

**COMMENTS OF THE ABA SECTION OF ANTITRUST LAW
IN RESPONSE TO THE FEDERAL TRADE COMMISSION'S
REQUEST FOR PUBLIC COMMENT REGARDING
PARTS 3 AND 4 RULES OF PRACTICE RULEMAKING - P072104**

November 6, 2008

The Section of Antitrust Law (Section) of the American Bar Association (ABA) is pleased to submit these comments to the Federal Trade Commission (Commission or FTC) in response to its request for public comments regarding Parts 3 and 4 Rules of Practice Rulemaking (P072104) (NPRM).¹ The views expressed herein are being presented on behalf of the Section. They have not been approved by the House of Delegates or the Board of Governors of the ABA and, accordingly, should not be construed as representing the policy of the ABA.

The Section welcomes this opportunity to respond to the request for comments from the Commission. The Section supports strong, effective antitrust enforcement and the Commission's efforts to expedite certain adjudicative proceedings, improve the quality of its adjudicative decision making, and clarify the respective roles of the Administrative Law Judge (ALJ) and the Commission in Part 3 proceedings.²

EXECUTIVE SUMMARY

At the core of many of the Commission's proposed rule changes is a desire to expand the Commission's direct involvement in, and accelerate the speed of, Part 3 litigation. This desire appears to be motivated by two concerns: (1) the risk of delay and (2) the risk of substantive error due to the perceived failure of the Part 3 system effectively to incorporate the antitrust expertise of the Commission at appropriate stages of the adjudicatory process. These are legitimate concerns.³ The Section supports the Commission's desire to expedite (in appropriate cases) and improve the quality of its Part 3 proceedings, and supports the proposed changes that further those objectives, as well as those changes that bring Part 3 rules more in line with the Federal Rules of Civil Procedure (FRCP) and Federal Rules of Evidence (FRE).

¹ 16 C.F.R. Parts 3 and 4 Rules of Practice, 70 Fed. Reg. 58832 (Oct. 7, 2008) (NPRM).

² The Section notes that the 30-day comment period does not allow adequate time to provide more complete comments. For example, although the Section recognizes that the proposed Part 3 rules apply both to antitrust and consumer protection matters, these comments are particularly focused on the impact of the proposed rules on antitrust cases and do not explicitly address consumer protection cases.

³ Increased reliance on the Commission's expertise would in general seem both beneficial and consistent with the intent of the FTC Act. Antitrust cases "often require the careful development of a factual record and a sensitive application of difficult legal principles. This takes time and expertise." Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission, 58 Antitrust L.J. 43, 120 (1989-90). As the Commission observes in its NPRM, the antitrust expertise of the Commission is a valuable resource. NPRM at 7.

The Section is concerned, however, that some of the proposed rule changes are unnecessary or seek to promote the speed and quality of Part 3 proceedings at the expense of important principles that should not be compromised. More specifically, the Section has concerns about those proposed rule changes that (1) compromise respondents' rights and ability to mount an effective defense; and (2) fail sufficiently to expedite Part 3 proceedings by not imposing a time within which the Commission should issue a final decision.

The Section's comments are organized as follows: Parts I through III discuss the Section's general comments on (1) the proposed adjudicatory process rules, (2) the proposed timing rules, and (3) the proposed discovery and evidence rules. Part IV discusses the Section's specific comments on those rules about which it has the greatest concern.

DISCUSSION

I. Proposed Adjudicatory Process Rules⁴

The proposed amendments to the adjudicatory process rules afford the Commission the opportunity to render initial decisions on a number of issues that are potentially dispositive of a particular case. Earlier Commission involvement in this manner will undoubtedly result in more efficient resolution of these issues. Moreover, it will allow the Commission to apply its antitrust expertise to matters at an earlier stage.

Delay occasioned by an erroneous ALJ decision on a dispositive motion, followed by the dismissal of the complaint, appeal to the Commission, briefing, hearing, and reversal, provides little benefit and exacts a toll on all participants in the process.⁵ The main virtue of the proposed adjudication process rule changes is that this source of delay will likely be reduced. And, given that one of the Commission's purposes in such proceedings is to provide antitrust expertise, it seems reasonable to assume that the risk of error is reduced when the Commission, rather than the ALJ, decides substantive motions. However, these changes are at the expense of other principles that merit consideration.

The FTC, like many other administrative agencies, has always had responsibility to function as an investigator-prosecutor, on the one hand, and an adjudicator, on the other. This system, in which the agency defines the scope and extent of the inquiry, issues the complaint, conducts the trial, and resolves the issues in dispute, is inherent in the agency's founding statute, the FTC Act.⁶ However, as this Section has noted, "[n]o thoughtful observer is entirely

⁴ The Section's comments on proposed rule changes to the adjudicatory process include rules: 3.12(b) and (c); 3.22(a) and (e); 3.23; 3.24; 3.26; and 3.42(a).

⁵ In *Unocal*, for example, the administrative complaint was filed on March 4, 2003. An initial decision was provided on November 25, 2003, and vacated by the Commission on July 6, 2004, with the case remanded to the ALJ for further proceedings. The case was finally withdrawn from adjudication on June 8, 2005—no new initial decision having been issued—following the conclusion of a consent order with the respondent more than twenty-seven months after the complaint was filed. See *Union Oil Co. of California*, Docket No. 9305, available at <http://www.ftc.gov/os/adjpro/d9305/>.

⁶ Federal Trade Commission Act, 15 U.S.C. §§ 41-58, as amended. This system may also have been—at least in part—a consequence of the changing vision of President Wilson during the passage of the Act, as well as the diversity of views among supporters of the legislation. See Marc Winerman, *The Origins of The FTC: Cooperation, Control, and Competition*, 71 *Antitrust L.J.* 1, 38 (2003-2004) ("When [President Wilson] proposed an investigatory

comfortable with the FTC's (or other agencies') combining of prosecutory and adjudicatory functions. Whenever the same people who issued a complaint later decide whether it should be dismissed, concern about at least the appearance of fairness is inevitable."⁷

Historically, this concern has been tempered by a significant degree of separation, both procedurally and temporally, between the Commission's performance of its duties during the investigative phase and its role as an adjudicator. During the pendency of administrative proceedings, for example, the Commission's own Rules of Practice strictly prohibit communications between persons involved in the decisional process, on the one hand, and those performing investigative or prosecutorial functions, on the other.⁸ Moreover, the extended duration of Part 3 proceedings, combined with the regular turnover of Commissioners, has tended to ensure that the Commission that votes to issue a complaint is often different from the Commission that sits in a quasi-judicial function to hear an appeal from an ALJ's initial decision.⁹

The separation of the Commission's Part 2 and Part 3 responsibilities is affected by some of the Commission's proposed rule changes. For example, the proposed revisions to Rules 3.22(a) and 3.42 would permit the Commission to rule immediately on dispositive pre-hearing motions and motions filed during the hearing. These proposed revisions, allowing the Commission to rule on certain issues as a matter of first instance, would, in some cases, likely reduce or avoid delay.¹⁰ However, they also present the prospect that respondents will be forced to address prehearing issues with the Commission shortly after the same Commission has voted in favor of issuing a complaint against the respondent without the benefit of a prior opinion authored by a party who was not involved in crafting and approving the complaint.

Similar difficulties are confronted with respect to dispositive motions made during the hearing. The prospect of a decision maker who had voted to issue the complaint presiding over the pre-hearing proceedings, and/or an entire evidentiary hearing, may avoid delay but raises concerns regarding impartiality and fairness. This would be done without the customary time lapse, without the benefit of an independent opinion and—in the case of early proceedings, at

commission in January 1914, the House adopted his proposal. When he endorsed a prosecutorial commission in June, the Senate bill and final law embraced that proposal. When he later emphasized the agency's assistive functions, his selection of Commissioners reflected that orientation." See also *id.* at 59-88 (describing the differing viewpoints regarding—and the changes in—the anticipated functions of both the Commission and § 5 of the Act).

