



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:** Notice of proposed rulemaking.

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 Finally, we propose to remove outdated references to the Equal Access to Justice Act.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

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

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

**ADDRESSES:** You may submit comments, identified by Docket No. CPSC 2016-0006, electronically or in writing, by any of the following methods:

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

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

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

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

**FOR FURTHER INFORMATION CONTACT:** Mary B. Murphy, Assistant General Counsel, U.S. Consumer Product Safety Commission, 4330 E. West Highway, Bethesda, MD 20814-4408; email: mmurphy@cpsc.gov telephone: (301) 504-7809.

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

## **Table of Contents**

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

## **I. Background and Statutory Authority**

### *a. Commission Adjudicative Proceedings*

The Consumer Product Safety Act (15 U.S.C. 2064(c), (d), (f); 2076(b)) (“CPSA”), the Federal Hazardous Substances Act (*id.* 1274) (“FHSA”), the Flammable Fabrics Act (*id.* 1192, 1194, 1197(b)) (“FFA”), the Poison Prevention Packaging Act (*id.* 1473(c)) (“PPPA”), and the Virginia Graeme Baker Pool and Spa Act, (*id.* 8003) (“VGBA”) authorize the Commission to

initiate and conduct adjudicative proceedings related to the safety of certain consumer products, and, based on the Commission's findings, issue orders or take other action to protect the public. Under the requirements of the cited statutes, such adjudicative proceedings must be determined on an administrative record after opportunity for a public hearing.

*b. Procedural Rules Requirement*

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

*c. History of the Rules of Practice*

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

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

## **II. Reasons for Proposed Revision of the Rules**

### *a. Alignment with the Federal Rules of Civil Procedure*

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

Prominent among these changes were detailed rules requiring parties to cooperate in pre-discovery and pre-trial planning. For example, the Federal Rules now require an affirmative pre-discovery disclosure by each party of information, documents, ESI, and other evidence that the party may use to support its claims or defenses. The Federal Rules also require participation by parties in pre-discovery and pretrial conferences, with the aim of focusing the issues to be adjudicated. Along with these changes have come new limits on formal discovery tools, including interrogatories, document requests, and depositions. In addition to proposing that our Rules of Practice follow the scope of discovery stated in Rule 26 of the Federal Rules, we are proposing to follow, with certain changes, the Federal 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. We believe that changing our Rules of Practice to require affirmative pre-discovery disclosure, mandate participation in pre-discovery and prehearing conferences, and

impose limits on wasteful discovery practices will streamline the adjudicative process, and thereby, advance our goal of establishing expeditious and fair proceedings.

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

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

*b. Increasing the Efficiency of Adjudicative Proceedings*

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

Additional proposed changes would adapt the Rules of Practice to the general needs of administrative litigation, based on the experiences of Commission staff in adjudicative

proceedings. In each case, we propose to emphasize the discretion of the Presiding Officer to facilitate quick, fair, and efficient discovery and trial of adjudicative matters. Although we would vest significant discretion in the Presiding Officer, we would, nevertheless, seek to impose timelines on the adjudicative proceeding and deadlines on the Presiding Officer, requiring initial decisions to be made within set time frames.

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

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

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

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

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

*Proposed Changes to Rule § 1025.1 (Scope of Rules)*

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

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

We also propose new language in § 1025.1 to establish the Commission's health and safety mission as a critical concern the Presiding Officer must take into account when establishing deadlines and managing cases. When a matter fails to proceed in a timely manner, it not only results in increased costs and uncertainty for the parties and participants, it can also undermine the agency's statutory obligation to protect the public against unreasonable risks of injury and death associated with consumer products. The Commission expects that the Presiding Officer shall, whenever possible, and in in the interest of protecting public health and safety, expedite 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.

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

*Proposed Changes to § 1025.3 (Definitions)*

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

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

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

#### *Proposed Changes to § 1025.11 (Commencement of Proceedings)*

Section 1025.11 sets out requirements for the filing of a complaint in an adjudicative proceeding. In § 1025.11(a), we propose revisions to reflect organizational changes within the Commission since adoption of the current Rules of Practice. Complaint Counsel would be authorized to sign a complaint following Commission approval, rather than the Assistant Executive Director for Compliance and Enforcement, as the current rule requires.

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

We propose 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. 2064(g) shall not serve as the basis to stay proceedings under these rules. In light of the extensive time frame for resolving matters in adjudicative proceedings, it is the Commission’s strong expectation that if the respondent fails to agree to stop sale and distribution of a product which the Commission has

reason to believe presents a substantial product hazard, Commission staff will, within a reasonable amount of time following the commencement of proceedings under this part 1025, apply to a district court of the United States for the issuance of a preliminary injunction (pursuant to 15 U.S.C. 2064(g)) to restrain the distribution in commerce of such product pending the completion the adjudicative proceedings. For this reason, and in furtherance of its mission to protect public health and safety, the Commission strongly urges the Presiding Officer to, whenever practicable, shorten the time limitations imposed by these rules and endeavor to issue an Initial Decision as soon as possible.

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

*Proposed Changes to § 1025.13 (Amendments and Supplemental Pleadings)*

Section 1025.13, titled, *Amendments and supplemental pleadings*, currently states that the Presiding Officer may allow appropriate amendments and supplemental pleadings which do not unduly broaden the issues in the proceedings or cause undue delay. When this section was initially proposed in 1977, commenters expressed concern that granting such broad discretion risked “usurping the Commission’s function” to serve as the sole source of administrative litigation seeking to compel recall of consumer products. 45 FR 29 206-207 (May 1, 1980). At the time, stating that the Rules “provide adequate procedures for the parties to argue their respective positions and an adequate framework for the exercise of the broad discretion vested in the Presiding Officer,” the Commission concluded that, under §1025.13, “neither the Presiding Officer nor the Commission staff is usurping the Commission function.” 45 FR 29208. We now believe it may be helpful to provide additional clarity.

The Commission proposes to amend § 1025.13 to require that the Presiding Officer refer to the Commission any amendment that would (1) have the effect of adding to or removing from the litigation any party or count, (2) fall outside the scope of an authorized complaint, or (3) broaden staff's authority under a complaint.

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

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

To emphasize our preference for electronic filing, we propose to omit existing language stating that documents “may be filed in person or by mail.” We also propose changes, consistent with our proposal on electronic filing, establishing the filing date for documents. Electronically filed documents would be deemed filed on the date of the electronic filing; however, recognizing

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

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

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

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

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

*Proposed Changes to § 1025.15 (Time)*

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

We further propose to amend § 1025.15(b) to state that whenever a party is required or permitted to do an act within a prescribed period after service of a document and the Presiding

Officer permits service by mail, three (3) days shall be added to the prescribed period. This amendment recognizes that while electronic service is preferred, service by mail may be allowed by order of the Presiding Officer; if such service is made by mail, three additional days would be added to the date by which the recipient must perform a subsequent action.

