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Subpart I—Recovery of Awards Under the Equal Access to Justice Act in Commission Proceedings

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

SOURCE: 32 FR 8449, June 13, 1967, unless otherwise noted.

Subpart A—Scope of Rules; Nature of Adjudicative Proceedings

§ 3.1 Scope of the rules in this part.

The rules in this part govern procedure in adjudicative proceedings. It is the policy of the Commission that, to the extent practicable and consistent with requirements of law, such proceedings shall be conducted expeditiously. In the conduct of such proceedings the Administrative Law Judge and counsel for all parties shall make every effort at each state of a proceeding to avoid delay.

§ 3.2 Nature of adjudicative proceedings.

Adjudicative proceedings are those formal proceedings conducted under one or more of the statutes administered by the Commission which are required by statute to be determined on the record after opportunity for an agency hearing. The term includes hearings upon objections to orders relating to the promulgation, amendment, or repeal of rules under sections 4, 5 and 6 of the Fair Packaging and Labeling Act and proceedings for the assessment of civil penalties pursuant to § 1.94 of this chapter. It does not include other proceedings such as negotiations for the entry of consent orders; investigational hearings as distinguished from proceedings after the issuance of a complaint; requests for extensions of time to comply with final orders or other proceedings involving compliance with final orders; proceedings for the promulgation of industry guides or trade regulation rules; proceedings for fixing quantity limits under section 2(a) of the Clayton Act;

investigations under section 5 of the Export Trade Act; rulemaking proceedings under the Fair Packaging and Labeling Act up to the time when the Commission determines under § 1.26(g) of this chapter that objections sufficient to warrant the holding of a public hearing have been filed; or the promulgation of substantive rules and regulations, determinations of classes of products exempted from statutory requirements, the establishment of name guides, or inspections and industry counseling, under sections 4(d) and 6(a) of the Wool Products Labeling Act of 1939, sections 7, 8(b), and 8(c) of the Fur Products Labeling Act, and sections 7(c), 7(d), and 12(b) of the Textile Fiber Products Identification Act.

[45 FR 67319, Oct. 10, 1980]

Subpart B—Pleadings

§ 3.11 Commencement of proceedings.

(a) *Complaint.* Except as provided in § 3.13, an adjudicative proceeding is commenced when an affirmative vote is taken by the Commission to issue a complaint.

(b) *Form of complaint.* The Commission's complaint shall contain the following:

(1) Recital of the legal authority and jurisdiction for institution of the proceeding, with specific designation of the statutory provisions alleged to have been violated;

(2) A clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law;

(3) Where practical, a form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint; and

(4) Notice of the time and place for hearing, the time to be at least thirty (30) days after service of the complaint.

(c) *Motion for more definite statement.* Where the respondent makes a reasonable showing that it cannot frame a responsive answer based on the allegations contained in the complaint, the respondent may move for a more definite statement of the charges against

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it before filing an answer. Such a motion shall be filed within ten (10) days after service of the complaint and shall point out the defects complained of and the details desired.

[32 FR 8449, June 13, 1967, as amended at 43 FR 11978, Mar. 23, 1978; 50 FR 53305, Dec. 31, 1985]

§3.11A Fast-track proceedings.

(a) *Scope and applicability.* This section governs the availability of fast-track procedures in administrative cases where the Commission files a collateral federal district court complaint that seeks preliminary injunctive relief against some or all of the conduct alleged in the Commission's administrative complaint. The Commission will afford the respondent the opportunity to elect such fast-track procedures, subject to the conditions set forth in paragraph (b)(1) of this section, in cases that the Commission designates as appropriate. In cases so designated, the Commission will provide written notice to each respondent at the time that it is served with the Commission's federal district court complaint for preliminary injunctive relief. Except as modified by this section, the rules contained in subparts A through I of part 3 of this chapter will govern fast-track procedures in adjudicative proceedings. Discovery will be governed by subpart D of this part, and the Administrative Law Judge may exercise his plenary authority under §3.42(c)(6) to establish limitations on the number of depositions, witnesses, or any document production.

