UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of MAXFIELD AND OBERTON HOLDINGS, LLC AND ZEN MAGNETS, LLC Respondents.	CPSC DOCKET NO. 12-1 CPSC DOCKET NO. 12-2

In the Matter of STAR NETWORKS USA, LLC Respondent.	CPSC DOCKET NO. 13-2

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF COMPLAINT COUNSEL'S MOTION TO CONSOLIDATE PROCEEDINGS

The adjudicative proceedings against Respondents Maxfield & Oberton Holdings, LLC ("M&O") and Zen Magnets, LLC ("Zen") were consolidated before this Court on October 30, 2012.[1] Complaint Counsel now moves to consolidate before this Court a newly-filed third proceeding against an importer and distributor of substantively identical magnets, Star Networks USA, LLC ("Star Networks"). On July 27, 2012 Star Networks represented to Consumer

[1] CPSC Docket Nos. 12-1 and 12-2 were initially assigned to Administrative Law Judges Bruce T. Smith and Dean C. Metry, respectively. Because the proceedings were assigned to different Presiding Officers, Acting Chief Administrative Law Judge Parlen L. McKenna considered CPSC's motion to consolidate those two proceedings and ordered that they be consolidated before Judge Metry. *See* Order Granting CPSC's Motion to Consolidate Proceedings at 2 n.3 (October 30, 2012). Complaint Counsel's instant Motion to Consolidate is filed before Judge Metry because he is the Presiding Officer for the two consolidated proceedings, but a copy has also been sent to Chief Judge McKenna should he be the appropriate judicial officer to decide the instant Motion. No judge has been assigned yet to CPSC Docket No. 13-2 naming Star Networks USA, LLC as Respondent.

Product Safety Commission ("CPSC" or "Commission") staff that it would voluntarily stop importing and distributing aggregated masses of high-powered, small rare earth magnets under the brand name Magnicube ("Subject Products") effective July 31, 2012. Subsequently, the Firm notified CPSC staff that it was considering modifications to the product's packaging, warnings, and shapes. However, at no time did the Firm provide sufficiently detailed proposals regarding any such product, packaging or warnings changes for staff's consideration and staff is unaware that any such changes were in fact made. On November 13, 2012, the Firm, through counsel, notified staff that it had reversed its decision to stop sale and announced that it intended to resume sale and distribution of the Subject Products. CPSC staff requested that Star Networks renew its commitment to stop sale voluntarily and submit a voluntary corrective action plan, but Star Networks refused to stop sale and produced no formal corrective action plan for staff's consideration. On November 15, 2012, and again on December 7, 2012, counsel for the Firm confirmed in writing to CPSC staff that Star Networks had resumed sale of the Subject Products.

On December 17, 2012, Complaint Counsel filed an administrative complaint (attached as Exhibit A) against Star Networks requesting that the Commission determine that the Subject Products are a substantial product hazard under sections 15(a)(1) and 15(a)(2) of the Consumer Product Safety Act, 15 U.S.C. § 2064(a)(1), (2). Complaint Counsel further requested, among other relief, that the Commission order Star Networks to cease importation and distribution of the Subject Products and offer consumers a refund. The administrative complaint against Star Networks alleges the same violations of the CPSA and seeks identical relief as the amended complaints against M&O and Zen. Moreover, the Subject Products are substantively identical to the products imported and sold by M&O and Zen.

Commission Regulations at 16 C.F.R. § 1025.19 provide that "two or more matters which have been scheduled for adjudicative proceedings and which involve similar issues may be consolidated for the purposes of hearing or Commission review." Commission Regulations give the Court broad latitude to order consolidation at any time during the proceedings and to determine which issues should be considered jointly. *See* 16 C.F.R. § 1025.19 ("the proceedings may be consolidated to such extent and upon such terms as may be proper.").[2] *See also* Preamble to 16 C.F.R. Part 1025, 45 Fed. Reg. 29206, 29207 (May 1, 1980) (attached as Exhibit B) ("The granting of broad discretion to the Presiding Officer can be seen throughout the provisions of these rules.").[3] For example, the Court might decide that issues relating to the magnets' physical properties and the health risks associated with ingestion of the products should be considered in a joint session, while issues relating to individual marketing and packaging for each Respondent should be considered separately. In short, consolidated proceedings would provide a more efficient and economical forum for resolution of these three administrative actions than resolving the same issues in duplicative proceedings in separate jurisdictions.

Legally and factually, the case against Star Networks is extremely similar to the cases against M&O and Zen. The products at issue in all three cases consist of aggregated masses of small, high-powered rare earth magnets that can cause serious injury if ingested. Respondents' products in all three cases share, at a minimum, the following similarities: (1) they are nearly

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[2] *See also* FRCP 42(a)(1) (allowing for the consolidation of "any or all matters at issue in the actions"); *Simon v. Philip Morris, Inc.*, 200 F.R.D. 21, 27 (E.D.N.Y. 2001) (a court may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue in those claims in a class action proceeding).

[3] Although not controlling, federal case law also gives this Court broad discretion to consolidate the proceedings. *See Thomas Inv. Partners, Ltd. v. United States*, 444 Fed. Appx. 190, 193 (9th Cir. 2011) ("The court appropriately determined that 'the saving of time and effort consolidation would produce' outweighed 'any inconvenience, delay, or expense that it would cause.' [internal citations omitted])." Although these proceedings are governed by Commission Regulations and not the Federal Rules of Civil Procedure ("FRCP"), "the Commission expects that interpretations of these Rules by the Presiding Officer will be guided by principles stated and developed in case law interpreting the Federal Rules of Civil Procedure." *See* Preamble to 16 C.F.R. Part 1025, 45 Fed. Reg. 29206, 29207 (May 1, 1980) (attached as Exhibit B).

identical in terms of physical size, appearance, magnetic properties, and metallic composition; (2) they exhibit nearly identical behavior when manipulated; (3) they have the potential to cause severe intestinal injuries if ingested; (4) children are likely to interact with the magnets in a way that puts the children at risk to ingest the magnets; and (5) the hazard presented from swallowing magnets contained in the Subject Products is a hidden hazard because parents and caregivers often cannot determine that the magnets have been swallowed until intestinal injury has already occurred, and medical professionals find it difficult to determine whether a child who has ingested the products is at risk. Because similar issues are presented in all three cases, many of the issues to be litigated will apply equally in all three proceedings.

Moreover, Complaint Counsel anticipates that some of its expert witnesses will be used in all three proceedings and will provide testimony on points common to all three matters. Counsel for all Respondents will likely seek to depose the same fact witnesses as the agency, augmenting the rationale for consolidation. Consolidation will allow for the most efficient conduct of discovery and, if necessary, streamlining of hearings and, ultimately, trial proceedings. Discovery has yet to be scheduled in the consolidated proceedings or in the proceeding against Star Networks, so none of the parties would be prejudiced by consolidation in terms of discovery.

Consolidation would also avoid duplication of effort and would expedite the resolution of the administrative proceedings. Moreover, because Zen and Star Networks are represented by the same counsel, David Japha, consolidation would allow Mr. Japha to appear at only a single hearing or deposition in many cases. Consolidation would minimize the possibility of inconsistent adjudications of common factual and legal issues, limit expenditures associated with litigating the matters in separate forums, and lower expenditure of time and resources for the

parties, witnesses, and the Court.[4] As Chief Judge McKenna noted when ordering the consolidation of Dockets 12-1 and 12-2, "[j]udicial efficiency and economy of resources favor consolidation." Order Granting CPSC's Motion to Consolidate Proceedings at 10. Consolidation of the matters would benefit all parties, and Complaint Counsel submits that none of the Respondents would suffer prejudice through consolidation.

Complaint Counsel anticipates that Star Networks may oppose consolidation and potentially raise arguments similar to those raised by Zen when it argued against consolidation.[5] However, Judge McKenna rejected all of Zen's arguments. Specifically, Zen claimed that it would be prejudiced by consolidation because, according to Zen, its magnets, packaging, and warnings were different from M&O's, and no ingestion incidents had yet been documented involving its brand of product. *See* Zen's Objection to Motion to Consolidate at 2-3. In evaluating Zen's contention that its magnets had "greater precision" than M&O's magnets, Judge McKenna stated, "It is difficult to see how any greater precision (either, e.g., in magnetism or consistency of shape/size) has anything to do with the alleged harm or risk such products might represent to consumers." Order Granting CPSC's Motion to Consolidate Proceedings at 9. As to Zen's argument that its packaging and marketing were different from M&O's, Judge McKenna stated that "even if true . . . [c]onsolidation under Agency rules does not require exact similarity with all facts and issues, but rather is broadly worded to contemplate possible

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[4] Under the standard set forth in *Arnold v. Eastern Airlines, Inc.*, 681 F.2d 186, 193 (4th Cir. 1982), this case is an excellent candidate for consolidation:

> The critical question for the district court in the final analysis was whether the specific risks of prejudice and possible confusion were overborne by the risk of inconsistent adjudications of common factual and legal issues, the burden on parties, witnesses and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one, and the relative expense to all concerned of the single-trial, multiple-trial alternatives.

[5] This Court may grant consolidation even if Respondents oppose. *See, e.g., Gonzalez-Quiles v. Cooperativa De Ahorro Y Credito De Isabela*, 250 F.R.D. 91, 93 (D.P.R. 2007) ("the fact that one or all of the parties object, or that the issue of consolidation is raised by the court *sua sponte*, is not dispositive. The important question is whether the cases involve a common question of law or fact.").

consolidation where there are 'similar issues.'" *Id.* at 9. Similarly, when Zen contended that its proceeding should not be consolidated with M&O's proceeding given the absence of any ingestion incidents involving Zen's product, Judge McKenna ruled that "Zen Magnets' assertion that their products have not been associated with any of the particular incidents CPSC cites is also potentially less relevant if the products are essentially the same." *Id.* at 9 n.12.

As Judge McKenna recognized, "Consolidation does not force the parties to litigate the cases together or mandate that the parties present a unified or consistent defense. . . . Each Respondent will have the full opportunity to litigate its respective case and defend itself in a consolidated proceeding as compared to separate adjudications." *Id.* at 10. By the same reasoning, the legal and factual allegations against Star Networks are so similar to the allegations in the other two proceedings that consolidation is proper even if the cases are not absolutely identical.

Complaint Counsel acknowledges and appreciates that hearing three proceedings may increase the workload on this Court, and Complaint Counsel will take all steps possible to minimize any additional burden for both the Court and Respondents. Complaint Counsel nonetheless believes that consolidation will reduce duplication of effort and the possibility of inconsistent outcomes if the Star Networks proceeding remains separate. Complaint Counsel hereby moves to consolidate the proceeding at CPSC Docket No. 13-2 with the proceedings at CPSC Docket Nos. 12-1 and 12-2 pursuant to § 16 C.F.R. § 1025.19.

Respectfully submitted,

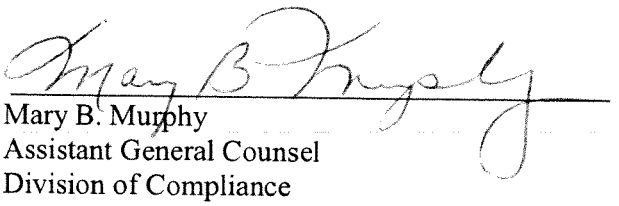

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EXHIBIT A

ADMINISTRATIVE COMPLAINT AGAINST STAR NETWORKS USA, LLC

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of STAR NETWORKS USA, LLC Respondent.	)	CPSC DOCKET NO. 13-2

COMPLAINT

Nature of Proceedings

1. This is an administrative enforcement proceeding pursuant to Section 15 of the Consumer Product Safety Act ("CPSA"), as amended, 15 U.S.C. § 2064, for public notification and remedial action to protect the public from the substantial risk of injury presented by aggregated masses of high-powered, small rare earth magnets known as Magnicube Magnet Balls ("Magnicube Spheres") and Magnet Cubes ("Magnicube Cubes") (collectively the "Subject Products"), imported and distributed by STAR NETWORKS USA, LLC ("Star" or "Respondent").

2. This proceeding is governed by the Rules of Practice for Adjudicative Proceedings before the Consumer Product Safety Commission ("Commission"), 16 C.F.R. part 1025.

Jurisdiction

3. This proceeding is instituted pursuant to the authority contained in Sections 15(c), (d), and (f) of the CPSA, 15 U.S.C § 2064 (c), (d), and (f).

Parties

4. Complaint Counsel is the staff of the Division of Compliance within the Office of the General Counsel of the Commission ("Complaint Counsel"). The Commission is an independent federal regulatory agency established pursuant to Section 4 of the CPSA, 15 U.S.C. § 2053.

5. Upon information and belief, Star is a New Jersey corporation with its principal place of business located at 26 Commerce Road, Suite B, Fairfield, New Jersey, 07004.

6. Respondent is an importer and distributor of the Subject Products.

7. As an importer and distributor of the Subject Products, Respondent is a "manufacturer" and "distributor" of a "consumer product" that is "distributed in commerce," as those terms are defined in CPSA sections 3(a)(5),(7), (8), and (11) of the CPSA, 15 U.S.C. §§ 2052(a)(5),(7), (8), and (11).

The Consumer Product

8. Respondent imported and distributed the Subject Products in U.S. commerce and offered them for sale to consumers for their personal use in or around a permanent or temporary household or residence, a school, and in recreation or otherwise.

9. Upon information and belief, the Subject Products consist of small, individual magnets that are packaged as aggregated masses in different sized containers holding 125, 216, 250, 343 or 1,027 small magnets, ranging in size from approximately 5.0 mm to 6.0 mm, with a variety of coatings, and a flux index greater than 50.

10. Upon information and belief, the flux index of the Magnicube Spheres ranges from 435.1 to 876.5 $kg^2mm.^2$

11. Upon information and belief, the flux index of the Magnicube Cubes ranges from 441.9 to 496.4 $kg^2mm.^2$

12. Upon information and belief, Magnicubes Spheres were introduced into U.S. commerce sometime after August 2010.

13. Upon information and belief, Magnicubes Cubes were introduced into U.S. commerce sometime after August 2010.

14. Upon information and belief, the Subject Products are manufactured by Dongyang Huale Electronics, LTD, Hengdian Industrial Area, Dongyang Zheijiang, China.

15. Upon information and belief, the Subject Products are sold in velvet-lined boxes or foam-lined tins.

16. Upon information and belief, the Subject Products range in retail price from approximately $19.95 to $79.95.

17. Upon information and belief, more than 21,000 sets of Magnicube Spheres have been sold to consumers in the United States.

18. Upon information and belief, more than 480 sets of Magnicube Cubes have been sold to consumers in the United States.

19. Upon information and belief, approximately 17 mixed sets of 125 Magnicube Spheres and 125 Magnicube Cubes marketed as the Magnicube Duo Edition have been sold to consumers in the United States.