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

We also propose to add a new paragraph (d), which would be titled *Stay of proceedings*, to clarify that if a stay of proceedings is granted by order of the Presiding Officer or Commission, the time limits specified in these rules shall be automatically tolled during the period while the stay is in effect.

#### *Proposed Changes to § 1025.16 (Service)*

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

We also propose in § 1025.16(b)(3) to add “a limited liability company” to the list of corporate entities that may be served, and would add “entity” in the title of the paragraph, for clarity. We propose this change to capture the types of legal entities that exist and may be the subject of an administrative complaint. Finally, we propose to add language in new § 1025.16(b)(4) that, recognizing the preference for electronic service of documents, clarifies the circumstances in which delivery of a document to an address is appropriate.

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

*Proposed Changes to § 1025.17 (Intervention)*

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

*Proposed Changes to § 1025.18 (Class Actions)*

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

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

We propose to revise the title of § 1025.19, currently *Joinder of proceedings*, to *Consolidation of proceedings* because the rule, modeled on Rule 19 of the Federal Rules, actually describes consolidation, rather than joinder, a different legal concept. In addition, we propose new § 1025.19(a) to state that the Presiding Officer or the Commission may order the actions involving a common question of law or fact be consolidated for any purpose if the Presiding Officer finds that consolidation will “avoid unnecessary cost or delay.” This would change the current rule, which permits the Presiding Officer or the Commission to consolidate actions only “for the purpose of hearing or Commission review.” This proposed language expands the authority of the Presiding Officer to consolidate actions or portions of actions, as appropriate, a change that is consistent with our goal of assigning broad discretion to the Presiding Officer in the conduct of a proceeding. In practice, the current rule may lead to uncertainty about whether cases may be consolidated for limited purposes, such as discovery, where there are multiple respondents. Under the proposed rule, we make clear that the Presiding Officer may order partial consolidations on issues including, but not limited to, discovery, pretrial procedure, and/or hearing.

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

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

*Proposed Changes to § 1025.21 (Prehearing Conferences)*

We propose changes to § 1025.21, *Prehearing conferences*, to reflect updated procedures in the Federal Rules. Specifically, the proposed changes would require a preliminary meeting of the parties before discovery commences, followed by an initial prehearing conference with the

Presiding Officer. We believe these preliminary steps would streamline the process, focus the issues, and advance our goal of achieving a fair and expeditious proceeding.

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

Under proposed § 1025.21(b), which would be titled, *Initial prehearing conference*, we propose to modify the issues to be discussed at the prehearing conference to provide a more concise list of issues to be addressed. We believe a tailored agenda for the prehearing conference would maximize efficiency and concentrate focus on major issues. At the initial prehearing conference, the parties, with the guidance of the Presiding Officer, would address a range of issues, including their factual and legal theories, the current status of pending motions or petitions, the date for the evidentiary hearing, steps taken to preserve evidence, and the scope of anticipated discovery and a discovery plan. This list would be for illustrative purposes only and

would not be intended to restrict the topics that could be discussed at the prehearing conference under the proposed revision to this section.

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

Under proposed § 1025.21(d), the Presiding Officer would be required to enter an order setting forth the results of the initial prehearing conference, establishing a timeline for discovery, motions, and any other appropriate matters. We make this proposal to address the inadequacy of the current requirement that the Presiding Officer issue a prehearing order only after the conclusion of the final prehearing conference, a point late in the process that does not provide sufficient time for potential resolution of issues. We believe that the parties and the Presiding Officer would benefit from establishing a schedule earlier in the proceedings, and we also trust that such a schedule would clarify issues and expedite the proceedings. In addition, in § 1025.21 we propose to re-designate existing paragraph (d), *Reporting*, as paragraph (h), and make it consistent with our proposal in § 1025.41(a) to exclude Commissioners and their staffs from attending or viewing public hearings prior to the Presiding Officer's initial decision. In paragraph (e), which we propose to re-designate paragraph (g), we would revise the title to be *Final prehearing order*, for clarity. We also propose to remove references to the format set forth in appendix I, because, as discussed below, we are proposing to delete the appendix.

Under proposed § 1025.21(f), we would require a final prehearing conference as close to the evidentiary hearing as practicable. Under the current rules, it is not clear that such a conference should occur; our proposed change would make clear that such a conference would

be mandatory. We believe that such a conference would benefit the parties and the Presiding Officer by focusing the issues before the hearing and resolving final evidentiary matters.

*Proposed Changes to § 1025.22 (Prehearing Briefs)*

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

*Proposed Changes to § 1025.23 (Motions)*

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

experience, replies are granted routinely, and this change merely recognizes that practice, eliminating the unnecessary step of seeking leave. This paragraph also would permit the Presiding Officer (or the Commission, as the case may be), to authorize the filing of additional briefs, on good cause shown, a change that reflects our belief that the broad authority to administer a proceeding should be vested with the Presiding Officer. We further propose that additional briefs, if permitted, must be filed within 5 days after service of the pleading to which the brief replies.

*Proposed Changes to § 1025.24 (Interlocutory Appeals)*

Section 1025.24 currently lists four exceptions to the general rule against interlocutory appeals. Proposed § 1025.24 would add a fifth exception, permitting interlocutory appeal where the Presiding Officer grants or denies a motion to amend a complaint under § 1025.13. The proposed revisions to § 1025.13 are intended to reiterate that only the Commission is empowered to issue administrative complaints and that any amendments cannot have that effect without Commission approval. This revision to § 1025.13 is intended to ensure that, if a party believes the Presiding Officer has improperly ruled on such an amendment without Commission approval, that party will have the opportunity to appeal that ruling immediately, without being compelled to litigate a matter in order to obtain a Commission decision on whether or not that party should be in the litigation at all.

We propose to revise § 1025.24(b)(1)(ii) to clarify that nature of the proceeding from which an interlocutory appeal may be filed. We propose to revise § 1025.24(b)(2) to state that the Commission may decide a petition for an interlocutory appeal based on the existing record, or the Commission may request additional briefing and oral presentation. As written, the rule

currently imposes an obligation on the Commission to decide the petition or request further briefing. Our proposed change makes clear that such a binary decision is not required and that the Commission has the option of deciding the petition based on the record, or the Commission may request further briefing or oral presentation.

