure under 5 U.S.C. 552b(c), or, although exempt, should be disclosed in the public interest. The Commission will determine whether to release, in whole or in part, the minutes of its executive sessions to consider oral arguments. With regard to all other closed meetings, the General Counsel or the General Counsel's designee shall determine, in accordance with § 4.9(c), which portions of the transcripts or minutes may be released.

(d) The presiding officer shall be responsible for preserving order and decorum at meetings and shall have all powers necessary to that end.

[42 FR 13541, Mar. 11, 1977; 42 FR 15409, Mar. 22, 1977, as amended at 42 FR 62912, Dec. 14, 1977: 43 FR 1937, Jan. 13, 1978; 43 FR 35684, Aug. 11, 1978; 63 FR 32978, June 17, 1998]

§ 4.16 Privilege against self-incrimination.

Section 2.11 of Pub. L. 91–462 specifically repeals paragraph 7 of section 9 of the Federal Trade Commission Act. Title 18, section 6002, of the United States Code provides that whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to:

(a) A court or grand jury of the United States,

(b) An agency of the United States, or

(c) Either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under section 6004, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a

prosecution for perjury, giving a false statement, or otherwise failing to comply with the order. Title 18, section 6004, of the United States Code provides that: (1) In the case of any individual who has been or who may be called to testify or provide other information at any proceeding before an agency of the United States, the agency may, with the approval of the Attorney General, issue, in accordance with subsection (b) of section 6004, an order requiring the individual to give testimony or provide other information which he refused to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in title 18, section 6002, of the United States Code; (2) an agency of the United States may issue an order under subsection (a) of section 6004 only if in its judgment (i) the testimony or other information from such individual may be necessary to the public interest; and (ii) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

(18 U.S.C. 6002, 6004)

[37 FR 5017, Mar. 9, 1972. Redesignated at 45 FR 36345, May 29, 1980]

§ 4.17 Disqualification of Commissioners.

(a) *Applicability*. This section applies to all motions seeking the disqualification of a Commissioner from any adjudicative or rulemaking proceeding.

(b) *Procedures*. (1) Whenever any participant in a proceeding shall deem a Commissioner for any reason to be disqualified from participation in that proceeding, such participant may file with the Secretary a motion to the Commission to disqualify the Commissioner, such motion to be supported by affidavits and other information setting forth with particularity the alleged grounds for disqualification.

(2) Such motion shall be filed at the earliest practicable time after the participant learns, or could reasonably have learned, of the alleged grounds for disqualification.

(3)(i) Such motion shall be addressed in the first instance by the Commissioner whose disqualification is sought.

(ii) In the event such Commissioner declines to recuse himself or herself from further participation in the proceeding, the Commission shall determine the motion without the participation of such Commissioner.

(c) *Standards*. Such motion shall be determined in accordance with legal standards applicable to the proceeding in which such motion is filed.

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

[46 FR 45750, Sept. 15, 1981]

PART 5—STANDARDS OF CONDUCT

Subpart A—Employee Conduct Standards and Financial Conflicts of Interest

Sec.
5.1 Cross-reference to executive branch-wide regulations.
5.2 Exemption of insubstantial financial conflicts.

Subpart B—Financial Disclosure Requirements

5.10 Cross-reference to executive branch-wide regulations.

Subparts C–D [Reserved]

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AUTHORITY: 5 U.S.C. 7301; 5 U.S.C. App. (Ethics in Government Act of 1978); 15 U.S.C. 46(g); E.O. 12674, 54 FR 15159, 3 CFR, 1989 Comp., p. 215, as modified by E.O. 12731, 55 FR 42547, 3 CFR, 1990 Comp., p. 306; 5 CFR part 2635, unless otherwise noted.