⁷ *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 Antitrust L.J. 43, 119 (1989-90).

⁸ 32 Fed. Reg. 8,449, 8,458 (codified at 16 C.F.R. § 4.7).

⁹ See *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 Antitrust L.J. 43, 122 (1989-90) ("Given [the length of proceedings and] the regular turnover of commissioners, the unfairness argument is often only theoretical . . .").

¹⁰ Compare *Unocal* (erroneous initial decision resulting in delay) with *In the Matter of South Carolina State Board of Dentistry*, Docket 9311 Compl. at 7 (filed Dec 7, 2003) available at: <http://www.ftc.gov/os/adjpro/d9311/index.shtm>, (the Commission retained jurisdiction to resolve initial dispositive motions).

least—before a fully developed record could be created upon which to persuade the Commission to revisit an issue necessarily close in substance and time to its original adverse determination.

The proposed amendments to these rules also would afford the Commission the opportunity routinely to inject itself into prehearing case management. In addition, other proposed changes limit substantially the effect of an adverse district court decision on the Commission’s Part 3 proceeding.¹¹

Although all of this is possible under the current rules if the Commission chooses to retain jurisdiction over a matter during all or part of a Part 3 proceeding, converting the exception to the norm seems likely to exacerbate concerns about fairness and impartiality. It is unclear that such a rule change is needed. The Commission is already free to retain jurisdiction over a matter in which it believes the issues merit such a process. At a minimum, regular Commission involvement at the prehearing stage appears likely to have a measurable effect on the course of Part 3 litigation. It seems probable, for example, that motions to dismiss in particular would become rare, as such motions challenge the facial sufficiency of a complaint with inferences drawn in complaint counsel’s favor. This standard seems quite difficult to meet if the decision maker had only shortly before concluded that there was a “reason to believe” that the respondent’s conduct violated the FTC Act.¹² The practical unavailability of a motion to dismiss in Part 3 litigation would contrast sharply with antitrust litigation in federal court. This deficiency is particularly acute in the challenging, cutting-edge cases it was originally intended the FTC would investigate and decide.¹³

The proposed rules also undercut the possibility of a favorable decision by an ALJ. The ALJs are partitioned from the investigative process and provide the first fresh set of eyes to consider the issues, particularly as those issues are presented for the first time without the *ex parte* communications and other limitations of Part 2. The chance to obtain a favorable ruling from an ALJ who has not been previously involved in the investigation and decision to prosecute, perhaps for later use before a Court of Appeals, provides the parties with a sense of fairness and impartiality. Moreover, the prospect of an independent opinion regarding the merits of the preliminary motion may itself improve the quality of the Commission’s determination. The measure of this improvement will, of course, be greater where the ALJ is able to augment

¹¹ Historically, the Commission has halted Part 3 proceedings, at least temporarily, once a district court has denied its application for preliminary injunctive relief so that it may reconsider whether the administrative action remains in the public interest. This afforded the Commissioners the ability to weigh the district court’s decision and to discuss the public interest with the parties and the agency staff in a frank and fair manner, outside the confines of the Part 3 process. Under the proposed amendments to Rule 3.26, however, a Part 3 proceeding would continue unabated even after preliminary injunctive relief has been denied, thus limiting the effect of the district court’s ruling and the Commission’s ability to discuss the merits of pursuing the case with the parties.

¹² See 15 U.S.C. § 45(b) (“Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership or corporation a complaint stating its charges . . .”).

¹³ See D. Bruce Hoffman and M. Sean Royall, *Administrative Litigation at the FTC: Past, Present, and Future*, 71 Antitrust L.J. 319 (2003), and sources cited therein. If, as commentators suggest, the FTC focuses its Part 3 agenda on cases in which, *inter alia*, the legal theory being advanced is novel or uncertain or the conduct is arguably entitled to an antitrust exception, motions testing the sufficiency of the complaint might be quite valuable.

the Commission's expertise with substantive antitrust or economics experience of his or her own.¹⁴ In short, while this opportunity may not be required by the statutory framework, it does enhance the apparent objectivity of Part 3 proceedings and could improve the quality of the substantive result.

It could be argued that the Part 2 investigative process provides ample opportunity for respondents to present their arguments to the Commission. But the fact is that Part 2 is neither completely transparent to the respondents, nor does it provide the opportunity for the sharply-focused advocacy that Part 3 offers.¹⁵ Lacking access to the full range of facts on which the Commission Staff is recommending a complaint, with often imperfect insight into the nature of the legal theory on which the Staff is proceeding, and faced with the fact that, for perfectly good reasons, much of the communication between the Staff and the Commission during Part 2 is *ex parte*, respondents are often placed in a difficult position when attempting to articulate even threshold legal defenses during Part 2. While Part 2 helps expedite and streamline Part 3, it is not a substitute for it. Finally, while we do not suggest that the FTC abandon its rights to pursue administrative litigation in cases in which the district court has denied preliminary relief, nor that the agency shy away from employing its expertise where appropriate, the Section believes, as the Commission stated in 1995, that such exercises should be the exception rather than the rule.¹⁶

Accordingly, the Section believes that while it may sometimes be desirable for the Commission to address dispositive motions in the first instance, changing the Part 3 rules to make that the default procedure is unnecessary. At most, the Commission should clarify its ability to retain jurisdiction in cases in which the Commission deems it appropriate under the existing rules.

II. Proposed Timing Rules¹⁷

The Section has a fundamental concern that the proposed rules do not impose a time limit within which the Commission should issue a final decision. The time between initial decision and final decision can be a significant source of delay and, therefore, should be part of any rule changes designed to expedite Part 3 proceedings.

The Section also has concerns that the proposed rule changes relating to timing do not provide adequate flexibility to account for the fundamental differences between Part 3 cases involving unconsummated mergers, consummated mergers and conduct challenges. Any set of

¹⁴ See, e.g., Federal Trade Commission Reauthorization Act of 2008, S. 2831, 110th Cong. § 4(a) (2008) (proposed legislation providing that “[i]n appointing administrative law judges under section 3105 of title 5, United States Code, to conduct hearings and render initial decisions in formal adjudicative matters before it, the Federal Trade Commission may give preference to administrative law judges who have experience with antitrust or trade regulation and who are familiar with the kinds of economic analysis associated with such litigation”).

¹⁵ See J. Thomas Rosch, Remarks at the ABA Antitrust Masters Course IV (Sept. 25, 2008) (stating that the “reason to believe standard means that the staff’s pre-complaint (part 2) investigations sometimes take too long and they are neither fair nor transparent”).

¹⁶ 60 Fed. Reg. 39,472-473 (Aug. 3, 1995).

¹⁷ The Section’s comments on proposed changes to timing rules include rules: 3.1, 3.11, 3.12, 3.41, and 3.51.

procedural rules should attempt to strike an appropriate balance between the need for a swift resolution and provide respondents with adequate time to prepare and present a defense. The weight that should be accorded these considerations differs depending on the nature of the case. For example, obtaining a prompt result is critical in unconsummated merger cases. On the other hand, different timing needs may exist in conduct cases, where complaint counsel typically have engaged in months or years of fact development, and respondents need to have an adequate opportunity to conduct their own discovery.