*Proposed Changes to § 1025.25 (Summary Decisions and Orders)*

We are proposing changes to § 1025.25(a) to align our rule more closely with Rule 56 of the Federal Rules. Under our current Rules of Practice, the movant does not have to file a statement of material facts not in dispute, nor does the respondent have to file a statement of material facts that respondent contends are in dispute. The proposed change would require that motions and oppositions to motions be accompanied by separate statements of material facts about which the movant asserts there is no dispute and about which the opposing party contends there is a genuine dispute. We believe this change will enhance efficiency because filing statements of material fact would help pinpoint the primary issues in dispute. We also propose to revise § 1025.25(a) to conform to changes we propose to § 1025.21, discussed above, to state that a summary decision motion be filed in accordance with any prehearing order issued by the Presiding Officer. The time for filing the motion would also be defined, providing that such motions to be filed up to thirty (30) days following the close of discovery. We are proposing this change because we believe this time period would afford the Presiding Officer sufficient time to carefully consider such motions, and would encourage resolution of part or all the matter well in advance of the scheduled hearing date.

We also propose to revise § 1025.25(b) to require that a response to a summary decision motion be accompanied by a statement of material facts that the opposing party contends are in

dispute, a change that will enhance focus on the main issues in dispute. We also propose to modify § 1025.25(c) to add specific items in the record that should be considered by the Presiding Officer in resolving the motion, a change that mirrors Rule 56 of the Federal Rules.

*Proposed Changes to § 1025.26 (Settlements)*

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

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

Under current § 1025.26(d), the Presiding Officer may transmit to the Commission offers of settlement that meet the requirements of form and content set forth in § 1025.26(c). We propose to revise this paragraph to require the Presiding Officer to transmit all non-frivolous,

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

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

### **Subpart D—Discovery, Compulsory Process**

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

The Commission proposes to revise § 1025.31(a) to require parties to conduct discovery in accordance with Rule 26 of the Federal Rules, with several exceptions, discussed below. Rule 26 imposes a number of requirements, such as requiring initial disclosures, prehearing conferences, scope of discovery, and limitations on the timing, frequency and extent of discovery. Rule 26 also sets forth provisions governing discovery of material prepared in anticipation of trial, expert discovery, and requests for protective orders. Under the current rule, methods, sequence and scope of discovery are addressed in a general fashion. We believe that adopting the detailed procedures set forth in Rule 26 will achieve earlier and more meaningful coordination between the parties and will advance the efficient progress of an adjudicative proceeding.

Although we intend largely to follow Rule 26, we propose to depart from Rule 26 procedures in a number of ways. Specifically, regarding the time periods for discovery, we will not follow Rule 26 guidance and will instead allow schedules to be set at the discretion of the Presiding Officer, unless a specific time frame is set forth in our rules. We expect the Presiding

Officer to set appropriate timelines as the facts may dictate or the comparative complexity of a matter requires. We also expect that, whenever possible, the Presiding Officer will shorten schedules, particularly where expedited hearings would serve the public interest, or where issues do not require expert discovery or lengthy evidentiary hearings.

In addition, in proposed § 1025.31(a), we would require that initial disclosure of information be produced no later than 5 days after the preliminary meeting of the parties. This proposed rule shortens the 14-day time frame for such disclosures that is afforded under the Federal Rule, a step that furthers coordination among the parties and encourages expeditious resolution of issues. We also propose that our proceedings not adhere to Rule 26 requirements that experts must produce a written report (Rule 26(a)(2)(B)) because such reports may not be practicable in adjudicative matters that proceed on an expedited schedule. We also adopt the provisions governing protective orders in Rule 26(c), but we have modified the Rule to recognize that in adjudicative proceedings under part 1025, such motions shall be made to and decided by the Presiding Officer. In addition, we propose that our proceedings not adhere to Rule 26(f) regarding conference timing, content, and discovery plan because such matters are governed by the proposed revisions to § 1025.21, which allow the Presiding Officer to impose deadlines and shorten time frames, as necessary.

Additionally, we propose changes in newly designated § 1025.31(b), *Completion of discovery*, to state that the 150-day standard discovery period controls fact discovery but does not control expert discovery, which may extend beyond the 150-day limit. Moreover, our proposed revisions would vest the Presiding Officer with the discretion to establish a time frame for completion of expert discovery. We propose these changes because in our experience expert discovery is more efficient after fact discovery is completed. For less complex matters, the

Presiding Officer is vested with the discretion to shorten deadlines and time frames under § 1025.21 of this Rule. Because we are following Rule 26 in large part, we are proposing to omit current paragraphs (a) through (i). We also note that, in following Rule 26, parties are not required to file discovery with the Secretariat and the Presiding Officer. Instead, parties would serve discovery responses on each other, thus relieving the Secretariat and the Presiding Officer of the burden of maintaining a voluminous amount of information.

*Proposed Changes to § 1025.32 (Written Interrogatories to Parties)*

We propose to revise this section to follow Rule 33 of the Federal Rules (*Interrogatories to Parties*), including the number, scope, and timing of interrogatories, the requirements of answers and objections, and the option to produce business records, so that we can maximize efficiency and reduce undue delay. Under the proposed change, for example, interrogatories would be limited to 25. The current rules do not impose any limits, thereby inviting overly burdensome requests and potential abuse that could impede the progress of a matter. Adopting Rule 33 of the Federal Rules would allow the Presiding Officer to alter the limits on the frequency and extent of discovery pursuant to Rule 26(b).

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

*Proposed Changes to § 1025.33 (Production of Documents)*

The Commission proposes to revise the title to *Production of documents, electronically stored information, and tangible things; access for inspection and other purposes*, to reflect the expanded types of information covered by this section. In addition, we propose to revise this section to follow, with one exception, Rule 34 of the Federal Rules (*Producing Documents*,

*Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes*). This provision governs the number, scope, and timing of information requests, the requirements of responses and objections, and Rule 34's treatment of production of ESI. We believe this proposed change would maximize efficiency because the proposed procedure would align our discovery practice with discovery under the Federal Rules and case law interpreting the Federal Rules, and would provide specific direction on the discovery of ESI, which is not specifically addressed in our current rules. However, we propose to depart from Rule 34 regarding requests for subpoenas, and propose instead that requests for subpoenas be governed by § 1025.38 of our Rules of Practice, as discussed below. Because we propose to follow the Federal Rules for the production of documents, we also propose to omit § 1025.33(a) through (d).

*Proposed Changes to § 1025.34 (Requests for Admission)*

We propose to revise this section to follow, with one exception, Rule 36 of the Federal Rules (*Requests for Admission*). We would not follow Rule 36 regarding the award of expenses under Rule 37(a)(5) because expenses are not authorized under our Rules of Practice; rather, parties may follow the procedures set forth in § 1025.70 of the Rules of Practice. Because we propose to follow the Federal Rules, we also propose to omit § 1025.34(a) through (c).

*Proposed Changes to § 1025.35 (Depositions)*

For efficiency reasons and ease of practice, we propose largely to follow the Federal Rules on depositions, which are familiar to most practitioners. Specifically, the Commission proposes to revise this section to follow Rule 30 (*Depositions by Oral Examination*), Rule 31 (*Depositions by Written Questions*), and Rule 32 (*Using Depositions in Court Proceedings*) of

the Federal Rules, with certain exceptions discussed below. We propose that requests for subpoenas continue to be governed by § 1025.38 of our Rules of Practice. We also propose that provisions in the Federal Rules governing award of attorney's fees and expenses shall not apply. Because we propose to follow the Federal Rules, we also propose to omit § 1025.35(a) through (h).