COUNT I

The Subject Products are Substantial Product Hazards Under Section 15(a)(2) of the CPSA, 15 U.S.C. § 2064(a)(2), Because They Contain Product Defects That Create a Substantial Risk of Injury to the Public

The Subject Products are Defective Because Their Instructions, Packaging, and Warnings Are Inadequate

20. Paragraphs 1 through 19 are hereby realleged and incorporated by reference as though fully set forth herein.

21. A defect can occur in a product's contents, construction, finish, packaging, warnings and/or instructions. 16 C.F.R. §1115.4

22. A defect can occur when reasonably foreseeable consumer use or misuse, based in part on lack of adequate instructions and safety warnings, could result in injury, even where there are no reports of injury. 16 C.F.R. §1115.4

23. Upon information and belief, Star offered the Subject Products for sale sometime after August 2010 through December 2012 on its direct-sales website, www.magnicube.com.

24. Upon information and belief, sometime after August 2010 through December 2012, Star's U.S. Direct sales website contained the following warning regarding the Subject Products: "**Keep Away from All Children!** This product is NOT intended to be inhaled or swallowed, magnets should not be put in those nose or mouth. Magnets that are inhaled or swallowed may stick to intestines, which may lead to serious injury or death. Immediate medical attention is required if magnets are inhaled or swallowed. Recommended age 14+."

25. Upon information and belief, from sometime after August 2010 through December 2012, the "Safety Notice" page of Star's Direct sales website contained the following

warning regarding the Subject Products: "Magnicube products are NOT toys for children[.] Recommended age 14+. Magnicube Magnet Balls and Magnet Cubes are not manufactured, distributed, promoted, labeled, or intended for children. Ingestion Hazard – This product represents an ingestion Hazard, DO NOT ingest magnets. Magnets that are inhaled or swallowed may stick to intestines, which may lead to serious injury or death. Immediate medical attention is required if magnets are inhaled or swallowed."

26. Upon information and belief, Star offered the Subject Products for sale from November 2011 through July 2012, on Amazon.com, Inc.'s website www.amazon.com.

27. Upon information and belief, from November 2011 through July 2012 Star's product listing for the Subject Products on the Amazon.com, Inc.'s website contained the following warning: **WARNING: CHOKING HAZARD** – WARNING: KEEP AWAY FROM ALL CHILDREN. Do not put in mouth or nose. This product contains small magnets. Swallowed magnets can stick together across intestines causing serious infections and death. Seek immediate medical attention if magnets or swallowed or inhaled. **CHOKING HAZARD** – This toy is a marble. Not for children under 3 yrs. **CHOKING HAZARD** – This toy is a small ball. Not for children under 3 yrs. **CHOKING HAZARD** – Small parts. Not for children under 3 yrs. **CHOKING HAZARD** – Toy contains a small ball. Not for children under 3 yrs."

28. Upon information and belief, on or about June 14, 2012, Star authorized online discount retailer Groupon, Inc. to issue an internet offer for the sale of the Subject Products on Groupon, Inc.'s website, www.groupon.com.

29. Upon information and belief, the Groupon internet offer contained the following warning: "Recommended for ages 14 and up. Keep out of reach of children."

30. Upon information and belief, sets of the Subject Products are currently sold in tins with the following warning printed on a sticker on the underside of the tin:

> WARNING: Keep Away From All Children! This product is NOT intended to be inhaled or swallowed, magnets [*sic*] should not be put in nose or mouth. Magnets that are inhaled or swallowed may stick to intestines, which may lead to serious injury or death. Immediate medical attention is required if magents are inhaled or swallowed. Recommended age 14+."

31. Upon information and belief, sets of the Subject Products are currently sold in boxes with following warning printed on the underside of a cardboard sleeve that wraps around the box:

> WARNING: Keep Away From All Children! This product is NOT intended to be inhaled or swallowed, magnets [*sic*] should not be put in nose or mouth. Magnets that are inhaled or swallowed may stick to intestines, which may lead to serious injury or death. Immediate medical attention is required if magents are inhaled or swallowed. Recommended age 14+."

32. Upon information and belief, the Subject Products are packaged without any instructions.

33. Before and after the Subject Products were introduced into commerce sometime after August 2010, many children under the age of 14 have ingested products (the "Ingested Products") that are almost identical in form, substance, and content to the Subject Products.

34. Upon information and belief, the Ingested Products are marketed and used in substantially similar ways to the Subject Products.

35. Upon information and belief, on or about January 28, 2010, a 9-year-old boy used high-powered, small, spherically-shaped magnets almost identical in form, substance, and content to the Subject Products to mimic tongue and lip piercings, and accidentally ingested seven magnets. He was treated at an emergency room.

36. Upon information and belief, on or about September 5, 2010, a 12-year-old girl accidentally swallowed two high-powered, small, spherically-shaped magnets almost identical in form, substance, and content to the Subject Products. She sought medical treatment at a hospital, including x-rays and monitoring for infection and damage to her gastrointestinal tract.

37. Upon information and belief, on or about December 23, 2010, a 3-year-old girl ingested eight high-powered, small, spherically-shaped magnets almost identical in form, substance, and content to the Subject Products that she found on a refrigerator in her home. She required surgery to remove the magnets. The magnets caused intestinal and stomach perforations, and had also become embedded in the girl's trachea and esophagus.

38. Upon information and belief, on or about January 6, 2011, a 4-year-old boy suffered intestinal perforations after ingesting three high-powered, small, spherically-shaped magnets almost identical in form, substance, and content to the Subject Products that he thought were chocolate candy because they looked like the decorations on his mother's wedding cake.

39. By November 2011, the Commission was aware of approximately 22 reports of ingestions of high-powered, small, spherically-shaped magnets almost identical in form, substance, and content to the Subject Products.

40. On November 11, 2011, the Commission issued a public safety alert warning the public of the dangers of the ingestion of rare earth magnets like the Subject Products.

41. Ingestion incidents, however, continue to occur.

42. Since the safety alert, the Commission has received dozens of reports of children ingesting high-powered, small, spherically-shaped magnets that are almost identical in form, substance, and content to the Subject Products, but may be manufactured and/or sold by firms other than the Respondent.

43. Upon information and belief, on or about January 17, 2012, a 10-year-old girl accidentally ingested two high-powered, small, spherically-shaped magnets almost identical in form, substance, and content to the Subject Products after using them to mimic a tongue piercing. The magnets became embedded in her large intestine, and she underwent x-rays, CT scans, endoscopy, and an appendectomy to remove them. The girl's father had purchased the magnets for her at the local mall.

44. All warnings on the Subject Products and/or on the websites where the Subject Products are or were offered for sale are inadequate and defective because they do not and cannot effectively communicate to consumers, including parents and caregivers, the hazard associated with the Subject Products and magnet ingestions.

45. Because the warnings on the Subject Products and/or on the websites where the Subject Products are or were offered for sale are inadequate and defective, parents will continue to give children the Subject Products or allow children to have access to the Subject Products.

46. Parents and caregivers are unlikely to appreciate the hazard associated with the product because the product warnings refer to the product as a "marble" and as a "small ball." This product description suggests that the potential health risk posed by the Subject Products is

from choking, rather than intestinal perforations or other gastrointestinal injuries that can result if more than one magnet ball is swallowed.

47. Children cannot and do not appreciate the hazard, and it is foreseeable that they will mouth the items, swallow them, or, in the case of adolescents and teens, use them to mimic body piercings. These uses can and do result in injury.

48. All warnings on the packaging of the Subject Products are inadequate and defective because the font-size of the warnings hinders legibility and may discourage consumers from reading the warning message, making it less likely that consumers will review the warnings on the packaging prior to foreseeable uses of the Subject Products. These uses can and do result in injury.

49. All warnings on the packaging and/or carrying cases of the Subject Products are inadequate and defective because the placement of the warnings only on the underside of the packaging and/or carrying case renders the warnings inconspicuous such that consumers likely will not review the warnings prior to foreseeable uses of the Subject Products. These uses can and do result in injury.

50. All warnings on the Subject Products that are packaged in boxes are inadequate and defective because the cardboard sleeve on which the warnings are written is not necessary for use of the Subject Products and is often discarded. Because the cardboard sleeve is unnecessary and is often discarded, consumers likely will not review the warnings on the packaging prior to foreseeable uses of the Subject Products. These uses can and do result in injury.

51. All warnings on the Subject Products are inadequate and defective because once the Subject Products are removed from the packaging and/or the carrying case prior to foreseeable uses of the Subject Products, the magnets themselves display no warnings, and the small size of the individual magnets precludes the addition of warnings. These uses can and do result in injury.

52. All warnings on the Subject Products are inadequate and defective because the magnets are shared and used among various consumers, including children, after the packaging is discarded; thus, many consumers of the Subject Products will have no exposure to any warnings prior to using the Subject Products. These uses can and do result in injury.

53. All warnings displayed on the carrying cases, if any, are inadequate and defective because consumers are unlikely to disassemble configurations made with the Subject Products after each use, many of which are elaborate and time-consuming to create, to return the Subject Products to the carrying case or to put the Subject Products out of the reach of children.

54. The effectiveness of the warnings on the Subject Products is further diminished by the advertising and marketing of the Subject Products.

55. Upon information and belief, as late as May 2012, Star was aware that the Subject Products were displayed with other toys on the Amazon.com, Inc.'s website.

56. Upon information and belief, as of November 2012, Respondent advertised the Subject Products on its direct sale website as a "toy," encouraging consumers to "get out of your daze with your new toy."

57. Upon information and belief, the Subject Products are described on Star's direct sales website as a magnetic puzzle, a 3d puzzle, and magnetic puzzle gift items that are typically considered playthings for children under the age of 14.

58. The advertising and marketing of the Subject Products conflict with the claimed 14+ age grade label on the Subject Products.

59. Because the advertising and marketing of the Subject Products conflict with the age label, the effectiveness of the age label is diminished.

60. The advertising and marketing of Subject Products conflict with the stated warnings on the Subject Products.

61. Because the advertising and marketing conflict with the stated warnings, the effectiveness of the warnings is diminished.

62. No warnings or instructions could be devised that would effectively communicate the hazard in a way that would be understood and heeded by consumers and would reduce the incidences of magnet ingestions.

63. Because of the lack of adequate instructions and safety warnings, a substantial risk of injury occurs as a result of the foreseeable use and misuse of the Subject Products.

The Subject Products Are Defective Because the Risk of Injury Occurs as a Result of Its Operation and Use and the Failure of the Subject Products to Operate as Intended

64. A design defect can be present if the risk of injury occurs as a result of the operation or use of the product or a failure of the product to operate as intended. 16 C.F.R. § 1115.4.

65. The Subject Products contain a design defect because they present a risk of injury as a result of their operation and/or use.

66. Upon information and belief, the Subject Products have been advertised and marketed by the Respondent to both children and adults.

67. As a direct result of such marketing and promotion, the Subject Products have been, and are currently used by, both children and adults.

68. The risk of injury occurs as a result of the use of the Subject Products by adults, who give the Subject Products to children or allow children to have access to the Subject Products.

69. The risk of injury occurs as a result of the foreseeable use and/or misuse of the Subject Products by children.

70. The Subject Products contain a design defect because they fail to operate as intended and present a substantial risk of injury to the public.

71. Upon information and belief, Respondent contends that the Subject Products are manipulatives that provide stress relief and other benefits to adults only.

72. The Subject Products are intensely appealing to children due to their tactile features, their small size, and their highly reflective, shiny metallic and colorful coatings.

73. Certain sets of the Subject Products come in bright color combinations which are likely to add to the perception that the magnets are intended to appeal to children because they offer creative value as puzzles, models, or art by combining magnetism and color.

74. The Subject Products are also appealing to children because they are smooth, unique, and make a soft snapping sound as they are manipulated.

75. The Subject Products also move in unexpected, incongruous ways as the poles on the magnets move to align properly, which can evoke a degree of awe and amusement among children enticing them to play with the Subject Products.

76. Despite the Respondent's current age label and asserted use of the Subject Products, they do not operate as intended because they are intensely appealing to and are often played with by children.

77. This defective design of the Subject Products poses a risk of injury because parents and caregivers buy the Subject Products for children and/or allow children to play with the Subject Products.

The Type of the Risk of Injury Renders the Subject Products Defective

78. The risk of injury associated with a product may render the product defective. 16 C.F.R. § 1115.4.

79. Upon information and belief, the Subject Products have low utility to consumers.

80. Upon information and belief, the Subject Products are not necessary to consumers.

81. The nature of the risk of injury includes serious, life-threatening, and long-term health conditions that can result when magnets attract to each other through intestinal walls, causing harmful tissue compression that can lead to perforations, fistulas, and other gastrointestinal injuries.

82. Children, a vulnerable population protected by the CPSA, are exposed to risk of injury by the Subject Products.

83. The risk of injury associated with the ingestion of the Subject Products is neither obvious nor intuitive.

84. Warnings and instructions cannot adequately mitigate the risk of injury associated with ingesting the Subject Products.

85. Children mouthing and ingesting the Subject Products is foreseeable.

86. Children using the Subject Products for body art, including mimicking tongue piercings, is foreseeable.

87. The type of the risk of injury renders the Subject Products defective.

The Subject Products Create a Substantial Risk of Injury to the Public

88. The Subject Products pose a risk of magnet ingestion by children below the age of 14, who may, consistent with developmentally appropriate behavior, place a single magnet or numerous magnets in their mouth.

89. The risk of ingestion also exists when adolescents and teens use the Subject Products to mimic piercings of the mouth, tongue, and cheek and accidentally swallow the magnets.

90. If two or more of the magnets are ingested and the magnetic forces of the magnets pull them together, the magnets can pinch or trap the intestinal walls or other digestive tissue between them, resulting in acute and long-term health consequences. Magnets that attract through the walls of the intestines result in progressive tissue injury, beginning with local inflammation and ulceration, progressing to tissue death, then perforation or fistula formation. Such conditions can lead to infection, sepsis, and death.

91. Ingestion of more than one magnet often requires medical intervention, including endoscopic or surgical procedures.

92. Because the initial symptoms of injury from magnet ingestion are nonspecific and may include nausea, vomiting, and abdominal pain, caretakers, parents, and medical professionals may easily mistake these nonspecific symptoms for other common gastrointestinal upsets, and erroneously believe that medical treatment is not immediately required, thereby delaying potentially critical treatment.

93. Medical professionals may not be aware of the dangers posed by ingestion of the Subject Products and the corresponding need for immediate evaluation and monitoring. A delay of surgical intervention or other medical treatment due to the presentation of nonspecific symptoms and/or a lack of awareness by medical personnel of the dangers posed by multiple magnet ingestion can exacerbate life-threatening internal injuries.

94. Magnets that become affixed through the gastrointestinal walls and are not surgically removed may result in intestinal perforations which can lead to necrosis, the formation of fistulas, or ultimately, perforation of the bowel and leakage of toxic bowel contents into the abdominal cavity. These conditions can lead to serious injury and possibly even death.

95. Endoscopic and surgical procedures may also be complicated in cases of multiple magnet ingestion due to the attraction of the magnets to the metal equipment used to retrieve the magnets.

96. Children who undergo surgery to remove multiple magnets from their gastrointestinal tract are also at risk for long-term health consequences, including intestinal

scarring, nutritional deficiencies due to loss of portions of the bowel, and, in the case of girls, fertility problems.

97. The Subject Products contain defects in packaging, warnings, and instructions, that create a substantial risk of injury to the public.

