



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

This document has been electronically approved and signed.

THIS MATTER IS NOT SCHEDULED FOR A BALLOT VOTE.

A DECISION MEETING ON THIS MATTER IS SCHEDULED ON: TBD

DATE: November 6, 2019

TO: The Commission
 Alberta E. Mills, Secretary

THROUGH: J. Gibson Mullan, Acting General Counsel
 Mary T. Boyle, Executive Director

FROM: Patricia M. Pollitzer, Assistant General Counsel, RAD
 Melissa V. Hampshire, Assistant General Counsel, E&I
 Mary B. Murphy, Assistant General Counsel, Compliance
 Mary A. House, Attorney, RAD
 Patricia K. Vieira, Attorney, E&I
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 Daniel Vice, Attorney, Compliance
 Gregory M. Reyes, Attorney, Compliance

SUBJECT: Supplemental Notice of Proposed Rulemaking to Update the Rules of Practice for Adjudicative Proceedings, 16 CFR Part 1025

Staff of the Office of the General Counsel (OGC) is forwarding to the Commission a draft supplemental notice of proposed rulemaking (Supplemental NPR) to update the Consumer Product Safety Commission's Rules of Practice for Adjudicative Proceedings (Rules of Practice or Rules). The Commission issued an NPR on April 13, 2016 (2016 NPR), stating that the Commission proposed to modernize the Rules of Practice to reflect changes in civil and administrative litigation since adoption of the Rules in 1980. OGC staff prepared the draft Supplemental NPR for Commission consideration, to update the Rules of Practice based on recent Commission experience with adjudicative proceedings, respond to comments on the 2016 NPR, and propose additional changes to the Rules based on the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

Please indicate your vote on the following options:

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

 (Signature)

 (Date)

Consumer Hotline and General Information: 1-800-638-2772 ★ CPSC's Web Site: <http://www.cpsc.gov>

II. Approve publication of the attached document in the *Federal Register*, with the specified changes:

(Signature)

(Date)

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

(Signature)

(Date)

IV. Take other action specified below:

(Signature)

(Date)

Attachment: Draft *Federal Register* Notice: Supplemental Notice of Proposed Rulemaking to Update the Rules of Practice for Adjudicative Proceedings, 16 CFR Part 1025

Billing Code 6355-01-P

CONSUMER PRODUCT SAFETY COMMISSION

16 CFR Part 1025

[CPSC Docket No. 2016-0006]

Rules of Practice for Adjudicative Proceedings

AGENCY: Consumer Product Safety Commission.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: The United States Consumer Product Safety Commission (CPSC) is issuing this supplemental notice of proposed rulemaking (Supplemental NPR) to update the Commission's Rules of Practice for Adjudicative Proceedings (Rules of Practice or Rules). The Commission issued a notice of proposed rulemaking on April 13, 2016 (2016 NPR), stating that the Commission proposed to modernize the Rules of Practice to reflect changes in civil and administrative litigation since adoption of the Rules in 1980. Consistent with the 2016 NPR, the Commission now proposes to update the Rules of Practice, responding to comments on the 2016 NPR, and proposing additional changes to the Rules based on the Federal Rules of Civil Procedure and recent Commission experience with the Rules in adjudicative proceedings.

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

ADDRESSES: Comments, identified by Docket No. CPSC-2016-0006, may be submitted electronically or in writing:

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

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encourages you to submit electronic comments by using the Federal eRulemaking Portal, as described above.

Written Submissions: Submit written submissions in the following way: Mail/Hand delivery/Courier (for paper, disk, or CD-ROM submissions) to: Division of the Secretariat, Consumer Product Safety Commission, Room 704-D, 4330 East West Highway, Bethesda, MD 20814; telephone (301) 504-7923.

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

Docket: For access to the docket to read background documents or comments received, go to: <http://www.regulations.gov>, and insert the docket number, CPSC-2016-0006, into the “Search” box, and follow the prompts.

FOR FURTHER INFORMATION CONTACT: Mary A. House, Attorney, Regulatory Affairs Division, Office of the General Counsel, Consumer Product Safety Commission, 4330 East West Highway, Office 703-G; telephone: 301-504-6810; e-mail: MHouse@cpsc.gov.

SUPPLEMENTARY INFORMATION: The Commission issues this Supplemental NPR proposing to amend the CPSC’s Rules of Practice for Adjudicative Proceedings, codified at 16 CFR part 1025.

I. Background and Statutory Authority

A. Commission Adjudicative Proceedings

The Consumer Product Safety Act (15 U.S.C. 2064(c), (d), (f); 2076(b)) (CPSA), the Federal Hazardous Substances Act (*id.* 1274) (FHSA), the Flammable Fabrics Act (*id.* 1192, 1194, 1197(b)) (FFA), the Poison Prevention Packaging Act (*id.* 1473(c)) (PPPA), and the Virginia Graeme Baker Pool and Spa Act, (*id.* 8003) (VGBA) authorize the Commission to initiate and conduct adjudicative proceedings related to the safety of certain consumer products, and, based on the Commission’s findings, issue orders or take other action to protect the public. Under the requirements of the cited statutes, such adjudicative proceedings must be determined on an administrative record after opportunity for an agency hearing. 15 U.S.C. 2064(f)(1).

The Commission intends for the Rules of Practice to apply to all hearings required by 5 U.S.C. 554. Typically, the Rules apply to matters arising under section 15 of the CPSA (15 U.S.C. 2064(f)) where Commission staff allege that a consumer product is a “substantial product hazard” and seek a corrective action to address the risk of injury to consumers. The Rules of Practice would also apply, for example, when the Commission refuses admission of imported consumer products under 15 U.S.C. 2066(b), after affording the importer or consignee an opportunity for a hearing in accordance with section 554.

B. Procedural Rules Requirement

Under the Administrative Procedure Act (APA) (5 U.S.C. 551 *et seq.*), adjudications mandated by statute to be determined on the record after opportunity for an agency hearing are subject to certain procedural requirements. These requirements include notice of the time, place, and nature of the hearing, information about the legal authority under which the hearing is to be held, and information on the matters of fact and law asserted. *Id.* 554(a)–(b). The Commission adopted the Rules of Practice to

govern adjudicative proceedings under its enabling statutes and other administrative proceedings, as determined by the Commission.

C. History of the Rules of Practice

The Commission first proposed the Rules of Practice in 1974 for use on an interim basis. 39 FR 26848 (July 23, 1974). In 1977, the Commission revised the Rules of Practice, publishing them for use on an interim basis and for public comment. 42 FR 31431 (interim rules); 42 FR 36818 (issuing correction). In 1980, after considering public comments and the Commission's experiences with the existing interim rules, the Commission adopted the Rules of Practice now codified in part 1025. 45 FR 29215 (May 1, 1980). The Commission last amended the Rules of Practice in 1982 to make them applicable to hearings required by section 15 of the FHSA. 47 FR 46845 (Oct. 21, 1982).

D. 2016 NPR

On May 12, 2015, the Commission directed staff to present for Commission consideration a revision of the Rules of Practice, with the goal of streamlining future adjudications and aligning the Rules of Practice with the Federal Rules of Civil Procedure (Federal Rules). The 2016 NPR published in the Federal Register on April 13, 2016. 81 FR 21775.

II. Reasons for Proposed Revision of the Rules

In light of recent Commission experience with the Rules of Practice, this Supplemental NPR seeks to revise the existing part 1025, as well as supplement the 2016 NPR, to propose changes to the Rules of Practice. As with the 2016 NPR, the purpose of this Supplemental NPR is to simplify future adjudications by aligning the Rules of Practice with the Federal Rules of Civil Procedure and with other federal agencies that have similar rules of practice for adjudications. The Commission's proposed amendments also update and modernize adjudicatory practices in light of recent Commission experience with the rules.

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A. Alignment with the Federal Rules of Civil Procedure

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

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

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Recent changes in the Federal Rules also place substantial focus on the discretionary powers of a judge or magistrate in managing the scope of discovery.¹ Accordingly, the 2016 and Supplemental NPRs provide that the Presiding Officer may limit or expand discovery, and on motion, or on his or her own initiative, may tailor the pace of the adjudication and the scope and length of discovery based on the issues in each case. The Commission proposes to follow, with appropriate changes, the Federal Rules, and to place emphasis on empowering the Presiding Officer to use discretion to control the pace and progress of discovery. In the Supplemental NPR, the Presiding Officer would be an active participant in the discovery process, with powers to manage cases actively to avoid delays and forestall inefficient or wasteful discovery.

The Federal Rules provide substantial guidance on the discoverability and use of ESI because, increasingly, information is stored in digital form. The Supplemental NPR largely would follow the Federal Rules' guidance on the discoverability of electronic evidence. In similar respects, the Supplemental NPR also proposes many changes throughout Subpart E concerning evidentiary issues that arise in hearings, in order to be consistent with the Federal Rules of Evidence.

B. Increasing the Efficiency of Adjudicative Proceedings

In addition to aligning CPSC's Rules of Practice with the Federal Rules, the Supplemental NPR proposes to increase efficiency and decrease the burden of preparing for and litigating adjudicative matters. For example, the Supplemental NPR proposes to update the Rules for consolidating cases to allow the Presiding Officer to consolidate cases, fully or partially, for discovery and/or for hearing, on a party's motion, or at the Presiding Officer's discretion.

¹ See, e.g., Chief Justice John Roberts' 2015 Year-End Report on the Federal Judiciary, available at: <https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf>. The Chief Justice describes the substantial changes to the Federal Rules (effective in 2015) to streamline discovery, stating that "the pretrial process must provide parties with efficient access to what is needed to prove a claim or defense, but eliminate unnecessary or wasteful discovery" and explaining that the amended rules "emphasize the crucial role of federal judges in engaging in early and effective case management." 2015 Year-End Report on the Federal Judiciary at 8.

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Additional proposed changes would adapt the Rules of Practice to the general needs of administrative litigation, based on the experiences of the Commission and staff in adjudicative proceedings. In each case, the Supplemental NPR proposes to emphasize the discretion of the Presiding Officer to facilitate prompt, fair, and efficient discovery and trial of adjudicative matters. Although the Supplemental NPR proposes to vest significant discretion in the Presiding Officer, the Supplemental NPR proposes, nevertheless, to impose timelines on the adjudicative proceeding and deadlines on the Presiding Officer, requiring Initial Decisions to be made within specified time frames.

C. Updating CPSC's Rules of Practice to Provide Clarity and to Reflect Modern Administrative Law Practices

Additional reasons for updating the Rules of Practice include providing clarity regarding certain provisions of the rules, and modernizing the rules to reflect administrative practices familiar to CPSC staff and practitioners. For example, the Commission proposes to update CPSC's Rules of Practice to provide clear guidance on whether proposed amendments and supplemental pleadings require Commission consideration. The Supplemental NPR revises the 2016 NPR regarding amending a Complaint, proposing that the Presiding Officer shall have the authority to allow amendments that are "reasonably within the scope of the original complaint which do not unduly broaden the issues in the adjudicative proceeding or cause undue delay." The Supplemental NPR proposes to provide the Presiding Officer with discretion to refer denied amendments to the Commission upon the motion of the moving party. This places the responsibility on the party to object to a Presiding Officer's ruling, and allows the Presiding Officer the discretion to refer, or not to refer, denial of a motion to amend or supplement a pleading to the Commission. The Commission retains the ability to review amendments to pleadings on appeal; however, the responsibility for reviewing the majority of amendments rests with the Presiding Officer. This revision reflects the Commission's concern about creating undue delay, if too many proposed amendments or supplemental pleadings are referred to the Commission for decision.

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The Supplemental NPR continues to propose to revise the Rules of Practice to permit electronic filing and service of pleadings and documents and to discourage filing of paper documents. Likewise, the Supplemental NPR proposes to revise the existing requirement that the Commission's Division of the Secretariat maintain an official docket for public inspection during normal business hours, a practice that is cumbersome and fails to reflect significant technological advancements. Currently, the Division of the Secretariat maintains an electronic docket on the Commission's public website.

The Supplemental NPR also continues to propose to revise the Rules of Practice regarding service of process to accommodate electronic service of most documents and pleadings, and to recognize the use of common carriers in the delivery of paper documents.

Likewise, the Supplemental NPR continues to propose to clarify our Rules of Practice regarding motions for summary decisions, amending that section to follow more closely the Federal Rules. The Supplemental NPR also proposes a new section on dispositive motions, combining motions to dismiss and motions for summary decision in proposed § 1025.25.

D. 2019 Supplemental NPR

The Commission proposes to make supplemental changes to the 2016 NPR based on a review of other agencies' practices and the Commission's experience with adjudicative proceedings since the 2016 NPR. For example, the Commission applied the Rules of Practice in issuing a final decision and order in *In re Zen Magnets, LLC*; CPSC Docket No. 12-2, which is currently on appeal in the U.S. Court of Appeals for the Tenth Circuit. Supplemental proposed changes are based on Commission and staff experience with the Rules of Practice during the adjudications, with guidance from other agencies' rules of practice. The Commission's supplemental proposals are intended to create an adjudicatory process that furthers prompt resolution of matters, while protecting the rights of all parties to a fair and impartial proceeding.

III. Description of the Proposed Revisions of the Rules of Practice

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

1. Proposed Changes to § 1025.1 (Scope of Rules)

The 2016 NPR proposed to revise § 1025.1, Scope of rules, to clarify that, in addition to adjudicative proceedings related to the CPSA, the FHSA, and the FFA, the Commission is empowered to conduct adjudications under the PPPA and the VGBA. Specifically, the 2016 proposed revision clarified that the Commission may conduct adjudicative proceedings under section 4(c) of the PPPA and section 1404 of the VGBA.

Additionally, the 2016 NPR proposed to revise § 1025.1 to remove the existing statement that the Rules of Practice govern adjudicative proceedings for assessing civil penalties under section 20(a) of the CPSA, because this practice has been superseded by changes in the law and the Commission no longer uses adjudicative proceedings to assess civil penalties. Pursuant to a statutory change, such actions are now litigated in U.S. District Court, rather than before the Commission. The 2016 NPR also proposed to remove a similarly outdated statement regarding the limited scope of discovery in civil penalty cases.

The 2016 NPR proposed new language in § 1025.1 to ensure that the Commission's health and safety mission is a critical concern the Presiding Officer considers when setting deadlines and managing cases. The Commission stated that, whenever possible, and in the interest of protecting public health and safety, the Presiding Officer should expedite adjudicative proceedings by setting shorter time limitations than the maximum limits imposed by the rules, with the goal of issuing an Initial Decision within 1 year from the date of the complaint.

The 2016 NPR also proposed to add a statement to § 1025.1, indicating that, except where stated otherwise, parties shall follow the Federal Rules on certain discovery matters. The Commission

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stated that following the Federal Rules on discovery matters would streamline the discovery process, and thereby introduce increased efficiencies to advance the goal of avoiding unnecessary delay.

Through this change, the Commission proposed to redefine the scope of discovery to encompass Rule 26 of the Federal Rules, and to follow generally, with some stated exceptions, the Federal Rules' procedures on pretrial discovery, including interrogatories (Federal Rule 33); production of documents, ESI, and tangible things (Federal Rule 34); requests for admission (Federal Rule 36); and depositions (Federal Rule 30-32). The 2016 NPR proposed not following the Federal Rules on subpoenas, which by statute, require Commission approval. The 2016 NPR also proposed additional minor and non-substantive changes to the Rules of Practice for clarity.

Proposed revisions in the Supplemental NPR ensure that § 1025.1 solely addresses the scope of the Rules of Practice. The Supplemental NPR proposes to remove the specific list of statutes added in the 2016 NPR so that the agency will not have to update the Rules of Practice each time the Commission receives new authority from Congress. Instead, the Supplemental NPR proposes to refer specifically to the CPSA, and then refer generally to "any other hearing afforded by acts administered and enforced by the Consumer Product Safety Commission which are required to be determined on the record after an opportunity for an agency hearing as provided in 5 U.S.C 554." The Supplemental NPR also proposes to move policy statements regarding the health and safety mission of the agency and the timeliness of adjudicative proceedings to § 1025.2. Moving these statements consolidates Commission policies into proposed § 1025.2, which already addresses Commission policy in adjudicative proceedings. Although the Commission maintains the proposal that the Rules of Practice align more closely with the Federal Rules on discovery matters, this policy statement has been moved to appropriate sections governing discovery. The Supplemental NPR also proposes minor grammatical edits for clarity.

2. *Proposed Changes to § 1025.2 (Nature of Adjudicative Proceedings)*

The 2016 NPR did not propose any changes to § 1025.2. The Supplemental NPR proposes to incorporate text from § 1025.1 of the 2016 NPR regarding the safety mission of the agency and the timeliness of adjudicative proceedings into proposed § 1025.2. The Supplemental NPR proposes to change the word “extent” in the last sentence of proposed § 1025.2 regarding discovery, to “scope,” to be consistent with provisions addressing the scope of discovery in Subpart D. The Supplemental NPR also proposes to include language from an amendment to the 2016 NPR by Commissioner Adler, adopted by the Commission, which was inadvertently omitted in the published version of the 2016 NPR, regarding the Commission’s statutory obligation to protect the public from unreasonable risks of injury and death from consumer products. Finally, the Supplemental NPR proposes grammatical edits for clarity.

3. *Proposed Changes to § 1025.3 (Definitions)*

The 2016 NPR proposed to update the definitions in § 1025.3 to reflect current litigation practices and advances in technology, such as the inclusion of a definition of ESI, which tracks the Federal Rules. The 2016 NPR also proposed several non-substantive changes, such as: (1) cross-referencing the definition of “*ex parte* communication” as stated in proposed § 1025.68; (2) adding a definition of “Federal Rules”; and (3) updating the definition of “Secretary” to include “Secretariat.” To accommodate new definitions, the 2016 NPR renumbered § 1025.3.

The Supplemental NPR includes the proposed changes in the 2016 NPR, without revision. The Supplemental NPR proposes to add eight new definitions, including cross-references to terms defined elsewhere in part 1025; revisions to five definitions to clarify the roles of parties, intervenors, participants, and agency staff in adjudicative proceedings; and to codify new legal precedent regarding the appointment of administrative law judges. In crafting the new and revised definitions, the

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Commission reviewed and considered the definitions codified by other departments and federal agencies, such as the Federal Trade Commission (FTC), the Securities and Exchange Commission (SEC), and the Consumer Financial Protection Bureau (CFPB). The Supplemental NPR seeks to modernize the definitions, to include terms to assist in explaining amendments in other sections, and to ensure consistency in terminology throughout the Rules of Practice. For example, the Supplemental NPR clarifies and distinguishes between decisional staff and adversarial staff to explain proposed changes to § 1025.68 regarding *ex parte* communications and to implement proposed § 1025.69 in the 2016 NPR concerning separation of functions.

Specifically, the Supplemental NPR proposes to add or revise the following definitions:

- Adds a definition for “Adjudicative proceedings,” a term used in describing the scope of this part in § 1025.1. The Commission reviewed the FTC’s definition at 16 CFR 3.2, and drafted this definition to provide more information on the form of adjudicative proceedings covered under part 1025.
- Adds a definition for “Adversarial staff” and “Decisional staff,” to clarify the roles of staff who participate in adjudicative matters and ensure that separation of functions is observed. For example, attorneys within the Office of the General Counsel serve in different roles in each adjudicative proceeding, including Complaint Counsel, who investigate and prosecute a case, and decisional staff, who assist the Commission in its role as decision-maker. OGC attorneys are separated by an ethical wall established for each adjudicative proceeding. The Commission reviewed the APA and considered the CFPB’s regulation at 12 CFR 1081.103 to define staff roles in an adjudicative proceeding.

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- Changes the definition of “Commission” to mean the Commissioners who comprise the U.S. Consumer Product Safety Commission, or a quorum thereof. The Supplemental NPR also adds a definition for “CPSC” to mean the U.S. Consumer Product Safety Commission as an independent agency. The Commission intends these changes to differentiate between the Commission, acting in its capacity as a decisional body, and the CPSC, operating as an administrative agency to fulfill the statutory mission to protect consumers from hazardous consumer products.
- Modifies the definition for “Complaint Counsel” to clarify that Complaint Counsel includes any individual named as Complaint Counsel on a complaint, or who files a notice of appearance as Complaint Counsel in an adjudicative proceeding.
- Adds cross-references for the definitions of “Intervenor” and “Participant” in § 1025.17 for ease of use.
- Adds a cross-reference to the definition of “Decision-maker” in § 1025.68(b)(1) for ease of use.
- Amends the definition of “Party” to clarify that CPSC staff represented by Complaint Counsel is a party to an adjudicative proceeding.
- Updates the definition of “Person” to include additional entities that the Commission considers a “Person” subject to this part, using CFPB’s rule 12 CFR 1081.103 for guidance.
- Updates the definition of “Presiding Officer” to reflect changes in the law regarding Commission appointments of administrative law judges under Article II of the Constitution.

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- Adds a cross-reference for the definition of “Representative” in § 1025.64 and § 1025.65 for ease of use.
- Amends the definition of “Staff” to include, in addition to CPSC employees, contractors, agents, and others, including consulting experts.

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

1. Proposed Changes to § 1025.11 (Commencement of Proceeding)

The 2016 NPR proposed to amend § 1025.11(a) to state that Complaint Counsel has the authority to sign a complaint authorized by the Commission. The 2016 NPR also proposed to remove the requirement in § 1025.11(b)(3) that a complaint include an attached list and summary of documentary evidence supporting the charges, because Federal Rule 26(a)(1)(A) requires mandatory disclosures of evidence, which the Commission proposes to follow as part of § 1025.31, *General Provisions Governing Discovery*. The Supplemental NPR continues to propose these changes, and also includes minor editorial changes to § 1025.11(c), including stating that the Office of the Secretariat is responsible for sending an issued complaint to the Office of the Federal Register (OFR) for publication, and for posting the Complaint on the CPSC’s website.

2. Proposed Changes to § 1025.12 (Answer)

The 2016 NPR did not propose any changes to § 1025.12. The Supplemental NPR proposes adding one day to the deadline for filing an answer in § 1025.12(a), changing the time period from 20 to 21 days, to align the time with the deadline to file an answer specified in Federal Rule 12(a)(1)(A)(i). The Supplemental NPR also proposes adding a new § 1025.12(c)(2), and amending § 1025.12(c)(1). The Supplemental NPR proposes to amend § 1025.12(c)(1) to add a time frame of seven (7) days to allow the Presiding Officer to enter an Order of Default, if the respondent fails to file an answer within the time provided in the rule. The Supplemental NPR also proposes adding a new § 1025.12(c)(2).

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This paragraph on default adopts a similar procedure from the SEC rule for a motion to set aside a default, 17 CFR 201.155, and from the CPFB's rule 12 CFR 1081.201(d)(2). Although proposed § 1025.12(c)(2) imposes a seven (7)-day time limit to set aside a default, the Presiding Officer retains discretion to set aside an Order of Default, stating that a Presiding Officer, prior to the filing of the recommended decision, or the Commission, at any time, may set aside a default for good cause shown. This new provision is intended to increase a respondent's due process with regard to a default judgment.

3. Proposed Changes to § 1025.13 (Amendments and Supplemental Pleadings)

The 2016 NPR proposed to revise § 1025.13(a) to limit the discretion of the Presiding Officer to allow amendments and supplemental pleadings, by requiring the Presiding Officer to refer to the Commission for decision any proposed amendments or supplemental pleadings that: (1) added or removed a person or respondent, or added or removed a count, (2) fell outside the scope of an authorized complaint, or (3) broadened the staff's authority under a complaint.

Commenters supported this revision, and the ABA commented that this change was consistent with the practice at the FTC. The Commission reviewed the FTC's rules of practice, and the Supplemental NPR proposes to modify proposed § 1025.13(a) to include the FTC's language stating that the Presiding Officer may allow amendments that are "reasonably within the scope of the original complaint." The intent of this revision is to simplify the language in proposed § 1025.13(a) and provide the Presiding Officer with the authority to allow amended or supplemental pleadings that fall within the scope of the original complaint. Additionally, the Supplemental NPR proposes to provide the Presiding Officer with discretion to refer to the Commission proposed amendments that are denied by the Presiding Officer, upon motion of the party moving to amend or supplement a pleading. This places the responsibility on a party, denied the ability to amend or supplement a pleading, to object to a

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Presiding Officer's ruling, and allows the Presiding Officer the discretion to refer, or not to refer, a proposed amendment to the Commission.

Under the Supplemental NPR, the Commission retains the ability to review amendments to pleadings allowed by a Presiding Officer in a Final Decision and Order. These changes from the 2016 NPR reflect the Commission's concern with simplifying the criteria to amend a pleading, and avoiding undue delay if too many proposed amendments or supplemental pleadings are referred to the Commission for decision.

The Supplemental NPR proposes to add a time for filing a response to an amended or supplemental pleading, adopted from Federal Rule 15(a)(3). Finally, the Supplemental NPR proposes adding § 1025.13(c) regarding conforming to the evidence. Upon review of other agencies' procedures, the Commission notes that CPSC's procedures lack a provision for conforming to the evidence. This section adopts the procedure from the CFPB rules for amended pleadings in 12 CFR 1081.202(b). The Commission intends that this new provision will promote adjudication on the merits and protect parties from undue prejudice.

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

The 2016 NPR proposed to revise the title of § 1025.14 from "Form and filing of documents" to "Form and filing of pleadings and other documents." The 2016 NPR also proposed to amend § 1025.14(a) to state that pleadings and documents shall be filed electronically with the Secretariat and the Presiding Officer, unless the Presiding Officer orders otherwise. This change was proposed because the rule, as written, is outdated and does not reflect current practice for filing pleadings and evidence electronically, which is standard practice in most state and federal courts. Moreover, the current rule requires the Office of the Secretary (versus the current Division of the Secretariat) to maintain the official file, in paper format, access to which is limited by the Commission's hours of operation. Thus,

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this proposed change not only would reflect current technological advances, but also expand public access to the official docket. The 2016 NPR proposal, however, would allow the Presiding Officer discretion to permit exceptions to the electronic filing requirement, so that paper documents can be filed if the Presiding Officer so orders.