The proposed rules would set tighter time limits for Part 3 proceedings, including the review of unconsummated mergers. That objective is commendable, as the long delays that characterize Part 3 litigation frequently prompt parties to abandon transactions rather than await final adjudication by the Commission. However, the proposed changes to the complaint-to-initial-hearing timeline are only modest and fall short in that they fail to set any time limits for the Commission itself. The Section is concerned that the proposed rules will not expedite Part 3 proceedings nearly enough to make them practicable for unconsummated mergers. For that reason, the Section believes that Part 3 litigation should not serve as a substitute for fully developed and far quicker proceedings in federal district court. As for consummated mergers, the Section supports the desire to reach a prompt result, but cautions against a one-size-fits-all approach. Factors such as whether the ability to obtain a remedy is compromised by delay, as well as whether the matter was the subject of a preliminary injunction hearing, should be considered.

In cases involving unconsummated mergers, the Commission traditionally has approved a Part 3 complaint along with a district court complaint and accompanying motion for preliminary injunction. The federal complaint is usually quite detailed and the preliminary injunction motion generally includes as attachments, documents transcripts and declarations supporting the application for preliminary relief.

In most instances, the motion for a preliminary injunction has proven determinative. If the Commission prevails on the injunction, as is often the case with mergers (the Commission has a winning record in these matters over the last 15 years), the parties typically abandon the transaction because it is usually impractical, as a business matter, to keep the transaction parties aligned pending an administrative trial. On the other hand, if preliminary relief is denied, the FTC usually abandons the Part 3 action, which has generally been stayed up to that point.¹⁸

Federal courts typically recognize that, as a practical matter, the preliminary injunction hearing is determinative and, while setting an aggressive schedule, permit an evidentiary hearing with live witnesses. Thus, district court judges typically have allowed the defense to conduct discovery in challenging the FTC's case, including depositions of trial witnesses, third parties, and experts. And the FTC usually deposes defense witnesses, sometimes even those whose testimony was taken in investigational hearings during the Hart-Scott-Rodino (HSR) investigation.

¹⁸ See, e.g., Press Release, Federal Trade Commission, FTC Closes Its Investigation of Arch Coal's Acquisition of Triton Coal Company's North Rochelle Mine (June 13, 2005), *available at* <http://www.ftc.gov/opa/2005/06/archcoal.shtm>; Press Release, Federal Trade Commission, FTC Ends Administrative Litigation in Western Refining Case (Oct. 3, 2007), *available at* <http://www.ftc.gov/opa/2007/10/western.shtm>. See also Federal Trade Commission, Administrative Litigation Following the Denial of a Preliminary Injunction: Policy Statement, 50 Fed. Reg. 39,741-45 (Aug. 3, 1995).

Such discovery and live testimony have proven valuable both to the parties and the court, as credibility determinations have been significant in determining whether the FTC has raised the “substantial questions” necessary to justify a Part 3 trial. In *Arch Coal*, for example, the FTC filed declarations of several customers who opposed the deal.¹⁹ All were deposed and a number testified live. Judge Bates of the United States District Court for the District of Columbia heard the testimony, considered the cross examination, and discounted the testimony as not persuasive.²⁰ Likewise, Judge Hogan in *Staples* rejected the efficiencies testimony of the defense expert and ruled for the FTC.²¹ “Evaluating credibility, as the Court must do, the Court credits the testimony ... of the Commission’s expert ... over the testimony and Efficiencies Study of the defendants’ efficiencies witness.”²² Discovery, live testimony and cross examination during the preliminary hearing in federal court were helpful to the courts and central to the outcomes in both cases.

The FTC’s recent actions in *Federal Trade Commission v. Inova Health Systems Foundation*²³ suggest that it is embarking upon a new approach that would significantly change the role of federal courts in unconsummated merger cases brought by the Commission. In *Inova*, the Commission filed a complaint seeking a preliminary injunction in federal court as it normally does but opposed defendants’ request for discovery and an evidentiary hearing. The Commission took the position that it had already started a Part 3 administrative proceeding and had set the Part 3 trial to start in five months, obviating the need for discovery or a hearing in federal court.²⁴ The district court agreed to decide the preliminary injunction on the papers, and the parties abandoned the transaction a week later. The proposed rules appear designed to reinforce the *Inova* approach, an approach the Section does not support under the existing rules or proposed amendments to those rules.

Assume a hypothetical merger challenge in which the FTC files a complaint on April 1. Assume also that the FTC obtains a preliminary injunction by persuading the court, as it did in *Inova*, that discovery should not be allowed, and that there should be an abbreviated proceeding on the papers. An evidentiary hearing will be set for September 1, consistent with Proposed Rule 3.11. According to Rule 3.41, the ALJ could allow up to 30 trial days, which would extend the proceeding well into October. Assume trial ends on October 10, and proposed findings are submitted on October 11 (even though Proposed Rule 3.46 provides 21 days). An ALJ decision must be forthcoming in 70 days, i.e., by December 20. Then the initial decision is appealed to

¹⁹ *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 146 (D.D.C. 2004).

²⁰ *Id.*

²¹ *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1089 (D.D.C. 1997).

²² *Id.*

²³ No. 1:08CV460 (E.D. Va. 2008).

²⁴ The Commission's recent actions in *In re Red Sky Holdings, LP* suggests that it intends to make the new *Inova* approach the norm. In *Red Sky*, the Commission has filed simultaneous complaints in federal district court and Part 3 and notified the district court that it intends to commence a full administrative trial "no later than January 22, 2009" -- three months from the date of complaint filing. See Complaint ¶ 3, *F.T.C. v. Red Sky Holdings LP*, No. 4:08-cv-03147 (S.D. Tex. Oct. 23, 2008), available at <http://www.ftc.gov/os/caselist/0810170/081023redskycmpttro.pdf>.

the Commission, which faces no deadline whatsoever on its final order. In *Inova*, the FTC agreed to a Commission decision within 90 days of the initial decision. But that would be mid-March in this hypothetical, nearly a year after the filing of the complaint. The parties to most transactions cannot keep the deal intact nearly that long, especially where the deal's closing has already been delayed by a lengthy pre-complaint investigation.

By contrast, full proceedings at the preliminary injunction stage in the district court—the procedure that has been followed for many years—afford an opportunity for prompt but thorough review. In *Arch Coal*, the complaint was filed on April 1, 2004, Judge Bates permitted a two-month discovery period, trial started on June 14, and it ended three weeks later. On August 14, Judge Bates issued a 90-page opinion and the Court of Appeals denied the stay on August 20. The parties closed the transaction. In *Federal Trade Commission v. Cardinal Health, Inc.*, the complaint was filed on March 3, 1998, and Judge Sporkin started trial on June 9. On July 31—less than five months after complaint filing—the court issued a 70- page ruling in favor of the government and the parties abandoned the deals.²⁵ In *Staples*, the case was to hearing in approximately six weeks, tried in five hearing days, and decided less than three months after it was filed.

In each case, the federal proceedings were comprehensive and fair, and they were over long before the Commission would have issued a final order under its proposed rules. Indeed, in *Arch Coal*, the courts had reached a final decision on the preliminary injunction approximately two weeks before trial would have even started under the FTC's proposed procedures. In all of these cases, both the FTC and the parties had a fair opportunity to prepare and to present their case, and the courts had ample opportunity to prepare thoughtful opinions.

Contrariwise, some of the proposed revisions raise particular concerns for respondents in conduct cases, where the need for highly expedited proceedings is often absent. Generally, the Commission's proposed rule changes would compress the pre-trial discovery and motions period, the trial, and the immediate post-trial briefing and findings period. These changes could reduce the average time from complaint to initial decision in conduct cases to a maximum (assuming no extensions are granted) of approximately 12.5 months.

