ANTITRUST, TRADE REGULATION AND CONSUMER AFFAIRS SECTION

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Summary of the Proposed Comments of the Antitrust, Trade Regulation and Consumer Affairs Section to the Federal Trade Commission ("FTC")

In the proposed comments to the Federal Trade Commission, the Antitrust, Trade Regulation and Consumer Affairs Section makes three basic points regarding the agency's Rules of Practice for Adjudicative Proceedings.

First, the Section encourages the FTC to expand existing Section 3.21 (in keeping with the salutary purpose of the agency's exchange rule and the spirit of Federal Rule 26(a)(1)) so that the disclosure of relevant documents and potential witnesses also are required early in the process.

Second, the Section recommends that the FTC adopt rules permitting the parties to work together to engage in routine discovery without requiring involvement by the Administrative Law Judge ("ALJ"). This should both lessen the overall workload and speed up the process, while keeping the ALJ available to resolve any discovery disputes.

Third, the Section objects to the current requirement that forces respondents seeking access to FTC or other governmental agency records to demonstrate to the ALJ "that the information or materials sought cannot reasonably be obtained by other means." The Section thinks this is an unreasonable burden to place on respondents, given that there is no comparable requirement on complaint counsel seeking discovery from respondents. As to discovery from other agencies, the Section thinks judicial economy would be better served by relying upon the relevant agency's rules rather than raising the barriers to discovery by respondents by requiring advance ALJ authorization before initiating the request process with those other agencies.

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Dear Mr. Calkins and Ms. Plyler:

The Antitrust, Trade Regulation and Consumer Affairs Section of the District of Columbia Bar[1/] is pleased to submit the following comments in response to the Federal Trade Commission's request for suggestions regarding its Rules of Practice for Adjudicative Proceedings. We thank the Commission for this opportunity to provide the views of the Section, and hope they will be of assistance in the review process.

Section 3.21 of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings requires that complaint counsel provide a "non-binding statement setting forth in detail the theory of the case, the issues to be tried, and what complaint counsel expect their evidence to prove" within ten days after an answer is filed by the last answering respondent. That section also requires that 10 days later each respondent file a "non-binding statement setting forth in detail the respondent's

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[1/] The views expressed herein represent only those of the Antitrust, Trade Regulation and Consumer Affairs Section of the District of Columbia Bar and not those of the District of Columbia Bar or of its Board of Governors. Section members Larry D. Sharp, of McGuire, Woods, Battle & Boothe, and Lisa Jose Fales, of Collier, Shannon, Rill & Scott, were the principal authors of these comments which were approved by the Section's Steering Committee.

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theory of the defense, the issues to be tried, and what the respondent expects its evidence to prove."

Section 3.21 reflects a creditable attempt to provide a useful exchange of information early in the course of a case under Part III of the Commission's Rules, but realistically, in the normal course of Federal Trade Commission proceedings it is highly unlikely that much, if any, new information would be learned by either party as a result of the exchanges.

The apparent purpose of the Section 3.21 exchanges - an early disclosure of the basis for each side's case - is the same as that of Rule 26(a)(1) of the Federal Rules of Civil Procedure. By comparison, however, Rule 26 requires substantially more in the way of disclosure. Under Fed. R. Civ. P. 26(a)(1), each party must identify all individuals "likely to have discoverable information," and either descriptions "by category and location of, all documents, data compilations, and tangible things" that are relevant to the case, or copies of them. While we do not advocate the adoption of Rule 26(a)(1) in all aspects, we believe that an approach more in line with the disclosure concepts underlying Rule 26 would be an improvement over the approach taken by the Commission in Section 3.21.

In most cases, by the time a complaint is issued by the Federal Trade Commission, complaint counsel have collected a vast amount of information relevant to the case they are bringing, and they have identified a significant number of people with relevant information. Respondents, of course, do not have access to all the sources of information available to complaint counsel, but they do often assemble a substantial body of relevant information in the course of responding to the FTC's investigation and in attempting to negotiate a settlement with the Commission.

Instead of limiting the exchanges to the "non-binding statements" now required by Section 3.21, why not adopt a rule more in keeping with the spirit of Federal Rule 26(a)(1)? Our Section believes that the salutary purpose of Section 3.21(a) of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings would be better served if these exchanges required the disclosure of relevant documents and potential witnesses early in the process, in addition to the descriptions by the parties or their theories of the case, the views of the issues to be tried, and their anticipated proof. We also suggest that setting a sequential schedule for these disclosures, with complaint counsel (who usually have had the benefit of an extensive investigation) going first, and the respondents following after they have had an adequate opportunity to digest complaint counsel's disclosures and consider their possible defenses.

In Part III proceedings, the Federal Trade Commission requires pre-clearance through the Administrative Law Judge of discovery that is considered entirely routine in any United States District Court, and in virtually all state courts. The requirement that a party apply to the Administrative Law Judge before taking a deposition, serving an interrogatory, or requesting the production of documents is unnecessary, and it discourages the parties from working together on developing a cooperative program of discovery.

These requirements unnecessarily burden both the Administrative Law Judge and the parties. In their place, we recommend that the Commission adopt rules permitting the parties to engage in routine discovery as they do in the Federal Courts - without the involvement of the Administrative Law Judges, and that the parties invoke the authority of the Administrative Law Judge only when they have been unable to resolve a discovery dispute. This approach would reduce the workload on Complaint Counsel, respondents' counsel, and on the Administrative Law Judges, and should serve to speed up the progress of the Section III proceedings.

Finally, Section 3.36 of the Federal Trade Commission's Rules of Practice for Adjudicative Proceedings requires that, in order to gain access to the records of the Federal Trade Commission or another governmental agency, a party must demonstrate to the satisfaction of the Administrative Law Judge "that the information or materials sought cannot reasonably be obtained by other means." We believe that is an unreasonable burden to place on litigants before the Federal Trade Commission.

First, the rules impose no comparable barrier to discovery by complaint counsel from respondents. To obtain discovery from a respondent, complaint counsel need only show "that the requested discovery may reasonably be expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defense of any respondent." Section 3.31(b)(1), FTC Rules of Practice for Adjudicative Proceedings. There is no readily discernable justification for imposing a higher burden on respondents seeking discovery from the Commission.

Second, individual government agencies have their own internal policies about providing documents to private litigants, whether they are in courts or before other administrative agencies. Many agencies have particular statutory provisions governing their responses to discovery requests in litigation in which they are not involved. These individualized protections seem better tailored to meet the needs of the individual agencies than does the Commission's blanket rule that the Administrative Law Judge be satisfied that the information "cannot reasonably be obtained by other means," and even after the Administrative Law Judge has made a

determination, the other agency's rules come into play. We believe judicial economy would be better served if the Commission were to rely on and defer to these individualized protections (often created by Congress), and not on an individual Administrative Law Judge's determination.

Finally, the Federal Trade Commission regularly turns to sister agencies for information and expertise when it investigates or prosecutes a case. To permit this cooperation, while at the same time raising the barriers to discovery by respondents from those same agencies seems particularly unfair.

Thank you again for your consideration of the thoughts presented above. Please let us know if you have any questions or if elaboration upon this discussion would be of assistance to the Commission.

Sincerely yours,

Andrew J. Strenio, Jr.

Laura R. Polacheck

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