approval letter must specifically reference this AD.

(2) *Airworthy Product:* For any requirement in this AD to obtain corrective actions from a manufacturer or other source, use these actions if they are FAA-approved. Corrective actions are considered FAA-approved if they are approved by the State of Design Authority (or their delegated agent). You are required to assure the product is airworthy before it is returned to service.

(i) Related Information

Refer to MCAI Canadian Airworthiness Directive CF–2011–14, dated June 17, 2011; and Bombardier Service Bulletin 84–32–89, dated March 22, 2011; for related information.

Issued in Renton, Washington on January 13, 2012.

John Piccola,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 2012–1210 Filed 1–20–12; 8:45 am]

BILLING CODE 4910–13–P

FEDERAL TRADE COMMISSION

16 CFR Parts 2 and 4

Rules of Practice

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

ACTION: Proposed rule amendments; request for public comment.

SUMMARY: The FTC is proposing to amend parts of its regulations. The proposed amendments would make changes to the FTC's investigatory procedures in the interest of fairness, efficiency, and openness in all FTC investigations. The amendments would also revise the Commission's rules governing reprimand, suspension, and disbarment of attorneys practicing before the Commission.

DATES: Written comments must be received on or before March 23, 2012.

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part (subsection III) of the **SUPPLEMENTARY INFORMATION** section below. Write ''Parts 2 and 4 Rules of Practice Rulemaking (16 CFR Parts 2 and 4) (Project No. P112103)'' on your comment, and file your comment online at *https://ftcpublic.commentworks.com/ftc/rulespart2and4.1nprm*, by following the instructions on the Web-based form. If you prefer to file your comment on paper, mail or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex Y), 600 Pennsylvania Avenue NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: For further information on the proposed revisions to the investigatory procedures, contact Lisa M. Harrison, Assistant General 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. Introduction

1. Need for Reform of the Commission's Investigatory Process

The Commission has periodically examined and revised its Rules of Practice in the interest of clarifying the Rules and making the Commission's procedures more efficient and less burdensome for all parties.[1] Especially in response to growing reliance upon and use of electronic media in document discovery, the Commission has reviewed its current rules governing the process of nonadjudicative investigations (''Part 2 Rules'').

Document discovery today is markedly different than it was only a decade ago. The growing prevalence of business files in electronic form—email, voicemail, text messages, blogs, word processing documents, PowerPoint presentations, videos, spreadsheets, and data files—has changed document discovery in several ways. First, information is no longer accurately measured in pages, but instead in megabytes, gigabytes, terabytes, and more. Second, because electronically stored information (''ESI'') is widely dispersed throughout organizations, parties can no longer complete searches by merely looking in file cabinets and desk drawers. While searchers must still reach into file cabinets and desk drawers, they must also—and primarily—seek and retrieve information from mainframe computers, shared servers, computers, cell phones, smart phones, portable devices, and other media, as well as from third-party service providers. Third, because ESI is broadly dispersed and not always consistently organized by its custodians, searches, identification, and collection all require special skills and, if done properly, may utilize one or more search tools such as advanced key word searches, Boolean connectors, Bayesian logic, concept searches, predictive coding, and other advanced analytics. Fourth, because ESI may be readily altered, it must be preserved early in any discovery process—or even before discovery, when litigation is anticipated—and handled carefully at all stages to preserve its accuracy, authenticity, and ultimate admissibility. Fifth, even when investigations are conducted cooperatively, and are both well organized and well managed, there remains a substantial risk that mistakes and delays will occur as the responding party collects responsive materials, analyzes them for relevance and privilege, and prepares them for production.

The need to reform Part 2 Rules is also based in part on concerns that modern document discovery and its attendant complexities have become a source of delay in the Commission's securing the information it needs to complete its investigations. Thus, the Commission views its reexamination of the rules as an opportunity not only to account for the widespread use of ESI, but also to improve the efficiency of investigations, and the willingness of targets and third parties to cooperate.

2. Overview of Proposed Rule Revisions

The proposed changes to the Part 2 Rules would expedite Commission investigations by: (1) Conditioning any extensions of time to comply with Commission processes on a party's continued progress in achieving compliance; (2) conditioning 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; and (3) removing the two-step process for resolving petitions to quash and establishing tighter deadlines for the Commission to rule on petitions.

The proposed revisions are also intended to streamline the rules and add structure to the agency's investigatory process by consolidating related provisions that are currently scattered throughout Part 2. The rules also update investigatory practices, especially in light of the ubiquity of ESI, by including express references to ESI in the rules. Finally, they facilitate the enforcement of Commission compulsory process by clarifying the rights and obligations both of agency staff and compulsory process recipients.

