billion pounds,[7] the increased cost per pound due to the overtime fee will be less than $0.0001 on average.

Benefits of the Rule

This final rule will include integral and indispensible work activities (as defined by the Fair Labor Standards Act) into the defined inspector ''workday.'' Therefore, this rule will help ensure compliance with the law and the improved use of Agency resources.

Regulatory Flexibility Analysis

The FSIS Administrator has made a determination that this final rule will not have a significant impact on a substantial number of small entities, as defined by the Regulatory Flexibility Act (5 U.S.C. 601). There are 263 small and 566 very small meat and poultry slaughter establishments (by Small Business Administration standard). In small and very small establishments, inspection program personnel typically have adequate time during their tour of duty to sharpen their knives as well as conduct the other activities under this final rule, because they do not have to be on-line for 8 hours. Therefore, the impact will not be significant.

Paperwork Reduction Act

This final rule has been reviewed under the Paperwork Reduction Act and imposes no new paperwork or recordkeeping requirements.

USDA Nondiscrimination Statement

The U.S. Department of Agriculture (USDA) prohibits discrimination in all its programs and activities on the basis of race, color, national origin, gender, religion, age, disability, political beliefs, sexual orientation, and marital or family status. (Not all prohibited bases apply to all programs.) Persons with disabilities who require alternative means for communication of program information (Braille, large print, or audiotape) should contact USDA's Target Center at (202) 720–2600 (voice and TTY).

To file a written complaint of discrimination, write USDA, Office of the Assistant Secretary for Civil Rights, 1400 Independence Avenue SW., Washington, DC 20250–9410 or call (202) 720–5964 (voice and TTY). USDA is an equal opportunity provider and employer.

Additional Public Notification

FSIS will announce this final rule online through the FSIS Web page located at: *http://www.fsis.usda.gov/regulations_&_policies/Federal_Register_Notices/index.asp.*

FSIS will also make copies of this **Federal Register** publication available through the FSIS Constituent Update, which is used to provide information regarding FSIS policies, procedures, regulations, **Federal Register** notices, FSIS public meetings, and other types of information that could affect or would be of interest to constituents and stakeholders. The Update is communicated via Listserv, a free electronic mail subscription service for industry, trade groups, consumer interest groups, health professionals, and other individuals who have asked to be included. The Update is also available on the FSIS Web page. Through the Listserv and Web page, FSIS is able to provide information to a much broader and more diverse audience. In addition, FSIS offers an electronic mail subscription service which provides automatic and customized access to selected food safety news and information. This service is available at: *http://www.fsis.usda.gov/News_&_Events/Email_Subscription/.* Options range from recalls to export information to regulations, directives and notices. Customers can add or delete subscriptions themselves, and have the option to password protect their accounts.

List of Subjects

9 CFR Part 307

Government employees, Meat inspection.

9 CFR Part 381

Government employees, Poultry products inspection.

For the reasons discussed in the preamble, FSIS is amending 9 CFR Chapter III as follows:

PART 307—FACILITIES FOR INSPECTION

■ 1. The authority citation for part 307 continues to read as follows:

Authority: 7 U.S.C. 394; 21 U.S.C. 601–695; 7 CFR 2.17, 2.55.

■ 2. In § 307.4(c), remove the second sentence and add two sentences in its place to read as follows:

§ 307.4 Schedule of operations.

* * * * *

(c) * * * The basic workweek shall consist of 5 consecutive 8-hour days within the administrative workweek Sunday through Saturday, except that, when possible, the Department shall schedule the basic workweek so as to consist of 5 consecutive 8-hour days Monday through Friday. The 8-hour day excludes the lunch period but shall include activities deemed necessary by the Agency to fully carry out an inspection program, including the time for FSIS inspection program personnel to put on required gear and to walk to a work station; to prepare the work station; to return from a work station and remove required gear; to sharpen knives, if necessary; and to conduct duties scheduled by FSIS, including administrative duties. * * *

* * * * *

PART 381—POULTRY PRODUCTS INSPECTION REGULATIONS

■ 3. The authority citation for part 381 continues to read as follows:

Authority: 7 U.S.C. 138f, 450; 21 U.S.C. 451–470; 7 CFR 2.7, 2.18, 2.53.

■ 4. In § 381.37(c), remove the second sentence and add two sentences in its place to read as follows:

§ 381.37 Schedule of operations.

* * * * *

(c) * * * The basic workweek shall consist of 5 consecutive 8-hour days within the administrative workweek Sunday through Saturday, except that, when possible, the Department shall schedule the basic workweek so as to consist of 5 consecutive 8-hour days Monday through Friday. The 8-hour day excludes the lunch period but shall include activities deemed necessary by the Agency to fully carry out an inspection program, including the time for FSIS inspection program personnel to put on required gear, pick up required forms and walk to a work station; and the time for FSIS inspection program personnel to return from a work station, drop off required forms, and remove required gear; and to conduct duties scheduled by FSIS, including administrative duties. * * *

* * * * *

Done at Washington, DC, on: September 21, 2012.

Alfred V. Almanza,

Administrator.

[FR Doc. 2012–23682 Filed 9–26–12; 8:45 am]

BILLING CODE 3410–DM–P

FEDERAL TRADE COMMISSION

16 CFR Parts 2 and 4

Rules of Practice

AGENCY: Federal Trade Commission (''Commission'' or ''FTC'').

ACTION: Final rule.

[7] *Livestock, Dairy, & Poultry Outlook*/LDP–M–209/November 16, 2011; Economic Research Service, USDA.

SUMMARY: The FTC is adopting revised rules governing the process of its investigations and attorney discipline. These rules, located in the Commission's Rules of Practice, are intended to promote fairness, transparency, and efficiency in all FTC investigations; and to provide additional guidance about appropriate standards of conduct for attorneys practicing before the FTC.

DATES: *Effective date:* November 9, 2012.

Compliance date: The amendments to Rule 4.1(e) (16 CFR 4.1(e)) will govern attorney misconduct alleged to have occurred on or after November 9, 2012.

FOR FURTHER INFORMATION CONTACT: Lisa M. Harrison, Assistant General Counsel for Legal Counsel, (202) 326–3204, or W. Ashley Gum, Attorney, (202) 326–3006, Office of the General Counsel, Federal Trade Commission, 600 Pennsylvania Avenue NW., Washington DC 20580. For information on the proposed revisions to the rule governing attorney discipline, contact Peter J. Levitas, Deputy Director, Bureau of Competition, (202) 326–2030, Federal Trade Commission, 600 Pennsylvania Avenue NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: This discussion contains the following sections:

I. Overview of Rule Revisions and Comments Received

The purpose of these final rules is to update and improve the Commission's Part 2 [1] investigation process by accounting for and incorporating modern discovery methods, facilitating the enforcement of Commission compulsory process, and generally increasing efficiency and cooperation. The adopted revisions to Rule 4.1 [2] are designed to provide additional guidance regarding appropriate standards of conduct, and procedures for addressing alleged violations of those standards. The revisions to Part 2 will take effect on November 9, 2012 unless the Commission or a Commission official identified in Rule 2.7(l) determines that application of an amended rule in an investigation pending as of November 9, 2012 would not be feasible or would create an injustice. Revised Rule 4.1(e) will govern attorney conduct alleged to have occurred on or after November 9, 2012.

A. Part 2 Rules Governing Investigations

In its January 23, 2012 Notice of Proposed Rulemaking (''NPRM''),[3] the Commission invited public comment on proposed amendments to its Rules of Practice governing its nonadjudicative procedures in investigative proceedings (''Part 2 investigations''). The public comment period closed on March 23, 2012.[4] The Commission stated in the NPRM that it has periodically examined and revised its Rules of Practice for the sake of clarity and to make the Commission's procedures more efficient and less burdensome for all parties. The Commission observed that its review of the Part 2 investigation process was especially appropriate in light of growing reliance upon and use of electronic media in Part 2 investigations.

The proposed amendments announced in the NPRM were the culmination of a broad and systematic internal review to improve the Commission's investigative procedures and reflect the development of Part 2 investigative practice in recent years. The Commission undertook this effort in order to improve the Part 2 investigation process through a comprehensive review, rather than piecemeal modifications of a limited number of rules, to ensure that the rules are internally consistent and that they are workable in practice.

With the NPRM, the Commission endeavored to modernize some of the Part 2 rules by proposing regulations that included: (1) A rule that sets out specifications for privilege logs; (2) a rule that conditions any extensions of time to comply with Commission process on a party's continued progress in achieving compliance; (3) a rule that conditions the filing of any petition to quash or limit Commission process on a party having engaged in meaningful ''meet and confer'' sessions with Commission staff; (4) a rule that eliminates the two-step process for resolving petitions to quash; and (5) rules that establish tighter deadlines for the Commission to rule on petitions. Other proposed changes updated the rules by including express references to electronically stored information (''ESI'') and consolidated related provisions that were dispersed throughout Part 2.

Apart from modernizing the Part 2 rules, the NPRM also sought to turn well-accepted agency best practices into formal components of the Part 2 investigation process. Such rules included: (1) A rule affirming that staff may disclose the existence of an investigation to certain third parties; (2) a rule codifying staff's practice of responding internally to petitions to limit or quash compulsory process; and (3) the Commission's announcement of its general policy that all parties engage in meaningful discussions with staff to prevent confusion or misunderstandings about information sought during an investigation.

The Commission received comments on the proposed Part 2 revisions from five individuals or entities: the Section of Antitrust Law of the American Bar Association (''Section''); Crowell & Moring, LLP (''Crowell & Moring''); Kelley, Drye & Warren, LLP (''Kelley Drye''); James Butler of Metropolitan Bank Group; and Joe Boggs, an individual consumer.[5] Most commenters endorsed the objectives of the Commission's proposed amendments. Mr. Butler opined that ''the proposed revisions will streamline the rules and add structure to the agency's investigatory process by consolidating related provisions that are currently scattered and/or may be outdated.'' The Section commented that it was generally supportive of the Commission's efforts ''to review its investigatory procedures with an eye toward fairness, efficiency, and openness.'' [6] The Crowell & Moring and Kelley Drye comments likewise endorsed the Commission's proposed changes, ''particularly as they relate to electronic media in document discovery.'' [7] The Crowell & Moring

[1] 16 CFR part 2.

[2] 16 CFR 4.1(e).

[3] 77 FR 3191 (Jan. 23, 2012).

[4] The public comments are available at *http://www.ftc.gov/os/comments/part2and4.1rules/*. As stated in the NPRM, the Commission sought public comment although the proposed rule revisions relate solely to agency practice and procedure, and thus are not subject to the notice and comment requirements of the Administrative Procedure Act (''APA''). *See* 5 U.S.C. 553(b)(3)(A). The American Financial Services Association (''AFSA'') argues that the proposed revisions to the Commission's attorney discipline rules ''are substantive in nature and not merely procedural,'' and therefore should not be exempt from notice and comment. AFSA Comment at 2 & n.2. The Commission regards the rule revisions as concerning agency practice and procedure but notes that AFSA's concerns are not relevant in this instance because the Commission has afforded the public notice and an opportunity to comment on the proposed changes. Accordingly, the Commission has fully complied with the APA.

[5] The Commission also received comments from one entity and one individual that limited their focus to an analysis of the agency's proposed revisions to 16 CFR 4.1. These are discussed in Section I.B. below.

[6] Comment from the Section of Antitrust Law of the American Bar Association (''Section Comment'') at 1.

[7] Comment from Kelley Drye & Warren LLP (''Kelley Drye Comment'') at 1.

comment also observed that the rules should ''help the Commission execute its enforcement mandate while minimizing unnecessary cost and burden on parties and bringing investigations to a speedier conclusion.'' [8]

But these commenters also offered several substantive criticisms of the proposed rules. As a threshold matter, the Commission addresses the Section's general observation that ''although it is apparent that the Commission has serious concerns about how the investigative process is working, it is not entirely clear from the proposed amendments what those problems are, why the Commission's existing authority is inadequate to remedy particular issues * * * or how the proposals would remedy any such problems or omissions.'' [9] In conjunction with this comment, the Section also proposed that the Commission convene a joint task force comprised of members of the private bar ''to review whether there are indeed problems with the investigative or disciplinary processes, and, if so, the types of targeted remedies that might be appropriate.'' [10] The Commission notes in response that each of the rule revisions is a product of the Commission's own considerable expertise and investigative experience. As noted above, some of the problems that the Commission has identified stem from a lack of a clear, well-recognized policy setting out what is expected of respondents in certain circumstances. One example the Section identifies pertains to proposed Rule 2.11(c), discussed below. Compulsory process respondents occasionally produce documents with material redacted for reasons apart from its protected status. However, redaction of, for example, allegedly confidential, but non-privileged, business material, is improper.[11] The proposed rule clarifies the obligations of recipients of compulsory process.[12]

These commenters also offered more specific criticisms addressed in detail below in the section-by-section analysis. The announced privilege log specifications were among the new modernizing rules that garnered significant comments. Many commenters urged the Commission to relax these specifications to align them with the Commission's procedures for privilege logs submitted during discovery for administrative adjudications (''Part 3'') and Hart-Scott-Rodino second requests (''second requests''). Commenters also criticized the Commission's adaptation of the Federal Rules of Civil Procedure (''FRCP'') to account for ESI and provide for the sampling and testing of documents.