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

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

of this rule address more comprehensively than § 1025.35, the appropriate uses of depositions, the objections to such use, and the form of presentation.

*Proposed Changes to § 1025.36 (Motions to Compel Discovery)*

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

*Proposed Changes to § 1025.38 (Subpoenas)*

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

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

Additionally, in § 1025.38(e), we propose to allow subpoena service to nonparties, as set forth in § 1025.16(b)(2) through (5), which allows for service by a variety of means, but does not permit electronic service. Because nonparties may not have verified electronic addresses, and certification of receipt is not required, service of a subpoena by the other specified methods is

more reliable. For parties, we propose allowing for service in any of the methods set forth in § 1025.16(b)(1) through (5). We believe these proposed changes would increase the efficiency of subpoena service because the revisions allow for multiple methods of service, and, in particular, permit electronic service among parties, where the parties have agreed to such methods of service or the Presiding Officer has permitted these methods of service. Additionally, § 1025.38(f) would permit, in addition to mail carrier service, return of service of subpoenas by commercial carrier, a change that reflects common practice today. We also propose to eliminate the requirement that a copy of the subpoena be returned to the Secretary. In addition to other minor and non-substantive changes in § 1025.38(g), we propose 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 Decision Making Procedures.

*Proposed Changes to § 1025.39 (Orders requiring witnesses to testify or provide other information and granting immunity).*

We propose deleting this section and other distinctions relating to the Flammable Fabrics Act (“FFA”) throughout these rules because they are no longer necessary in light of the Commission’s enhanced authority set forth in section 214 of the Consumer Product Safety Improvement Act of 2008, 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.

### **Subpart E— Hearings**

*Proposed Changes to § 1025.41 (Hearings; General rules)*

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

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

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

In § 1025.42(e), we propose 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, we propose other minor, non-substantive changes.

*Proposed Changes to § 1025.43 (Evidence)*

The Commission proposes 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. More specifically, the proposal states that evidence constituting hearsay may be admitted if it is relevant, material, and bears satisfactory indicia or reliability so that its use is fair. In addition, we are proposing a minor, non-substantive change in § 1025.43(d)(1)(i) for uniformity. We also propose to remove an unnecessary “reserved” paragraph in § 1025.43(e) and re-designate paragraph (f) as paragraph (e).

*Proposed Changes to § 1025.44 (Expert Witnesses)*

The Commission proposes to revise § 1025.44(a) to align our rule on experts more closely with the standard set forth in Rule 702 of the Federal Rules of Evidence (*Testimony by Expert Witnesses*). We make this change to maximize efficiency by working within an evidentiary framework with which most practitioners are familiar and allowing the parties and Presiding Officer to be guided by case law interpreting the Federal Rules.

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

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

*Proposed Changes to § 1025.45 (In Camera Materials)*

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

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

The Commission proposes to revise this section to make the filing of post-hearing briefs mandatory. Under the current rule, parties may file post hearing briefs, but are not required to do so. Because we believe the public and the Presiding Officer would benefit from a concise but comprehensive summary of the matter at issue, we propose that this filing be mandatory. In addition, we propose to limit post-hearing briefs to thirty (30) pages. Currently, the rule does not impose a page limit, and we believe parties should be encouraged to file concise pleadings. We also propose to limit replies to the discretion of the Presiding Officer so that the pace of the adjudication at this juncture is not slowed unnecessarily by the filing of excessive briefing materials. We propose other non-substantive changes for clarity.

*Proposed Changes to § 1025.47 (Record)*

The Commission proposes to revise § 1025.47(a) of this section to delete the requirement for an “official court reporter of the Commission” because the Commission has no official court reporter. The revised language would require that a hearing shall be “recorded and transcribed by a court reporter under the supervision of the Presiding Officer.” We are proposing other non-

substantive changes for clarity, including a revision to the appendix citation in the Federal Advisory Committee Act.

*Proposed Changes to § 1025.48 (Official Docket)*

The Commission proposes to revise this section to require that the official docket be maintained electronically, in keeping with changes we are proposing throughout our Rules of Practice to update our procedures to reflect advances in technology. We also propose to delete the statement that the docket would be available for inspection by the public during normal business hours as unnecessary because the docket would be available electronically. We propose other non-substantive changes for clarity.

*Proposed Changes to § 1025.49 (Fees)*

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

**Subpart F--Decision**

*Proposed Changes to § 1025.51 (Initial Decision)*

Under current § 1025.51(a), the Presiding Officer shall endeavor to file an Initial Decision within sixty (60) days after the record closes in a case, or after the filing of post-hearing briefs, whichever is later. The Commission proposes to revise § 1025.51(a) to require the Presiding Officer to file the Initial Decision within a fixed deadline of 60 days. This change is consistent with the Commission's goal of avoiding unnecessary delay and ensuring that a matter progresses in a timely manner to serve the interests of justice.

The current rules impose numerous interim deadlines, but do not explicitly provide for a total time limit from complaint to Initial Decision. Staff advises that most cases will take more than 1 year for the Presiding Officer to render an Initial Decision. The Commission believes that the Presiding Officer has considerable discretion in managing cases to ensure the timely and efficient resolution of proceedings, and the Commission expects that the Presiding Officer shall endeavor to make those proceedings as swift as practicable in the interest of due process and the protection of consumer health and safety.

The administrative procedures at sister agencies such as the Securities and Exchange Commission (“SEC”), the Consumer Financial Protection Bureau (“CFPB”), and the Federal Trade Commission (“FTC”) employ other practices on ways to make adjudicatory proceedings more efficient, including a fixed time limit from issuance of complaint to evidentiary hearing as required by FTC Rule 16 CFR 3.11 (Commencement of Proceedings), a fixed time limit from complaint to initial decision as required by SEC Rule, 17 CFR 201.360(a)(2) (Initial Decision of Hearing Officer) and CFPB Rule, 12 CFR 1081.400(a) (Recommended Decision of the Hearing Officer), and changes to the rules that limit the scope of discovery available to parties in administrative proceedings as has been adopted by the SEC and CFPB. The Commission seeks comment on whether CPSC should adopt similar practices.

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

We are proposing to revise § 1025.51(d) to limit the authority of the Presiding Officer to reopen the proceedings to only those circumstances “where the interests of justice so require.”

We propose this change to emphasize the need for finality and to ensure timely disposition of a matter.