98. The Subject Products contain defects in design that pose a substantial risk of injury.

99. The type of the risk of injury posed by the Subject Products creates a substantial risk of injury.

100. Therefore, because the Subject Products are defective and create a substantial risk of injury, the Subject Products present a substantial product hazard within the meaning of Section 15(a)(2) of the CPSA, 15 U.S.C. § 2064(a)(2).

COUNT II

The Subject Products Are Substantial Product Hazards Under Section 15(a)(1) of the CPSA, 15 U.S.C. § 2064(a)(1)

101. Paragraphs 1 through 100 are hereby realleged and incorporated by reference as though fully set forth herein.

102. Upon information and belief, each of the Subject Products is an object designed and/or manufactured as a plaything for children under 14 years of age, and, therefore, each of the Subject Products that was imported and/or otherwise distributed in commerce after August 16, 2009, is a "toy" as that term is defined in ASTM International Standard F963-08, *Standard*

Consumer Safety Specification for Toy Safety, section 3.1.72 and its most recent version, ASTM 963-11 section 3.1.81 ("the Toy Standard").

103. As toys, and as toys intended for use by children under 14 years of age as addressed in the Toy Standard, the Subject Products that were imported and/or otherwise distributed in commerce after August 16, 2009, were and are covered by the Toy Standard.

104. Pursuant to the Toy Standard, a magnet that has a flux index greater than 50 and that is a small object as determined by the Toy Standard is a "hazardous magnet."

105. The Toy Standard prohibits toys from containing a loose as-received hazardous magnet.

106. The Subject Products that were imported and/or otherwise distributed in commerce after August 16, 2009 consist of and contain loose as-received hazardous magnets. As a result, the Subject Products that were imported and/or otherwise distributed in commerce after August 16, 2009 fail to comply with the Toy Standard.

107. The Subject Products that were imported and/or otherwise distributed in commerce after August 16, 2009 create a substantial risk of injury to the public.

108. Because the Subject Products that were imported and/or otherwise distributed in commerce after August 16, 2009 fail to comply with the Toy Standard and create a substantial risk of injury to the public, they are substantial product hazards as the term "substantial product hazard" is defined in Section 15(a)(1) of the CPSA, 15 U.S.C. § 2064(a)(1).

Relief Sought

Wherefore, in the public interest, Complaint Counsel requests that the Commission:

A. Determine that the Subject Products present a "substantial product hazard" within the meaning of Section 15(a)(2) of the CPSA, 15 U.S.C. § 2064(a)(2), and/or presents a "substantial product hazard" within the meaning of Section 15(a)(1) of the CPSA, 15 U.S.C. § 2064(a)(1).

B. Determine that extensive and effective public notification under Section 15(c) of the CPSA, 15 U.S.C. § 2064(c), is required to adequately protect children from the substantial product hazard presented by the Subject Products, and order Respondents under Section 15(c) of the CPSA, 15 U.S.C. § 2064(c) to:

(1) Cease importation and distribution of the Subject Products;

(2) Notify all persons that transport, store, distribute or otherwise handle the Subject Products, or to whom such product has been transported, sold, distributed or otherwise handled, to immediately cease distribution of the products;

(3) Notify appropriate state and local public health officials;

(4) Give prompt public notice of the defects in the Subject Products, including the incidents and injuries associated with ingestion including posting clear and conspicuous notice on Respondent's website, and providing notice to any third party website on which Respondent has placed the Subject Products for sale, and provide further announcements in languages other than English and on radio and television;

(5) Mail notice to each distributor or retailer of the Subject Products; and

(6) Mail notice to every person to whom the Subject Products were delivered

or sold;

C. Determine that action under Section 15(d) of the CPSA, 15 U.S.C. § 2064(d), is in the public interest and additionally order Respondent to:

(1) Refund consumers the purchase price of the Subject Products;

(2) Make no charge to consumers and to reimburse consumers for any reasonable and foreseeable expenses incurred in availing themselves of any remedy provided under any Commission Order issued in this matter, as provided by Section 15 U.S.C. § 2064(e)(1);

(3) Reimburse retailers for expenses in connection with carrying out any Commission Order issued in this matter, including the costs of returns, refunds and/or replacements, as provided by Section 15(e)(2) of the CPSA, 15 U.S.C. § 2064(e)(2);

(4) Submit a plan satisfactory to the Commission, within ten (10) days of service of the Final Order, directing that actions specified in Paragraphs B(1) through (6) and C(1) through (3) above be taken in a timely manner;

(5) To submit monthly reports, in a format satisfactory to the Commission, documenting the progress of the corrective action program;

(6) For a period of five (5) years after issuance of the Final Order in this matter, to keep records of its actions taken to comply with Paragraphs B(1) through (6) and C(1) through (4) above, and supply these records to the Commission for the purpose of monitoring compliance with the Final Order;

(7) For a period of five (5) years after issuance of the Final Order in this matter, to notify the Commission at least sixty (60) days prior to any change in its

business (such as incorporation, dissolution, assignment, sale, or petition for bankruptcy) that results in, or is intended to result in, the emergence of a successor corporation, going out of business, or any other change that might affect compliance obligations under a Final Order issued by the Commission in this matter; and

D. Order that Respondent shall take other and further actions as the Commission deems necessary to protect the public health and safety and to comply with the CPSA.

ISSUED BY ORDER OF THE COMMISSION:

Dated this 17th day of December, 2012

BY: Kenneth R. Hinson
Executive Director

U.S. Consumer Product Safety Commission
Bethesda, MD 20814
Tel: (301) 504-7854

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CERTIFICATE OF SERVICE

I hereby certify that on December 17th 2012, I served the foregoing Complaint and List and Summary of Documentary Evidence upon all parties of record in these proceedings by mailing, certified mail, postage prepaid, a copy to each at their principal place of business, and e-mailing a courtesy copy, as follows:

David C. Japha, Esquire
Counsel to Respondent Star Networks USA, LLC
The Law Offices of David C. Japha, P.C.
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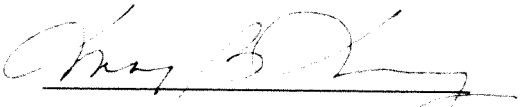

Complaint Counsel for
U.S. Consumer Product Safety Commission

UNITED STATES OF AMERICA
CONSUMER PRODUCT SAFETY COMMISSION

In the Matter of STAR NETWORKS USA, LLC Respondent.	)	CPSC DOCKET NO. 13-2

LIST AND SUMMARY OF DOCUMENTARY EVIDENCE

Pursuant to 16 C.F.R. § 1025.11(b)(3) of the Commission's Rules of Practice for Adjudicative Proceedings, the following is a list and summary of documentary evidence supporting the charges in this matter. Complaint Counsel reserves the right to offer additional evidence during the course of the proceedings.

1. Claims, complaints, medical records, and reports concerning incidents involving the Magnicube Magnet Balls and Magnicube Magnet Cubes (collectively, Subject Products) and similar products.
2. Communications from consumers regarding their purchase of the Subject Products for children under the age of 14, including their attention to, and understanding of, the Subject Products' warnings, labeling, and instructions.
3. Documents evidencing the product warnings, labeling, and packaging since the introduction of the Subject Products in or about 2010.
4. Advertisements, marketing, and promotional materials for the Subject Products, including print and Web media, since sometime after August 2010.
5. Correspondence between Respondent and CPSC staff arising out of staff's defect

investigation of the Subject Products under section 15(a) of the CPSA §15 U.S.C. 2064(a).

6. CPSC's In-Depth Epidemiological Investigation Reports of near-ingestion, ingestion, and injury incidents involving the Subject Products and similar products.

7. CPSC Product Safety Assessments from the Directorate for Engineering Sciences, the Directorate of Economic Analysis, the Division of Health Sciences, and the Division of Human Factors concerning the Subject Products.

8. Documentary evidence regarding any changes to the packaging, labeling, and instructions of the Subject Product since sometime after August 2010.

9. Technical records, technical analyses, and evaluations of the Subject Products conducted by or for Respondent.

10. Technical records, technical analyses, and evaluations of the Subject Products and similar products, and summaries thereof, from outside expert witnesses retained by CPSC staff for the purposes of litigation.

11. Information provided by Respondent to Commission staff pertaining to the Subject Products.

12. Public notices issued by the Commission regarding the Subject Product and similar products.

13. Standards regarding high-powered magnets, including, but not limited to, ASTM F963-08.

14. Reports and publications from medical professionals regarding the hazards of ingestion of magnets, including how the injuries occur, the difficulty in diagnosing and treating such ingestion incidents, and the long-term health consequences

attendant to such injuries.

15. Information provided by consumers pertaining to any products liability, personal injury, or other lawsuits filed against Respondent in connection with the Subject Products.

Dated this 17th day of December, 2012.

Mary Murphy
Assistant General Counsel
Division of Compliance
Office of the General Counsel
U.S. Consumer Product Safety Commission
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Tel: (301) 504-7809

Jennifer Argabright, Trial Attorney
Richa Shyam Dasgupta, Trial Attorney
Leah Wade, Trial Attorney

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Bethesda, Maryland 20814

EXHIBIT B

PREAMBLE TO 16 C.F.R. PART 1025

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1025

Rules of Practice for Adjudicative Proceedings

AGENCY: Consumer Product Safety Commission.

ACTION: Final rules.

SUMMARY: In this document, the Consumer Product Safety Commission sets forth its final Rules of Practice for Adjudicative Proceedings, which shall govern the procedure in adjudicative proceedings arising under the Consumer Product Safety Act, the Flammable Fabrics Act, and in such other proceedings as the Commission may designate.

EFFECTIVE DATE: May 1, 1980.

FOR FURTHER INFORMATION CONTACT: Winston M. Haythe, Directorate for Compliance and Enforcement, Consumer Product Safety Commission, Washington, D.C. 20207, Telephone No. (301) 492–6633.

SUPPLEMENTARY INFORMATION: On July 23, 1974 the Consumer Product Safety Commission published in the **Federal Register** (39 FR 26843) proposed and interim rules of practice for adjudicative proceedings and received comments on that proposal. Thereafter, on June 21, 1977 the Commission published in the **Federal Register** (42 FR 31431) a revised set of proposed and interim rules of practice for adjudicative proceedings, 16 CFR Part 1025. The revisions in the second proposal were made in light of the comments received on the first proposal, as well as the experience gained by the Commission staff in trying cases pursuant to the initially published rules. The proposal of June 21, 1977 invited public comment by July 21, 1977. The comment period was extended until August 22, 1977 at the request of several interested persons who were unable to prepare comments by July 21 (42 FR 29089, August 2, 1977).

A basic intent of the Commission in the development of these final Rules of Practice has been to promulgate a single set of procedural rules which can accommodate both simple matters and complex matters in adjudication. The Commission believes this objective has been accomplished in these Rules. For this reason, the Commission has concluded that it will be unnecessary, and confusing, to have separate rules to govern procedures in adjudications to assess civil penalties. Therefore, the Commission is simultaneously revoking its interim Rules of Practice for Expedited Proceedings ("Expedited Rules") (16 CFR Part 1026) and withdrawing the proposed rule (45 FR 27923, April 25, 1980).

As discussed in the notice revoking the Expedited Rules, the three public comments on 16 CFR Part 1026 stated that, among other things, procedural rights (e.g., discovery) would be limited in expedited proceedings for the assessment of civil penalties. Since the Commission is revoking the Expedited Rules and will conduct all administrative proceedings for the assessment of civil penalties under these final Rules of Practice, the concerns expressed by the public comments have been rendered moot. Thus, the final Rules of Practice, which are patterned on the Federal Rules of Procedure, will be used in all administrative matters, including civil penalty assessment hearings, except in those instances where the matter of a civil penalty is presented to a United States District Court in conjunction with an action by the Commission for injunctive or other appropriate relief. When the Commission proceeds against a person for injunctive or other appropriate relief in a United States District Court, the Commission may, if it so chooses, combine the assessment of a civil penalty with the injunctive application into a single case to be heard by the Court. However, the Commission retains the right to institute an administrative proceeding for the assessment of a civil penalty separate and distinct from any court action for an injunction against the same party. In either instance every affected party will be afforded the full panoply of procedural due process rights as guaranteed by the Constitution.

Discussion of Major Comments

Identification of Comments

In response to the Commission's proposal of June 21, 1977 comments were received from manufacturers, directly and through trade associations, an association of retailers and a law school-affiliated public interest organization.

In addition to the public comments on the proposed rules, a number of suggestions were made by members of the Commission staff, based upon their individual experiences in using the proposed rules in the course of administrative hearings.

As the "Section-By-Section Analysis of Comments" will show, the Commission has accepted some suggestions contained in the comments, thereby either amending or deleting portions of the proposed rules, and has rejected others.

Commission Objectives in Development of Rules

The Commission has been guided by certain overall objectives in drafting rules which are to govern matters in adjudication. The primary objective is to achieve a just, speedy and inexpensive determination based upon the evidence, with a uniformity of treatment in all adjudications. Openness is another objective. From its inception in 1973, the Commission has conducted its regulatory activities in full public view and has encouraged, to the maximum extend, meaningful public participation in its regulatory efforts. These final Rules reflect the Commission's openness policy by requiring that matters in litigation be transacted in sessions which are open to the public to the fullest extent possible.

To encourage meaningful public participation in the adjudicative process, the Commission has provided in these Rules for a person to appear as a "participant." A participant shall have the privilege of participating in the proceedings to the extent of making a written or oral statement of position, and may file proposed findings of fact and conclusions of law, as well as a post hearing brief, with the Presiding Officer. See § 1025.17(b). A participant's statements shall be considered but not accorded the status of probative evidence. A participant may also participate in any appeal of a matter by complying with §§ 1025.53–54. In exchange for the limited participation just described, those provisions relieve participants from the necessity of complying with the more stringent legal requirements which are imposed on parties with full litigating rights. Additionally, if a member of the public, who is not a named party to the proceedings, desires to participate in the adjudication with the full range of litigating rights of any other party, one can be an "intervenor" if the requirements for intervenor status set forth in § 1025.17 are met.

Another major objective of the Commission in the development of these rules has been to insure that all matters in adjudication move forward in a timely manner because of the safety issues involved in the Commission's enforcement actions. Thus, while affording adequate protection to the Constitutional due process rights of every affected party, the Commission has imposed certain time restrictions within these Rules. For example, all discovery must be completed within 150 days after issuance of a complaint,

unless otherwise ordered by the Presiding Officer in exceptional circumstances. See § 1025.31(g).

These rules have been designed to accommodate both the simplest and the most complex types of cases. The vehicle for achieving such flexibility within a single set of adjudicative rules is to place broad discretion in the Presiding Officer who hears a matter in controversy. The granting of broad discretion to the Presiding Officer can be seen throughout the provisions of these rules.

Except as otherwise provided, these Rules have been patterned on the Federal Rules of Civil Procedure. Therefore, legal practitioners who are familiar with the United States court system will already be familiar with most, if not all, procedural requirements of the Commission. Additionally, the Federal Rules of Evidence are applicable to proceedings before the Commission, except as they may be relaxed by the Presiding Officer if the ends of justice will be better served in so doing. See § 1025.43(a).

