to review the guidelines along with the proposals in the notice in order to provide meaningful comment on the proposed rulemaking by the April 2 comment deadline. As this has not been the case, the commenters now request that the comment period be extended for a sufficient amount of time to allow the issuance of the guidelines by the manufacturers and to allow the commenters to study the proposal and prepare their comments. The FAA anticipates that the guidelines will be available for operators to review within 30 days after the publication of this notice.

Extension of Comment Period

The FAA has reviewed the requests for consideration of an extended comment period for Notice 97–16 and determined that an extension would be in the public interest and that good cause exists for taking this action. Accordingly, the comment period for Notice 97–16, as well as the draft advisory circular (AC) 120–XX, is extended for an additional ninety days, as identified under the caption **DATES**.

Issued in Washington, D.C. on March 27, 1998.

Elizabeth Erickson,

Deputy Director, Aircraft Certification Service.

[FR Doc. 98–8735 Filed 4–2–98; 8:45 am]

BILLING CODE 4910–13–M

COMMODITY FUTURES TRADING COMMISSION

17 CFR Part 10

Rules of Practice; Proposed Amendments

AGENCY: Commodity Futures Trading Commission.

ACTION: Notice of proposed amendments.

SUMMARY: The Commodity Futures Trading Commission (''Commission'' or ''CFTC'') requests comments on proposed amendments to its Rules of Practice (''Rules'') which govern most adjudicatory proceedings brought under the Commodity Exchange Act, as amended (''Act''), other than reparations actions. The proposed amendments are intended to improve the overall fairness and efficiency of the administrative process, as well as to facilitate use of the authority granted to the Commission by the Futures Trading Practices Act of 1992 (''FTPA'') to require the payment of restitution by respondents in administrative enforcement proceedings.

The Commission has not attempted to revisit wholesale its Rules of Practice. Rather, the proposed amendments focus on a few key areas where case law and current practice suggest that clarification or revision may be most useful. Besides restitution, most of the substantive amendments being proposed relate to prehearing discovery. The other proposed changes are technical in nature, clarifying or updating existing rules to reflect recent Commission decisions and better accord with the current practices being followed by the Commission's Administrative Law Judges (''ALJs'').

With respect to prehearing discovery, the Commission is proposing, among other revisions, to: clarify the obligations of its Division of Enforcement (''Division'') under existing Rule 10.42(b), by requiring production to respondents of specified information in the Division's investigative files; obligate all parties to produce prior statements of any witness whom they intend to call that relate to that witness's anticipated testimony; and allow all parties to subpoena documents for production prior to the scheduled hearing date. These and the other proposed changes regarding discovery will foster a greater exchange of relevant information between the Division and respondents and clarify the production obligations of each party, thus bringing about increased efficiency and fairness in CFTC administrative proceedings.

The Commission is also proposing to put procedures in place to facilitate the restitution process in adjudicatory proceedings. A new provision would be added to existing Rule 10.84 that would be applicable to any proceeding in which an order requiring the payment of restitution may be entered. Under this provision, if the ALJ decides that restitution is an appropriate remedy, he or she would issue an order specifying the violations that form the basis for restitution, the customers or class of customers entitled to seek restitution and the method of calculating and, if then determinable, the amount of restitution to be paid.

The actual administration of an ALJ's restitution order would be governed by a new subpart in the Rules of Practice that would allow the Division to recommend to the Commission or, at the Commission's discretion, to the presiding ALJ a procedure for notifying individual customers who may be entitled to restitution, receiving and evaluating customer claims, obtaining funds to be paid as restitution from the respondent and distributing such funds to qualified claimants. The respondent would be given notice of the Division's recommendations and afforded an opportunity to be heard before the procedure is implemented.

Although largely technical in nature, the remaining changes being proposed by the Commission reflect matters raised in recent decisions issued by the Commission or its ALJs in enforcement cases, involving, for example, commencement of the proceeding, the service of complaints and other papers, amending complaints, advance rulings on the admissibility of evidence, the presentation of rebuttal evidence, and the filing of cross appeals, reply briefs (on appeal), petitions for reconsideration and stay applications. The Commission is also proposing to add an appendix to the Rules of Practice, setting forth the Commission's policy not to accept any offer of settlement in an administrative or a civil proceeding if the respondent or defendant wishes to continue to deny the allegations of the Commission's complaint (although they may continue to state that they neither admit nor deny the allegations).

The Commission welcomes public comment on the proposed changes to its Rules of Practice. Suggestions on other changes that would improve or expedite the adjudicatory process are also invited.

DATES: Comments must be received on or before June 2, 1998.

ADDRESSES: Comments on the proposed amendments should be sent to Jean A. Webb, Secretary, Commodity Futures Trading Commission, Three Lafayette Center, 1155 21st Street, N.W., Washington, D.C. 20581. Comments may be sent by electronic mail to secretary@cftc.gov. Reference should be made to ''Proposed Amendments to the Rules of Practice.''

FOR FURTHER INFORMATION CONTACT: Stephen Mihans, Office of Chief Counsel, Division of Enforcement, at (202) 418–5399 or David Merrill, Office of the General Counsel, at (202) 418–5120, Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W., Washington, D.C. 20581.

SUPPLEMENTARY INFORMATION: The Commission is proposing for comment amendments to its Rules of Practice, 17 CFR 10.1–10.109, which were promulgated originally in 1976, shortly after the Commission was established as an independent agency. 41 FR 2508 (Jan. 16, 1976). Although the Commission's proposals are not intended to be sweeping or groundbreaking, they do represent the first major revision of the Rules in more than 20 years. Practices of the

Commission and its ALJs which evolved over that time are not necessarily reflected in the existing Rules. Moreover, procedural and other issues raised by litigants themselves suggest that, in a number of key areas, the Rules are in need of review and updating.

Most of the substantive amendments to the Rules being proposed by the Commission relate to issues involving the Commission's procedures for conducting limited discovery in preparation for a hearing. More specifically, the Commission is proposing to amend Rule 10.42, which addresses pretrial materials, investigatory materials and admissions, and Rule 10.68, which governs subpoenas. The proposed amendments to these two rules will facilitate the exchange of relevant evidence between the parties to a proceeding and afford them a ready means for obtaining needed documents in advance of the scheduled hearing.

The other existing Rules that the Commission proposes to amend, and the subject areas they cover, are Rule 10.1 (scope and applicability of rules of practice); Rule 10.12 (service and filing of documents; form and execution); Rule 10.21 (commencement of the proceeding); Rule 10.22 (complaint and notice of hearing); Rule 10.24 (amendments and supplemental pleadings); Rule 10.26 (motions and other papers); Rule 10.41 (prehearing conferences; procedural matters); Rule 10.66 (conduct of the hearing); Rule 10.84 (initial decision); Rule 10.102 (review of initial decision); and Rule 10.106 (reconsideration). In addition to these changes, the Commission is proposing to add to the rules a new subpart (proposed Subpart I) addressing the administration of restitution orders issued pursuant to Section 6(c) of the Act, 7 U.S.C. 9 (1994), as well as a statement of policy with respect to settling with respondents and defendants in Commission-instituted administrative and civil proceedings (proposed Appendix A).

The specific amendments to the Rules of Practice that the Commission is proposing are as follows.

I. Proposed Rule Changes Related To Discovery

Rule 10.42(a)—Pretrial Materials

As currently written, Rule 10.42(a) authorizes the Commission's ALJs to require that each party to a proceeding submit any or all of the following information in the form of a prehearing memorandum or otherwise: (1) an outline of its case or defense; (2) the legal theories on which it will rely; (3) the identity of the witnesses who will testify on its behalf; and (4) copies or a list of documents which it intends to introduce at the hearing. The Commission proposes to amend Rule 10.42(a) in three respects.

First, the information required to be included in each party's prehearing memorandum would be expanded to include the identity, and the city and state of residence, of each witness (other than an expert witness) who is expected to testify on the party's behalf, along with a brief summary of the matters to be covered by the witness's expected testimony. In practice, prehearing orders issued by the Commission's ALJs already require the parties to provide much of this information. As thus revised, Rule 10.42(a) would more fully accord with the current disclosure requirements found in Rule 26(a)(1) of the Federal Rules of Civil Procedure.

Second, rather than allow the parties to provide either copies or a list of documents that they will introduce as evidence at the hearing, revised Rule 10.42(a) would require that each party furnish a list of such documents and copies of any documents which the other parties do not already have in their possession and to which they do not have reasonably ready access. Although this proposed change imposes a heavier burden on all parties in preparing their prehearing submissions, the corresponding benefit of securing, in advance of trial, copies of documents to be used as evidence by the opposing party would be significant.

