



Friday
February 13, 1998

Part III

**Federal Trade
Commission**

16 CFR Part 3
Rules of Practice; Final Rule

FEDERAL TRADE COMMISSION**16 CFR Part 3****Rules of Practice**

AGENCY: Federal Trade Commission (FTC).

ACTION: Final rule, with request for public comment.

SUMMARY: This document amends Commission Rule 3.11A (16 CFR 3.11A), which establishes "fast-track" procedures applicable in certain FTC adjudicatory proceedings. Under the amended rule, a respondent will have the option of electing these procedures in certain cases where the procedures have not previously been available. Amendments have also been made to improve and clarify notice procedures and other technical provisions of the Rule.

EFFECTIVE DATE: February 13, 1998. Public comments will be received until March 16, 1998.

ADDRESSES: Send comments to the Office of the Secretary, Federal Trade Commission, Room 159-H, Sixth Street and Pennsylvania Avenue, NW., Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Cynthia Hogue Levy, (202) 326-2158, or Alex Tang, (202) 326-2447, Attorneys, Office of General Counsel, FTC, Sixth Street and Pennsylvania Avenue, NW., Washington, DC 20580.

SUPPLEMENTARY INFORMATION: On September 26, 1996, the Commission published and sought public comment on interim amendments to the rules governing the Commission's adjudicatory proceedings, 61 FR 50640. The interim amendments included a new Rule 3.11A, which makes expedited ("fast-track") procedures available to respondents in certain Commission adjudicatory proceedings challenging conduct that has been preliminarily enjoined by a federal court. The public comment period on the interim rule amendments ended November 25, 1996. The amendments became fully applicable to all proceedings commenced on or after January 1, 1997. The one public comment received by the Commission did not discuss Rule 3.11A.¹

The Commission has determined that the Rule should make the fast-track option expressly available in certain circumstances even where no preliminary injunction of the challenged conduct has been issued. As the

Commission observed in its statement accompanying the Rule, the Administrative Law Judge presiding over an adjudicatory proceeding may, in his or her discretion, treat discovery from the preliminary injunction hearing and transcripts of testimony in the preliminary injunction proceeding as if the material had been discovered and presented in the administrative proceeding. 61 FR at 50641. The Commission concludes that, where no preliminary injunction has been issued, implementation of an expedited schedule in the administrative proceeding nonetheless may be appropriate where the evidentiary record from the federal court injunctive proceeding is likely materially to facilitate prompt resolution of the adjudicatory proceeding. Accordingly, the Commission is amending the Rule to expand the availability of the fast-track procedures to cases in which the Commission determines that such circumstances exist. The Commission believes that this expansion of the Rule is in the public interest because it would foster expeditious resolution of allegations of possible law violations and reduce uncertainty for the affected respondent.

To accomplish expansion of the Rule, paragraph (b) has been bifurcated to address separately the conditions under which the fast-track option will be available and the mechanics of electing the procedure. Amended paragraph (b)(1) provides that a respondent may elect fast-track procedures either (i) if a federal court enters preliminary injunctive relief against some or all of the conduct alleged in the Commission's administrative complaint, or (ii) where no such injunction is issued, if the Commission determines that the evidentiary record resulting from the court proceeding is likely materially to facilitate the resolution of the administrative adjudication in accordance with the expedited schedule set forth in the Rule. In making the latter determination, the Commission will consider, *inter alia*, whether significant discovery has occurred in the federal court proceeding.

A conforming change has been made in paragraph (a) of the Rule by deleting language that preserved the Commission's discretion to take "appropriate action" in cases where "the preliminary injunction" is vacated. A preliminary injunction will not necessarily have been issued in every case where fast-track procedures may now apply. Further, even in cases where such an injunction is vacated after fast-track proceedings have been initiated, the Commission concludes that such

proceedings should ordinarily continue to be conducted on an expedited basis. The Commission, however, retains its discretion under the Rule to extend the 13-month deadline specified for issuance of a final order and opinion where, *inter alia*, adherence to the deadline would result in a miscarriage of justice due to circumstances unforeseen at the time that the respondent elected fast-track procedures. § 3.11A(c)(3).