[1] *See, e.g.,* 74 FR 1828 (Jan. 13, 2009).

The Commission also proposes to amend the attorney disciplinary procedures codified in current Rule 4.1(e) in order to address more effectively any misconduct by attorneys practicing before the agency. The proposed amendments are designed to provide additional guidance regarding appropriate standards of conduct, and procedures for addressing alleged violations of those standards.

Finally, the Commission intends to make certain technical revisions throughout the rules including, for example, eliminating the convention of specifying numbers in both written and numerical form, and substituting gender-neutral language. The proposed rule revisions relate solely to agency practice and, thus, are exempt from the notice-and-comment requirements of the Administrative Procedure Act (''APA''). 5 U.S.C. 553(b)(3)(A). Nonetheless, the FTC is issuing the revisions as a proposed rule for public comment in order to benefit from the input of affected parties. The proposed revisions are also not subject to the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601(2), the requirements of the Paperwork Reduction Act, 44 U.S.C. 3518(c)(1)(B)(ii), and 5 CFR 1320.4 (exempting information collected during the conduct of administrative proceedings or investigations). If finalized, these revisions would govern all Commission investigations commenced on or after the date on which the rules are issued. The amendments would also govern all Commission investigations pending as of that date, unless the Commission, acting through its managers, determines that the application of an amended rule in a particular investigation would not be feasible or would create an injustice.

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

The following is a section-by-section analysis of the proposed revisions to Part 2 of the Commission's Rules, and the proposed revision to Rule 4.1, which provides for new attorney discipline procedures.

Section 2.2: Request for Commission Action

The Commission would amend this Rule to account for new web-based methods of submitting complaints and requests for agency action, and to avoid repetition of certain provisions in current Rule 2.1. The latter Rule—which the Commission does not propose to revise—identifies how, and by whom, any Commission inquiry or investigation may be initiated. Rule 2.2 describes the procedures that apply when members of the public or other parties outside of the agency request Commission action.

Section 2.4: Investigational Policy

The revisions to this Rule would underscore the importance of cooperation between recipients of compulsory process and FTC staff to resolve issues related to compliance with CIDs and subpoenas. The proposed Rule affirms the Commission's endorsement of voluntary cooperation in all investigations, but would view cooperation as a complement—rather than a mutually exclusive alternative—to compulsory process. This revision is intended to more accurately account for the complexity and scope of modern discovery, specifically the electronic discovery so prevalent in Commission investigations.

Equally important, the Commission's revised investigational policy would also endorse the principles articulated in the Sedona Conference's ''Cooperation Proclamation'' [2] and Fed. R. Civ. P. 1's call for ''just, speedy, and inexpensive'' adjudication and apply them where they fit into law enforcement investigations. The Sedona Conference has been instrumental in providing guidance to practitioners with respect to modernized discovery practices. Numerous authorities, including more than 100 judges nationwide have endorsed the Cooperation Proclamation since its release, and the Commission believes that it provides a sound articulation of ''best practices'' in modern discovery.

Section 2.6: Notification of Purpose

The Commission would amend this Rule to clarify staff's ability to disclose the existence of an investigation to certain parties. The added provision would restate longstanding agency policy and practice recognizing that staff may at times 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.

Section 2.7: Compulsory Process in Investigations

The revisions to this Rule would consolidate and re-designate into one rule the compulsory process provisions now found in Rules 2.8, 2.10, 2.11, and 2.12. Although the proposed revisions would encompass all types of documentary material sought by the Commission, the revisions would better reflect modern document retention and production practices by expressly accounting for the use of new technologies.[3]

The Commission expects the proposed revisions to substantially expedite its investigations by: (1) Conditioning any extensions of time to comply on a party demonstrating its progress in achieving compliance; (2) 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; and (3) requiring 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.

Finally, the proposed revisions to this Rule would 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.

Section 2.9: Rights of Witnesses in Investigations

Current Rule 2.9 details the rights of witnesses in Commission investigations, including witnesses compelled to appear in person at an investigational hearing or deposition. Rule 2.9(b)(2) permits a witness at an investigational hearing to refuse to answer questions that call for privileged information. As it is currently written, the rule does not provide guidance regarding the perimeters of the privileges that may be asserted. Counsel for witnesses have sometimes taken advantage of the rule's lack of clarity by repeating objections, excessively consulting with their clients during the hearing, and otherwise employing arguably obstructionist tactics. Revised Rule 2.9(b)(1) is