(b)(1) *Conditions.* In cases designated as appropriate by the Commission pursuant to paragraph (a) of this section, a respondent may elect fast-track procedures:

(i) if a federal court enters a preliminary injunction against some or all of the conduct alleged in the Commission's administrative complaint; or,

(ii) where no such injunction is entered, if the Commission determines that the Federal court proceeding has resulted in an evidentiary record that is likely materially to facilitate resolution of the administrative proceeding in accordance with the expedited schedule set forth in this section. The Commission will provide each respondent

with written notice of any such determination.

(2) *Election.* A respondent that determines to elect fast-track procedures shall file a notice of such election with the Secretary by the latest of: three days after entry of a preliminary injunction as described in paragraph (b)(1)(i) of this section; three days after the respondent is served with notice of the Commission's determination under paragraph (b)(1)(ii) of this section; or three days after the respondent is served with the Commission's administrative complaint in the adjudicative proceeding. In proceedings involving multiple respondents, the fast-track procedures set forth in this section will not apply unless the procedures are elected by all respondents.

(c) *Deadlines in fast-track proceedings.*
(1) For purposes of this paragraph, "triggering event" means the latest of: entry of a preliminary injunction as described in paragraph (b)(1)(i) of this section; service on the last respondent of notice of the Commission's determination under paragraph (b)(1)(ii) of this section; service on the last respondent of the Commission's administrative complaint in the adjudicative proceeding; or filing with the Secretary by the last respondent of a notice electing fast-track procedures.

(2) *Proceedings before the Administrative Law Judge.* In fast-track proceedings covered by this section:

(i) The scheduling conference required by §3.21(b) shall be held not later than three days after the triggering event.

(ii) Respondent's answer shall be filed within 14 days after the triggering event.

(iii) The Administrative Law Judge shall file an initial decision within 56 days following the conclusion of the evidentiary hearing. The initial decision shall be filed no later than 195 days after the triggering event.

(iv) Any party wishing to appeal an initial decision to the Commission shall file a notice of appeal with the Secretary within three days after service of the initial decision. The notice shall comply with §3.52(a) in all other respects.

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(v) The appeal shall be in the form of a brief, filed within 21 days after service of the initial decision, and shall comply with § 3.52(b) in all other respects. All issues raised on appeal shall be presented in the party's appeal brief.

(vi) Within 14 days after service of the appeal brief, the appellee may file an answering brief, which shall comply with § 3.52(c). Cross-appeals, as permitted in § 3.52(c), may not be raised in an appellee's answering brief.

(vii) Within five days after service of the appellee's answering brief, the appellant may file a reply brief, in accordance with § 3.52(d) in all other respects.

(3) *Proceedings before the Commission.* In fast-track proceedings covered by this section, the Commission will issue a final order and opinion within 13 months after the triggering event. If the adjudicative proceeding is stayed pursuant to a motion filed under § 3.26, the 13-month deadline will be tolled for as long as the proceeding is stayed. The Commission may extend the date for issuance of the Commission's final order and opinion in the following circumstances: if necessary to permit the Commission to provide submitters of *in camera* material or information with advance notice of the Commission's intention to disclose all or portions of such material or information in the Commission's final order or opinion; or if the Commission determines that adherence to the 13-month deadline would result in a miscarriage of justice due to circumstances unforeseen at the time of respondent's election of fast-track procedures.

[63 FR 7527, Feb. 13, 1998]

§ 3.12 Answer.

(a) *Time for filing.* A respondent shall file an answer within twenty (20) days after being served with the complaint; *Provided, however,* That the filing of a motion permitted under these Rules shall alter this period of time as follows, unless a different time is fixed by the Administrative Law Judge:

(1) If the motion is denied, the answer shall be filed within ten (10) days after service of the order of denial or

thirty (30) days after service of the complaint, whichever is later;

(2) If a motion for more definite statement of the charges is granted, in whole or in part, the more definite statement of the charges shall be filed within ten (10) days after service of the order granting the motion and the answer shall be filed within ten (10) days after service of the more definite statement of the charges.