*Proposed Changes to § 1025.52 (Adoption of Initial Decision)*

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

*Proposed Changes to § 1025.53 (Appeal from Initial Decision)*

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

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

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

The Commission proposes to revise § 1025.55 to remove the word “endeavor.” By doing so, the Commission commits to issue its final decision on appeal or review within 90 days after the filing of all briefs or after receipt of transcript of the oral argument, whichever is later. We are also proposing a minor, non-substantive change in § 1025.55(a) for clarity.

*Proposed Changes to § 1025.56 (Reconsideration)*

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

*Proposed Changes to § 1025.57 (Effective Date of Order)*

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

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

*Proposed Changes to § 1025.58 (Reopening of Proceedings)*

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

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

**Subpart G--Appearances, Standards of Conduct**

*Proposed Changes to § 1025.63 (Written Appearances)*

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

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

*Proposed Changes to § 1025.65 (Persons Not Attorneys)*

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

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

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

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

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

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

We propose to 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. Specifically, 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 current rule, an *ex parte* communication is defined as a communication concerning a matter in adjudication made to a decision-maker by any person subject to the Rules of Practice. Our proposed change, which is consistent with the APA, would broaden the *ex parte* prohibition to include any “interested person not employed by the Commission.” Additionally, new proposed § 1025.68(b)(2) would prohibit any decision maker from making an *ex parte* communication to

any interested party not employed by the Commission. To conform new § 1025.68(c)(2)(i) and (ii) with our proposed new § 1025.68(b), we would omit language in those paragraphs limiting the prohibition to persons subject to these Rules of Practice and add language tracking new § 1025.68(b).

The Commission also proposes 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. We are proposing this change because we believe this would allow parties to communicate information to the Commission that might not otherwise be available to the Commission.

We also propose changes in § 1025.68(e) 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. We make other, non-substantive changes to § 1025.68(e), as well.

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

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

*Proposed § 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 a proceeding, we propose to add a new § 1025.69 titled, *Separation of functions*, setting forth the separation of functions provisions of the APA, 5 U.S.C. 554(d).

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

*Proposed Changes to § 1025.70 (General Provisions)*

The Commission proposes to revise this section to remove outdated and confusing references to the Equal Access to Justice Act (“EAJA”). As written, the rule substantially restates EAJA requirements existing when the rule was adopted initially. Many elements of those requirements are no longer current. To avoid updating these rules each time an element of the EAJA is changed, we propose removing references to specific EAJA requirements and stating instead that the EAJA applies to certain adjudicative proceedings before the Commission. We propose stating generally that applications for fees and expenses may be made according to the EAJA, as interpreted by the federal courts and guidance provided by the U.S. Department of Justice (“DOJ”). Such interpretative case law and DOJ guidance provide ample direction for applicants, the Presiding Officer, and the Commission in the application for, and consideration of, a request for attorney’s fees and other expenses. We do not believe our proceedings warrant particularized requirements regarding EAJA and that the guidance provided by the DOJ, and as

interpreted by federal courts, would be sufficient for applicants to proceed with an EAJA claim. We note too that other federal agencies, such as the CFPB, have adopted rules of practice without reference to EAJA. Because we believe DOJ and federal court guidance is sufficient, we propose to omit language in § 1025.70(a) and the entirety of § 1025.70(b) through (h). We are also proposing several minor, non-substantive changes for clarity.

*Proposed Changes to 1025.71 (Information Required from Applicant)*

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

*Proposed Changes to § 1025.72 (Procedures for Considering Applications)*

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

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

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

#### **IV. Environmental Considerations**

The Commission's regulations address whether the Commission is required to prepare an environmental assessment or an environmental impact statement. 16 CFR part 1021. These regulations provide a categorical exclusion for certain CPSC actions that normally have "little or

no potential for affecting the human environment." 16 CFR 1021.5(c)(1). This proposed rule falls within the categorical exclusion.

## **V. Regulatory Flexibility Analysis**

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

## **VI. Paperwork Reduction Act**

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

## **VII. Executive Order 12988 (Preemption)**

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

#### **VIII. Effective Date**

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

#### **IX. Request for Comments**

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

#### **List of Subjects in 16 CFR Part 1025**

Administrative practice and procedure, Consumer protection.

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

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

2. Revise § 1025.1 to read as follows:

**§ 1025.1 Scope of rules.**

The Rules in this part govern procedures in adjudicative proceedings relating to the provisions of sections 15(c), (d), and (f) and 17(b) of the Consumer Product Safety Act (15 U.S.C. 2064(c), (d), (f); 2066(b)), section 15 of the Federal Hazardous Substances Act (15 U.S.C. 1274), sections 3 and 8(b) of the Flammable Fabrics Act (15 U.S.C. 1192, 1197(b)), section 4(c) of the Poison Prevention Packaging Act (15 U.S.C. 1473(c)), and section 1404 of the Virginia Graeme Baker Pool and Spa Act (15 U.S.C. 8003), which are required to be determined on the record after opportunity for a public hearing. This part may also be applied to such other adjudicative proceedings as the Commission, by order, shall designate. A basic intent of the Commission in the development of these Rules has been to promulgate a single set of procedural rules which can accommodate both simple matters and complex matters in adjudication. To accomplish this objective, broad discretion has been vested in the Presiding Officer who will hear a matter being adjudicated to allow him/her to alter time limitations and other procedural aspects of a case, as required by the complexity of the particular matter involved. A major concern of the Commission is that all matters in adjudication move forward in a timely manner, consistent with the Constitutional due process rights of all parties. Therefore, the Presiding Officer should, whenever appropriate, expedite the proceedings by setting shorter time limitations than those generally applicable under this part. For example, the time limitation for discovery, as provided in § 1025.31(d), may be shortened, consistent with the extent of discovery

reasonably necessary to prepare for the hearing. Except where stated otherwise, discovery matters shall be governed by the Federal Rules of Civil Procedure.

**§ 1025.2 [Amended]**

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

4. Amend § 1025.3 by:

- a. Redesignating paragraphs (e) through (l) as paragraphs (h) through (o);
- b. Adding new paragraphs (e), (f), and (g); and
- c. Revising newly redesignated paragraphs (i) and (n).

The additions and revisions read as follows:

**§ 1025.3 Definitions.**

\* \* \* \* \*

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

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

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

\* \* \* \* \*

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

\* \* \* \* \*

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

\* \* \* \* \*

5. Amend § 1025.11 by:

- a. Revising paragraphs (a) and (b)(3); and
- b. Adding paragraph (d).

The revisions and addition read as follows:

**§ 1025.11 Commencement of proceedings.**

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

(b) \* \* \*

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

\* \* \* \* \*

(d) *Preliminary injunction.* A judicial proceeding for a preliminary injunction pursuant to 15 U.S.C. 2064(g) shall not serve as the basis to stay any proceedings under this part.