[2] The Sedona Conference is a nonprofit research and educational institute whose members are judges, attorneys and academics. The institute's Cooperation Proclamation declares that ''the legal profession can engage in a comprehensive effort to promote pre-trial discovery cooperation. Our 'officer of the court' duties demand no less. This project * * * is a tailored effort to effectuate the mandate of court rules calling for a 'just, speedy, and inexpensive determination of every action' and the fundamental ethical principles governing our profession.'' *See http://www.thesedonaconference.org/content/tsc_cooperation_proclamation/proclamation.pdf.*

[3] The term ''electronic media'' is not a legal term of art. The Commission recommends the use of the term throughout the revised Rules for precisely this reason; it does not want any single technological advance in data storage or production to render a Rule provision obsolete.

intended to prevent counsel from improperly engaging in such 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 or other protected status. The Commission believes that such a provision is necessary to prevent obstructionist conduct and has concluded that this revision is supported by federal court decisions that prevent counsel for a witness from conferring with the witness during a deposition while a question is pending.[4] As one court has observed, such coaching ''tend[s], at the very least, to give the appearance of obstructing the truth.'' [5] Many district courts have adopted rules prohibiting consultation in depositions while a question is pending.[6] Also persuasive is the Advisory Committee's notes to Fed. R. Civ. P. 30, which associate the general regulation of attorney conduct during a deposition with the more specific prohibition against improper coaching.[7]

The Commission also proposes revising this Rule to clarify the process for resolving those privilege objections that require a recess in a deposition or investigational hearing. At present, the validity of a witness's assertion of privilege during an investigational hearing is resolved definitively only through an enforcement action in district court, in accordance with the provisions of Rule 2.13, and not as part of a petition to limit or quash a subpoena in accordance with the provisions of existing Rule 2.7(d). Revised Rule 2.9(b)(3) would clarify the process for resolving privilege objections during a deposition or investigational hearing by expressly granting to Commission investigators the ability to recess, and subsequently continue, a course of inquiry interrupted by a witness's privilege objection. The new rule also states expressly that the Commission may file an enforcement action if the witness fails to reappear.

Section 2.10: Petitions To Limit or Quash Commission Compulsory Process

The Commission proposes to consolidate the provisions governing petitions to limit or quash [8] into a re-designated Rule 2.10. Apart from this consolidation, the revised Rule would clarify the process for filing and ruling on such petitions. Revised paragraph (a)(3) provides guidance to parties in instances where the Commission investigator 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 2.10 expressly allow the Commission investigator 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. Paragraph (a)(4) clarifies the right of Commission staff to respond to a petition to limit or quash.

To expedite rulings on petitions to quash, the revised Rule would provide that the Commission itself, rather than a designated Compulsory Process Commissioner, would rule upon petitions to quash or limit in the first instance. This amendment is designed to address the fact that it has now become standard procedure for petitioners to file requests for review of virtually all letter rulings issued by the Compulsory Process Commissioner, frequently by simply filing a request for review and attaching to that request the original petition to quash or limit in its entirety. The current practice now results in substantial delays in disposing of petitions to quash or limit without offering any countervailing advantages. Second, the Commission proposes a new Rule 2.10(c) to provide for a 30-day deadline for the issuance of an order ruling on a petition to limit or quash.[9] To facilitate expedited review of petitions to limit or quash, the Commission also proposes an amended paragraph (a)(1), providing that petitions be limited to 3,750 words (approximately 15 pages). The word limit would not apply to affidavits or other supporting documentation.

Section 2.11: Withholding Requested Material

This proposed Rule would revise and re-designate current Rule 2.8A to require parties to give more meaningful and specific information concerning privilege claims in Part 2 investigative proceedings. Parties withholding requested material would be subject to the revised Rule 2.11, which would set out specifications for a privilege log to be submitted to the Commission in lieu of a motion to limit or quash compulsory process.

As part of its comprehensive reforms governing adjudicative proceedings, in 2009, the Commission amended Rule 3.38A to eliminate the requirement that a privilege log must always contain specific information for each item being withheld.[10] The Commission substituted the more flexible requirement of Fed. R. Civ. P. 26(b)(5)(A), which prescribes that the nature of the materials withheld be described ''in a manner that * * * will enable other parties to assess the claim.'' The Commission believes that the Part 2 Rule should contain a more specific requirement because there is no neutral Administrative Law Judge (''ALJ'') 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.

The proposed amendment would require detailed descriptions of the withheld material (including the number of pages or bytes comprising the privileged material and the respective dates when the material was both created and sent), and descriptions of the authors and recipients of the material (including the parties' names, titles, physical addresses, email addresses, and organizations). The revision would also require the person claiming a privilege to provide a factual basis for the claims. Finally, the proposed privilege log would be notarized by the ''lead attorney'' on the matter, to avoid instances where junior-level attorneys or non-lawyer ESI specialists might notarize a log and thereby attempt to shield senior attorneys from sanctions in the event of misrepresentation.