Third, the Commission proposes adding a new provision to Rule 10.42(a) to require the submission of additional information concerning any expert witness whom a party expects to call at the hearing, including: (1) a statement of the qualifications of the witness; (2) a listing of any publications authored by the witness within the preceding ten years; (3) a listing of all cases in which the witness has testified as an expert, at trial or in deposition, within the preceding four years; (4) a complete statement of all opinions to be expressed and the basis or reasons for those opinions; and (5) a list of any documents, data or other written information considered by the witness in forming his or her opinion, along with copies of any such materials which are not already in the possession of the opposite parties and to which they do not have reasonably ready access. This proposed revision to existing Rule 10.42(a) generally accords with the current requirements of Rule 26(a)(2) of the Federal Rules of Civil Procedure. It is intended to eliminate unnecessary and inappropriate surprise from the proceeding and allow for a more rational fact-finding process.

The proposed version of Rule 10.42(a) also would provide that the ALJ fashion a remedy which is just and appropriate for any failure to comply with the rule's requirements, taking into account all of the facts and circumstances. Thus, a minor, inadvertent failure to provide all of the required information would presumably require a less onerous remedy than a more significant, prejudicial failure, which might require a delay in the proceeding or an exclusion of witnesses or evidence.

Rule 10.42(b)—Investigatory Materials

Although broadly captioned ''Investigatory Materials,'' Rule 10.42(b), as currently written, requires the Division to produce only three categories of documents, all relating to witnesses or witness statements. These are ''transcripts of testimony, signed statements and substantially verbatim reports of interviews * * * from or concerning witnesses to be called at the hearing and all exhibits to those transcripts, statements and reports.''

In practice, besides producing the witness statements referenced in existing Rule 10.42(b), the Division often provides respondents with prehearing access to documents obtained during the investigation that preceded the initiation of the complaint against them. To reflect this practice, and promote a fairer, more efficient hearing process, the Commission proposes two amendments to Rule 10.42(b).

First, the existing version of Rule 10.42(b) would be replaced with a new ''investigatory materials'' provision. As proposed by the Commission, revised Rule 10.42(b) would obligate the Division of Enforcement to make available for inspection and copying by the respondents documents obtained during the investigation that preceded issuance of the complaint and notice of hearing against them. These materials would include (1) all documents that were subpoenaed or otherwise obtained by the Division from persons not employed by the Commission, and (2) all transcripts of investigative testimony taken by the Division, together with all exhibits to those transcripts.

Under revised Rule 10.42(b), certain classes of documents would be exempt from disclosure. These include documents that would (1) reveal the identity of confidential sources, (2) disclose confidential investigatory techniques or procedures, or

(3) disclose the business transactions or market positions of any person other than the respondents, unless such

information is relevant to the resolution of the proceeding.

Nothing in revised Rule 10.42(b) would require the Division to turn over any internal memoranda, writings or notes prepared by Commission employees who will not appear as a Division witness at the hearing. Nor would the revised rule limit the ability of the Division to withhold documents or other information on the grounds of privilege or attorney work-product.

As is now the case, production of investigatory materials under revised Rule 10.42(b) would occur prior to the scheduled hearing date, at a time to be fixed by the ALJ. Unless otherwise agreed by the Division, respondents would be given access to all documents being produced at the Commission office where they are ordinarily maintained. If respondents want copies made for themselves, they, and not the Division, would pay for the cost of reproduction.

In order to prevent undue disruption of the administrative process, the proposed Rule 10.42(b) provides that, if after hearing or decision of the matter, it develops that the Division of Enforcement failed to comply in some manner with the production requirements of the rule, rehearing or reconsideration of the matter will not be required unless the respondent can show prejudice.

Rule 10.42(c)—Witness Statements

To address witness statements, the subject matter covered by existing Rule 10.42(b), the Commission proposes to promulgate a new Rule 10.42(c).[1] Under this new rule, all parties to a proceeding, including the Division, would be obligated to make available to the other parties any statement of any person whom the party calls, or expects to call, as a witness that relates to his or her anticipated testimony. Such statements would include: (1) transcripts of investigative or trial testimony given by the witness; (2) written statements signed by the witness; and (3) substantially verbatim notes of interviews with the witness, and all exhibits to such transcripts, statements and notes.

Producible statements also would include memoranda and other writings authored by the witness that contain information directly relating to his or her anticipated testimony.[2] The phrase ''substantially verbatim'' requires that the notes fairly record the witness's exact words, subject to minor, inconsequential deviations. As now, production of witness statements under the new rule would take place prior to the scheduled hearing date, at a time designated by the ALJ.

The Commission's proposed ''witness statement'' provision generally accords with Rule 26.2 of the Federal Rules of Criminal Procedure, which places in the Federal Rules the substance of the Jencks Act, 18 U.S.C. 3500. As now written, existing Rule 10.42(b) defines the term ''witness statement'' more broadly than Rule 26.2 or the Jencks Act in two respects: (1) by seeming to call for the production of statements by persons other than the witness himself, and (2) by requiring the Division to make witness statements available regardless of whether the statements relate to the witness's testimony at trial (as long as they are ''from or concerning'' the witness). Also unlike Rule 26.2 of the Federal Rules of Criminal Procedure, existing Rule 10.42(b) only obligates the Division, rather than all parties, to produce witness statements.

In the Commission's view, restricting the reach of existing Rule 10.42(b) to prior statements relating to the subject matter of a witness's anticipated testimony is appropriate. A primary reason for requiring the production of prior witness statements has been the value of such statements for impeachment purposes. Statements that are unrelated to a witness's testimony and statements of persons other than the witness himself have little, if any, impeachment value.[3]

Requiring all parties, instead of only the Division, to produce prior statements made by the witnesses they intend to call would benefit the hearing process. Making the prior statements of a party's witness available to the other parties would likely result in more meaningful cross-examination. *United States* v. *Nobles*, 422 U.S. 225, 231 (1975) (allowing prosecution to call upon court to compel the production of previously recorded witness statements will strengthen the truthfinding process and facilitate full disclosure of relevant facts).

Unlike Rule 26.2 of the Federal Rule of Criminal Procedure or the Jencks Act, however, the new ''witness statement'' provision being proposed by the Commission would continue to require the production of witness statements before the start of the hearing, at a time to be fixed by the ALJ. This accords with the current practice of the Division of Enforcement, which generally turns over witness statements prior to a scheduled hearing either as a part of the Division's document production under existing Rule 10.42(b) or as part of its submission of prehearing materials pursuant to existing Rule 10.42(a).

The proposed Rule 10.42(c) contains a provision similar to that contained in proposed Rule 10.42(b) to avoid undue disruption of the Commission's administrative process because of the discovery of a failure to comply with the production requirements of the rule after hearing or decision. As with proposed Rule 10.42(b), no rehearing or reconsideration of a matter already heard or decided shall be required, unless a party demonstrates prejudice.

Rules 10.42(e) and (f)—Admissions

As currently written, existing Rule 10.42(c) permits ''any party [to] serve upon any other party * * * a written request for admission of the truth of any facts relevant to the pending proceedings set forth in the request, including the genuineness of any documents described therein.'' In addition to redesignating the existing rule as new Rule 10.42(e),[4] the Commission is proposing to revise and restructure the provision in order to discourage requests to admit that may be abusive in number or content.

First, the number of admissions that any party to a proceeding may request from any other party would be limited. As proposed by the Commission, new Rule 10.42(e) would allow each party to serve 50 requests to admit on any other party. To serve a larger number of requests, parties would have to obtain

[1] If, as proposed, a new Rule 10.42(c) is adopted to address witness statements, existing Rule 10.42(c), which governs admissions, would be redesignated as Rule 10.42(d).

[2] In revising existing Rule 10.42(b), the Commission intends that notes prepared by a witness which clearly and unambiguously set forth the views of that witness relating to the subject matter of his or her testimony, even if not in the nature of a formal memorandum, would be produced to the other parties. Under the revised rule, however, fragmentary notes, jottings and other writings that might be part of the analytical work of a witness would not have to be turned over. Moreover, the revised rule would not mandate the production of notes prepared by persons other than the witness, including, for example, attorney notes (except to the extent that they are substantially verbatim notes of interviews with the witness). In addition, both proposed Rule 10.42(b) and Rule 10.42(c) explicitly state that the parties, including the Division of Enforcement, can invoke privileges and work product to withhold materials otherwise producible under those rules.