Additionally, to emphasize the Commission's preference for electronic filing, the 2016 NPR proposed to omit existing language stating that documents "may be filed in person or by mail." The 2016 NPR also proposed changes, consistent with the proposal on electronic filing, establishing the filing date for documents. Electronically filed documents would be deemed filed on the date of the electronic filing; however, recognizing the broad discretion afforded the Presiding Officer, the 2016 NPR proposed adding language stating that the Presiding Officer may allow alternative methods of filing, by order, and that such order shall state the applicable date on which such pleadings or documents are deemed filed.

The 2016 NPR proposed new language in § 1025.14(c) to eliminate the current requirement that three copies of pleadings must be filed, a superfluous requirement in an era where digital copies are easily created. Under the proposed change, a single electronic copy would be filed with the Secretariat and the Presiding Officer; however, the 2016 NPR proposed to add language acknowledging that the Presiding Officer may order paper filings.

Additionally, the 2016 NPR proposed changes in § 1025.14(d) to require that the original of each document filed electronically must be signed electronically. The Commission intends to allow filings using electronic signatures or filings containing a manual signature that is uploaded using a pdf format.

The 2016 NPR proposed to amend § 1025.14(e) to establish requirements that address the electronic filing of pleadings and documents. The Commission proposed to require an email address, in

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addition to a mailing address, in § 1025.14(e)(1). Section 1025.14(e)(2) of the 2016 NPR proposed to require filing electronic text documents in a format that uses 12-point font with double spacing and prints on standard letter-sized paper with 1-inch margins. This provision would include the requirement that electronic documents and files that cannot be readily printed, such as large spreadsheets, videos, or photographs, be identified by technical format and also include information on the program or protocol required to review the information. The proposed font, spacing, and margin requirements are consistent with Rule 32 of the Federal Rules of Appellate Procedure and Rule 102(a)(b) of the U.S. District Court for the District of Maryland.

The 2016 NPR also proposed to update § 1025.14(e)(3) to state that documents that do not meet the filing requirements, or electronic documents that cannot be opened or read, may be returned to the filer by the Secretariat or the Presiding Officer. Lastly, the 2016 NPR proposed to add language to § 1025.14(e)(3) to allow a Presiding Officer to permit deviation from the form prescribed in this section, for good cause shown, a change that underscored the Commission's goal of vesting broad discretion in the Presiding Officer to maximize efficiency and flexibility in how an adjudication proceeds.

The Supplemental NPR includes all of the proposed amendments in the 2016 NPR. In addition to a grammatical edit in § 1025.14(a), the Commission also proposes to break into three paragraphs the proposed change to § 1025.14(e)(3) in the 2016 NPR, which in the Supplemental NPR comprises §§ 1025.14(e)(3), (e)(4), and (e)(5). The Supplemental NPR proposes this change for ease of use.

5. Proposed Changes to § 1025.15 (Time)

The 2016 NPR proposed several non-substantive changes to § 1025.15(a), including a clarification of the title to make clear that the computation of time refers to days. The Commission also sought to make clear that “day” meant calendar day. The 2016 NPR further proposed to clarify the

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existing language to state that the day on which the event triggering the period shall not be included in the calculation of time, but each calendar day thereafter shall be included, and that if the last day of the time period falls on a weekend or legal holiday, the time period shall be tolled until the next day that is not a weekend or a legal holiday. The Commission proposed to update § 1025.15 to delete references to specified legal holidays in the existing rule, and refer instead to the legal public holidays identified in 5 U.S.C. 6103. This revision would include Martin Luther King, Jr.'s birthday as a holiday and would allow the Rules of Practice to reflect any future changes to the list of legal public holidays.

The 2016 NPR proposed to amend § 1025.15(b) to read: “Whenever a party is required or permitted to do an act within a prescribed period after service of a document and the Presiding Officer permits service by mail, three (3) days shall be added to the prescribed period.” The 2016 NPR recognized that although electronic service is preferred, service by mail may be allowed by order of the Presiding Officer; if such service is made by mail, three additional days would be added to the date by which the recipient must perform a subsequent action.

Regarding the extension of time limits, the 2016 NPR proposed to add language to § 1025.15(c) to clarify that Initial Decisions are decisions issued under § 1025.51 of the Rules of Practice. Additionally, the 2016 NPR proposed to add a new paragraph (d), “Stay of proceedings,” to clarify that if a stay of the proceeding is granted by order of the Presiding Officer or the Commission, the time limits specified in the rules shall be tolled automatically during the period while the stay is in effect.

The Supplemental NPR proposes two changes to § 1025.15(a) for clarity: the creation of subparagraphs and the definition of “last day” used in Federal Rule 6.

In the 2016 NPR, the Commission proposed adding a new § 1025.11(d) to clarify that a Commission action to obtain a preliminary injunction from a federal district court pursuant to 15 U.S.C.

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2064(g) shall not serve as the basis to stay proceedings under these rules. Because the issue involved in a preliminary injunction is whether an adjudicatory proceeding should be stayed, the Supplemental NPR moves proposed § 1025.11(d) concerning preliminary injunction proceedings to proposed § 1025.15(e) concerning stays.

The Commission received several comments on the proposed amendment regarding preliminary injunctions, stating that the Presiding Officer's absence of discretion regarding whether to issue a stay conflicts with the broad discretion placed in the Presiding Officer elsewhere in the Rules, and places undue burden on the finances and human resources of businesses and the agency. The ABA urged the Commission to take a more balanced approach by permitting the Presiding Officer discretion on whether to impose a stay, upon good cause shown. Upon further consideration, the Commission agrees with the comment and has revised proposed § 1025.15(e) to provide the Presiding Officer with discretion to issue a stay in cases where Commission staff seeks a preliminary injunction in federal district court.

6. Proposed Changes to § 1025.16 (Service)

The 2016 NPR proposed a new § 1025.16(b)(1) that would allow service of a complaint to be made electronically. The 2016 NPR also proposed renumbering the subparagraphs of § 1025.16(b) to reflect this addition. In proposed § 1025.16(b)(2), the 2016 NPR proposed permitting service by commercial carrier, a change that reflects common practice today. The 2016 NPR proposed in § 1025.16(b)(3) to add "a limited liability company" to the list of corporate entities that may be served, and proposed adding "entity" in the title of the paragraph, for clarity. The 2016 NPR proposed this change to capture the types of legal entities that exist and that may be the subject of an administrative complaint. The 2016 NPR proposed to add language in a new § 1025.16(b)(4), recognizing the

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preference for electronic service of documents, and clarifying the circumstances in which delivery of a document to an address is appropriate.

In § 1025.16(c), the 2016 NPR proposed to establish electronic service as the primary mode of service for all documents other than a complaint or a subpoena, unless the Presiding Officer orders otherwise or the parties agree otherwise. The 2016 NPR proposed changes to § 1025.16(e), which provides a form for certificates of service, and § 1025.16(f), which sets the date of service of documents to account for electronic filing. To be consistent with developments in electronic filing, the 2016 NPR proposed to delete reference in § 1025.16(e) to “the original of every document,” and instead, require that “every document” be accompanied by a certificate of service.

The Supplemental NPR proposes to include only complaints and subpoenas in the service requirements for § 1025.16(b), because service of other documents is already addressed in § 1025.16(c), which allows for service by electronic mail. The Supplemental NPR proposes that a complaint or subpoena can also be served by electronic means, if the parties or a subpoena recipient agrees, while all other documents must be served by electronic means, unless the Presiding Officer orders otherwise, or the parties agree otherwise. This change is intended to reflect current practice, promote efficiency, and conserve resources.

The Supplemental NPR proposes in § 1025.16(b)(2) to allow service of a complaint or subpoena by commercial carrier, for example, via FedEx, to reflect current practice under the Federal Rules. The Supplemental NPR proposes to update § 1025.16(f) concerning date of service to be consistent with § 1025.16(b)(2). Finally, the Supplemental NPR proposes to remove the exemplar certificate of service from § 1025.16(e) because most practitioners follow a similar format, and the Federal Rules do not include an example.

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7. *Proposed Changes to § 1025.17 (Intervention)*

The 2016 NPR did not propose substantive changes to this section. The 2016 NPR proposed to revise § 1025.17(a), (b), and (c) to identify accurately the Secretariat of the Commission, and proposed to correct a typographical error in § 1025.17(c)(5).

The Supplemental NPR proposes to reorganize this section for ease of use and clarity. Proposed paragraph (a) now includes all provisions addressing a petition to intervene. Proposed paragraph (b) now includes all provisions addressing a petition to participate as a nonparty. The Commission revised the designation of paragraphs and revised the paragraph headings accordingly, and updated all internal cross-references. The Supplemental NPR also proposes in § 1025.17(b)(1)(i) that requests to participate as a non-party must be submitted at the time motions for summary decision are due. Providing a reasonable deadline for non-parties to request leave to participate in a matter is consistent with the orderly and efficient administration of adjudicative matters. Because the Commission lacks recent experience with this section, the Supplemental NPR contains no additional substantive changes to this section.

8. *Proposed Changes to § 1025.18 (Class Actions)*

The 2016 NPR proposed to revise § 1025.18(a)(1) for clarity, by replacing the general word “class” with the more specific phrase “class of respondents.” The 2016 NPR also proposed to move the last sentence in § 1025.18(f) to combine it with § 1025.18(f)(4).

The Supplemental NPR proposes to revert to existing § 1025.18(f)(4) to leave the sentence: “The orders may be combined with a prehearing order under § 1025.21 and may be altered or amended as may be necessary” as a stand-alone concept, which can be applied to each of the identified orders in § 1025.18(f), because this was the original intent of this concept. The Supplemental NPR also proposes grammatical changes to § 1025.18(a) for clarity.

9. *Proposed Changes to § 1025.19 (Joinder of Proceedings)*

The 2016 NPR proposed to revise the heading of § 1025.19, currently “Joinder of proceedings,” to “Consolidation of proceedings,” because the rule, modeled on Rule 19 of the Federal Rules, actually describes consolidation, rather than joinder, which is a different legal concept.

The 2016 NPR proposed a new § 1025.19(a) to state that the Presiding Officer or the Commission may order the actions involving a common question of law or fact to be consolidated for any purpose, if the Presiding Officer finds that consolidation will “avoid unnecessary cost or delay.” This would change the existing rule, which permits the Presiding Officer or the Commission to consolidate actions only “for the purpose of hearing or Commission review.” The 2016 NPR proposed language that expanded the authority of the Presiding Officer to consolidate actions or portions of actions, as appropriate, consistent with the Commission’s goal of assigning broad discretion to the Presiding Officer in the conduct of an adjudicative proceeding. The 2016 NPR explained that the existing rule may lead to uncertainty about whether cases may be consolidated for limited purposes, such as discovery, where there are multiple respondents. Proposed changes in the 2016 NPR made clear that the Presiding Officer may order partial consolidations on issues including, but not limited to, discovery, pretrial procedure, and/or hearing.

Proposed § 1025.19(a) of the Supplemental NPR includes part of the first sentence of existing § 1025.19, to explain the general concept of consolidation of adjudicative proceedings. The Supplemental NPR proposes to revise § 1025.19(b) to include the criteria for granting consolidation, using the language from proposed § 1025.19(a) of the 2016 NPR, which reflects the substance of the 2016 NPR’s proposal to clarify that a Presiding Officer can consolidate some or all of two or more adjudicative proceedings.

The Supplemental NPR proposes to revise § 1025.19(c) to contain the procedure for consolidation of adjudicative proceedings. This paragraph reflects the substance of the 2016 NPR’s proposed § 1025.19(b), with changes to simplify the information contained in this paragraph. Finally, the Supplemental NPR proposes revisions to § 1025.19(d) to contain the last sentence of the 2016 NPR’s proposed § 1025.19(b). The Supplemental NPR proposes subparagraphs and headings for clarity and to promote ease of use.

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

The Supplemental NPR proposes to rename Subpart C currently titled “Prehearing Procedures, Motions, Interlocutory Appeals, Summary Judgments, Settlements,” to “Prehearing Conferences, Motions, Interlocutory Appeals, Dispositive Motions,” to reflect more accurately the contents of Subpart C. The Supplemental NPR renames § 1025.25 currently titled “Summary decisions and orders” to “Dispositive motions,” and it moves the section on Settlements from § 1025.26, to a new Subpart H, Settlements and Mediation, proposed as § 1025.71 and § 1025.72, respectively, which necessitates removing “Settlements” from the title of Subpart C.

1. Proposed Changes to § 1025.21 (Prehearing Conferences)

The 2016 NPR proposed changes to § 1025.21, “Prehearing conferences,” to reflect updated procedures in the Federal Rules. Specifically, the 2016 NPR proposed to require a preliminary meeting of the parties before discovery commences, followed by an initial prehearing conference with the Presiding Officer. The 2016 NPR proposed in § 1025.21(a) that the parties be required to conduct a preliminary meeting no later than 5 days after the answer is due by the last answering party. The 2016 NPR proposed that at the preliminary meeting, the parties discuss the nature and basis of their claims and defenses and the possibilities for settlement or resolution of the case. The 2016 NPR proposed that the parties attempt to agree on a proposed discovery plan with a schedule for depositions of fact

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witnesses, the production of documents and ESI, and the timing of expert discovery. In addition, the 2016 NPR proposed that the parties be required to seek agreement on the scope of electronic discovery, including specified times to seek electronic information, and agreeing on the format for producing electronic discovery. The 2016 NPR proposed that the parties be required to develop a preliminary time estimate for the evidentiary hearing and to attempt to agree on any other matters to be determined at the prehearing conference.

In § 1025.21(b) of the 2016 NPR, titled “Initial prehearing conference,” the Commission proposed to modify the issues to be discussed at the prehearing conference to be more concise. The Commission continues to believe that a tailored agenda for the prehearing conference would maximize efficiency and concentrate focus on major issues. At the initial prehearing conference, the parties, with the guidance of the Presiding Officer, would address a range of issues, including factual and legal theories, the current status of pending motions or petitions, the date for the evidentiary hearing, steps taken to preserve evidence, and the scope of anticipated discovery and a discovery plan. The list in proposed § 1025.21(b) is for illustrative purposes only and is not intended to restrict the topics that could be discussed at the prehearing conference under the proposed revisions in the 2016 NPR.

The 2016 NPR proposed to re-designate existing paragraph (b), Public notice, as paragraph (c), and to re-designate existing paragraph (c), Additional conferences, as paragraph (e). The 2016 NPR proposed in § 1025.21(d) that the Presiding Officer be required to enter an order setting forth the results of the initial prehearing conference, establishing a timeline for discovery, motions, and any other appropriate matters. The Commission made this proposal to address the inadequacy of the existing requirement that the Presiding Officer issue a prehearing order only after the conclusion of the final prehearing conference, a point late in the process that does not provide sufficient time for potential resolution of issues. The Commission maintained that the parties and the Presiding Officer would

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benefit from establishing a schedule earlier in the proceedings, and expected that such a schedule would clarify issues and expedite the proceedings. In paragraph (e), which the 2016 NPR proposed to re-designate as paragraph (g), the Commission proposed revising the paragraph heading to “Final prehearing order,” for clarity. The 2016 NPR also proposed to remove references to the format set forth in appendix I, because the Commission proposed to delete the appendix.

The 2016 NPR proposed in § 1025.21(f) to require a final prehearing conference as close as practicable to the evidentiary hearing. The existing rule is not clear that such a conference should occur; the 2016 NPR proposed change made clear that such a conference is mandatory. The Commission continues to believe that such a conference would benefit the parties and the Presiding Officer by focusing the issues before the hearing and resolving final evidentiary matters.

The Supplemental NPR continues to propose a preliminary meeting of the parties before the start of discovery, maintaining that these preliminary steps would streamline the process, focus the issues, and advance the goal of achieving a fair and expeditious adjudicative proceeding. The Supplemental NPR continues to propose changes in § 1025.21(a) regarding the substance and timing of a preliminary meeting between the parties to help expedite the discovery process, by setting an earlier deadline for a meeting of the parties and by having the parties resolve issues through mutual agreement. The Supplemental NPR proposes to include a requirement to discuss initial disclosures and preservation obligations at the prehearing meeting to be consistent with Federal Rule 26(f).

The Supplemental NPR proposes to expand the scope of matters that could be addressed during the scheduling conference in § 1025.21(b)(3) to include pretrial briefs and dates for additional conferences. The Supplemental NPR proposes to revise § 1025.21(b)(5) to cross-reference the proposed discovery plan addressed in § 1025.21(a)(1) for ease of use.

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The Supplemental NPR proposes to revise the heading for paragraph (b) from “initial prehearing conference” to “initial scheduling conference” to track the Federal Rules and describe more accurately the scope of the matters discussed at the initial conference. The Supplemental NPR proposes additional revisions consistent with this change. For example, § 1025.21(d) would be retitled “scheduling order” from “prehearing scheduling order.” The Supplemental NPR also proposes to revise the term “evidentiary hearing” used in § 1025.21(d) to “hearing” to be consistent with terminology in Subpart E – Hearings.

The Supplemental NPR proposes to merge the matters identified in § 1025.21(d) into § 1025.21(b) and to cross-reference § 1025.21(b) so that a scheduling order includes all of the matters discussed at the initial scheduling conference. In § 1025.21(h) of the Supplemental NPR, the Commission proposes to remove the statement, “except as provided in § 1025.41(a),” to be consistent with proposed changes to § 1025.41(a) regarding Commissioner hearing attendance.

Finally, the Supplemental NPR proposes to add a reference to Federal Rule 26(f)(3) for the discovery plan that must be exchanged between the parties and provided to the Presiding Officer, to be consistent with other changes throughout this part. This proposed change reflects CPSC’s preference to follow Federal Rule 26 regarding discovery, wherever possible.

2. Proposed Changes to § 1025.22 (Prehearing Submissions)

The 2016 NPR proposed to revise this section to require filing prehearing briefs, which, under the existing Rules of Practice, are discretionary. The Commission continues to believe that prehearing briefs should be mandatory because information contained in these briefs would set the necessary framework for the adjudicative proceeding, clarify the facts to be proven, the order of proof, and the issues to be decided. The Supplemental NPR proposes to retitl this section “Prehearing submissions” from “Prehearing briefs” and broaden the scope of the documents required to be exchanged pretrial,

proposing to require a prehearing statement, a final witness list, sworn statements, exhibit lists, and stipulations of fact or liability. This proposed revision is based upon the CFPB's rule on prehearing submissions, codified at 12 CFR 1081.215. Setting clear expectations for pretrial submissions should clarify the issues to be litigated.

The Supplemental NPR proposes to follow the timing for pretrial disclosures in Federal Rule 26(a)(3)(B), which is 30 days before the hearing. Currently, prehearing briefs must be submitted 10 days before the hearing. Providing additional time is intended to allow parties sufficient time to review prehearing submissions and consider the possibility of mediation or settlement before a hearing.

3. Proposed Changes to § 1025.23 (Motions)

The 2016 NPR proposed to clarify rules governing the filing of motions. Under the existing rule, all motions, except for disqualification motions, must be addressed to the Presiding Officer. In proposed § 1025.23(b) of the 2016 NPR, the Commission proposed a minor, non-substantive clarification, changing "Secretary" to "Secretariat."

The 2016 NPR expressly proposed to permit reply briefs, which currently are available only by leave of the Presiding Officer or the Commission. In CPSC staff's experience, replies are granted routinely, and this change recognizes that practice, eliminating the unnecessary step of seeking leave. The 2016 NPR proposed to permit the Presiding Officer (or the Commission, as the case may be), to authorize the filing of additional briefs, on good cause shown, a change that reflects the Presiding Officer's broad authority to administer adjudicative proceedings.

The 2016 NPR proposed to revise the paragraph heading of § 1025.23(c) from "Opposition to motions" to "Response and replies," which reflects the proposed language regarding reply briefs. The 2016 NPR proposed to expand the time to respond to motions from 10 days to 14 days because, in staff's experience, 10 days does not provide adequate time to respond to a motion, particularly when

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weekend days are considered in the computation. The Commission continues to believe that the addition of 4 days to respond to a motion would provide sufficient time to prepare and submit a response without burdening the process with unnecessary delay.

All of the proposed changes in the 2016 NPR are included in the Supplemental NPR, except two. The 2016 NPR proposed to revise § 1025.23(a) to add subpoena applications to the list of motions that would not be addressed to the Presiding Officer. Upon further reflection, the Supplemental NPR proposes to remove the list of motions directed to the Commission under § 1025.23(a) to the Presiding Officer instead, because other motions that are not listed in § 1023.23(a) may be more appropriately directed to the Commission. Accordingly, the Supplemental NPR proposes to revise § 1025.23(a) to state more generally that except as otherwise provided under these rules, motions shall be addressed to the Presiding Officer.

Additionally, the Supplemental NPR reconsiders the 5-day limitation imposed on additional briefing in § 1025.23(c), given the broad discretion afforded the Presiding Officer to regulate the course of adjudicative proceedings under this part. The Commission prefers a short briefing period, such as 5 days, if the Presiding Officer allows for additional briefing, but proposes to give the Presiding Officer discretion on when such additional briefing is due.

Finally, the Supplemental NPR proposes to move § 1025.23(d) regarding motions to dismiss to the proposed, renamed § 1025.25(a) on dispositive motions.

4. Proposed Changes to § 1025.24 (Interlocutory Appeals)

Existing § 1025.24 lists four exceptions to the general rule against interlocutory appeals. The 2016 NPR proposed adding a fifth exception to § 1025.24(b)(1), permitting an interlocutory appeal when the Presiding Officer grants or denies a motion to amend a complaint under proposed § 1025.13. The 2016 NPR proposed revisions to § 1025.13 intended to underscore that only the Commission is

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empowered to issue administrative complaints and that any amendments that substantially alter the complaint issued by the Commission must have Commission approval. Accordingly, the Commission proposed that a party will have the opportunity to appeal a ruling regarding amending or supplementing a pleading immediately, without being compelled to litigate a matter in its entirety before obtaining a Commission decision on the permissibility of an amendment that substantially altered the initial complaint authorized by the Commission.

The 2016 NPR proposed to revise § 1025.24(b)(1)(ii) to clarify the nature of the proceeding from which an interlocutory appeal may be filed. Existing § 1025.24(b)(2) requires the Commission to decide a petition for interlocutory review based on the existing record, or to request further briefing. The 2016 NPR proposed to revise § 1025.24(b)(2) to state that the Commission may decide a petition for an interlocutory appeal based on the existing record, or the Commission may request additional briefing and oral presentation. The proposed change clarified that a binary decision is not required and that the Commission can opt to decide the petition based on the record, or the Commission may request further briefing or oral presentation.

The Supplemental NPR retains the proposed revision to § 1025.24(b)(2), but also proposes to revert to the existing language set forth in § 1025.24(b)(1)(ii), because the existing section is clear that the testimony is limited to the matter that is the subject of the adjudication. No further clarification is required. Additionally, the Supplemental NPR proposes to remove the proposed addition in § 1025.24(b)(1), which permitted an interlocutory appeal when the Presiding Officer grants or denies a motion to amend a complaint under proposed § 1025.13. The Supplemental NPR revises § 1025.13 to allow the Presiding Officer more discretion over amended and supplemental pleadings, and allows the Presiding Officer to refer a denied motion to amend or supplement a pleading to the Commission upon motion of the moving party. Consistent with this proposed revision, the Commission is also proposing

to remove the right to seek an interlocutory appeal for most motions to amend or supplement a pleading, in the interest of justice and efficiency in adjudicatory proceedings.

The Supplemental NPR also proposes non-substantive changes that include re-designating and renumbering paragraphs throughout this section, and other minor editorial changes for ease of use.

5. Proposed Changes to § 1025.25 (Summary Decisions and Orders)

The 2016 NPR proposed changes to § 1025.25(a) to align CPSC's rule more closely with Federal Rule 56. Under CPSC's existing Rules of Practice, the movant does not have to file a statement of material facts not in dispute, nor does the respondent have to file a statement of material facts that respondent contends are in dispute. The 2016 NPR proposed to require that motions and oppositions to motions be accompanied by separate statements of material facts about which the movant asserts there is no dispute and about which the opposing party contends there is a genuine dispute. This proposed change was intended to enhance efficiency because filing statements of material fact would help pinpoint primary issues in dispute.

The 2016 NPR also proposed to revise § 1025.25(a) to conform to changes proposed in § 1025.21, stating that a summary decision motion be filed in accordance with any prehearing order issued by the Presiding Officer. The time for filing the motion would also be defined, providing that such motions may be filed up to thirty (30) days after the close of discovery. The 2016 NPR proposed this change because the Commission concluded that this time period would afford the Presiding Officer sufficient time to carefully consider such motions, and would encourage resolution of part or all the matter well in advance of the scheduled hearing date.

The 2016 NPR proposed to revise § 1025.25(b) to require that a response to a summary decision motion be accompanied by a statement of material facts that the opposing party contends are in dispute, a change that would enhance focus on the main issues in dispute. The 2016 NPR also proposed to

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modify § 1025.25(c) to add specific items in the record that should be considered by the Presiding Officer in resolving the motion, a change that mirrored Federal Rule 56.

After reviewing other agencies' rules, the Supplemental NPR proposes to combine all dispositive motions, including motions to dismiss and motions for summary decision, under one section. Accordingly the Supplemental NPR proposes to change the heading of this section from "Summary decisions and orders" to "Dispositive motions." The Supplemental NPR proposes to adopt the CFPB's organizational premise for dispositive motions, but reflects specific requirements of the CPSC's existing rules. Accordingly, the Supplemental NPR proposes subheading changes throughout this section to conform to the organizational and substantive changes.