6. Revise § 1025.13 to read as follows:

**§ 1025.13 Amendments and supplemental pleadings.**

The Presiding Officer may allow appropriate amendments and supplemental pleadings which do not unduly broaden the issues in the proceedings or cause undue delay. If any proposed amendment or supplemental pleading would have the effect of adding or removing any persons as a respondent to the complaint or adding or removing any count, or if the Presiding Officer determines that the amendments or supplemental pleadings do not fall within the scope of an authorized complaint, broaden the authority granted staff in a complaint, unduly broaden the issues in the proceedings, or would cause undue delay, the Presiding Officer shall refer such amendments or supplemental pleadings to the Commission for decision.

7. Amend § 1025.14 by revising the section heading and paragraphs (a), (c), (d)(1), and (e) to read as follows:

**§ 1025.14 Form and filing of pleadings and other documents.**

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

\* \* \* \* \*

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

(d) \* \* \*

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

\* \* \* \* \*

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

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

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

8. Revise § 1025.15 to read as follows:

**§ 1025.15 Time.**

(a) *Computation of days.* In computing any time period specified in this part or in any order filed in a proceeding subject to this part, the day of the event triggering the period shall not be included, but each calendar day thereafter shall be included. If the last day of the time period

is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday. When the period of time prescribed or allowed is less than seven (7) days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this Rule, “legal holiday” means any day designated as a legal public holiday in 5 U.S.C. 6103.

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

(c) *Extensions.* For good cause shown, the Presiding Officer may extend any time limit prescribed or allowed by this part or by order of the Commission or the Presiding Officer, except for those sections governing the filing of interlocutory appeals and appeals from initial decisions pursuant to § 1025.13 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 proceedings.* If a stay of proceedings 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.

9. Revise § 1025.16 to read as follows:

**§ 1025.16 Service.**

(a) *Mandatory service.* Every document filed with the Secretariat shall be served upon all parties to any proceedings, i.e., Complaint Counsel, respondent(s), and party intervenors, as well

as the Presiding Officer. Every document filed with the Secretariat or Presiding Officer shall also be served upon each participant, if the Presiding Officer or the Commission so directs.

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

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

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

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

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

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

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

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

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

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

---

(Signature)

For \_\_\_\_\_

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

**§ 1025.17 [Amended]**

10. Amend § 1025.17 by:

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

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

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

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

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

**§ 1025.18 Class actions.**

(a) \* \* \*

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

\* \* \* \* \*

(f) \* \* \*

(4) Dealing with other procedural matters. The orders may be combined with a prehearing order under § 1025.21 and may be altered or amended as may be necessary.

\* \* \* \* \*

12. Revise § 1025.19 to read as follows:

**§ 1025.19 Consolidation of proceedings.**

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

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

13. Revise § 1025.21 to read as follows:

**§ 1025.21 Prehearing conferences.**

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) *Prehearing scheduling order.* Following the first prehearing conference, the Presiding Officer shall enter an order that sets forth the results of the conference and establishes a schedule of proceedings that will permit the evidentiary hearing to commence expeditiously, including a plan for discovery, and the production of documents and electronically stored information, dates for the submission and hearing of motions, the time and place of a final prehearing conference, and other matters as appropriate.

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

(f) *Final prehearing conference.* As close to the commencement of the evidentiary hearing as practicable, the Presiding Officer shall hold a final prehearing conference, at which time deadlines for proposed stipulations as to law, fact, or admissibility of evidence, and the exchange of exhibit and witness lists shall be established. At this conference, the Presiding

Officer shall also resolve any outstanding evidentiary matters or pending motions (except motions for summary decision) and establish a final schedule for the evidentiary hearing.

(g) *Final prehearing order.* The Presiding Officer shall issue a final prehearing order in each case after the conclusion of the final prehearing conference. The final prehearing order should contain, to the fullest extent possible at that time, all information which is necessary for controlling the course of the hearing. The Presiding Officer may require the parties to submit a jointly proposed final prehearing order. 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.* Prehearing conferences shall be stenographically reported as provided in § 1025.47 and shall be open to the public (except as provided in § 1025.41(a)), unless otherwise ordered by the Presiding Officer or the Commission.

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

**§ 1025.22 Prehearing briefs.**

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

\* \* \* \* \*

15. Amend § 1025.23 by:

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

b. Revising paragraphs (a) and (c).

The revisions read as follows:

**§ 1025.23 Motions.**

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

\* \* \* \* \*

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

\* \* \* \* \*

**§ 1025.24 [Amended]**

16. Amend § 1025.24 by:

a. Adding the words “that is the subject of a proceeding under this part” at the end of paragraph (b)(1)(ii);

b. Removing the period at the end of paragraph (b)(1)(iv) and adding a semicolon in its place;

c. Adding paragraph (b)(1)(v); and

d. Revising the last sentence of paragraph (b)(2).

The addition and revision read as follows:

**§ 1025.24 Interlocutory appeals.**

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(v) Grants or denies a motion under § 1025.13 unless the Commission has issued a decision under § 1025.13.

(2) \* \* \* The Commission may decide the petition, or may request such further briefing or oral presentation as it deems necessary.

\* \* \* \* \*

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

**§ 1025.25 Summary decisions and orders.**

(a) *Motion.* Any party may file a motion, with a supporting memorandum, for a Summary Decision and Order in its favor upon all or any of the issues in controversy. The motion shall be accompanied by a separate and concise statement of the material facts as to which the moving party contends there is no dispute. Complaint Counsel may file such a motion at any time after thirty (30) days following issuance of a complaint, and any other party may file a motion at any

time after issuance of a complaint. Any such motion by any party shall be filed in accordance with prehearing orders issued by the Presiding Officer under § 1025.21, and shall be filed no later than thirty (30) days after the close of discovery.

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

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

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

\* \* \* \* \*

18. Revise § 1025.26 to read as follows:

**§ 1025.26 Settlements.**

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

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

(c) *Contents.* An offer of settlement shall contain:

- (1) An admission of all jurisdictional facts;
- (2) An express waiver of further procedural steps and of all rights to seek judicial review or otherwise to contest the validity of the Commission order;
- (3) A statement that the allegations of the complaint are resolved by the consent agreement and order;
- (4) A description of the alleged hazard, noncompliance, or violation;
- (5) As appropriate, a listing of the acts or practices from which the respondent shall refrain and those acts or practices that the respondent shall affirmatively undertake; and
- (6) As appropriate, a detailed statement of the corrective action(s) which the respondent shall undertake. In proceedings arising under Section 15 of the Consumer Product Safety Act, 15 U.S.C. 2064, this statement shall contain all the elements of a "Corrective Action Plan," as outlined in the Commission's Interpretation, Policy, and Procedure for Substantial Product Hazards, 16 CFR part 1115.