(b) *Content of answer.* An answer shall conform to the following:

(1) *If allegations of complaint are contested.* An answer in which the allegations of a complaint are contested shall contain:

(i) A concise statement of the facts constituting each ground of defense;

(ii) Specific admission, denial, or explanation of each fact alleged in the complaint or, if the respondent is without knowledge thereof, a statement to that effect. Allegations of a complaint not thus answered shall be deemed to have been admitted.

(2) *If allegations of complaint are admitted.* If the respondent elects not to contest the allegations of fact set forth in the complaint, his answer shall consist of a statement that he admits all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such an answer, the respondent may, however, reserve the right to submit proposed findings and conclusions under § 3.46 and the right to appeal the initial decision to the Commission under § 3.52.

(c) *Default.* Failure of the respondent to file an answer within the time provided shall be deemed to constitute a waiver of the respondent's right to appear and contest the allegations of the complaint and to authorize the Administrative Law Judge, without further notice to the respondent, to find the facts to be as alleged in the complaint

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and to enter an initial decision containing such findings, appropriate conclusions, and order.

[32 FR 8449, June 13, 1967, as amended at 50 FR 53305, Dec. 31, 1985; 61 FR 50646, Sept. 26, 1996; 66 FR 17628, Apr. 3, 2001; 66 FR 20527, Apr. 23, 2001]

§ 3.13 Adjudicative hearing on issues arising in rulemaking proceedings under the Fair Packaging and Labeling Act.

(a) *Notice of hearing.* When the Commission, acting under § 1.26(g) of this chapter, determines that objections which have been filed are sufficient to warrant the holding of an adjudicative hearing in rulemaking proceedings under the Fair Packaging and Labeling Act, or when the Commission otherwise determines that the holding of such a hearing would be in the public interest, a hearing will be held before an Administrative Law Judge for the purpose of receiving evidence relevant and material to the issues raised by such objections or other issues specified by the Commission. In such case the Commission will publish a notice in the FEDERAL REGISTER containing a statement of:

(1) The provisions of the rule or order to which objections have been filed;

(2) The issues raised by the objections or the issues on which the Commission wishes to receive evidence;

(3) The time and place for hearing, the time to be at least thirty (30) days after publication of the notice; and

(4) The time within which, and the conditions under which, any person who petitioned for issuance, amendment, or repeal of the rule or order, or any person who filed objections sufficient to warrant the holding of the hearing, or any other interested person, may file notice of intention to participate in the proceeding.

(b) *Parties.* Any person who petitions for issuance, amendment, or repeal of a rule or order, and any person who files objections sufficient to warrant the holding of a hearing, and who files timely notice of intention to participate, shall be regarded as a party and shall be individually served with any pleadings filed in the proceeding. Upon written application to the Administrative Law Judge and a showing of good

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cause, any interested person may be designated by the Administrative Law Judge as a party.

[32 FR 8449, June 13, 1967, as amended at 40 FR 33969, Aug. 13, 1975]

§ 3.14 Intervention.

(a) Any individual, partnership, unincorporated association, or corporation desiring to intervene in an adjudicative proceeding shall make written application in the form of a motion setting forth the basis therefor. Such application shall have attached to it a certificate showing service thereof upon each party to the proceeding in accordance with the provisions of § 4.4(b) of this chapter. A similar certificate shall be attached to the answer filed by any party, other than counsel in support of the complaint, showing service of such answer upon the applicant. The Administrative Law Judge or the Commission may by order permit the intervention to such extent and upon such terms as are provided by law or as otherwise may be deemed proper.