The Supplemental NPR proposes adding a new § 1025.25(a) on motions to dismiss. This section adopts the standard and procedure from both the FTC rules for motions to dismiss in 16 CFR 3.22(b) and the CFPB rules for dispositive motions in 12 CFR 1081.212(a) and (b). The Supplemental NPR adds a new § 1025.25(a)(2), proposing to provide a mechanism for a respondent to seek a motion to dismiss, as well as describing the legal effect of an order on a motion to dismiss. The CPSC's rules currently allow for a motion to dismiss in § 1025.23(d), and describe the legal effect, but the rules provide no clear guidance on when to file such motion. The Supplemental NPR moves and integrates the requirements for a motion to dismiss from § 1025.23(d) to § 1025.25(a) and (a)(1).

For the Supplemental NPR, the Commission considered revising or removing proposed § 1025.25(a)(3), which allows the Presiding Officer to defer ruling on a motion to dismiss until "the close of the case." The Commission considered making this revision because of concern that deferral may delay ruling on motions until during or after a trial on the merits, and also because the phrase may cause confusion. However, after reviewing the preamble to the 1980 rules of practice, the Commission does not propose to make changes to this section. The preamble states:

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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.

45 FR at 29210. The Commission reaffirms this rationale and proposes to leave this requirement as drafted.

CPSC received two comments recommending that proposed § 1025.25(b) regarding motions for summary decision be modified to recognize the Presiding Officer's discretion to allow motions for summary decision beyond 30 days after the close of discovery. The Commission agrees that there may be circumstances when extending the time to file motions for summary decision beyond the 30-day time frame may be appropriate. Accordingly, the Supplemental NPR includes changes consistent with the comments, stating that motions for summary decision must be made within the time limit, "absent a showing of good cause and leave of the Presiding Officer."

The Supplemental NPR proposes to reorganize § 1025.25(b) by breaking into subparagraphs the response to motion, grounds for seeking summary decision, form, legal effect, and issues when a case is not fully adjudicated on the motion, to align CPSC's rule more closely with Federal Rule 56, which is familiar to CPSC staff and practitioners. The Supplemental NPR also proposes procedures for seeking motions for summary decision that are consistent with Federal Rule 56.

The Commission considered removing reference to "interlocutory in character" summary decisions under § 1025.25(b)(4), because the phrase may be confusing regarding when Commission

review could be sought for motions for summary decisions. The Commission decided to retain the phrase, understanding the phrase to mean that even though a partial decision on a motion for summary decision could seem ripe for review, the Commission will not review the decision until the Presiding Officer issues the Initial Decision. This is consistent with the 1980 preamble, which states:

[T]o 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.

45 FR at 29210.

Finally, the Supplemental NPR proposes to clarify a sentence, moved from § 1025.23(d) to 1025.25(a)(2), that explains the procedural outcome of a dispositive motion that disposes of some, but not all, respondents or allegations in a complaint.

6. Proposed Changes to § 1025.26 (Settlements)

The Supplemental NPR proposes to create a new subpart H containing Rules of Practice for settlements and mediation, at §§ 1025.71 and 72, respectively. Accordingly, the section on settlements is discussed under subpart H of this preamble.

D. Subpart D—Discovery, Compulsory Process

The Supplemental NPR proposes to rename Subpart D “Discovery, Subpoenas,” instead of “Discovery, Compulsory Process” to reflect more accurately the contents of Subpart D. The Supplemental NPR proposes to remove § 1025.39 on orders requiring witnesses to testify or provide other information and granting immunity. Accordingly, Subpart D now addresses only discovery and subpoenas, making the renaming more appropriate and helpful to practitioners.

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1. *Proposed Changes to § 1025.31 (General Provisions Regarding Discovery)*

The 2016 NPR proposed adopting the detailed procedures set forth in Federal Rule 26 to achieve earlier and more meaningful coordination among the parties and advance the efficient progress of adjudicative proceedings. To accomplish this, the 2016 NPR proposed revising § 1025.31 to align discovery with Rule 26 of the Federal Rules, with several exceptions. The Supplemental NPR builds on this approach, by specifically proposing to adopt the elements of Federal Rule 26 that are germane to CPSC adjudicative proceedings and that the Commission proposes using. This approach makes § 1025.31 easier to follow and use, and avoids potential conflicts or ambiguity that may have resulted from simply citing to the Federal Rule.

In addition, the Supplemental NPR proposes to maintain limitations on the materials Complaint Counsel is required to search when responding to discovery served by respondents. The proposed limitation aligns the scope of discovery with the Commission's desire to encourage the prompt resolution of adjudicatory matters, avoiding costly, irrelevant discovery into matters that are unrelated to staff's charges. The Supplemental NPR authorizes the Presiding Officer, upon a showing of good cause, to broaden the scope of Complaint Counsel's search for responsive materials.

Two commenters indicated that reducing the timeline for initial disclosures from 14 days to 5 days may not be sufficient time in all cases, and accordingly, suggested that the Commission follow the time period in the Federal Rules. The commenters also suggested that we allow the Presiding Officer to have discretion to adjust the deadline for initial disclosures for good cause. After reviewing these comments to the 2016 NPR, we agree with the commenters that the proposed five (5) days for initial disclosures may be insufficient; and we now propose to follow the Federal Rules, which provide for initial disclosures fourteen (14) days after the preliminary meeting of the parties.

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The CPSC also received a comment on the 2016 NPR proposal not to require written expert reports, because this departs from Federal Rule 26(a)(2)(B) and eliminates opportunity to inform respondents of the Commission's underlying support for the adjudicative proceeding. The commenter suggested that the Commission remove this language and allow the Presiding Officer to change the expert disclosure requirements, where necessary, for good cause shown. We agree with the commenter that the removal of the requirement to exchange expert reports does not create understanding of the issues by all parties and does not promote swifter resolution of the adjudicative proceeding.

Accordingly, the Supplemental NPR proposes to remove the proposed exception in § 1025.31(a)(2). The Supplemental NPR proposes to follow the Federal Rules regarding the exchange of expert reports.

Lastly, commenters stated that the 150-day time limit for completing discovery is too short. The commenters suggested changing the rule to allow non-expert discovery to be completed within 150 days, unless the Presiding Officer orders otherwise for good cause shown. Another commenter agreed, suggesting that the Commission consider allowing for flexible or longer deadlines for initial disclosures and completing non-expert discovery. The Supplemental NPR proposes to remove this provision because the Rules of Practice empower the Presiding Officer to build such discovery time limitations into the prehearing order, based on the unique facts of each case.

2. Proposed Changes to § 1025.32 (Written Interrogatories to Parties)

The 2016 NPR proposed to revise the section on interrogatories to follow Federal Rule 33 (Interrogatories to Parties), including the number, scope, and timing of interrogatories, the requirements of answers and objections, and the option to produce business records so that the CPSC can maximize efficiency and reduce undue delay. Under the proposed change, for example, interrogatories would be limited to 25. The existing rules do not impose any limits, thereby inviting overly burdensome requests and potential abuse that could impede the progress of a matter. The 2016 NPR stated that adopting

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Rule 33 of the Federal Rules would allow the Presiding Officer to alter the limits on the frequency and extent of discovery, pursuant to Rule 26(b). Because the Commission proposed to follow the Federal Rules on interrogatories, the Commission also proposed to omit paragraphs (a) through (d) of existing § 1025.32. The Supplemental NPR includes this proposed change, with minor grammatical edits.

3. Proposed Changes to § 1025.33 (Production of Documents)

In the 2016 NPR, the Commission proposed to revise the heading of § 1025.33 from “Production of documents” to “Production of documents, electronically stored information, and tangible things; access for inspection and other purposes,” to reflect the expanded types of information covered by this section. In addition, the 2016 NPR proposed to revise this section to follow, with one exception, Federal Rule 34 (Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes). Proposed § 1025.33 in the 2016 NPR was intended to govern the number, scope, and timing of information requests, the requirements of responses and objections, and Federal Rule 34’s treatment of production of ESI. The 2016 NPR stated that this proposed change would maximize efficiency because the proposed procedure would align the CPSC’s discovery practice with discovery under the Federal Rules and case law interpreting the Federal Rules, and would provide direction on the discovery of ESI, which is not specifically addressed in the CPSC’s existing rules. The 2016 NPR proposed to depart from Federal Rule 34 regarding requests for subpoenas, and proposed instead that requests for subpoenas be governed by § 1025.38 of the CPSC’s Rules of Practice. Because the 2016 NPR proposed to follow the Federal Rules for the production of documents, the 2016 NPR proposed to omit § 1025.33(a) through (d). The Supplemental NPR proposes to include the changes as outlined in the 2016 NPR proposal, with minor edits for clarity.

4. Proposed Changes to § 1025.34 (Requests for Admission)

The 2016 NPR proposed to revise this section to follow, with one exception, Federal Rule 36 (Requests for Admission). The Commission proposed not following Federal Rule 36 regarding the award of expenses under Federal Rule 37(a)(5), because expenses are not authorized under the CPSC's Rules of Practice. The 2016 NPR preamble noted that parties may follow the procedures set forth in § 1025.70 (now proposed § 1025.81) of the Rules of Practice regarding expenses. The 2016 NPR proposed to delete existing § 1025.34(a) through (c), based on the proposal to follow the Federal Rules. The Supplemental NPR makes minor edits to the 2016 NPR proposals for clarity.

Additionally, the Commission notes that Federal Rule 36(b) provides that requests for admission cannot be withdrawn or amended after the final prehearing conference under Federal Rule 16(e). The Commission's prehearing conference rule in § 1025.21 should be read consistent with Federal Rules 36(b) and 16(e) regarding the finality of requests for admission.

5. Proposed Changes to § 1025.35 (Depositions)

For reasons of efficiency and ease of practice, the 2016 NPR proposed to largely follow the Federal Rules on depositions, which are familiar to most practitioners. Specifically, the Commission proposed to revise the rule on depositions to follow Federal Rule 30 (Depositions by Oral Examination), Federal Rule 31 (Depositions by Written Questions), and Federal Rule 32 (Using Depositions in Court Proceedings), with certain exceptions. The 2016 NPR proposed that requests for subpoenas continue to be governed by § 1025.38 of the CPSC's Rules of Practice. The 2016 NPR also proposed that provisions in the Federal Rules governing award of attorney's fees and expenses shall not apply. Because the Commission proposed to follow the Federal Rules, the Commission also proposed to omit § 1025.35(a) through (h).

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The 2016 NPR proposed these changes because the procedures set forth in Federal Rule 30, for example, would facilitate the noticing of depositions by the parties and encourage cooperation among the litigants during the discovery process. Under the CPSC's existing rule, parties are required to obtain leave of the Presiding Officer to notice all depositions, and no limit applies on the number of depositions that may be noticed. Federal Rule 30 allows parties to notice depositions without leave in most circumstances, including if the parties have stipulated to the deposition, and the deposition would not result in more than 10 depositions being taken by each party. A party wishing to depose a nonparty under the CPSC's existing rule is required to apply for a subpoena. Federal Rule 30 has no such requirement, which will expedite the discovery process. The CPSC's existing rules also do not limit the length of a deposition, which can lead to protracted and costly depositions. Federal Rule 30, however, establishes a limit on the length of a deposition, limiting depositions to one 7-hour day, unless the court orders otherwise.

The 2016 NPR also proposed following Federal Rule 31 (Depositions by Written Questions), a practice currently not reflected in the Rules of Practice. The 2016 NPR proposed this addition because this discovery tool can be more efficient and less costly than an in-person deposition, and may facilitate a more streamlined use of additional discovery methods. The 2016 NPR additionally proposed following Federal Rule 32 (Using Depositions in Court Proceedings), because the provisions of this rule address more comprehensively than § 1025.35 the appropriate uses of depositions, the objections to such use, and the form of presentation.

The Supplemental NPR includes the proposed changes in the 2016 NPR, with minor edits for clarity.

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6. Proposed Changes to § 1025.36 (Motions to Compel Discovery)

The 2016 NPR proposed to revise the section on motions to compel discovery to include a requirement that motions to compel certify that the movant, in good faith, conferred or attempted to confer with the person or party failing to make disclosure. This proposed change in the 2016 NPR is consistent with the requirements in Federal Rule 37(a)(1). The Commission stated that this change would encourage resolution of the issues among parties, without intervention by the Presiding Officer.

The CPSC's existing rule on motions to compel is one paragraph, with no formatting. For ease of use, the Supplemental NPR formats this section, and includes the change proposed in the 2016 NPR in § 1025.36(b). Additionally, the Supplemental NPR describes the specific motions available to parties seeking to compel discovery. The Commission created this list based on Federal Rule 37. The Commission's revisions elaborate on the circumstances that give rise to motions to compel discovery and to ensure that the CPSC's rules are consistent with the Federal Rules. Finally, the Supplemental NPR proposes to amend § 1025.36(c)(3), related to depositions, to track the language in Federal Rule 37, which allows a party taking an oral deposition to complete or adjourn the examination before moving for an order to compel.

7. Proposed Changes to § 1025.37 (Sanctions for Failure to Comply with Discovery Orders)

The 2016 NPR did not propose any changes to this section. For ease of use, the Supplemental NPR proposes to revise the first sentence of this section to cross-reference motions to compel discovery in § 1025.36.

8. Proposed Changes to § 1025.38 (Subpoenas)

The 2016 NPR proposed to update this section to make it consistent with proposed changes on electronic filing and for clarity. The 2016 NPR proposed revising § 1025.38(b) to identify the

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Secretariat properly, and proposed amendment of § 1025.38(c) and (d) to clarify the content of, and application process for, subpoenas. The Commission proposed to remove the paper filing requirement, eliminate the requirement that applications be submitted in triplicate, and delete other requirements related to paper filing.

Additionally, the 2016 NPR, in § 1025.38(e), proposed to allow subpoena service to nonparties, as set forth in § 1025.16(b)(2) through (5), which proposed to allow for service by a variety of means, but did not propose to permit electronic service of a subpoena to nonparties. The 2016 NPR stated that these proposed changes would increase the efficiency of subpoena service because the revisions allow for multiple methods of service, and, in particular, permit electronic service among parties, where the parties have agreed to such methods of service, or the Presiding Officer has permitted these methods of service. Additionally, the 2016 NPR, in § 1025.38(f), proposed to permit, in addition to mail carrier service, return of service of subpoenas by commercial carrier, a change that reflects common practice today. The Commission also proposed to eliminate the requirement that a copy of the subpoena be returned to the Secretariat. In addition to other minor and non-substantive changes in § 1025.38(g), the 2016 NPR proposed to clarify that a motion to quash or limit should be ruled on by the Commission as a time-critical matter, in accordance with the Commission's Decision-Making Procedures.

The Supplemental NPR proposes to allow nonparty subpoena recipients to be served via electronic mail, if the subpoena recipient agrees. This proposed change allows a party to determine the most reliable and efficient means to effect service. The Supplemental NPR proposes to modify and make minor edits to § 1025.38(a) and § 1025.38(b) to track the types of information that could be compelled by subpoena under Federal Rule 45.

The Supplemental NPR proposes to modify § 1025.38(c) to require the Presiding Officer to recommend whether a subpoena should be issued and transmitted to the Commission. Consistent with

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the nature of the Presiding Officer’s authority in adjudicative proceedings, for example, to hold hearings and to review and consider supporting information, the Presiding Officer is appropriately positioned to manage discovery and to make such a recommendation. By statute, however, the Commission cannot delegate the authority to issue a subpoena to a Presiding Officer. Accordingly, the Commission may consider the subpoena application and the Presiding Officer’s recommendation, but the Commission must vote on whether to issue a subpoena. The Supplemental NPR also would require the Presiding Officer to transmit the application and proposed subpoena to the Commission within 5 days of receipt, unless the Presiding Officer orders otherwise, to prevent delay of the proceeding and provide for timely discovery and compliance with the timelines provided in this part and in the scheduling order. The Supplemental NPR proposes to modify § 1025.38(c) to explain what an application for a subpoena should contain: changing “stating reasons” to “an explanation of how the information sought is within the scope of discovery as set forth in § 1025.31.” Recent experience suggests that additional guidance on the content of subpoena applications would benefit all parties and would assist the Presiding Officer by providing objective criteria upon which to review a subpoena application. The Presiding Officer and the Commission will review any subpoena request under the discovery standard set forth in § 1025.31(b).

The Supplemental NPR proposes in § 1025.38(d) to provide *in camera* notice to the parties of a Commission vote that does not result in a decision on the subpoena application. This provision is intended to ensure that parties and the Presiding Officer are informed of a Commission vote, and how to address deficiencies in a subpoena application, if any.

9. Proposed Changes to § 1025.39 (Orders Requiring Witnesses to Testify or Provide Other Information and Granting Immunity)

This section applies only to witnesses testifying in matters arising under the Flammable Fabrics Act (FFA). The 2016 NPR proposed to delete the CPSC’s existing § 1025.39, as well as other

distinctions relating to the FFA throughout the Rules of Practice, because they are no longer necessary given the Commission's enhanced authority set forth in section 214 of the Consumer Product Safety Improvement Act of 2008 (CPSIA), which permits the Commission to take action under section 15 of the Consumer Product Safety Act for violations of that statute and any other Act enforced by the Commission. The Supplemental NPR continues to propose to remove this section for the same reasons.

E. Subpart E—Hearings

1. Proposed Changes to § 1025.41 (Hearings; General Rules)

The 2016 NPR proposed to revise § 1025.41(a) to clarify that Commissioners and their staffs should not attend or view public hearings concerning matters that may become the subject of review by the Commission as the appellate body. The 2016 NPR also proposed to revise § 1025.41(b) to clarify that adjudicative proceedings shall be held in one location, absent unusual circumstances. Based on staff's experience at that time, and common practice in other agencies, the Commission also proposed to limit the duration of an adjudicative proceeding to no more than 210 hours, absent a showing of good cause. The Commission believed that this provided ample time for the proper conduct of most hearings, but allowed flexibility to alter the time frame if circumstances warrant. In the 2016 NPR, the Commission also proposed other minor, non-substantive changes in § 1025.41(c) for clarity.

The Supplemental NPR retains the proposals in the 2016 NPR, except for one. Upon further consideration, the Supplemental NPR proposes to remove the requirement in § 1025.41(a) to exclude Commissioners and their staff from public hearings. Going forward, with regard to attending hearings in adjudicative proceedings, the Commission will be guided by applicable law, and will not codify in the regulation a requirement for future Commissions.

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

The 2016 NPR proposed to revise § 1025.42(a)(6) to state that, in addition to procedural motions, the Presiding Officer is empowered to consider and rule on evidentiary motions and other issues, as appropriate. The 2016 NPR also proposed other minor, non-substantive changes in paragraphs (a)(3) and (b) of § 1025.42 for clarity. In proposed § 1025.42(d), the 2016 NPR sought to clarify that, in addition to the Commission, a Presiding Officer shall not be responsible to, or subject to the supervision of, a Commissioner or a member of a Commissioner's staff in performance of the adjudicative function.

In § 1025.42(e), the 2016 NPR proposed to clarify that the Commission shall consider a motion to disqualify the Presiding Officer only if the matter has been decided and appealed to the Commission. In addition, the Commission proposed other minor, non-substantive changes.

The Supplemental NPR includes additional authorities of the Presiding Officer, consistent with these rules, for clarity. The Commission reviewed other agencies' rules to ensure the list of authorities is more complete. The Supplemental NPR proposes to amend § 1025.42(b) to place a limit on the amount of time an adjudicative proceeding is suspended to allow a party to obtain a new representative. A party will have no more than 14 business days to retain new representation, to prevent undue delay of the proceeding and prejudice to other parties.

The Supplemental NPR proposes to make grammatical changes to § 1025.42(d) for clarity. The Supplemental NPR also proposes to make grammatical changes to § 1025.42(e), including changing the word "assigning" in the last sentence to "appointing," to reflect recent changes in the law with regard to appointing ALJs in adjudicative proceedings.

The Supplemental NPR proposes to remove the last phrase in § 1025.42(e)(1): "and shall notify the Chief Administrative Law Judge and the Secretary of such withdrawal," because the CPSC does not

have a Chief Administrative Law Judge. Instead, the Supplemental NPR proposes that a Presiding Office who is withdrawing shall place a notice of withdrawal on the record and notify OPM's ALJ loan program, or its equivalent. The Supplemental NPR proposes a similar change in the last sentence of proposed § 1025.42(e)(2).

3. Proposed Changes to § 1025.43 (Evidence)

The 2016 NPR proposed to supplement § 1025.43(a) to provide specific examples of the ways in which the Federal Rules of Evidence may be relaxed to best serve the interests of justice. Specifically, the proposal stated that evidence constituting hearsay may be admitted if it is relevant, material, and bears satisfactory indicia or reliability so that its use is fair. The 2016 NPR also proposed a minor, non-substantive change in § 1025.43(d)(1)(i) for uniformity, proposed to remove an unnecessary "reserved" paragraph in § 1025.43(e), and proposed designating paragraph (f) as paragraph (e).

The Supplemental NPR proposes to make changes to this section based upon the Commission's experience and expertise, other agencies' rules, the Federal Rules of Evidence, and comments on the 2016 NPR. The Supplemental NPR addresses the ABA's comment that the proposed language in § 1025.43(a) of the 2016 NPR was self-contradictory with regard to relaxing the hearsay rule, as one example. To address the ABA's comment, the Supplemental NPR proposes to adopt the CFPB's approach with regard to relaxation of the evidentiary rules in adjudicatory proceedings by stating in proposed § 1025.43(a): "Evidence that would be admissible under the Federal Rules of Evidence is admissible in an adjudicative proceeding conducted pursuant to this part. Evidence that would be inadmissible under the Federal Rules of Evidence may not be deemed or ruled to be inadmissible in a proceeding conducted pursuant to this part solely on that basis."

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The Supplemental NPR proposes to add the word “expertise” to § 1025.43(c)(1)(i) regarding taking official notice to encompass the Commission’s practice and experience regulating consumer products. The Commission does not intend to change or expand the scope of this section; rather, the Commission intends to align this section with the FTC’s rule on official notice and the Federal Rules of Evidence.

The Supplemental NPR proposes to add a new “rebuttal” provision at § 1025.43(c)(2) regarding taking official notice, because the current regulation is silent regarding the process afforded parties when official notice is requested or is taken. The Commission is including this procedural sentence to ensure due process by specifying that the parties shall, upon timely request, have the opportunity to respond when official notice is requested or is taken. This change is consistent with 5 U.S.C. 556(e) of the APA, and FTC and CFPB practices.

The Supplemental NPR proposes to delete current § 1025.43(c) on admissibility, and § 1025.43(f), on offer of proof, because these evidentiary issues are addressed in the Federal Rules of Evidence.

4. Proposed Changes to § 1025.44 (Expert Witnesses)

The 2016 NPR proposed to revise § 1025.44(a) to align the CPSC’s rule on experts more closely with the standard set forth in Rule 702 of the Federal Rules of Evidence (Testimony by Expert Witnesses). The Commission proposed this change to maximize efficiency by working within an evidentiary framework with which CPSC staff and most practitioners are familiar, and to allow the parties and Presiding Officer to be guided by case law interpreting the Federal Rules of Evidence.

The 2016 NPR proposed revising § 1025.44(b) to clarify that the Presiding Officer is authorized to order expert testimony to be in writing and filed on the record. The 2016 NPR also proposed to clarify that the Presiding Officer has the discretion to allow live testimony in lieu of a written

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submission. This change would be consistent with the Commission's goal of vesting broad discretion in the Presiding Officer to conduct an adjudicative proceeding. Finally, the 2016 NPR proposed to revise § 1025.44(c) and (d) to conform to the Commission's proposed revision in § 1025.44(b).

Because the Supplemental NPR proposes to incorporate the majority of Federal Rule 26 in § 1025.31, the provisions concerning experts in § 1025.44 are implicated as well. For example, § 1025.44 of the Supplemental NPR proposes that provisions in Federal Rule 26(a)(2)(B) and Rule 26(b)(4) apply to the use of expert witnesses in adjudicative proceedings. Accordingly, the Supplemental NPR creates a new § 1025.44(a), to state clearly that the Commission will follow Federal Rule 26 regarding expert witnesses as well.

The Supplemental NPR moves the definition of "expert" from § 1025.44(a) to proposed § 1025.44(b), and aligns this provision with the standard set forth in Rules 702, 703, and 705 of the Federal Rules of Evidence. This change will promote consistency and certainty. The Supplemental NPR proposes to re-designate proposed §§ 1025.44(b) and (c) to §§ 1025.44(c) and (d), respectively, and proposes minor edits to § 1025.44(c) on the method of testimony, for clarity.

5. Proposed Changes to § 1025.45 (In Camera Materials)

The 2016 NPR proposed to revise § 1025.45(b) to correct typographical and grammatical errors, and to clarify the standard that applies to *in camera* treatment of documents and testimony. The 2016 NPR proposed to move language related to the length of time for *in camera* treatment from § 1025.45(b) to § 1025.45(b)(3). The 2016 NPR proposed adding language to § 1025.45(e) to make clear that *in camera* materials may not be released to the public until the order granting *in camera* treatment expires, and proposed other changes to § 1025.45(f) for additional clarity.

The Supplemental NPR proposes to remove from § 1025.45(c)(1), re-designated as § 1025.45(c), the lengthy description of persons with access to *in camera* materials, and replace it with

“Decision-makers,” which is defined in proposed § 1025.68(b)(1). The Supplemental NPR also proposes to rephrase in § 1025.45(c), “CPSC staff members concerned with judicial review,” to “CPSC appellate counsel in federal court,” to remove confusion about to whom the phrase applies, and to clarify that the description includes CPSC staff members, as well as Department of Justice staff, who represent the CPSC in federal court. The Supplemental NPR proposes to move existing § 1025.45(c)(2) to § 1025.45(d), renaming each paragraph and re-designating the remaining paragraphs accordingly.

The Supplemental NPR proposes to remove the term “protective order” from the paragraph on using *in camera* materials at a hearing, proposed § 1025.45(d), to prevent confusion. Generally, each adjudicative proceeding likely will be governed by an appropriate protective order negotiated by the parties and ordered by the Presiding Officer at the beginning of each case. The Commission proposes to remove the phrase to prevent confusion.