Paragraph (b) of the proposed rule allows the requirements to be modified as the result of any agreement reached during the ''meet and confer'' session. In some situations, less detailed requirements (for example, allowing

[4] *See, e.g., Hall* v. *Clifton Precision,* 150 F.R.D. 525, 528 (E.D. Pa. 1993); *Plaisted* v. *Geisinger Med. Ctr.,* 210 F.R.D. 527, 535 (M.D. Pa. 2002).

[5] *Hall,* 150 F.R.D. at 528.

[6] *See, e.g.,* 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).

[7] *See, e.g.,* Fed. R. Civ. P. 30 advisory committee's note (1993 Amendments) (noting 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.'').

[8] At present, the provisions are found in Rules 2.7(d)–(e), 2.11(b)–(d), and 2.12(c)–(e).

[9] The Commission would retain its inherent authority to extend this time period if the petition is not acted upon within 30 days.

[10] *See* 73 FR 58839.

documents to be described by category) may suffice to assess privilege claims. This revision is designed to encourage cooperation and facilitate partial privilege logs, such as those encouraged by the Commission's ''best practices'' in merger cases.[11]

Paragraph (c) of the proposed rule addresses an issue that has arisen in some recent investigations wherein the targets of Part 2 investigations, in contravention of instructions in a subpoena issued by the Commission, redacted numerous documents that were not claimed to be protected by any privilege. Paragraph (c) highlights the instruction by explicitly providing that responsive material for which no privilege claim has been asserted must be produced without redaction.

Finally, the suggested revised Rule also incorporates recent changes in Commission Rules 3.31(g), 3.38A, and Fed. R. Evid. 502 regarding the return or destruction of inadvertently disclosed material. The Federal Rule sets the new standard for subject matter waiver in the United States. As previously noted with respect to the Part 3 revisions,[12] the risk of privilege and work product waiver, and the resources used to avoid it, significantly increase the costs and delay of discovery. This risk is amplified when a party is asked to produce ESI. The Commission believes that requiring parties to make only those efforts reasonably necessary to protect privilege or immunity will reduce the time and effort needed to avoid waivers.

Section 2.13: Noncompliance With Compulsory Process

The proposed Rule amendment would expedite the Commission's Hart-Scott-Rodino enforcement process by delegating to the General Counsel the authority to initiate enforcement proceedings for noncompliance with a Hart-Scott-Rodino second request under 15 U.S.C. 18a(g)(2) (''(g)(2) actions''). The Commission believes this change is appropriate because it 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. The revised Rule would also authorize the General Counsel to initiate an enforcement action in connection with noncompliance of a Commission order requiring access pursuant to 15 U.S.C. 49, in addition to compliance with compulsory process already covered in the existing Rule.

Section 2.14: Disposition

Rule 2.14 applies after the Commission determines whether to take corrective action following an investigation. If corrective action is deemed necessary, the Commission may elect to institute proceedings in Part 3 or in federal court. If corrective action is not necessary, the investigation is usually closed. Past subjects of Commission investigations have occasionally expressed informal concerns about the lack of a formal notification process following the disposition of an investigation, especially in light of the fact that at times staff does not affirmatively issue closing letters.[13] Currently, if a party does not receive notification that a matter has been closed, it is under a continuing obligation to preserve documents.

To address these concerns, the Commission proposes a new paragraph (c) to Rule 2.14. Paragraph (c) is intended to benefit both the subjects of FTC investigation and third parties by relieving them of any obligation to preserve documents after a year passes with no written communication from the Commission or staff. The Commission believes this revision is warranted because the retention and preservation of information, documentary material, and other evidence can, depending on the volume, be expensive—and wasteful if unnecessary. In many instances such retention and preservation can expose the custodian to potential liability; for example, sensitive personal or medical information, or non-current (but still sensitive) trade information and data can all cause substantial problems for a firm if lost, stolen, or hacked into. The Commission also notes that in some circumstances, 18 U.S.C. 1519 threatens imprisonment for any party who violates an obligation to retain such materials if an investigation is pending. Equally significant, third parties are generally not informed when one of the agency's non-public investigations has been concluded. In sum, recipients of compulsory process report that they often do not know when they are relieved of any obligation to retain information or materials for which neither the agency nor they have any use; nor are they inclined to ask about the status of an investigation for fear of renewed agency attention. The proposed Rule 2.14 revisions would relieve parties of any obligation to preserve documents if twelve months pass with no written communication from the Commission or staff.