Although the Section applauds the proposed reforms to require quicker determinations by ALJs and streamline certain of the prehearing aspects of the Part 3 process, the proposed changes fail to address the stage of the proceeding that consumes the greatest time: the time it takes the Commission to rule. A review of the eight Part 3 cases filed since 2000 that have resulted in a Commission final order shows that the average time from complaint to initial decision in conduct cases has been 15.2 months, while the time from initial decision to final Commission order has been 20.3 months.²⁶

²⁵ See *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34 (D.D.C. 1998).

²⁶ These matters are *In the Matters of Schering-Plough Corp., Polygram Holding, Inc., Chicago Bridge & Iron Co., Rambus Inc., Kentucky Household Goods Carriers Ass'n, North Texas Specialty Physicians, Evanston Northwestern Healthcare Corp., and Telebrands Corp.* The Commission has brought a ninth Part 3 case, *In re Realcomp II Ltd.*, which is currently pending before the Commission. Briefing on appeal was completed in March 2008, and there has been no action since April 2008. *In re Unocal* is not included in this list as there was no final Commission order.

Moreover, the modest reduction in the average duration of Part 3 proceedings up to the point of initial decision achieved by the proposed reforms in conduct cases (3.1 months) would come at the cost of accelerating some of the deadlines that are most crucial to affording respondents a full and fair opportunity to mount an effective defense. Conduct cases are brought after months—if not years—of pre-complaint investigation by Commission staff often involving the collection of vast amounts of third party discovery. Respondents typically find themselves at a significant informational disadvantage at the time of complaint filing and need a meaningful prehearing period to analyze the Commission’s allegations and conduct their own third party discovery. The Section is concerned that some of the proposed changes unduly compress this prehearing period and could compromise the ability of respondents to develop and present their case.

III. Proposed Discovery and Evidentiary Rules²⁷

The Section’s comments are more specific with respect to the individual changes to the discovery and evidentiary rules and, therefore, are detailed in Part IV below. Generally, the proposed changes to certain rules governing discovery and evidence in Part 3 proceedings reflect an effort to “expedite and improve the quality of the proceedings” as well as “expedite and streamline the evidentiary hearing.”²⁸ The Section supports the FTC’s efforts to expedite the pre-hearing process and to better harmonize certain Part 3 procedural rules with the federal rules.

Although the Section recognizes that good reasons may exist for occasional departures from the Federal Rules of Civil Procedure and Federal Rules of Evidence in Part 3 proceedings, given the effect discovery and evidentiary procedures and rulings can have on the outcomes of cases, the Section supports changes designed to improve consistency with these rules. Harmonization of procedural rules can help ensure consistency between federal court proceedings and FTC proceedings, whether the Part 3 matter is an antitrust or consumer protection case. In particular, the Section believes that this consistency is especially important in the context of merger litigation. As the Section has previously stated, and continues to believe, differences in treatment by the antitrust agencies do not serve any public purpose, and should be minimized as much as possible.²⁹ Therefore, the Section has urged, to the extent that FTC procedural rules differ from those applicable to Department of Justice proceedings in federal court, those differences should, as much as possible, be eliminated.³⁰

The Section supports many of the proposed evidentiary rule changes. However, a number of the proposed changes are problematic. Even though these proposed rule changes are intended to reduce protracted Part 3 proceedings, they have the potential unfairly to prejudice respondents. First, some of the proposed rules take broad principles contained in the federal

²⁷ The Section’s comments on proposed changes to discovery and evidentiary rules include rules: 3.11(c); 3.22(b); 3.31(b), (c) and (d); 3.31A; 3.33(d) and (g)(1); 3.35(b)(2); and 3.43(d)(1).

²⁸ NPRM at 12-13.

²⁹ See, e.g., Comments of the Section of Antitrust Law of the American Bar Association in Response to the Antitrust Modernization Commission’s Request for Public Comment Regarding Government Enforcement Institutions: Differential Merger Enforcement Standards.

³⁰ *Id.* at 1.

rules and presume how they should be applied in situations regularly encountered in Part 3 proceedings, as they codify, dictate, or require a specific outcome without regard to the facts. Eliminating an ALJ's discretion to apply a principle of law on a case-by-case basis could disadvantage respondents by prejudging the balance of equities in certain situations and inappropriately shifting burdens.

For example, as discussed in more detail in Part IV, the new limitations imposed on the scope of discoverable FTC materials (Rule 3.31(c)(2)), and the requirements for depositions (Rule 3.33(b)) and interrogatories (Rule 3.35(b)(2)) appear calculated to track the principles contained in the FRCP, but the risk of unfair prejudice to respondents from these changes appears to outweigh any corresponding decrease in the length of Part 3 proceedings. Similarly, eliminating ALJ discretion to draft protective orders on a case-by-case basis may severely impede the ability of respondents to present their case by, for example, imposing a blanket prohibition on the disclosure of confidential material to in-house counsel (Rule 3.31(d)).

Second, other of the proposed rule changes are problematic because they depart dramatically from the federal rules, without sufficient justification, and could disadvantage respondents in Part 3 proceedings in significant ways. In these instances, the proposed changes modify existing FTC rules that previously had been somewhat aligned with the FRCP and FRE presumably because the federal rules provide important and necessary safeguards to the parties, along with a rich history of rulings further delineating their bounds.

For example, the new rules eliminating motions for a more definite statement (Rule 3.11(c)) and, more generally, eliminating the stay for pre-answer motions (Rule 3.22(b)) will likely have the unintended consequence of eliminating any meaningful review of the sufficiency of a complaint. Similarly, the Section believes that the current rule allowing case-by-case determination regarding the admission of hearsay evidence is more appropriate than the new default rule admitting hearsay evidence in every circumstance (Rule 3.43(b)), and that, at a minimum, the new rule should require parties to provide notice when they intend to introduce a particular piece of hearsay evidence in order to increase the efficiency of Part 3 proceedings. In addition, the new rules on expert discovery (Rule 3.31A) unnecessarily impede respondents' ability to call rebuttal experts, and limiting experts to five per "side" rather than five per "party" has the potential to arbitrarily disadvantage respondents in multi-party proceedings.

IV. Comments on Specific Rules

A. Rules Proposing Changes to the Adjudicatory Process

1. Rules Addressing the Commission's Role as Initial Decision Maker on Dispositive Issues

Rule 3.12(b) and (c): *The proposed amendments to these sub-sections of Rule 3.12 would remove the ALJ's authority to render an initial decision when the material allegations of the complaint are admitted or there is a default. Instead, the Commission would render its final decision directly, on the basis of the facts alleged in the Complaint.*

Rule 3.22(a) and (e): *The proposed amendments to these sub-sections of Rule 3.22 would require referral to the Commission in the first instance of motions to strike, motions for summary decision, and pre-hearing motions to dismiss, but would allow the Commission, in its*

discretion, to refer such motions back to the ALJ for initial disposition.³¹ In matters referred back to the ALJ, a decision would be required within 14 days of full briefing.

Rule 3.24: *The proposed amendments to this Rule provide that dispositive motions are to be decided by the Commission unless referred by the Commission to the ALJ.³² The amendments also would eliminate the 30-day deadline for ruling on such a motion but would allow the Commission to set a deadline for decision when referring the motion to the ALJ. Nonetheless, the filing of a dispositive motion would not stay the proceeding before the ALJ.*

Comments:

The FTC Act envisions the Commission as a repository of antitrust expertise, and in that role, as the body to advance substantive antitrust law by deciding difficult cases. Thus, much of the motivation behind this set of proposed rule changes seems to be the concern that ALJs lacking expertise in antitrust law are likely to make erroneous substantive decisions, necessitating correction by the Commission and wasting time in the process.