In § 1025.45(g), the Supplemental NPR proposes to use the term “Decision-maker,” which is a defined term, and to add “parties subject to a protective order” to the list of persons who should be served with *in camera* materials.

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

The 2016 NPR proposed to revise this section to require filing post-hearing briefs. Under the existing rule, parties may file post-hearing briefs, but they are not required to do so. The 2016 NPR stated that the public and the Presiding Officer would benefit from a concise, but comprehensive, summary of the matter at issue, by making post-hearing briefs mandatory. The 2016 NPR also proposed to limit post-hearing briefs to thirty (30) pages to encourage concise pleadings. The existing rule does not impose a page limit. The 2016 NPR proposed to limit reply briefs to the discretion of the Presiding Officer, so that the pace of the adjudication post-hearing is not slowed unnecessarily by the

filing of excessive briefing materials. The 2016 NPR proposed other non-substantive changes for clarity.

The Supplemental NPR continues the proposals from the 2016 NPR, but also proposes to replace the word “established” in the last sentence of this section to “ordered “ to reflect more accurately the action of the Presiding Officer. Additionally, in response to the ABA’s comment stating that the Presiding Officer should have discretion regarding page limits, the Supplemental NPR proposes to allow the Presiding Officer to alter the page limit for post-hearing briefs.

7. Proposed Changes to § 1025.47 (Record)

The 2016 NPR proposed to revise paragraph (a) of this section to delete the requirement for an “official court reporter of the Commission” because the Commission has no official court reporter. The proposed revised language would require that a hearing shall be “recorded and transcribed by a court reporter under the supervision of the Presiding Officer.” The 2016 NPR also proposed other non-substantive changes for clarity, including a revision to the appendix citation in the Federal Advisory Committee Act.

The Supplemental NPR proposes to add subparagraphs to § 1025.47(a), for ease of use, and to delineate a proposal to allow the Presiding Officer to order video recording of witnesses. The Commission’s intent is to update the options available for recording witness testimony and to align with other federal agencies’ practices, such as the FTC and the CFPB. The Supplemental NPR also proposes to add new paragraphs (c), (d), (e), and (f) containing guidance from the CFPB and FTC rules of practice. Additionally, based on Commission experience with an appeal, the Commission would find it useful for the Rules of Practice to describe when a hearing record is closed, what is included in the contents of an adjudicative record, and, in general, provide more guidance in the CPSC’s regulation on the content of the adjudicative record. Accordingly, the Supplemental NPR fills in the gaps in the

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CPSC's existing rule regarding these topics, using the FTC and the CFPB's Rules of Practice for guidance.

8. Proposed Changes to § 1025.48 (Official Docket)

The 2016 NPR proposed to revise this section to require that the official docket be maintained electronically, consistent with changes proposed throughout our Rules of Practice to update the CPSC's procedures to reflect advances in technology. The 2016 NPR also proposed to delete, as unnecessary, the statement that the docket would be available for inspection by the public during normal business hours, because the docket would be available electronically. The 2016 NPR proposed other non-substantive changes for clarity.

The Supplemental NPR makes no changes to this provision. The Commission intends for the Division of the Secretariat to maintain the docket for each adjudicative proceeding electronically and make it available to the public. Currently, the CPSC maintains the docket for each adjudicative proceeding on our website at: <https://www.cpsc.gov/Recalls/Recall-Lawsuits/Adjudicative-Proceedings>. However, if a Presiding Officer is on loan from an agency that has an electronic docket, and the Presiding Officer prefers to use that docket, the Presiding Officer may order such use. The Commission prefers that a substitution would be made only if an alternate electronic docket is more efficient and is available to the public. Additionally, the Presiding Officer must transmit an electronic copy of the docket to the Commission and certify the docket to the Commission, as set forth in proposed § 1025.51(c) and (d).

9. Proposed Changes to § 1025.49 (Fees)

The 2016 NPR proposed to revise § 1025.49(a) to allow parties to agree to modify fees for deponents and witnesses. The Supplemental NPR proposes no changes to this section.

F. Subpart F—Decision

1. Proposed Changes to § 1025.51 (Initial Decision)

Under the existing § 1025.51(a), the Presiding Officer shall “endeavor” to file an Initial Decision within sixty (60) days after the record closes in a case, or after the filing of post-hearing briefs, whichever is later. The 2016 NPR proposed to revise § 1025.51(a) to require the Presiding Officer to file the Initial Decision and Order within a fixed deadline of 60 days, stating that the change is consistent with the Commission’s goal of avoiding unnecessary delay and ensuring that a matter progresses in a timely manner to serve the interests of justice. The 2016 NPR stated the Commission’s belief that the Presiding Officer has considerable discretion in managing cases to ensure the timely and efficient resolution of adjudicatory proceedings, and the 2016 NPR stated the Commission’s expectation that the Presiding Officer shall endeavor to make proceedings as swift as practicable in the interest of due process and the protection of consumer health and safety.

The 2016 NPR proposed to revise § 1025.51(c) to make clear that the Commission may order that an individual, other than the Presiding Officer, may make and file an Initial Decision and Order, if the Presiding Officer is disqualified under § 1025.42(e). The 2016 NPR also proposed to revise § 1025.51(d) to limit the authority of the Presiding Officer to reopen the proceedings only in circumstances “where the interests of justice so require.” The Commission proposed this change to emphasize the need for finality and to ensure timely disposition of a matter.

The 2016 NPR stated that administrative procedures at sister agencies, such as the SEC, the CFPB, and the FTC, employ other practices to make adjudicatory proceedings more efficient. These practices include: a fixed time limit from issuance of complaint to evidentiary hearing (FTC Rule 16 CFR 3.11 (Commencement of Proceedings)) and a fixed time limit from complaint to Initial Decision (SEC Rule, 17 CFR 201.360(a)(2)(Initial Decision of Hearing Officer) and CFPB Rule, 12 CFR

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1081.400(a)(Recommended Decision of the Hearing Officer)). Additionally, the 2016 NPR explained that the SEC and the CFPB have rules that limit the scope of discovery available to parties in adjudicative proceedings. Consistent with the 2016 NPR, the Supplemental NPR seeks comment on whether the CPSC should adopt similar practices.

The Supplemental NPR continues to propose removing the phrase “endeavor to” from § 1025.51(a). Although the 2016 NPR intended to remove the phrase, it was inadvertently included in the proposed text for § 1025.51. The Supplemental NPR also proposes to increase the time for the Presiding Officer to issue an Initial Decision and Order from 60 to 90 days. This moderate increase provides time for the Presiding Officer to certify the record, a new proposed requirement, and it is also consistent with the initial period provided to the Commission to render a Final Decision and Order. Additionally, the Commission proposes to allow the Presiding Officer an additional 30 days to issue an Initial Decision and Order, for good cause shown. The Commission recognizes that each adjudicative proceeding is fact-specific and may present differences in scope and evidence, including exhibits and witnesses, during the hearing. Accordingly, the period to issue an Initial Decision and Order may require flexibility, depending on the complexity of each proceeding. Generally, however, the Commission anticipates that a Presiding Officer will meet the initial 90-day time limit.

The Supplemental NPR maintains the existing content criteria for an Initial Decision and Order, but proposes to provide additional guidance to the Presiding Officer regarding the content of an appropriate order. For example, the Supplemental NPR clarifies that orders issued under 15 U.S.C. 2064(c) and (d) shall contain the elements of a corrective action plan (CAP) outlined in § 1115.20(a), as appropriate, because the existing rule does not identify the specific section of part 1115 that is applicable to orders under 15 U.S.C. 2064(c) and (d). Additionally, the Supplemental NPR proposes to add a new paragraph

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§ 1025.51(b)(3) requiring the Presiding Officer to advise the parties of the time to appeal the Initial Decision and Order to ensure the parties are advised of their due process rights regarding appeals.

The Supplemental NPR proposes to delete § 1025.51(c) regarding the ability of an individual other than the Presiding Officer to issue an Initial Decision and Order if the Presiding Officer has been disqualified. The Supplemental NPR proposes to update § 1025.42 to reflect the Commission's procedures to appoint a new Presiding Officer in the event of disqualification. Accordingly, only a duly appointed Presiding Officer has the authority to file an Initial Decision and Order in an adjudicative proceeding under this part.

The Supplemental NPR proposes to add a new paragraph (c) regarding certification of the record. The CPSC's existing regulation contains no provision for the Presiding Officer to certify the adjudicative record to the Commission. The proposal is consistent with other federal agency procedures. For guidance, the Commission looked to CFPB's section 1081.401 and SEC's section 201.351.

Additionally, the Supplemental NPR proposes a procedure for the Presiding Officer to transmit the record to the Commission in § 1025.51(d), because the existing Rules of Practice do not address the process for transmitting the record to the Commission upon the termination of the jurisdiction of the Presiding Officer. The Supplemental NPR re-designates existing paragraph (d) to paragraph (e) to accommodate the proposed new provision.

2. Proposed Changes to § 1025.52 (Adoption of Initial Decision)

The 2016 NPR proposed a minor, non-substantive change to § 1025.52 for consistency. The Supplemental NPR proposes to change the existing requirement that the Initial Decision and Order become the Final Decision and Order after 40 days to after 50 days, so that the Secretariat has time to determine whether an appeal is perfected or whether the Commission has ordered a review in the

absence of an appeal. Moreover, the Supplemental NPR proposes to change the word “noted” to “noticed” to reflect the procedure set forth in § 1025.53(a). Finally, the Supplemental NPR proposes additional non-substantive changes for clarification.

3. Proposed Changes to § 1025.53 (Appeal From Initial Decision)

The 2016 NPR proposed to revise the heading for § 1025.53(a) from “Who may file notice of intention” to “Notices of appeal,” and proposed several additional changes for clarity. The 2016 NPR proposed to revise § 1025.53(b) to limit appeal briefs to thirty (30) pages to encourage concise pleadings. Currently, the rule does not impose a page limit. The 2016 NPR also proposed to amend § 1025.53(c) to impose the same 30-page restriction on answering briefs (renamed in the Supplemental NPR to response briefs). In § 1025.53(f), the 2016 NPR proposed to clarify that reply briefs are not required, but if filed, they shall not exceed fifteen (15) pages.

The Supplemental NPR proposes in § 1025.53(a) to clarify that a notice of appeal must be filed on the docket and served on all parties. The Commission prefers concise pleadings. However, in response to a comment by the ABA regarding page limitations, the Supplemental NPR proposes to give the Commission discretion whether to limit the length of appeal briefs, response briefs, and reply briefs to a specific page limit. Additionally, the Supplemental NPR proposes to change the term “Answering Brief” to “Response Brief” to align with federal appellate practice.

The Supplemental NPR provides parties with advance notice of the oral argument schedule and sets a procedure for each party to follow, unless the Commission orders otherwise, to allow for the most orderly and efficient presentation of cases. The Supplemental NPR proposes to add a procedure in § 1025.53(g)(1) and (2) for correcting an oral argument transcript, which is absent in the existing Rules. The proposed procedure follows the FTC’s procedure for oral argument transcripts (16 CFR 4.52(i)).

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4. Proposed Changes to § 1025.54 (Review of Initial Decision in Absence of Appeal)

The Supplemental NPR proposes to change the time period in which the Commission must decide whether to review an Initial Decision and Order on its own initiative from forty (40) days to forty-five (45) days. Currently, three events may occur within 40 days of an Initial Decision and Order: an appeal may be perfected by one or more of the parties; the Commission may order review on its own initiative in the absence of an appeal; or, in the absence of an appeal or Commission initiated review, the Initial Decision and Order becomes the Final Decision and Order. To provide time for the Secretariat to determine whether any of these events has occurred, the Supplemental NPR proposes to extend two of the time periods. Accordingly, the Supplemental NPR proposes that the Commission may review an adjudicative matter in the absence of an appeal by issuing an order within 45 days of the Initial Decision. The Supplemental NPR proposes to make additional non-substantive changes for consistency.

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

The 2016 NPR proposed to revise § 1025.55 to remove the word “endeavor” from § 1025.55(c) regarding the time the Commission has to issue a Final Decision and Order. By doing so, the Commission considered committing to issue the Final Decision and Order within 90 days after the filing of all briefs or after receipt of the oral argument transcript, whichever is later. The 2016 NPR also proposed a minor, non-substantive change to § 1025.55(a) for clarity.

The Supplemental NPR proposes to change the heading of this section from “Final decision on appeal or review” to “Final decision and order” because these requirements apply to the Final Decision and Order, regardless of its origin. For example, the Commission could review for Final Decision and Order a matter on remand from a district court. The Supplemental NPR makes consistent changes in § 1025.55(a).

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The Supplemental NPR also proposes to add information regarding the scope of the record considered by the Commission in § 1025.55(a). For guidance, the Commission reviewed the CFPB's rule concerning the scope of the record in CFPB proceedings (12 CFR § 1081.405(a)). Additionally, in § 1025.55(b), the Supplemental NPR proposes to more comprehensively explain the Commission's options in rendering its Final Decision and Order by including the authority to remand a matter to a Presiding Officer. The Supplemental NPR also proposes that the Commission include findings of fact upon which its decision is predicated, in addition to stating the reasons and basis for its Final Decision and Order. The Commission intends to ensure that parties receive due process and to protect the agency on appeal to a district court by fully explaining the reasons for the Commission's decision. The changes proposed in § 1025.55(b) are consistent with case law and other agencies such as CFPB.

The Supplemental NPR proposes to revert to the existing requirements for the timing of a Final Decision and Order in § 1025.55(c). Since issuing the 2016 NPR, the Commission conducted an oral argument in an appeal from an Initial Decision and Order and issued a Final Decision and Order in an adjudicative proceeding. The Commission considered lengthening the time the Commission has to issue a Final Decision and Order from ninety days to 180 days, based on the Commission's recent experience and the multitude of issues that can arise, which may require longer than 90 days to resolve. However, the Commission realizes that each case is different, and the complexities and scope of each matter may require more or less time to issue a Final Decision and Order. Upon reflection, the Commission has decided to retain the word "endeavor" and to retain the 90 day time period in the existing regulation. The Commission intends that most decisions be issued within the 90 day time period when practicable, in the interest of consumer safety. This proposed change is intended to allow maximum flexibility for the Commission to conduct adjudicative proceedings consistent with other Commission priorities.

6. Proposed Changes to § 1025.56 (Reconsideration)

The 2016 NPR proposed minor, non-substantive changes for clarity and to correct a typographical error. The Supplemental NPR re-proposes this section without revision.

7. Proposed Changes to § 1025.57 (Effective Date of Order)

The 2016 NPR proposed to revise § 1025.57(a) to clarify that Commission orders in an adjudicative proceeding under the CPSA become effective upon receipt by the respondent. The 2016 NPR proposed to delete the specific provision for the FFA because it is no longer necessary in light of the Commission's enhanced authority set forth in section 214 of the CPSIA, which permits the Commission to take action under section 15 of the CPSA for violations of that statute and any other Act enforced by the Commission. The 2016 NPR proposed to re-designate § 1025.57(c) to § 1025.57(b).

The Supplemental NPR proposes to modify the 2016 NPR proposal with regard to when Commission orders become effective, and now proposes that such orders become effective when served on the parties in accordance with proposed § 1025.16, which is consistent with the revisions regarding service of orders using email. The Supplemental NPR also makes minor grammatical changes to § 1025.57(a).

8. Proposed Changes to § 1025.58 (Reopening of Proceedings)

The 2016 NPR proposed to remove § 1025.58(b) regarding the FFA, consistent with other revisions in this part. The 2016 NPR proposed to revise the language in § 1025.58(c)(2), changing the phrase "is of the opinion" to "determines" for clarity. In § 1025.58(e)(2) regarding factual issues, the 2016 NPR proposed to clarify that the Commission may direct the Presiding Officer to conduct additional hearings if the pleadings raise substantial factual issues. The Commission proposed this change because, as written, it is unclear under whose auspices such a hearing would be conducted and recognized that such a hearing should be conducted by the Presiding Officer as the finder of fact. The

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2016 NPR further proposed to clarify in this section, consistent with proposed changes to § 1025.46, to state that post hearing briefs are mandatory.

The Supplemental NPR proposes to explain in more detail the time period when the Commission may reopen an adjudicative proceeding. For clarity, the Supplemental NPR proposes to specifically state that the Commission can consider whether a Consent Order should be reopened. Additionally, the Supplemental NPR proposes to add in § 1025.58(b)(1) that the Commission may reopen an adjudicative proceeding and remand it to the Presiding Officer. This change is consistent with proposed changes in § 1025.55(b).

The Supplemental NPR proposes to revert to the original wording “is of the opinion” in § 1025.58(a)(2), which is consistent with the language in the FTC’s rules of practice (16 CFR 3.72(b)(1)), and more accurately reflects that the Commission does not need to “determine” whether a reopening is necessary before issuing a show cause order. Rather, when the Commission receives some information indicating that a reopening may be necessary, the Supplemental NPR would allow the Commission to require that the parties brief the Commission regarding the changed facts or circumstances before a Commission decision on reopening. The proposed procedure would also allow the Commission to state the reasons for reopening, without providing proposed changes to an order. The Commission retains the ability, however, to decide whether to reopen an adjudicative proceeding and issue a show cause order simultaneously, especially where the Commission receives information indicating that reopening is appropriate.

The Supplemental NPR proposes to include a paragraph on Commission disposition for each type of reopening, to explain in more detail what is required for a Commission decision when there are no factual issues to resolve (§ 1025.58(c)(1)), in contrast to when a Presiding Officer holds a hearing to resolve factual issues (§ 1025.58(d)(4)). In either case, if the Commission alters, modifies, or sets aside

a previous Commission order, the Commission must issue a decision to explain the Commission's determination regarding reopening and any changes to a previous Commission decision or order. However, whether a new Final Decision and Order is required will depend on the nature and complexity of the factual issues resolved by the recommended decision.

G. Subpart G—Appearances, Standards of Conduct

1. Proposed New Provision § 1025.60 (Disqualification of Commissioners)

The Supplemental NPR proposes to add a new provision creating a procedure to seek disqualification of a Commissioner from participating in the review of an Initial Decision and Order and issuing a Final Decision and Order. The existing Rules of Practice do not contain a procedure for Commissioner disqualification. For guidance, we considered the FTC's procedure for disqualifying a Commissioner at 16 CFR 4.17.

2. Proposed Changes to § 1025.61 (Who May Make Appearances)

The 2016 NPR made no changes to this section. The Supplemental NPR re-proposes this section without revision. The Commission is considering combining related rules concerning appearances and welcomes comment on this proposal.

3. Proposed Changes to § 1025.62 (Authority for Representation)

The 2016 NPR made no changes to this section. The Supplemental NPR proposes this section without substantive revision.

4. Proposed Changes to § 1025.63 (Written Appearances)

The 2016 NPR proposed to revise § 1025.63(a) and (b) regarding the requirement for filing a notice of appearance to conform to the proposed electronic filing changes to § 1025.14 of the Rules of Practice. The 2016 NPR also proposed other minor, non-substantive changes for clarity in § 1025.63(b).

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The Supplemental NPR proposes to add a new sentence to the end of § 1025.63(a), stating that any person listed as Complaint Counsel on the complaint does not need to file a written appearance. This change reflects that Complaint Counsel are already part of the adjudicative proceeding by virtue of being listed on the complaint, and therefore, it is duplicative to file another written notice of appearance. A person listed as Complaint Counsel on the complaint will still need to file a withdrawal, if they leave the agency, or are assigned to other duties. Complaint counsel who did not appear on the complaint must file a written notice of appearance. Finally, the Supplemental NPR proposes to replace the word “proceedings” in § 1025.63(a) and (b), and use instead, the defined term “adjudicative proceeding” for consistency and clarity.

5. Proposed Changes to § 1025.64 (Attorneys)

Neither the 2016 NPR nor the Supplemental NPR proposes changes to this section.

6. Proposed Changes to § 1025.65 (Persons Not Attorneys)

The 2016 NPR proposed minor grammatical changes to § 1025.65(a) for clarity. The Supplemental NPR proposes additional minor changes for clarity. For example, the phrase “Commission proceedings” in § 1025.65(b) was revised to use the defined term “adjudicative proceeding.”

The Rules of Practice do not include a means to provide counsel to unrepresented parties. The Supplemental NPR seeks comment regarding whether the Commission should include procedures in the Rules of Practice for appointing counsel to *pro se* respondents.

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

The 2016 NPR proposed minor grammatical changes in § 1025.66(d) for clarity. The Supplemental NPR proposes to replace the term “proceedings” in § 1025.66(a) with the defined term “adjudicative proceeding” for consistency and clarity. The Supplemental NPR also proposes minor

grammatical changes to § 1025.66(c) for clarity. Finally, the Supplemental NPR proposes in § 1025.66(d) to impose a reasonable time frame, 30 days, for a party or participant to obtain another representative after the exclusion of a previous representative.

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

The 2016 NPR proposed to retitle this section: “Restrictions as to former Commission members and employees,” to align the heading with the text in § 1025.67(a). The 2016 NPR also proposed to revise § 1025.67(a) to include additional statutory and regulatory restrictions, and proposed to revise § 1025.67(c) regarding procedure, along with grammatical changes for clarity.

The Supplemental NPR proposes to replace the term “Commission members” in the section heading and in proposed § 1025.67(a), with the term “Commissioners,” which is the current terminology for referencing Commissioners in official documents, and “Commissioner” is a defined term in part 1025. The Commission interprets the term “Commissioner” to apply to any person who served on the Commission. Additionally, the Supplemental NPR proposes to revise the term “employee” to “CPSC employee.” The Commission intends for Commissioners’ staff members to be considered CPSC employees for purposes of this section.

The Supplemental NPR adds “applicable Executive Orders” to the list of governing law in § 1025.67(a) that may restrict the activities of former Commissioners and CPSC employees. For example, a new Executive Order (EO), EO 13770, “Ethics Commitments by Executive Branch Appointees,” was issued by President Trump on January 28, 2017. Additionally, the Supplemental NPR proposes to replace the term “proceedings” throughout this section with the defined term “adjudicative proceeding” for consistency and clarity. The Supplemental NPR proposes minor grammatical changes in this section for clarity.

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9. *Proposed Changes to § 1025.68 (Prohibited Ex Parte Communications)*

The 2016 NPR proposed to add a new § 1025.68(b) to state that, except to the extent required for disposition of *ex parte* matters authorized by law or by this part, *ex parte* prohibitions apply to a number of circumstances. The 2016 NPR stated that the proposed new § 1025.68(b)(1) would prohibit *ex parte* communications relevant to the merits of an adjudication by any interested person not employed by the CPSC, to any decision-maker during the pendency of a proceeding under the Rules. Under the existing rule, an “*ex parte* communication” is defined as a communication concerning a matter in adjudication made to a decision-maker by any person subject to the Rules of Practice. The 2016 NPR proposed change, which is consistent with the APA, would broaden the *ex parte* prohibition to include any “interested person not employed by the Commission.”

Additionally, in § 1025.68(b)(2), the 2016 NPR proposed to prohibit any decision-maker from making an *ex parte* communication to any interested party not employed by the Commission. To conform proposed new § 1025.68(c)(2)(i) and (ii) with proposed new § 1025.68(b), the 2016 NPR omitted language in those paragraphs limiting the prohibition to persons subject to these Rules of Practice and added language tracking new § 1025.68(b). Additionally, the 2016 NPR proposed changes in § 1025.68(e) to clarify that the procedures for handling prohibited *ex parte* communications are also available to recipients of such communications who are not employed by the Commission. The 2016 NPR made other, non-substantive changes to § 1025.68(e), as well.

In § 1025.68(g), the 2016 NPR proposed changes to be consistent with the proposed changes to this section discussed above, and also proposed that sanctions shall apply to any person or party who makes or causes a prohibited *ex parte* communication to be made. As drafted, the provision allows sanctions to apply only to persons subject to the Rules of Practice. The 2016 NPR proposed language that would allow sanctions to be imposed on a person who, while not a party, makes a prohibited *ex*

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parte communication and subsequently becomes a party. The proposed language, which is consistent with the adjudicative rules adopted by the FTC, would authorize the Presiding Officer to impose sanctions allowed under this section, if that person later becomes a party to the adjudicative proceeding. The 2016 NPR proposed other minor, non-substantive changes for clarity.

The 2016 NPR also proposed to revise § 1025.68(d) to add paragraph (d)(3) to state that *ex parte* prohibitions do not apply to communications by any party to the Commission concerning a proposed settlement agreement that has been transmitted to the Commission. The 2016 NPR proposed this change to allow parties to communicate information to the Commission about an offer of settlement, information that otherwise might not be available to the Commission.

Proposed revisions in the 2016 NPR are largely retained in the Supplemental NPR. The Supplemental NPR proposes to reorganize § 1025.68 by moving the definitions section to proposed § 1025.68(b), and moving the prohibition on *ex parte* communications to proposed § 1025.68(c). The Supplemental NPR proposes to broaden the scope of the prohibition on *ex parte* communications to include CPSC staff engaged in the performance of investigative and prosecutorial functions of the Commission and mediators, in addition to interested persons not employed by the Commission, with “decision-makers,” consistent with the scope of the existing rule and with other federal agencies, such as the FTC (16 CFR 4.7(b)(1)).

The Supplemental NPR proposes to expand the list of exceptions to prohibited *ex parte* communications in § 1025.68(d), proposing a new paragraph (d)(4), to clarify that communications among CPSC staff and decision-makers that are unrelated to an adjudicative function of the agency, such as separate investigations, complaints, rulemakings, and matters in state and federal court, are not prohibited. The Supplemental NPR also separates § 1025.68(d)(2) into separate sub-paragraphs, § 1025.68(d)(2) and (3), for clarity.