The major overall objective of the Commission in developing these Rules has been to ensure that matters in adjudication be carried out in furtherance of the Commission's Congressional mandate "to protect the public against unreasonable risks of injury associated with consumer products." 15 U.S.C. 2051(b)(1). The Commission believes that these final Rules of Practice for Adjudicative Proceedings achieve the Commission's objectives for matters in administrative litigation.

Section-by-Section Analyses of Comments

Significant changes have been made throughout these Rules as a result of public comments, staff recommendations, and/or upon the Commission's own initiative. The principal issues raised by the comments and the Commission's conclusions are as follows:

1. *Section 1025.3(e).* Two comments suggested that the definition of the term "motion" be amended to make clear that only those persons with an interest in the subject of the motion would be entitled to respond to it. Section 1025.3(e) limits responses to motions to parties in a proceeding. Section 1025.3(f) defines the term "party" to mean any person named in the proceedings subject to the Rules or any intervenor. Section 1025.17(d) sets forth factors which a Presiding Officer shall consider in ruling on petitions to intervene, e.g., the nature and extent of the property, financial or other substantial interest in the proceedings of the person seeking to intervene. Section 1025.17(a) provides that once granted intervenor status, such intervenor shall have the full range of litigating rights afforded to any other party. Since § 1025.3(e) already limits responses to parties to the proceedings, the Commission's view is that the commenters objective has already been achieved and no further clarification within § 1025.3(e) is necessary.

2. *Section 1025.3(i).* One comment requested that the term "Presiding Officer" be redefined to include only a member of the Commission or an administrative law judge. The Commission has decided to revise the definition of the term "Presiding Officer" to exclude Commissioners. Without this change a Commissioner could review on appeal the determinations he/she made during the hearing and the initial decision he/she prepared.

The Commission has decided it is better to exclude a member of the Commission from serving as a Presiding Officer than to exclude the Commissioner who serves as a Presiding Officer from participating as a member of the Commission in an appeal. If a Commissioner presides at an adjudication, prepares the initial decision and is excluded from the appellate process, the other Commissioners might nonetheless be influenced by the fact that a fellow Commissioner rendered the decision. In addition, there may be the public perception that that may happen. Also, by excluding the Commissioner that presided, the possibility of a tie Commission vote is greatly enhanced. To avoid these difficulties the definition has been changed to exclude members of the Commission.

3. *Sections 1025.11 (a) and (b).* Although no public comment addressed these provisions which concern the commencement of proceedings, the Commission has amended the language in these sections to provide that adjudicative proceedings will be commenced, after the Commission has determined that a *prima facie* case has been established, by the issuance of a complaint bearing the signature of the individual delegated responsibility to sign the Complaint by the Commission. As proposed, §§ 1025.11 (a) and (b) provided that a complaint must be issued "by the Commission" and "signed by the Secretary on the seal of the Commission."

The final provision reflects the fact that the burden of proof in an administrative proceeding is on the Directorate for Compliance and Enforcement and to avoid the appearance that the Commission is both prosecuting and deciding each adjudication.

4. *Section 1025.11(b)(3).* As proposed, this section directs that the documents that accompanied the staff's recommendation to the Commission to initiate the proceeding, and that are obtainable under the Freedom of Information Act, 5 U.S.C. 552, be attached to the complaint. Two comments stated that this provision could authorize the attachment of trade secrets and other confidential commercial information to a complaint. The concerns expressed and suggestions raised in those comments are now moot since § 1025.11(c) has been changed in the final section to provide that only a list and summary of the documentary evidence shall be attached to the complaints.

5. *Section 1025.11(c) (§ 1025.11(d) as proposed).* This section provides for the prompt publication in the Federal Register of the complaint after it is issued. One comment stated that a complaint should not be published in the Federal Register as provided in proposed § 1025.11(d) and two other comments expressed concern that a complaint could conceivably be published before a respondent had knowledge of the complaint. Although it is theoretically possible that a complaint could be published in the Federal Register prior to completion of service, the Commission believes such an occurrence is unlikely because of the necessary delay in publication resulting from the preparation of transmitted documents at the Commission and the time required at the Office of the Federal Register to prepare the complaint for publication. Despite the risk of delayed service upon the respondent, the Commission believes prompt publication is important, especially in view of possible class actions under § 1025.18, as well as to give notice of the complaint to potential participants or intervenors under § 1025.17.

6. *Section 1025.13.* Three comments object to the section authorizing the Presiding Officer to allow appropriate amendments and supplemental pleadings which do not unduly broaden the issues in the proceedings or cause undue delay. The commenters expressed concern that amendments to the administrative complaint could (1) alter the charges originally authorized by the Commission, thereby usurping the Commission's function, (2) allow extraneous issues to be introduced into an adjudication, and (3) hamper the respondent's ability to develop an adequate defense or conduct adequate

discovery if permitted just before or during a hearing. One comment stated that the Rules of Practice contain no express mechanism for opposing amendments or supplemental pleadings, while another suggested allowing an interlocutory appeal to the Commission of a decision of the presiding officer allowing amendments to the complaint or the submission of supplemental pleadings.

The Commission believes that procedures established by the final Rules of Practice are adequate to protect the rights of respondents and to accomplish the purposes of a just and speedy adjudication. The procedural mechanism for amending the complaint or allowing supplemental pleadings is by motion addressed to the presiding officer. *See* final § 1025.23. Sections 1025.23 (a) and (c) expressly provide for the submission of opposition to the motion. In ruling upon a motion, the presiding officer must heed certain fundamental principles. Respondents are entitled to be adequately informed of the legal authority and jurisdiction invoked for the proceeding and of the matters of fact and law relied upon. 5 U.S.C. 554(b). *See, Rodale Press, Inc.* v. *FTC*, 407 F.2d 1252 (D.C. Cir. 1968); *NRLB* v. *Tennsco Corp.*, 339 F.2d 396 (6th Cir. 1964). The right to be informed of the charges, alleged facts and legal theories implicitly carries with it the right to an adequate opportunity to prepare a defense to the charges, including conducting discovery. In ruling upon a motion to amend or file supplemental pleadings, the presiding officer must consider any delay or prejudice to the parties that may result. In addition, since § 1025.11(a) provides that only a complaint authorized by the Commission may be issued, amendments to the complaint must come within the scope of the Commission's authorization. Thus, neither the presiding officer nor the Commission's staff is usurping the Commission's function. The Commission believes that these Rules of Practice provide adequte procedures for the parties to argue their respective positions and an adequate framework for the exercise of the broad discretion vested in the presiding officer. Consistent with the Commission's view to limit interlocutory appeals to avoid undue delay during the progress of an adjudication, we have declined to adopt any of the changes recommended by the commenters.

7. *Section 1025.16(b)(4).* Three comments raised objection to the provision allowing service by publication in the **Federal Register** for "a respondent not otherwise served pursuant to these rules." Each comment observed that the Supreme Court of the United States has determined that actual notice is required to all class members who can be ascertained through reasonable efforts. The Commission intends nothing less.

Where known or reasonably ascertainable, each class member will recieve notice as provided by § 1025.16(b)(1)–(3). Where class members cannot be identified through reasonable efforts by the Commission, then service may be made by publication in the **Federal Register** "and such other notice as may be directed by the Presiding Officer * * *" § 1025.16(b)(4). The Commission anticipates that the notice directed by the Presiding Officer will include notice by publication in trade journals and by other efforts reasonably calculated to give to each class member the best notice practicable under the circumstances.

Moreover, the Commission observes that is is unnecessary for individual class members to receive personal notice in a class action maintained pursuant to the Federal Rules of Civil Procedure (Fed.R.Civ.P.) Rule 23 (b)(1) or (b)(2) if the class is adequately represented. Where the representation is adequate, due process is satisfied because the cohesiveness of the class assures that "the named representatives will protect the absent members and give them the functional equivalent of a day in court." *Souza* v. *Scalone*, 64 F.R.D. 654, 659 (N.D.Cal. 1974); 7A Wright and Miller, *Federal Practice and Procedures: Civil* § 1786 (1972 ed.).

The class actions which may be instituted under these Rules are the equivalent of those under Fed.R.Civ.P. 23 (b)(1) or (b)(2). The Presiding Officer may direct notice to be published in any acceptable publication, in addition to the **Federal Register**. The service by publication will be resorted to where class members are unknown, are not reasonably ascertainable, or are unreachable by other means of service as provided by these Rules. Accordingly, the Commission has not substantively changed this section.

8. *Section 1025.16(g).* One comment requested that the proposed rule be changed to provide that the service date be the date of actual delivery rather than the date of deposit in the mail, because of delays in mail delivery. Section 1025.15(b) provides for three (3) additional days in time computations for documents served by mail, as does Fed.R.Civ.P. 6(e). Accordingly, the Commission's view is that § 1025.16(f) is sufficient as proposed.

9. *Section 1025.17(b).* Three comments were received on the section on intervention which provides for participation by a person not an intervenor as a "participant." A participant shall have the privilege, as provided in § 1025.41(d), of making a statement of position and of filing proposed findings of fact and conclusions of law and a post hearing brief. One comment sought clarification as to whether § 1025.17(b)(3), in conjunction with § 1025.41(d), was intended to limit a participant to a single "statement of position," and if so intended, then no objection was interposed by the comment. The Commission does intend to limit a participant to a single statement of position.

A second comment urged that public participation be limited to intervenors with full rights and obligations and suggested deletion of the "participant" status. The commentor recommended, alternatively, limiting the participant to filing only a statement of position. A third commenter praised the concept of such status, while offering some suggested changes to § 1025.17. After careful consideration of all comments on this section, the Commission's position is that all persons affected by the agency's regulatory enforcement activities and the public generally should and will have the means to be heard. Participant status provides a mechanism for accomplishing that objective with less involvement and responsibility than an interview. Accordingly, no substantive revisions have been made.

10. *Section § 1025.18.* Two comments were received which addressed the issue of respondent class actions as authorized in § 1025.18. Both comments acknowledged that a respondent (defendant) class action is an accepted procedural device, as provided in Fed.R.Civ.P 23(b) and sanctioned by case law. However, each voiced some concern as described below about the section as proposed. To a limited extent, the Commission agrees with the concern expressed and has amended § 1025.18 accordingly.

As proposed, § 1025.18 contained language from Fed.R.Civ.P. 23(a) and Fed.R.Civ.P. 23(b)(3), but contained none of the procedural safeguards contained in Fed.R.Civ. P. 23(c)(2) which relate to class actions brought under Fed.R.Civ.P. 23(b)(3). It was this omission which caused concern. The omission reflects the Commission's intention that respondent class actions brought pursuant to § 1025.18 incorporate only Fed.R.Civ.P. 23(b)(1) and (2) class

actions. The Commission intends to exclude respondent class actions under Fed.R.Civ.P. 23(b)(3). To make this clear, § 1025.18(d) has been amended as follows:

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

"(1) The prosecution of separate actions against individual members of the respondent class might result in (A) inconsistent or varying determinations with respect to individual members of the class which might produce incompatible or conflicting results, or (B) determinations with respect to individual members of the class which would, as a practical matter, be dispositive of the interests of the other members who are not parties to the proceedings or would substantially impair or impede the ability of the absent members to protect their interests; or

"(2) The Commission has acted on grounds generally applicable to the class, thereby making appropriate an order directed to the class as a whole. In reaching a decision, the Presiding Officer shall consider the interests of members of the class in individually controlling the defense of separate actions, the extent and nature of any proceedings concerning the controversy already commenced against members of the class, the desirability or undesirability of concentrating the litigation in one adjudication, and the difficulties likely to be encountered in the management of a class action, as well as the benefits expected to result from the maintenance of a class action."

In addition, one comment expressed concern that the respondent or respondents selected to represent the respondent class would be unable or unwilling to defend adequately the absent class members. This is an objection which should more properly be raised in the context of a particular adjudication and considered by the Presiding Officer on a case-by-case basis when he/she is asked to determine whether or not a class action may be maintained. It is an issue faced and addressed by United States district courts when they are requested to certify a class action. As noted elsewhere in this preamble, the Commission expects that interpretations of these Rules by the Presiding Officer will be guided by principles stated and developed in case law interpreting the Federal Rules of Civil Procedure.

The same comment observed that there is no procedure in these rules comparable to Fed.R.Civ.P. 23(c)(2) whereby a respondent may elect to be excluded from the respondent class and represent himself/herself/itself through counsel or otherwise. The amendment of § 1025.18(d) discussed above makes such a provision unnecessary. The procedure in Fed.R.Civ.P. 23(c)(2) allowing a respondent to "opt out" of the class applies only to class actions maintained under Fed.R. Civ.P. 23(b)(3). Since that section has not been incorporated into these rules, the procedure to "opt out" has not been included.

Furthermore, providing an "opt out" procedure from a defendant class would be contrary to the purpose of class actions. Presumably every respondent who could afford to "opt out" would do so, leaving a "shell" respondent class. Since sound reasons exist for not including such a provision, the Commission has accordingly not provided one.

The provisions of §§ 1025.18 (a) and (d) which require the Presiding Officer to consider certain factors when deciding whether to allow the class action to be maintained, together with the interlocutory appeal procedure, guarantee that a respondent class will not be maintained unless the Presiding Officer is satisfied that the representative will adequately represent the interests of the absent class members and that the action is one suitable for class action treatment. Finally, the rights of individual absent members are further protected by the provision which permits subclasses to be used and by the inherent authority of the Presiding Officer to order such notice or other actions as he/she may deem necessary for the orderly and fair progress of the case.

The Commission believes that the section in final form provides the due process envisioned by the Federal Rules of Civil Procedures and required by law.

11. *Section 1025.19.* One comment stated that the section on joinder of proceedings fails to provide a mechanism for a party whose rights would be prejudiced by joinder to prevent joinder or at least to present arguments. Section 1025.19 provides for consolidation upon motion by a party. Section 1025.23(c) provides for the filing of a written response to any written motion by an opposing party. Thus, a party that believes it will be prejudiced by joinder may express its opposition in a response to a motion for joinder. Hence, no change to § 1025.19 is deemed by the Commission to be warranted.

12. *Section 1025.21.* Three comments were received concerning prehearing conferences. One requested clarification as to the meaning of the phrase "except in unusual circumstances" as used in § 1025.21(a). The intent of the Commission is to establish the holding of a prehearing conference reasonably soon after the commencement of an adjudication under these Rules of Practice as the customary procedure. The qualifying language "except in unusual circumstances" was included to permit the presiding officer discretion to vary the time or dispense with the hearing when unusual circumstances not now anticipated make such a conference impractical or valueless. The language of the qualifying clause has been altered to clarify its meaning.

The other two comments objected to the provision requiring an initial prehearing conference within approximately 50 days after publication of a complaint in the **Federal Register.** Section 1025.21(a) states that the purpose of the prehearing conference is "to consider" a number of relevant items, including those set forth within the Rule. The comments expressed concern as to whether or not a proper defense could be prepared within the 50-day time limit. The Commission anticipates that for highly complex cases, more than one prehearing conference might be held before a hearing on the merits of the cause. Thus, at an initial prehearing conference it would not be necessary in every case that each of the parties would be fully prepared on each of the items in § 1025.21(a). The initial prehearing conference is the proper forum for establishing schedules and insuring that adjudicated matters proceed in a timely fashion. The Commission therefore will adhere to the 50-day requirement as proposed.