The commenters also offered analysis of the rule revisions intended to codify existing practices. This subset of comments included the Section's and Kelley Drye's view that staff replies to petitions to limit or quash should be served on the petitioner. Those same commenters also argued against the provision in Rule 2.6 stating that Commission staff may disclose the existence of an investigation to potential witnesses.

Upon consideration of the various comments and its own review of the existing and proposed rules, the Commission agrees that some of the proposed rules can be modified to better reduce the burdens of the Part 2 process without sacrificing the quality of an investigation. After all, the proposed rules were intended to improve, rather than diminish, the FTC's ability to conduct fair and efficient investigations. The Part 2 investigative process works most effectively and efficiently when staff and outside counsel and their clients engage in meaningful communication and work in a cooperative and professional manner.

Accordingly, the Commission is adopting the proposed rules and issuing some further modifications, including: (1) A revision of the privilege log specifications to decrease the burden on respondents, while still accounting for staff's need to effectively evaluate privilege claims; (2) extending the deadline for the first meet and confer to decrease the burden on recipients of process and their counsel; and (3) implementing a ''safety valve'' provision allowing parties showing good cause to file a petition to limit or quash before any meet and confer has taken place.

The comments and the Commission's revisions to Part 2 are addressed in more detail in the section-by-section analysis of the final rule revisions.[13]

B. Rule 4.1(e) Governing Attorney Discipline

The Commission also sought comment on proposed changes to its rule governing attorney discipline, Rule 4.1(e). As the Commission explained in the NPRM,[14] the proposed rule was designed to provide additional clarity regarding appropriate standards of conduct for attorneys practicing before the Commission and procedures for the evaluation of allegations of attorney misconduct. The proposed rule clarified that attorneys may be subject to discipline for violating such standards, including engaging in conduct designed merely to delay or obstruct Commission proceedings or providing false or misleading information to the Commission or its staff. The proposed rule also provided that a supervising attorney may be responsible for another attorney's violation of these standards of conduct if he or she orders or ratifies the attorney's misconduct.

In addition, the proposed rule instituted appropriate procedural safeguards to govern the Commission's consideration of allegations of attorney misconduct, which is discussed further in the section-by-section analysis. To that end, the proposed rule established a framework for evaluating and adjudicating allegations of misconduct by attorneys practicing before the Commission.

The Commission received three comments addressing the proposed revisions to Rule 4.1(e) from the Section, the American Financial Services Association (''AFSA''), and a law student.[15] These commenters offered several substantive criticisms of the proposed rule, which are addressed below. The Commission, upon consideration of these comments and its own review of the existing and proposed rules, issues several modifications to the proposed rules, including: (1) A revision to clarify the scope of potential imputed responsibility under the rule for supervisory or managerial attorneys; and (2) revisions to provide for the Commission to issue an order to show cause before issuance of an attorney reprimand in all cases and to provide an opportunity for a hearing prior to imposition of any sanction where there are disputed issues of material fact to be resolved.

[8] Comment from Crowell & Moring, LLP (''Crowell & Moring Comment'') at 1.

[9] Section Comment at 1–2.

[10] *Id.* at 2.

[11] *See FTC* v. *Church & Dwight Co.,* 665 F.3d 1312 (DC Cir. 2011).

[12] The need for revisions to other rules, including Rule 4.1(e) governing attorney discipline, is discussed further in the section-by-section analysis below.

[13] The Commission is also making a number of technical, non-substantive changes to the proposed rules.

[14] 77 FR at 3194.

[15] Kristen Sweet Comment.

II. Section-by-Section Analysis of Final Rule Revisions

Section 2.2: Complaint and Request for Commission Action

The Commission proposed revisions to this rule that would account for more modern methods of submitting complaints and requests for agency action, and to avoid repetition of certain provisions in current Rule 2.1. That rule identifies how, and by whom, any Commission inquiry or investigation may be initiated. In contrast, Rule 2.2 describes the procedures that apply when members of the public or other parties outside of the agency request Commission action. No comments were received, and the Commission adopts the revised procedures with some minor modifications intended to simplify the proposed rule text.

Section 2.4: Investigational Policy

The Commission proposed revising Rule 2.4 to underscore the importance of cooperation between FTC staff and compulsory process recipients, especially when confronted with issues related to compliance with CIDs and subpoenas. The proposed rule affirmed the Commission's endorsement of voluntary cooperation in all investigations, but explained that cooperation should be viewed as a complement, rather than a mutually exclusive alternative, to compulsory process. This proposed revision was meant to more accurately account for the complexity and scope of modern discovery practices.

The proposed revision was not intended to herald a groundbreaking approach to investigations. The Commission proposed the revised rule as an affirmation of—and not a significant departure from—current Commission policy regarding compulsory process. Contrary to the Section's interpretation, the revised rule does not ''announc[e] a preference for compulsory process over voluntary production.'' [16] The Commission will continue to use whatever means of obtaining information is appropriate, and notes that compulsory process is more likely to be necessary in complex cases. In a substantial number of investigations, voluntary methods are used.

The Section also observed that ''the 'meaningful discussions' expected under the proposed rule could be read as an obligation imposed only on the parties receiving process.'' [17] The Commission believes that such a reading is misguided because staff are necessarily participants in the discussions. Indeed, Crowell & Moring commented that the proposed rule will often encourage ''trust and cooperation and reduce[] possible confusion regarding mutual expectations.'' [18] The Commission adopts the proposed rule.

Section 2.6: Notification of Purpose

The Commission proposed amending this rule to clarify staff's ability to disclose the existence of an investigation to witnesses or other third parties. As noted in the NPRM, the proposed revision would restate longstanding agency policy and practice recognizing that, at times, staff may need to disclose the existence of an otherwise non-public investigation, or the identity of a proposed respondent, to potential witnesses, informants, or other non-law-enforcement groups. The Commission's ability to disclose this information to third parties, to the extent that disclosure would further an investigation, is well established,[19] and the practice plainly facilitates the efficient and effective conduct of investigations. Nevertheless, the Section remarked that ''it is unclear why a change in the current policy is necessary, or indeed what specific changes the Commission intends.'' [20] The proposed rule was intended merely to reflect existing practice. As the Section further noted, the Commission ''historically has been properly mindful of the importance of confidentiality of its investigations, taking into consideration the various federal statutes that protect the confidential nature of non-public investigations.'' [21] Under its current policy, the Commission does not ordinarily make blanket disclosure to the public of the identity of persons (including corporations) under investigation prior to the time that a complaint issues.[22] The Commission is not departing from its current policy in this regard.

Similarly, the Commission finds it unnecessary to require, as Kelley Drye suggested, a certification from ''all third parties with access to nonpublic information'' that ''the material will be maintained in confidence and used only for official law enforcement purposes.'' [23] The statutory basis for Kelley Drye's comment applies only to disclosure to law enforcement agencies of ''documentary material, results of inspections of tangible things, written reports or answers to questions, and transcripts of oral testimony.'' [24] The revisions to Rule 2.6 do not expand staff's authority to share such material with third parties, but merely acknowledge staff's ability, in limited circumstances, to disclose the existence of an investigation. Appropriate safeguards against improper use of confidential materials are already in place.

The Section expressed an additional concern that the rule's proposed new language, specifying that ''[a] copy of the Commission resolution * * * shall be sufficient to give * * * notice of the purpose of the investigation,'' diminishes the Commission's obligation to notify targets about the scope of investigations. Specifically, the Section commented that ''Commission resolutions prescribed under 2.7(a) often are stated in broad general terms and, as such, do not provide sufficient detail to investigation targets of the objectives of a particular investigation.'' [25] However, it is well established that ''in the pre-complaint stage, an investigating agency is under no obligation to propound a narrowly focused theory of a possible future case. Accordingly, the relevance of the agency's subpoena requests may be measured only against the general purposes of its investigation.'' [26] Further, the Commission observes that questions about the investigation may be discussed during the meet and confer process prescribed by Rule 2.7(k), or raised in a petition to limit or quash, as described in Rule 2.10. Thus, Rule 2.6 is adopted as proposed.

Section 2.7: Compulsory Process in Investigations

The proposed revisions to this rule consolidated the compulsory process provisions previously found in Rules 2.8, 2.10, 2.11, and 2.12. As explained in the NPRM, the proposed rule would substantially expedite its investigations by: (1) Articulating staff's authority to inspect, copy, or sample documentary material—including electronic media—to ensure that parties are employing viable search and compliance methods; (2) requiring parties to ''meet and confer'' with staff soon after compulsory process is received to discuss compliance with compulsory process and to address and attempt to resolve potential problems relating to document production; and (3) conditioning any extension of time to comply on a party

[16] Section Comment at 2.

[17] *Id.* at 3.

[18] Crowell & Moring Comment at 2–3.

[19] *See* FTC Operating Manual, Ch. 16.9.3.4.

[20] Section Comment at 3.

[21] *Id.*

[22] *See* FTC Operating Manual, Ch. 3.1.2.3.

[23] Kelley Drye Comment at 4.

[24] 15 U.S.C. 57B–2(b)(6).

[25] Section Comment at 3.

[26] *FTC* v. *Texaco, Inc.,* 555 F.2d 862, 874 (D.C. Cir. 1977).

demonstrating its progress in achieving compliance.

Proposed paragraph (a) describes the general procedures for compulsory process under Sections 9 and 20 of the Federal Trade Commission Act.[27] In its comments, Kelley Drye requested that the Commission explain ''whether metadata will be included in the definition of ESI and consistently apply that definition to all investigative proceedings.'' [28] The Commission believes that the rule requires no further clarification because, on its terms, the definition of ESI encompasses ''other data or data compilations stored in any electronic medium,'' which clearly includes metadata. This definition also comports with the broad meaning of ''electronically stored information'' in the FRCP.[29] In a particular case, the instructions accompanying compulsory process may provide variations in the definition of ESI attributable to the particular circumstances of the investigation.

Kelley Drye also recommended that the Commission revise the definition of ESI ''to limit application of the translation requirement to instances when reasonably necessary to further the FTC's investigation.'' [30] Here again, the Commission observes that, as with the FRCP, the definition on its terms calls for translation of data ''if necessary.'' Moreover, even after compulsory process has issued, the meet and confer process described at paragraph (k), in conjunction with paragraph (*l*)'s delegation of authority to certain Commission officials to modify the terms of compliance with compulsory process, provides an adequate means to depart from this standard requirement when necessary. If the issue is unresolved after discussions with staff, the Commission is available to consider a petition to limit or quash compulsory process.

The Commission received no further comments on paragraph (a) and it has been adopted as modified. Likewise, revised paragraphs (b)–(h), which described the Commission's additional compulsory process authority, did not elicit substantive comments and they have been adopted with some minor modifications intended to simplify the proposed rule text.[31]

Proposed paragraph (i) articulates staff's authority to inspect, copy, or sample documentary material, including electronic media. The proposal elicited extensive comment from Crowell & Moring. First, the firm expressed a concern that the Commission could employ this method through ''mere'' compulsory process because it ''does not require the procedural safeguard of obtaining a Commission order.'' [32] Crowell & Moring also expressed concerns about the scope of this provision, arguing that it could be read to ''allow the Commission to issue a subpoena or CID requiring the production of, e.g., servers, hard drives, or backup tapes, so that the Commission staff can 'inspect' the ESI to see if there is anything of interest contained thereupon.'' [33] The firm further argued that ''the proposed rule appears to give staff essentially unfettered access to any source of ESI,'' and thus ''staff could conceivably obtain access to an enterprise-wide email system and review large volumes of business information beyond the scope of the purported investigation.'' [34] Finally, Crowell & Moring observed that the proposed rule raises privilege issues because ''conducting a privilege review, redaction, and then compiling the required privilege log'' attendant to such an inspection ''would in some cases present an enormous burden, since the privilege review would necessarily have to be conducted across the entire contents of the electronic media.'' [35]

The proposed rule is authorized by Sections 9 and 20 of the FTC Act.[36] Section 9 provides for access to documentary evidence in investigations other than those pertaining to unfair or deceptive practices, and Section 20 allows the Commission to require that ''tangible things'' relevant to the investigation be submitted. The proposed rule is modeled after Fed. R. Civ. P. 34(a)(1), which expressly permits parties to test, sample, inspect or copy requested material. The methods contemplated by this paragraph are limited to ''inspection, copying, testing, or sampling,'' and are not meant to sidestep, but only to supplement, the other tools of compulsory process available to the Commission. Any testing method would be specifically tailored to the needs of the investigation. Thus, the Commission anticipates that, as with all forms of compulsory process, an inspection or sampling demand would be bounded by the nature and scope of the investigation, as articulated in the Commission resolution and compulsory process.