[3] Compliance with the proposed rule will not necessarily satisfy the Division's obligation to produce exculpatory material. *In re First National Monetary Corp.*, [1982–1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,853 at 27,581 (CFTC Nov. 13, 1981). The scope of that obligation is not addressed by these proposed amendments *to the Rules of Practice.*

[4] Proposed Rule 10.42(d) would authorize ALJs to modify the production requirements provided for in subsections (a)–(c) of the rule under certain circumstances.

prior approval from the ALJ; they would not be allowed to evade this limitation by framing requests for discrete and different admissions as ''subparts'' or ''subparagraphs.'' By revising existing Rule 10.42(c) in this way, the Commission's aim is not to prevent parties from seeking appropriate admissions, but rather to provide scrutiny by the ALJ before the parties make potentially abusive use of this device.

Second, requests to admit would be separated from questions involving the authenticity and admissibility of documents that the parties intend to introduce at the hearing. To accomplish this, the Commission proposes to promulgate a new Rule 10.42(f), modeled on Rule 26(a)(3)(C) of the Federal Rules of Civil Procedure. Under the proposal, upon order of the ALJ, each party to a proceeding would be allowed to serve on the other parties a list of documents that it intends to introduce at the hearing. Upon receipt of the list, the other parties would have 20 days to file a response, disclosing any objections that they wish to preserve to the authenticity or admissibility of the documents thus identified.

Like Rule 26(a)(3)(C) of the Federal Rules of Civil Procedure, proposed Rule 10.42(f) is intended to expedite the presentation of evidence at the hearing. It would, for example, eliminate the need to have witnesses available to provide foundation testimony for most items of documentary evidence. Moreover, although the ALJ would not be required to do so, he or she would be permitted to treat as a motion *in limine* any list served by a party pursuant to the proposed new rule, where any other party has filed a response objecting to the authenticity or the admissibility of any item listed. In that event, after affording the parties an opportunity to brief the motion, the ALJ could rule on objections to the authenticity or admissibility of documents in advance of trial, to the extent appropriate.

Rule 10.68—Subpoenas.

The Commission is proposing three substantive amendments to existing Rule 10.68, which governs subpoenas. In addition to those amendments, minor changes are being made to paragraph (e).

With respect to the substantive revisions proposed by the Commission, existing Rule 10.68(a)(2) would be revised to allow parties to apply for the issuance of subpoenas compelling the production of documents at any designated time, including prior to the hearing. Under the existing rule, ALJs are not permitted to issue subpoenas requiring documents to be produced before the hearing actually begins. Postponing compelled document production from the prehearing phase until the hearing, however, promotes surprise, lack of preparation and delay. By affording parties an opportunity to subpoena and review relevant documents before the start of a hearing, revised Rule 10.68(a)(2) will enable them to prepare questions relating to the information produced and to determine whether additional information will be needed, thereby making the hearing process both fairer and more expeditious.

Second, the Commission proposes to amend Rules 10.68(a)(1) and 10.68(a)(2) by requiring that all subpoena requests be submitted in writing and be served on all other parties, unless (1) the request is made on the record at the hearing or (2) the requesting party can demonstrate why, in the interest of fairness or justice, the requirement of a written submission or service should be waived. In the Commission's view, generally there is no undue prejudice in requiring disclosure to other parties of the fact that a subpoena is being sought or the identity of the person or documents being subpoenaed. On the contrary, by requiring requests for subpoenas to be served in writing on all parties, the proposed revision will facilitate the proper joining of any issue regarding the appropriateness of the requested subpoena.

Third, the Commission is proposing to revise paragraph (f) of Rule 10.68. Under that provision, if any person fails to comply with a subpoena issued at the request of a party, the requesting party may petition the Commission to institute a subpoena enforcement action in an appropriate United States District Court. As proposed by the Commission, a sentence would be added to Rule 10.68(f), providing that, when instituting an action to enforce a subpoena requested by the Division of Enforcement, the Commission, in its discretion, may delegate to the Director of the Division or any Commission employee under the Director's direction that he or she may designate, or to such other employee as the Commission may designate, authority to serve as the Commission's counsel in such action.

Finally, the Commission proposes to delete from paragraphs (a)(1) and (b)(3) of Rule 10.68 references to the Director of the Office of Proceedings. At the same time, a referencing error in paragraph (e) would be corrected.

II. Other Proposed Rule Changes

Rule 10.1—Scope and Applicability of Rules of Practice

Rule 10.1 identifies administrative proceedings that are subject to the Rules and those that are not. The Commission proposes to amend the list of proceedings governed by the Rules to reference specifically proceedings for the issuance of restitution orders pursuant Section 6(c) of the Act, 7 U.S.C. 9 (1994), as amended by the FTPA in 1992.

Rule 10.12—Service and Filing of Documents; Form and Execution

As currently written, Rule 10.12 authorizes the service of all pleadings subsequent to the complaint by personal service or by first-class mail. The Commission proposes to revise paragraph (a)(2) of Rule 10.12 to also allow service by a commercial package delivery service similar to the postal service and, provided that certain conditions are met, by facsimile machine. By referring to such commercial services, the Commission intends to include intercity package delivery services such as Federal Express and United Parcel Service. It does not intend to have this part of the service rule apply to intracity bicycle messengers and similar services, which would fall within the personal service part of the rule. As is now the case for service by mail, when documents are served by a commercial package delivery service similar to the postal service, an additional three days will be added to the time within which the party being served may respond to the pleading. Parties who wish to serve each other by facsimile machine must agree to do so in writing. The written agreement shall be filed with the Proceedings Clerk and must, at a minimum, (1) be signed by each party; and (2) specify the facsimile machine telephone numbers to be used, the hours during which the facsimile machine is in operation, and when service will be deemed complete (e.g., when the sender has completed transmission and his or her facsimile machine has produced a confirmation report indicating successful transmission).

Rule 10.21—Commencement of the Proceeding

The Commission proposes to amend existing Rule 10.21 to state that an adjudicatory proceeding is commenced when a complaint is filed with the Commission's Office of Proceedings. As currently written, the rule deems the proceeding commenced ''when the Commission authorizes service of a

complaint and notice of hearing upon one or more respondents.''

Rule 10.22—Complaint and Notice of Hearing

Existing Rule 10.22 addresses the content and service of the complaint and notice of hearing in an administrative proceeding before the Commission. With respect to service, the Commission proposes to add language to paragraph (b) of Rule 10.22 addressing those instances where a respondent is not found at his or her last known business or residence address and no forwarding address is available. Under those circumstances, additional service may be effected, at the discretion of the Commission, by publishing the complaint in one or more newspapers with general circulation where the respondent's last known business or residence address was located and, if ascertainable, where the respondent is believed to reside or do business currently. The complaint would be displayed simultaneously on the Commission's Internet web site. By adding these additional methods of service, the Commission does not intend to suggest that service at the respondent's last known address is not sufficient. Rather, the Commission is building into the rule the flexibility to provide additional methods of service where it deems they are warranted under particular circumstances.

Rule 10.24—Amendments and Supplemental Pleadings

Under existing Rule 10.24, any party to a proceeding may amend his or her pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, within 20 days after it is served. Otherwise, a party may amend his or her pleading only by leave of the ALJ, which ''shall be freely given when justice so requires.'' *See* 17 CFR 10.24(a). The rule also provides that, upon motion by a party, the ALJ may permit that party to serve a supplemental pleading ''setting forth [relevant] transactions or occurrences or events which have happened since the date of the pleadings sought to be supplemented.'' *See* 17 CFR 10.24(b).

By definition, the complaint issued by the Commission in an enforcement proceeding is a ''pleading'' for Part 10 purposes. *See* 17 CFR 10.2(m). Because existing Rule 10.24 only permits a ''party'' to amend or supplement a pleading, however, the rule as currently worded creates some ambiguity as to whether the Commission has retained the authority to amend or supplement a complaint once the proceeding has commenced. To allay any confusion on this issue, the Commission is proposing to revise and restructure Rule 10.24.

As revised, Rule 10.24 would grant the Commission exclusive and unlimited authority to amend a complaint. The only exception to this rule would be a proviso permitting the Division of Enforcement, upon motion to the ALJ and the other parties and with notice to the Commission, to correct typographical and clerical errors or to make similar technical, non-substantive revisions to the complaint. Otherwise, amendments to complaints could only be made by the Commission itself. The Rule also would make explicit the ALJ's authority, if the Commission exercises its authority to amend the complaint, to adjust the hearing and/or pre-hearing schedule so as to avoid any prejudice to any of the parties that might otherwise be caused by the filing of an amended complaint.

