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VIA ONLINE SUBMISSION
Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue, NW
Washington, DC 20580

RE: Parts 2 and 4 Rules of Practice Rulemaking (16 CFR Parts 2 and 4) (Project No. P112103)

On behalf of the Section of Antitrust Law of the American Bar Association (the "Section"), we respectfully submit these comments to the Federal Trade Commission ("FTC" or "Commission"). The views expressed in these comments have received approval from the Section's governing Council. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

The Section supports the ongoing efforts of the Commission to review its investigatory procedures with an eye toward fairness, efficiency, and openness as well as its effort to assure that attorneys practicing before the Commission maintain appropriate decorum and adhere to appropriate professional standards. Nevertheless, the Section has certain questions about the pending proposals. A number of specific comments with respect to particular proposed rules follow in the sections below.

More generally, although it is apparent that the Commission has serious concerns about how the investigative process is working, it is not entirely clear from the proposed

amendments what those problems are, why the Commission's existing authority is inadequate to remedy particular issues (e.g., attorney discipline or unwarranted redactions of documents), or how the proposals would remedy any such problems or omissions. The Section proposes that the private bar engage in a joint task force with the Commission to review whether there are indeed problems with the investigative or disciplinary processes and, if so, the types of targeted remedies that might be appropriate.

I. Section 2.4: Investigational policy.

The Section observes that, although the specific terms of the proposed rule change may not fundamentally change the existing Rule of Practice, the Commission appears to be announcing a preference for compulsory process over voluntary production. The Commission suggests, for example, that voluntary cooperation would be complementary to, rather than an alternative to, compulsory process. Although the Section does not disagree that compulsory process may be the appropriate mechanism in some circumstances, the Section cautions that reliance on compulsory process may create additional burdens for both private parties and the agency. For example, because of the involvement of upper levels of management as well as the Commissioners, investigations in which compulsory process has been authorized are more difficult to close than those conducted under informal investigatory authority. The additional cost and time delay of securing formal closure is certainly a concern for practitioners and respondents, but will also present a management burden and complication for the Commission, which may interfere with the Commission's ability to manage its caseload. A greater dependence on

compulsory process also likely will lead to increased litigation and corresponding expenditures of time and money.

The Section also notes that the "meaningful discussions" expected under the proposed rule could be read as an obligation imposed only on the parties receiving process and suggests that the proposed rule be amended to make clear that the Commission staff similarly is expected to engage in good faith, meaningful discussions to promote cooperative discovery.

II. Section 2.6: Notification of purpose.

The Section has concerns that the proposed new language, specifying that "[a] copy of the Commission resolution . . . shall be sufficient to give . . . notice of the purpose of the investigation," diminishes the FTC's obligation to notify targets about the scope of investigations. Commission resolutions prescribed under section 2.7(a) often are stated in broad general terms and, as such, do not provide sufficient detail to investigation targets of the objectives of a particular investigation.

Regarding the changes allowing the Commission to disclose the existence of non-public investigations to potential witnesses or other third parties, it is unclear why a change in the current policy is necessary, or indeed what specific changes the Commission intends. The Commission historically has been properly mindful of the importance of confidentiality of its investigations, taking into consideration the various federal statutes that protect the confidential nature of non-public investigations. *See e.g.*, 15 U.S.C. § 18a(h) ("[N]o such information or documentary material [submitted pursuant to the HSR Act] may be made public, except as may be relevant to any administrative or

judicial action or proceeding."); 15 U.S.C. § 57b-2 (protecting the confidentiality of information obtained by the Commission through compulsory process) *and* § 46(f) (protection of trade secrets and confidential commercial or financial information). A summary of the Commission's policies in this regard already is in the Operating Manual at §16.9. Given the importance of confidentiality to all parties, if the Commission intends that its proposed rule change will modify existing practice in this area such a change should be explained in greater detail.

III. Section 2.7: Compulsory process.

The revised rule consolidates and revises a number of rules, as the Commission notes, and the Section will not attempt to analyze all potential issues that could arise under the revised rule. The Section notes, however, that several of the revisions implicitly depend on specific statutory authority, and therefore the interpretation of those provisions are dependent on that authority. For example, new sections (c) and (e) derive from Section 9 of the Act, and section (d) relates to Section 6.

Finally, although the Section understands the desire to expedite investigations, the Section believes that the obligation to identify all potential issues relating to a substantial document production in a mandatory meet and confer session within ten days of receipt of process would impose a significant burden on outside counsel and responding parties. Alternatively, the meet and confer sessions could start within ten days, as is customary, without precluding additional discussions of other issues as they arise, or the mandatory meet and confer could be pushed back to 30 days or a similar period.

IV. Section 2.9: Rights of witnesses in investigations.

The proposed rule states that in nonpublic hearings a witness may be limited to inspection of the official transcript of the testimony. It is the Section's position that any witness should be entitled to retain or procure a copy of any submitted document or recorded testimony, as the Commission recognized several years ago in its merger process reforms.