Furthermore, the Commission acknowledges Crowell & Moring's concerns about privileged material, and notes that parties may raise such concerns with staff during meet and confer sessions and discuss whether methods may be employed to allay any burden attendant to the production of privileged material. Such methods may include the implementation of an independent ''taint team,'' to segregate privileged material obtained under this rule in a manner that is duly respectful of the protected status of any material sought. If a respondent finds these means ultimately to be unavailing, the Commission believes that a petition to limit or quash compulsory process is a sufficient remedy. Accordingly, paragraph (i) is adopted as proposed.

Proposed paragraph (j) sets out the manner and form in which respondents must provide ESI. Regarding this provision, Kelley Drye noted that, because producing a document in native electronic format often ''precludes the ability to protect privileged or sensitive information in that document,'' the Commission should ''exclude from production privileged information contained in native electronic format, provided that non-privileged information is produced in another format.'' [37] The Commission notes that while staff would of course be open to discussing such concerns at a meet and confer session, it is the respondent's responsibility to produce all material in a usable format, and some materials (such as Microsoft Excel spreadsheets) are not usable unless produced in native

[27] 15 U.S.C. 49, 57b–1.

[28] Kelley Drye Comment at 6.

[29] *See* Fed. R. Civ. P. 34 note (2006) (Notes of Advisory Committee on 2006 amendments) (''The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information. Rule 34(a)(1) is expansive and includes any type of information that is stored electronically.'').

[30] Kelley Drye Comment at 7.

[31] As noted in the NPRM, these provisions consolidate provisions found in Rules 2.8, 2.10, 2.11, and 2.12. In addition, the revisions update and streamline the process for taking oral testimony by requiring corporate entities to designate a witness to testify on their behalf, as provided in FRCP Rule 30(b)(6), and by allowing testimony to be videotaped or recorded by means other than stenograph.

[32] Crowell & Moring Comment at 5.

[33] *Id.*

[34] *Id.*

[35] *Id.* at 6.

[36] *See* 15 U.S.C. 49 (''the Commission * * * shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any person, partnership, or corporation being investigated or proceeded against * * *''); 15 U.S.C. 57b–1(c)(1) (''Whenever the Commission has reason to believe that any person may be in possession * * * of any documentary material or tangible things, or may have any information, relevant to unfair or deceptive acts or practices * * * or to antitrust violations * * * the Commission may * * * issue in writing * * * a civil investigative demand requiring such person to produce such documentary material for inspection and copying or reproduction, [or] to submit such tangible things.'').

[37] Kelley Drye Comment at 20.

format. Thus, while it is advisable to bring these concerns to staff's attention, the blanket rule that Kelley Drye proposes would be unworkable in practice. Finally, the Commission acknowledges Kelley Drye's request that production requirements be narrowly tailored ''particularly as they relate to metadata and duplicative electronic formats,'' [38] and notes that revised paragraph (j) specifically provides authority for a Commission official to modify production requirements as they relate to ESI. Accordingly, revised paragraph (j) is adopted as proposed.

Proposed paragraph (k) required parties to meet and confer with staff within ten days after compulsory process is received to discuss compliance with compulsory process and to address and attempt to resolve potential problems relating to document production. Several commenters objected to the ten-day timeline. For example, the Section commented that the ten-day requirement ''would impose a significant burden on outside counsel and responding parties.'' [39] In response to these concerns, the Commission revises the rule to extend the meet and confer timeline to 14 days. The revised rule also provides that the deadline for the first conference may be further extended to up to 30 days by any Commission official identified in paragraph (*l*). The revised rule provides further that the Commission will not consider petitions to quash or limit absent a pre-filing meet and confer session with Commission staff and, absent extraordinary circumstances, will consider only issues raised during the meet and confer process. The Commission observes that the meet and confer procedure is intended to be an iterative process. The rule only prescribes a timeline for the first meeting with staff, not the last. The rule does not preclude, and indeed the Commission strongly encourages, additional discussions of other issues as they arise. Revised paragraph (k) is therefore adopted as modified.

Finally, proposed paragraph (*l*) stipulates that certain Commission officials may modify the terms of compliance with compulsory process. Kelley Drye requested that the Commission revise this rule to allow for time extensions based on a respondent's ''written acknowledgment that it is taking steps to comply with the FTC's request,'' [40] rather than an actual demonstration of satisfactory progress toward compliance. This paragraph is intended to improve the overall speed and efficiency of investigations, like many other revisions to the rules. Conditioning extensions merely upon unsupported assurances that parties intend to comply with compulsory process would not adequately serve this purpose. Although the Commission recognizes that counsel ordinarily deal in good faith, it is the Commission's experience that assurances are often not met. Therefore, paragraph (*l*) is adopted as proposed.

Section 2.9: Rights of Witnesses in Investigations

Proposed Rule 2.9 specified the rights of witnesses in Commission investigations, including witnesses compelled to appear in person at an investigational hearing or deposition. Paragraph (a) of the proposed rule continued to provide that a witness has a right to a transcript of the proceeding and copies of any documents used. This provision kept in place an exception—established in the preceding Rule 2.9—for some nonpublic proceedings. In those circumstances, the witness may inspect a transcript of the proceedings, but, for good cause, may not keep a copy. Although the proposed paragraph (a) did not revise that exception, the Section commented that ''any witness should be entitled to retain or procure a copy of any submitted document or recorded testimony, as the Commission recognized several years ago in its merger process reforms.'' [41] The rule continues to provide that in general, staff should make such transcripts and documents available to witnesses. However, in certain circumstances, it is appropriate to withhold a transcript until the Commission pursues litigation. The Commission has long recognized the need for a good cause exception, even in the context of merger investigations.[42] This provision is thus consistent both with established agency policy pursuant to Section 20(c)(14)(G) of the FTC Act and the Administrative Procedure Act.[43] Paragraph (a) is therefore adopted as proposed.

Proposed Rule 2.9(b)(1) was intended to prevent counsel from improperly engaging in obstructionist tactics during an investigational hearing or deposition conducted pursuant to Section 9 of the FTC Act by prohibiting consultation except with respect to issues of privilege. As the Section noted in its comments, Section 9 of the FTC Act [44] grants the Commission broader authority than Section 20 [45] to prohibit such conduct in matters not involving unfair or deceptive acts or practices. The proposed revision is necessary to prevent obstructionist conduct and is supported by federal court decisions and court rules prohibiting consultation in depositions while a question is pending.[46] Thus, the Commission is statutorily authorized to regulate this aspect of investigational hearings and depositions conducted pursuant to Section 9, and it has elected to do so.

The other proposed changes to Rule 2.9, such as paragraph 2.9(b)(2)'s limitations on objections, and the process for resolving privilege objections set out in revised paragraph 2.9(b)(3), generated no comments and are adopted with minor modifications intended to simplify the proposed rule text.

Section 2.10: Petitions To Limit or Quash Commission Compulsory Process

In the NPRM, the Commission proposed to consolidate and clarify the provisions governing petitions to limit or quash into a re-designated Rule 2.10. In paragraph (a)(1), the Commission proposed a 3,750 word limit for all petitions to limit or quash. Both Kelley Drye and the Section objected to this word limit, and Kelley Drye suggested that the Commission increase the word

[38] *Id.* Compulsory process requests do not typically call for material to be provided in duplicative formats. However, where the documents are produced in a form that is not searchable, the documents may need to be accompanied by an extracted text file to render them searchable.

[39] Section Comment at 4; *see also* Kelley Drye Comment at 11–13.

[40] Kelley Drye Comment at 11.

[41] Section Comment at 5.

[42] *See* Statement of the Federal Trade Commission's Bureau of Competition On Guidelines for Merger Investigations (December 11, 2002) (*http://www.ftc.gov/os/2002/12/bcguidelines021211.htm*).

[43] *See* 15 U.S.C. 57b–1(c)(14)(G); 5 U.S.C. 555(c) (''in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony'').

[44] 15 U.S.C. 49.

[45] 15 U.S.C. 57b–1.

[46] *See, e.g., Hall* v. *Clifton Precision,* 150 F.R.D. 525, 528 (E.D. Pa. 1993) (such coaching ''tend[s], at the very least, to give the appearance of obstructing the truth.''); *see also* Fed. R. Civ. P. 30 advisory committee's note (1993 Amendments) (observing that ''[d]epositions frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond. While objections may * * * be made during a deposition, they ordinarily should be limited to * * * objections on grounds that might be immediately obviated, removed, or cured, such as to the form of a question or the responsiveness of an answer * * *. Directions to a deponent not to answer a question can be even more disruptive than objections.''); D. Col. L. Civ. R. 30.3(A) (Sanctions for Abusive Deposition Conduct); S.D. Ind. LR 30.1(b) (Private Conference with Deponent), E.D.N.Y. L. Civ. R. 30.6 (Conferences Between Deponent and Defending Attorney); S.D.N.Y. L. Civ. R. 30.6 (Conferences Between Deponent and Defending Attorney); M.D.N.C., LR 204(b); (Differentiated Case Management and Discovery); N.D. Ohio LR 30.1(b); D. Or. LR 30–5; D. Wyo. LR 30 (Depositions Upon Oral Examination).

count to 5,000 words. The Commission agrees that a 5,000 word limit would still promote an efficient process for petitions to limit or quash while providing a party ample opportunity to address the issues raised in its petition. The Commission therefore incorporates this suggestion.

Proposed paragraph (a)(3) establishes a procedure in instances where the hearing official elects to recess and reconvene an investigational hearing to continue a line of questioning that was interrupted by a witness's privilege objection. The provisions of paragraph 2.10(a)(3) expressly allow the hearing official to recess the hearing and give the witness an opportunity to challenge the reconvening of the hearing by filing a petition to limit or quash the Commission's compulsory process directing his or her initial appearance. Kelley Drye suggested that the Commission replace the five-day deadline for filing a petition with the more inexact phrase ''within a reasonable time.'' [47] Proposed paragraph (a)(3), however, provides more clarity, and will further promote efficiency in Part 2 investigations by foreclosing protracted discussions about what constitutes ''a reasonable time'' to address protected status issues raised during depositions or investigational hearings. Finally, the Commission notes, in reply to another comment from Kelley Drye, that the five-day deadline is computed by counting only business days, in accordance with Commission Rule 4.3(a).[48] This paragraph is adopted as modified.

Proposed paragraph (a)(4) clarified that Commission staff may provide the Commission with a response to the petition to limit or quash without serving the petitioner. The Section and Kelley Drye each commented that any response by staff should be served on the petitioner. The proposed revision was intended only to articulate the Commission's long-established procedure for collecting staff's input on petitions to quash. Staff recommendations regarding petitions, like other staff recommendations, are privileged, deliberative communications and often reveal details about the matter, the premature disclosure of which could reasonably be expected to interfere with the investigation. Contrary to Kelley Drye's suggestion, the President's and the Commission's transparency policy do not call for the disclosure of this information.

The Section also suggested that the Commission reevaluate Rule 2.10(d), which makes public all petitions to limit or quash and the related Commission decisions. Specifically, the Section commented that ''there is no compelling reason to reveal the identity of the respondent and the nature of the investigation during the pendency of the Part 2 investigation.'' [49] But the Commission has previously determined that redaction of information that reveals the identity of the subject of a nonpublic investigation would ''impair the public's ability to assess and understand these important rulings.'' [50] The Commission continues to believe that publication of past proceedings will guide future petitioners and provide predictability to the determination process. Therefore, the Commission has a compelling reason to continue its well-established practice of making petitions to limit or quash generally available unless a particularized showing is made that confidentiality should be granted pursuant to Rule 4.9(c). Accordingly, the Commission declines to adopt the Section's suggested changes.

The other proposed changes to Rule 2.10 established a time limit for disposition for review of petitions by the entire Commission, and stay the time for compliance with compulsory process. The Commission did not receive comments on the former proposal, but notes by way of clarification that any failure to meet the deadline imposed by Rule 2.10(c) will result in neither the automatic grant, nor the automatic denial, of a petition. No comments were received on the latter proposal, and both proposals are adopted with some revisions intended to clarify the proposed rule text. [51]

Section 2.11: Withholding Requested Material

The Commission proposed Rule 2.11 to set out the specific information required in privilege logs submitted in Part 2 investigations.[52] The objective of the proposed specifications, and those in the further revised rule, adopted in this notice, is to encourage parties to withhold only materials that qualify for a protected status, as that term is defined at Rule 2.7(a)(4),[53] and to provide a basis for staff to analyze whether documents withheld on privilege grounds do, in fact, satisfy the legal requirements for the applicable privilege.

Several commenters suggested generally that the Commission adopt the more flexible privilege log rules that it has implemented for administrative adjudications conducted under Part 3, which are modeled on the FRCP, or the procedures that it has implemented for HSR second requests.[54] However, there are factors specific to Part 2 proceedings that often make protected status claims difficult to assess and resolve efficiently. As explained in the NPRM, the Part 2 rule must contain more specific requirements than the rules applicable to Part 3 because there is no neutral Administrative Law Judge available in Part 2 proceedings to analyze the sufficiency of the log. At present, the Commission's sole recourse in a Part 2 investigation is to file an enforcement action in federal court. Similarly, the nature of HSR second requests and attendant statutory deadlines create an environment where staff and respondents can more readily address and resolve issues of protected status.