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

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

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

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

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

19. Revise § 1025.31 to read as follows:

**§ 1025.31 General provisions governing discovery.**

(a) Unless otherwise provided by statute, the parties shall conduct discovery in accordance with and subject to Rule 26 of the Federal Rules, as specified in this part. Unless specified in paragraphs (a)(1) through (4) of this section or provided for in this part, the time frames set for all actions described in Rule 26 shall be set by the Presiding Officer.

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

(2) Federal Rule 26(a)(2)(B) (Witnesses Who Must Provide a Written Report) shall not apply.

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

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

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

Officer shall establish a time frame for the completion of expert discovery in accordance with § 1025.21.

20. Revise § 1025.32 to read as follows:

**§ 1025.32 Written interrogatories to parties.**

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

21. Revise § 1025.33 to read as follows:

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

This section shall be governed by Rule 34 of the Federal Rules, with the following exception: Requests for subpoenas shall be governed by § 1025.38.

22. Revise § 1025.34 to read as follows:

**§ 1025.34 Requests for admission.**

This section shall be governed by Rule 36 of the Federal Rules, except that Rule 37(a)(5) award of expenses shall not apply.

23. Revise § 1025.35 to read as follows:

**§ 1025.35 Depositions.**

This section shall be governed by Rules 30-32 of the Federal Rules, with the following exceptions: Requests for subpoenas shall be governed by § 1025.38; and Federal Rule 37(a)(5) award of expenses shall not apply.

24. Revise § 1025.36 to read as follows:

### **§ 1025.36 Motions to compel discovery.**

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

### **§ 1025.37 [Amended]**

25. Amend § 1025.37(g) by removing the words “of these rules”.

26. Revise § 1025.38 to read as follows:

### **§ 1025.38 Subpoenas.**

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

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

(c) *How obtained*—(1) *Content of application*. An application for the issuance of a subpoena, stating reasons, shall be submitted to the Presiding Officer, who shall forward the application to the Commission.

(2) *Procedure for application*. The Commission shall rule upon the application for a subpoena *ex parte*, by issuing an order granting or denying the application.

(d) *Issuance of a subpoena*. The Commission shall issue a subpoena by authorizing the Secretariat or the Presiding Officer to sign and date the approved subpoena for transmittal to the applicant for service.

(e) *Service of a subpoena*. A subpoena issued by the Commission shall be served upon the addressee as provided in § 1025.16(b)(2) through (5) and upon all parties as provided in § 1025.16(b).

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

(g) *Motion to quash or limit subpoena*. Within five (5) days after receipt of a subpoena, the person to whom it is directed may file a motion to quash or limit the subpoena, setting forth the reasons why the subpoena should be withdrawn or why it should be limited in scope. Any such motion shall be answered within five (5) days after service and shall be ruled on by the Commission as a time critical matter, in accordance with the Commission Decision Making

Procedures. The order shall specify the date, if any, for compliance with the specifications of the subpoena.

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

§ 1025.39 [Removed]

27. Remove § 1025.39.

28. Amend § 1025.41 by revising paragraphs (a) through (d) to read as follows:

**§ 1025.41 General rules.**

(a) *Public hearings.* All hearings conducted pursuant to this part shall be public unless otherwise ordered by the Commission or the Presiding Officer, except that Commissioners and their staffs shall not attend or view public hearings concerning matters that may become subject of review by the Commission as the appellate body.

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

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

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

\* \* \* \* \*

29. Amend § 1025.42 by:

a. Revising paragraphs (a)(3), (6), and (9), (b), (d), and (e)(2); and

b. In paragraph (e)(1), removing the word “Secretary” and adding, in its place, the word “Secretariat”.

The revisions read as follows:

**§ 1025.42 Powers and duties of Presiding Officer.**

(a) \* \* \*

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

\* \* \* \* \*

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

\* \* \* \* \*

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

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

\* \* \* \* \*

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

(e) \* \* \*

(2) Whenever, for good and reasonable cause, any party considers the Presiding Officer to be disqualified to preside, or to continue to preside, in any adjudicative proceedings, that party may file with the Secretariat a motion to disqualify and remove, supported by affidavit(s) setting forth the alleged grounds for disqualification. A copy of the motion and supporting affidavit(s) shall be served by the Secretariat on the Presiding Officer whose removal is sought. The

Presiding Officer shall have ten (10) days to respond in writing to such motion. However, the motion shall not stay the proceedings unless otherwise ordered by the Presiding Officer or the Commission. If the Presiding Officer does not disqualify himself/herself 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 and, in the event of disqualification, shall take appropriate action by assigning another Presiding Officer or requesting loan of another Administrative Law Judge through the U.S. Office of Personnel Management.

30. Amend § 1025.43 by:

- a. Revising paragraphs (a) and (d)(1)(i);
- b. Removing paragraph (e); and
- c. Redesignating paragraph (f) as paragraph (e).

The revisions read as follows:

**§ 1025.43 Evidence.**

(a) *Applicability of Federal Rules of Evidence.* Unless otherwise provided by statute or this part, the Federal Rules of Evidence shall apply to all proceedings held pursuant to this part. However, the Federal Rules of Evidence may be relaxed by the Presiding Officer if the ends of justice will be better served by so doing. Evidence that would be admissible under the Federal Rules of Evidence is admissible in a 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. For example,

evidence that constitutes hearsay may be admitted in accordance with paragraph (c) of this section, if it is relevant, material, and bears satisfactory indicia of reliability so that its use is fair.

\* \* \* \* \*

(d) \* \* \*

(1) \* \* \*

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

\* \* \* \* \*

31. Revise § 1025.44 to read as follows:

**§ 1025.44 Expert witnesses.**

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

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

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

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

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

(b) *Method of presenting testimony of expert witness.* In lieu of 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.

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

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

32. Amend § 1025.45 by revising paragraphs (b) introductory text, (b)(2) and (3), (e), and (f) to read as follows:

**§ 1025.45 *In camera* materials.**

\* \* \* \* \*

(b) *In camera treatment of documents and testimony.* The Presiding Officer or the Commission may for good cause shown and based on the record, order documents or testimony offered in evidence, whether admitted or rejected, to be received and preserved *in camera*. The order shall include:

\* \* \* \* \*

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

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

\* \* \* \* \*

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

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

33. Revise § 1025.46 to read as follows:

**§ 1025.46 Proposed findings, conclusions, and order.**

Within a reasonable time after the closing of the record and receipt of the transcript, all parties shall file, and participants may file simultaneously unless otherwise ordered by the Presiding Officer, post-hearing briefs, including proposed findings of fact and conclusions of law, as well as a proposed order. The Presiding Officer shall establish a date certain for the filing

of the briefs, which shall not exceed fifty (50) days after the closing of the record except in unusual circumstances. The briefs shall be in writing and shall be served upon all parties. The briefs of all parties shall contain adequate references to the record and authorities relied upon, but shall not exceed thirty (30) pages, excluding covers, indexes, table of contents, list of citations, and list of references. Replies, if permitted by the Presiding Officer, shall be filed within fifteen (15) days of the date for the filing of briefs unless otherwise established by the Presiding Officer.