(b) In an adjudicative proceeding where the complaint states that divestiture relief is contemplated, the labor organization[s] representing employees of the respondent[s] may intervene as a matter of right. Applications for such intervention are to be made in accordance with the procedures set forth in paragraph (a) of this section and must be filed within 60 days of the issuance of the complaint. Intervention as a matter of right shall be limited to the issue of the effect, if any, of proposed remedies on employment, with full rights of participation in the proceeding concerning this issue. This paragraph does not affect a labor organization's ability to petition for leave to intervene pursuant to § 3.14(a).

[32 FR 8449, June 13, 1967, as amended at 46 FR 20979, Apr. 8, 1981]

§ 3.15 Amendments and supplemental pleadings.

(a) *Amendments—(1) By leave.* If and whenever determination of a controversy on the merits will be facilitated thereby, the Administrative Law Judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the

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parties, allow appropriate amendments to pleadings or notice of hearing: *Provided, however,* That a motion for amendment of a complaint or notice may be allowed by the Administrative Law Judge only if the amendment is reasonably within the scope of the original complaint or notice. Motions for other amendments of complaints or notices shall be certified to the Commission.

(2) *Conformance to evidence.* When issues not raised by the pleadings or notice of hearing but reasonably within the scope of the original complaint or notice of hearing are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings or notice of hearing; and such amendments of the pleadings or notice as may be necessary to make them conform to the evidence and to raise such issues shall be allowed at any time.

(b) *Supplemental pleadings.* The Administrative Law Judge may, upon reasonable notice and such terms as are just, permit service of a supplemental pleading or notice setting forth transactions, occurrences, or events which have happened since the date of the pleading or notice sought to be supplemented and which are relevant to any of the issues involved.

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

§ 3.21 Prehearing procedures.

(a) *Meeting of the parties before scheduling conference.* An early as practicable before the prehearing scheduling conference described in paragraph (b) of this section, counsel for the parties shall meet to discuss the nature and basis of their claims and defenses and the possibilities for a prompt settlement or resolution of the case, and to agree, if possible, on a proposed discovery schedule, a preliminary estimate of the time required for the hearing, and a proposed hearing date, and on any other matters to be determined at the scheduling conference.

(b) *Scheduling conference.* Not later than fourteen (14) days after the answer is filed by the last answering re-

spondent, the Administrative Law Judge shall hold a scheduling conference. At the scheduling conference, counsel for the parties shall be prepared to address their factual and legal theories, a schedule of proceedings, possible limitations on discovery, and other possible agreements or steps that may aid in the orderly and expeditious disposition of the proceeding.

(c) *Prehearing scheduling order.* (1) Not later than two (2) days after the scheduling conference, the Administrative Law Judge shall enter an order that sets forth the results of the conference and establishes a schedule of proceedings, including a plan of discovery, dates for the submission and hearing of motions, the specific method by which exhibits shall be numbered or otherwise identified and marked for the record, and the time and place of a final prehearing conference and of the evidentiary hearing.

(2) The Administrative Law Judge may grant a motion to extend any deadline or time specified in this scheduling order only upon a showing of good cause. Such motion shall set forth the total period of extensions, if any, previously obtained by the moving party. In determining whether to grant the motion, the Administrative Law Judge shall consider any extensions already granted, the length of the proceedings to date, and the need to conclude the evidentiary hearing and render an initial decision in a timely manner. The Administrative Law Judge shall not rule on *ex parte* motions to extend the deadlines specified in the scheduling order, or modify such deadlines solely upon stipulation or agreement of counsel.

(d) *Meeting prior to final prehearing conference.* Counsel for the parties shall meet before the final prehearing conference described in paragraph (e) of this section to discuss the matters set forth therein in preparation for the conference.

(e) *Final prehearing conference.* As close to the commencement of the evidentiary hearing as practicable, the Administrative Law Judge shall hold a final prehearing conference, which counsel shall attend in person, to submit any proposed stipulations as to law, fact, or admissibility of evidence,