One comment objected to § 1025.21(a)(9) as unreasonable and unnecessary in terms of limiting the number of witnesses. As stated earlier, the initial prehearing conference provides an opportunity to consider all relevant matters, and the number of witnesses is a matter of relevant concern. The purpose is not to control the presentation of a party's case or to limit the number of witnesses needed to prove any point, but rather to avoid unnecessary duplication of testimony and delay. Hence, no substantive change is being made in § 1025.21.

13. *Section 1025.22.* Although no public comment addressed this provision, the Commission has decided to amend the mandatory requirement for the filing by parties of prehearing briefs and to place the matter within the discretion of the Presiding Officer. In final form, § 1025.22 provides that parties may file prehearing briefs not later than 10 days prior to the hearing, unless otherwise ordered by the Presiding Officer. Since pretrial briefs serve as an aid to the Presiding Officer,

the discretion to require pretrial briefs should be and, therefore, is vested in the Presiding Officer.

14. *Section 1025.23(d).* One comment stated that the provision allowing the Presiding Officer to defer ruling on a motion to dismiss until the close of the case is unfair to litigants. The Commission expects that the Presiding Officer will promptly rule on a motion to dismiss where the correct disposition is clear. If the motion is granted, the parties are spared the expense of participating in an unjustified trial. However, the proper ruling on the motion is not always ascertainable until the evidence is presented, at which time the motion may be granted or denied. For this reason and in accordance with the Commission's decision to grant broad discretion to the Presiding Officer, the Commission has decided not to alter § 1025.23(d) as drafted.

15. *Section 1025.24(b)(1).* Several comments were submitted concerning interlocutory appeals. One suggested the addition of an enumerated exception to permit an interlocutory appeal of the Presiding Officer's ruling on what constitutes a defendant class similar to Fed.R.Civ.P. 23(c). The comment also suggested that an interlocutory appeal be allowed for a review by the Commission of the Presiding Officer's determination of the scope of the issues to be decided at the hearing.

The Commission believes that as a general rule, all issues that arise during an adjudication should be considered and decided by the Presiding Officer during the proceeding. Commission review during the evidentiary stage will promote delay, unnecessary confusion and eliminate the opportunity for the Presiding Officer to correct his/her errors. An exception from the general rule should be, and is, provided where substantial prejudice or harm may result from a ruling of the Presiding Officer if not appealable prior to completion of the evidentiary stage of the adjudication. Allowing interlocutory appeals liberally would also tend to undercut the Commission's decision to place broad discretion in the Presiding Officer. The Commission has concluded that the § 1025.24(b)(1) as proposed achieves the proper balance between protection of the rights of the parties and promoting a prompt and fair decision. Therefore, the proposed addition of another exception to the policy against interlocutory appeals has not been adopted.

16. *Section 1025.24(b)(2).* Another comment concerning interlocutory appeals suggested that the Commission should provide for the filing of a reply in addition to the appeal petition and answer, at least in those cases where there will be no oral argument. As proposed, the section provides that the Commission may request further briefing in addition to the petition and response. The Commission is of the view that the section as proposed provide ample opportunity for the parties to argue their respective positions and is adequate without an automatic right to reply.

17. *Sections 1025.24(b) (3) and (4).* In response to another comment, a new subsection has been added to § 1025.24(b). § 1025.24(b)(3) as proposed has been redesignated as § 1025.24(b)(4) and a new subsection, § 1025.24(b)(3), has been added to provide as follows:

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

Since this section provides for an automatic stay of the Presiding Officer's order, the time to file a petition for interlocutory appeal and the opposition has been set at 5 days to minimize delay resulting from the interlocutory appeal.

The discussion in the following paragraph relating to § 1025.24(c) should be noted for further understanding of the new provision set forth in § 1025.24(b)(4).

18. *Section 1025.24(c).* One comment expressed the view that this section should be amended to provide for a mandatory stay of an order by the Presiding Officer requiring the production of records claimed to be confidential, pending an interlocutory appeal to the Commission under § 1025.24(b)(2). Otherwise, the comment contended, the issue would be moot if immediate compliance with the Presiding Officer's adverse ruling were required.

After consideration of this comment, the Commission has added a new subsection in § 1025.24(b) providing for a stay pending appeal of the order requiring the production of records claimed to be confidential. However, § 1025.24(c) shall remain in final form substantially as proposed since the justification for the stay pending appeal of the order concerning confidential records is not applicable to other interlocutory appeals.

19. *Section 1025.25(d).* As proposed, this section defers Commission review of an order granting Summary Decision that is not fully dispositive of all issues in the adjudication until issuance of the Presiding Officer's Initial Decision and Order. One comment suggested that this provision expressly reference § 1025.24(b)(3) and provide for interlocutory review of a Summary Decision which is not fully dispositive of all issues in the adjudication, if the requirements of § 1025.24(b)(3) have been met. The Commission is of the view that to allow an interlocutory appeal of a partial Summary Decision could result in unnecessary delay. Deferring review of the Summary Decision until completion of the hearing will not result in prejudice to the party adversely affected, may eliminate the desire to appeal and will permit the Commission to review all issues at one time. Accordingly, § 1025.25(d) is being promulgated as proposed.

20. *Section 1025.26.* A total of six comments relating to the section on settlements was received. Two comments suggested that all settlement discussions be held *in camera* and that settlement offers be filed *in camera.*

The Rules of Practice, as proposed and now as final, contain no provision concerning the format for meetings to negotiate settlement in adjudications. The Commission policy that meetings shall be open to the public, and the limited exceptions to that policy, are contained in 16 CFR Part 1012. Thus, the comments recommending that settlement negotiations be conducted in closed meetings are outside the scope of this rulemaking. Nevertheless, the Commission believes that the comments that settlement discussions should be closed to the public warrants consideration when the Commission considers changes in 16 CFR Part 1012. Accordingly, the comments will be retained and considered in the context of changes in the meetings policy.

The Commission agrees with the commenter's suggestion that settlement offers should be filed *in camera* to prevent prejudice resulting from public disclosure of the contents of an offer prior to acceptance by the Commission. Accordingly, proposed § 1025.26(b) has been modified to read that "[o]ffers of settlement shall be filed *in camera* and in the form of a consent agreement and order * * *." The Commission believes that adoption of the suggestion brings the Rules of Practice within the spirit of Rule 408 of the Federal Rules of Evidence, which excludes offers of settlement from evidence.

For further consistency with Rule 408, the Commission has adopted a

commenter's suggestion to exclude the contents of a rejected settlement offer from introduction into evidence. Final § 1025.26(h) applied not only to the terms of the rejected settlement offer, but the fact of the offer itself.

A comment suggested that only a respondent, as opposed to "any party," should have the opportunity to submit an offer of settlement. Since the term "party" is defined in § 1025.3(f) to mean "any person named or any intervenor," and, further, since pursuant to § 1025.17(a) a person accorded intervenor status "shall have the full range of litigating rights afforded to any other party," the Commission believes that any party should be able to propose a settlement offer. It should be noted, however, that any settlement offer must be signed by the respondent(s), pursuant to § 1025.26(b), to be valid.

Another comment asked that § 1025.26(c)(2) be amended to provide that waiver of further rights to seek judicial review be predicated upon the acceptance by the Commission of a consent agreement and order which is identical to the proposed consent agreement and order. The Commission's position is that such a change is unnecessary since the Commission will only see consent agreements and orders that have been signed by the respondent concerned and transmitted by the Presiding Officer. Presumably the respondent will be aware of and satisfied with the contents of the consent agreement and order it has signed. If in rejecting a proposed consent agreement, the Commission indicates it would accept another with altered terms, a new agreement containing the altered terms would have to be prepared and signed by the respondent. Thus, the Commission sees no need for adopting the suggested change.

Two comments objected to the requirements in §§ 1025.26 (c) (3) and (6) for detailed provisions, including a corrective action plan, in a settlement proposal. The comments suggested there be more "give and take" in the settlement process. The comments ignore the fact that in authorizing an adjudication under these rules, the Commission is acting upon behalf of the public, and often to protect the public from exposure to a consumer product that allegedly presents a substantial product hazard or is dangerously flammable. The Commission staff, therefore, lacks the freedom to "give and take" in the same way as counsel for parties in private litigation. This is especially so in adjudications for an order under section 15 of the CPSA, 15 U.S.C. 2064, where issuance of an administrative complaint signifies that the Commission and the respondent were unable to arrive at a voluntary corrective action plan as provided for in 16 CFR 1115.20. Permitting settlements that fail to meet the requirements for a voluntary corrective action plan will encourage individuals and firms to believe that they may be able to achieve more favorable terms after issuance of an administrative complaint. Such an expectation is unrealistic because authorization of a complaint means that the Commission has determined that the respondent's "best offer" for a voluntary corrective action plan did not meet the Commission's estimate of the minimum corrective action required to adequately protect the public. Since the Commission is concerned that matters in adjudication either be settled promptly and completely or else proceed through the judicial process in a timely manner, the Commission will retain the provisions in § 1025.26(c) relating to the contents of settlement proposals.

One comment stated that § 1025.26(d) should be amended to require the Presiding Officer to transmit all qualifying offers of settlement to the Commission, rather than to leave the matter to the discretion of the Presiding Officer.

Adopting the suggestion could result in a delay in the proceedings because frivolous offers or those in conflict with fundamental Commission policies, which would be summarily rejected, would go forward to the Commission. The Commission has concluded that the better course is to require the Presiding Officer to transmit only joint agreements subscribed to by Complaint Counsel and one or more respondents and to vest discretion in the Presiding Officer to certify to the Commission those unilateral *bona fide* offers of settlement that meet the standards of § 1025.26(c), are not clearly frivolous, duplicative or contrary to established policy. Therefore, the suggestion has been adopted in part and rejected in part.

Three comments addressed § 1025.26(e) relating to a stay of the proceedings while a settlement offer is being considered. One comment stated that the provision requiring all parties to agree to a settlement offer before the proceedings will be stayed pending a Commission ruling on the offer, will not work well in a multi-party litigated matter. The Commission was not unmindful of the complexities involved in multi-party settlement negotiations when it proposed this section. However, after careful consideration of all submitted points of view, the Commission remains convinced that an enforcement matter should not be halted for consideration of a settlement offer unless all interested parties can agree on a settlement proposal. This will insure that an adjudication proceeds in as timely a manner as possible.

Another comment suggested that under § 1025.26(g) there are only two possible dispositions for a settlement proposal: acceptance or rejection. The comment suggested that other alternatives not be precluded from review.

The Commission views the section as drafted to be the preferred language. As a practical matter an offer can only be accepted or rejected. It would be inappropriate and procedurally unwieldy for it to attempt to negotiate acceptable settlement terms with the respondents. In rejecting an offer of settlement, the Commission will endeavor to set forth its reasons and, where appropriate, indicate what modifications to the rejected offer would make it acceptable to the Commission. Thus, if a settlement offer is rejected, the party or parties offering the settlement may submit a revised offer, taking into consideration the reasons given in writing by the Commission for its having rejected the original offer. For example, see the Commission's Order issued on June 6, 1979 in *Matter of Spare Parts et al.*, CPSC Docket No. 78-1.

21. *Section 1025.31.* A total of six comments addressed the general provisions governing discovery. Section 1025.31(c) concerning the scope of discovery, in particular, generated considerable comment. One comment expressed the view that not only must the scope of discovery be within the Commission's authority and relevant to the subject matter in the proceedings, but that its production must be both reasonable and necessary. As proposed, § 1025.31(c)(1) provides that discoverable facts must be relevant to the subject matter involved in the proceedings and also that for information sought which will not be admissible at the hearing, it must be shown that the information appears reasonably calculated to lead to the discovery of admissible evidence. The Commission has revised § 1025.31(c)(1) to the extent of making the provision consistent with Fed.R.Civ.P. 26(b)(1) and it has added new § 1025.31(c) (2) and (3). They are patterned on provisions of the Federal Trade Commission's Rules of Practice, 16 CFR 3.31. Section 1025.31(c)(2) affirms that nothing in these Rules abridges the traditional right to protect privileged material from unreasonable disclosure. Section

1025.31(c)(3) identifies the circumstances when material prepared in anticipation of litigation, other than the work of experts, is subject to discovery. These new sections, taken with the bases for granting protective orders in § 1025.31(d), reasonably protect the interests of the parties.

As proposed, § 1025.31(c)(2) excepted from discovery the documents which accompanied the staff's recommendation to the Commission as to whether a complaint should be issued. The purpose was to eliminate unnecessary discovery since under proposed § 1025.11(c) the same documents which were obtainable under the Freedom of Information Act were required to be attached to the complaint. Several comments objected to the exception from discovery. Those comments have been rendered moot by several changes in the final rules. Final § 1025.11(b)(3) (superseding proposed § 1025.11(c)) requires that only "[a] list and summary of documentary evidence supporting the charges" in the complaint (not the documents themselves) be attached to the complaint. Since the reason for the exception no longer exists, the exception in proposed § 1025.31(c)(2) has been deleted from the final rules.

Several comments addressed proposed § 1025.31(c)(3), which concerns discovery of experts. The commenters suggested that the provisions on discovery should be redrafted to prohibit discovery of experts who are not expected to appear at trial, except in extraordinary circumstances, such as those contemplated in Fed.R.Civ.P. 26(b)(4)(B).

As stated earlier in this preamble, these Rules have been patterned on the Federal Rules of Civil Procedure. In view of this fact and after consideration of the comments concerning the discovery of experts, the Commission has decided to substantially revise § 1025.31(c)(3) to bring it into accord with Fed.R.Civ.P. 26(b)(4) (A) and (B).

Section 1025.31(c)(3) as promulgated provides:

(3) Hearing Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of paragraph (c)(1) of this section and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

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

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

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means."

Another comment suggested a revision to § 1025.31 to provide for the tender and payment of fees and expenses to follow the provisions of Fed.R.Civ.P. 26(b)(4)(C). That section provides that a party seeking discovery from an expert shall customarily pay the expert a reasonable fee, and in the case of an expert retained by another party but not expected to be called as a witness, the party seeking discovery shall pay a fair portion of the reasonable fees and expenses paid by the party that retained the expert.

The Commission agrees with the fundamental principle expressed in the comment that a party may be required to bear the cost of conducting discovery of another party's expert. The Commission has therefore added a new § 1025.31(c)(3)(C) to provide for the payment of experts. Rather than following Fed.R.Civ.P. 26(b)(4)(C), the Commission has patterned the new section on the Federal Trade Commission's Rules of Practice, 16 CFR 3.31(b)(4)(B)(iii). Section 1025.31(c)(3)(C) as promulgated reads as follows:

The Presiding Officer may require as a condition of discovery that the party seeking discovery pay the expert a reasonable fee, but not more than the maximum specified in 5 U.S.C. 3109 for the time spent in responding to discovery.

Unlike Fed.R.Civ.P. 26(b)(4)(C), no provision is included in these Rules for reimbursement to an attorney of fees paid to an expert who will not be called to testify. The Commission expects that on the rare occasion when such a circumstance occurs, payment will go directly to the expert based upon the time spent in complying with the discovery. Allocating the original fee would be difficult and cumbersome and the inclusion of a provision adequate t the task is not justified by the number of times such a situation is likely to arise.