Consistent with this proposed change, paragraph (b) of existing Rule 10.24, which deals with supplemental pleadings, would be deleted. In its place, the Commission proposes to insert a new paragraph (b), addressing (1) amendments to answers to complaints; and (2) any replies to such answers that may be permitted. The wording of this proposed paragraph generally tracks the current language of Rule 10.24(a). As a consequence of this revision, references to supplemental pleadings now found in paragraph (c) of Rule 10.24 also would be deleted.

Rule 10.26—Motions and Other Papers

Existing Rule 10.26 governs motion practice before the Commission. As now written, paragraph (b) of the rule permits any party who is served with a motion to file a response within 10 days of service or within such other period as may be established by the ALJ or the Commission. The Commission proposes to delete the last sentence now found in paragraph (b), which requires that any party who does not file a response to a motion shall be deemed to have consented to the relief sought by the motion. The Commission believes that the failure to file a response should be considered by the ALJ in ruling on the motion, but should not automatically be treated as an affirmative consent to the relief being sought. Thus, the deleted sentence would be replaced with language allowing the ALJ or the Commission to consider a party's decision not to file a response when deciding whether or not to grant the relief requested in the motion.

Rule 10.41—Prehearing Conferences; Procedural Matters

As currently written, Rule 10.41 authorizes the ALJ presiding over an administrative proceeding to hold prehearing conferences for a number of specific purposes set forth in the rule. Consistent with the proposed changes involving the discovery provisions of the Rules, the Commission is proposing to revise Rule 10.41 to allow its ALJs to hold prehearing conferences to consider objections to the introduction of documentary evidence and the testimony of witnesses identified in prehearing materials submitted by the parties. This proposed revision accords with Rule 16(c) of the Federal Rules of Civil Procedure, which was intended, among other purposes, to encourage better planning and management of litigation.

Rule 10.66—Conduct of Hearing

As currently written, Rule 10.66, which governs the conduct of hearings, does not explicitly allow the Division, as plaintiff, to put on a rebuttal case, although it often is permitted to do so. The Commission is proposing to amend the rule to recognize this established practice, by adding language to paragraph (b) of Rule 10.66 expressly permitting the presentation of rebuttal evidence.

In addition, the Commission is proposing adding language to paragraph (b) of Rule 10.66 to note explicitly the Commission's and the ALJ's existing authority to enforce the requirement that evidence presented in the proceeding be relevant and to limit cross-examination to the subject matter of direct examination and matters affecting credibility. *See* Fed. R. Evid. 611(b). Of course, the ALJ may also exercise his or her discretion to permit inquiry during cross-examination into additional matters as if on direct examination if the circumstances so warrant, such as to avoid having to have a witness return to provide direct testimony during the cross-examining party's case-in-chief or rebuttal. *See id*.

Rule 10.84—Initial Decision

The Commission is proposing two amendments to existing Rule 10.84, which deals with initial decisions. First, the rule would no longer require that the ALJ render his or her initial decision within 30 days after the parties file their posthearing submissions. The 30-day time limit is unrealistic in many cases and does not accord with the practice of other federal regulatory agencies.

Second, a new provision would be added to paragraph (b), requiring that,

in any proceeding in which an order requiring restitution may be entered, the ALJ shall determine, as part of his initial decision, whether restitution is appropriate. In the event that it is, the initial decision would include an order of restitution specifying: (1) the violations that form the basis for restitution; (2) the particular persons, or class of persons, who suffered damages proximately caused by such violations; and

(3) the method of calculating and, if then determinable, the amount of damages to be paid as restitution.

In deciding whether or not restitution is an appropriate remedy, the ALJ would be given broad latitude. Under revised Rule 10.84(b), the ALJ would be able to consider: (1) the degree of complexity likely to be involved in establishing individual claims; (2) the likelihood that such claimants can obtain compensation through their own efforts; (3) the ability of the respondent to pay claimants damages that his violations have caused; (4) the availability of resources to administer restitution; and (5) any other matters that justice may require.

In most cases, the ALJ's Initial Decision would not address how or when restitution would be paid. Instead, the Commission proposes adding to the Rules a new and separate Subpart I, which would govern the implementation of required restitution. Under this proposal, after an order requiring restitution becomes effective (*i.e.*, becomes final and is not stayed), the Commission would direct the Division of Enforcement to recommend to the Commission or, at the Commission's discretion, the ALJ a procedure for implementing restitution. Each respondent who will be required to pay restitution will be afforded notice of the Division's recommendations and an opportunity to be heard.

Based on the Division's recommendations, the Commission or, at the Commission's discretion, the ALJ would establish a procedure for: (1) identifying and notifying individual claimants who may be entitled to restitution; (2) receiving and evaluating claims; (3) obtaining funds to be paid as restitution from the respondent; and (4) distributing such funds to qualified claimants. If appropriate, the Commission or the ALJ would be permitted to appoint any person, including a Commission employee, to administer, or assist in administering, restitution. Unless otherwise ordered by the Commission, all fees and other costs incurred in administering an order of restitution will be paid from the restitution funds obtained from the respondent. If the administrator is a Commission employee, however, no fee shall be charged for his or her services or for services performed by other Commission employees working under his or her direction.

Finally, any order issued by an ALJ directing or authorizing payment of restitution to individual claimants would be deemed to be a final order for appeal purposes and thus be subject to review by the Commission pursuant to § 10.102(a).

The Commission expects that this bifurcated procedure would be followed in most proceedings. However, the proposed amendments would allow the bifurcated proceedings to be combined into one proceeding under limited circumstances, upon motion of the Division of Enforcement or where the resolution of the issues regarding implementation of the restitution would not materially delay the resolution by the ALJ of the rest of the proceeding. The Commission anticipates that this alternative procedure would be used only where the issues relating to the implementation of restitution were sufficiently simple—for instance, where there are only a handful of potential recipients of restitution and the calculation of each individual's claim is not complex—that combining the proceedings would not add much time either to the hearing of the matter or to the rendering of the Initial Decision.

Rule 10.101—Interlocutory Appeals

Rule 10.101 addresses the circumstances under which interlocutory appeals may be taken from rulings of the Administrative Law Judges and the procedures to be followed in doing so. Paragraph (a) sets forth the circumstances under which the Commission may permit interlocutory appeals. Subparagraphs (1)–(4) of that paragraph identify particular circumstances which, if present, would allow a party to ask the Commission directly to consider interlocutory review. Subparagraph (5) provides for interlocutory appeal based upon certification by the Administrative Law Judge that certain circumstances are presented by the issue on which review is to be sought.

Subparagraph (b) sets the time deadlines for the filing of an Application for review with the Commission. It provides that an application is to be filed within five days of notice of the Administrative Law Judge's ruling on which review is to be sought under subparagraphs (a)(1)–(4), or within five days of the Judge's ruling on a certification request made under subparagraph (a)(5).

As currently worded, paragraph (b) creates an ambiguity as to the applicable deadlines if a party believes that it may have a basis to seek interlocutory review under subparagraphs (a)(1)–(4), but is also seeking certification from the Administrative Law Judge under subparagraph (a)(5). The Commission proposes to revise subparagraph (b) to eliminate that ambiguity. Under the revised rule, if a party seeks certification under subparagraph (a)(5) within five days of the Administrative Law Judge's ruling on which review will be sought, that party would have five days after the Judge's ruling on the request for certification to file an application for review under any of the subparagraphs of paragraph (a).

Rule 10.102—Review of Initial Decisions

Existing Rule 10.102 gives any party to an administrative proceeding the right to appeal an ALJ's initial decision to the Commission. The appeal is initiated by filing a notice of appeal within 15 days after service of the initial decision. The appeal then must be perfected through the filing of an appeal brief within 30 days after the notice of appeal is filed. Within 30 days after being served with an appeal brief, the opposite party may file an answering brief. No further briefs are permitted.

The Commission proposes to amend Rule 10.102 in two respects. First, a new provision allowing for cross appeals would be added to paragraph (a) of Rule 10.102. Pursuant to this provision, if a timely notice of appeal is filed by one party, any other party would be permitted to file a notice of appeal within 15 days after service of the first notice or within 15 days after service of the initial decision or other order terminating the proceeding, whichever is later. In the event that a notice of cross appeal were to be filed, the Commission, to the extent practicable, would adjust the briefing schedule and any page limitations otherwise applicable to allow for consolidated briefing by all parties.