Section 4.1: Appearances

Rule 4.1(e) governs the administration of attorney discipline for attorneys practicing before the Commission. The Commission proposes to amend this Rule to provide additional guidance regarding the type of conduct that may warrant disciplinary action. The revised Rule provides for disciplinary action where an attorney engages in conduct during a Commission investigation or other proceeding that is contemptuous, obstructionist, or violates appropriate standards of professional conduct, as well as where an attorney knowingly or recklessly provides false or misleading information to the Commission or its staff. In addition, the revised Rule provides 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 other attorney's misconduct, or has managerial authority over the attorney.

The revised Rule also establishes a new framework for evaluating and adjudicating allegations of misconduct by attorneys practicing before the Commission. The revised Rule provides for Commission staff to submit allegations of misconduct on a confidential basis to designated officers within the Bureaus of Competition or Consumer Protection with the authority to investigate such charges. The rule establishes procedures for the investigation of alleged misconduct and authorizes an investigating officer to request that the Commission issue compulsory process to facilitate an investigation of the allegations. After completion of an investigation, the revised rule provides the investigating officer with discretion to determine whether the allegations warrant further action and, if so, to recommend the charges to the Commission for its consideration.

The revised Rule also introduces a process for issuance of attorney reprimands without an evidentiary hearing in appropriate circumstances. The revised Rule provides that the Commission may issue a public reprimand, after the subject of an investigation has been given notice and an opportunity to respond during the course of the investigation, if it determines, based on the attorney's response, if any, and the record before it, that the attorney has engaged in professional misconduct warranting a public reprimand.

In cases where the Commission determines that a full administrative disciplinary proceeding is warranted to

[11] *See http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf.*

[12] *See* 73 FR 58839.

[13] Because closing letters are public, some companies affirmatively request that no closing letter be issued.

determine if a reprimand, suspension, or disbarment should be imposed, the Rule provides for the Commission to institute disciplinary proceedings by serving an order to show cause on the respondent attorney and assigning the matter to an ALJ.[14] The revised Rule grants the ALJ the necessary powers to oversee expeditious attorney disciplinary proceedings, including the authority to allow for limited discovery and the filing of pleadings. Agency attorneys—appointed by the Director of the Bureau that has proffered the allegations—would serve as Commission counsel during a hearing to adjudicate the allegations of misconduct.

Revised Rule 4.1(e) also establishes expedited procedures to allow the Commission to suspend an attorney temporarily in the event that it receives official notice from a state bar that an attorney has been suspended or disbarred by that authority, pending a full disciplinary proceeding to assess the need for a permanent disbarment from practice before the Commission. These summary procedures would provide the Commission the ability to act promptly to suspend attorneys that have been found guilty by a state bar of conduct warranting suspension or disbarment.

III. Invitation To Comment

The Commission invites interested persons to submit written comments on any issue of fact, law, or policy that may bear upon its proposal to revise its Part 2 and 4 Rules. Please include explanations for any answers provided, as well as supporting evidence where appropriate. After examining the comments, the Commission will determine whether to issue specific amendments.

You can file a comment online or in a written document. For the Commission to consider your comment, we must receive it on or before March 23, 2012. Write ''Notice of Proposed Rulemaking on Parts 2 and 4 of the FTC's Rules of Practice (16 CFR Parts 2 and 4) (Project No. P112103)'' on your comment. Your comment—including your name and your state—will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Web site, at *http://www.ftc.gov/os/publiccomments.shtm*. As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Web site.

Because your comment will be made public, you are solely responsible for making sure that your comment does not include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, like medical records or other individually identifiable health information. In addition, do not include any ''[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential,'' as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).[15] Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online, or to send them to the Commission by courier or overnight service. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/rulespart2and4.1nprm*, by following the instructions on the web-based form. If this Notice appears at *http://www.regulations.gov/#!home*, you also may file a comment through that Web site.

If you file your comment on paper, write ''Notice of Proposed Rulemaking on Parts 2 and 4 of the FTC's Rules of Practice (16 CFR Parts 2 and 4) (Project No. P112103)'' on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex Y), 600 Pennsylvania Avenue NW., Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at *http://www.ftc.gov* to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before March 23, 2012. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm*.

IV. Proposed 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 proposes to amend 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 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) Complaints or requests submitted to the Commission may 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

[14] In the alternative, the rule provides that the Commission may preside over the matter in the first instance or assign one or more members to sit as administrative law judges in a matter. Under the APA, the Commission or its members have the authority to preside over a hearing. *See* 5 U.S.C. 556(b).

[15] In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

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. With these exceptions, it is the Commission's policy not to publish or divulge the name of a complainant except as authorized by law or by the Commission's rules.