Discretion whether to require payment of a fee, and to fix the amount of a reasonable fee is placed in the Presiding Officer. In an adjudication in which each party is seeking discovery of a like number of experts of an opposing party, it may be reasonable to have each party bear the fees for its own experts. The amount of the expert's fee not only must be reasonable, but it cannot exceed the statutory maximum specified in 5 U.S.C. 3109.

Two comments objected to the provision to supplement responses after discovery is had, pursuant to § 1025.31(f). The Commission has not adopted the suggestion for two reasons. Any extra burden placed upon respondents and Complaint Counsel by the requirement to update responses to discovery is greatly outweighed by the practice that would ultimately evolve of making numerous, periodic and repetitive discovery requests to ascertain if there will be a change from a prior response as a result of information obtained since the last request. In addition, the exchange of all relevant data during the course of any enforcement proceeding helps assure that the result is fair, equitable and proper.

Five comments objected to the 150-day limitation upon discovery provided in § 1025.31(g). Prior to proposing these Rules, the Commission carefully considered the time limitations imposed, being aware of the due process rights of every respondent but at the same time being concerned that every enforcement matter proceed in a timely fashion. The comments have failed to persuade the Commission that the 150-day limitation is unreasonable. The commenters have suggested leaving the time limitation to the discretion of the Presiding Officer. While the suggestion is consistent with one of the basic principles embodied in these Rules, and the Presiding Officer is, in fact, authorized to increase or decrease the time period for discovery based upon the nature of the proceedings and the circumstances, the Commission believes inclusion of a 150-day time limit as a general rule will result in diligent efforts to complete discovery within the time allowed. Therefore the Commission has declined to adopt the suggested change in the final rule.

22. *Section 1025.33.* Although none of the public comments addressed the section on the production of documents, the Commission has decided to amend § 1025.33 to make the language more consistent with the wording of Fed.R.Civ.P. 34. The reason is to insure that judicial interpretations of Fed. R. Civ. P. 34 will be more directly applicable to administrative interpretations of the scope of § 1025.33.

23. *Section 1025.35.* Three comments were directed to the requirements that good cause be shown for the taking of a deposition and that leave of the

Presiding Officer must be obtained for each deposition. The comments also objected to the requirement that depositions not be scheduled until after the first prehearing conference.

The Commission deliberately chose to depart from the procedures under the Federal Rules of Civil Procedure in establishing its requirements for the taking of depositions. For administrative law enforcement cases under the Consumer Product Safety Act and the Flammable Fabrics Act, as well as other cases which may be heard pursuant to these Rules, the Commission's view is that the adjudicative process will be better served by placing the noticing and taking of depositions under the control of the Presiding Officer and, at the same time, vesting broad powers in the Presiding Officer under § 1025.42. The Commission believes that scrutiny by the Presiding Officer is desirable to prevent dilatory tactics, as well as harrassment or abuse. To permit the Presiding Officer to exercise proper control over depositions, this form of discovery may not commence prior to the first pretrial conference, although other forms of discovery may commence with the filing of the answer.

24. *Section 1025.38(d).* Two comments addressed the provision containing the procedure for issuing subpoenas; this authority is reserved to the Commission. The commenters expressed the view that the Commission should seek legislative relief from the language contained in Section 27(b)(3)(9) of the Consumer Product Safety Act, 15 U.S.C. 2076(b)(3)(9), which provides that the issuance of a subpoena is a non-delegable function of the Commission. The same comments suggested that the power to issue subpoenas be delegated to the Presiding Officer under the Flammable Fabrics Act.

Since at the present time the power to issue subpoenas under the Consumer Product Safety Act cannot be delegated, the Commission has chosen not to delegate such power to the Presiding Officer under the Flammable Fabrics Act. The Commission's position is that uniform procedures under both Acts is the preferable option.

25. *Section 1025.39.* One comment suggested that the portion of § 1025.39 concerning the granting of immunity be modified to cover proceedings under the Consumer Product Safety Act, as well as those under the Flammable Fabrics Act. The Commission, as discussed below, lacks the statutory authority to grant immunity under the CPSA.

Title 18, United States Code, section 6002, which is referenced in § 1025.39, deals with immunity from prosecution when compelled to testify or provide other information in any proceedings before an agency of the United States. As stated in House Report No. 91-1549 (September 30, 1970), 18 U.S.C. 6001 defines the term "agency of the United States", as used in 18 U.S.C. § 6002, to mean—

> "any executive department or military department and certain independent agencies. The agencies enumerated are those having immunity granting power under present law."

See *1970 U.S. Cong. & Adm. News* at p. 4017. Those independent agencies enumerated in 18 U.S.C. § 6001 include the Federal Trade Commission, but section 6001 has not been amended to include the Consumer Product Safety Commission. For this reason, § 1025.39 of the Commission's Rules is limited to the Flammable Fabrics Act, which is enforced pursuant to the Federal Trade Commission Act (15 U.S.C. 41 *et seq.).*

26. *Sections 1025.43 (b) and (c).* Several comments addressed the section concerning burden of proof and presumptions. They stated that the language is needlessly ambiguous, unclear and fails to properly reflect the Administrative Procedure Act. In light of the comments, and after further consideration, the Commission has chosen to retain § 1025.43(b) but has decided to delete proposed § 1025.43(c) from the final Rules. The Commission believes that § 1025.43(b) is sufficiently clear and complies with 5 U.S.C. 556. It is not necessary to state that Complaint Counsel bears the burden of proof for the order since the relief afforded in the order must be supported by the evidence in the record. Proposed § 1025.43(c) has been dropped as unnecessary because § 1025.43(a) provides that the Federal Rules of Evidence are applicable to proceedings conducted under these Rules. The provisions of the rules concerning presumptions are therefore incorporated here by reference. *See* Fed. R. Evid. 301.

27. *Section 1025.44(b).* One comment suggested that respondents be given preferential treatment over the Commission staff by requiring the staff to file the direct testimony of its expert witnesses twenty (20) days before the commencement of a hearing, with a respondent being required to file the direct testimony of its expert witnesses ten (10) days thereafter.

The Commission views the section as proposed as being more equitable to all parties, since it requires the concurrent exchanging and filing of expert witnesses' direct testimony. Therefore, it has declined to adopt the recommended change.

28. *Section 1025.45.* One comment on the provisions concerning confidential material suggested a presubmittal determination of confidentiality for materials deemed by a respondent to be privileged from public disclosure and for which *in camera* protection is sought. The procedure suggested is both cumbersome and unnecessary. Any party may request *in camera* treatment for any material it claims is confidential or privileged, and therefore not subject to discovery. The Presiding Officer is authorized by § 1025.45(b) to grant that request; a denial may be immediately appealed to the Commission pursuant to § 1025.24(b)(i). Thus, the Rules already provide for adequate review prior to disclosure. Furthermore, in view of the limitations imposed on the Commission by Section 6(a) of the Consumer Product Safety Act, 15 U.S.C. 2055(a), which prohibits the release of information, trade secrets or other matters referred to in 18 U.S.C. 1905 (except when relevant in any proceedings under the CPSA), the Commission's position is that a respondent's rights are adequately protected under § 1025.45. Such disclosure is, of course, subject to all other applicable provisions of law.

It should be noted, however, that in the interest of equal treatment for all parties, the first sentence of § 1025.45(c) has been amended to delete the words "enforcement and". The significance of the deletion is to place the enforcement staff of the Commission in no better position than any other party to any adjudicatory proceedings.

29. *Section 1025.53(b).* Although no public comments addressed the requirements for the appeal briefs, the Commission has significantly changed the requirements imposed upon participants in their filing of appeal briefs. The Commission believes that meaningful public participation in all phases of its regulatory activities, including matters in adjudication, is desirable and should be encouraged. For this reason, the more stringent legal requirements for a participant's brief have been deleted. In deleting the legalistic burdens imposed upon participants, the Commission does not intend, nowever, to lower its standard for meaningful participation by the public. For this reason, participants are encouraged to articulate their views as clearly and succinctly as possible in any briefs which are filed in any adjudicative proceedings.

30. *Section 1025.54* One comment suggested that in an instance where the Commission elects to review an Initial Decision in the absence of appeal by a party, the respondent be granted the

right to file a brief on all issues deemed by the respondent to be relevant and not be limited solely to issues specified by the Commission. The same comment suggested that the section be amended to designate which party shall have the burden of going first with respect to briefing and which party may file an answering brief.

The Commission believes the comment has merit and has decided to amend § 1025.54 by adding the following sentences after the end of the first paragraph of the section as proposed:

"If the filing of briefs is scheduled by the Commission, the order shall designate which party or parties shall have the burden of filing an initial brief and which party or parties may thereafter file an answering brief, or the order may designate the simultaneous filing of briefs by the parties. If the filing of briefs is scheduled by the Commission, any party may address all issues deemed by the party to be relevant and not be limited solely to the issues specified by the Commission in its order."

This change adequately addresses the concern raised in the comment

31. *Section 1025.57.* Two comments suggested that orders of the Commission in any proceedings arising under the Consumer Product Safety Act become effective upon receipt by a respondent, rather than effective when issued. Since such orders often carry an obligation to take certain action, usually within a prescribed period of time, fairness requires that the obligation of compliance begin with actual receipt of the order. The Commission has amended § 1025.57(a) accordingly. Section 1025.57(b)(1) has been amended to provide that consent orders under the Flammable Fabrics Act became effective when the respondent receives notice, which may be by telephone of Commission issuance of an order following acceptance of an offer of settlement.

32. *Section 1025.59 (as proposed).* Two comments addressed the proposed section on related proceedings. One stated that the provision is unsound and the other suggested that the provision be deleted. Both expressed the view that significant Constitutional rights have been cut off by the section, which provided that any related proceedings shall be conducted in accordance with the Commission's Proposed and Interim Rules for Expedited Procedures, 16 CFR Part 1026 (42 FR 31446, June 21, 1977).

The Commission has considered these comments, as well as its prior determination to have rules to expedite certain proceedings. The Commission concluded that two sets of procedural rules are unnecessary and confusing. Accordingly, the Commission revoked the Proposed and Interim Rules for Expedited Procedures, 16 CFR Part 1026, on May 1, 1980.

In making its decision to delete the entire proposed provision on related proceedings, the Commission considered that, the determination of whether two matters share common questions of fact or issues of law could create an independent controversy. The delay resulting from the need to resolve that controversy as a preliminary matter could outweigh any benefit to be achieved from the now-abandoned procedure.

In addition, to eliminate any potential Constitutional question of due process rights, as well as to eliminate (in the absence of stipulation of the parties) any postponement of the hearing which might be caused in initially determining what questions of fact or issues of law are in common, the Commission has decided that the better approach is to allow each matter in controversy to proceed independent of any prior adjudication and to rely upon the Presiding Officer to use his/her broad discretion to insure that the matter in litigation is resolved without undue delay.

34. *Section 1025.67.* The Commission received one comment concerning the post-employment restrictions on former members and employees. Actually a comment previously submitted to the Internal Revenue Service on that agency's proposed rules of practice, it urged adoption of the provisions of Opinion 342 of the American Bar Association's Committee on Ethics and Professional Responsibilities. Under Opinion 342, a law firm employing a former government employee has the first obligation to disqualify any former member or employee from representing a client and to avoid the appearance of impropriety. The commenter urged the IRS to write its rules to take an active role in preventing a former employee from representing a client before the agency if the law firm failed to do so.

As proposed, the restrictions on former members and employees incorporates by reference the Commission's regulations on post employment activities, 16 CFR Part 1030, Subpart L. Since that rule was promulgated, there has been considerable discussion and activity concerning the activities of former Commission members and employees. The Ethics in Government Act, Pub. L. 95-521, was enacted on October 26, 1978. Given the uncertainty resulting from recent and proposed changes in law, the Commission has decided to promulgate § 1025.67 as proposed but to continue consideration of revisions through later amendments that will reflect the comment discussed above, actual experience and statutory changes. This decision is based upon the conclusion that the promulgation of these Rules of Practice should not be further delayed while changes in § 1025.67 are considered.

35. The Commission on Federal Paperwork was established by Pub. L. 93-556 to study the burden of submitting information in compliance with Federal statutes and regulations. It recommended that agencies reconsider all multicopy requirements for submission from the public and, wherever possible, to require only the original document in submissions, in an effort to lessen the burden of government paperwork on the public.

Section 1025.14 contains the requirements for the form and number of documents to be submitted to the Commission. As proposed, § 1025.14(c) requires an original and nine (9) copies of all documents filed with the Commission in any adjudicative proceedings. The Commission has decided that the requirement may be reduced to an original and three (3) copies. In addition, the requirements for the form of documents filed with the Commission found in § 1025.14(e) have been simplified from the proposal to cover page size, print size and fastening. Documents that fail to comply may be returned by the Secretary.

Rules promulgated under 5 U.S.C. 553 are generally required to be published at least thirty days prior to their effective date. 5 U.S.C. 553(b)(A), however, expressly exempts rules of agency procedure or practice from the requirements for publication. In addition, 5 U.S.C. 553(d)(3) provides that a rule may be made effective upon publication provided the agency finds good cause for so doing.

As stated above, the Commission has revoked its interim Expedited Rules (45 FR 27923, April 25, 1980). Thus, adjudications to assess civil penalties will be treated as all other adjudications. If the effective date of these Rules of Practice were delayed thirty days, the Commission would be compelled to delay initiation of civil penalty adjudications for up to thirty days, or conduct them under the less satisfactory interim rules of practice currently in effect. To avoid this result, the Commission finds that good cause exists for making these Rules of Practice effective May 1, 1980.

Accordingly, pursuant to the provisions of the Consumer Product Safety Act (sections 15, 20 and 27, 15 U.S.C. 2064, 2069 and 2076), the Flammable Fabrics Act (section 5, 15

U.S.C. 1194) and the Federal Trade Commission Act (15 U.S.C. 45), the Commission amends Title 16 of the Code of Federal Regulations by revising Part 1025 to read as follows:

PART 1025—RULES OF PRACTICE FOR ADJUDICATIVE PROCEEDINGS

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1025.3 Definitions.

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Authority: Consumer Product Safety Act (Secs. 15, 20, 27 (15 U.S.C. 2064, 2069, 2076), the Flammable Fabrics Act (Sec. 5 15 U.S.C. 1194), the Federal Trade Commission Act (15 U.S.C. 45))

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

§ 1025.1 Scope of the Rules.