This section also addresses a curious aspect of FTC practice: the right of a witness to consult with an attorney while a question is pending. As the Commission is aware, however, this right is provided by statute with respect to examinations conducted pursuant to a CID. *See* FTC Act Section 20(c)(14)(d)(i). The Commission evidently acknowledges and attempts to avoid this statutory provision by applying the new procedure only to individuals testifying under subpoena. The Section notes that this will result in different procedures for competition and consumer protection investigations. Other related interpretative issues may arise. A preferable solution to this issue, if the Commission desires one, would be to seek statutory relief.

Section 2.10: Petitions to quash.

The Section is concerned that the limitation regarding the length of a petition to quash to 3,570 words in subpart (a)(1) is overly restrictive and would not provide sufficient opportunity to address potential deficiencies in a Commission subpoena. In addition, any reply by staff should be served on the petitioner.

Because the Commission is reconsidering the process for petitions to quash, the Section also suggests that this is an appropriate opportunity to reevaluate the fundamental

dilemma faced by targets whereby seeking relief from a discovery demand in an otherwise non-public proceeding compromises the confidentiality of the investigation because of the requirement that petitions to quash are placed on the public record. *See* 16 C.F.R. §2.7(g). Although proprietary trade secret information or otherwise competitively sensitive information can be the subject of a request for confidential treatment, there is no compelling reason to reveal the identity of the respondent and the nature of the investigation during the pendency of the Part 2 investigation, as discussed above. At a minimum, therefore, the Section suggests that such identifying information be routinely redacted (after consultation with respondent) from any material placed on the public record.

V. Section 2.11: Withholding requested material.

The Section observes that the Commission appears to have significantly tightened the requirements for privilege logs and that these obligations will impose a substantial time and cost burden on parties, which should be weighed against any incremental value to the Commission staff. This is a step backwards from such advances as the merger process reforms, which recognized that the preparation of full privilege logs would threaten to derail any investigation. At a minimum, the Section recommends that the Commission staff have the flexibility to relax the requirements for the privilege log where appropriate.

Section 2.13: Noncompliance with compulsory process.

The proposed rule grants authority for the General Counsel to initiate enforcement actions but does not require the General Counsel to consult with any other part of the

agency before taking such action. This is essentially an advance delegation of the Commission's core law enforcement function and such a shift in authority is of concern to the Section. The decision to initiate litigation should not, in the Section's view, be subject to an advance delegation but should be the result of Commission consideration of specific facts and other circumstances in each particular case.

VI. Section 2.14: Disposition.

The Section supports the release of document preservation obligations following a year of inactivity. The Commission might consider a formal presumption that an investigation has closed after this period. This might address, for example, potential prejudice to a respondent who loses access to potentially relevant third party documents if the third party destroys its documents after 12 months, but the Commission subsequently revives an investigation.

VII. Section 4.1(e): Reprimand, suspension, or disbarment of attorneys.

First, the Section notes that Section 4.1(e)(1)(ii) does not define the terms "obstructionist, contemptuous, or unprofessional" conduct. This broad and vague terminology presents potential due process concerns and leaves the Commission with essentially unfettered discretion to reprimand, suspend, or disbar practicing attorneys.

Second, the proposed rule could be read to suggest that *any* "partner" or person with "comparable managerial authority" "in the law firm in which the [violating] attorney practices" may be held responsible for the violating attorney's actions. This might not be the Commission's intention. Such an application would be overbroad, and to the extent the Commission intended that the phrase "and knew of the conduct at a time when its

consequences could have been avoided or mitigated but failed to take reasonable remedial action" would apply to and restrict the category of those persons who could be held responsible, the proposed rule should be amended to make this clearer.

Third, subsection six appears to suggest that on appeal, the Commission can forego a hearing if, at its own discretion, the Commission is satisfied that misconduct has occurred and a public reprimand is appropriate. However, even a public reprimand can have serious repercussions for a practicing attorney. The Section therefore requests that, if the remainder of the proposed disciplinary procedure is retained, this provision be deleted.

More globally, the Section questions whether the proposed changes to the Part 4 Rules actually are necessary, given that the Commission already has the power to sanction attorneys under the existing rules (or refer matters to local bar authorities). *See* 16 C.F.R. § 4.2(e). To the extent there are specific situations that have caused the Commission to promulgate these proposed rules, the Section suggests that various stakeholders, including the American Bar Association, engage in a meaningful dialogue aimed at arriving at specifically-targeted changes to address the precise problems the Commission has experienced.

VIII. Commissioner Rosch Concurrence and Dissent.

Although the Section recognizes that Commissioner Rosch's Concurrence and Dissent is not part of the Commission's proposal, the Section would like to state its concern that the notion of Commissioners being briefed regularly on the substance and status of investigations, not only would create bureaucratic backlog, but would raise the

possibility of a violation of the Separation of Functions provision of the Administrative Procedure Act (section 554(d)). Although the APA contemplates that the heads of independent agencies will of necessity be exposed to some investigative issues, off-the-record consultations between staff and the ultimate decisionmakers in adjudication would create a number of potential, otherwise avoidable, issues for the Commission. *See, e.g.* Attorney General's Manual on the APA (1947) at 56-57.

Conclusion

The Section supports the Commission's continued efforts to improve its rules and expedite its investigations, and appreciates the opportunity to provide comments on this proposal.

Sincerely,

Richard M. Steuer
Chair, Section of Antitrust Law