3. Revise § 2.4 to read as follows:

§ 2.4 Investigational policy.

Consistent with obtaining the information, including documentary material, it needs for investigations, 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 section, 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 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 legal exemption, privilege, or work product protection.

(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 Commission investigator 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 or not 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 of any Commission member, examiner, attorney, investigator, or other person duly designated under the Federal Trade Commission Act, for the purpose of hearing the testimony of witnesses 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 Commission Investigator shall exclude from the hearing room all persons other than the person being examined, counsel for the person being examined, and any stenographer or other person recording such testimony. A copy of the transcript shall promptly be forwarded by the Commission Investigator to the Commission custodian designated under § 2.16. At the discretion of the Commission Investigator, 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 Commission Investigator 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 Commission Investigator, 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 § 2.7(*l*). 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 by a Commission official identified in § 2.7(*l*), a recipient of Commission compulsory process shall meet and confer with Commission staff within 10 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 privilege issues and the form and manner in which privilege claims will be asserted. Such meetings 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, and/or other relevant materials such as organizational charts and 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 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 negotiate 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.

6. Reserve § 2.8.

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 Commission Investigator, 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 Commission Investigator shall take the actions 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 of privilege involving protected status.

(2) Any objection during a deposition or investigational hearing shall be stated concisely on the 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 privilege or work product. Counsel may instruct a witness not to answer only when necessary to preserve a claim of privilege or work product.

(3) The Commission Investigator 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 (b)(2). The Commission Investigator 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 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 Commission Investigator, the witness or his or her counsel may on the record request that the Commission Investigator permit the witness to clarify any answers. The grant or denial of such request shall be within the discretion of the Commission Investigator and would ordinarily be granted except for good cause stated and explained on the record, and with an opportunity for counsel to undertake to correct the expressed concerns of the Commission Investigator or otherwise to reply.

(5) The Commission Investigator shall conduct the deposition or investigational hearing in a manner that avoids unnecessary delay, and prevents and restrains disorderly or obstructionist conduct. The Commission Investigator 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) 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 privilege 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 3,750 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), 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) shall be accompanied by a signed separate statement representing that counsel for the petitioner has conferred with counsel for the Commission pursuant to § 2.7(k) 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 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 Commission Investigator elects pursuant to § 2.9(b)(3) to recess the 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 privilege 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). 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 amount of time permitted for compliance with the portion challenged. 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) 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, or any other request for production of material issued under this part, shall assert a claim of protected status not later than the date set for the production of the material. The claim of privilege, work product, or protected status by operation of law 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 a claim of privilege or protected status. All responsive material that is neither privileged, work product, nor in a protected status by operation of law, including all attachments, that contain privileged or protected information shall be produced 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 of privilege, work product, or protected status by operation of law without disclosing the privileged or protected information. The failure to provide information sufficient to support a claim of privilege or protection may result in a denial of the claim of privilege or protection. The log shall provide:

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

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

(3) The date the material was created or prepared;

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

(5) The names, titles, physical addresses, email addresses, and organizations of all authors (if not contained in the disclosed material);

(6) The names, titles, physical addresses, email addresses, and organizations of all recipients of the material (if not contained in the disclosed material);

(7) The factual basis supporting the claim that the material is privileged, work product, or protected by operation of law (for example, that it was prepared by an attorney rendering legal advice to a client in an attorney-client privileged communication, or prepared by an attorney in anticipation of litigation regarding a specifically identified claim of work product);

(8) The number of pages (if the withheld material is a document) or the number of bytes (if the withheld material is in electronic form); and

(9) Any other pertinent information necessary to support the assertion of privilege, work product, or protected status by operation of law.

(b) A person withholding responsive material solely for the reasons described in paragraph (a) shall meet and confer with Commission staff pursuant to § 2.7(k) 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). The Commission may challenge the validity of any privilege or protection claim for responsive material by initiating a judicial enforcement proceeding.

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

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

(i) The disclosure is inadvertent;

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

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

(B) After being so notified, Commission must:

(i) 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

(ii) 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.

(C) 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:

(A) The waiver is intentional;

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

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

11. 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;

(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 in a United States District Court under section 7A(g)(2) of the Clayton Act (15 U.S.C. 18a(g)(2)); 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 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 sent by the Commission or Commission staff to the recipient or his or her counsel.