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The Supplemental NPR re-designates proposed § 1025.68(d)(3), regarding settlement communications with the Commission, to § 1025.68(d)(5). The Commission seeks comment on whether to include this provision in the final rule, and how a similar provision under the FTC’s Rules of Practice regarding settlement communications, 16 CFR 4.7(f), works in practice. Specifically, we are seeking on comment on the issues, potential problems, or procedural safeguards that the Commission should weigh in its consideration of whether to adopt this proposal in the final rule.

10. Proposed New Provision in § 1025.69 (Separation of Functions)

To clarify that Commission staff charged with investigative and prosecutorial responsibilities may not advise a decision-maker or otherwise participate in a decision in an adjudicative proceeding, the 2016 NPR proposed to add a new § 1025.69 on “Separation of functions,” setting forth the separation of functions provisions of the APA, 5 U.S.C. 554(d).

The Supplemental NPR makes grammatical edits for clarity and replaces the word “case” with the defined term “adjudicative proceeding” for consistency.

H. Subpart H—Settlements, Mediation

The Supplemental NPR proposes to include a new subpart for rules regarding settlements and mediation. In the current Rules of Practice, provisions on settlements are codified in § 1025.26, and mediation does not exist. The Supplemental NPR proposes to re-designate § 1025.26 on settlements to a new § 1025.71, and to create a new § 1025.72 for mediation. The Supplemental NPR proposes to move the provisions in current Subpart H on the Equal Access to Justice Act (EAJA) to a new Subpart I.

1. Proposed Changes to § 1025.71 (Settlements)

The 2016 NPR proposed to revise § 1025.26(b) to clarify that motions that request the Presiding Officer to transmit a proposed consent agreement to the Commission must be filed *in camera*.

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Moreover, under the existing rule, a party may submit a settlement offer and a motion to transmit such settlement offer to the Commission, without notifying Complaint Counsel. The 2016 NPR proposed to amend § 1025.26(b) to state that offers of settlement shall be served on Complaint Counsel to ensure that Complaint Counsel is apprised of any non-jointly submitted offers of settlement.

The 2016 NPR proposed in § 1025.26(c)(1) through (4) a number of non-substantive editorial changes. In § 1025.26(c)(5), the 2016 NPR proposed to add language that an offer of settlement should also include a list of “acts or practices that the respondent shall affirmatively undertake.” This addition acknowledges the authority of the Commission, after an opportunity for hearing, to order a firm to undertake certain actions pursuant to section 15(d) of the CPSA.

Under existing § 1025.26(d), the Presiding Officer may transmit to the Commission offers of settlement that meet the form and content requirements set forth in § 1025.26(c). The 2016 NPR proposed to revise this paragraph to require the Presiding Officer to transmit all non-frivolous, non-duplicative settlement offers to the Commission, removing the discretion provided to the Presiding Officer in the current rule. The 2016 NPR explained that this proposed change allows the Commission to review all non-frivolous, non-duplicative settlements, which could advance resolution of a matter, if possible, and is consistent with section 15(f)(1) of the CPSA. In addition, the 2016 NPR proposed that, to be transmitted, an offer of settlement must comply with the requirements of § 1025.26(b), as well as § 1025.26(c). The 2016 NPR proposed non-substantive grammatical changes in § 1025.26(e) and (g). Finally, the 2016 NPR proposed to remove the *ex parte* prohibition on communications in the context of settlement agreements, discussed in § 1025.68.

The Supplemental NPR proposes to revise § 1025.71(a) to clarify that settlement offers are submitted to a Presiding Officer before issuance of an Initial Decision and Order, and may be submitted directly to the Commission after issuance of an Initial Decision and Order. The existing rule does not

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clearly state that the parties may submit settlements to the Commission after issuance of an Initial Decision and Order.

The Supplemental NPR proposes to broaden § 1025.71(b) to allow the Secretariat to transmit settlement offers to the Commission when the Commission is reviewing an Initial Decision and Order. The Supplemental NPR also proposes in § 1025.71(b) to allow a Presiding Officer to determine whether non-settling parties may be served with a copy of the proposed consent agreement and order. The Supplemental NPR proposes minor grammatical changes to § 1025.71(b).

The Supplemental NPR proposes to remove the phrase “if appropriate” from existing § 1025.26(c)(6), and proposes to break into two paragraphs the contents of consent agreements arising under section 15 of the CPSA, and the contents of all other consent agreements that resolve adjudicative proceedings at CPSC in order to provide clarity concerning this section by distinguishing matters required to have a hearing under section 554 of the APA that do not involve a mandatory CAP, from matters settled under section 15(c) or (d) that do involve a mandatory CAP. The Supplemental NPR also proposes to clarify that consent agreements settled under section 15(c) or (d) of the CPSA shall contain all the elements of a corrective action plan in 16 CFR 1115.20(a), as appropriate, because the existing regulation is unclear concerning which section of part 1115 applies to a CAP contained in a proposed consent agreement and order. We also note that § 1115.20(a) contains the phrase “as appropriate” for purposes of describing the elements of a CAP in a consent order agreement. Accordingly, including the “as appropriate” phrase in proposed § 1025.71(c) is duplicative and unnecessary in light of the proposed structural changes to this section.

Proposed § 1025.71(d) would describe the contents of consent agreements that do not arise under section 15 of the CPSA. For example, settlements resolving a hearing arising under 15 U.S.C. 2066(b), involving products refused admission into the customs territory of the United States, would be

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subject to paragraph (d). The Supplemental NPR proposes minor revisions to the 2016 NPR revisions, to address the two different content requirements now stated in proposed § 1025.71(b) and (c).

Regarding transmittal of the motion to transmit and the proposed consent agreement and order to the Commission, a section re-designated in the Supplemental NPR from § 1025.26(d) to § 1025.71(e), the Supplemental NPR proposes to remove the phrase “or contrary to establish Commission policy” from the list of considerations by the Presiding Officer because the proposed removal aligns with the statutory language in 15 U.S.C. 2064(f)(1). The Supplemental NPR also proposes to require the Secretariat to distribute an *in camera* copy of the proposed consent agreement and order to the Commission within 2 days of transmittal by a Presiding Officer.

The Supplemental NPR proposes to break into two subsections § 1025.71(g) regarding the Commission’s ruling on a proposed settlement. Section 1025.71(g)(1) proposes to state the procedure if the Commission accepts a proposed consent agreement and order, while section § 1025.71(g)(2) describes the procedure when the Commission rejects a proposed consent order, and when the Commission fails to reach a majority decision. The Supplemental NPR proposes that when the Commission rejects a proposed consent agreement, the Commission will issue an *in camera* order rejecting the settlement. When a Commission vote does not result in a majority decision on a proposed consent agreement, the Supplemental NPR proposes that the Secretariat issue an *in camera* notice to the parties and the Presiding Officer, so that the parties are notified of the result of the Commission vote. The Supplemental NPR proposes that in either case, rejection or no majority decision, in any adjudicative proceeding that has been stayed pending a Commission decision, the proceeding should resume. The existing rule does not contain a provision where the Commission does not reach a decision on a proposed settlement.

2. *Proposed New Provision § 1025.72 (Mediation)*

The Supplemental NPR proposes to add a new section on mediation, reflecting the Commission's preference for the parties to mediate disputes in the interest of consumer safety. Recent CPSC experience demonstrates that litigating matters to a conclusion can be expensive, and burdensome, and is not always an efficient means to protect consumers from allegedly defective consumer products. The Supplemental NPR encourages parties to participate in mediation in all adjudicative proceedings.

The Commission drafted the proposed § 1025.72 by reviewing guidelines and rules from the Administrative Dispute Resolution Act of 1996 (ADRA), Administrative Conference of the United States (ACUS), Federal Energy Regulatory Commission (FERC), Federal Maritime Commission (FMC), various U.S. courts, and other sources. The Supplemental NPR proposes that mediators have the discretion to structure the mediation to maximize prospects for settling all or part of the case. Such discretion could include timing or the length of mediation, with scheduled breaks, the order of the mediation (*e.g.*, private sessions with each of the parties, followed by joint session), and other logistical issues that facilitate the mediation.

The Supplemental NPR proposes that the procedure for seeking mediation is through an *in camera* joint notice of mediation. The joint notice is filed with the Presiding Officer while the case is pending before a Presiding Officer, or with the Commission for all other matters. The *in camera* designation of the notice is consistent with the procedure for settlements and settlement discussions, which are also designated *in camera* until finally accepted by the Commission.

The Commission expects that most mediation sessions will occur over the course of a single day or session, and that ordinarily, a stay of the proceedings will not be necessary. However, the Supplemental NPR proposes that, for good cause, the Presiding Officer may stay the proceeding, not to

exceed 60 days. The Commission expects that if a stay is warranted, the parties may file a joint motion seeking a stay of the proceeding.

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

The 2016 NPR proposed to revise implementation of the EAJA in adjudicative proceedings, to remove outdated and confusing references. The 2016 NPR stated that the rule substantially re-states EAJA requirements existing when the rule was initially adopted in 1982, and notes that many elements of the requirements are no longer current. The 2016 NPR proposed that to avoid updating EAJA rules each time an element of the EAJA is changed, references to specific EAJA requirements be removed, and instead, state in the Rules of Practice that the EAJA applies to certain adjudicative proceedings before the Commission. The 2016 NPR proposed to state generally that applications for fees and expenses may be made according to the EAJA, as interpreted by the federal courts and guidance provided by the U.S. Department of Justice (DOJ), and to omit language in existing § 1025.70(a) and the entirety of § 1025.70(b) through (h).

The statutory requirements of the EAJA, under 5 U.S.C. 504, have been amended since the Commission issued its final rule implementing the EAJA in 1982. ACUS issued revised model rules in 1986, and most recently, in 2019, and encourages agencies to replace the 1986 model rules with the 2019 revised model rules to reflect evolving practice and the latest EAJA amendments. Additionally, the Commission notes that the SEC, FTC, and Federal Communications Commission (FCC) each have a subpart addressing the Implementation of EAJA in their rules of practice. Accordingly, the Supplemental NPR proposes to reinsert a revised version of the EAJA rules based on the 2019 model rules.

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The Supplemental NPR proposes to move provisions implementing EAJA to a new Subpart I, to accommodate the new Subpart H for settlements and mediation. Accordingly, existing §§ 1025.70, 1025.71, and 1025.72, have been re-designated to §§ 1025.81, 1025.82, and 1025.83, respectively.

The Commission is seeking comment regarding whether to implement the proposals set forth in §§ 1025.81 through 1025.83, or to implement the proposal in the 2016 NPR.

1. Proposed Changes to § 1025.81 (General Provisions)

The Supplemental NPR proposes to omit a majority of the language in existing § 1025.70 in the new § 1025.81, to be consistent with the elimination of most of what was Subpart A of the model rules. Existing § 1025.70 features language from the following provisions from Subpart A of the 1981 model rules: purpose of these rules; when the Act applies; proceedings covered; eligibility of applicants; standards for awards; allowable fees and expenses; and rulemaking on maximum rates for attorney fees. Each of these provisions has been eliminated in the 2019 model rules. The Supplemental NPR also proposes to eliminate these provisions in § 1025.81. The Supplemental NPR proposes to add definitions in § 1025.81(b)(1)-(5) to be consistent with the changes to the 2019 model rules. The Supplemental NPR does not include definitions related to monetary demands by an agency, because the Commission does not seek monetary penalties in adjudicatory proceedings. The addition of these definitions helps to promote uniformity of procedure and greater accuracy and clarity.

2. Proposed Changes to § 1025.82 (Information Required From Applicant)

The Supplemental NPR proposes to change the heading of § 1025.82(a) to “Application requirements,” to be consistent with the proposed content of the section and Subpart C of the 2019 model rules. The content in this paragraph was previously addressed in existing § 1025.70(d)(1); however, the Supplemental NPR proposes to move this language to § 1025.82(a) because the topic is addressed in proposed § 1025.82(a)(2). The Supplemental NPR proposes to revise § 1025.81(a)(2) to

add additional procedure, taken from Subpart C of the 2019 model rules, for the EAJA application as it relates to the criteria the applicant must identify in the application. Additionally, the Supplemental NPR proposes to revise § 1025.81(a)(3) to cross-reference the definition of “party” in proposed § 1025.81(b)(4).

The Supplemental NPR proposes to make minor changes to §§ 1025.82(a)(5), (b), and (c) to update the language in the paragraph to be consistent with sections 315.301(e), .302, and .303 of the 2019 model rules. The Supplemental NPR, however, maintains the language in existing § 1025.71(b)(3) regarding section 6(a)(2) of the CPSA, 15 U.S.C. 2055(a)(2).

The Supplemental NPR proposes to remove existing paragraphs (d)(1) through (4) in this section because the definition of “final disposition” is addressed in proposed § 1025.81(b)(3). The Supplemental NPR also makes minor grammatical changes and updates the paragraph numbering throughout this section for clarity, and to remove provisions regarding monetary penalties.

3. Proposed Changes to § 1025.83 (Procedures for Considering Applications)

The Supplemental NPR proposes to remove existing § 1025.72(d), in accordance with the elimination of this paragraph in the 2019 model rules. The Supplemental NPR proposes minor changes to proposed § 1025.83(a) regarding the filing and service of documents containing confidential financial information to be consistent with section 315.401 of the 2019 model rules. The Supplemental NPR also proposes to add a sentence to § 1025.83(d): “If a proposed settlement of an underlying proceeding provides that each side shall bear its own expenses and the settlement is accepted, no application may be filed,” to be consistent with the language in the 2019 model rules.

In § 1025.83(e), the Supplemental NPR proposes to add specific, further proceedings that the Adjudicative Officer may order. This addition clarifies what opportunities for further proceedings are still permissible and is consistent with the language in the 2019 model rules.

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In § 1025.83(f), the Supplemental NPR proposes adding specific timeframes for the Adjudicative Officer to issue an initial decision and order to be consistent with the language in section 315.406 of the 2019 model rules. The Supplemental NPR proposes that the Adjudicative Officer issue an initial decision and order within thirty (30) days after the time for filing a reply, or when further proceedings are held, within thirty (30) days after completion of such proceedings.

The Supplemental NPR proposes to remove existing § 1025.72(g)(2) and (3), because the procedure is cross-referenced in existing § 1025.72. If neither party seeks review of an Initial Decision and Order, and the Commission declines to review an Initial Decision and Order on its own initiative, the procedure set forth in proposed § 1025.51 would apply. If a party appeals, or the Commission reviews an Initial Decision and Order, the procedure set forth in proposed § 1025.53, § 1025.54, and § 1025.55 of this part would apply.

The Supplemental NPR proposes adding two additional sections to § 1025.83 to be consistent with sections 314.406(c) and 315.409 of the 2019 model rules. Proposed § 1025.83(g) authorizes the Adjudicative Officer to reduce, or deny, an award, to the extent that the party during the course of the proceedings engaged in conduct that unduly and unreasonably protracted the final resolution of the matter. Proposed § 1025.83(j) addresses a stay of a decision concerning an award.

The Supplemental NPR proposes to revise § 1025.83(i) to update the address of the Division of the Secretariat. Additionally, the Supplemental NPR proposes to update the paragraph to be consistent with section 315.410 of the 2019 model rules.

The Supplemental NPR proposes renumbering of § 1025.83, as well as minor editorial changes to this paragraph for clarity and consistency with the language in the 2019 model rules.

IV. Public Comment on the 2016 NPR

In the 2016 NPR, the Commission invited comments on the proposed changes to the rules. The Commission received four comments. Two comments addressed the 2016 NPR as a whole. One commenter submitted comments on specific sections of the 2016 NPR, which another commenter adopted. Below, the Commission responds to significant issues raised by the commenters.

A. General Comments

Comment 1 – One commenter supports and commends the Commission’s efforts to update the Rules of Practice to minimize delay and improve the quality of its administrative decision-making process in a fair manner fully consistent with the APA and without prejudicing the due process rights of parties to adjudicative proceedings. The commenter states that providing the Presiding Officer enhanced flexibility is important, at the same time, limiting that flexibility in some instances – for instance, by mandating a written final ruling within a prescribed time period – will also enhance fairness and efficiency. The commenter adopts and endorses the comments submitted by the Section of Administrative Law and Regulatory Practice of the ABA.

Response 1 – The Commission appreciates the comment and generally agrees with the commenter regarding providing the Presiding Officer with flexibility to tailor time limits for maximum efficiency in each adjudicative proceeding.

Comment 2 – One commenter agrees that the Commission should update the Rules of Practice to align with updated practices in the Federal Rules of Civil Procedure and the Federal Rules of Evidence. However, this commenter suggests that the Commission wait to update the Rules until the resolution of the matter *In re Zen Magnets, LLC*, CPSC Docket 12-2, because the matter would afford Commission staff with an ideal chance to experience the modern administrative process and discover what changes should be made to the Rules of Practice.

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Response 2 – The Commission agrees with the commenter that the 2016 NPR was premature, and that the Commission and staff has learned through experience what additional changes to the Rules of Practice would modernize and streamline the Rules. Accordingly, the Commission is issuing this Supplemental NPR to refine proposals in the 2016 NPR and to make additional proposed changes to the Rules based on recent Commission experience.

Comment 3 – One commenter states that the Commission should not exempt a Commissioner from the requirements set forth in proposed § 1025.69 regarding separation of functions, because “[b]y purporting to exempt Commissioners from the requirement of not violating the separation of powers, CPSC formally embraces a fundamental and egregious violation of the Rule of Law – and an unconstitutional regime.”

Response 3 – The Commission’s proposed section on separation of functions is not unconstitutional. The comment is inconsistent with the case law and legislative history on the agency member exception to the concept of separation of functions in the APA. *See* U.S. Attorney General’s Committee on Administrative Procedure, Final Report at 56, S. Doc. No. 8, 77th Cong., 1st Sess. (1941) [hereinafter “APA Final Report”]; Administrative Procedure Act Legislative History 24-25, S. Doc. 248, 79th Cong. 1st Sess. (1946). In fact, the Commission is adopting the APA provision on separation of function at 5 U.S.C. 554(d) and the specific exception for “a member or members of the body comprising the agency.” 5 U.S.C. 554(d)(2)(C). The APA Final Report reviews the legislative history of this section, stating that this exception “is required by the very nature of administrative agencies, where the same authority is responsible for both the investigation-prosecution and the hearing and decision of cases.” APA Final Report at 58 (quoting Sen. Rep. p. 18; H.R. Rep. p. 30 (Sen. Doc. pp. 204, 262)). Agency heads who actively participate in or direct the investigation of an adjudicatory case are not precluded from participating in the decision of that case, provided that the agency head was

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acting in his or her capacity as an agency head in both circumstances. Accordingly, the Commission is not proposing to modify § 1025.69 based on this comment.

Comment 4 – One commenter states that the overarching goal of the 2016 NPR is to broaden and expand the reach of the Presiding Officer. The commenter explains that the 2016 NPR allows the Presiding Officer to have discretion to push an adjudication through the system, while tying his or her hand at the same time. Lastly, the commenter suggests that allowing the Presiding Officer to have this amount of discretion vests too much power into the hands of an individual who is outside of the judicial system.

Response 4 – An ALJ acting as a Presiding Officer in an adjudicative proceeding at the CPSC plays an important fact-finding role. Because the Commission has jurisdiction over more than 15,000 types of consumer products across a broad range of industries that vary widely in complexity, the Commission relies on a Presiding Officer to tailor an adjudicative proceeding to the matter, product, and risk of injury at issue. The Commission believes it appropriate and necessary to provide the Presiding Officer with considerable, but not unlimited, discretion, to promote efficiency, due process, and consumer safety.

B. Section-Specific Comments

Comment 5 – Two commenters support revising CPSC’s proposals in §§ 1025.11(d) (stays and preliminary injunctions) and 1025.25 (summary decisions) to provide the Presiding Officer with discretion in particular cases. The commenters also support allowing the Presiding Officer discretion to set flexible or longer deadlines regarding proposed §§ 1025.31(a)(1) (initial disclosures) and 1025.31(b) (discovery completion). One commenter expresses concern with the proposal to remove the requirement for expert reports in § 1025.31(a)(2) of the 2016 NPR.

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Response 5 – The Supplemental NPR proposes to move § 1025.11(d) regarding stays when a preliminary injunction is sought to § 1025.15(e) on timing, and addresses the comment by vesting the Presiding Officer with discretion to issue a stay, upon good cause shown. The Supplemental NPR proposes to combine motions to dismiss and motions for summary decision in proposed § 1025.25 regarding dispositive motions. To address the comment, proposed § 1025.25(b) now vests the Presiding Officer with discretion to allow a motion for summary decision beyond the 30-day limit, for good cause shown. Regarding § 1025.31, the Supplemental NPR substantially rewrites this provision to align with Federal Rule 26. Throughout proposed § 1025.31, the Supplemental NPR adopts time frames set forth in Federal Rule 26, and vests the Presiding Officer with discretion to alter time limits for discovery. The proposed revisions also address a commenter’s concern over the proposal to remove the requirement for expert reports in § 1025.31(a)(2) of the 2016 NPR. The Supplemental NPR removes this proposal and follows the Federal Rules regarding the exchange of expert reports.

Comment 6 – Two commenters support the proposed revision in § 1025.13 of the 2016 NPR requiring the Presiding Officer to refer to the Commission for decision amendments that would expand the scope of proceedings. One commenter stated that this approach is consistent with the FTC’s Rules of Practice, which allow a Presiding Officer to approve amendments that are “reasonably within the scope of the original complaint.”

Response 6 – The Supplemental NPR seeks to balance the Commission’s desire to review any amendment that goes beyond the scope of the original complaint and the need to provide the Presiding Officer with discretion to allow certain amended pleadings, against the desire to prevent delay of proceedings with unnecessary Commission review. Accordingly, proposed § 1025.13(a) of the Supplemental NPR adopts a similar approach to the FTC’s, allowing the Presiding Officer to approve amendments that are reasonably within the scope of the original complaint which do not unduly

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broaden the issues in the adjudicative proceeding or cause undue delay. The Supplemental NPR proposes to allow the Presiding Officer the discretion to refer amendments that do not meet this criteria, and are denied, to the Commission, if the moving party objects.

Comment 7 – One commenter opposes the proposal in § 1025.11(b)(3) to eliminate the list and summary of documentary evidence supporting the charges in a complaint. The commenter states that documentary evidence supporting the charges provides the respondent with fair notice of the charges, including the engineering rationale for CPSC staff’s determination, and further asserts that summary and documentary evidence can only help move the process toward resolution faster, without harming the Commission, because the Commission would only be sharing the information it possessed when the complaint is filed.

Response 7 – The Commission declines to reinstate the provision regarding the list and summary of documentary evidence supporting charges in a complaint. This information does not help to move a case to resolution, as suggested by the commenter. When a complaint is filed, typically, CPSC staff has already been discussing and sharing information with a potential respondent. To the extent such information can help move a case to an expeditious resolution, a potential respondent is already aware of information. Additionally, mandatory disclosures of evidence set forth in Federal Rule 26(a)(1)(A), which the 2016 NPR and the Supplemental NPR propose to follow, already provide a respondent, early in the proceeding, with the same information as the list and summary of documentary evidence. Finally, the Commission receives information for official use only that is related to support for an administrative complaint before deciding whether to issue the complaint.

Comment 8 – One commenter expresses concern about proposed § 1025.43(a) regarding relaxing the rules of evidence for hearsay, stating that while it is often appropriate to relax the rules of

evidence in an adjudicatory proceeding, specifically calling out the hearsay rule should not be included in the final rule.

Response 8 – The Supplemental NPR addresses this comment by removing the specific example of hearsay. Section 1025.43(a) now states that the Federal Rules of Evidence shall apply to all adjudicative proceedings. Additionally, proposed § 1025.43(a) states that evidence that would be admissible under the Federal Rules of Evidence is admissible, and evidence that would be inadmissible under the Federal Rules of Evidence, may not be deemed or ruled to be inadmissible in a proceeding conducted under this part, solely on the basis that it is inadmissible under the Federal Rules of Evidence. This approach is consistent with the FTC’s and the CFPB’s approach.

Comment 9 – One commenter states that the Presiding Officer should have discretion to adjust page limits for briefing, as described in proposed §§ 1025.46 and 1025.53.

Response 9 – The Supplemental NPR, in §§ 1025.46 and 1025.53, vests the Presiding Officer with discretion to alter page limits.

V. Environmental Considerations

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

VI. Regulatory Flexibility Analysis

Under section 603 of the Regulatory Flexibility Act (RFA), when the APA requires an agency to publish a general notice of proposed rulemaking, the agency must prepare an initial regulatory flexibility analysis (IRFA), assessing the economic impact of the proposed rule on small entities. 5

U.S.C. 603(a). As noted, the Commission is proposing to update its Rules of Practice for Adjudicative Proceedings. Although the Commission is choosing to issue the rule through notice and comment procedures, the APA does not require a proposed rule when an agency issues rules of agency procedure and practice (5 U.S.C. 553(b)). Therefore, the CPSC is not required to prepare an IRFA under the RFA. Moreover, the Supplemental NPR does not propose to establish mandatory requirements for, and would not impose any obligations on, small entities (or any other entity or party).

VII. Paperwork Reduction Act

The Paperwork Reduction Act (PRA) establishes certain requirements when an agency conducts or sponsors a “collection of information.” 44 U.S.C. 3501–3520. The Supplemental NPR proposes to amend the Commission’s Rules of Practice to adopt more modern adjudicative procedures. The Supplemental NPR does not propose to create information collection requirements. The PRA is not implicated in this proposed rulemaking because the existing Rules of Practice and the Supplemental NPR do not require or request information from firms, but rather, explain procedures for adjudicatory hearings.

VIII. Executive Order 12988 (Preemption)

According to Executive Order 12988 (February 5, 1996), agencies must state in clear language the preemptive effect, if any, of new regulations. Section 26 of the CPSA explains the preemptive effect of consumer product safety standards issued under the CPSA. 15 U.S.C. 2075. The Supplemental NPR proposes updates to the CPSC’s existing Rules of Practice for Adjudicative Proceedings and does not seek to issue a consumer product safety standard. Accordingly, section 26 of the CPSA does not apply to this rulemaking.