While a more immediate disposition of legal questions may save costs and afford respondents a quicker path to the court of appeals, these proposed rule changes bring with them the potential sacrifice of some of the rigor inherent to the process as discussed above. They could reduce the quality of decision making, and may color the perception of the fairness and impartiality of Commission proceedings – a particularly important issue considering that when hearing an appeal, federal courts will give deference to a final FTC decision. As a result, the Section believes concern about improving the quality of the Commission’s decisions is better addressed by enhancing the antitrust expertise of the ALJs. To the extent these rules are modified, those modifications should be limited to affirming the Commission’s right to retain jurisdiction of dispositive motions, rather than making that the default procedure.

Moreover, by continuing the Part 3 proceeding during the pendency of dispositive motions to the Commission, and by failing to impose tight deadlines on the Commission to resolve such motions, the proposed amendments create the real possibility that litigants (and the ALJ) will be disadvantaged in preparing for and presiding over a Part 3 hearing without advance knowledge of the precise scope that the hearing should take.³³

2. Rules Addressing the Commission’s Role in Case Management

³¹ The amendments also provide that the ALJ’s consideration of a motion to dismiss made at the close of the evidence offered in support of the complaint based upon an alleged failure to establish a prima facie case shall be deferred until after the entire hearing record is closed.

³² The amended Rule also would impose a filing deadline for such motions of 30 days before the evidentiary hearing, rather than the current 20 days, and would extend the deadline for filing affidavits in opposition to a summary decision motion from 10 to 14 days.

³³ For example, *In re South Carolina State Board of Dentistry*, FTC Docket No. 9311, over seven months elapsed between the full briefing of the motion to dismiss and the Commission’s decision on that motion. While that underlying proceeding was stayed pending resolution of the motion, a rule by which proceedings are not stayed could, in the absence of a tight timeframe for Commission decision on such motions, force parties to litigate without resolution of important prehearing issues.

Rule 3.42(a): *The proposed amendments to this Rule would make explicit provision for the Commission retaining jurisdiction over a matter during some or all of the pre-hearing proceedings and designating one or more Commissioners to preside.*

Comments:

The Commission previously has employed its authority under section 556(b) of the Administrative Procedures Act (APA) to preside over the pretrial portions of specific cases, and now wishes to make explicit provision for such actions in its Part 3 Rules. It is not entirely clear what role the Commission's involvement in pre-hearing proceedings and discovery other than dispositive motions—i.e., the proposed revision to Rule 3.42—is intended or likely to play in expediting the Part 3 litigation process. While the legislative history and literature supports the point that the Commission's antitrust expertise should be particularly valued in resolving substantive antitrust issues, it is not obvious why the Commission, as opposed to the ALJ, is likely to be better situated, or more deeply experienced, than the ALJ in efficiently managing day-to-day nonsubstantive litigation issues.

Given the Commission's stated interest in expediting the pretrial process, however, it is likely that direct Commission oversight will, in many cases, result in some limiting of respondent's discovery opportunities. We urge that the Commission exercise caution in limiting respondents' discovery. Complaint counsel often will have had ample time and substantial advantages during the pretrial investigatory period to discover facts relevant to the case, and respondents ought to be allowed to conduct adequate discovery prior to the hearing.

Moreover, we note that the Commission's management of the case during the discovery phase can diminish the ALJ's ability to learn about the matter prior to the hearing. It may also tie the hands of the ALJ unnecessarily by restricting his or her ability to tailor discovery on critical issues prior to the hearing over which the ALJ will preside. The proposed revisions, by reducing the opportunities for the ALJ to acquaint himself or herself with the facts and issues in the case—perhaps even delaying the involvement of the ALJ until the commencement of the full evidentiary hearing—reduce the information available to that ALJ when hearing the case and rendering a decision on the merits. This concern would seem to be particularly acute where the ALJ lacks extensive antitrust experience or if the suggested, and generally shorter, time limits presented elsewhere in the NPRM are implemented. This raises the specter that the proposed rule changes designed to reduce the risk of error in preliminary dispositive motions could increase the risk of error in the ALJ's initial decisions.

In short, the Section's primary concern is that by "codifying" the Commission's right to interject itself into prehearing case management, it may undermine the integrity of the process, compromise the ALJ, and create an appearance of unfairness. Accordingly, the Section suggests that other measures be adopted to address the underlying concerns of prehearing case management.³⁴

³⁴ If, despite this concern, the proposed amendments are adopted, the Section urges that such Commission oversight be exercised sparingly.

3. Rules Addressing the Commission’s Role in Deciding Interlocutory Issues

Rule 3.23: *The proposed amendments to this Rule would permit certain interlocutory appeals only on a specific determination by the ALJ made within three days after a request. In the event the ALJ does not make a timely ruling, the proposed amendments would provide that the party seeking review may file its application with the Commission. Unless the Commission decides to entertain the appeal within three days after the filing of the application and answer, the request for discretionary review would be deemed denied. The proposed amendments also would set shorter deadlines for filing of applications and answers.*

Comments:

This primarily technical change appears designed to ensure quick resolution of applications for interlocutory review, and as such the Section supports it. We suggest, however, that the rule be further modified to make clear that Commission denial of discretionary review would not constitute an affirmation of the ALJ’s decision on the merits.³⁵ The short timeframe anticipated in paragraph (d) of this revision also raises the prospect that the Commission’s discretionary power of review might, in practice, be exercised simply by an omission, delay, or even oversight; a positive requirement that the Commission shall affirmatively grant or deny an application for discretionary review should be required.

4. Rules Addressing the Stay and Withdrawal of Proceedings in the Wake of a District Court’s Denial of Preliminary Relief

Rule 3.26: *The proposed amendments would revise the current Rule to eliminate the automatic withdrawal from adjudication of the Part 3 case upon the filing of a motion to withdraw from adjudication, and the automatic stay of the proceeding upon the filing of a motion to dismiss, in those instances in which a district court has denied the agency’s motion for preliminary injunction. Instead, under the proposed amended Rule, the Part 3 case would proceed unless the Commission determines, on the facts of the particular case, that a withdrawal or stay is appropriate. The proposed amendments also would make explicit that a motion to dismiss or withdraw may be filed only after the Commission has an opportunity to seek reconsideration and appellate review of a denial of injunctive relief.*

Comments:

These proposed amendments reverse the Commission’s existing Rule 3.26 framework, under which matters automatically are withdrawn from Part 3 or stayed upon motion of a party following a district court’s denial of the Commission’s application for preliminary injunction and pending the Commission’s review of the matter. In its 1995 Statement of Federal Trade Commission Policy Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction, the Commission indicated that it will “assess on a case-by-case basis whether to pursue administrative litigation following the denial of a preliminary injunction.”³⁶ Because the Commission wished to “facilitate reconsideration of the public interest in continuing

³⁵ This is indicated in the NPRM but not reflected in the proposed revised text.

³⁶ 60 Fed. Reg. 39472, 39473 (Aug. 3, 1995).

with an administrative case when an administrative complaint already issued,”³⁷ it “determined to adopt a new rule, 16 CFR § 3.26,”³⁸ to “ensure parties to a transaction the opportunity to have their views heard by the Commission before it makes its determination”³⁹ of whether to continue its Part 3 action. This rule thus was designed to allow full reconsideration of the matter in light of the district court’s decision, and was specifically designed to afford the merging parties an opportunity to address the public interest with the Commission outside the bounds of Part 3.

The proposed amendments would eliminate automatic withdrawals/stays, setting forth a new “norm . . . that the Part 3 case can proceed even if a court denies preliminary relief.” By adopting this change, the Commission would set a clear policy favoring Part 3 adjudication over a district court determination of the matter. Although the Commission always has maintained the discretion to continue with a Part 3 case after its application for preliminary relief has been denied by a federal district court, doing so as a matter of course raises three concerns.

First, it deprives the Commission of the opportunity to hear from both complaint counsel and the parties outside the bounds of Part 3.