(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:

* * * * *

(e) *Reprimand, suspension, or disbarment of attorneys.*

(1) The following provisions govern procedures for evaluating 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:

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

(ii) Has failed to conform to standards of ethical conduct required of practitioners at the bar of any court of which he or she is a member;

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

(iv) 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]

An attorney may be responsible for another attorney's violation of this § 4.1(e) if the attorney orders, or with knowledge of the specific conduct, ratifies the conduct involved, or is a partner or has comparable managerial authority in the law firm in which the other attorney practices, or has direct supervisory authority over the other attorney, and 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 subsection may be proffered by any person possessing information concerning the alleged misconduct. Any such allegations may be submitted orally or in writing to the Bureau Director, the Deputy Director if the Director is not available, or to any of their designees, of the Bureau or office responsible for the matter about which the allegations are made (''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 deems it appropriate, shall in writing notify the subject of the complaint of the underlying allegations and potential sanctions available to the Commission under this subsection, 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 good cause 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), 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)(8) of this subsection, 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. Within 14 days of service of the order to show

[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.

cause, the respondent may file a response admitting or denying the allegations of misconduct, and may request a hearing. If no response is filed, the allegations shall be deemed admitted.

(ii) The Commission may assign the matter for further proceedings to be presided over by an Administrative Law Judge or by the Commission or one or more members of the Commission sitting as Administrative Law Judges. The Administrative Law Judge or the Commission if it reviews the matter in the first instance shall rule on any request for a hearing.

(iii) 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.

(iv) To the extent appropriate, practicable, and consistent with the Commission's policy of conducting proceedings expeditiously, the Administrative Law Judge or the Commission may issue orders (1) authorizing the filing of pleadings in accordance with subpart B of Part 3 of the Commission's rules; (2) specifying the available prehearing procedures in accordance with subpart C of Part 3 of the Commission's rules, (3) authorizing discovery to whatever extent deemed appropriate, but no more than what is provided for in proceedings held under subpart D of Part 3 of the Commission's rules; (4) conducting and controlling administrative proceedings in accordance with subpart E of Part 3 of the Commission's rules; and (5) providing for the opportunity to be heard, the receipt into evidence of documentary material, and the taking of testimony at a hearing. The time periods specified in subparts B, C, D, and E of Part 3 of the Commission's rules with respect to pleadings, prehearing procedures, discovery, and hearings shall not apply to administrative disciplinary proceedings. Instead, all time periods and deadlines shall be determined by the Administrative Law Judge or the Commission consistent with the Commission's interest in an expeditious proceeding and fairness to the attorney respondent.

(v) In its order to show cause, the Commission will establish a deadline for an initial decision by the Administrative Law Judge or by the Commission if it reviews the matter in the first instance. The deadline shall not be modified by the Administrative Law Judge except that it may be amended by leave of the Commission.

(vi) After completing a review of the allegations of misconduct, the response of the respondent attorney, if any, and the entirety of the record of administrative proceedings, the Administrative Law Judge or the Commission if it reviews the matter in the first instance shall issue an initial 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 initial decision may be appealed to the Commission by either party within 30 days. If the Administrative Law Judge's initial decision is appealed, the Commission will thereafter issue a scheduling order governing the appeal.

(vii) 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) Notwithstanding the administrative disciplinary proceedings described in paragraph (e)(5) of this subsection, if after completing a review of the Bureau Officer's recommendation, the response of the attorney, if any, and the entirety of the record before it, the Commission determines that an attorney has engaged in professional misconduct of the type described in paragraph (e)(1) of this subsection, the Commission may issue a public reprimand without resort to the procedures specified in paragraph (e)(5).

(7) 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.

(8) 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 subsection, 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 paragraphs (e)(5) or (e)(6) of this subsection before making a determination whether, and to what extent, to impose further discipline against the attorney.

(9) The disciplinary process described in this subsection 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).

By direction of the Commission, Commissioner Rosch dissenting.

Donald S. Clark,

Secretary.

Concurring and Dissenting Statement of Commissioner J. Thomas Rosch Regarding Proposed Revisions to the Part 2 Rules and Rule 4.1(e)

January 13, 2012

The Commission announced today that it will publish a notice in the Federal Register proposing revisions to the FTC's Rules of Practice. I support the Commission's efforts to modernize our operating rules and generally agree with the changes proposed today. I nevertheless dissent from the proposed rule changes insofar as they omit two important reforms: mandatory compulsory process in all full-phase investigations and regular reports on the status of pending investigations to all Commissioners.

A thorough investigation requires the use of compulsory process. This is particularly true for investigations involving competition concerns. Targets cannot be expected to provide incriminatory information in response to access letters, which are not judicially enforceable. Likewise, third parties cannot be expected to provide candid information unless they are given the ''cover'' from a target's retaliation that compulsory process provides. Only through the use of mandatory compulsory process at the outset of all full-phase competition investigations can the Commission be assured of having a thorough and complete record when making enforcement decisions.