34. Amend § 1025.47 by revising paragraph (a) to read as follows:

**§ 1025.47 Record.**

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

\* \* \* \* \*

35. Revise § 1025.48 to read as follows:

**§ 1025.48 Official docket.**

The official docket in any adjudicatory proceedings shall be maintained electronically by the Secretariat as set forth in § 1025.14 and shall be made available to the public.

36. Amend § 1025.49 by revising paragraph (a) to read as follows:

**§ 1025.49 Fees.**

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

\* \* \* \* \*

37. Amend § 1025.51 by revising paragraphs (a), (c), and (d)(1) to read as follows:

**§ 1025.51 Initial decision.**

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

\* \* \* \* \*

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

(d) \* \* \*

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

\* \* \* \* \*

**§ 1025.52 [Amended]**

38. Amend § 1025.52 by removing the word “Secretary” and adding, in its place, the word “Secretariat”.

39. Amend § 1025.53 by revising paragraphs (a), (b) introductory text, (c), and (f) to read as follows:

**§ 1025.53 Appeal from initial decision.**

(a) *Notices of appeal.* Any party may appeal an Initial Decision to the Commission by serving a notice of appeal within ten (10) days after issuance of the Initial Decision.

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

\* \* \* \* \*

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

references to the record and legal or other materials relied upon. An answering brief shall be subject to the same page limit as the appeal brief.

\* \* \* \* \*

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

\* \* \* \* \*

40. Amend § 1025.55 by:

- a. Removing the comma following the words “in addition” in paragraph (a); and
- b. Revising paragraph (c).

The revision reads as follows:

**§ 1025.55 Final decision on appeal or review.**

\* \* \* \* \*

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

**§ 1025.56 [Amended]**

41. Amend § 1025.56 by:

- a. Removing the word “sevice” and adding, in its place, the word “service”; and
- b. Adding, in the last sentence, the word “Final” before the words “Decision or Order”.

42. Amend § 1025.57 by revising paragraph (a), removing paragraph (b), and redesignating paragraph (c) as paragraph (b) to read as follows:

**§ 1025.57 Effective date of order.**

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

\* \* \* \* \*

43. Amend § 1025.58 by:

- a. Removing paragraph (b);
- b. Redesignating paragraphs (c) through (f) as paragraphs (b) through (e); and
- c. Revising newly redesignated paragraphs (b)(2) and (d)(2).

The revisions read as follows:

**§ 1025.58 Reopening of proceedings.**

\* \* \* \* \*

(b) \* \* \*

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

\* \* \* \* \*

(d) \* \* \*

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

\* \* \* \* \*

44. Revise § 1025.63 to read as follows:

**§ 1025.63 Written appearances.**

(a) *Filing.* Any person who appears in any proceedings shall file a written notice of appearance, stating for whom the appearance is made and the name, electronic address, mailing address, and telephone number of the person making the appearance and the date of the commencement of the appearance. The appearance shall be made a part of the record.

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

**§ 1025.65 [Amended]**

45. Amend § 1025.65 by:

a. Removing the word “files” from paragraph (a) and adding, in its place, the word “provides”; and

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

**§ 1025.66 [Amended]**

46. Amend § 1025.66 by removing the words “of these rules” from paragraph (d).

47. Amend § 1025.67 by:

a. Revising the section heading and paragraphs (a) and (b); and

b. Removing the word “Secretary” in paragraph (c) introductory text and adding, in its place, the word “Secretariat”.

The revisions read as follows:

**§ 1025.67 Restrictions as to former Commission members and employees.**

(a) *Generally.* Except as otherwise provided in paragraph (b) of this section, the post-employment restrictions applicable to former Commission members and employees, including but not limited to those referenced at 16 CFR 1030.101, 5 CFR part 2641, 18 U.S.C. 207, and, as applicable, Executive Order 13490, shall govern the activities of former Commission members and employees in adjudicative matters connected with their former duties and responsibilities.

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

\* \* \* \* \*

48. Revise § 1025.68 to read as follows:

**§ 1025.68 Prohibited *ex parte* communications.**

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

(b) Except as set forth in paragraph (d) of this section, *ex parte* communications in any form that are relevant to the merits of any proceedings under this part are prohibited:

(1) By any interested person not employed by the Commission to any decision-maker; or

(2) By a decision maker to any interested person not employed by the Commission.

(c) *Definitions*—(1) *Decision-maker*, as used in this section, shall include: those Commission personnel 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;

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

(2) *Ex parte communication*. Any communication concerning a matter that is the subject of proceedings under this part that is made by an interested person not employed by the Commission to a decision-maker or by a decision-maker to an interested person not employed by the Commission, which is:

(i) Written and not served on all parties; or

(ii) Oral and without advance notice to all parties to the proceedings and opportunity for them to be present.

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

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

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

(3) Communications by any party to the Commission concerning a proposed settlement agreement that has been transmitted to the Commission.

(e) *Procedures for handling prohibited ex parte communication*—(1) *Prohibited written ex parte communication.* To the extent possible, a prohibited written *ex parte* communication received by any Commission employee or interested person not employed by the Commission 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.

(2) *Prohibited oral ex parte communication.* (i) If a prohibited oral *ex parte* communication is made to a decision-maker or interested person not employed by the Commission, 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 proceedings;

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

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

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

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

(3) *Filing.* All communications and statements forwarded to the Secretariat 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 proceedings to which the communication or statement pertains.

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

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

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

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

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

49. The authority citation for part 1025, subpart H, is revised to read as follows:

Authority: 5 U.S.C. 504, 551 *et seq.*

50. Add § 1025.69 to subpart H to read as follows:

**§ 1025.69 Separation of functions.**

An employee or agent engaged in the performance of investigative or prosecuting functions for the Commission in a case, other than a Commissioner, may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review of the recommended decision, except as witness or counsel in public proceedings.

51. Revise § 1025.70 to read as follows:

**§ 1025.70 General provisions.**

The Equal Access to Justice Act, 5 U.S.C. 504 (called “the EAJA” in this subpart), provides for the award of attorney fees and other expenses to eligible persons who are parties to

certain adversary adjudicative proceedings before the Commission. Applications for such fees and expenses may be made according to the EAJA, as interpreted by the federal courts and guidance provided by the U.S. Department of Justice.

§§ 1025.71 and 1025.72 and Appendix I to Part 1025 [Removed]

52. Remove §§ 1025.71 and 1025.72 and appendix I to part 1025.

Dated: April 5, 2016.

---

Todd A. Stevenson,  
Secretary,  
Consumer Product Safety Commission.

[FR Doc. 2016-08125 Filed: 4/12/2016 8:45 am; Publication Date: 4/13/2016]