The Rules in this part govern procedures in adjudicative proceedings relating to the provisions of Section 15(c), (d) and (f) and 17(b) of the Consumer Product Safety Act (15 U.S.C. 2064(c), (d) and (f); 2066(b)), and Sections 3 and 8(b) of the Flammable Fabrics Act (15 U.S.C. 1192, 1197(b)), which are required by statute to be determined on the record after opportunity for a public hearing. These rules will also govern adjudicative proceedings for the assessment of civil penalties under Section 20(a) of the Consumer Product Safety Act (15 U.S.C. 2068(a)), except in those instances where the matter of a civil penalty is presented to a United States District Court in conjunction with an action by the Commission for injunctive or other appropriate relief. These Rules may also be used for such other adjudicative proceedings as the Commission, by order, shall designate. A basic intent of the Commission in the development of these rules has been to promulgate a single set of procedural rules which can accommodate both simple matters and complex matters in adjudication. To accomplish this objective, broad discretion has been vested in the Presiding Officer who will hear a matter being adjudicated to allow him/her to alter time limitations and other procedural aspects of a case, as required by the complexity of the particular matter involved. A major concern of the Commission is that all matters in adjudication move forward in a timely manner, consistent with the Constitutional due process rights of all parties. It is anticipated that in any adjudicative proceedings for the assessment of civil penalties there will be less need for discovery since most factual matters will already be known by the parties. Therefore, the Presiding Officer should, whenever appropriate, expedite the proceedings by setting shorter time limitations than those time limitations generally applicable under these Rules. For example, the 150-day limitation for discovery, as provided in § 1025.31(g), should be shortened, consistent with the extent of discovery reasonably necessary to prepare for the hearing.

§ 1025.2 Nature of adjudicative proceedings.

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

§ 1025.3 Definitions.

As used in this part:

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

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

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

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

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

(f) "Party" means any named person or any intervenor in any proceedings governed by these Rules.

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

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

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

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

(k) "Secretary" means the Secretary of the Consumer Product Safety Commission.

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

Additional definitions relating to prohibited communications are in § 1025.68.

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

§ 1025.11 Commencement of proceedings.

(a) *Notice of Institution of Enforcement Proceedings.* Any adjudicative proceedings under this part shall be commenced by the issuance of a complaint, authorized by the Commission, and signed by the Associate Executive Director for Compliance and Enforcement.

(b) *Form and Content of Complaint.* The complaint shall contain the following:

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

(2) Identification of each respondent or class of respondents.

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

(4) A request for the relief which the staff believes is in the public interest.

(c) *Notice to the Public.* Once issued, the complaint shall be submitted without delay to the Federal Register for publication.

§ 1025.12 Answer.

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

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

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

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

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

§ 1025.13 Amendments and supplemental pleadings.

The Presiding Officer may allow appropriate amendments and suppiemental pleadings which do not unduly broaden the issues in the proceedings or cause undue delay.

§ 1025.14 Form and filing of documents.

(a) *Filing.* Except as otherwise provided in these Rules, all documents submitted to the Commission or the Presiding Officer shall be addressed to, and filed with, the Secretary. Documents may be filed in person or by mail and shall be deemed filed on the day of filing or mailing.

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

(c) *Copies.* An original and three (3) copies of all documents shall be filed. Each copy must be clear and legible.

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

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

(e) *Form.* (1) All documents shall be dated and shall contain the address and telephone number of the signer.

(2) Documents shall be on paper approximately 8½ x 11 inches in size. Print shall not be less than standard elite or 12 point type. Pages shall be fastened in the upper left corner or along the left margin.

(3) Documents that fail to comply with this section may be returned by the Secretary.

§ 1025.15 Time.

(a) *Computation.* In computing any period of time prescribed or allowed by these rules, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared as a holiday by the President or the Congress of the United States.

(b) *Additional Time After Service by Mail.* Whenever a party is required or permitted to do an act within a prescribed period after service of a document and the document is served by mail, three (3) days shall be added to the prescribed period.

(c) *Extensions.* For good cause shown, the Presiding Officer may extend any time limit prescribed or allowed by these rules or by order of the Commission or the Presiding Officer, except for those sections governing the filing of interlocutory appeals and appeals from Initial Decisions and those sections expressly requiring Commission action. Except as otherwise provided by law, the Commission, for good cause shown, may extend any time limit prescribed by these rules or by order of the Commission or the Presiding Officer.

§ 1025.16 Service.

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

(b) *Service of Complaint, Ruling, Petition for Interlocutory Appeal, Order, Decision, or Subpoena.* A complaint, ruling, petition for interlocutory appeal, order, decision, or subpoena shall be served in one of the following ways:

(1) *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/its residence or principal office or place of business and sent by registered or certified mail; or

(2) *By delivery to an individual.* A copy of the document 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; or to an agent authorized by appointment or by law to receive service; or

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

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

(c) *Service of Other Documents.* Except as otherwise provided in paragraph (b) of this section, when service of a document starts the running of a prescribed period of time for the submission of a responsive document or the occurrence of an event, the document may be served as provided in paragraph (b) of this section or by ordinary first-class mail, properly addressed, postage prepaid.

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

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

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

(Signature)
For

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

§ 1025.17 Intervention.

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

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

(2) A petition shall (i) identify the specific aspect or aspects of the proceedings as to which the petitioner wishes to intervene, (ii) set forth the interest of the petitioner in the proceedings, (iii) state how the petitioner's interest may be affected by the results of the proceedings, and (iv) state any other reasons why the petitioner should be permitted to intervene as a party, with particular reference to the factors set forth in paragraph (d) of this section. Any petition relating only to matters outside the jurisdiction of the Commission shall be denied.

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

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

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

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

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

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

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

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

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

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

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

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

(6) The extent to which the petitioner's interest will be represented by existing parties;

(7) The extent to which the petitioner's intervention may broaden the issues or delay the proceedings; and

(8) The extent to which the petitioner's interest can be protected by other available means.

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

(e) *Ruling by Presiding Officer on Request.* In ruling on a request to participate as a participant, the Presiding Officer, in the exercise of his/her discretion, shall be mindful of the

Commission's mandate under its enabling legislation (see 15 U.S.C. 2051 *et seq.*) and its affirmative desire to afford interested persons, including consumers and consumer organizations, as well as governmental entities, an opportunity to participate in the agency's regulatory processes, including adjudicative proceedings. The Presiding Officer shall consider, in addition to all other relevant matters, the following factors:

(1) The nature and extent of the person's alleged interest in the proceedings;

(2) The possible effect of any final order which may be entered in the proceedings on the person's interest; and

(3) The extent to which the person's participation can be expected to assist the Presiding Officer and the Commission in rendering a fair and equitable resolution of all matters in controversy in the proceedings.

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

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

§ 1025.18 Class actions.

(a) *Prerequisites to a Class Action.* One or more members of a class of respondents may be proceeded against as representative parties on behalf of all respondents if (1) the class is so numerous or geographically dispersed that joinder of all members is impracticable; (2) there are questions of fact or issues of law common to the class; (3) the defenses of the representative parties are typical of the defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Composition of Class.* A class may be composed of (1) manufacturers, distributors, or retailers, or a combination of them, of products which allegedly have the same defect, or (2) manufacturers, distributors, or retailers, or a combination of them, of products which allegedly fail to conform to an applicable standard, regulation, or consumer product safety rule, or (3) manufacturers, distributors, or retailers, or a combination of them, who have themselves allegedly failed to conform to an applicable standard, regulation, or consumer product safety rule. When appropriate, a class may be divided into subclasses and each subclass shall be treated as a class.

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

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

(1) The prosecution of separate actions against individual members of the respondent class might result in (i) inconsistent or varying determinations with respect to individual members of the class which might produce incompatible or conflicting results, or (ii) determinations with respect to individual members of the class which would, as a practical matter, be dispositive of the interests of the other members who are not parties to the proceedings or would substantially impair or impede the ability of the absent members to protect their interests; or

(2) The Commission has acted on grounds generally applicable to the class, thereby making appropriate an order directed to the class as a whole.

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

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

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

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

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

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

(4) Dealing with other procedural matters.

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

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

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

§ 1025.19 Joinder of proceedings.

Two or more matters which have been scheduled for adjudicative proceedings

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

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

§ 1025.21 Prehearing conferences

(a) *When Held.* Except when the presiding officer determines that unusual circumstances would render it impractical or valueless, a prehearing conference shall be held in person or by conference telephone call within fifty (50) days after publication of the complaint in the **Federal Register** and upon ten (10) days' notice to all parties and participants. At the prehearing conference any or all of the following shall be considered:

(1) Petitions for leave to intervene;

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

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

(4) Necessity or desirability of amending the pleadings;

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

(6) Oppositions to notices of depositions;

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

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

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

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

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

(12) Consideration of offers of settlement;

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

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

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

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

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

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

§ 1025.22 Prehearing briefs.

Not later than ten (10) days prior to the hearing, unless otherwise ordered by the Presiding Officer, the parties may simultaneously serve and file prehearing briefs which should set forth (a) a statement of the facts expected to be proved and of the anticipated order of proof; (b) a statement of the issues and the legal arguments in support of the party's contentions with respect to each issue; and (c) a table of authorities relied upon.

§ 1025.23 Motions.

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

(b) *Written Motions.* All written motions shall state with particularity the order, ruling, or action desired and the reasons why the action should be granted. Memoranda, affidavits, or other documents supporting a motion shall be served and filed with the motion. All motions shall contain a proposed order setting forth the relief sought. All written motions shall be filed with the Secretary and served upon all parties, and all motions addressed to the Commission shall be in writing.

(c) *Opposition to Motions.* Within ten (10) days after service of any written motion or petition or within such longer or shorter time as may be designated by these Rules or by the Presiding Officer or the Commission, any party who opposes the granting of the requested order, ruling or action may file a written response to the motion. Failure to respond to a written motion may, in the discretion of the Presiding Officer, be considered as consent to the granting of the relief sought in the motion. Unless otherwise permitted by the Presiding Officer or the Commission, there shall be no reply to the response expressing opposition to the motion.

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

§ 1025.24 Interlocutory appeals.

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

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

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

(ii) Requires the testimony of a supervisory official of the Commission other than one especially knowledgeable of the facts of the matter in adjudication;

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

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

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

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

(4) Interlocutory appeals from all other rulings.

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

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

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

§ 1025.25 Summary decisions and orders.

(a) *Motion.* Any party may file a motion, with a supporting memorandum, for a Summary Decision and Order in its favor upon all or any of the issues in controversy. Complaint Counsel may file such a motion at any time after thirty (30) days following issuance of a complaint, and any other party may file a motion at any time after issuance of a complaint. Any such motion by any party shall be filed at least twenty (20) days before the date fixed for the adjudicative hearing.

(b) *Response to Motion.* Any other party may, within twenty (20) days after service of the motion, file a response with a supporting memorandum.

(c) *Grounds.* A Summary Decision and Order shall be granted if the pleadings and any depositions, answers to interrogatories, admissions, or affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to a Summary Decision and Order as a matter of law.

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

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

§ 1025.26 Settlements.

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

(b) *Form.* Offers of settlement shall be filed *in camera* and the form of a consent agreement and order, shall be signed by the respondent or respondent's representative, and may be signed by any other party. Each offer of settlement shall be accompanied by a motion to transmit the proposed agreement and order to the Commission. The motion shall outline the substantive provisions of the agreement and state reasons why it should be accepted by the Commission.

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

(1) An admission of all jurisdictional facts;

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

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

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

(5) If appropriate, a listing of the acts or practices from which the respondent shall refrain; and

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

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

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

(f) *Commission Ruling.* The Commission shall rule upon all transmitted offers of settlement. If the Commission accepts the offer, the Commission shall issue an appropriate

order, which shall become effective upon issuance.

(g) *Commission Rejection.* If the Commission rejects an offer of settlement, the Secretary, in writing, shall give notice of the Commission's decision to the parties and the Presiding Officer. If the proceedings have been stayed, the Presiding Officer shall promptly issue an order notifying the parties of the resumption of the proceedings, including any modifications to the schedule resulting from the stay of the proceedings.

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

Subpart D—Discovery, Compulsory Process

§ 1025.31 General provisions governing discovery.

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

(b) *Discovery Methods.* Parties may obtain discovery by one or more of the following methods: (1) Written interrogatories; (2) requests for production of documents or things; (3) requests for admission; or (4) depositions upon oral examination. Unless the Presiding Officer otherwise orders under paragraph (d) of this section, the frequency of use of these methods is not limited.

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

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

(2) *Privilege.* Discovery may be denied or limited, or a protective order may be entered, to preserve the privilege of a witness, person, or governmental agency as governed by the Constitution, any applicable Act of Congress, or the principles of the common law as they may be interpreted by the Commission in the light of reason and experience.

(3) *Hearing Preparation: Materials.* Subject to the provisions of paragraph (c)(4) of this section, a party may obtain discovery of documents and tangible things otherwise discoverable under paragraph (c)(1) of this section and prepared in anticipation of litigation or for hearing by or for another party or by or for that other party's representative (including his attorney or consultant) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without unique hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the Presiding Officer shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party.

(4) *Hearing Preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of paragraph (c)(1) of this section and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

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

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

(ii) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(iii) The Presiding Officer may require as a condition of discovery that the party seeking discovery pay the expert a reasonable fee, but not more than the maximum specified in 5 U.S.C. 3109 for the time spent in responding to discovery.

(d) *Protective Orders.* Upon motion by a party and for good cause shown, the Presiding Officer may make any order which justice requires to protect a party or person from annoyance, embarrassment, competitive disadvantage, oppression, or undue burden or expense, including one or more of the following: (1) That the discovery shall not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery shall be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters shall not be inquired into or that the scope of discovery shall be limited to certain matters; (5) that discovery shall be conducted with no one present except persons designated by the Presiding Officer; (6) that a trade secret or other confidential research, development, or commercial information shall not be disclosed or shall be disclosed only in a designated way or only to designated parties; and (7) that responses to discovery shall be placed *in camera* in accordance with § 1025.45 of these rules. If a motion for a protective order is denied in whole or in part, the Presiding Officer may, on such terms or conditions as are appropriate, order that any party provide or permit discovery.

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

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

(g) *Completion of Discovery.* All discovery shall be completed as soon as practical but in no case longer than one hundred fifty (150) days after issuance of a complaint, unless otherwise ordered by the Presiding Officer in exceptional circumstances and for good cause shown. All discovery shall be commenced by a date which affords the party from whom discovery is sought the full response period provided by these Rules.

(h) *Service and Filing of Discovery.* All discovery requests and written

responses, and all notices of deposition, shall be filed with the Secretary and served on all parties and the Presiding Officer.

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

§ 1025.32 Written interrogatories to parties.

(a) *Availability; Procedures for Use.* Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or unincorporated association or governmental entity, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of the Presiding Officer, be served upon any party after the filing of an answer.

(b) *Procedures for Response.* Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. Each answer shall be submitted in double-spaced typewritten form and shall be immediately preceded by the interrogatory, in single-spaced typewritten form, to which the answer is responsive. The answers are to be signed by the person making them, and the objections signed by the person or representative making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after service of the interrogatories. The Presiding Officer may allow a shorter or longer time for response. The party submitting the interrogatories may move for an order under § 1025.36 of these rules with respect to any objection to, or other failure to answer fully, an interrogatory.

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

(d) *Option to Produce Business Records.* Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served, or from an examination, audit, or inspection of such business records, or from a compilation, abstract, or summary of those records, and the burden of deriving the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to the interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries.

§ 1025.33 Production of documents and things.

(a) *Scope.* Any party may serve upon any other party a request (1) to produce and permit the party making the request, or someone acting on behalf of that party, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs, phono-records, and any other data compilation from which information can be obtained, translated, if necessary, by the party in possession through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of § 1025.31(c) and which are in the possession, custody, or control of the party upon whom the request is served, or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection (including photographing), or sampling any designated object or operation within the scope of § 1025.31(c).