Second, paragraph (b) of existing Rule 10.102 would be revised to permit reply briefs, which would have to be filed within 14 days after service of an answering brief. Under the Commission's proposal, reply briefs would be strictly confined to matters raised in the answering brief and be limited to 15 pages in length.

Rule 10.106—Reconsideration

Rule 10.106 deals with petitions for reconsideration of Commission opinions and orders. Although the rule specifically provides that the filing of a petition for reconsideration shall not

operate to stay the effectiveness of the Commission's opinion or order, it does not otherwise address stay applications. In the past, when considering requests to stay the effective date of its opinions and orders pending judicial review, the Commission has generally relied on standards developed by federal courts. Under those standards, a respondent seeking to stay governmental action pending appeal must establish, along with irreparable injury, that he or she is likely to succeed on the merits of his or her appeal and that neither the public interest nor the interest of any other party would be adversely affected if a stay is granted.

The Commission proposes to add a new paragraph to Rule 10.106 codifying the standards it has relied upon in considering stay applications, as described above. In addition, the Commission proposes to require any respondent seeking to stay the imposition of a civil monetary penalty to post a surety bond with the Commission in the amount of any penalty imposed plus interest. If neither the public interest nor the interest of any other party would be adversely affected, imposition of the civil monetary penalty would be stayed once the bond is posted. The bond requirement would assure that, should the Commission prevail on appeal, the civil monetary penalty would be paid. In this way, the proposed rule would reduce the harm to the public interest which otherwise could result from the granting of a stay.

Additionally, the Commission proposes to add a new paragraph (c) to existing Rule 10.106, dealing with responses to petitions for reconsideration or stay applications. Under the proposed provision, no response would be filed unless requested by the Commission. Based on the Commission's experience, petitions for reconsideration and stay applications normally do not necessitate a response in order for the Commission to rule.

Appendix A—Commission Policy Relating to the Acceptance of Settlements in Administrative and Civil Proceedings

The Commission proposes to add to the Rules an appendix setting forth the policy of the Commission not to accept any offer of settlement submitted by any respondent or defendant in an administrative or civil proceeding if the settling respondent or defendant wishes to continue to deny the allegations of the complaint. In accepting a settlement and entering an order finding violations of the Act and/or regulations promulgated under the Act, the Commission makes uncontested findings of fact and conclusions of law. The Commission does not believe it would be appropriate for it to be making such uncontested findings of violations if the party against whom the findings and conclusions are to be entered is continuing to deny the alleged misconduct.

The refusal of a settling respondent or defendant to admit the allegations in a Commission-instituted complaint shall be treated as a denial, unless the party states that he neither admits nor denies the allegations. In that event, the offer of settlement, consent or consent order submitted to the Commission shall include a provision stating that, by neither admitting nor denying the allegations, the settling respondent or defendant agrees that neither he nor any of his agents or employees under his authority or control shall take any action or make any public statement denying, directly or indirectly, any allegation in the complaint or creating, or tending to create, the impression that the complaint is without a factual basis; provided, however, that nothing in such provision shall affect the settling respondent's or defendant's testimonial obligation, or right to take legal positions, in other proceedings to which the Commission is not a party.

This policy reflects the current practice of the Commission.

III. Related Matters

The proposed rules relate solely to agency organization, procedure and practice. Therefore, the provisions of the Administrative Procedure Act, 5 U.S.C. 553, generally requiring notice of proposed rulemaking and opportunity for public comment, are not applicable to them. However, because these proposed amendments represent significant changes in the Commission's current rules of practice, the Commission is inviting public comment on the rules as proposed and suggestions for any other changes that would improve the procedures used in adjudicatory administrative proceedings instituted by the Commission.

The Regulatory Flexibility Act (''RFA''), 5 U.S.C. 601–611 (1994), requires that agencies, in proposing rules, consider the impact of those rules on small businesses. Section 3(a) of the RFA defines the term ''rule'' to mean ''any rule for which the agency publishes a general notice of proposed rulemaking pursuant to section 553(b) of this title * * * for which the agency provides an opportunity for notice and public comment.'' 5 U.S.C. 601(2). Since the proposed rules are not being effected pursuant to section 553(b), they are not ''rules'' as defined in the RFA, and the analysis and certification process certified in that statute do not apply. In any event, the Chairperson certifies, on behalf of the Commission, that the proposed rules, which seek to improve the overall efficiency and fairness of the administrative process, will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 17 CFR Part 10

Administrative practice and procedure, Commodity futures.

In consideration of the foregoing, the Commission proposes to amend Chapter I of Title 17 of the Code of Federal Regulations as follows:

PART 10—RULES OF PRACTICE

1. The authority citation for part 10 continues to read as follows:

Authority: Pub. L. 93–463, sec. 101(a)(11), 88 Stat. 1391; 7 U.S.C. 4a(j), unless otherwise noted.

2. Section 10.1 is amended by deleting the third ''and'' from paragraph (d), redesignating paragraphs (e), (f), (g) and (h) as paragraphs (f), (g), (h) and (i), respectively, and adding a new paragraph (e), to read as follows.

10.1 Scope and applicability of rules of practice.

* * * * *

(e) The issuance of restitution orders pursuant to section 6(c) of the Act, 7 U.S.C. 9; and

* * * * *

3. Section 10.12 is amended by revising paragraph (a)(2) to read as follows:

§ 10.12 Service and filing of documents; form and execution.

(a) *Service by a party or other participant in a proceeding.* * * *

(2) *How service is made.* Service shall be made by:

(i) Personal service;

(ii) Delivering the documents by first-class United States mail or a similar commercial package delivery service; or

(iii) Transmitting the documents via facsimile machine.

Service shall be complete at the time of personal service or upon deposit in the mails or with a similar commercial package delivery service of a properly addressed document for which all postage or fees have been paid to the mail or delivery service. Where a party effects service by mail or similar package delivery service, the time within which the party being served may respond shall be extended by three days. Service by facsimile machine shall

be permitted only if all parties to the proceeding have agreed to such an arrangement in writing and a copy of the written agreement, signed by each party, has been filed with the Proceedings Clerk. The agreement must specify the facsimile machine telephone numbers to be used, the hours during which the facsimile machine is in operation, and when service will be deemed complete.

* * * * *

4. Section 10.21 is revised to read as follows:

§ 10.21 Commencement of the proceeding.

An adjudicatory proceeding is commenced when a complaint and notice of hearing is filed with the Office of Proceedings.

5. Section 10.22 is amended by adding a new sentence at the end of paragraph (b) and adding new paragraphs (b)(1) and (b)(2) to read as follows:

§ 10.22 Complaint and notice of hearing.

* * * * *

(b) *Service.* * * * If a respondent is not found at his last known business or residence address and no forwarding address is available, additional service may be made, at the discretion of the Commission, as follows:

(1) By publishing a notice of the filing of the proceeding and a summary of the complaint, approved by the Commission or the Administrative Law Judge, once a week for three consecutive weeks in one or more newspapers having a general circulation where the respondent's last known business or residence address was located and, if ascertainable, where the respondent is believed to reside or be doing business currently; and

(2) By continuously displaying the complaint on the Commission's Internet web site during the period referred to in paragraph (b)(1) of this section.

6. Section 10.24 is amended by revising paragraphs (a), (b) and (c) to read as follows.

§ 10.24 Amendments and supplemental pleadings.

(a) *Complaint and notice of hearing.* The Commission may, at any time, amend the complaint and notice of hearing in any proceeding. If the Commission so amends the complaint and notice of hearing, the Administrative Law Judge may, at his discretion, adjust the scheduling of the proceeding so as to avoid any prejudice to any of the parties to the proceeding. Upon motion to the Administrative Law Judge and with notice to all other parties and the Commission, the Division of Enforcement may amend a complaint to correct typographical and clerical errors or to make other technical, non-substantive revisions within the scope of the original complaint.

(b) *Other pleadings.* Except for the complaint and notice of hearing, a party may amend any pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted, he may amend it within 20 days after it is served. Otherwise a party may amend a pleading only by leave of the Administrative Law Judge, which shall be freely given when justice so requires.

(c) *Response to amended pleadings.* Any party may file a response to any amendment to any pleading, including the complaint, within ten days after the date of service upon him of the amendment or within the time provided to respond to the original pleading, whichever is later.