Nevertheless, upon consideration of the various comments about these specifications, the Commission has modified proposed paragraph (a) to reduce the burdens placed on process recipients without sacrificing the quality of the privilege logs submitted. For example, although the Commission is modifying the proposed rule to require that the log be submitted in searchable electronic format, the proposed rule has also been amended to permit respondents to append a legend to the log enabling them to more conveniently identify the titles, addresses, and affiliations of authors, recipients, and persons copied on the material. The legend can be used in lieu of providing that information for each document. The paragraph also allows respondents to more conveniently identify authors or recipients acting in their capacity as attorneys by identifying them with an asterisk in the privilege log.

Furthermore, the Commission acknowledges the suggestion from commenters such as Kelley Drye [55] that providing the number of pages or bytes of a withheld document would be too burdensome. At the same time, the

[47] Kelley Drye Comment at 14.

[48] Rule 4.3(a) provides that time periods of seven days or less exclude weekends and holidays.

[49] Section Comment at 6.

[50] 42 FR 64135 (1977).

[51] The Commission is also updating the cross-references in Rules 4.2 and 4.9 to reflect the new numbering of the petition to quash rule.

[52] The previous requirements for privilege logs were in Rule 2.8A.

[53] '''Protected status' refers to information or material that may be withheld from production or disclosure on the grounds of any privilege, work product protection, or statutory exemption.'' 16 CFR 2.7(a)(4).

[54] *See, e.g.,* Crowell Comment at 8–10; Kelley Drye Comment at 20; Section Comment at 6.

[55] *See* Kelley Drye Comment at 17.

Commission likewise recognizes that a privilege log must also contain control numbers in order for the parties to clearly and efficiently communicate with one another about the privilege claims asserted (including at the meet-and-confer session). Without control numbers, it would be difficult or infeasible to identify the precise documents under discussion. Thus, the Commission has determined to require document control numbers for withheld material, but will not require parties to provide document size information in a privilege log.

The Commission further modified paragraph (a) to require that respondents include document names in the privilege log. This codification of standard practice will allow staff to quickly identify the nature and source of the document. Finally, the modified paragraph includes a requirement that privilege logs contain the email address, if any, from which and to which documents were sent. This will enable staff to determine whether, and to what extent, authors, recipients, and persons copied on the material used non-secure email systems to access allegedly protected material.

Parties should bear in mind that, as provided in paragraph (b), staff may relax or modify the specifications of paragraph (a), in appropriate situations, and as the result of any agreement reached during the meet and confer session. Under certain circumstances, less detailed requirements (for example, allowing documents to be described by category) may suffice to assess claims of protected status. This revision is designed to encourage cooperation and discussion among parties and staff regarding privilege claims. Consistent with existing practices, the Commission also codified in this rule its existing authority to provide that failure to comply with the rule shall constitute noncompliance subject to Rule 2.13(a). Paragraph (b) elicited no comments and is adopted as modified.

Paragraph (c) of the proposed rule addresses an issue that has arisen in some investigations wherein targets of Part 2 investigations, in contravention of the instructions accompanying process, redacted numerous documents that were not claimed to qualify for any protected status. Paragraph (c) codifies the Commission's routine instructions by explicitly providing that responsive material for which no protected status claim has been asserted must be produced without redaction. The Commission has modified the proposed paragraph to replace the term ''privilege or protection'' with the more general term ''protected status'' to comport with the revised definition of ''protected status'' in Rule 2.7(a)(4), and to better account for all categories of protected status claims available to respondents.[56] No comments were received, and the paragraph is adopted with one modification intended to clarify the proposed rule text.

Proposed paragraph (d) follows recent changes in the Commission's Part 3 Rules and Fed. R. Evid. 502 regarding the return or destruction of inadvertently disclosed material, and the standard for subject matter waiver. Crowell & Moring supported this proposal, commenting that ''the non-waiver provisions reduce risk to recipients of compulsory process, and greatly facilitate the ability of recipients to take advantage of advanced technologies that can significantly reduce the overall costs of compliance.'' [57] The Commission received no other comments about this paragraph and it is adopted with one non-substantive modification.

Section 2.13: Noncompliance With Compulsory Process

Proposed paragraph (b)(3) expedited the Commission's Hart-Scott-Rodino second request enforcement process by delegating to the General Counsel the authority to initiate enforcement proceedings for noncompliance with a second request under 15 U.S.C. 18a(g)(2) (''(g)(2) actions''). This change would enable the General Counsel to file (g)(2) actions quickly and without the need for a formal recommendation by staff to the Commission, and a subsequent Commission vote. Proposed Rule 2.13(b) also authorized the General Counsel to initiate an enforcement action in connection with noncompliance of a Commission order requiring access. In addition, the proposed rule clarified that the General Counsel is authorized to initiate compulsory process enforcement proceedings when he or she deems enforcement proceedings to be the appropriate course of action.

Kelley Drye and the Section both offered criticism of this proposed rearticulation of the General Counsel's authority. Specifically, the Section wrote that ''[t]he decision to initiate litigation should not, in the Section's view, be subject to an advance delegation but should be the result of Commission consideration of specific facts and other circumstances in each particular case.'' [58] In response, the Commission notes that Rule 2.13(b) does not establish a firewall or otherwise discourage communication between the Commission, Bureau staff conducting the investigation, and the General Counsel. As with many of the rules adopted today, this provision simply reflects longstanding agency procedure. The Commission notes that neither the Commission nor the General Counsel works in a vacuum regarding these matters. To underscore this point, the Commission has modified paragraph (b)(3) to provide that the General Counsel shall provide the Commission with at least two days' notice before initiating an action under that paragraph. The rule is adopted with that modification and a revision to paragraph (b)(1), which clarifies the General Counsel's authority to enforce compulsory process against a party that breaches any modification.

Section 2.14: Disposition

The Commission proposed to revise Rule 2.14 to relieve the subjects of FTC investigations and third parties of any obligation to preserve documents after one year passes with no written communication from the Commission or staff.[59] The Commission proposed this revision in response to recipients of compulsory process who reported that they often did not know when they were relieved of any obligation to retain information or materials for which neither the agency nor they have any use. Such recipients were not inclined to inquire about the status of an investigation for fear of renewed agency attention. The proposed revision relieves compulsory process recipients of any obligation to preserve documents if twelve months pass with no written communication from the Commission or staff. However, the revision does not lift any obligation that parties may have to preserve documents for investigations by other government agencies, or for litigation.

Commenters were generally supportive of these proposed revisions, although the Section and Kelley Drye asked that the Commission consider providing for a formal presumption that a matter has closed after the one-year period has passed. While the Commission recognizes that parties may, in certain circumstances, be reluctant to contact staff to inquire

[56] The modifications to Rule 2.7(a)(4) and Rule 2.11(c) are representative of several technical revisions that the Commission has made to the proposed rules. Another example is the modification of Rules 2.7 and 2.9 to replace the term ''Commission Investigator,'' which has a separate meaning under Rule 2.5, with the term ''hearing official.''

[57] Crowell & Moring Comment at 3.

[58] Section Comment at 7.

[59] In the final Rule, the Commission is also extending this relief to recipients of a preservation demand.

about the status of a seemingly dormant investigation, it is unclear how such a ''formal presumption'' that a matter has closed would work in practice. Furthermore, the release of document preservation obligations strikes the appropriate balance between fairness to compulsory process recipients and staff's ability to conduct long-term investigations. Finally, Crowell & Moring urged the Commission to affirmatively notify targets of compulsory process when an investigation is closed. The Commission notes that, like each of the foregoing proposed rules, Rule 2.14 is not intended to discourage interaction and transparency during the Part 2 investigatory process. Consequently, wherever feasible, staff will continue to keep open lines of communication in all stages of an investigation. The rule is adopted with some modifications intended to clarify the proposed language.

Section 4.1: Reprimand, Suspension, or Disbarment of Attorneys

The proposed rule provided additional clarity regarding standards of conduct for attorneys practicing before the Commission. In addition, the proposed rule established a framework for evaluating allegations of misconduct by attorneys practicing before the Commission. Under the proposed rule, allegations of misconduct would be submitted on a confidential basis to designated officers within the Bureaus of Competition or Consumer Protection who would assess the allegations to determine if they warranted further review by the Commission. After completing its review and evaluation of the Bureau Officer's assessment, the proposed rule provided for the Commission to initiate proceedings for disciplinary action where warranted. If the Commission determined that a full administrative disciplinary proceeding would be warranted to consider potential sanctions including reprimand, suspension, or disbarment, the Commission would serve an order to show cause on the respondent and assign the matter to an Administrative Law Judge.[60] The proposed rule also granted the Administrative Law Judge the necessary powers to oversee fair and expeditious attorney disciplinary proceedings.

The Commission also proposed a process for issuance of attorney reprimands without a hearing in appropriate circumstances. After affording a respondent attorney notice and an opportunity to respond to allegations of misconduct during the Bureau Officer's investigation, the Commission could issue a public reprimand if it determined on the basis of the evidence in the record and the attorney's response that the attorney had engaged in professional misconduct warranting a reprimand. The proposed rule also established expedited procedures to allow the Commission to suspend an attorney temporarily after receiving official notice from a state bar that the attorney has been suspended or disbarred by that authority, pending a full disciplinary proceeding to assess the need for permanent disbarment from practice before the Commission.

As noted previously, the Commission received three comments addressing the proposed revisions to Rule 4.1(e) from the Section, AFSA, and an individual commenter. Upon consideration of these comments and its own review of the existing and proposed rules, the Commission is announcing several modifications to the proposed rules, which are addressed in detail below.

A. Need for Revisions

The Section questioned the need for revisions to Rule 4.1(e), noting that the Commission already has the power to sanction attorneys under Rule 4.1(e) or refer charges of attorney misconduct to local bar authorities.[61] Rather than adopting the proposed changes to this rule, the Section suggested that the Commission should convene a working group of stakeholders to consider more limited changes to the rule.[62] AFSA also suggested that the Commission's current rules are sufficient to address attorney discipline.[63] In contrast, an individual commenter applauded the Commission for proposing a rule that provides greater clarity regarding the procedures that will be employed to investigate and adjudicate allegations of attorney misconduct.[64]

After reviewing these comments, the Commission has determined that the proposed rule revisions are warranted in order to address what have sometimes appeared to be dilatory and obstructionist practices by attorneys that have undermined the efficiency and efficacy of Commission investigations. Counsel for witnesses have sometimes taken advantage of the rule's lack of clarity during investigational hearings and depositions by repeating objections, excessively consulting with their clients during the proceedings, and otherwise employing arguably obstructionist tactics.[65] In addition, the complexity of producing ESI may create an incentive for parties to engage in obstructionist or dilatory conduct that could interfere with the appropriate resolution of Commission investigations.[66] In some cases, such conduct by an attorney could violate prevailing standards of professional conduct, as discussed below.[67]

In addition, the Commission has concluded that the proposed revisions will benefit attorneys practicing before the Commission by providing clearer guidance regarding appropriate standards of conduct. Although Rule 4.1(e) previously contained a general proscription against conduct that violates the standards of professional responsibility adopted by state bars or other conduct warranting disciplinary action, the revised rule more clearly describes the type of misconduct that may result in disciplinary action. The revised rule also provides greater transparency regarding the procedures that the Commission will use to adjudicate allegations of attorney misconduct.[68] This increased transparency furthers due process in the adjudication of allegations of misconduct.[69]

B. Prohibition of ''Obstructionist, Contemptuous, or Unprofessional'' Conduct

The Commission proposed paragraph 4.1(e)(1)(iii) to clarify that attorneys who engage in conduct that is ''obstructionist, contemptuous, or unprofessional,'' may be subject to discipline under the rule. The Section suggests that this provision ''presents potential due process concerns and leaves the Commission with essentially unfettered discretion to reprimand, suspend, or disbar attorneys.'' [70]

The Commission has determined to retain this provision, which provides

[60] In the alternative, the proposed rule provided for the Commission to preside over the matter in the first instance or assign one or more members of the Commission to sit as Administrative Law Judges in a matter.

[61] Section Comment at 1, 7.

[62] *Id.* at 7–8.

[63] AFSA Comment at 1.

[64] Kristen Sweet Comment at 2.

[65] *See e.g.*, 77 FR at 3192–94.

[66] *See, e.g.*, Dan H. Willoughby, Jr. *et al., Sanctions for E-Discovery Violations: By the Numbers,* 60 Duke L.J. 789 (2010).

[67] *See, e.g.*, Ralph C. Losey, *Lawyers Behaving Badly: Understanding Unprofessional Conduct in e-Discovery,* 60 *Mercer L.Rev.* 983 (2009).