Amended paragraph (b)(2), dealing with timing of the respondent's fast-track election, has also been conformed to include a reference to the evidentiary record determination made by the Commission under paragraph (b)(1)(ii) of the Rule. Further, language in former paragraph (b) providing that the fast-track election could be made "after service of the administrative complaint challenging the merger or acquisition" has been modified in paragraph (b)(2) to refer simply to service of the "administrative complaint." This amendment makes fast-track procedures available in any appropriate administrative case, including cases under the Commission's authority respecting unfair or deceptive acts and cases involving anticompetitive practices other than mergers, provided that the Commission has filed a collateral action seeking preliminary injunctive relief against conduct alleged in the administrative complaint. Thus, Rule 3.11A is not restricted to cases involving mergers or acquisitions. As the Commission has previously indicated, however, 61 FR at 50641 n.2, fast-track procedures are likely as a practical matter to be available most often to respondents in cases involving mergers.

The Commission also notes that respondents may make a fast-track election under paragraph (b)(2) of the Rule before the necessary conditions specified in paragraph (b)(1) for fast-track treatment have been fulfilled. In such cases, the election will become effective only if a federal court thereafter issues a preliminary injunction, as required by paragraph (b)(1)(i), or the Commission determines that the evidentiary record from the federal court injunctive proceeding is likely materially to facilitate the expedited resolution of the administrative adjudication, as required by paragraph (b)(1)(ii).

The Rule provisions specifying the procedural deadlines for administrative cases in which fast-track scheduling applies are now consolidated in paragraph (c). Amended paragraph (c)(1) sets out the "triggering events," formerly found in paragraph (a), that

¹ The Commission will address that comment when it completes its full review of the rules' impact.

specify the dates upon which the fast-track deadlines are based. The triggering events have been expanded to include evidentiary record determinations made by the Commission under paragraph (b)(1)(ii). Amended paragraph (c)(2), which is the list of deadlines applicable to fast-track proceedings before the Administrative Law Judge, formerly comprised paragraph (c). Amended paragraph (c)(3) contains the 13-month deadline for issuance of a final order and opinion by the Commission that previously appeared in paragraph (a). Paragraph (c)(3) also contains new language explaining the effect on the 13-month deadline if an automatic stay of the adjudicatory proceeding is triggered by a motion to dismiss under Rule 3.26. As amended, the Rule explicitly provides that the 13-month deadline will be tolled for as long as the Rule 3.26 stay remains in effect.

Several clarifying changes have been made in the Rule. Amended paragraph (a) provides that, when the Commission designates a case as appropriate for election of fast-track procedures by a respondent (subject to the conditions set forth in paragraph (b)(1)), written notice of the Commission's designation will be provided. The notice will be given to the respondent (or to the potential respondent, if the administrative complaint has not yet been issued) at the time that it is served with the Commission's complaint for injunctive relief. These requirements are designed to forestall questions concerning whether and when the agency provided the notice specified in the Rule. The Commission continues to believe that certain cases may appear too complex at the outset to be designated as appropriate for the fast-track schedule. 61 FR at 50641. In such instances, the Commission will not notify the respondent of an option to elect fast-track procedures. This aspect of the Rule remains unchanged.

The revised Rule also clarifies that a respondent may elect fast-track procedures in cases where a preliminary injunction has been issued in a collateral federal court proceeding even if the injunction addresses only part of the conduct alleged in the Commission's administrative complaint. The Commission also intends that, under the revised Rule, a respondent will have an opportunity to elect fast-track procedures if injunctive relief is initially denied by the district court but later ordered as the result of judicial review. The amended Rule's reference to the court's entry of preliminary injunctive relief is intended to be consistent with the usage of the term "entry" in the Federal Rules of Civil Procedure. See

Fed. R. Civ. P. 58, 79. Finally, paragraph (d) of the Rule, dealing with discovery procedures in fast-track cases, has been deleted, and the text incorporated into paragraph (a). Various typographical and stylistic changes have been made throughout the Rule.

Because these amendments relate solely to agency practice, they are not subject to the notice-and-comment requirements of the Administrative Procedure Act, 5 U.S.C. 553(b)(A), or to the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601(2). The amendments do not impose information collection requirements under the Paperwork Reduction Act. 44 U.S.C. 3501-3520.

List of Subjects in 16 CFR Part 3

Administrative practice and procedure, Claims, Equal access to justice, Lawyers

For the reasons set forth in the preamble, the Federal Trade Commission amends Title 16, Chapter I, Subchapter A of the Code of Federal Regulations, as follows:

PART 3—RULES OF PRACTICE FOR ADJUDICATIVE PROCEEDINGS

1. The authority for Part 3 continues to read as follows:

Authority: Sec. 6, 38 Stat. 721 (15 U.S.C. 46), unless otherwise noted.