Second, the proposed Rule change would impose substantial additional costs on respondents, even where a district judge has raised serious doubts about the Commission’s case. Moreover, it creates a cloud of uncertainty around the respondents’ ongoing actions (whether integrating a merging entity or continuing on a particular course of conduct) that may inhibit their ability to realize fully the benefits of conduct that the district court has already decided against the FTC.

Third, the proposed amendments would highlight, and in many instances, exacerbate the differences between FTC and DOJ proceedings. Although the Department of Justice maintains substantially overlapping jurisdiction with the FTC, its prosecutions must proceed entirely before a federal district court. In many instances the Department’s preliminary and permanent relief proceedings are consolidated into a single trial on the merits, particularly in merger cases. The potential for divergent treatment of cases at the two agencies (including differences in outcome, as well as in time and expense of litigation) have been much discussed over the years. Indeed, differences in merger litigation at the two agencies prompted the Antitrust Modernization Commission in 2007 to recommend:

The Federal Trade Commission should adopt a policy that when it seeks injunctive relief in Hart Scott Rodino Act merger cases in federal court, it will seek both preliminary and permanent injunctive relief, and will seek to consolidate those proceedings so long as it is able to reach agreement on an appropriate scheduling order with the merging parties.⁴⁰

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 39472.

⁴⁰ Antitrust Modernization Commission Report and Recommendations 131 (Apr. 2007), *available at*: www.govinfo.library.unt.edu/amc/report_recommendation/toc.htm.

By giving substantial weight to the district court’s preliminary determinations in the past, the FTC has helped to minimize both the perceived and actual differences between the FTC and DOJ process. Creating a new norm under which the district court’s preliminary relief decision would be routinely (indeed presumptively) disregarded by the Commission would invite real divergence between the practical outcomes in DOJ cases and FTC proceedings, cutting against the desired outcome of more unified enforcement.

B. Rules Addressing Timing

Rule 3.1: *The proposed amendments to this rule would allow the ALJ or the Commission to shorten the periods set forth by the Rule.*

Comments:

The Section recommends revising Proposed Rule 3.1 to permit the ALJ or Commission to shorten the periods provided under the rules only upon consent of the parties rather than authorizing the ALJ or Commission to shorten these periods unilaterally. In addition, given that conduct cases do not implicate the same timing concerns that exist in the unconsummated merger context (at least to the same degree), it seems unnecessary to authorize the ALJ or Commission to speed up proceedings beyond the deadlines set forth in the rules when the parties themselves do not believe that the circumstances of their case warrant additional expedition.

Rule 3.11: *The proposed amendments to this rule would require an evidentiary hearing before an ALJ take place five months after the filing of the complaint in merger cases and establish an eight-month pre-hearing period in all other cases.*

Comments:

There is reason to doubt that these changes will sufficiently expedite Part 3 proceedings in unconsummated merger cases. Under the current rules, “[e]xtensions of time for discovery, trial, and even the initial decision are often granted, extending what appears to be a year-long process under the Part III rules to often more than two years.”⁴¹ Because ALJs and the Commission would retain considerable authority under the new rules to extend deadlines as they see fit, a significant risk of protracted litigation will remain. This risk is magnified because the new rules do not contain any schedule for the Commission to issue its final order after initial decision (potentially a significant source of delay in Part 3 litigation) or issue rulings on dispositive motions that they decide to resolve in the first instance.⁴² For these reasons, the proposed rules cannot transform Part 3 litigation into an adequate substitute for robust and more expedited proceedings in federal court.

We applaud the FTC for shortening periods to move its internal procedures along. But whatever happens in that regard, the Section recommends that Part 3 litigation not replace

⁴¹ J. Robert Robertson, *Antitrust*, 12, 14 (Spring 2006).

⁴² The NPRM expresses the FTC’s intent to “make its best efforts to expedite its preparation and disposition of final orders,” but the new rules do not set any deadlines. NPRM at 10.

discovery and full preliminary injunction proceedings before the district court in unconsummated merger cases. If, however, the FTC intends to pursue unconsummated merger challenges in Part 3 proceedings, the Section believes that the FTC must provide a timetable that is far quicker than that proposed in the new rules. Specifically, instead of providing a five-month period from complaint to *initial hearing*, the Section recommends that Proposed Rule 3.11 be revised to provide a five-month period from complaint issuance to *final Commission order*.⁴³ This shorter period for unconsummated mergers would bring the FTC's Part 3 proceedings in line with federal district court preliminary injunction proceedings and make them far more practicable from a business perspective.

As for challenges to already consummated and nonreportable mergers, the Section believes that the five-month timetable set forth in Proposed Rule 3.11 may be appropriate in some cases and not in other cases. The Section opposes a one-size-fits-all approach and believes the FTC should consider other factors, such as whether delay may compromise the FTC's ability to obtain relief.

In addition, in order to ensure that Part 3 proceedings reach a prompt conclusion and to eliminate a potential source of delay, the Section recommends amending the new rules to require that the Commission issue its final order no more than 90 days after the initial decision—the same period it committed itself to in *Inova*. This revision will ensure that already consummated merger challenges move quickly, which is particularly important in nonreportable mergers if the passage of time may compromise the FTC's ability to craft meaningful relief.

The Section believes that the eight-month prehearing period established by Proposed Rule 3.11 is too abbreviated to serve as a default rule in conduct cases. In light of the wide variety of anticompetitive conduct alleged from case-to-case and the need for an adequate period of prehearing discovery and preparation, a “one-size-fits-all” approach seems inadvisable. Instead, the Section proposes providing that the parties consult as to an appropriate hearing date based on the specific attributes of their case and that the ALJ set this hearing date at the first scheduling conference.

Rule 3.12: *The proposed amendments to this rule would reduce the time for parties to file an Answer from 20 to 14 days.*

Comments:

The Section opposes Proposed Rule 3.12's reduction of the time to answer from 20 to 14 days. Complaints are often extremely detailed and respondents need ample time to properly

⁴³ The FTC's recent actions in *Red Sky* and *Whole Foods* provide the roadmap for a more workable system. In its recent complaint in *Red Sky*, the FTC has set an initial hearing date of three months after complaint filing -- i.e., a timetable two months shorter than that established by Proposed Rule 3.11. See Complaint at 4, In re Red Sky Holdings, LP, Docket No. 9333 (F.T.C. Oct. 22, 2008), available at <http://www.ftc.gov/os/adjpro/d9333/081023redskyadmincmpt.pdf>. Meanwhile, in its order replacing Commissioner Rosch as ALJ in *Whole Foods*, the Commission has pledged to "make every effort" to issue a final order within 45 days of oral argument. See Order Designating Administrative Law Judge at 2, In re Whole Foods Market, Inc., Docket No. 9324 (F.T.C. Oct. 20, 2008), available at <http://www.ftc.gov/os/adjpro/d9324/081020order.pdf>. Although the Section recommends keeping unconsummated merger review in federal district court for all of the reasons stated *supra*, if the Commission does apply the new rules to unconsummated mergers, it should amend the new rules to more closely reflect the expedited timetables set forth in these two cases.

analyze the Commission’s factual and legal allegations and prepare a response. The overall time to be saved by the Commission’s proposed revision is minimal while the potential unfairness to respondents could be significant. Accordingly, the time to answer should remain at 20 days—the same period provided by Rule 12(a)(1)(A) of the FRCP.

Rule 3.41: *The proposed amendments to this rule would require that trial be restricted to 30 days (or 210 hours) in most cases.*

Comments:

The Section believes that Proposed Rule 3.41’s requirement to apply to the Commission to extend the hearing time limit of 210 hours should be accompanied by additional flexibility, especially in nonmerger cases involving multiple parties. The Section recommends that the presiding ALJ retain the flexibility to extend the hearing length for non-merger cases based on the particularities of the case and that the ALJ be required to articulate on the record the basis for the extension.