[68] The revised rule also clarifies that investigations and show cause proceedings under the rule will be nonpublic until the Commission orders otherwise or schedules an administrative hearing. Administrative hearings on an order to show cause, and any oral argument on appeal of the Administrative Law Judge's decision, will be public unless otherwise ordered by the Commission or an Administrative Law Judge. *See* Rule 4.1(e)(5)(vii).

[69] *See infra* Section II.D.

[70] Section Comment at 7; *see also* AFSA Comments at 4; Kristen Sweet Comment at 2.

enhanced guidance to practicing attorneys regarding the type of conduct that may warrant sanctions under the rule. Previously, Rule 4.1(e) defined attorney misconduct by reference to state bar professional responsibility standards, providing that ''attorneys practicing before the Commission shall conform to the standards of ethical conduct required by the bars of which the attorneys are members.'' 16 CFR 4.1(e). In addition, the rule authorized the Commission to discipline attorneys in other cases if it determined an attorney was ''otherwise guilty of misconduct warranting disciplinary action.'' *Id.*

The revised rule's prohibition of contemptuous, obstructionist, or unprofessional conduct provides clearer guidance and is consistent with standards of conduct already adopted by federal agencies including the Commission. The Commission's rules governing investigations and adjudications already prohibit such conduct during Commission proceedings. Prior to the current revisions, the Commission's Part 2 rules explicitly prohibited ''dilatory, obstructionist, or contumacious conduct'' and ''contemptuous language'' during Commission investigations.[71] As a part of this revision, the Commission's Part 2 rules have been revised to clarify that hearing officials have authority to prevent or restrain disorderly or obstructionist conduct during investigations.[72] Similarly, the Commission's rules governing adjudicative proceedings prohibit such conduct during administrative adjudications.[73] Accordingly, revised Rule 4.1(e)'s prohibition against ''contemptuous, obstructionist, and unprofessional conduct'' reaffirms the existing proscription against such conduct in the Commission's rules.

In addition, the rules of practice of other federal agencies explicitly provide that contemptuous, obstructionist, and unprofessional conduct may be grounds for attorney sanctions.[74] Likewise, such conduct is prohibited by the model rules of attorney professional conduct and corresponding rules that have been adopted in jurisdictions across the country:

- *Obstructionist conduct:* The ABA Model Rules of Professional Conduct prohibit attorneys from engaging in obstructionist conduct. For example, these rules prohibit attorneys from seeking to ''unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value'' or to ''fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party.'' [75] The ABA Model Rules also define misconduct to include ''engag[ing] in conduct that is prejudicial to the administration of justice.'' [76] Comments on the DC Bar's Rule 8.4 explain that such conduct may include ''failure to cooperate with Bar Counsel'' investigating allegations of misconduct; ''failure to respond to Bar Counsel's inquiries or subpoenas''; ''failure to abide by agreements made with Bar Counsel''; ''failure to obey court orders''; and similar behavior.[77]
- *Contemptuous conduct:* The rules of professional conduct also prohibit conduct that is contemptuous and designed to disrupt discovery or adjudicatory processes. ABA Model Rule 3.5 prohibits attorneys from ''engag[ing] in conduct intended to disrupt a tribunal.'' [78] The Comments on the Model Rule note that ''[t]he duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition.'' [79]
- *Unprofessional conduct:* As the Commission explained in the NPRM, the revised rule prohibits conduct that violates appropriate standards of professional conduct and the Commission's rules.[80] For example, the Model Rules of Professional Conduct provide that attorneys have dual obligations to competently represent their clients, while expediting and protecting the integrity of the adjudicative process. To that end, attorneys must display candor when practicing before a tribunal and avoid conduct that undermines the integrity of the adjudicative process.[81] In addition, the Model Rules prohibit conduct that is merely designed to delay or burden another party.[82]

Accordingly, the revised rule clarifies attorneys' existing obligations to refrain from obstructionist, contemptuous, and unprofessional conduct when practicing before the Commission. As a result, the revised rule is consistent with the Commission's existing rules of practice as well as the rules of attorney professional conduct and the practice of other federal agencies.

C. Imputed Responsibility for Attorney Supervisors and Managers

Proposed paragraph 4.1(e)(1) provided for imputed responsibility for supervisory or managerial attorneys who direct or ratify a subordinate attorney's misconduct. The Section expressed concern with this provision, suggesting that the proposed rule could be read to provide that ''*any* 'partner' or person with 'comparable management authority' 'in the law firm in which the [violating] attorney practices' may be held responsible for the violating attorney's actions.'' [83] The Section argued that such liability would be overbroad and recommended that the proposed rule be amended to make clear that only parties who knew of the misconduct and failed to take reasonable remedial action should be held responsible for another attorney's prohibited conduct.[84]

The proposed rule is similar to the rules of professional conduct adopted by many state bars, which provide for imputed responsibility for supervisory or managerial attorneys who order or, with knowledge, ratify misconduct by their subordinates.[85] To provide greater clarity concerning the rule's scope, however, the Commission is adopting the proposed rule with modifications to make clear that the rule provides for imputed responsibility only when a supervisor or managerial attorney orders or, with knowledge, ratifies another

[71] Previous Rule 2.9.

[72] Revised Rule 2.9(b)(5).

[73] *See* 16 CFR 3.42(d) (prohibiting ''dilatory, obstructionist, or contumacious conduct'' and ''contemptuous language'' during Commission adjudications).

[74] *See, e.g.,* Federal Deposit Insurance Corporation, 12 CFR 263.94 (prohibiting *contemptuous* conduct in administrative proceedings); Department of Justice, Foreign Claims Settlement Commission of the United States, 24 CFR 1720.135 (same); Department of Housing and Urban Development, 24 CFR 1720.135 (same); Comptroller of the Currency, Department of the Treasury, 12 CFR 112.6 (providing that *obstructionist* conduct that interferes with an agency investigation or administrative proceeding may subject an attorney to sanction); Consumer Financial Protection Bureau, 12 CFR 1080.9 (same); Federal Energy Regulatory Commission, 18 CFR 1b.16 (same); Commodity Futures Trading Commission, 8 CFR 1003.104 (providing that CFTC may sanction attorneys practicing before the agency for *unethical or unprofessional c*onduct); Occupational Safety and Health Review Commission, 29 CFR 2200.104 (same); Department of the Interior, 43 CFR 1.6 (same).

[75] *Model Rules of Prof'l Conduct* R. 3.4(a), (d).

[76] *Model Rules of Prof'l Conduct* R. 8.4(d). Similarly, DC Rule of Professional Conduct 8.4(d) defines ''misconduct'' to include ''engag[ing] in conduct that seriously interferes with the administration of justice.'' *District of Columbia Bar Ass'n Rules of Prof'l Conduct* R. 8.4(d).

[77] *See District of Columbia Bar Ass'n Rules of Prof'l Conduct* R. 8.4 cmt [3]–[4].

[78] *Model Rules of Prof'l Conduct* R. 3.5(d).

[79] *Model Rules of Prof'l Conduct* R. 3.5 cmt [5]; *see also* District of Columbia Bar Association Rules of Professional Conduct, Rule 3.5(d) (''Impartiality and Decorum of Tribunal'').

[80] 77 FR at 3194.

[81] *Model Rules of Prof'l Conduct* R. 3.3.

[82] *Model Rules of Prof'l Conduct* R. 4.4(a).

[83] Section Comment at 7; AFSA Comment at 3.

[84] Section Comment at 7–8.

[85] *See, e.g., Model Rules of Prof'l Conduct R. 5.1; District of Columbia Bar Ass'n Rules of Prof'l Conduct* R. 5.1; *New York State Bar Ass'n Rules of Prof'l Conduct* R. 5.1.

attorney's conduct. For purposes of the revised rule, a lawyer with direct supervisory authority is a lawyer who has an actual supervisory role with respect to directing the conduct of other lawyers in a particular representation.

D. Due Process

Some commenters expressed concern regarding the due process protections afforded by the proposed rule.[86] The Commission finds, however, that the rule as proposed provided appropriate procedural protections to ensure a full and fair evaluation of allegations of attorney misconduct. First, the proposed rule provided for a Bureau Officer to perform an initial assessment to determine whether allegations of attorney misconduct merit further review by the Commission.[87] Second, after the Bureau Officer has completed this assessment, the Commission would review the record and make its own determination as to whether further action is warranted.[88] And, ultimately, the rule provided for a determination of the merits of the allegations by the Commission or an Administrative Law Judge.[89] Accordingly, the proposed rule provided several layers of procedural safeguards to ensure that allegations of misconduct are fully vetted and that respondent attorneys receive adequate process.

Nonetheless, the Section and AFSA expressed concern with the proposed rule's procedures for attorney reprimand without a hearing in certain circumstances. Under the rule, the Commission could issue a public reprimand if, after providing a respondent attorney notice and an opportunity to respond to allegations of misconduct during the Bureau Officer's review of the allegations, the Commission determined on the basis of the evidence in the record and the attorney's response that the attorney had engaged in professional misconduct warranting a reprimand. The Section asserted that ''even a public reprimand can have serious repercussions for a practicing attorney'' [90] and, therefore, recommended that the Commission delete this provision.[91]

Based on these concerns and its own further consideration, the Commission adopts the proposed rule with modifications. Revised paragraph (e)(5) provides for the Commission to issue an order to show cause following its examination of the results of the Bureau Officer's review when considering any disciplinary sanctions, including reprimand, suspension, or disbarment.[92] If, based on an attorney's response to the order and other evidence in the record, the Commission determines that the material facts, as to which there is no genuine dispute, show that an attorney has engaged in professional misconduct, the Commission may issue a disciplinary sanction without further process.

The opportunity for a respondent attorney to explain why disciplinary action is unwarranted in response to the order to show cause addresses the due process concerns raised by the commenters. While an attorney facing disciplinary sanctions is entitled to fair notice of the charges at issue and an opportunity to explain why he or she should not be sanctioned,[93] courts have made clear that a full evidentiary hearing is not necessary before the imposition of attorney sanctions in all cases.[94] As a result, the revised rule's procedures for affording attorneys with an opportunity to be heard in response to an order to show cause provides appropriate procedural protections. The order to show cause shall be accompanied by all declarations, deposition transcripts, or other evidence the staff wishes the Commission to consider in support of the allegations of misconduct. The rule also directs respondent attorneys to include all materials the Commission should consider relating to the allegations of misconduct along with his or her response to the order to show cause.

Where the attorney's response raises a genuine dispute of material fact or the Commission determines otherwise that a hearing is warranted, the revised rule provides for the Commission to order further proceedings to be presided over by the Commission, an Administrative Law Judge, or by one or more Commissioners sitting as Administrative Law Judges before imposition of any sanction. Any such disciplinary proceeding shall afford an attorney respondent with due opportunity to be heard in his or her own defense, but does not necessarily invoke the full procedures of Part 3 of the Commission's rules. The Commission will specify the nature and scope of any such hearing consistent with the Commission's interest in an expeditious proceeding and fairness to the attorney respondent. An attorney respondent may be represented by counsel during the proceeding.

AFSA also criticized the role of the ''Bureau Officer'' to investigate allegations of misconduct and refer charges to the Commission for further action where warranted.[95] AFSA expressed concern that designation of officers in the Bureaus to assess allegations of misconduct will not ensure an impartial and unbiased review of those allegations.[96] However, the revised rule provides appropriate procedural safeguards to ensure that allegations of attorney misconduct are evaluated by the Commission in an unbiased manner.

The rule provides for the Commission to make an independent assessment to determine whether further action on allegations of misconduct is warranted based on the results of the Bureau Officer's assessment. Following this review, the Commission will determine whether to institute administrative disciplinary proceedings by issuing an order to show cause to the respondent attorney or take other action, such as referral to a state bar, under the rule. Accordingly, the decision as to whether an attorney's conduct warrants discipline under the rule ultimately rests with the Commission, an Administrative Law Judge, or one or more Commissioners sitting as Administrative Law Judges, who will evaluate allegations of attorney misconduct.[97] It is well-established that

[86] Section Comment at 7; AFSA Comment at 2–3.

[87] Proposed Rule 4.1(e)(3).

[88] Proposed Rule 4.1(e)(5).

[89] Proposed Rule 4.1(e)(5).

[90] Section Comment at 8.

[91] *See* Section Comment at 8. AFSA suggests that the proposed rule could be read to provide that ''the Commission may issue a public reprimand, sua sponte based solely on the Bureau Officer's recommendation with no notice to or opportunity for the subject of the complaint to be heard.'' AFSA Comment at 4.

[92] Rule 4.1(e)(5).

[93] *See, e.g., In re Ruffalo,* 390 U.S. 544, 550 (1968); *Theard* v. *United States,* 354 U.S. 278, 282 (1957).

[94] *Muset* v. *Ishimaru,* 783 F.Supp.2d 360, 371 (E.D.N.Y. 2011) (In context of EEOC's issuance of an attorney reprimand, '' '[a]n opportunity to be heard' does not necessarily entail a formal hearing or the ability to cross-examine witnesses. A court contemplating sanctions 'need only ensure that an attorney who is potentially subject to a sanctions order has an opportunity to respond in writing to the allegations.' ''); *see also Pacific Harbor Capital, Inc.* v. *Carnival Air Lines, Inc.,* 210 F.3d 1112, 1118 (9th Cir. 2000) (upholding district court's imposition of attorney discipline without a prior hearing and finding that ''an opportunity to be heard does not require an oral or evidentiary hearing on the issue'').