2. Section 3.11A is revised to read as follows:

§ 3.11A Fast-track proceedings.

(a) *Scope and applicability.* This section governs the availability of fast-track procedures in administrative cases where the Commission files a collateral federal district court complaint that seeks preliminary injunctive relief against some or all of the conduct alleged in the Commission's administrative complaint. The Commission will afford the respondent the opportunity to elect such fast-track procedures, subject to the conditions set forth in paragraph (b)(1) of this section, in cases that the Commission designates as appropriate. In cases so designated, the Commission will provide written notice to each respondent at the time that it is served with the Commission's federal district court complaint for preliminary injunctive relief. Except as modified by this section, the rules contained in subparts A through I of part 3 of this chapter will govern fast-track procedures in adjudicative proceedings. Discovery will be governed by subpart D of this part, and the Administrative Law Judge may exercise his plenary authority under § 3.42(c)(6) to establish limitations on the number of

depositions, witnesses, or any document production.

(b)(1) *Conditions.* In cases designated as appropriate by the Commission pursuant to paragraph (a) of this section, a respondent may elect fast-track procedures:

(i) if a federal court enters a preliminary injunction against some or all of the conduct alleged in the Commission's administrative complaint; or,

(ii) where no such injunction is entered, if the Commission determines that the Federal court proceeding has resulted in an evidentiary record that is likely materially to facilitate resolution of the administrative proceeding in accordance with the expedited schedule set forth in this section. The Commission will provide each respondent with written notice of any such determination.

(2) *Election.* A respondent that determines to elect fast-track procedures shall file a notice of such election with the Secretary by the latest of: three days after entry of a preliminary injunction as described in paragraph (b)(1)(i) of this section; three days after the respondent is served with notice of the Commission's determination under paragraph (b)(1)(ii) of this section; or three days after the respondent is served with the Commission's administrative complaint in the adjudicative proceeding. In proceedings involving multiple respondents, the fast-track procedures set forth in this section will not apply unless the procedures are elected by all respondents.

(c) *Deadlines in fast-track proceedings.*

(1) For purposes of this paragraph, "triggering event" means the latest of: entry of a preliminary injunction as described in paragraph (b)(1)(i) of this section; service on the last respondent of notice of the Commission's determination under paragraph (b)(1)(ii) of this section; service on the last respondent of the Commission's administrative complaint in the adjudicative proceeding; or filing with the Secretary by the last respondent of a notice electing fast-track procedures.

(2) *Proceedings before the Administrative Law Judge.* In fast-track proceedings covered by this section:

(i) The scheduling conference required by § 3.21(b) shall be held not later than three days after the triggering event.

(ii) Respondent's answer shall be filed within 14 days after the triggering event.

(iii) The Administrative Law Judge shall file an initial decision within 56 days following the conclusion of the evidentiary hearing. The initial decision

shall be filed no later than 195 days after the triggering event.

(iv) Any party wishing to appeal an initial decision to the Commission shall file a notice of appeal with the Secretary within three days after service of the initial decision. The notice shall comply with § 3.52(a) in all other respects.

(v) The appeal shall be in the form of a brief, filed within 21 days after service of the initial decision, and shall comply with § 3.52(b) in all other respects. All issues raised on appeal shall be presented in the party's appeal brief.

(vi) Within 14 days after service of the appeal brief, the appellee may file an answering brief, which shall comply with § 3.52(c). Cross-appeals, as permitted in § 3.52(c), may not be raised in an appellee's answering brief.

(vii) Within five days after service of the appellee's answering brief, the appellant may file a reply brief, in accordance with § 3.52(d) in all other respects.

(3) *Proceedings before the Commission.* In fast-track proceedings covered by this section, the Commission will issue a final order and opinion within 13 months after the triggering event. If the adjudicative proceeding is stayed pursuant to a motion filed under § 3.26, the 13-month deadline will be tolled for as long as the proceeding is stayed. The Commission may extend the date for issuance of the Commission's final order and opinion in the following circumstances: if necessary to permit the Commission to provide submitters

of *in camera* material or information with advance notice of the Commission's intention to disclose all or portions of such material or information in the Commission's final order or opinion; or if the Commission determines that adherence to the 13-month deadline would result in a miscarriage of justice due to circumstances unforeseen at the time of respondent's election of fast-track procedures.

By direction of the Commission,
Commissioner Azcuenaga not participating.

Donald S. Clark,

Secretary.

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