IX. Effective Date

The APA’s general requirement is that a final rule become effective at least 30 days after publication in the *Federal Register*. 5 U.S.C. 553(d). Accordingly, the Commission proposes that the final rule to amend 16 CFR part 1025 become effective 30 days after publication in the *Federal Register* for adjudicative proceedings that commence, or that re-commence, thereafter.

X. Request for Comments

The Commission requests comments on all aspects of the Supplemental NPR. Comments must be submitted in accordance with the instructions in the ADDRESSES section of the preamble. Comments must be received no later than [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

List of Subjects in 16 CFR part 1025

Administrative practice and procedure; Consumer protections

For the reasons set forth in the Preamble, the Commission proposes to amend 16 CFR part 1025 to read as follows:

PART 1025—RULES OF PRACTICE FOR ADJUDICATIVE PROCEEDINGS

1. Revise the authority citation for part 1025 to read as follows:

Authority: 15 U.S.C. 45, 1192, 1194, 1197(b), 1274, 1473(c), 2064, 2066(b), 2076, 8003; 5 U.S.C. 551 - 559.

2. Revise part 1025 as follows:

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

Sec.

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

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

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

Subpart C – Prehearing Conferences, Motions, Interlocutory Appeals, Dispositive Motions

- 1025.21 Prehearing conferences.
- 1025.22 Prehearing submissions.
- 1025.23 Motions.
- 1025.24 Interlocutory appeals.
- 1025.25 Dispositive motions.

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Subpart D – Discovery, Subpoenas

- 1025.31 General provisions governing discovery.
- 1025.32 Written interrogatories to parties.
- 1025.33 Production of documents, electronically stored information, and tangible things; access for inspection and other purposes.
- 1025.34 Requests for admission.
- 1025.35 Depositions.
- 1025.36 Motions to compel discovery.
- 1025.37 Sanctions for failure to comply with discovery orders.
- 1025.38 Subpoenas.

Subpart E – Hearings

- 1025.41 General rules.
- 1025.42 Powers and duties of Presiding Officer.
- 1025.43 Evidence.
- 1025.44 Expert witnesses.
- 1025.45 *In camera* materials.
- 1025.46 Proposed findings, conclusions, and order.
- 1025.47 Record.
- 1025.48 Official docket.
- 1025.49 Fees.

Subpart F – Decision

- 1025.51 Initial decision.
- 1025.52 Adoption of initial decision.

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- 1025.53 Appeal from initial decision.
- 1025.54 Review of initial decision in absence of appeal.
- 1025.55 Final decision and order.
- 1025.56 Reconsideration.
- 1025.57 Effective date of order.
- 1025.58 Reopening of proceeding.

Subpart G – Appearances, Standards of Conduct

- 1025.60 Disqualification of commissioners.
- 1025.61 Who may make appearances.
- 1025.62 Authority for representation.
- 1025.63 Written appearances.
- 1025.64 Attorneys.
- 1025.65 Persons not attorneys.
- 1025.66 Qualifications and standards of conduct.
- 1025.67 Restrictions as to former members and employees.
- 1025.68 Prohibited *ex parte* communications.
- 1025.69 Separation of functions.

Subpart H – Settlements, Mediation

- 1025.71 Settlements.
- 1025.72 Mediation.

Subpart I – Implementation of the Equal Access to Justice Act in

Adjudicative Proceedings with the Commission

- 1025.81 General provisions.

1025.82 Information required from applicant.

1025.83 Procedures for considering applications.

Authority: 15 U.S.C. 45, 1194, 1197(b), 1274, 1473(c), 2064, 2066(b), 2076, 8003; 5 U.S.C. 551 - 559.

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

§ 1025.1 Scope of rules.

The Rules in this part govern procedures in adjudicative proceedings relating to the provisions of sections 15(c), (d), and (f), and 17(b) of the Consumer Product Safety Act (15 U.S.C. 2064(c), (d), (f), and 2066(b)); and any other hearing afforded by acts administered and enforced by the Consumer Product Safety Commission which are required to be determined on the record after an opportunity for an agency hearing as provided in 5 U.S.C 554. This part may also be applied to such other adjudicative proceedings as the Commission, by order, shall designate. The Commission intends for these Rules to accommodate both simple and complex matters in adjudication. To accomplish this objective, the Rules vest broad discretion 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.

§ 1025.2 Nature of adjudicative proceedings.

Adjudicative proceedings shall be conducted in accordance with 5 U.S.C. 551 through 559, and this part. The Commission's policy is that adjudicative proceedings shall be conducted in a timely manner, in locations chosen with due regard to the convenience of all parties, consistent with the Constitutional due process rights and interests of all persons, and the CPSC's statutory obligation to protect the public from unreasonable risks of injury and death from consumer products. Therefore, the Presiding Officer

and all parties shall make every effort at each stage of any proceeding to avoid unnecessary delay. The Presiding Officer should, whenever appropriate, expedite the proceedings by setting shorter time limitations than those generally applicable under this part. For example, the time limitation for discovery, as provided in § 1025.31, may be shortened, consistent with the scope of discovery reasonably necessary to prepare for the hearing, and as provided for in this part.

§ 1025.3 Definitions.

As used in this part:

(a) *Adjudicative proceeding* means a formal proceeding conducted under one or more of the statutes administered by the CPSC which are required by statute to be determined on the record after opportunity for an agency hearing as provided in 5 U.S.C. 554.

(b) *Adversarial staff* means any staff who engages in an investigative or prosecutorial role in a proceeding, including Complaint Counsel.

(c) *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.

(d) *Commission* means the Commissioners who comprise the voting members of the U.S. Consumer Product Safety Commission or a quorum thereof.

(e) *Commissioner* means a Commissioner of the U.S. Consumer Product Safety Commission.

(f) *Complaint Counsel* means counsel for CPSC staff, including any individual who files a notice of appearance in an adjudicative proceeding under these rules as Complaint Counsel, or is listed as Complaint Counsel in a complaint, in such an adjudicative proceeding.

(g) *CPSC* means the U.S. Consumer Product Safety Commission, an independent regulatory agency.

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(h) *Decisional staff* means any staff who has not engaged in an investigative or prosecutorial role in an adjudicative proceeding and who may assist the Commission in its decision making role, including, as appropriate, the General Counsel, and his or her designated staff who provide legal advice to the Commission.

(i) *Decision-maker* shall have the meaning set forth in § 1025.68(b)(1).

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

(k) *Ex parte communication* shall have the meaning set forth in § 1025.68(b)(2).

(l) *Federal Rule(s)* means the Federal Rules of Civil Procedure. For purposes of construction, the terms plaintiffs and defendants as used in the Federal Rules of Civil Procedure shall mean Complaint Counsel and respondent, respectively.

(m) *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.

(n) *Participant* means any non-party person as defined in § 1025.17(b).

(o) *Party* means any named person or any intervenor in any proceeding governed by this part, including CPSC staff represented by Complaint Counsel.

(p) *Intervenor* means any person as defined in § 1025.17(a).

(q) *Person* means an individual, partnership, company, corporation, association (incorporated or unincorporated), trust, estate, cooperative organization, a federal, state or municipal governmental entity, or other entity.

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

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(s) *Presiding Officer* means a person who is appointed by the Commission to conduct an adjudicative proceeding under this part, and may include an administrative law judge qualified under 5 U.S.C. 3105, but shall not include a Commissioner.

(t) *Representative* means an attorney or a non-attorney, as set forth in § 1025.64 or § 1025.65, who represents a party or participant in an adjudicative proceeding.

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

(v) *Secretary* or *Secretariat* means the Secretariat of the CPSC.

(w) *Staff* means CPSC employees, contractors, agents, and others, including consulting experts.

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

§ 1025.11 Commencement of proceeding.

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

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

(1) A statement of the legal authority for instituting the proceeding, including the specific sections of statutes 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.

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

(c) *Notice to the public.* Without delay, the Office of the Secretariat shall submit the issued complaint to the Federal Register for publication and shall make the complaint publicly available on the CPSC's website.

§ 1025.12 Answer.

(a) *Time for filing.* A respondent shall file an answer within twenty one (21) days after service of a complaint.

(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.* (1) 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. Seven (7) days after the time to file an answer has passed, the Presiding Officer shall enter an Order of Default, containing findings of fact and conclusions of law as are just and reasonable under the circumstances to justify the entry of an Order of Default. In such cases, respondent shall have no right to appeal, but must instead proceed pursuant to paragraph (c)(2) of this section.

(2) A motion to set aside a default shall be made within a reasonable time, but in no event later than seven (7) days after an order of default is entered, state the reasons for the failure to appear or defend, and specify the nature of the proposed defense in the proceeding. In order to prevent injustice and on such conditions as may be appropriate, the Presiding Officer, at any time prior to the filing of the recommended decision, or the Commission, at any time, may for good cause shown set aside a default.

§ 1025.13 Amendments and supplemental pleadings.

(a) *Generally.* The Presiding Officer may allow appropriate amendments and supplemental pleadings reasonably within the scope of the original complaint which do not unduly broaden the issues in the adjudicative proceeding or cause undue delay. If a motion to amend or supplement a pleading is

denied, upon motion of the moving party, the Presiding Officer may issue an order referring to the Commission for decision any such amendment or supplemental pleading.

(b) *Time*. Any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later, unless the Presiding Officer orders otherwise for good cause.

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

§ 1025.14 Form and filing of pleadings and other documents.

(a) *Filing*. Except as otherwise provided by order of the Presiding Officer, all pleadings and documents submitted to the Commission or the Presiding Officer shall be addressed to, and electronically filed with, the Secretariat and the Presiding Officer. Pleadings and documents filed electronically shall be deemed filed on the day of electronic filing. If the Presiding Officer permits by order an alternative method of filing, such order shall state the applicable date on which such filings are to be deemed filed.

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

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

(d) *Signature*. (1) The original of each document filed shall be signed by a representative of record for the party or participant; or in the case of parties or participants not represented, by the party or

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participant; or by a partner, officer or other appropriate official of any corporation, partnership, or unincorporated association, who files an appearance on behalf of the party or participant. Documents electronically filed shall be signed electronically.

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

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

(2) Electronic text documents shall be filed in a format that prints on paper approximately 8 1/2 x 11 inches in size. Print shall be in 12-point font and double spaced, and margins shall be one inch. Electronic documents and files that cannot readily be printed, such as large spreadsheets, videos, or photographs, should be identified by format and the program or protocol required to review the information.

(3) Documents that fail to comply with this section may be returned by the Secretariat or Presiding Officer.

(4) Electronic documents and files that cannot be opened or read may be returned by the Secretariat or Presiding Officer.

(5) For good cause shown, the Presiding Officer may allow deviation from the form prescribed in this section.

§ 1025.15 Time.

(a) *Computation of days.* In computing any time period specified in this part or in any order filed in a proceeding subject to this part:

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(1) The day of the event triggering the period shall not be included, but each calendar day thereafter shall be included. If the last day of the time period is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) 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.

(3) “Legal holiday” means any day designated as a legal public holiday in 5 U.S.C. 6103.

(4) “Last Day” ends for electronic filing, at midnight Eastern Time, unless the Presiding Officer sets a different time.

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

(c) *Extensions.* For good cause shown, the Presiding Officer may extend any time limit prescribed or allowed by this part 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 this part or by order of the Commission or the Presiding Officer.

(d) *Stay of proceeding.* If a stay of proceeding is granted by order of the Presiding Officer or the Commission, the time limits specified in this part shall be automatically tolled during the period while the stay is in effect.

(e) *Preliminary injunction.* A judicial proceeding for a preliminary injunction pursuant to 15 U.S.C. 2064(g) shall generally not serve as the basis to stay any proceeding under this part, but the Presiding Officer, upon good cause shown, shall have discretion regarding whether to stay the proceeding.

§ 1025.16 Service.

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

(b) *Service of complaint or subpoena.* A complaint or subpoena shall be served in one of the following ways:

(1) *By electronic means.* Service of a complaint may be made by electronic means if agreed to by the parties, and service of a subpoena may be made by electronic means if agreed to by the subpoena recipient; or

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

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

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

or of a member of the partnership or of an executive officer, director, or agent of the corporation or unincorporated association to be served; or

(5) *By publication in the Federal Register.* A respondent or subpoena recipient 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 all other documents.* All other documents shall be served by electronic means unless the Presiding Officer or the Commission orders otherwise, or the parties agree otherwise.

(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. An individual who has submitted a delegation of authority pursuant to 16 CFR 1115.13(a) with regard to the subject matter of the adjudicative proceeding shall be deemed to have entered an appearance for purposes of service under this section.

(e) *Certificate of service.* Every document filed with the Commission and required to be served upon all parties to any adjudicative proceeding, 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 adjudicative proceeding.

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

§ 1025.17 Intervention.

(a) *Intervenor.* (1) Any person who desires to participate as a party in any adjudicative proceeding subject to this part shall file a written petition for leave to intervene with the Secretariat and shall serve a copy of the petition on each party and the Presiding Officer as required by § 1025.16.

(i) 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.

(ii) A petition shall: (A) Identify the specific aspect or aspects of the proceeding as to which the petitioner wishes to intervene,

(B) Set forth the interest of the petitioner in the proceeding,

(C) State how the petitioner's interest may be affected by the results of the proceeding, and

(D) 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 (a)(3) of this section.

(iii) Any petition relating only to matters outside the jurisdiction of the Commission shall be denied.

(iv) 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.

(2) *Response to petition to intervene.* Any party may file a response to a petition for leave to intervene within 14 days after the petition is filed with the Secretariat, with particular reference to the factors set forth in paragraph (a)(3) of this section.

(3) *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:

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

(ii) 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;

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

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

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

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

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

(viii) 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 proceeding as a participant pursuant to paragraph (b) of this section.

(b) *Participant.* (1) Any person who desires to participate in the proceeding as a nonparty shall file with the Secretariat a request to participate in the proceeding and shall serve a copy of such request on each party to the proceeding.

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(i) A request shall ordinarily be filed no later than the date motions for summary decision are due. 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.

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

(iii) Any person who files a request to participate in the proceeding as a nonparty and whose request is granted by the Presiding Officer shall be known as a "Participant" and shall have the right to participate in the proceeding 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.

(2) *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 an adjudicative proceeding. The Presiding Officer shall consider, in addition to all other relevant matters, the following factors:

(i) The nature and extent of the person's alleged interest in the proceeding;

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

(iii) 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 proceeding. 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 proceeding or if he/she determines that the person's participation would unduly broaden the issues in controversy or unduly delay the proceeding.

(c) *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.* An adjudicative proceeding may be initiated against one or more members of a class of respondents as representative parties on behalf of all respondents if:

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

(2) There are questions of fact or issues of law common to the class;

(3) The defenses of the representative parties are typical of the defenses of the class; and

(4) The representative parties will fairly and adequately protect the interests of the class.

(b) *Composition of class.* A class may be composed of: (1) Manufacturers, distributors, or retailers, or a combination of them, of products which allegedly have the same defect;

(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

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(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 proceeding 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 proceeding 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 proceeding concerning the controversy already commenced against members of the class, the desirability or undesirability of concentrating the litigation in one

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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 proceeding 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 and may be altered or amended as may be necessary.

(g) *Scope of final order.* In any proceeding 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 Consolidation of proceedings.

(a) *General.* Two or more matters which have been scheduled for adjudicative proceedings and which involve similar issues may be consolidated.

(b) *Criteria.* When actions involving a common question of law or fact are pending, the Presiding Officer or the Commission may issue an order consolidating proceedings respecting any or all of the matters at issue in the actions, for any purpose, and as may tend to avoid unnecessary cost or delay.

(c) *Procedure.* A motion for consolidation may be filed by any party to such proceedings not later than thirty (30) days prior to a hearing before a Presiding Officer or for a matter before the Commission on review within the time prescribed in § 1025.53(b). The motion may include a request that the consolidated proceeding be maintained as a class action in accordance with § 1025.18. Consolidation also may be ordered upon the initiative of the Presiding Officer or the Commission.

(d) *Representation.* Single representatives may be designated by represented parties, intervenors, and participants with an identity of interests.

Subpart C – Prehearing Conferences, Motions, Interlocutory Appeals, Dispositive Motions

§ 1025.21 Prehearing conferences.

(a) *Preliminary conference of the parties.* As early as practicable before the initial scheduling conference described in paragraph (b) of this section, but in no event later than five (5) days after the answer is due to be filed by the last answering respondent, counsel for the parties shall meet to discuss the nature and basis of their claims and defenses, the possibilities for a prompt settlement or resolution of the case through mediation as set forth in § 1025.72, the disclosures required by Federal Rule

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26(a)(1), and any issues about preserving discoverable information. The parties shall also agree, if possible, on:

- (1) A discovery plan consistent with Federal Rule 26(f)(3);
- (2) A preliminary estimate of the time required for the hearing; and
- (3) Any other matters to be determined at the prehearing conference.

The parties are jointly responsible for arranging the preliminary conference, for attempting in good faith to agree on a discovery plan, and for submitting to the Presiding Officer within fourteen (14) days after the preliminary meeting a written report outlining the plan.

(b) *Initial scheduling conference.* Except when the Presiding Officer determines that unusual circumstances render it impractical, the Presiding Officer shall hold a scheduling conference after the parties submit the written report as required under paragraph (a) of this section, but no later than fifty (50) days after the answer is due to be filed by the last answering respondent and upon ten (10) days' notice to all parties and participants. At the scheduling conference any or all of the following shall be considered:

- (1) The factual and legal theories of the parties;
- (2) The current status of any pending motions or petitions, and the dates for the submission and hearing of additional motions;
- (3) Proposed date(s) for the hearing, and a schedule of proceedings that is consistent with the date of the hearing, including the filing and exchange of any pretrial briefs and setting dates for the final prehearing conference;
- (4) Steps taken to preserve evidence relevant to the issues raised by the claims and defenses;
- (5) The scope of anticipated discovery, any limitations on discovery, and a proposed discovery plan consistent with the matters addressed in paragraph (a)(1) of this section;

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

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

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

(d) *Scheduling order.* Following the initial scheduling conference, the Presiding Officer shall enter an order that sets forth the results of the conference and establishes a schedule for the proceeding that addresses the matters identified in paragraph (b) of this section.

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

(f) *Final prehearing conference.* As close to the commencement of the hearing as practicable, but no more than seven (7) days prior to the commencement of the hearing, the Presiding Officer shall hold a final prehearing conference, at which time deadlines for proposed stipulations as to law, fact, or admissibility of evidence, and the exchange of exhibit and witness lists shall be established. At this conference, the Presiding Officer shall also resolve any outstanding matters or pending motions (except motions for summary decision) and establish a final schedule for the hearing.

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

order. If the complexities of the issues, extent of discovery, or good cause require that the hearing commence more than 300 days past the filing of the complaint, it shall be noted in the order.

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

§ 1025.22 Prehearing submissions.

(a) Within the time set by the Presiding Officer, but in no case later than thirty (30) days before the start of the hearing, each party shall serve on every other party and the Presiding Officer:

(1) A prehearing statement, which shall include an outline or narrative summary of its case or defense, and the legal theories upon which it will rely;

(2) A final list of witnesses, including expert witnesses, expected to be called to testify at the hearing, including the name and address of each witness and a short summary of the expected testimony of each witness, unless previously provided;

(3) Any prior sworn statements that a party intends to admit into evidence pursuant to § 1025.43;

(4) A list of the exhibits to be introduced at the hearing along with a copy of each exhibit, consistent with the provisions of any protective order; and

(5) Any stipulations of fact or liability.

(b) *Effect of failure to comply.* No witness may testify and no exhibits may be introduced at the hearing if such witness or exhibit is not listed in the prehearing submissions pursuant to paragraph (a) of this section, except for good cause shown.

§ 1025.23 Motions.

(a) *Presentation and disposition.* Except as otherwise provided under these rules, all motions shall be addressed to the Presiding Officer, who shall rule upon them promptly, after affording an opportunity for response.

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

(c) *Responses and replies to motions.* Within fourteen (14) days after service of any written motion or petition, or within such longer or shorter time as may be designated by this part or by the Presiding Officer or the Commission, any party who opposes the granting of the requested order, ruling, or action may file a written response to the motion. Failure to respond to a written motion may, in the discretion of the Presiding Officer, be considered as consent to the granting of the relief sought in the motion. Replies to responses shall be filed within ten (10) days after service of the response. No additional replies or responses shall be permitted absent leave granted by the Presiding Officer or the Commission on good cause shown. Any additional replies or responses are at the discretion of the Presiding Officer or the Commission.

§ 1025.24 Interlocutory appeals.

(a) *General.* Rulings of the Presiding Officer may not be appealed to the Commission prior to the Initial Decision and Order, 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:

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(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 proceeding pursuant to § 1025.42(b); or

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

(2) *Procedure for interlocutory appeals.* (i) *General.* 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 may decide the petition or may request such further briefing or oral presentation as it deems necessary.

(ii) *Procedure for confidential records.* 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 paragraph (b)(2) of this section. If an affected party files a petition with the Commission pursuant to paragraph (b)(2) of this section within the 5-day period, the stay of the Presiding Officer's order is automatically extended until the Commission decides the petition.

(3) *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)(3)(i) of this section, a petition for interlocutory appeal under this subparagraph may be filed in accordance with paragraph (b)(2)(i) of this section.

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

§ 1025.25 Dispositive motions.

(a) *Motion to dismiss*. A respondent may file a motion to dismiss asserting that, even assuming the truth of the facts alleged in the complaint, respondent is entitled to dismissal as a matter of law.

(1) *Time to file*. A motion to dismiss must be filed within twenty one (21) days after service of a complaint, and does not eliminate a respondent's obligation to file an answer or take any other action required by this part or by an order of the Presiding Officer, unless the Presiding Officer expressly so provides.

(2) *Legal effect of motion to dismiss*. If the Presiding Officer grants a motion to dismiss a complaint or a motion for other relief with the result that the entire proceeding before the Presiding Officer is terminated, the Presiding Officer shall issue an Initial Decision and Order in accordance with the provisions of § 1025.51. If the motion is not dispositive of all charges in the complaint against all

named respondents, the Presiding Officer shall also issue an order identifying those charges that remain.

(3) *Deferral of Ruling*: The Presiding Officer may elect to defer ruling on a motion to dismiss until the close of the case.

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

(1) *Contents of Response to motion for summary decision*. Any party may file a response to another party's motion for Summary Decision and Order with a supporting memorandum accompanied by a separate and concise statement of the material facts as to which the opposing party contends a genuine dispute exists.

(2) *Grounds*. A Summary Decision and Order shall be granted if the moving party shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(3) *Form*. A party asserting that a fact cannot be disputed, or that a fact is genuinely disputed, must support the assertion by filing a motion showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support

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the fact. The motion must be supported by citing to particular parts of materials in the record, including depositions, documents, ESI, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials. Any affidavit or declaration submitted in support of or in opposition to a motion for summary decision shall set forth such facts as would be admissible in evidence, shall show affirmatively that the affiant is competent to testify to the matters stated therein, and must be signed under oath and penalty of perjury. The Presiding Officer and parties may follow additional procedures set forth in Federal Rule 56 where appropriate.

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

(5) *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 Decision and Order shall direct such further proceedings as are appropriate.

(c) *Time for filing opposition and reply; page limitation on reply briefs.* Any party, within twenty (20) days after service of a dispositive motion, or within such time period as allowed by the Presiding Officer, may file a response to such motion. Any reply brief filed in response to an opposition to a dispositive motion shall be filed within five (5) days after service of the opposition. Reply briefs shall not exceed ten (10) pages.

(d) *Decision on motion.* Within thirty (30) days following the expiration of the time for filing all responses and replies to any dispositive motion, the Presiding Officer shall issue an order granting or denying the requested relief, in whole or in part, or deferring a decision until the close of the case. If it

appears that a party, for good cause shown, cannot present by affidavit, prior to hearing, facts essential to justify opposition to the motion, the Presiding Officer shall deny or defer the motion.

Subpart D – Discovery, Subpoenas

§ 1025.31 General provisions governing discovery.

(a) *Required disclosures.* (1) *Initial disclosure.* (i) *Generally.* Except as otherwise stipulated or ordered by the Presiding Officer, a party must, without awaiting a discovery request, provide to the other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information--along with the subjects of that information--that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment; and

(B) a copy--or a description by category and location--of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment.

(ii) *Time for initial disclosures--Generally.* A party must make the initial disclosures at or within 14 days after the parties' § 1025.21(a) preliminary conference unless a different time is set by stipulation or order of the Presiding Officer, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the Presiding Officer must determine what disclosures, if any, are to be made and must set the time for disclosure.

(iii) *Time for initial disclosures--for parties served or joined later.* A party that is first served or otherwise joined after the § 1025.21(a) preliminary conference must make the initial disclosures within thirty (30) days after being served or joined, unless a different time is set by stipulation or order of the Presiding Officer.

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(iv) *Basis for initial disclosure; unacceptable excuses.* A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not conducted a full investigation or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) *Disclosure of expert testimony.* (i) *Generally.* In addition to the disclosures required by paragraph (a)(1) of this section, a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(ii) *Witnesses who must provide a written report.* Unless otherwise stipulated or ordered by the Presiding Officer, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially employed to provide expert testimony in the adjudicative proceeding or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(A) a complete statement of all opinions the witness will express and the basis and reasons for them;

(B) the facts or data considered by the witness in forming them;

(C) any exhibits that will be used to summarize or support them;

(D) the witness's qualifications, including a list of all publications authored in the previous ten (10) years;

(E) a list of all other adjudicative proceedings or cases in which, during the previous four (4) years, the witness testified as an expert at trial or by deposition; and

(F) a statement of the compensation to be paid for the study and testimony in the adjudicative proceeding.

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(iii) *Witnesses who do not provide a written report.* Unless otherwise stipulated or ordered by the Presiding Officer, if the witness is not required to provide a written report, this disclosure must state:

(A) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and

(B) a summary of the facts and opinions to which the witness is expected to testify.