Rule 3.51: *The proposed amendments to this rule would require that an initial decision by the ALJ be due within 70 days of the last proposed findings of fact and conclusions of law, or within one year of the issuance of the complaint, assuming the Commission does not grant an extension.*

Comments:

While the Section believes that in most cases, expediting the merger review process is a positive step, such timing requirements are not universally applicable. The Section applauds this revision to speed up an ALJ’s decision. However, the Section notes that this and other rules fail to address another significant potential source of delay: the time it takes the Commission to issue decisions. Accordingly, the Section recommends that the Commission establish specific and appropriate timelines for issuing its own decisions. Such a limit is particularly important for unconsummated mergers, where time is of the essence.

C. Rules Addressing Discovery and Evidence

Rules 3.11(c) and 3.22(b): *The proposed rules eliminate Rule 3.11(c), which provides respondents with the opportunity to file a motion for a more definite statement and tolls the deadline for filing an answer to the complaint until the motion is resolved. More generally, the proposed rules also eliminate Rule 3.12(a), which permits the filing of any motion to toll the deadline for filing an answer. The proposed rules also add Rule 3.22(b), which provides that certain motions, including motions to dismiss and motions to strike, will be heard directly by the Commission rather than an ALJ, and that proceedings before the ALJ will not be stayed while the motions are being considered by the Commission unless the Commission so orders.*

Comments:

Although the commentary to the proposed rules states that respondents will still be permitted to raise arguments that would otherwise be raised in a motion for more definite statement in a pre-hearing motion to dismiss, the respondent will still be forced to answer the

complaint within 14 days—likely before any motion regarding a vague or ambiguous complaint is resolved by the Commission.

FRCP 12(b), (e), and (f) require a party to file challenges to the sufficiency of a complaint before the party files a responsive pleading. The logic of the rule is clear: if a complaint fails to state a claim or is vague and ambiguous, there is little point in requiring the party to answer the complaint until the complaint’s defects are resolved. However, under the proposed rule changes, a respondent could potentially be required to do just that. Even if a respondent could overcome the difficulty of answering a vague or ambiguous complaint, the Commission will not likely grant a motion to dismiss such a complaint because the respondent will have already been forced to file an answer, and, if a complaint can be answered, it must not be vague or ambiguous.

Although it is certainly not necessary for every motion to toll the deadline for a respondent to file an answer, the logic of the FRCP regarding motions challenging the sufficiency of a complaint is clear, compelling, and directly applicable to Part 3 proceedings. Therefore the Section recommends that the proposed rules be modified so that it requires the resolution of such motions (e.g., motion for more definite statement, motion to strike, etc.) before the respondent is required to file an answer. Implementing the proposed rule in its current form would create significant disparities between Part 3 proceedings and proceedings in federal court, and eliminate a significant procedural safeguard for respondents.

Rule 3.31(c)(2): *The proposed rule states that, during discovery, complaint counsel need not search for any materials other than those that were collected or reviewed by the FTC in the course of the investigation or prosecution of the case. The proposed rule further states that additional discovery of materials in the possession of the FTC may only be authorized by an ALJ for good cause. The commentary to the proposed rules explains that these excluded materials are frequently duplicative and almost always protected by privilege or as work product.*

Comments:

The Section opposes this proposed rule change. FRCP 26(b) contains specific limitations on the scope of discovery, and the FRCP generally limit the discovery of evidence that is duplicative, privileged, or work product. Although, in many cases, FTC materials other than those generated during the investigation or prosecution of a case may indeed be undiscoverable, there may be situations in which materials excluded by this rule would not be duplicative, privileged, or work product. Requiring respondents to satisfy a heightened requirement of “good cause” to obtain such materials could disadvantage those respondents and potentially create disparities between the substantive outcomes achieved by parties in Part 3 proceedings and proceedings in federal court, seemingly without justification.

Rule 3.31(d): *The proposed rule requires the ALJ to issue a standard protective order rather than permit the parties to negotiate or modify a protective order for each case.*

Comments:

Although this rule may reduce protracted negotiations and motion practice on the content of protective orders in individual cases, certain provisions of protective orders unavoidably require case-by-case decisions. For example, the standard protective order contained in the proposed rules excludes in-house counsel from access to confidential material.⁴⁴ In many cases, exclusion of in-house counsel would inhibit a respondent's ability to defend a case.⁴⁵ The Section recommends that the proposed rules be modified to grant the parties more discretion to agree to terms for a protective order that may differ from the terms contained in the proposed standard protective order. FRCP 26(c)(1) permits a federal court to fashion a unique protective order in each case upon the motion of a party. Unmodified, the proposed rule has the potential unfairly to prejudice respondents and to create unwarranted disparities between Part 3 proceedings and proceedings in federal court. Thus, the Section recommends that this proposed change be reconsidered.

Rules 3.31A and 3.31(b) and (c): *The proposed rules eliminate the provisions in Rule 3.31(b) and (c) governing expert discovery and consolidate all the expert discovery provisions into Rule 3.31(A). The new rule limits the number of experts to 5 per side, eliminates the ALJ's ability to dispense with expert reports, and imposes a new timeline for expert discovery: parties must submit lists of experts no later than 1 day after the close of fact discovery; complaint counsel must submit expert reports no later than 14 days after the close of fact discovery; respondent must submit expert reports no later than 28 days after the close of fact discovery; complaint counsel must submit rebuttal experts and reports no later than 38 days after the close of fact discovery; and all depositions must be taken no later than 65 days after the close of fact discovery.*

Comments:

FRCP 26(a)(2) does not limit the number of experts, permits a court to dispense with a written report, and imposes the following timeline for expert discovery: expert and expert report disclosures must be made at least 90 days before trial, or, if rebuttal, within 30 days of the other party's disclosure. The timeline under the current rules is the same as that under the FRCP.

The proposed rule creates two significant problems. First, the new rule does not permit a respondent to have rebuttal experts unless respondent "seek[s] appropriate relief" when complaint counsel presents "material outside the scope of fair rebuttal."⁴⁶ In contrast, the FRCP permit both parties potentially to call rebuttal experts. Rebuttal experts are often required by respondents in Part 3 proceedings. The Section therefore recommends that the respondent be given the same opportunity as complaint counsel to call rebuttal experts, particularly given the aggressive new timeframe within which the respondent's initial experts must be disclosed. Without this modification, the proposed rules unfairly discriminate against respondents, and potentially create significant differences in substantive outcomes between Part 3 proceedings and proceedings in federal court.

⁴⁴ NPRM at 69.

⁴⁵ For example, in *United States v. Microsoft Corp.*, the protective order contemplated three levels of confidentiality, with in-house counsel only excluded from viewing evidence designated "very confidential." 253 F.3d 34 (D.C. Cir. 2001).

⁴⁶ NPRM at 73.

Second, the new rule limits experts to five per “side” rather than five per party. Although limiting the number of experts (and expert testimony) may expedite Part 3 proceedings, there are many cases in which multiple parties may appear before the Commission, particularly in consumer protection matters. These parties may not always have the same interests, and will likely require their own expert witnesses. The Section therefore recommends that, in situations involving multiple respondents, the rules should be modified to permit each respondent to have five expert witnesses.

Rule 3.33(b): *This proposed rule permits ALJs to prohibit the taking of a deposition upon the motion of a party if the deposition would exceed the scope of discovery under Rule 3.31(c) or does not satisfy the standards for the admissibility of evidence under Rule 3.43(b).*

Comments:

This proposed rule imposes a new burden on parties seeking depositions to the explain why deposition testimony would be admissible. Although the FRCP place general limitations on discovery, permission from a federal judge to take a deposition is required under FRCP 30(a)(2) only if the parties have not stipulated to the deposition, and (1) the deposition would result in more than 10 depositions being taken; (2) the deponent has already been deposed; or (3) the party seeks to take the deposition before the time specified in FRCP 26(d).