[95] AFSA Comment at 4.

[96] *Id.*

[97] AFSA also criticizes the proposed rule because, it claims, ''there is no requirement that an administrative law judge will hear'' disciplinary cases. AFSA Comments at 4. However, the revised rule maintains the Commission's longstanding practice that administrative adjudications may be tried in the first instance before either an Administrative Law Judge, the Commission, or Commissioners sitting as Administrative Law Judges. *See* Rule 4.1(e)(5)(ii); *see also, e.g.,* 16 CFR 3.42(a) (''Hearings in adjudicative proceedings shall be presided over by a duly qualified Administrative

a system in which agency staff perform investigative functions, but the function of adjudication is vested in the agency head or another impartial decisionmaker, does not raise due process concerns.[98]

Finally, AFSA argued that it is unfair that allegations of misconduct by Commission employees are handled pursuant to the Commission's procedures for employee discipline or through investigations by the Office of the Inspector General.[99] However, the Commission's procedures for addressing employee misconduct, coupled with the authority of the Commission's Inspector General to investigate misconduct, provide the most appropriate means to address allegations of misconduct by Commission attorneys acting in the scope of their duties on behalf of the Commission. Employees who engage in misconduct in the course of their employment face serious potential consequences and adverse employment action, including reprimand, suspension, or dismissal, as well as investigations by the Inspector General to address administrative, civil, and criminal violations of laws and regulations. In addition, the Commission may refer employees who have engaged in misconduct to state bar authorities for further action, including reprimand or disbarment. As a result, AFSA's claim that ''the potential for unwarranted disciplinary action against attorneys practicing before the Commission would be significantly higher than those for attorneys employed by the Commission,'' *id.,* is incorrect.

III. Final Rule Revisions

List of Subjects in 16 CFR Parts 2 and 4

Administrative practice and procedure.

For the reasons set forth in the preamble, the Federal Trade Commission amends Title 16, Chapter 1, Subchapter A of the Code of Federal Regulations, parts 2 and 4, as follows:

PART 2—NONADJUDICATIVE PROCEDURES

■ 1. The authority citation for part 2 continues to read as follows:

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

■ 2. Revise § 2.2 to read as follows:

§ 2.2 Complaint or request for Commission action.

(a) A complaint or request for Commission action may be submitted via the Commission's web-based complaint site (*https://www.ftccomplaintassistant.gov/*); by a telephone call to 1–877–FTC–HELP (1–877–382–4357); or by a signed statement setting forth the alleged violation of law with such supporting information as is available, and the name and address of the person or persons complained of, filed with the Office of the Secretary in conformity with § 4.2(d) of this chapter. No forms or formal procedures are required.

(b) The person making the complaint or request is not regarded as a party to any proceeding that might result from the investigation.

(c) Where the complainant's identity is not otherwise made public, the Commission's policy is not to publish or divulge the name of a complainant except as authorized by law or by the Commission's rules. Complaints or requests submitted to the Commission may, however, be lodged in a database and made available to federal, state, local, and foreign law enforcement agencies that commit to maintain the privacy and security of the information provided. Further, where a complaint is by a consumer or consumer representative concerning a specific consumer product or service, the Commission in the course of a referral of the complaint or request, or in furtherance of an investigation, may disclose the identity of the complainant. In referring any such consumer complaint, the Commission specifically retains its right to take such action as it deems appropriate in the public interest and under any of the statutes it administers.

■ 3. Revise § 2.4 to read as follows:

§ 2.4 Investigational policy.

Consistent with obtaining the information it needs for investigations, including documentary material, the Commission encourages the just and speedy resolution of investigations. The Commission will therefore employ compulsory process when in the public interest. The Commission encourages cooperation in its investigations. In all matters, whether involving compulsory process or voluntary requests for documents and information, the Commission expects all parties to engage in meaningful discussions with staff to prevent confusion or misunderstandings regarding the nature and scope of the information and material being sought, in light of the inherent value of genuinely cooperative discovery.

■ 4. Revise § 2.6 to read as follows:

§ 2.6 Notification of purpose.

Any person, partnership, or corporation under investigation compelled or requested to furnish information or documentary material shall be advised of the purpose and scope of the investigation, the nature of the acts or practices under investigation, and the applicable provisions of law. A copy of a Commission resolution, as prescribed under § 2.7(a), shall be sufficient to give persons, partnerships, or corporations notice of the purpose of the investigation. While investigations are generally nonpublic, Commission staff may disclose the existence of an investigation to potential witnesses or other third parties to the extent necessary to advance the investigation.

■ 5. Revise § 2.7 to read as follows:

§ 2.7 Compulsory process in investigations.

(a) *In general.* When the public interest warrants, the Commission may issue a resolution authorizing the use of compulsory process. The Commission or any Commissioner may, pursuant to a Commission resolution, issue a subpoena, or a civil investigative demand, directing the recipient named therein to appear before a designated representative at a specified time and place to testify or to produce documentary material, or both, and in the case of a civil investigative demand, to provide a written report or answers to questions, relating to any matter under investigation by the Commission. For the purposes of this subpart, the term:

(1) Electronically stored information (''ESI'') means any writings, drawings, graphs, charts, photographs, sound recordings, images and other data or data compilations stored in any electronic medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form.

(2) ''Documentary material'' includes all documents, materials, and information, including ESI, within the

Law Judge or by the Commission or one or more members of the Commission sitting as Administrative Law Judges.''). Moreover, under the APA, the Commission or its members have the authority to preside over a hearing. *See* 5 U.S.C. 556(b). Accordingly, the revised rule affords appropriate procedural protections and provides for an impartial decisionmaker to adjudicate any allegations of misconduct.

[98] *Withrow* v. *Larkin,* 421 U.S. 35, 47–48 (1975); *see also FTC* v. *Cement Institute,* 333 U.S. 683, 701 (1948).

[99] *See* AFSA Comment at 3.

meaning of the Federal Rules of Civil Procedure.

(3) ''Compulsory process'' means any subpoena, CID, access order, or order for a report issued by the Commission.

(4) ''Protected status'' refers to information or material that may be withheld from production or disclosure on the grounds of any privilege, work product protection, or statutory exemption.

(b) *Civil Investigative Demands.* Civil Investigative Demands (''CIDs'') shall be the only form of compulsory process issued in investigations with respect to unfair or deceptive acts or practices under section 5(a)(1) of the Federal Trade Commission Act (hereinafter referred to as ''unfair or deceptive acts or practices'').

(1) CIDs for the production of documentary material, including ESI, shall describe each class of material to be produced with sufficient definiteness and certainty as to permit such material to be fairly identified, prescribe a return date providing a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction, and identify the Commission's custodian to whom such material shall be made available. Documentary material, including ESI, for which a CID has been issued shall be made available as prescribed in the CID. Such productions shall be made in accordance with the procedures prescribed by section 20(c)(11) of the Federal Trade Commission Act.

(2) CIDs for tangible things, including electronic media, shall describe each class of tangible thing to be produced with sufficient definiteness and certainty as to permit each such thing to be fairly identified, prescribe a return date providing a reasonable period of time within which the things so demanded may be assembled and submitted, and identify the Commission's custodian to whom such things shall be submitted. Submission of tangible things in response to a CID shall be made in accordance with the procedures prescribed by section 20(c)(12) of the Federal Trade Commission Act.

(3) CIDs for written reports or answers to questions shall propound with sufficient definiteness and certainty the reports to be produced or the questions to be answered, prescribe a return date, and identify the Commission's custodian to whom such reports or answers to questions shall be submitted. The submission of written reports or answers to questions in response to a CID shall be made in accordance with the procedures prescribed by section 20(c)(13) of the Federal Trade Commission Act.

(4) CIDs for the giving of oral testimony shall prescribe a date, time, and place at which oral testimony shall commence, and identify the hearing official and the Commission custodian. Oral testimony in response to a CID shall be taken in accordance with the procedures set forth in section 20(c)(14) of the Federal Trade Commission Act.

(c) *Subpoenas.* Except in investigations with respect to unfair or deceptive acts or practices, the Commission may require by subpoena the attendance and testimony of witnesses and the production of documentary material relating to any matter under investigation. Subpoenas for the production of documentary material, including ESI, shall describe each class of material to be produced with sufficient definiteness and certainty as to permit such material to be fairly identified, prescribe a return date providing a reasonable period of time for production, and identify the Commission's custodian to whom such material shall be made available. A subpoena may require the attendance of the witness or the production of documentary material at any place in the United States.

(d) *Special reports.* Except in investigations regarding unfair or deceptive acts or practices, the Commission may issue an order requiring a person, partnership, or corporation to file a written report or answers to specific questions relating to any matter under investigation, study or survey, or under any of the Commission's reporting programs.

(e) *Commission orders requiring access.* Except in investigations regarding unfair or deceptive acts or practices, the Commission may issue an order requiring any person, partnership, or corporation under investigation to grant access to their files, including electronic media, for the purpose of examination and to make copies.

(f) *Investigational hearings.* (1) Investigational hearings may be conducted in the course of any investigation undertaken by the Commission, including rulemaking proceedings under subpart B of part 1 of this chapter, inquiries initiated for the purpose of determining whether a respondent is complying with an order of the Commission or to monitor performance under, and compliance with, a decree entered in suits brought by the United States under the antitrust laws, the development of facts in cases referred by the courts to the Commission as a master in chancery, and investigations made under section 5 of the Webb-Pomerene (Export Trade) Act.

(2) Investigational hearings shall be conducted by one or more Commission employees designated for the purpose of hearing the testimony of witnesses (the ''hearing official'') and receiving documents and information relating to any subject under investigation. Such hearings shall be under oath or affirmation, stenographically recorded, and the transcript made a part of the record of the investigation. The Commission may, in addition, employ other means to record the hearing.

(3) Unless otherwise ordered by the Commission, investigational hearings shall not be public. For investigational hearings conducted pursuant to a CID for the giving of oral testimony, the hearing official shall exclude from the hearing room all persons other than the person being examined, counsel for the person being examined, Commission staff, and any stenographer or other person recording such testimony. A copy of the transcript shall promptly be forwarded by the hearing official to the Commission custodian designated under § 2.16 of this part. At the discretion of the hearing official, and with the consent of the person being examined (or, in the case of an entity, its counsel), persons other than Commission staff, court reporters, and the hearing official may be present in the hearing room.

(g) *Depositions.* Except in investigations with respect to unfair or deceptive acts or practices, the Commission may order by subpoena a deposition pursuant to section 9 of the Federal Trade Commission Act, of any person, partnership, or corporation, at any stage of an investigation. The deposition shall take place upon notice to the subjects of the investigation, and the examination and cross-examination may proceed as they would at trial. Depositions shall be conducted by a hearing official, for the purpose of hearing the testimony of witnesses and receiving documents and information relating to any subject under investigation. Depositions shall be under oath or affirmation, stenographically recorded, and the transcript made a part of the record of the investigation. The Commission may, in addition, employ other means to record the deposition.

(h) *Testimony from an entity.* Where Commission compulsory process requires oral testimony from an entity, the compulsory process shall describe with reasonable particularity the matters for examination and the entity must designate one or more officers, directors, or managing agents, or designate other

persons who consent, to testify on its behalf. Unless a single individual is designated by the entity, the entity must designate in advance and in writing the matters on which each designee will testify. The persons designated must testify about information known or reasonably available to the entity and their testimony shall be binding upon the entity.

(i) *Inspection, copying, testing, and sampling of documentary material, including electronic media.* The Commission, through compulsory process, may require the production of documentary material, or electronic media or other tangible things, for inspection, copying, testing, or sampling.

(j) *Manner and form of production of ESI.* When Commission compulsory process requires the production of ESI, it shall be produced in accordance with the instructions provided by Commission staff regarding the manner and form of production. All instructions shall be followed by the recipient of the process absent written permission to the contrary from a Commission official identified in paragraph (l) of this section. Absent any instructions as to the form for producing ESI, ESI must be produced in the form or forms in which it is ordinarily maintained or in a reasonably usable form.

(k) *Mandatory pre-petition meet and confer process.* Unless excused in writing or granted an extension of no more than 30 days by a Commission official identified in paragraph (l) of this section, a recipient of Commission compulsory process shall meet and confer with Commission staff within 14 days after receipt of process or before the deadline for filing a petition to quash, whichever is first, to discuss compliance and to address and attempt to resolve all issues, including issues relating to protected status and the form and manner in which claims of protected status will be asserted. The initial meet and confer session and all subsequent meet and confer sessions may be in person or by telephone. The recipient must make available personnel with the knowledge necessary for resolution of the issues relevant to compliance with compulsory process. Such personnel could include individuals knowledgeable about the recipient's information or records management systems, individuals knowledgeable about other relevant materials such as organizational charts, and persons knowledgeable about samples of material required to be produced. If any issues relate to ESI, the recipient shall have a person familiar with its ESI systems and methods of retrieval participate in the meeting. The Commission will not consider petitions to quash or limit absent a pre-filing meet and confer session with Commission staff and, absent extraordinary circumstances, will consider only issues raised during the meet and confer process.