* * * * *

7. Section 10.26 is amended by revising the last sentence in paragraph (b) to read as follows:

§ 10.26 Motions and other papers.

* * * * *

(b) *Answers to motions.* * * * The absence of a response to a motion may be considered by the Administrative Law Judge or the Commission in deciding whether to grant the requested relief.

* * * * *

8. Section 10.41 is amended by redesignating paragraphs (f) and (g) as paragraphs (g) and (h), respectively, and by adding a new paragraph (f) to read as follows.

§ 10.41 Prehearing conferences; procedural matters.

* * * * *

(f) Considering objections to the introduction of documentary evidence and the testimony of witnesses identified in prehearing materials filed or otherwise furnished by the parties pursuant to § 10.42;

* * * * *

9. Section 10.42 is amended by revising paragraph (a); by redesignating paragraphs (b) and (c) as paragraphs (c) and (e); by revising newly redesignated paragraphs (c) and (e)(1); and by adding a new paragraph (b), a new paragraph (d) and a new paragraph (f), to read as follows.

§ 10.42 Discovery.

(a) *Pretrial Materials.*—(1) *In general.* Unless otherwise ordered by an Administrative Law Judge, the parties to a proceeding shall furnish to all other parties to the proceeding on or before a date set by the Administrative Law Judge in the form of a prehearing memorandum or otherwise:

(i) An outline of its case or defense;

(ii) The legal theories upon which it will rely;

(iii) The identity, and the city and state of residence, of each witness, other than an expert witness, who is expected to testify on its behalf, along with a brief summary of the matters to be covered by the witness's expected testimony;

(iv) A list of documents which it intends to introduce at the hearing, along with copies of any such documents which the other parties do not already have in their possession and to which they do not have reasonably ready access.

(2) *Expert witnesses.* Unless otherwise ordered by the Administrative Law Judge, in addition to the information described in paragraph (a)(1) of this section, any party who intends to call an expert witness shall furnish to all other parties to the proceeding on or before a date set by the Administrative Law Judge:

(i) A statement identifying the witness and setting forth his qualifications;

(ii) A list of any publications authored by the witness within the preceding ten years;

(iii) A list of all cases in which the witness has testified as an expert, at trial or in deposition, within the preceding four years;

(iv) A complete statement of all opinions to be expressed by the witness and the basis or reasons for those opinions; and

(v) A list of any documents, data or other written information which were considered by the witness in forming his opinions, along with copies of any such documents, data or information which the other parties do not already have in their possession and to which they do not have reasonably ready access.

(3) The foregoing procedures shall not be deemed applicable to rebuttal evidence submitted by any party at the hearing.

(4) In any action in which a party fails to comply with the requirements of this paragraph (a), the Administrative Law Judge may make such orders in regard to the failure as are just, taking into account all of the relevant facts and circumstances of the failure to comply.

(b) *Investigatory materials.* (1) *In general.* Unless otherwise ordered by the Commission or the Administrative Law Judge, the Division of Enforcement shall make available for inspection and copying by the respondents prior to the

scheduled hearing date any of the following documents that were obtained by the Division prior to the institution of proceedings in connection with the investigation that led to the complaint and notice of hearing:

(i) All documents that were produced pursuant to subpoenas issued by the Division or were otherwise obtained from persons not employed by the Commission; and

(ii) All transcripts of investigative testimony and all exhibits to those transcripts.

(2) *Documents that may be withheld.* The Division of Enforcement may withhold any document which would:

(i) Reveal the identity of a confidential source;

(ii) Disclose confidential investigatory techniques or procedures; or

(iii) Separately disclose the market positions, business transactions, trade secrets or names of customers of any persons other than the respondents, unless such information is relevant to the resolution of the proceeding.

(3) Nothing in paragraphs (b)(1) and (b)(2) of this section shall limit the ability of the Division of Enforcement to withhold documents or other information on the grounds of privilege or work product.

(4) *Index of withheld documents.* The Administrative Law Judge may, at the request of any respondent or upon his own motion, require the Division of Enforcement to submit for review an index of documents withheld pursuant to paragraphs (b)(2) or (b)(3) of this section.

(5) *Arrangements for inspection and copying.* Documents subject to inspection and copying pursuant to this section shall be made available to the respondents at the Commission office where they are ordinarily maintained or any other location agreed upon by the parties in writing. Upon payment of the appropriate fees set forth in appendix B to part 145 of this chapter, any respondent may obtain a photocopy of any document made available for inspection. Without the prior written consent of the Division of Enforcement, no respondent shall have the right to take custody of any documents that are made available for inspection and copying, or to remove them from Commission premises.

(6) *Failure to make documents available.* In the event that the Division of Enforcement fails to make available documents subject to inspection and copying pursuant to this section, no rehearing or reconsideration of a matter already heard or decided shall be required, unless the respondent demonstrates prejudice caused by the failure to make the documents available.

(7) *Requests for confidential treatment; protective orders.* If a person has requested confidential treatment of information submitted by him or her, either pursuant to rules adopted by the Commission under the Freedom of Information Act (part 145 of this chapter) or under the Commission's Rules Relating To Investigations (part 11 of this chapter), the Division of Enforcement shall notify him or her, if possible, that the information is to be disclosed to parties to the proceeding and he or she may apply to the Administrative Law Judge for an order protecting the information from disclosure. In considering whether to issue a protective order, the Administrative Law Judge shall weigh the burden on the person requesting the order if no order is granted against the burden on the public interest and any party to the proceeding if the order is granted. No protective order shall be granted which will prevent the introduction of material evidence by the Division of Enforcement or impair a respondent's ability to defend adequately.

(c) *Witness statements.* (1) *In general.* Each party to an adjudicatory proceeding shall make available to the other parties any statement of any person whom the party calls, or expects to call, as a witness that relates to the witness's anticipated testimony and is in the party's possession. Such statements shall include the following:

(i) Transcripts of investigative deposition, trial or similar testimony given by the witness,

(ii) Written statements signed by the witness, and

(iii) Substantially verbatim notes of interviews with the witness, and all exhibits to such transcripts, statements and notes. For purposes of this paragraph (c), ''substantially verbatim notes'' means notes that fairly record the witnesses exact words, subject to minor, inconsequential deviations. Such statements shall include memoranda and other writings authored by the witness that contain information directly relating to his anticipated testimony. The production of witness statements pursuant to this paragraph shall take place prior to the scheduled hearing date, at a time to be designated by the Administrative Law Judge.

(2) Nothing in paragraph (c)(1) of this section shall limit the ability of a party to withhold documents or other information on the grounds of privilege or work product.

(3) *Index of withheld documents.* The Administrative Law Judge may, at the request of any party or upon his own motion, require a party to submit for review an index of documents withheld pursuant to paragraph (c)(2) of this section.

(4) *Failure to produce witness statements.* In the event that a party fails to make available witness statements subject to production pursuant to this section, no rehearing or reconsideration of a matter already heard or decided shall be required, unless another party demonstrates prejudice caused by the failure to make the witness statements available.

(d) *Modification of Production Requirements.* The Administrative Law Judge shall modify any of the requirements of paragraphs (a) through (c) of this section that any party can show is unduly burdensome or is otherwise inappropriate under all the circumstances.

(e) *Admissions.* (1) *Request for admissions.* Any party may serve upon any other party, with a copy to the Proceedings Clerk, a written request for admission of the truth of any facts relevant to the pending proceeding set forth in the request. Each matter of which an admission is requested shall be separately set forth. Unless prior written approval is obtained from the Administrative Law Judge, the number of requests shall not exceed 50 in number including all discrete parts and subparts.

* * * * *

(f) *Objections to authenticity or admissibility of documents.* (1) *Identification of documents.* Upon order of the Administrative Law Judge, any party may serve upon the other parties, with a copy to the Proceedings Clerk, a list identifying the documents that it intends to introduce at the hearing and requesting the other parties to file and serve a response disclosing any objection, together with the factual or legal grounds therefor, to the authenticity or admissibility of each document identified on the list. A copy of each document identified on the list shall be served with the request, unless the party being served already has the document in his possession or has reasonably ready access to it.

(2) *Objections to authenticity or admissibility.* Within 20 days after service of the list described in paragraph (f)(1) of this section, each party upon whom it was served shall file a response disclosing any objection, together with the factual or legal grounds therefor, to the authenticity or admissibility of each document identified on the list. All objections not raised may be deemed waived.