Another needed reform to our Rules of Practice is requiring regular reports on the status of pending investigations to all Commissioners, not just the Chairman. Notwithstanding the laudable efforts of our current Chairman, the Commission has not always been kept apprised of the status of pending investigations, particularly those languishing for a lengthy period of time. The current Chairman will not be in his position forever so leaving the

decision up to whoever is the Chairman about whether and when to brief other Commissioners does not solve the problem. Requiring regular reports to all Commissioners for investigations lasting longer than six months will inspire public confidence and help avoid undue delays in completing investigations.

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–157714–06]

RIN 1545–BG43

Determination of Governmental Plan Status

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of public hearing on proposed rulemaking.

SUMMARY: This document announces a public hearing on proposed regulations, (REG–157714–06) relating to the determination of governmental plans.

DATES: The public hearing is scheduled for Tuesday, June 5, 2012, at 10 a.m. in the auditorium of the Internal Revenue Building. The IRS must receive outlines of the topics to be discussed at the public hearing by February 6, 2012.

ADDRESSES: The public hearing is being held in the Internal Revenue Building, 1111 Constitution Avenue NW., Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. In addition, all visitors must present photo identification to enter the building.

Mail outlines to CC:PA:LPD:PR (REG–157714–06), Room 5205, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–157714–06), Couriers Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC or sent electronically via the Federal eRulemaking Portal at *www.regulations.gov* (REG–157714–06).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Pamela Kinard at (202) 622–6060, and regarding the submission of public comments and the public hearing, Ms. Oluwafunmilayo (Funmi) Taylor, at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION: The subject of the public hearing is the advanced notice of proposed rulemaking (REG–157714–06) that was published in the **Federal Register** on Tuesday, November 8, 2011 (76 FR 69172).

The rules of 26 CFR 601.601(a)(3) apply to the hearing. A period of 10 minutes is allotted to each person for presenting oral comments. After the deadline has passed, persons who have submitted written comments and wish to present oral comments at the hearing must submit an outline of the topics to be discussed and the amount of time to be devoted to each topic (a signed original and four copies) by February 6, 2012.

The IRS will prepare an agenda containing the schedule of speakers. Copies of the agenda will be made available free of charge at the hearing. Because of access restrictions, the IRS will not admit visitors beyond the immediate entrance area more than 30 minutes before the hearing. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this document.

Guy R. Traynor,

Federal Register Liaison, Legal Processing Division, Publications and Regulations Br., Procedure and Administration.

[FR Doc. 2012–1253 Filed 1–20–12; 8:45 am]

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG–120282–10]

RIN 1545–BJ56

Dividend Equivalents From Sources Within the United States

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking by cross-reference to temporary regulations and notice of public hearing.

SUMMARY: In the Rules and Regulations section of this issue of the **Federal Register**, the IRS is issuing temporary regulations that provide guidance on the definition of the term ''specified notional principal contract'' for purposes of section 871(m) of the Internal Revenue Code (Code) beginning after March 18, 2012 through December 31, 2012. The text of those regulations also serves as the text of the proposed regulations. The preamble to the temporary regulations explains the amendments added by the temporary regulations. The preamble to this notice of proposed rulemaking explains the proposed regulations, which provide guidance to nonresident aliens and foreign corporations that hold certain financial products providing for payments that are contingent upon or determined by reference to payments of dividends from sources within the United States. This document also provides a notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by April 6, 2012. Outlines of topics to be discussed at the public hearing scheduled for April 27, 2012, at 10 a.m., must be received by April 6, 2012.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–120282–10), room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG–120282–10), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW., Washington, DC, or sent electronically, via the Federal eRulemaking Portal at *http://www.regulations.gov* (IRS REG–120282–10). The public hearing will be held in the auditorium, Internal Revenue Service Building, 1111 Constitution Avenue NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Mark E. Erwin or D. Peter Merkel at (202) 622–3870; concerning submission of comments, the hearing, and/or to be placed on the building access list to attend the hearing, Oluwafunmilayo (Funmi) Taylor, Publications and Regulations Branch Specialist, at (202) 622–7180 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

Temporary regulations in the Rules and Regulations section of this issue of the **Federal Register** amend the Income Tax Regulations (26 CFR part 1) relating to section 871. The temporary regulations extend the section 871(m)(3)(A) statutory definition of the term specified notional principal contract (specified NPC) through December 31, 2012. This document contains proposed regulations under section 871(m) of the Code that will be applicable as of January 1, 2013. The preamble to the temporary regulations provides a discussion of the background of section 871(m) and explains the provisions contained in the temporary