

FEDERAL TRADE COMMISSION

16 CFR Parts 1, 2, 3, and 4

Rules of Practice Amendments

AGENCY: Federal Trade Commission.

ACTION: Final rule.

SUMMARY: The Federal Trade Commission amends its Rules of Practice to adapt them to the Federal Trade Commission Act Amendments of 1994. This action conforms the Commission's Rules of Practice to certain statutory changes and provides guidance to the public.

EFFECTIVE DATE: July 21, 1995.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION: On August 26, 1994, the President signed into law the "Federal Trade Commission Act Amendments of 1994," Pub. L. 103-312, 108 Stat. 1691 (1994 Amendments), by which the Congress reauthorized the Federal Trade Commission and further defined or altered the Commission's authority. The 1994 Amendments make it necessary or appropriate to revise certain of the agency's Rules of Practice. These rule revisions relate solely to agency practice and, thus, are not subject to the notice and comment requirements of the Administrative Procedure Act, 5 U.S.C. 553(a)(2), nor to the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601(2). The Paperwork Reduction Act, 44 U.S.C. 3501, does not apply because these revisions do not contain requirements for information collection subject to approval of the Office of Management and Budget. Although the rule revisions are effective immediately, the Commission welcomes comment on them and will consider further revision, as appropriate.

I. Analysis

1. Deletion of Section 1.17

Section 1.17 is being removed in accordance with section 3 of the 1994 Amendments, which deletes section 18(h) of the FTC Act, 15 U.S.C. 57a. That section permitted the Commission to provide, in certain circumstances, compensation for attorney's fees and other costs incurred by participants in rulemaking proceedings.

2. Addition to Section 2.7

Section 7 of the 1994 Amendments broadens the Commission's investigatory authority by authorizing it to issue civil investigative demands

(CIDs) for tangible things, and to use CIDs in antitrust investigations. The Commission is adding a new subsection (2) to § 2.7(b) of the rules, to extend CID authority to tangible items. The new subsection parallels existing rules that apply to demands for other materials. Cross-references in other subsections are renumbered. No rule change is necessary to implement the extension of the Commission's authority to use CIDs in antitrust investigations.

3. Revisions Relating to Stays of Orders

The 1994 Amendments make any cease and desist order that is adjudicated under section 5 of the FTC Act effective 60 days after service, except for divestiture provisions,¹ unless the order is stayed by the Commission or a court. The Commission is adding a new § 3.56 to incorporate this statutory change and to establish procedural rules for stay applications. Section 3.56 requires that applications must be submitted within 30 days of service of the order. This time limit will help ensure that a Commission resolution of the request for a stay can be made before the order goes into effect and before a petition for judicial review must be filed. The rule also specifies that applications shall state the reasons for a stay and shall be supported by affidavits or other sworn statements, with attachments from the record where relevant.

In addition, applications must address the likelihood of the applicant's success on appeal, whether the applicant will suffer irreparable harm if a stay is not granted, the degree of injury to other parties if a stay is granted, and why the stay is in the public interest. These questions are based on the traditional four-part test that courts, as well as agencies governed by the Administrative Procedure Act, have applied in determining requests for stays of orders. See, e.g., *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *In re Chicago Mercantile Exchange, Board of Trade of the City of Chicago*, and

¹ Pursuant to amended section 5(g) of the FTC Act, the automatic stay still applies to "an order provision requiring a person, partnership or corporation to divest itself of stock, other share capital, or assets, if a petition for review of such order has been filed * * *." Divestiture provisions retain the automatic stay because of their substantial impact on business operations. See S. Rep. No. 130, 103d Cong., 1st Sess. 11 (1993); H. Rep. No. 138, 103d Cong., 1st Sess. 13 (1993). Other provisions of the order are not automatically stayed. The Commission notes that order paragraphs containing divestiture provisions may also contain other provisions, such as hold-separate requirements or asset-preservation provisions, which do not have the same impact as divestiture requirements and which, therefore, are not automatically stayed.

Investment Company Institute, Securities Exchange Act Release No. 26811 (May 12, 1989). The Commission previously has stated that this four-part test is the appropriate standard for stay applications under the FTC Act. See Order Denying Respondent's Motion to Stay Enforcement, *Trans Union Corp.*, D. 9255 (Dec. 5, 1994).

Section 3.56 also requires that service of applications be made in the same fashion as in adjudicative proceedings, to ensure that applications are filed with the Secretary of the Commission as well as the relevant staff. An answer to an application may be filed within 5 business days of receipt of the application, and a reply (limited to new matters raised in the answer) may be filed within 3 business days of receipt of the answer. These short time frames take into account that the Commission will undertake to rule on the application within 30 days, after which, if the Commission has not acted, or the application is denied, the applicant may request a stay from the court in which an appeal is pending. Specifically allowing replies, and limiting them to new matters raised in the answer, will deter submission of repetitious filings.

The Commission is also adding a provision to § 4.7(e) concerning *ex parte* communications, specifying that the requirements of Rule 4.7 are to be observed with respect to stay applications. In § 4.7(f), the Commission clarifies that the *ex parte* rules are not applicable to communications regarding preparations for judicial review.

In addition, the Commission is revising Rule 2.41 pertaining to the filing of compliance reports, to state that neither the filing of an application for a stay nor of a petition for review will operate to delay the required date for filing a compliance report. Compliance reports will be delayed only to the extent that an order is stayed automatically by statute, by order of the Commission or a court, or as otherwise permitted under the rules.

Finally, the Commission is clarifying that applications for stays and subsequent, related filings (as well as petitions for reconsideration) will be placed on the public record, pursuant to § 4.9(b). Requests for confidential treatment of material submitted with stay applications will be determined as provided in § 4.9(c)(1).

4. Revisions Affecting Custody of Tangible Things

Section 8 of the 1994 Amendments amended section 20 of the FTC Act regarding the Commission's custody of tangible things. To accommodate submissions of tangible items, the