(3) *Rulings on objections.* In his or her discretion, the Administrative Law Judge may treat as a motion in limine any list served by a party pursuant to paragraph (f)(1) of this section, where any other party has filed a response objecting to the authenticity or the admissibility on any item listed. In that event, after affording the parties an opportunity to file briefs containing arguments on the motion, the ALJ may rule on any objection to the authenticity or admissibility of any document identified on the list in advance of trial, to the extent appropriate.

10. Section 10.66 is amended by revising paragraph (b) to read as follows:

§ 10.66 Conduct of the hearing.

* * * * *

(b) *Rights of parties.* Every party shall be entitled to due notice of hearings, the right to be represented by counsel, and the right to cross-examine witnesses, present oral and documentary evidence, submit rebuttal evidence, raise objections, make arguments and move for appropriate relief. Nothing in this paragraph limits the authority of the Commission or the Administrative Law Judge to exercise authority under other provisions of the Commission's rules, to enforce the requirement that evidence presented be relevant to the proceeding, or to limit cross-examination to the subject matter of the direct examination and matters affecting the credibility of the witness.

* * * * *

11. Section 10.68 is amended by revising paragraphs(a)(1), (a)(2) and (b)(3); by revising the second sentence in paragraph (e)(1); and by adding a new sentence to the end of paragraph (f), to read as follows.

§ 10.68 Subpoenas.

(a) *Application for and issuance of subpoenas.*—(1) *Application for and issuance of subpoena ad testificandum.* Any party may apply to the Administrative Law Judge for the issuance of a subpoena requiring a person to appear and testify (subpoena ad testificandum) at the hearing. All requests for the issuance of a subpoena ad testificandum shall be submitted in duplicate and in writing and shall be served upon all other parties to the proceeding, unless the request is made on the record at the hearing or the requesting party can demonstrate why, in the interest of fairness or justice, the requirement of a written submission or service on one or more of the other parties is not appropriate. A subpoena ad testificandum shall be issued upon a showing by the requesting party of the general relevance of the testimony being sought and the tender of an original and two copies of the subpoena being requested, except in those situations described in § 10.68(b), where additional requirements are set forth.

(2) *Application for subpoena duces tecum.* An application for a subpoena requiring a person to produce specified documentary or tangible evidence (subpoena duces tecum) at any designated time or place may be made by any party to the Administrative Law Judge. All requests for the issuance of a subpoena ad testificandum shall be submitted in duplicate and in writing and shall be served upon all other parties to the proceeding, unless the request is made on the record at the hearing or the requesting party can demonstrate why, in the interest of fairness or justice, the requirement of a written submission or service on one or more of the other parties is not appropriate. Except in those situations described in § 10.68(b), where additional requirements are set forth, each application for the issuance of a subpoena duces tecum shall contain a statement or showing of general relevance and reasonable scope of the evidence being sought and be accompanied by an original and two copies of the subpoena being requested, which shall describe the documentary or tangible evidence to be subpoenaed with as much particularity as is feasible.

* * * * *

(b) *Special requirements relating to application for and issuance of subpoenas for Commission records and for the appearance of Commission employees or employees of other agencies.* * * *

(3) *Rulings.* The motion shall be decided by the Administrative Law Judge and shall provide such terms or conditions for the production of the material, the disclosure of the information, or the appearance of the witness as may appear necessary and appropriate for the protection of the public interest.

* * * * *

(e) *Service of subpoenas.* (1) *How effected.* * * * Service of a subpoena upon any other person shall be made by delivering a copy of the subpoena to him as provided in paragraph (e)(2) or (e)(3) of this section, as applicable, and by tendering to him the fees for one day's attendance. * * *

(f) *Enforcement of subpoenas.* * * * When instituting an action to enforce a subpoena requested by the Division of Enforcement, the Commission in its discretion may delegate to the Director of the Division or any Commission employee designated by the Director and acting under his or her direction, or to any other employee of the Commission, authority to serve as the Commission's counsel in such subpoena enforcement action.

12. Section 10.84 is amended by revising paragraph (b) to read as follows:

§ 10.84 Initial decision.

* * * * *

(b) *Filing of initial decision.* (1) *In general.* After the parties have been afforded an opportunity to file their proposed findings of fact, proposed conclusions of law and supporting briefs pursuant to § 10.82, the Administrative Law Judge shall prepare upon the basis of the record in the proceeding and shall file with the Proceedings Clerk his decision, a copy of which shall be served by the Proceedings Clerk upon each of the parties.

(2) *Restitution.* In any proceeding in which an order requiring restitution may be entered, the Administrative Law Judge shall, as part of his initial decision, determine whether restitution is appropriate. If it is, the ALJ shall issue an order specifying: all violations that form the basis for restitution; the particular persons, or class of persons, who suffered damages proximately caused by each such violation; and the method of calculating and, if then determinable, the amount of damages to be paid as restitution.

(3) In deciding whether restitution is appropriate, the Administrative Law Judge, in his discretion, may consider: the degree of complexity likely to be involved in establishing claims; the likelihood that claimants can obtain compensation through their own efforts; the ability of the respondent to pay claimants damages that his violations have caused; the availability of resources to administer restitution; and any other matters that justice may require.

* * * * *

13. Section 10.101 is amended by revising paragraph (b)(1) to read as follows.

§ 10.101 Interlocutory appeals

* * * * *

(b) *Procedure to obtain interlocutory review.* (1) *In general.* An Application for interlocutory review may be filed within five days after notice of the Administrative Law Judge's ruling on a matter described in paragraph (a)(1), (a)(2), (a)(3) or (a)(4) of this section, except if a request for certification under paragraph (a)(5) of this section has been filed with the Administrative Law Judge within five days after notice of the Administrative Law Judge's ruling

on the matter. If such a request has been filed, an Application for interlocutory review under paragraphs (a)(1) through (a)(5) of this section may be filed within five days after notification of the Administrative Law Judge's ruling on the request for certification.

* * * * *

14. Section 10.102 is amended by revising paragraphs (a), (d)(2) and the first sentence of paragraph (e)(2); by redesignating paragraph (b)(3) as paragraph (b)(4) and revising it; by adding a new sentence between the third and fourth full sentences of paragraph (e)(1); and by adding a new paragraph (b)(3) and a new paragraph (b)(5), to read as follows.

§ 10.102 Review of initial decision.

(a) *Notice of appeal.* (1) *In general.* Any party to a proceeding may appeal to the Commission an initial decision or a dismissal or other final disposition of the proceeding by the Administrative Law Judge as to any party. The appeal shall be initiated by serving and filing with the Proceedings Clerk a notice of appeal within 15 days after service of the initial decision or other order terminating the proceeding; where service of the initial decision or other order terminating the proceeding is effected by mail or commercial carrier, the time within which the party served may file a notice of appeal shall be increased by three days.

(2) *Cross appeals.* If a timely notice of appeal is filed by one party, any other party may file a notice of appeal within 15 days after service of the first notice or within 15 days after service of the initial decision or other order terminating the proceeding, whichever is later.

(3) *Confirmation of filing.* The Proceedings Clerk shall confirm the filing of a notice of appeal by mailing a copy thereof to each other party.

(b) *Briefs: time for filing.* * * *

(3) *Reply brief.* Within 14 days after service of an answering brief, the party that filed the first brief may file a reply brief.

(4) No further briefs shall be permitted, unless so ordered by the Commission on its own motion.

(5) *Cross appeals.* In the event that any party files a notice of cross appeal pursuant to paragraph (a)(2) of this section, the Commission shall, to the extent practicable, adjust the briefing schedule and any page limitations otherwise applicable under this section, so as to accommodate consolidated briefing by the parties.

* * * * *

(d) *Briefs: content and form.* * * *

(2) The answering brief generally shall follow the same style as prescribed for the appeal brief but may omit a statement of the issues or of the case if the party does not dispute the issues and statement of the case contained in the appeal brief. Any reply brief shall be confined to matters raised in the answering brief and shall be limited to 15 pages in length.

* * * * *

(e) *Appendix to briefs.* (1) *Designation of contents of appendix.* * * * Any reply brief filed by the appellant may, if necessary, supplement the appellant's previous designation. * * *

(2) *Preparation of the appendix.* Within 15 days after the last answering brief or reply brief of a party was due to be filed, the Office of Proceedings shall prepare an appendix to the briefs which will contain a list of the relevant docket entries filed in the proceedings before the Administrative Law Judge, the initial decision and order of the Administrative Law Judge, the pleadings filed on behalf of the parties who are participating in the appeal and such other parts of the record designated by the parties to the appeal in accordance with the procedures set forth in paragraph (e)(1) of this section. * * *

* * * * *

15. Section 10.106 is amended by revising the section heading; by designating the existing text as paragraph (a) and adding a paragraph heading to it; and by adding a new paragraph (b) and a new paragraph (c) to read as follows.