(l) *Delegations regarding CIDs and subpoenas.* The Directors of the Bureau of Competition, Consumer Protection, or Economics, their Deputy Directors, the Assistant Directors of the Bureaus of Competition and Economics, the Associate Directors of the Bureau of Consumer Protection, the Regional Directors, and the Assistant Regional Directors are all authorized to modify and, in writing, approve the terms of compliance with all compulsory process, including subpoenas, CIDs, reporting programs, orders requiring reports, answers to questions, and orders requiring access. If a recipient of compulsory process has demonstrated satisfactory progress toward compliance, a Commission official identified in this paragraph may, at his or her discretion, extend the time for compliance with Commission compulsory process. The subpoena power conferred by section 329 of the Energy Policy and Conservation Act (42 U.S.C. 6299) and section 5 of the Webb-Pomerene (Export Trade) Act (15 U.S.C. 65) are specifically included within this delegation of authority.

§ 2.8 [Removed and Reserved]

■ 6. Remove and reserve § 2.8.

§ 2.8A [Removed]

■ 7. Remove § 2.8A.

■ 8. Revise § 2.9 to read as follows:

§ 2.9 Rights of witnesses in investigations.

(a) Any person compelled to submit data to the Commission or to testify in a deposition or investigational hearing shall be entitled to retain a copy or, on payment of lawfully prescribed costs, procure a copy of any document submitted, and of any testimony as stenographically recorded, except that in a nonpublic hearing the witness may for good cause be limited to inspection of the official transcript of the testimony. Upon completion of transcription of the testimony, the witness shall be offered an opportunity to read the transcript. Any changes by the witness shall be entered and identified upon the transcript by the hearing official, together with a statement of the reasons given by the witness for requesting such changes. After the changes are entered, the transcript shall be signed by the witness unless the witness cannot be found, is ill and unavailable, waives in writing his or her right to sign, or refuses to sign. If the transcript is not signed by the witness within 30 days of having been afforded a reasonable opportunity to review it, the hearing official shall sign the transcript and state on the hearing record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with any reasons given for the failure to sign, as prescribed by section 20(c)(14)(E)(ii) of the Federal Trade Commission Act.

(b) Any witness compelled to appear in person in a deposition or investigational hearing may be accompanied, represented, and advised by counsel, as follows:

(1) In depositions or investigational hearings conducted pursuant to section 9 of the Federal Trade Commission Act, counsel may not consult with the witness while a question directed to a witness is pending, except with respect to issues involving protected status.

(2) Any objection during a deposition or investigational hearing shall be stated concisely on the hearing record in a nonargumentative and nonsuggestive manner. Neither the witness nor counsel shall otherwise object or refuse to answer any question. Following an objection, the examination shall proceed and the testimony shall be taken, except for testimony requiring the witness to divulge information protected by the claim of protected status. Counsel may instruct a witness not to answer only when necessary to preserve a claim of protected status.

(3) The hearing official may elect to recess the deposition or investigational hearing and reconvene the deposition or hearing at a later date to continue a course of inquiry interrupted by any objection made under paragraph (b)(1) or (2) of this section. The hearing official shall provide written notice of the date of the reconvened deposition or hearing to the witness, which may be in the form of an email or facsimile. Failure to reappear or to file a petition to limit or quash in accordance with § 2.10 of this part shall constitute noncompliance with Commission compulsory process for the purposes of a Commission enforcement action under § 2.13 of this part.

(4) In depositions or investigational hearings, immediately following the examination of a witness by the hearing official, the witness or his or her counsel may on the hearing record request that the hearing official permit the witness to clarify any answers. The grant or denial of such request shall be within the discretion of the hearing official and would ordinarily be granted

except for good cause stated and explained on the hearing record, and with an opportunity for counsel to undertake to correct the expressed concerns of the hearing official or otherwise to reply.

(5) The hearing official shall conduct the deposition or investigational hearing in a manner that avoids unnecessary delay, and prevents and restrains disorderly or obstructionist conduct. The hearing official shall, where appropriate, report pursuant to § 4.1(e) of this chapter any instance where an attorney, in the course of the deposition or hearing, has allegedly refused to comply with his or her directions, or has allegedly engaged in conduct addressed in § 4.1(e). The Commission may take any action as circumstances may warrant under § 4.1(e) of this chapter.

■ 9. Revise § 2.10 to read as follows:

§ 2.10 Petitions to limit or quash Commission compulsory process.

(a) *In general.* (1) *Petitions.* Any petition to limit or quash any compulsory process shall be filed with the Secretary within 20 days after service of the Commission compulsory process or, if the return date is less than 20 days after service, prior to the return date. Such petition shall set forth all assertions of protected status or other factual and legal objections to the Commission compulsory process, including all appropriate arguments, affidavits, and other supporting documentation. Such petition shall not exceed 5,000 words, including all headings, footnotes, and quotations, but excluding the cover, table of contents, table of authorities, glossaries, copies of the compulsory process order or excerpts thereof, appendices containing only sections of statutes or regulations, the statement required by paragraph (a)(2) of this section, and affidavits and other supporting documentation. Petitions to limit or quash that fail to comply with these provisions shall be rejected by the Secretary pursuant to § 4.2(g) of this chapter.

(2) *Statement.* Each petition filed pursuant to paragraph (a)(1) of this section shall be accompanied by a signed separate statement representing that counsel for the petitioner has conferred with Commission staff pursuant to § 2.7(k) of this part in an effort in good faith to resolve by agreement the issues raised by the petition and has been unable to reach such an agreement. If some of the issues in controversy have been resolved by agreement, the statement shall, in a nonargumentative manner, specify the issues so resolved and the issues remaining unresolved. The statement shall recite the date, time, and place of each conference between counsel, and the names of all parties participating in each such conference. Failure to include the required statement may result in a denial of the petition.

(3) *Reconvened investigational hearings or depositions.* If the hearing official elects pursuant to § 2.9(b)(3) of this part to recess the investigational hearing or deposition and reconvene it at a later date, the witness compelled to reappear may challenge the reconvening by filing with the Secretary a petition to limit or quash the reconvening of the hearing or deposition. Such petition shall be filed within 5 days after receiving written notice of the reconvened hearing; shall set forth all assertions of protected status or other factual and legal objections to the reconvening of the hearing or deposition, including all appropriate arguments, affidavits, and other supporting documentation; and shall be subject to the word count limit in paragraph (a)(1) of this section. Except for good cause shown, the Commission will not consider issues presented and ruled upon in any earlier petition filed by or on behalf of the witness.

(4) *Staff reply.* Commission staff may, without serving the petitioner, provide the Commission a statement that shall set forth any factual and legal response to the petition to limit or quash.

(5) *Extensions of time.* The Directors of the Bureaus of Competition, Consumer Protection, and Economics, their Deputy Directors, the Assistant Directors of the Bureaus of Competition and Economics, the Associate Directors of the Bureau of Consumer Protection, the Regional Directors, and the Assistant Regional Directors are delegated, without power of redelegation, the authority to rule upon requests for extensions of time within which to file petitions to limit or quash Commission compulsory process.

(b) *Stay of compliance period.* The timely filing of a petition to limit or quash any Commission compulsory process shall stay the remaining amount of time permitted for compliance as to the portion or portions of the challenged specifications or provisions. If the petition is denied in whole or in part, the ruling by the Commission shall specify new terms for compliance, including a new return date, for the Commission's compulsory process.

(c) *Disposition and review.* The Commission will issue an order ruling on a petition to limit or quash within 30 days after the petition is filed with the Secretary. The order may be served on the petitioner via email, facsimile, or any other method reasonably calculated to provide notice to the petitioner of the order.

(d) *Public disclosure.* All petitions to limit or quash Commission compulsory process and all Commission orders in response to those petitions shall become part of the public records of the Commission, except for information granted confidential treatment under § 4.9(c) of this chapter.

■ 10. Revise § 2.11 to read as follows:

§ 2.11 Withholding requested material.

(a)(1) Any person withholding information or material responsive to an investigational subpoena, CID, access order, or order to file a report issued pursuant to § 2.7 of this part, or any other request for production of material issued under this part, shall assert a claim of protected status, as that term is defined in § 2.7(a)(4), not later than the date set for the production of the material. The claim of protected status shall include a detailed log of the items withheld, which shall be attested by the lead attorney or attorney responsible for supervising the review of the material and who made the determination to assert the claim. A document, including all attachments, may be withheld or redacted only to the extent necessary to preserve any claim of protected status. The information provided in the log shall be of sufficient detail to enable the Commission staff to assess the validity of the claim for each document, including attachments, without disclosing the protected information. The failure to provide information sufficient to support a claim of protected status may result in a denial of the claim. Absent an instruction as to the form and content of the log, the log shall be submitted in a searchable electronic format, and shall, for each document, including attachments, provide:

(i) Document control number(s);

(ii) The full title (if the withheld material is a document) and the full file name (if the withheld material is in electronic form);

(iii) A description of the material withheld (for example, a letter, memorandum, or email), including any attachments;

(iv) The date the material was created;

(v) The date the material was sent to each recipient (if different from the date the material was created);

(vi) The email addresses, if any, or other electronic contact information to the extent used in the document, from which and to which each document was sent;

(vii) The names, titles, business addresses, email addresses or other

electronic contact information, and relevant affiliations of all authors;

(viii) The names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all recipients of the material;

(ix) The names, titles, business addresses, email addresses or other electronic contact information, and relevant affiliations of all persons copied on the material;

(x) The factual basis supporting the claim that the material is protected (for example, that it was prepared by an attorney rendering legal advice to a client in a confidential communication, or prepared by an attorney in anticipation of litigation regarding a specifically identified claim); and

(xi) Any other pertinent information necessary to support the assertion of protected status by operation of law.

(2) Each attorney who is an author, recipient, or person copied on the material shall be identified in the log by an asterisk. The titles, business addresses, email addresses, and relevant affiliations of all authors, recipients, and persons copied on the material may be provided in a legend appended to the log. However, the information required by paragraph (a)(1)(vi) of this section shall be provided in the log.

(b) A person withholding responsive material solely for the reasons described in paragraph (a) of this section shall meet and confer with Commission staff pursuant to § 2.7(k) of this part to discuss and attempt to resolve any issues associated with the manner and form in which privilege or protection claims will be asserted. The participants in the meet and confer session may agree to modify the logging requirements set forth in paragraph (a) of this section. The failure to comply with paragraph (a) shall constitute noncompliance subject to judicial enforcement under § 2.13(a) of this part.

(c) Unless otherwise provided in the instructions accompanying the compulsory process, and except for information or material subject to a valid claim of protected status, all responsive information and material shall be produced without redaction.

(d)(1)(i) The disclosure of material protected by the attorney-client privilege or as work product shall not operate as a waiver if:

(A) The disclosure is inadvertent;

(B) The holder of the privilege or protection took reasonable steps to prevent disclosure; and

(C) The holder promptly took reasonable steps to rectify the error, including notifying Commission staff of the claim and the basis for it.

(ii) After being so notified, Commission staff must:

(A) Promptly return or destroy the specified material and any copies, not use or disclose the material until any dispute as to the validity of the claim is resolved; and take reasonable measures to retrieve the material from all persons to whom it was disclosed before being notified; or

(B) Sequester such material until such time as an Administrative Law Judge or court may rule on the merits of the claim of privilege or protection in a proceeding or action resulting from the investigation.

(iii) The producing party must preserve the material until the claim of privilege or protection is resolved, the investigation is closed, or any enforcement proceeding is concluded.

(2) When a disclosure is made that waives attorney-client privilege or work product, the waiver extends to an undisclosed communication or information only if:

(i) The waiver is intentional;

(ii) The disclosed and undisclosed information or material concern the same subject matter; and

(iii) They ought in fairness to be considered together.

§ 2.12 [Removed and Reserved]

■ 11. Remove and reserve § 2.12.

■ 12. Revise § 2.13 to read as follows:

§ 2.13 Noncompliance with compulsory processes.

(a) In cases of failure to comply with Commission compulsory processes, appropriate action may be initiated by the Commission or the Attorney General, including actions for enforcement, forfeiture, civil penalties, or criminal sanctions. The Commission may also take any action as the circumstances may warrant under § 4.1(e) of this chapter.