Notably absent from FRCP 30(a)(2) is a requirement that federal judges attempt to anticipate the admissibility of evidence obtained from a deposition before the deposition is even taken. Although in many circumstances it may indeed be possible for an ALJ to determine, for example, the relevance of evidence obtained from a deposition before the deposition is taken, there could be situations in which an ALJ will be unable to determine the content of a deposition before the deponent has the opportunity to testify.

Therefore, because this proposed change appears unnecessarily to impose a new burden of showing why testimony would be admissible, and because this new burden could be used to prohibit depositions in Part 3 proceedings under circumstances in which such depositions would not be prohibited in federal court, the Section recommends that this proposed rule change be reconsidered or revised to comport with the FRCP.

Rule 3.35(b)(2): *This proposed rule states that parties may decline to answer an interrogatory that “involves an opinion or contention that relates to fact or the application of law to fact” until the close of discovery, the pretrial conference, “or other later time.”⁴⁷ Whereas this revised rule would require proponents of an interrogatory to move the ALJ to compel a response, the current rule (and FRCP 33(a)(2)) requires recipients of interrogatories to move the ALJ for permission not to answer.*

Comments:

The Section believes that this new provision is problematic for two reasons. First, the new rule inexplicably shifts the burden of contesting interrogatories from the recipients of an interrogatory to the proponents of an interrogatory. Whereas the current rule requires recipients

⁴⁷ NPRM at 81-82.

of interrogatories to seek permission not to answer, the new rule could potentially impair an interrogatory proponent's discovery efforts in significant ways by permitting recipients not to answer until the proponent moves the ALJ to compel a response. An interrogatory recipient may decline to answer permissible interrogatories either in the hope that the proponent will decline to move the ALJ to compel a response or in the hope that moving the ALJ to compel a response will simply impose additional burdens on the proponent's discovery efforts and impair their ability to prepare their case.

Second, the new rule permits recipients to decline to answer such an interrogatory until an unspecified "other later time," perhaps even arguably after the matter is entirely concluded. Conflict will inevitably arise in cases regarding what "other later time" means. The commentary to the proposed rules does not specify how this amendment would shorten Part 3 proceedings, but, if this is indeed the purpose of the rule, the rule should specify a point in time at which the recipient of an interrogatory must answer. Otherwise, recipients' failure to answer interrogatories could generate significant delays in completing discovery and require more ALJ involvement in resolving disputes than is required under the current rule. Thus, the Section recommends that this proposed change should be augmented to include a definition of or limitation on the phrase "other later time."

Rules 3.43(b) and 3.33(g)(1): *The proposed amendments to this rule would permit the introduction of hearsay evidence if it is "relevant, material, and bears satisfactory indicia of reliability so that its use is fair."⁴⁸ Similarly, Rule 3.33(g)(1), governing the use of depositions at hearings, is eliminated under the proposed rules because it contains hearsay-based limitations.*

Comments:

Although, as a general rule, hearsay evidence is admissible in federal administrative proceedings,⁴⁹ as well as in preliminary injunction proceedings in federal court,⁵⁰ explicitly permitting the use of hearsay evidence in Part 3 proceedings creates additional, unnecessary disparities between Part 3 proceedings and federal court proceedings, which could lead to differences in substantive outcomes. Furthermore, even if admitting hearsay evidence under

⁴⁸ NPRM at 97-98.

⁴⁹ Although many courts have acknowledged that hearsay evidence, standing alone, cannot serve as the basis for administrative decisions under the APA, the majority of courts considering the issue have held that hearsay evidence is admissible in administrative proceedings under APA so long as the evidence is not "irrelevant, immaterial, or unduly repetitious" under 5 U.S.C. § 556(d). *See, e.g., Bennett v. NTSB*, 66 F.3d 1130, 1137 (10th Cir. 1995); *Gray v. United States Dep't. of Agric.*, 39 F.3d 670, 676 (6th Cir. 1994); *Veg-Mix, Inc. v. United States Dep't. of Agric.*, 832 F.2d 601, 606 (D.C. Cir. 1987); *Calhoun v. Bailar*, 626 F.2d 145, 148 (9th Cir. 1980); *NLRB v. Imparato Stevedoring Corp.*, 250 F.2d 297, 302 (3d Cir. 1957). Several courts also have specifically held that hearsay is admissible in proceedings before the FTC. *See, e.g., Buchwalter v. FTC*, 235 F.2d 344 (2d Cir. 1956); *Dolcin Corp. v. FTC*, 219 F.2d 742 (D.C. Cir. 1954); *Concrete Materials Corp. v. FTC*, 189 F.2d 359 (7th Cir. 1951).

⁵⁰ *See, e.g., Kos Pharm., Inc., v. Andrx Corp.*, 369 F.3d 700, 718 (3d Cir. 2004); *Levi Strauss & Co. v. Sunrise Int'l Trading, Inc.*, 51 F.3d 982, 985 (11th Cir. 1995); *Sierra Club, Lone Star Chapter, v. FDIC*, 992 F.2d 545, 551 (5th Cir. 1993); *SEC v. Cherif*, 933 F.2d 403, 412 n.8 (7th Cir. 1991); *Republic of the Phil. v. Marcos*, 862 F.2d 1355, 1363 (9th Cir. 1988); *Asseo v. Pan Am. Grain Co.*, 805 F.2d 23, 26 (1st Cir. 1986).

some circumstances could expedite Part 3 proceedings, a case-by-case approach under the current rule is better than codifying a rule increasing the ability to rely on hearsay, given the risks associated with hearsay evidence and the potential to unfairly disadvantage respondents.

Perhaps most importantly, the proposed rule should include a provision that requires complaint counsel to provide notice of its intent to use hearsay evidence to respondents in advance of a hearing. The residual exception to the hearsay rule contained in FRE 807 requires parties to provide such notice, including the content of the hearsay statement and the name and address of the declarant. A similar safeguard in Part 3 proceedings would provide increased fairness to respondents by permitting them to have an opportunity to obtain evidence to rebut the hearsay evidence. A notice requirement would also increase efficiency and help respondents reduce costs (a purported goal of the new rules) because respondents would not have the significant burden of preparing for the possibility that complaint counsel will attempt to introduce any of their investigative material as hearsay evidence at a hearing.

Rule 3.43(d)(1): *This proposed rule states that a party is entitled to present evidence, rebuttal evidence, and such cross examination “as, in the discretion of the Commission or the ALJ, may be required for a full and true disclosure of the facts.”⁵¹ The commentary to the proposed rule states that the new rule “does not impose an absolute or unlimited right of cross examination.”⁵²*

Comments:

The Section is concerned with the extent to which the proposed rule might be interpreted to limit or abrogate rights of cross examination inconsistent with the APA. Cross examination is an important hallmark of an adjudicative system, whether in federal district court or administrative proceedings. The APA provides for a right of cross examination if cross examination is “required for a full and true disclosure of the facts.”⁵³ From the text of the proposed rule and the commentary, it is unclear whether the proposed rule is intended to give the Commission and the ALJ unfettered discretion to prevent cross examination when the right to cross examination is so required by the APA. The Section therefore recommends that the proposed rule be modified to make clarify that the Commission and the ALJ do not have the discretion to prevent cross examination when cross examination is required for a full and true disclosure of the facts as provided in the APA.

⁵¹ NPRM at 98-99.

⁵² *Id.* at 37-38.

⁵³ 5 U.S.C. § 556(d) (“A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.”).