§ 10.106 Reconsideration; stay pending judicial review.

(a) *Reconsideration.* * * *

(b) *Stay pending judicial appeal.* (1) *Application for stay.* Within 15 days after service of a Commission opinion and order imposing upon any party any of the sanctions listed in §§ 10.1(a) through 10.1(e), that party may file an application with the Commission requesting that the effective date of the order be stayed pending judicial review. The application shall state the reasons why a stay is warranted and the facts relied upon in support of the stay. Any averments contained in the application must be supported by affidavits or other sworn statements or verified statements made under penalty of perjury in accordance with the provisions of 28 U.S.C. 1746.

(2) *Standards for issuance of stay.* The Commission may grant an application for a stay pending judicial appeal upon a showing that:

(i) The applicant is likely to succeed on the merits of his appeal;

(ii) Denial of the stay would cause irreparable harm to the applicant; and

(iii) Neither the public interest nor the interest of any other party will be adversely affected if the stay is granted.

(3) If neither the public interest nor the interest of any other party will be adversely affected, the Commission shall grant any application to stay the imposition of a civil monetary penalty if the applicant has filed with the Proceedings Clerk a surety bond guaranteeing payment of the penalty plus interest, in the event that the Commission's opinion and order is sustained or the applicant's appeal is not perfected or is dismissed for any reason. This bond shall be in the form of an undertaking by a surety company on the approved list of sureties issued by the Treasury Department of the United States, and the amount of interest shall be calculated in accordance with 28 U.S.C. 1961(a) and (b), beginning on the date 30 days after the Commission's opinion and order was served on the applicant.

(c) *Response.* Unless otherwise requested by the Commission, no response to a petition for reconsideration pursuant to § 10.106(a) or an application for a stay pursuant to § 10.106(b) shall be filed. The Commission shall set the time for filing any response at the time it asks for a response. The Commission shall not grant any such petition or application without providing other parties to the proceeding with an opportunity to respond.

15. A new subpart I is added to part 10, to read as follows.

Subpart I—Administration of Restitution Orders

Sec.

§ 10.110 Recommendation of procedure for implementing restitution.

Except as provided in § 10.113, after such time as any order requiring restitution becomes effective (*i.e.*, becomes final and is not stayed), the Division of Enforcement shall petition the Commission for an order directing the Division of Enforcement to recommend to the Commission or, in its discretion, the Administrative Law Judge a procedure for implementing restitution. Each party that has been ordered to pay restitution shall be afforded an opportunity to review the

Division of Enforcement's recommendations and be heard.

§ 10.111 Administration of restitution.

Based on the recommendations submitted by the Division of Enforcement pursuant to § 10.110, the Commission or the Administrative Law Judge, as applicable, shall establish, in writing, a procedure for identifying and notifying individual persons who may be entitled to restitution, receiving and evaluating claims, obtaining funds to be paid as restitution from the party and distributing such funds to qualified claimants. As necessary or appropriate, the Commission or the Administrative Law Judge may appoint any person, including an employee of the Commission, to administer, or assist in administering, such restitution procedure. Unless otherwise ordered by the Commission, all costs incurred in administering an order of restitution shall be paid from the restitution funds obtained from the party who was so sanctioned; provided, however, that if the administrator is a Commission employee, no fee shall be charged for his or her services or for services performed by any other Commission employee working under his or her direction.

§ 10.112 Right to challenge distribution of funds to customers.

Any order of an Administrative Law Judge directing or authorizing the distribution of funds paid as restitution to individual customers shall be considered a final order for appeal purposes and be subject to Commission review under § 10.102.

§ 10.113 Acceleration of establishment of restitution procedure.

The procedures provided for by §§ 10.110 through 10.112 may be initiated prior to the issuance of an Initial Decision in a proceeding, and may be combined with the hearing in the proceeding, upon motion of the Division of Enforcement or if presentation, consideration and resolution of the issues relating to the restitution procedure will not materially delay the conclusion of the hearing or the issuance of an Initial Decision in the proceeding.

16. A new appendix A is added to part 10, to read as follows.

Appendix A—Commission Policy Relating to the Acceptance of Settlements in Administrative and Civil Proceedings

It is the policy of the Commission not to accept any offer of settlement submitted by any respondent or defendant in an administrative or civil proceeding, if the settling respondent or defendant wishes to continue to deny the allegations of the complaint. In accepting a settlement and entering an order finding violations of the Act and/or regulations promulgated under the Act, the Commission makes uncontested findings of fact and conclusions of law. The Commission does not believe it would be appropriate for it to be making such uncontested findings of violations if the party against whom the findings and conclusions are to be entered is continuing to deny the alleged misconduct.

The refusal of a settling respondent or defendant to admit the allegations in a Commission-instituted complaint shall be treated as a denial, unless the party states that he or she neither admits nor denies the allegations. In that event, the proposed offer of settlement, consent or consent order must include a provision stating that, by neither admitting nor denying the allegations, the settling respondent or defendant agrees that neither he or she nor any of his or her agents or employees under his authority or control shall take any action or make any public statement denying, directly or indirectly, any allegation in the complaint or creating, or tending to create, the impression that the complaint is without a factual basis; provided, however, that nothing in this provision shall affect the settling respondent's or defendant's testimonial obligation, or right to take legal positions, in other proceedings to which the Commission is not a party.

Issued in Washington, D.C., on March 16, 1998 by the Commission.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 98–8687 Filed 4–2–98; 8:45 am]

BILLING CODE 6351–01–P

POSTAL SERVICE

39 CFR Part 501

Requirements for Manufacturer, Demonstration and Loaner Postage Meters

AGENCY: Postal Service.

ACTION: Proposed rule.

SUMMARY: This proposal would clarify and strengthen requirements for manufacturers of postage meters to control meters that they use for demonstration and loaner purposes. The intended effect of this proposal is to reduce the potential for misuse and fraud.

DATES: Comments must be received on or before May 4, 1998.

ADDRESSES: Written comments should be mailed or delivered to the Manager, Metering Technology Management, Room 8430, 475 L'Enfant Plaza SW, Washington, DC 20260–2444. Copies of all written comments will be available at the above address for inspection and photocopying between 9 a.m. and 4 p.m. Monday through Friday.

FOR FURTHER INFORMATION CONTACT: Nicholas S. Stankosky, (202) 268–5311.

SUPPLEMENTARY INFORMATION: Serious postal revenue protection problems result from inconsistent practices and procedures followed by meter manufacturers in controlling demonstration meters and those that are lent to their customers. The manufacturers' employees, dealers, and agents are often held accountable for the movement, tracking, and use of these meters in a manner consistent with policies and procedures that have been established and implemented for all other meters in order to protect postal revenue. The following procedures are proposed in order to reduce the potential for misuse and fraud.

List of Subjects in 39 CFR Part 501

Administrative practice and procedure, Postal Service.

Although exempt from the notice and comment requirements of the Administrative Procedure Act (5 U.S.C. 553 ((b) and (c)), regarding proposed rulemaking by 39 U.S.C. 410(a), the Postal Service invites public comments on the following proposed amendments to Part 501 of Title 39 of the Code of Federal Regulations.

PART 501—AUTHORIZATION TO MANUFACTURE AND DISTRIBUTE POSTAGE METERS

1. The authority citation for Part 501 continues to read as follows:

Authority: 5 U.S.C. 552(a); 39 U.S.C. 101, 401, 403, 410, 2610, 2605; Inspector General Act of 1978, as amended (Pub. L. 95–452, as amended), 5 U.S.C. App 3.

2. Section 501.22 is amended by adding paragraph (s) to read as follows:

§ 501.22 [Amended]

* * * * *

(s) Implement controls over demonstration and lent meters as follows:

(1) There are two conditions under which postage meters may be placed with a customer on a temporary basis. One involves a ''demo'' meter and the other is a ''loaner meter.'' For purposes of definition, a ''demo'' meter contains a specimen indicia and cannot be used to meter live mail. A ''loaner'' meter has a ''live'' indicia and may be used to apply postage to a mailpiece. Both are typically used in marketing efforts to acquaint a potential user with the features of a meter.

(2) A ''demo'' meter must be recorded on internal manufacturer inventory records and must be tracked by model