(iv) *Time to disclose expert testimony.* A party must make these disclosures at the times and in the sequence that the Presiding Officer orders. Absent a stipulation or order of the Presiding Officer, the disclosures must be made:

(A) at least ninety (90) days before the date set for hearing; or

(B) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (a)(2)(ii) or (iii) of this section, within thirty (30) days after the other party's disclosure.

(v) *Supplementing the disclosure.* The parties must supplement these disclosures when required under § 1025.31(e).

(3) *Form of disclosures.* Unless the court orders otherwise, all disclosures under paragraph (a) of this section must be in writing, signed, and served.

(b) *Discovery scope and limits.* (1) *Scope in general.* Unless otherwise limited by order of the Presiding Officer, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the adjudicative proceeding, considering the importance of the issues at stake in the action, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely

benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) *Limitations on frequency and extent.* (i) *When permitted.* By order, the Presiding Officer may alter the limits provided for by these Rules on the number of depositions and interrogatories or on the length of depositions. By order, the Presiding Officer may also limit the number of requests allowed under § 1025.34.

(ii) *Specific limitations.* (A) *Electronically stored information.* A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the Presiding Officer may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of paragraph (b)(2)(iii) of this section. The Presiding Officer may specify conditions for the discovery.

(B) *Discovery of CPSC materials.* Complaint Counsel need only search for materials that were collected or reviewed in the course of the investigation of the matter related to the subject of the adjudicative proceeding and that are in the possession, custody, or control of the Directorates or Offices of the Commission that investigated the matter, including the Office of Compliance and Field Operations and Office of Hazard Identification and Reduction. The Presiding Officer may authorize for good cause additional discovery of materials in the possession, custody, or control of those Directorates, or other Directorates or subdivisions of the Commission.

(iii) *When required.* On motion or on its own, the Presiding Officer must limit the frequency or extent of discovery otherwise allowed by these Rules if he or she determines that:

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(A) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(B) the party seeking discovery has had ample opportunity to obtain the information by discovery in the adjudicative proceeding; or

(C) the proposed discovery is outside the scope permitted by paragraph (b)(1) of this section.

(3) *Hearing preparation: materials.* (i) *Documents and tangible things.* Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to paragraph (b)(4) of this section, those materials may be discovered if:

(A) they are otherwise discoverable under paragraph (b)(1) of this section; and

(B) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(ii) *Protection against disclosure.* If the Presiding Officer orders discovery of those materials, he or she must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(4) *Trial preparation: experts.* (i) *Deposition of an expert who may testify.* A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If paragraph (a)(2)(ii) of this section requires a report from the expert, the deposition may be conducted only after the report is provided.

(ii) *Trial-preparation protection for draft reports or disclosures.* Paragraphs (b)(3)(i) and (ii) of this section protect drafts of any report or disclosure required under paragraph (a)(2) of this section, regardless of the form in which the draft is recorded.

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(iii) *Trial-preparation protection for communications between a party's attorney and expert witnesses.* Paragraphs (b)(3)(i) and (ii) of this section protect communications between the party's attorney and any witness required to provide a report under paragraph (a)(2)(ii) of this section, regardless of the form of the communications, except to the extent that the communications:

(A) relate to compensation for the expert's study or testimony;

(B) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(C) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(iv) *Expert employed only for trial preparation.* Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(5) *Claiming privilege or protecting trial-preparation materials.* (i) *Information withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(A) expressly make the claim; and

(B) describe the nature of the documents, communications, or tangible things not produced or disclosed--and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(ii) *Information produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that

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received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the Presiding Officer under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(c) *Protective orders.* (1) *Generally.* A party or any person from whom discovery is sought may move for a protective order. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without action of the Presiding Officer. The Presiding Officer may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (i) forbidding the disclosure or discovery;
- (ii) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;
- (iii) prescribing a discovery method other than the one selected by the party seeking discovery;
- (iv) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;
- (v) designating the persons who may be present while the discovery is conducted;
- (vi) requiring that a deposition be sealed and opened only on order of the Presiding Officer;
- (vii) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(viii) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the Presiding Officer directs.

(2) *Ordering discovery.* If a motion for a protective order is wholly or partly denied, the Presiding Officer may, on just terms, order that any party or person provide or permit discovery.

(d) *Timing and sequence of discovery.* (1) *Timing.* A party may not seek discovery from any source before the parties have conferred as required by § 1025.21(a) except when authorized by order of the Presiding Officer.

(2) *Sequence.* Unless the parties stipulate or the Presiding Officer orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(i) methods of discovery may be used in any sequence; and

(ii) discovery by one party does not require any other party to delay its discovery.

(e) *Supplementing disclosures and responses.* (1) *Generally.* A party who has made a disclosure under paragraph (a)(1) of this section, or who has responded to an interrogatory, request for production, or request for admission, must supplement or correct its disclosure or response:

(i) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(ii) as ordered by the Presiding Officer.

(2) *Expert witness.* For an expert whose report must be disclosed under paragraph (a)(2)(ii) of this section, the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's prehearing submissions under § 1025.22 are due.

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(f) *Signing disclosures and discovery requests, responses, and objections.* (1) *Signature required; effect of signature.* Every disclosure under paragraph (a)(1) of this section and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name--or by the party personally, if unrepresented--and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(i) with respect to a disclosure, it is complete and correct as of the time it is made; and

(ii) with respect to a discovery request, response, or objection, it is:

(A) consistent with these Rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

(B) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and

(C) neither unreasonable nor unduly burdensome or expensive, considering the needs of the adjudicative proceeding, prior discovery in the adjudicative proceeding, and the importance of the issues at stake in the action.

(2) *Failure to sign.* Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the Presiding Officer must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) *Sanction for improper certification.* If a certification violates this rule without substantial justification, the Presiding Officer, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both.

§ 1025.32 Written interrogatories to parties.

Written interrogatories to parties shall be governed by Federal Rule 33.

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

The production of documents, ESI, and tangible things, as well as access for inspection and other purposes, shall be governed by Federal Rule 34, except that requests for subpoenas shall be governed by § 1025.38.

§ 1025.34 Requests for admission.

Requests for admission shall be governed by Federal Rule 36, except that Federal Rule 37(a)(5) regarding the award of expenses shall not apply.

§ 1025.35 Depositions.

Depositions shall be governed by Federal Rules 30–32 with the following exceptions: (1) Requests for subpoenas shall be governed by § 1025.38; and (2) Federal Rule 37(a)(5) regarding award of expenses shall not apply.

§ 1025.36 Motions to compel discovery.

(a) *Generally.* 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 disclosure, answer or response is to be treated as a failure to disclose, answer, or respond.

(b) *Procedure.* The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without action by the Presiding Officer.

(c) *Specific motions.* (1) *To compel disclosure.* If a party fails to make a disclosure required by § 1025.31, any other party may move to compel disclosure and for appropriate sanctions.

(2) *To compel a discovery response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under § 1025.35;

(ii) a party fails to answer an interrogatory submitted under § 1025.32; or

(iii) a party fails to produce documents or fails to respond that inspection will be permitted—or fails to permit inspection—as requested under § 1025.33.

(3) *Related to a deposition.* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

§ 1025.37 Sanctions for failure to comply with discovery orders.

In granting a Motion to Compel under § 1025.36, 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 proceeding, 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;

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(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 proceeding, in accordance with § 1025.42(b).

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

§ 1025.38 Subpoenas.

(a) *Availability.* A subpoena shall be addressed to any person not a party for the purpose of commanding attendance and testimony; production of documents, ESI, or tangible things at a hearing or deposition; or inspection of premises. A subpoena may also be addressed to any party for the same purposes.

(b) *Form and content.* A subpoena shall identify the action with which it is connected, the person to whom it is addressed, and the date, time, and place for compliance with its provisions. A subpoena *duces tecum* shall specify documents, ESI, or tangible things to be produced. A subpoena may combine one or more of the available options in paragraph (a). A subpoena must be issued pursuant to paragraph (d).

(c) *How obtained.* An application for the issuance of a subpoena shall be electronically submitted to the Presiding Officer. The application must contain a proposed subpoena, and an explanation of how the information sought is within the scope of discovery as set forth in § 1025.31. Unless the Presiding Officer orders otherwise, the Presiding Officer shall, within five (5) days of receipt of the application,

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transmit the submitted application and the subpoena to the Commission with a recommendation as to whether the subpoena should be issued.

(d) *Issuance of a subpoena.* The Commission shall rule upon the application for a subpoena *ex parte*, by issuing an order granting or denying the application. The Commission shall issue a subpoena by authorizing the Secretariat or the Presiding Officer to sign and date the approved subpoena for transmittal to the applicant for service. If the Commission denies an application for a subpoena, the Commission shall issue an Order Denying Subpoena, stating the factual and legal basis for the denial. If the Commission's vote results in no action on the application for a subpoena, the Secretariat shall issue an *In Camera* notice to the parties and the Presiding Officer.

(e) *Service of a subpoena.* A subpoena issued pursuant to section (d) shall be served upon the addressee and upon all parties as provided in § 1025.16(b).

(f) *Proof of service.* A person serving a subpoena shall promptly execute a proof of service, stating the date, time and manner of service upon the addressee. If service is effected by mail or commercial carrier, the signed return receipt or proof of delivery shall accompany the proof of service. In case of failure to make service, a statement of the reasons for the failure shall be submitted on the docket.

(g) *Motion to quash or modify subpoena.* (1) *Procedure.* Within five (5) days after service 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 by the party who served the subpoena within five (5) days after service of such motion and shall be ruled on immediately by the Commission. The order shall specify the date, if any, for compliance with the specifications of the subpoena.

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(2) *Standard for ruling on motions to quash or modify subpoenas.* If compliance with the subpoena would be unreasonable, oppressive, or unduly burdensome, the Commission shall quash or modify the subpoena, or may order return of the subpoena only upon specified conditions.

(h) *Consequences of failure to comply.* In the event of failure by a person to comply with a subpoena, the Presiding Officer may take any of the actions enumerated in § 1025.37, or may order any other appropriate relief to compensate for the withheld testimony, documents, or other materials, or failure to allow inspection of the premises. 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.

Subpart E – Hearings

§ 1025.41 General rules.

(a) *Public hearings.* All hearings conducted pursuant to this part shall be public unless the Commission or the Presiding Officer orders otherwise.

(b) *Prompt completion.* Hearings shall proceed with all reasonable speed and, insofar as practicable with due regard to the convenience of the parties, shall be held at one location and continue without suspension until concluded, except in unusual circumstances or as otherwise provided in this part. The hearing shall be limited to no more than 210 hours. The Presiding Officer, upon a showing of good cause, may extend the number of hours for the hearing.

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

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(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).

(e) *Rights of witnesses.* Any person compelled to testify in any proceeding 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, and to issue sanctions against parties or their representatives as necessary and as provided for in this part;
- (5) To hold conferences for simplification of the issues, settlement of the proceedings, or any other proper purposes, as provided for in this part;
- (6) To consider and rule, orally or in writing, upon all procedural, evidentiary, and other motions and issues appropriate in adjudicative proceedings;
- (7) To issue decisions, rulings, or orders provided in this part;
- (8) To certify motions or interlocutory appeals to the Commission for its determination;

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(9) To inform parties of the availability of mediation in § 1025.72 and encourage the use of mediation; and

(10) To take any action authorized by this part or the provisions of 5 U.S.C. 551–559.

(b) *Exclusion of parties, participants, and representatives.* A Presiding Officer shall have the authority, for good cause stated on the record, to exclude from participation in any proceedings any party, participant, or representative who violates the requirements of § 1025.66. Any party, participant, or representative so excluded may appeal to the Commission in accordance with the provisions of § 1025.24. If the representative of a party or participant is excluded, the hearing may be suspended for a reasonable time so that the party or participant may obtain another representative; however, in no event shall the suspension extend past fourteen (14) business days, unless the Presiding Officer orders otherwise for good cause.

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

(d) *Interference.* In the performance of adjudicative functions, a Presiding Officer shall not be responsible to, or subject to the supervision or direction of, any Commissioner or any member of a Commissioner's staff or 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 proceeding, he/she shall withdraw by notice on the record and shall notify the U.S. Office of Personnel Management's Administrative Law Judge loan program or its equivalent.

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(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 proceeding, that party may file with the Secretariat a motion to disqualify and remove the Presiding Officer, supported by affidavit(s) setting forth the alleged grounds for disqualification. A copy of the motion and supporting affidavit(s) shall be served by the Secretariat on the Presiding Officer whose removal is sought. The Presiding Officer shall have ten (10) days to respond in writing to such motion. However, the motion shall not stay the proceeding unless the Presiding Officer or the Commission orders otherwise. If the Presiding Officer does not disqualify himself/herself and the matter is appealed, 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. In the event of disqualification, the Commission shall take appropriate action by appointing another Presiding Officer through the U.S. Office of Personnel Management's Administrative Law Judge loan program or its equivalent.

§ 1025.43 Evidence.

(a) *Applicability of Federal Rules of Evidence.* Unless provided by statute otherwise, the Presiding Officer, the Commission, or this part, the Federal Rules of Evidence shall apply to all adjudicative proceedings held pursuant to this part. Evidence that would be admissible under the Federal Rules of Evidence is admissible in an adjudicative proceeding conducted pursuant to this part. Evidence that would be inadmissible under the Federal Rules of Evidence may not be deemed or ruled to be inadmissible in a proceeding conducted pursuant to this part solely on that basis.

(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) *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 Commission’s jurisdiction or expertise; 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. If official notice is requested or is taken of a material fact or legal conclusion not appearing in the evidence in the record, upon timely objection, the Presiding Officer or the Commission shall provide the parties an opportunity to disprove such noticed fact or legal conclusion. The adjudicative record shall reflect the facts and conclusions which have been officially noticed.

§ 1025.44 Expert witnesses.

(a) *General*. Requirements for experts under Federal Rule 26 apply to this part.

(b) *Definition*. An expert witness is any witness that a party may use at trial to present evidence under Federal Rules of Evidence 702, 703, and 705.

(c) *Method of presenting testimony of expert witness*. (1) *Oral testimony at hearing*. Each party shall have the opportunity to present the testimony of expert witnesses at the hearing.

(2) *Written testimony at hearing*. In lieu of oral testimony, the Presiding Officer may order that the direct testimony of an expert witness be in writing and be filed on the record and exchanged between the parties no later than ten (10) days preceding the commencement of the hearing. Such written testimony shall be incorporated into the record and shall constitute the direct testimony of that witness.

Upon a showing of good cause, the party sponsoring the expert witness may be permitted to amplify any written direct testimony during the hearing.

(3) *Failure to file or exchange written testimony.* If written direct expert testimony is ordered by the Presiding Officer, failure to file or exchange such written testimony 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 orders otherwise in unusual circumstances.

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

§ 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 may for good cause shown and based on the record, order documents or testimony offered in evidence, whether admitted or rejected, to be received and preserved *in camera*. The order shall include:

(1) A description of the documents or testimony;

(2) The reasons for granting *in camera* treatment; and

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

(c) *Access.* Decision-makers and CPSC appellate counsel in federal court, along with any party to the proceedings subject to a protective order, shall have complete access to *in camera* materials.

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(d) *Use at a hearing.* 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 an 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.

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

(f) *Public release of in camera materials.* *In camera* materials constitute a part of the confidential records of the Commission and shall not be released to the public until the expiration of any order granting *in camera* treatment, unless the disclosure is otherwise prohibited by law.

(g) *Reference to in camera materials.* In the submission of proposed findings, conclusions, briefs, or other documents, all parties shall refrain from disclosing specific details of *in camera* materials. However, such refraining shall not preclude general references to such materials. If parties consider the inclusion of specific details of *in camera* materials to be necessary, those references shall be incorporated into separate proposed findings, conclusions, briefs, or other documents marked "Confidential, Contains *In Camera* Material," which shall be filed *in camera* and become part of the *in camera* record. Documents filed *in camera* shall be served only on Decision-makers and parties subject to a protective order, or those otherwise 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 shall file, and participants may file simultaneously unless the Presiding Officer orders otherwise, post-

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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 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, but shall not exceed thirty (30) pages, excluding covers, indexes, table of contents, list of citations, and list of references, unless the Presiding Officer orders otherwise. Reply briefs and responses, if permitted by the Presiding Officer, shall be filed within fifteen (15) days of the date for the filing of briefs, unless the Presiding Officer orders otherwise.

§ 1025.47 Record.

(a) *Reporting and transcription. (1) Transcript.* Hearings shall be recorded and transcribed by a court reporter, under the supervision of the Presiding Officer. The original transcript shall be a part of the record of proceedings and the sole official transcript.

(2) *Video.* Upon a motion by any party, for good cause shown the Presiding Officer may order that the live oral testimony of all witnesses be video recorded digitally, at the expense of the moving party, and in such cases the video recording and the written transcript of the testimony shall be made part of the record. The Presiding Officer shall prescribe standards and procedures for the video recording to ensure that it is a complete and accurate record of the witnesses' testimony. Redacted versions of the video and transcript, as required by the presence of *in camera* material, shall constitute part of the official record that is available to the public.

(3) *Copies.* Copies of transcripts and videos shall be available from the reporter at a cost not to exceed the maximum rates fixed by contract between the CPSC and the reporter. In accordance with section 11 of the Federal Advisory Committee Act (Pub. L. 92-463, 5 U.S.C. app. Section 11), copies

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of transcripts and videos may be made by members of the public or by Commission personnel, when available, at the Secretariat at reproduction costs as provided in § 1025.49.

(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, if the evidence is material and there is good cause for failure to produce it prior to closing the administrative record. 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.

(c) *Closing of the hearing record.* Upon completion of the hearing, the Presiding Officer shall issue an order closing the hearing record after giving the parties three business days to determine if the hearing record is complete or needs to be supplemented or corrected. The Presiding Officer shall retain the discretion to permit or order correction of the hearing record as provided in paragraph (b) of this section.

(d) *Contents of the adjudicative record.* The adjudicative record of the proceeding shall consist of:

- (1) The complaint, the answer, and any amendments thereto;
- (2) Each motion, responsive pleading, submission, or other paper filed or docketed in the proceedings, and any amendments and objections to or regarding them;
- (3) Hearing record, including each stipulation, transcript of testimony, recordings, and any documents or other items admitted into evidence;
- (4) Any transcript of a conference or hearing before the Presiding Officer;
- (5) With respect to a request to disqualify a Presiding Officer or to allow the Presiding Officer's withdrawal under §1025.42(e), each affidavit or transcript of testimony taken and the decision made in connection with the request;

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(6) All motions, briefs, and other papers filed on interlocutory appeal;

(7) All proposed findings of fact and conclusions of law;

(8) Each written order issued by the Presiding Officer or Commission; and

(9) Any other document or item accepted into the record by the Presiding Officer or the Commission.

(e) *Retention of documents or evidence not admitted.* Any document or physical evidence offered into evidence but excluded shall not be considered part of the adjudicative record, but shall be retained until the later of the date upon which an order ending the proceeding becomes final and not appealable, or upon the conclusion of any judicial review.

(f) *Substitution of copies.* A true copy of a document may be substituted for any document in the record or any document retained pursuant to § 1025.47(e).

§ 1025.48 Official docket.

The official docket in any adjudicatory proceeding shall be maintained electronically by the Division of the Secretariat as set forth in § 1025.14 and shall be made available to the public, unless the Presiding Officer or the Commission orders otherwise.

§ 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 28 U.S.C. 1821. The fees and mileage referred to in this paragraph (a) shall be paid by the party at whose instance deponents or witnesses appear. The parties may by agreement modify this provision.

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(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," 16 CFR 1015.9.

Subpart F – Decision

§ 1025.51 Initial decision.

(a) *Procedure.* The Presiding Officer shall issue an Initial Decision and Order and enter it on the record within ninety (90) days after the closing of the record or the filing of post-hearing briefs, whichever is later. The Presiding Officer may extend this time period by up to thirty (30) days for good cause.

(b) *Content.* The Initial Decision and Order shall be based upon a consideration of the record as defined in § 1025.47(d) and shall be supported by reliable, probative, and substantial evidence. The Initial Decision shall include:

(1) a statement of findings of fact (with specific page references to principal supporting items of evidence in the record) and conclusions of law, as well as the reasons or basis therefore, as to all the material issues of fact, law, or discretion presented on the record;

(2) an appropriate order. For proceedings arising under section 15 of the CPSA or section 15 of the Federal Hazardous Substances Act (FHSA), when corrective action or similar relief is ordered, the order shall comply with 15 U.S.C. 2064 or 15 U.S.C. 1274, respectively, and 16 CFR part 1115 subpart C – Guidelines and Requirements for Mandatory Recall Notices; and

(3) a statement advising that a notice of appeal may be filed within ten (10) days after service of the Initial Decision and Order and a statement that, unless a party timely files and perfects a notice of appeal, pursuant to § 1025.53, the Commission may adopt the Initial Decision and Order as the Final Decision and Order of the Commission without further briefing or argument.

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(c) *Certification of the record.* When the Presiding Officer issues an Initial Decision and Order, he or she shall issue an order describing the record in accordance with § 1025.47(d) and certifying that the record is complete.

(d) *Transmission of the record.* When the Presiding Officer issues an Initial Decision and Order, he or she shall transmit to the Secretariat all electronic and physical exhibits and any hearing transcripts, along with an exhibit index. The exhibit index shall contain, at a minimum, the exhibit number and a title or description for each exhibit introduced and admitted into evidence, and also each exhibit introduced but not admitted into evidence.

(e) *Reopening of proceeding by Presiding Officer; termination of jurisdiction.* (1) At any time prior to, or concomitant with, the filing of the Initial Decision and Order, the Presiding Officer may reopen the proceeding to admit further evidence where the Presiding Officer has determined that the interests of justice so require.

(2) Except to correct clerical errors, or if an order under paragraph (e)(1) of this section reopens the proceeding, the jurisdiction of the Presiding Officer is terminated upon the filing of the Initial Decision and Order, unless and until such time as the Commission remands the matter to a Presiding Officer.

§ 1025.52 Adoption of initial decision.

The Initial Decision and Order shall become the Final Decision and Order of the Commission fifty (50) days after issuance unless an appeal is noticed and perfected or unless the Commission orders review in the absence of an appeal in accordance with § 1025.54. Upon the expiration of the fiftieth day, the Secretariat shall prepare, sign, and enter an order adopting the Initial Decision and Order as the Commission's Final Decision and Order, unless the Commission directs otherwise.

§ 1025.53 Appeal from initial decision.

(a) *Notices of appeal.* Any party may appeal an Initial Decision and Order to the Commission by filing a notice of appeal, served on all parties, within ten (10) days after the Presiding Officer issues the Initial Decision and Order.

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

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

(2) A concise statement of the case;

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

(4) The argument, presenting clearly the points of fact and law relied upon to support each reason why the Initial Decision and Order 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 and Order.

(c) *Response brief.* Within thirty (30) days after service of the appeal brief upon all parties, any party may file a response 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 response brief shall present clearly the points of fact and law relied upon in support of the

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reasons the party has for each position urged, with specific page references to the record and legal or other materials relied upon. Unless the Commission orders otherwise, a response brief shall be subject to the same page limit as the appeal brief.

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

(e) *Cross appeal.* If a party files a timely notice of appeal, 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 response 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.* Reply briefs shall be limited to rebuttal of matters presented in response briefs, including matters raised in cross-appeals. Reply briefs may be filed and served within fourteen (14) days after service of a response brief and, unless the Commission orders otherwise, shall not exceed fifteen (15) pages per response brief, excluding covers, indexes, table of contents, list of citations, and list of references.

(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 Commissioner absent from an oral argument may participate in the consideration of and decision on the appeal. Unless the Commission orders otherwise, each party shall be permitted 20 minutes to argue its respective position, and may reserve 5 minutes for rebuttal.

(1) A court reporter shall record and transcribe all oral arguments.

(2) The Commission will entertain only joint motions of the parties requesting corrections in the transcript of oral argument, except that the Commission will receive a unilateral motion which recites

that the parties have made a good faith effort to stipulate to the desired corrections but have been unable to do so. If the parties agree in part and disagree in part, they should file a joint motion incorporating the extent of their agreement, and, if desired, separate motions requesting those corrections to which they have been unable to agree. The Secretariat, pursuant to delegation of authority by the Commission, is authorized to prepare and issue in the name of the Commission a brief “Order Correcting Transcript” whenever a joint motion to correct transcript is received.

§ 1025.54 Review of initial decision in absence of appeal.

The Commission may, by order, review a case not otherwise appealed by a party. The Commission shall issue such an order within forty-five (45) days after issuance of the Initial Decision and Order. 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 order shall set forth the issues which the Commission will review and may provide for the filing of briefs. If the Commission schedules the filing of briefs, the order shall designate which party or parties shall file the initial brief and which party or parties may thereafter file a response brief, or the order may designate the simultaneous filing of briefs by the parties.

§ 1025.55 Final decision and order.

(a) *Consideration of record.* In issuing a Final Decision and Order, the Commission shall consider the adjudicative record as a whole or such parts of the record as are cited or as may be necessary to resolve the issues presented. In addition, the Commission shall, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had issued the Initial Decision and Order. In adjudicative proceedings before the Commission, the record shall consist of: all items specified in § 1025.47(d); any notices of appeal or order directing review; all briefs, motions, submissions, and other papers filed on appeal or review; and the transcript of any oral argument held. On notice to all

parties, however, the Commission may, at any time prior to issuance of a Final Decision and Order, raise and determine any other matters that the Commission deems material to consideration of the record, with opportunity for oral or written argument thereon by the parties.

(b) *Rendering of final decision and order.* In rendering its decision, the Commission shall adopt, modify, or set aside, the findings, conclusions, and order contained in the Initial Decision and Order, or remand the matter to the Presiding Officer with instructions for further proceedings. The Commission shall include in its Final Decision and Order findings of fact upon which the decision is predicated, and a statement of the reasons or basis for its action. The Commission shall issue a Final Decision and Order reflecting a decision of the majority of the Commission. Commissioners may also file concurring or dissenting opinions.