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

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

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

§ 1025.34 Requests for admission.

(a) *Procedure for Request.* A party may serve upon any other party a written request for the admission, for the purposes of the pending proceedings only, of the truth of any matters within the scope of § 1025.31(c) set forth in the request that relate to statements of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of the Presiding Officer, be served upon any party after filing of the answer. Each matter about which an admission is requested shall be separately set forth.

(b) *Procedure for Response.* The matter about which an admission is requested will be deemed admitted unless within thirty (30) days after service of the request, or within such shorter or longer time as the Presiding Officer may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or the party's representative and stating the reasons for the objections. The answer shall specifically admit or deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission. When good faith requires that a party qualify an answer or deny only a part of the matter to which an admission is requested, the party shall specify the portion that is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny a fact unless the party states that he/she has made reasonable inquiry and that the information known or readily available to him/her is insufficient to enable him/her to admit or deny a fact. A party who considers that a matter to which an admission has been requested presents a genuine issue for hearing may not, on

that ground alone, object to the request but may deny the matter or set forth reasons why the party cannot admit or deny it. The party who has requested an admission may move to determine the sufficiency of any answer or objection in accordance with § 1025.36 of these Rules. If the Presiding Officer determines that an answer does not comply with the requirements of this section, he/she may order that the matter be deemed admitted or that an amended answer be served.

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

§ 1025.35 Depositions upon oral examination.

(a) *When Depositions May Be Taken.* At any time after the first prehearing conference, upon leave of the Presiding Officer and under such terms and conditions as the Presiding Officer may prescribe, any party may take the deposition of any other party, including the agents, employees, consultants, or prospective witnesses of that party at a place convenient to the deponent. The attendance of witnesses and the production of documents and things at the deposition may be compelled by subpoena as provided in § 1025.38 of these rules.

(b) *Notice of Deposition*—(1) *Deposition of a Party.* A party desiring to take a deposition of another party to the proceedings shall, after obtaining leave from the Presiding Officer, serve written notice of the deposition on all other parties and the Presiding Officer at least ten (10) days before the date noticed for the deposition. The notice shall state (i) the time and place for the taking of the deposition; (ii) the name and address of each person to be deposed, if known, or if the name is not known, a general description sufficient to identify him/her; and (iii) the subject matter of the expected testimony. If a subpoena *duces tecum* is to be served on the person to be deposed, the designation of the materials to be produced, as set forth in the subpoena, shall be attached to or included in the notice of deposition.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) The deposition of a witness may be used by any party for any purpose if the Presiding Officer finds: (i) That the witness is dead; or (ii) that the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or (iii) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or (iv) that the party offering the depostion has been unable to procure the attendance of the witness by subpoena; or (v) that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard for the importance of presenting the testimony of witnesses orally during the hearing, to allow the deposition to be used.

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

§ 1025.36 Motions to compel discovery.

If a party fails to respond to discovery, in whole or in part, the party seeking discovery may move within twenty (20) days for an order compelling an answer, or compelling inspection or production of documents, or otherwise compelling discovery. For purposes of this section, an evasive or incomplete response is to be treated as a failure to respond. When taking depositions, the discovering party shall continue the examination to the extent possible with respect to other areas of inquiry before moving to compel discovery.

§ 1025.37 Sanctions for failure to comply with discovery orders.

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

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

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

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

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

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

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

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

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

§ 1025.38 Subpoenas.

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

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

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

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

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

(e) *Service of a Subpoena.* A subpoena may be served in person or by

registered or certified mail, return receipt requested, as provided in § 1025.16(b) of these rules. Service shall be made by delivery of the signed "duplicate" copy to the person named therein.

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

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

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

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

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

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

(1) That the testimony or other information sought from a witness or deponent, or prospective witness or deponent, may be necessary to the public interest; and

(2) That such individual has refused or is likely to refuse to testify or provide such information on the basis of that individual's privilege against self-incrimination.

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

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

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

Subpart E—Hearings

§ 1025.41 General rules.

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

(b) *Prompt Completion.* Hearings shall proceed with all reasonable speed and, insofar as practicable and with due regard to the convenience of the parties, shall continue without suspension until concluded, except in unusual circumstances or as otherwise provided in these Rules.

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

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

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

§ 1025.42 Powers and duties of presiding officer.

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

(1) To administer oaths and affirmations;

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

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

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

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

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

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

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

(9) To take any action authorized by these Rules or the provisions of Title 5, United States Code, §§ 551–559.

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

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

(d) *Interference.* In the performance of adjudicative functions, a Presiding Officer shall not be responsible to or subject to the supervision or direction of any Commissioner or of any officer, employee, or agent engaged in the

performance of investigative or prosecuting functions for the Commission. All directions by the Commission to a Presiding Officer concerning any adjudicative proceedings shall appear on and be made a part of the record.

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

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

§ 1025.43 Evidence.

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

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

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

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

(d) *Official Notice.*—(1) *Definition.* Official notice means use by the Presiding Officer or the Commission of facts not appearing on the record and legal conclusions drawn from those facts. An officially noticed fact or legal conclusion must be one not subject to reasonable dispute in that it is either (i) generally known within the jurisdiction of the Commission or (ii) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

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

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

§ 1025.44 Expert witnesses.

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

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

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

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

§ 1025.45 In camera materials.

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

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

(1) A description of the documents or testimony;

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

(3) The terms and conditions imposed by the Presiding Official, if any, limiting access to or use of the *in camera* material.

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

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

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

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

(f) *Reference to In Camera Materials.* In the submission of proposed findings, conclusions, briefs, or other documents, all parties shall refrain from disclosing specific details of *in camera* materials. However, such refraining shall not preclude general references to such materials. To the extent that parties consider necessary the inclusion of specific details of *in camera* materials, those references shall be incorporated into separate proposed findings, conclusions, briefs, or other documents marked "Confidential, Contains *In Camera* Material," which shall be placed *in camera* and become part of the *in camera* record. Those documents shall be served only on parties accorded access to the *in camera* materials by these rules, the Presiding Officer, or the Commission.

§ 1025.46 Proposed findings, conclusions, and order.

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

§ 1025.47 Record.

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

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

§ 1025.48 Official docket.

The official docket in any adjudicatory proceedings shall be maintained in the Office of the Secretary and be available for public inspection during normal business hours of the Commission.

§ 1025.49 Fees.

(a) *Fees for Deponents and Witnesses.* Any person compelled to appear in person in response to a subpoena or notice of deposition shall be paid the same attendance and mileage fees as are paid witnesses in the courts of the United States, in accordance with Title 28, United States Code, section 1821. The fees and mileage referred to in this paragraph shall be paid by the party at whose instance deponents or witnesses appear.

(b) *Fees for Production of Records.* Fees charged for production or disclosure of records contained in the official docket shall be in accordance with the Commission's "Procedures for Disclosures or Production of Information Under the Freedom of Information Act," Title 16, Code of Federal Regulations, § 1015.9.

Subpart F—Decision

§ 1025.51 Initial decision.

(a) *When Filed.* The Presiding Officer shall endeavor to file an Initial Decision with the Commission within sixty (60) days after the closing of the record or the filing of post-hearing briefs, whichever is later.

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

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

(2) An appropriate order.

(c) *By Whom Made.* The Initial Decision shall be made and filed by the Presiding Officer who presided over the hearing, unless otherwise ordered by the Commission.

(d) *Reopening of Proceedings by Presiding Officer; Termination of Jurisdiction.* (1) At any time prior to, or concomitant with, the filing of the Initial Decision, the Presiding Officer may reopen the proceedings for the reception of further evidence.

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

§ 1025.52 Adoption of initial decision.

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

§ 1025.53 Appeal from initial decision.

(a) *Who May File Notice of Intention.* Any party may appeal an Initial Decision to the Commission, provided that within ten (10) days after issuance of the Initial Decision such party files and serves a notice of intention to appeal.

(b) *Appeal Brief.* An appeal is perfected by filing a brief within forty (40) days after service of the Initial Decision. The appeal brief must be served upon all parties. The appeal brief shall contain, in the order indicated, the following:

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

(2) A concise statement of the case;

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

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

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

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

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

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

(f) *Reply Brief.* A reply brief shall be limited to rebuttal of matters presented in answering briefs, including matters raised in cross-appeals. A reply brief shall be filed and served within fourteen (14) days after service of an answering brief, or on the day preceding the oral argument, whichever comes first.

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

§ 1025.54 Review of initial decision in absence of appeal.

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

§ 1025.55 Final decision on appeal or review.

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

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

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

§ 1025.56 Reconsideration.

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

§ 1025.57 Effective date of order.

(a) *Orders in Proceedings Arising Under the Consumer Product Safety Act.* An order of the Commission in proceedings arising under the Consumer Product Safety Act becomes effective upon receipt, unless otherwise ordered by the Commission.

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

(2) *Litigated orders.* All other orders in proceedings arising under the Flammable Fabrics Act become effective upon the expiration of the statutory period for court review specified in Section 5(c) of the Federal Trade Commission Act, Title 15, United States Code, section 45(c), or, if a petition for review has been filed, upon a court's affirmance of the Commission's order.

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

§ 1025.58 Reopening of proceedings.

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

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

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

(2) *After effective date of order.* Whenever the Commission is of the

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

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

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

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

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

Subpart G—Appearances, Standards of Conduct

§ 1025.61 Who may make appearances.

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

§ 1025.62 Authority for representation.

Any individual acting in a representative capacity in any adjudicative proceedings may be required by the Presiding Officer or the Commission to show his/her authority to act in such capacity. A regular employee of a party who appears on behalf of the party may be required by the Presiding Officer or the Commission to show his/her authority to so appear.

§ 1025.63 Written appearances.

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

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

§ 1025.64 Attorneys.

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

§ 1025.65 Persons not attorneys.

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

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

§ 1025.66 Qualifications and standards of conduct.

(a) *Good Faith Transactions.* The Commission expects all persons

appearing in proceedings before the Commission or the Presiding Officer to act with integrity, with respect, and in an ethical manner. Business transacted before and with the Commission or the Presiding Officer shall be conducted in good faith.

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

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

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

§ 1025.67 Restrictions as to former members and employees.

(a) *Generally.* Except as otherwise provided in paragraph (b) of this section, the post-employee restrictions applicable to former Commission members and employees, as set forth in the Commission's "Post Employment Restrictions Applicable to Former Commission Officers and Employees", 16 CFR Part 1030, Subpart L, shall govern the activities of former Commission members and employees in matters connected with their former duties and responsibilities.

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

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

(1) The nature and extent of the former member's or employee's participation in, knowledge of, and connection with the proceedings or investigation during his/her service with the Commission;

(2) Whether the files of the proceedings or investigation came to his/her attention;

(3) Whether he/she was employed in the directorate, division, or other organizational unit within the Commission in which the proceedings or investigation is or has been pending;

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

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

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

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

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

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

§ 1025.68 Prohibited communications.

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

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

(i) The Commissioners and their staffs;

(ii) The Administrative Law Judges and their staffs;

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

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

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

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

(d) *Permissible Ex Parte Communications.* The following communications shall not be prohibited under this section.

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

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

(e) *Procedures for Handling Prohibited Ex Parte Communication*—(1) *Prohibited written ex parte communication.* To the extent possible, a prohibited written *ex parte* communication received by any Commission employee shall be forwarded to the Secretary rather than to a decision-maker. A prohibited written *ex parte* communication which reaches a decision-maker shall be forwarded by the decision-maker to the Secretary. If the circumstances in which a prohibited *ex parte* written communication was made are not apparent from the communication itself, a statement describing those circumstances shall be forwarded with the communication.

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

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

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

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

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

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

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

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

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

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

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

(g) *Sanctions.* A person subject to these Rules who make, a prohibited *ex parte* communication, or who encourages or solicits another to make any such communication, may be subject to any appropriate sanction or sanctions, including but not limited to, exclusion from the proceedings and an adverse ruling on the issue which is the subject of the prohibited communication.

Appendix I—Suggested Form of Final Prehearing Order

Case Caption

A final prehearing conference was held in this matter, pursuant to Rule 21 of the Commission's Rules of Practice for Adjudicative Proceedings (8 CFR 1025.21), on the ——— day of ———, 19—, at —— o'clock, —m.

Counsel appeared as follows:

For the Commission staff:

For the Respondent(s):

Others:

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

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

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

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

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

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

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

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

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

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

The foregoing were modified at the pretrial conference as follows:

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

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

(Identification number and brief description of each exhibit)

The authenticity of these exhibits has been stipulated.

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

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

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

(Identification number and brief description of each exhibit)

The authenticity of these exhibits has been stipulated.

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

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

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

(Identification number and brief description of each exhibit)

The authenticity of these exhibits has been stipulated.

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

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

Note.—If any other exhibits are to be offered by any party, such exhibits will be submitted to opposing counsel at least ten

(10) days prior to hearing, and a supplemental note of evidence filed into this record.

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

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

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

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

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

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

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

Presiding Officer.

Dated:————————

Approved as to Form and Substance

Date: ————————

Complaint Counsel.

Attorney for Respondent(s)

*Attorney for Intervenors

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

Dated: April 28, 1980.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

[FR Doc. 80-13433 Filed 4-30-80; 8:45 am]

BILLING CODE 6355-01-M

CERTIFICATE OF SERVICE

I hereby certify that I have provided on this date, December 17, 2012, the foregoing Motion to Consolidate Proceedings, Memorandum in Support, and Attachments A and B upon the Secretary, the Presiding Officer, and all parties and participants of record in these proceedings in the following manner:

Original and three copies by hand delivery, and one copy by electronic mail, to the Secretary of the U.S. Consumer Product Safety Commission: Todd A. Stevenson

One copy by certified mail and one copy by electronic mail to Acting Chief Administrative Law Judge Parlen L. McKenna:

The Honorable Parlen L. McKenna
Coast Guard Island, Building 54A
Alameda, CA 94501-5100

One copy by certified mail and one copy by electronic mail to the Presiding Officer for *In the Matter of Maxfield and Oberton Holdings, LLC*, CPSC Docket No. 12-1, and *In the Matter of Zen Magnets, LLC*, CPSC Docket No. 12-2:

The Honorable Dean C. Metry
U.S. Coast Guard
U.S. Courthouse
601 25th St., Suite 508A
Galveston, TX 77550
email: Janice.M.Emig@uscg.mil

One copy by certified mail and one copy by electronic mail to counsel for Respondent Maxfield and Oberton Holdings, LLC:

Paul M. Laurenza
Eric C. Tew
Dykema Gossett PLLC
Franklin Square Building
1300 I Street, N.W., Suite 300 West
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One copy by certified mail and one copy by electronic mail to counsel for Respondents Zen Magnets, LLC and Star Networks USA, LLC:

David C. Japha
The Law Offices of David C. Japha, P.C.
950 S. Cherry Street, Suite 912
Denver, CO 80246
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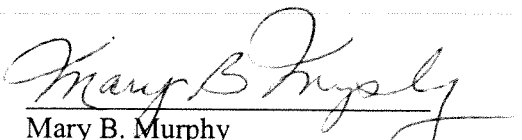

Mary B. Murphy
Complaint Counsel
U.S. Consumer Product Safety Commission