(b) The General Counsel, pursuant to delegation of authority by the Commission, without power of redelegation, is authorized, when he or she deems appropriate:

(1) To initiate, on behalf of the Commission, an enforcement proceeding in connection with the failure or refusal of a recipient to comply with, or to obey, a subpoena, a CID, or an access order, if the return date or any extension thereof has passed, or if the recipient breaches any modification regarding compliance;

(2) To approve and have prepared and issued, in the name of the Commission, a notice of default in connection with the failure of a recipient of an order to file a report pursuant to section 6(b) of the Federal Trade Commission Act to timely file that report, if the return date or any extension thereof has passed; to initiate, on behalf of the Commission, an enforcement proceeding; or to request to the Attorney General, on behalf of the Commission, to initiate a civil action in connection with the failure of such recipient to timely file a report, when the return date or any extension thereof has passed;

(3) To initiate, on behalf of the Commission, an enforcement proceeding under section 7A(g)(2) of the Clayton Act (15 U.S.C. 18a(g)(2)) in connection with the failure to substantially comply with any request for the submission of additional information or documentary material under section 7A(e)(1) of the Clayton Act (15 U.S.C. 18a(e)(1)), provided that the General Counsel shall provide notice to the Commission at least 2 days before initiating such action; and

(4) To seek an order of civil contempt in cases where a court order enforcing compulsory process has been violated.

■ 13. Revise § 2.14 to read as follows:

§ 2.14 Disposition.

(a) When an investigation indicates that corrective action is warranted, and the matter is not subject to a consent settlement pursuant to subpart C of this part, the Commission may initiate further proceedings.

(b) When corrective action is not necessary or warranted in the public interest, the investigation shall be closed. The matter may nevertheless be further investigated at any time if circumstances so warrant.

(c) In matters in which a recipient of a preservation demand, an access letter, or Commission compulsory process has not been notified that an investigation has been closed or otherwise concluded, after a period of twelve months following the last written communication from the Commission staff to the recipient or the recipient's counsel, the recipient is relieved of any obligation to continue preserving information, documentary material, or evidence, for purposes of responding to the Commission's process or the staff's access letter. The ''written communication'' may be in the form of a letter, an email, or a facsimile.

(d) The Commission has delegated to the Directors of the Bureaus of Competition and Consumer Protection, their Deputy Directors, the Assistant Directors of the Bureau of Competition, the Associate Directors of the Bureau of Consumer Protection, and the Regional Directors, without power of redelegation, limited authority to close investigations.

PART 4—MISCELLANEOUS RULES

■ 14. The authority citation for part 4 continues to read as follows:

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

■ 15. Amend § 4.1 by revising paragraph (e) to read as follows:

§ 4.1 Appearances.

* * * * *

(e) *Reprimand, suspension, or disbarment of attorneys.* (1)(i) The following provisions govern the evaluation of allegations of misconduct by attorneys practicing before the Commission who are not employed by the Commission.[1] The Commission may publicly reprimand, suspend, or disbar from practice before the Commission any such person who has practiced, is practicing, or holds himself or herself out as entitled to practice before the Commission if it finds that such person:

(A) Does not possess the qualifications required by § 4.1(a);

(B) Has failed to act in a manner consistent with the rules of professional conduct of the attorney's state(s) of licensure;

(C) Has engaged in obstructionist, contemptuous, or unprofessional conduct during the course of any Commission proceeding or investigation; or

(D) Has knowingly or recklessly given false or misleading information, or has knowingly or recklessly participated in the giving of false information to the Commission or any officer or employee of the Commission.[2]

(ii) An attorney may be responsible for another attorney's violation of this paragraph (e) if the attorney orders, or with knowledge of the specific conduct, ratifies the conduct involved. In addition, an attorney who has direct supervisory authority over another attorney may be responsible for that attorney's violation of this paragraph (e) if the supervisory attorney knew of the conduct at a time when its consequences could have been avoided or mitigated but failed to take reasonable remedial action.

(2) Allegations of attorney misconduct in violation of paragraph (e)(1) of this section may be proffered by any person possessing information concerning the alleged misconduct. Any such allegations may be submitted orally or in writing to a Bureau Officer who will evaluate the sufficiency of the allegations in the first instance to determine whether further action by the Commission is warranted. The Director of the Bureau or office responsible for the matter about which the allegations are made, or the Director's designee, shall serve as the Bureau Officer.

(3) After review and evaluation of the allegations, any supporting materials, and any additional information that the Bureau Officer may acquire, the Bureau Officer, if he or she determines that further action is warranted, shall in writing notify the subject of the complaint of the underlying allegations and potential sanctions available to the Commission under this section, and provide him or her an opportunity to respond to the allegations and provide additional relevant information and material. The Bureau Officer may request that the Commission issue a resolution authorizing the use of compulsory process, and may thereafter initiate the service of compulsory process, to assist in obtaining information for the purpose of making a recommendation to the Commission whether further action may be warranted.

(4) If the Bureau Officer, after review and evaluation of the allegations, supporting material, response by the subject of the allegations, if any, and all additional available information and material, determines that no further action is warranted, he or she may close the matter if the Commission has not issued a resolution authorizing the use of compulsory process. In the event the Bureau Officer determines that further Commission action may be warranted, or if the Commission has issued a resolution authorizing the use of compulsory process, he or she shall make a recommendation to the Commission. The recommendation shall include all relevant information and material as to whether further Commission action, or any other disposition of the matter, may be warranted.

(5) If the Commission has reason to believe, after review of the Bureau Officer's recommendation, that an attorney has engaged in professional misconduct of the type described in paragraph (e)(1) of this section, the Commission may institute administrative disciplinary proceedings proposing public reprimand, suspension, or disbarment of the attorney from practice before the Commission. Except as provided in paragraph (e)(7) of this section, administrative disciplinary proceedings shall be handled in accordance with the following procedures:

(i) The Commission shall serve the respondent attorney with an order to show cause why the Commission should not impose sanctions against the attorney. The order to show cause shall specify the alleged misconduct at issue and the possible sanctions. The order to show cause shall be accompanied by all declarations, deposition transcripts, or other evidence the staff wishes the Commission to consider in support of the allegations of misconduct.

(ii) Within 14 days of service of the order to show cause, the respondent may file a response to the allegations of misconduct. If the response disputes any of the allegations of misconduct, it shall do so with specificity and include all materials the respondent wishes the Commission to consider relating to the allegations. If no response is filed, the allegations shall be deemed admitted.

(iii) If, upon considering the written submissions of the respondent, the Commission determines that there remains a genuine dispute as to any material fact, the Commission may order further proceedings to be presided over by an Administrative Law Judge or by one or more Commissioners sitting as Administrative Law Judges (hereinafter referred to collectively as the Administrative Law Judge), or by the Commission. The Commission order shall specify the nature and scope of any proceeding, including whether live testimony will be heard and whether any pre-hearing discovery will be allowed and if so to what extent. The attorney respondent shall be granted due opportunity to be heard in his or her own defense and may be represented by counsel. If the written submissions of the respondent raise no genuine dispute of material fact, the Commission may issue immediately any or all of the sanctions enumerated in the order to show cause provided for in paragraph (e)(5)(i) of this section.

(iv) Commission counsel shall be appointed by the Bureau Officer to prosecute the allegations of misconduct in any administrative disciplinary proceedings instituted pursuant to this rule.

(v) If the Commission assigns the matter to an Administrative Law Judge, the Commission will establish a deadline for an initial decision. The deadline shall not be modified by the Administrative Law Judge except that it may be amended by leave of the Commission.

(vi) Based on the entirety of the record of administrative proceedings, the

[1] The standards of conduct and disciplinary procedures under this § 4.1(e) apply only to outside attorneys practicing before the Commission and not to Commission staff. Allegations of misconduct by Commission employees will be handled pursuant to procedures for employee discipline or pursuant to investigations by the Office of Inspector General.

[2] For purposes of this rule, knowingly giving false or misleading information includes knowingly omitting material facts necessary to make any oral or written statements not misleading in light of the circumstances under which they were made.

Administrative Law Judge or the Commission if it reviews the matter in the first instance, shall issue a decision either dismissing the allegations or, if it is determined that the allegations are supported by a preponderance of the evidence, specify an appropriate sanction. An Administrative Law Judge's decision may be appealed to the Commission by either party within 30 days. If the Administrative Law Judge's decision is appealed, the Commission will thereafter issue a scheduling order governing the appeal.

(vii) Investigations and administrative proceedings prior to the hearing on the order to show cause will be nonpublic unless otherwise ordered by the Commission. Any administrative hearing on the order to show cause, and any oral argument on appeal, shall be open to the public unless otherwise ordered for good cause by the Commission or the Administrative Law Judge.

(6) Regardless of any action or determination the Commission may or may not make, the Commission may direct the General Counsel to refer the allegations of misconduct to the appropriate state, territory, or District of Columbia bar or any other appropriate authority for further action.

(7) Upon receipt of notification from any authority having power to suspend or disbar an attorney from the practice of law within any state, territory, or the District of Columbia, demonstrating that an attorney practicing before the Commission is subject to an order of final suspension (not merely temporary suspension pending further action) or disbarment by such authority, the Commission may, without resort to any of the procedures described in this section, enter an order temporarily suspending the attorney from practice before it and directing the attorney to show cause within 30 days from the date of said order why the Commission should not impose further discipline against the attorney. If no response is filed, the attorney will be deemed to have acceded to such further discipline as the Commission deems appropriate. If a response is received, the Commission may take action or initiate proceedings consistent with paragraph (e)(5) of this section before making a determination whether, and to what extent, to impose further discipline against the attorney.

(8) The disciplinary process described in this section is in addition to, and does not supersede, the authority of the Commission or an Administrative Law Judge to discipline attorneys participating in part 3 proceedings pursuant to §§ 3.24(b)(2) or 3.42(d).

§ 4.2 [Amended]

■ 16. In § 4.2, amend paragraphs (d)(2) and (d)(4), by removing the phrase ''§ 2.7(d), § 2.7(f)'' and adding in its place ''§ 2.10(a)''.

§ 4.9 [Amended]

■ 17. Amend § 4.9, by removing the phrase ''(16 CFR 2.7)'' from paragraph (b)(4) heading and the phrase '', requests for review by the full Commission of those rulings, and Commission rulings on such requests'' from paragraph (b)(4)(i).

By direction of the Commission, Commissioner Rosch dissenting.

Donald S. Clark,

Secretary.

The following will not appear in the Code of Federal Regulations.

Statement of Chairman Jon Leibowitz Regarding Revisions to the Commission's Part 2 Rules and Rule 4.1(e)

September 19, 2012

Today the Commission issued final changes to Parts 2 and 4 of the agency's Rules of Practice. The revised Rules streamline and update the procedures for Commission investigations, and clarify the agency's procedures for evaluating allegations of misconduct by attorneys practicing before the Commission, making us a more effective agency.

All of the Commission generally supports the revisions. A legitimate question has been raised, however, that the revisions to the Part 2 Rules should have gone further. One issue involves the occasional use of ''access letters,'' rather than compulsory process, to conduct Commission competition investigations. Over the past few years, the Commission has moved decisively toward greater use of compulsory process in these investigations. Compulsory process results in faster, more efficient investigations, especially in anticompetitive conduct matters where the recipients may not have strong incentives to cooperate quickly with Commission staff. Our experience has shown that, all too often, the recipients of voluntary access letters slow walk compliance. Nevertheless, while most competition investigations warrant compulsory process, and its use is strongly encouraged, it makes sense to provide staff with at least some flexibility in choosing which method to deploy in at least some investigations.

Another question that has been raised is whether the Rules should require staff to submit regular status reports to all Commissioners on pending investigations. Our staff already meets regularly with individual Commissioners and responds to any inquiries about particular matters. Moreover, our current practice is for staff to submit regular status updates to the Commission at six-month intervals. This best practice, however, is a matter of internal management that does not necessarily need to be enshrined in the Rules of Practice.

[FR Doc. 2012–23691 Filed 9–26–12; 8:45 am]

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DEPARTMENT OF EDUCATION

34 CFR Parts 668, 674, 682, and 685

Federal Student Aid Programs (Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, and the Federal Direct Loan Program)

AGENCY: Office of Postsecondary Education, Department of Education.

ACTION: Updated waivers and modifications of statutory and regulatory provisions.

SUMMARY: The Secretary is issuing updated waivers and modifications of statutory and regulatory provisions governing the Federal student financial aid programs under the authority of the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act). The HEROES Act requires the Secretary to publish, in a notice in the **Federal Register**, the waivers or modifications of statutory or regulatory provisions applicable to the student financial assistance programs under title IV of the Higher Education Act of 1965, as amended (HEA), to assist individuals who are performing qualifying military service, and individuals who are affected by a disaster, war or other military operation or national emergency, as described in the **SUPPLEMENTARY INFORMATION** section of this notice.

DATES: Effective September 27, 2012. The waivers and modifications in this document expire on September 30, 2017.

FOR FURTHER INFORMATION CONTACT: For provisions related to the title IV loan programs (Federal Perkins Loan Program, Federal Family Education Loan (FFEL) Program, and Federal Direct Loan (Direct Loan) Program): Gail McLarnon, U.S. Department of Education, 1990 K Street NW., Room 8026, Washington, DC 20006–8510. Telephone: (202) 219–7048 or by email: *Gail.McLarnon@ed.gov.* For other