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

§ 1025.57 Effective date of order.

(a) *Order in an adjudicative proceeding.* An order of the Commission in an adjudicative proceeding under this part becomes effective upon service in accordance with § 1025.16, unless the Commission orders otherwise.

(b) *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 proceeding.

(a) *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 adjudicative proceeding 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, based on information provided by CPSC staff or other information, that changed conditions of fact or law or the public interest may require that a Commission decision or order, including a consent order agreement, be altered, modified, or set aside, or remanded to the Presiding Officer, in whole or in part, the Commission shall serve upon all parties to the original proceeding an order to show cause why a proceeding should not be reopened. An order to show cause shall state the reasons that may necessitate reopening, including proposed changes to a decision or order when known. Within thirty (30) days after service of an order to show cause, any party to the original proceeding may file a response to an order to show cause proposing to reopen a proceeding. Any party not responding to an order to show

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cause within the time allowed shall be considered to have consented to reopening of the proceeding and any proposed changes.

(b) *Petition for reopening by a party.* Whenever any person subject to a final order is of the opinion that changed conditions of fact or law require that a decision or order be altered, modified, or set aside, or remanded to the Presiding Officer, in whole or in part, or that the public interest so requires, that person may petition the Commission to reopen the proceeding. The petition shall state the reasons for the reopening, the changes desired, and the reasons those changes should be made. A petition for reopening 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 proceeding. Within thirty (30) days after service of the petition, any party opposing such petition shall file a response.

(c) *Unopposed or no factual issues to resolve.* Where an order to show cause or petition for reopening is not opposed, or is opposed but the Commission finds that the pleadings do not raise substantial issues of fact to be resolved, the Commission, in its discretion, may decide whether to reopen the proceeding based on the order to show cause or petition for reopening, and any other pleadings associated with the request. When the Commission deems it necessary, the Commission may serve upon the parties a notice of oral argument in the matter.

(1) *Commission disposition without a hearing.* If the Commission determines that changed conditions of fact or law or the public interest require reopening a proceeding, the Commission shall issue an appropriate decision and order, including where necessary, a new Final Decision and Order under § 1025.55. If the Commission determines that the original decision or order should not be reopened, the Commission shall issue an order affirming the original decision or order, and a decision stating the reasons for the Commission's decision not to reopen.

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(d) *Factual issues to resolve.* (1) *Hearing.* When an order to show cause or petition for reopening raises substantial factual issues, the Commission may issue an order directing the Presiding Officer to conduct such additional hearing as the Commission deems appropriate to determine whether a decision or order should be reopened. The hearing shall be conducted in accordance with Subpart E – Hearings.

(2) *Post-hearing briefs.* Upon conclusion of the hearing, the parties shall file post-hearing briefs containing proposed findings of fact and conclusions of law, as well as a proposed order.

(3) *Recommended decision and order.* Upon conclusion of the briefing, the Presiding Officer shall issue a Recommended Decision, including proposed findings of fact and conclusions of law, and the reasons therefore, as well as a proposed Commission order. If the Presiding Officer recommends that the decision or order be reopened, the proposed order shall include appropriate provisions for the alteration, modification, or setting aside of the Commission’s original decision or order. The record and the Presiding Officer’s Recommended Decision and Order shall be certified to the Commission for final disposition of the matter in accordance with § 1025.51(c), and transmitted to the Commission in accordance with § 1025.51(d).

(4) *Commission disposition after a hearing.* Upon receipt of the Presiding Officer’s Recommended Decision and Order, the Commission shall determine, based on the hearing record as a whole, whether changed conditions of fact or law or the public interest require reopening the proceeding to issue an appropriate decision or order, including where necessary, a new Final Decision and Order under § 1025.55. If the Commission determines that the original decision or order should not be reopened, the Commission shall issue an order affirming the original order, and a decision stating the reasons for the Commission’s decision not to reopen.

Subpart G – Appearances, Standards of Conduct

§ 1025.60 Disqualification of Commissioners.

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

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

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

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

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

§ 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 proceeding 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 proceeding under this part shall file a written notice of appearance, stating for whom the appearance is made and the name, e-mail address, mailing address, and telephone number (including area code) of the person making the appearance and the date of the commencement of the appearance. If the person making the appearance is an attorney, the written notice shall also include a representation that he/she is admitted to practice in, and is in good standing 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. The appearance shall be made a part of the record. This paragraph shall not apply to any person listed as Complaint Counsel on a complaint.

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

§ 1025.64 Attorneys.

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

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

(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 an adjudicative proceeding. 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 an adjudicative proceeding 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 adjudicative proceedings, the Commission or the Presiding Officer, upon motion of any party or on its own initiative, 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 any written or oral submissions or representations which are not made in good faith or which are unfair, incomplete, or inaccurate, and order the exclusion of such submissions or representations from the record.

(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. 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. However, in no event shall such suspension exceed 30 days.

§ 1025.67 Restrictions as to former Commissioners and CPSC employees.

(a) *Generally.* Except as otherwise provided in § 1025.67(b), the post-employment restrictions applicable to former Commissioners and CPSC employees, including but not limited to those referenced at 16 CFR 1030.101, 5 CFR part 2641, 18 U.S.C. 207, and applicable Executive Orders, shall govern the activities of former Commissioners and CPSC employees in adjudicative matters connected with their former duties and responsibilities.

(b) *Participation as witness.* A former Commissioner or CPSC employee may testify in any adjudicative proceeding subject to part 1025 concerning his/her participation in any Commission activity. This section does not constitute a waiver by the Commission of any objection provided by law to testimony that would disclose privileged or confidential material. The provisions of 18 U.S.C. 1905 and applicable CPSC statutes regarding prohibiting the disclosure of trade secrets and information

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obtained from a person that is privileged and confidential also apply to testimony by former Commissioners and CPSC employees.

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

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

(2) Whether the files of the adjudicative proceeding 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 adjudicative proceeding or investigation is or has been pending;

(4) Whether he/she worked directly or in close association with Commission personnel assigned to the adjudicative proceeding 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 adjudicative proceeding 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 Commissioner or CPSC employee, during service with the Commission, participated personally and substantially in the adjudicative proceeding 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 18 U.S.C. 207.

§ 1025.68 Prohibited *ex parte* communications.

(a) *Applicability*. This section applies during the period commencing with the date of issuance of a complaint and ending upon final agency action.

(b) *Definitions*—(1) *Decision-maker*, as used in this section, shall include: Those individuals who render decisions in adjudicative proceedings under this part, or who advise officials who render such decisions, including:

- (i) The Commissioners and their staffs;
- (ii) The Administrative Law Judges and their staffs; and
- (iii) Decisional staff as defined in § 1025.3.

(2) *Ex parte communication* means any material oral or written communication relevant to the merits of an adjudicative proceeding under this part that is not on the record with respect to which reasonable prior notice to all parties is not given that takes place between:

- (i) Any officer, employee, or agent of the Commission engaged in the performance of investigative or prosecuting functions for the Commission, mediator currently or previously engaged pursuant to § 1025.72, or any interested person not employed by the Commission and;
- (ii) A Decision-maker as defined in paragraph (b)(2) of this section.

(c) *Prohibited Ex Parte Communication*. Except as set forth in paragraph (d) of this section, *ex parte* communications in any form that are not purely procedural shall not be made, or knowingly caused to be made, between:

- (1) Any officer, employee, or agent of the Commission engaged in the performance of investigative or prosecuting functions for the Commission, mediator currently or previously engaged pursuant to § 1025.72, or any interested person not employed by the Commission and;
- (2) A Decision-maker as defined in paragraph (b)(1) of this section.

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(d) *Permissible ex parte communications.* The following communications are permitted under this section. (1) *Ex parte* communications authorized by statute or by this part. (See, for example, § 1025.38 which governs applications for the issuance of subpoenas.)

(2) Any staff communication concerning federal court litigation or judicial enforcement of a Commission order in any matter pending before or decided by the Commission.

(3) Discussions concerning administrative or judicial procedures that are not relevant to the merits.

(4) Communication occasioned by and concerning a nonadjudicative function of the Commission, including such functions as the initiation, conduct, or disposition of a separate investigation, the issuance of a complaint, or the initiation of a rulemaking or other proceeding, whether or not it involves a party already in an adjudicative proceeding; a proceeding outside the scope of § 1025.1, including a matter in state or federal court or before another governmental agency; or a communication with Congress.

(5) Communications by any party to the Commission concerning a proposed settlement agreement that has been transmitted to the Commission pursuant to § 1025.71.

(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 person identified in paragraph (b) of this section shall be forwarded to the Secretariat or Presiding Officer, as appropriate. A prohibited written *ex parte* communication which reaches a decision-maker shall be forwarded by the decision-maker to the Secretariat or the Presiding Officer, as appropriate. If the circumstances in which a prohibited *ex parte* written communication was made are not apparent from the communication itself, a statement describing those circumstances shall be forwarded with the communication.

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(2) *Prohibited oral ex parte communication.* (i) If a prohibited oral *ex parte* communication is made to a person identified in § 1025.68(b), he/she shall advise the person making the communication that the communication is prohibited and shall terminate the discussion; and

(ii) The recipient of the communication shall forward to the Secretariat or the Presiding Officer, as appropriate, a signed and dated statement containing such of the following information as is known to him/her.

(A) The title and docket number of the adjudicative proceeding;

(B) The name, address, any email and/or telephone number of the person making the communication and his/her relationship (if any) to the parties and/or participants to the adjudicative proceeding;

(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 prohibited *ex parte* communications and statements forwarded to the Secretariat or Presiding Officer 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 adjudicative proceeding to which the communication or statement pertains.

(4) *Service on parties.* The Secretariat or the Presiding Officer, as appropriate, shall serve a copy of each communication and statement forwarded under this section on all parties to the adjudicative proceeding.

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

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

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

§ 1025.69 Separation of functions.

Any employee, agent, or Commission officer (including an officer designated in 15 U.S.C. 2053 (g)(1)(A)), who engages in the performance of investigative or prosecuting functions for the CPSC in an adjudicative proceeding, other than a Commissioner, may not, in that or a factually related adjudicative proceeding, participate or advise in the decision, recommended decision, or agency review of the recommended decision, except as witness or counsel in a public proceeding.

Subpart H – Settlements, Mediation

§ 1025.71 Settlements.

(a) *Availability.* Any party may submit an offer of settlement to the Presiding Officer before the Presiding Officer issues an Initial Decision and Order. After issuance of an Initial Decision and Order, offers of settlement must be submitted to the Commission.

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(b) *Form.* Offers of settlement shall be filed *in camera*, shall be in the form of a proposed consent agreement and order, and shall be signed by a respondent (or their representative) joining in the offer of settlement. Complaint Counsel may also sign offers of settlement. Each offer of settlement shall be accompanied by an *in camera* motion requesting that the Presiding Officer, or Secretariat for a settlement submitted to the Commission, transmit the proposed consent agreement and order to the Commission. The motion shall outline the substantive provisions of the proposed consent agreement, and state reasons why the Commission should accept the proposed consent agreement. All offers of settlement and accompanying motions not signed by Complaint Counsel shall be served on Complaint Counsel. The Presiding Officer shall determine whether other parties that have not signed a proposed consent agreement should be served with the offer of settlement.

(c) *Consent order agreements under section 15 of the CPSA or section 15 of the FHSA.* A proposed consent agreement and order resolving a complaint arising under section 15 of the CPSA or section 15 of the FHSA shall contain all the elements of a consent agreement and order in paragraph (d) of this section and all the elements of a “Corrective Action Plan” contained in 16 CFR 1115.20(a).

(d) *Other consent agreements and orders.* All other proposed consent agreements and orders that do not arise under section 15 of the CPSA or section 15 of the FHSA, which constitute an offer of settlement, shall contain the following:

- (1) An admission of all jurisdictional facts;
- (2) An express waiver of further procedural steps and of all rights to seek judicial review or otherwise to contest the validity of a Commission order accepting the settlement as offered;
- (3) A statement that the allegations of the complaint are resolved by the consent agreement and order;
- (4) A description of the alleged hazard, noncompliance, or violation; and

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(5) As appropriate, a complete description of the actions being refrained from or undertaken by the respondent pursuant to the consent agreement and order.

(e) *Transmittal*. The Presiding Officer shall transmit all proposed consent agreements and orders that meet the requirements of this section to the Commission for its consideration unless the Presiding Officer determines that the proposed settlement is clearly frivolous or duplicative of offers previously made. The Presiding Officer may, but need not, recommend acceptance of the proposed consent agreement and order. Complaint Counsel, and other parties the Presiding Officer determines should be served with the proposed consent agreement and order, may object to transmittal to the Commission by filing an *in camera* response opposing the motion to transmit the proposed consent agreement and order within five (5) days after service of the motion to transmit. Within two (2) days of transmittal by the Presiding Officer, or within two (2) days of receipt by the Secretariat for a consent agreement submitted to the Commission, the Secretariat shall distribute to the Commission an *in camera* copy of the motion to transmit and the proposed consent agreement and order.

(f) *Stay of proceeding*. When a proposed consent agreement and order has been transmitted to the Commission, the proceeding shall be stayed until the Commission has ruled on the proposed settlement. When a proposed consent agreement and order has been transmitted to the Commission but has not been agreed to by all parties, the proceeding shall not be stayed pending Commission decision on the proposed settlement, unless the Presiding Officer or the Commission orders otherwise.

(g) *Commission ruling*. The Commission shall promptly rule on each transmitted proposed consent agreement and order.

(1) *Commission acceptance*. If the Commission accepts the proposed consent agreement and order, the Commission shall issue an appropriate order, which shall become effective upon issuance.

(2) *Commission rejection or no action on proposed settlement.* If the Commission rejects an offer of settlement, the Commission shall issue an *In Camera* Order Rejecting Proposed Consent Agreement and Order, and the Secretariat shall serve such order on the parties and the Presiding Officer. If the Commission's vote results in no action on the proposed settlement, the Secretariat shall issue an *in camera* notice to the parties and the Presiding Officer. In either case, if the proceeding has been stayed, the Presiding Officer shall promptly issue an order resuming the proceeding, with consideration to any modifications to the schedule necessitated by the stay.

(h) *Offers of settlement and negotiations.* Settlement negotiations, offers of settlement, proposed consent agreements and orders, submissions made pursuant to this section, and the disposition of submissions made pursuant to this section are subject to Federal Rule of Evidence 408.

§ 1025.72 Mediation.

(a) *Generally.* Mediation is a voluntary, non-binding, confidential process wherein the parties attempt a negotiated resolution or settlement of an adjudicative proceeding with the assistance of a third party facilitator or mediator. Parties are encouraged to utilize non-binding mediation in all adjudications.

(b) *Confidentiality.* All proceedings in a mediation session are confidential and privileged from discovery, and considered protected settlement discussions under Federal Rule of Evidence 408. Material or information provided to the mediator and subject to a protective order under § 1025.31(c) are confidential and may not be disclosed. Mediation sessions shall not be recorded by stenographic or non-stenographic means unless the parties agree otherwise in writing.

(c) *Ex parte communications.* Mediators are expressly authorized to conduct private sessions with parties. The mediator may hold separate, private caucuses with each side or each lawyer or, if the

parties agree, with the clients only. The mediator may choose to conduct any joint session or private caucus in person or by teleconference.

(d) *Mediator.* (1) A mediator may be any of the following individuals:

(i) An administrative law judge who is not the Presiding Officer;

(ii) Another individual obtained through a U.S. District Court mediation program; or

(iii) Any other individual, who is not a current employee of the CPSC, who is acceptable to the parties seeking mediation.

(2) Mediators shall have discretion to structure the mediation so as to maximize prospects for settling all or part of the case.

(3) A mediator must have no official, financial, or personal conflict of interest with respect to the issues in controversy, except that a mediator who is not a government employee may serve if the interest is fully disclosed in writing to all parties and all parties agree.

(4) The mediator has no authority to render a decision or dictate a settlement, however, if agreed to by all parties in mediation, the mediator may provide a mediator's report to the parties evaluating the merits of the case.

(5) The mediator shall not provide to any decision-maker any materials provided to the mediator or produced by the mediator.

(e) *Procedure.* (1) Mediation may be jointly noticed by Complaint Counsel and one or more of the parties at any time. The parties should confer regarding selection of a mediator, and the mediator selected shall be mutually acceptable to both parties.

(2) For matters pending before a Presiding Officer, an *in camera* joint notice of mediation must be filed with the Secretariat and served on the Presiding Officer by the parties seeking mediation. For all

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other matters, a joint notice of mediation must be filed by the parties seeking mediation with the Secretariat. A joint notice of mediation must be in writing and include:

(i) A general identification of the issues in controversy intended to be resolved by the mediation;

(ii) The name, professional address, and qualifications of the proposed mediator;

(iii) The signatures of all parties or evidence otherwise indicating the consent of all parties to mediation and use of the proposed mediator; and

(iv) A certificate of service pursuant to § 1025.16.

(3) If a settlement is reached as a result of mediation, the parties shall follow the procedures in § 1025.71.

(f) *Mediation statements.* Unless the parties in mediation and the mediator agree otherwise, no later than seven (7) days prior to the initial mediation session, each party shall submit directly to the mediator a confidential mediation statement. The mediation statement shall not exceed five (5) pages and shall outline the underlying facts of the dispute, the key legal issues in the case, possible areas of agreement and options for settlement, and the settlement history of the dispute, if any. The mediation statement shall also identify, by name and title or status the person(s) with settlement authority, who, in addition to counsel, may attend the mediation as representative(s) of the party.

(g) *Withdrawal from mediation.* Any party may withdraw from mediation at any time. A party seeking to withdraw from mediation shall make good faith efforts to discuss the decision to withdraw from mediation with the other parties and the mediator prior to withdrawing from mediation. The withdrawing party shall file a notice of withdrawal from mediation consistent with the provisions of this paragraph with the Secretariat at the time the withdrawal is made. Such notice of withdrawal shall be served upon the mediator, the Presiding Officer, and the parties participating in the mediation.

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(h) *Stay of proceedings.* For good cause shown, the Presiding Officer or the Commission may issue a stay of the proceeding not to exceed 60 days while the parties pursue mediation. Stays shall be promptly terminated by the Presiding Officer or the Commission in the event that the mediation ends or a party withdraws before the planned expiration of a stay.

(i) *Fees.* Fees associated with mediation are according to the mediator's fee schedule. Parties participating in the mediation shall share the cost of mediation equally unless the parties agree otherwise.

**Subpart I – Implementation of the Equal Access to Justice Act in
Adjudicative Proceedings with the Commission**

§ 1025.81 General provisions.

(a) *Scope of these rules.* The Equal Access to Justice Act, 5 U.S.C. 504 (EAJA), provides for the award of attorney fees and other expenses to eligible individuals and entities who are parties to certain adjudicative proceedings before the Commission. An eligible party may receive an award when it prevails over the Commission, unless the Commission's position was substantially justified or special circumstances make an award unjust.

(b) *Definitions.* For purposes of these rules: (1) *Adjudicative officer* means the Presiding Officer as defined in § 1025.3(s) who presides over the adjudicative proceeding or an EAJA proceeding.

(2) *Adversary Adjudication* means all adjudicative proceedings as defined in § 1025.3(a) of this part, 5 U.S.C. 504, and 5 U.S.C. 554.

(3) *Final disposition* means the date on which a complete resolution of the proceeding, such as a settlement or voluntary dismissal, becomes final and unappealable, both within the Commission and to the courts.

(4) *Party* means a party as defined in 5 U.S.C. 504(b)(1)(B).

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(5) *Position of the agency* means, in addition to the position taken by the Commission in the adversary adjudication, the action or failure to act by the Commission upon which the adversary adjudication is based, except that fees and other expenses may not be awarded to a party for any portion of the adversary adjudication in which the party has unreasonably protracted the proceedings.

§ 1025.82 Information required from applicant.

(a) *Application requirements.* (1) A party seeking an award under EAJA shall file an application with the Commission within thirty (30) days after the Commission's final disposition of the adversary adjudication.

(2) The application shall identify the applicant and the proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of the Commission that the applicant alleges was not substantially justified. Unless the applicant is an individual, the application shall also state the number of employees of the applicant and describe briefly the type and purpose of its organization or business.

(3) The application shall also show that the applicant meets the definition of "party" in § 1025.81(b)(4) including adequate documentation of its net worth, as set forth in paragraph (b) of this section.

(4) The application shall state the amount of fees and expenses for which an award is sought, subject to the requirements and limitations as set forth in 5 U.S.C. 504(b)(1)(A), with adequate documentation as set forth in paragraph (c) of this section.

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

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(b) *Net worth exhibit; confidential treatment.* (1) Each applicant, except a qualified tax-exempt organization or cooperative association, shall provide with its application, a detailed exhibit showing the net worth of the applicant is as represented in the statement required by paragraph (a)(3) of this section when the proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards provided in § 1025.81. The Adjudicative Officer may require an applicant to file additional information to determine its eligibility for an award.

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

(3) Section 6(a)(2) of the Consumer Product Safety Act, 15 U.S.C. 2055(a)(2), provides that certain information which contains or relates to a trade secret or other matter referred to in section 1905 of title 18, United States Code, or subject to 5 U.S.C. 552(b)(4) shall not be disclosed. This prohibition is an Exemption 3 statute under the Freedom of Information Act, 5 U.S.C. 552(b)(3). Material submitted as part of an application for which *in camera* treatment is granted shall be available to other parties only in accordance with 16 CFR 1025.45(c) of the Commission Rules and, if applicable, section 6(a)(2) of the CPSA. If the Adjudicative Officer determines that the information should not be withheld from disclosure because it does not fall within section 6(a)(2) of the CPSA, the Adjudicative Officer shall

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place the information in the public record but only after notifying the submitter of the information in writing of the intention to disclose such document at a date not less than 10 days after the date of receipt of notification. Otherwise, any request to inspect or copy the exhibit shall be disposed of in accordance with the Commission's established procedures under the Freedom of Information Act (*see* 16 CFR part 1015).

(c) *Documentation of fees and expenses.* The application shall be accompanied by adequate documentation of the fees and other expenses incurred after initiation of the adversary adjudication, including, but not limited to, the reasonable cost of any study, analysis, engineering report, test, project or similar matter, for which an award is sought. A separate itemized statement shall be submitted for each professional firm or individual whose services are covered by the application, showing the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The Adjudicative Officer may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

§ 1025.83 Procedures for considering applications.

(a) *Filing and service of documents.* Any application for an award or other pleading or document related to an application shall be filed and served on all parties to the proceeding in the same manner as provided in §§ 1025.14-1025.16, except, as provided in § 1025.82(b)(2), for confidential financial information.

(b) *Answer to application.* (1) Within thirty (30) days after service of an application for an award of fees and expenses, Complaint Counsel in the underlying adversary adjudication upon which the application is based, may file an answer to the application. Unless Complaint Counsel requests an

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extension of time for filing or files a statement of intent to negotiate under paragraph (b)(2) of this section, failure to file an answer within the 30-day period may be treated as a consent to the award requested.

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

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

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

(d) *Settlement*. The applicant and Complaint Counsel may agree on a proposed settlement of the award before final action on the application, either in connection with a settlement of the underlying adversary adjudication, or after the adversary adjudication has been concluded, in accordance with the Commission's standard settlement procedure (*See* 16 CFR 1115.20(b), 1118.20, 1025.71, and 1605.13). If a prevailing party and Complaint Counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement. If a proposed

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settlement of an underlying proceeding provides that each side shall bear its own expenses and the settlement is accepted, no application may be filed.

(e) *Further proceedings.* (1) Ordinarily, the determination of an award will be made on the basis of the written record. However, on request of either the applicant or Complaint Counsel, or on his or her own initiative, the Adjudicative Officer presiding over an EAJA proceeding may, if necessary for a full and fair decision on the application, order the filing of additional written submissions; hold oral argument; or allow for discovery or hold an evidentiary hearing, but only as to issues other than whether the Commission's position was substantially justified (such as those involving the applicant's eligibility or substantiation of fees and expenses). Any written submissions shall be made, oral argument held, discovery conducted, and evidentiary hearing held as promptly as possible so as not to delay a decision on the application for fees. Whether or not the position of the Commission was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expense are sought.

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

(f) *Initial decision and order.* The Adjudicative Officer shall issue an initial decision and order on the application within thirty (30) days after the time for filing a reply, or when further proceedings are held, within thirty (30) days after completion of such proceedings. The decision on the application shall include written findings and conclusions on the applicant's eligibility and status as a prevailing party, and an explanation of the reasons for any difference between the amount requested and the amount awarded. The decision shall also include, if applicable, findings on whether the Commission's

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position was substantially justified, whether the applicant unduly protracted the proceedings, or whether special circumstances make an award unjust.

(g) *Awards*. The Adjudicative Officer presiding over an EAJA proceeding may reduce the amount to be awarded, or deny any award, to the extent that the party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(h) *Commission review*. Either the applicant or Complaint Counsel may seek review of the initial decision and order on the fee application, or the Commission may decide to review the decision on its own initiative. A decision on the application should still be issued in accordance with §§ 1025.52, 1025.54, 1025.55 and 1025.56.

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

(j) *Stay of decision concerning award*. Any proceedings on an application for fees under this subpart shall be automatically stayed until the Commission's final disposition of the decision on which the application is based and either the time period for seeking judicial review expires, or if review has been sought, until final disposition is made by a court and no further judicial review is available.

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(k) *Payment of award.* An applicant seeking payment of an award shall submit to the Secretariat a copy of the Commission's Final Decision and Order granting the award, accompanied by a certification that the applicant will not seek review of the decision in the United States courts. (Office of the Secretariat, Consumer Product Safety Commission, Room 704-D, 4330 East West Highway, Bethesda, MD 20814.) CPSC will pay the amount awarded to the applicant within sixty (60) days of such submission.

Dated: _____

Alberta E. Mills
Secretariat,
Consumer Product Safety Commission