Union Calendar No. 263
95th Congress, 1st Session - - - - - - - House Report No. 95-472

FEDERAL TRADE COMMISSION OVERSIGHT—RULEMAKING, ADVERTISING, AND CONSUMER ACCESS

FOURTH REPORT

BY THE

COMMITTEE ON GOVERNMENT OPERATIONS

together with

ADDITIONAL VIEWS

JUNE 30, 1977.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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LETTER OF TRANSMITTAL

HOUSE OF REPRESENTATIVES,
Washington, D.C., June 30, 1977.

HON. THOMAS P. O'NEILL, JR.,
Speaker of the House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: By direction of the Committee on Government Operations, I submit herewith the committee's fourth report to the 95th Congress. The committee's report is based on a study made by its Commerce, Consumer, and Monetary Affairs Subcommittee.

JACK BROOKS, *Chairman.*

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JUNE 30, 1977.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

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Mr. BROOKS, from the Committee on Government Operations, submitted the following

FOURTH REPORT

together with

ADDITIONAL VIEWS

BASED ON A STUDY BY THE COMMERCE, CONSUMER, AND MONETARY AFFAIRS SUBCOMMITTEE

On June 28, 1977, the Committee on Government Operations approved and adopted a report entitled "Federal Trade Commission Oversight—Rulemaking, Advertising, and Consumer Access." The chairman was directed to transmit a copy to the Speaker of the House.

I. INTRODUCTION

The Committee on Government Operations, under the Rules of the House of Representatives, is responsible for "studying the operation of government activities at all levels with a view to determining its economy and efficiency." Within that framework, the Subcommittee on Commerce, Consumer, and Monetary Affairs has been assigned jurisdiction over the operations of the Federal Trade Commission.

In exercising its oversight responsibilities, the subcommittee examined three aspects of FTC activity—the rulemaking process of the Bureau of Consumer Protection, the advertising regulatory activities of the Bureau's Division of National Advertising, and citizen access to the regulatory process in these areas.

This report will focus on the results of subcommittee investigation into the delays in the rulemaking process, the adequacy of FTC advertising programs, and the effectiveness of the citizen petition process in the areas of rulemaking and advertising.

II. DELAYS IN RULEMAKING

A. Introduction and Background

With the passage of the FTC Improvements Act in 1975, the FTC's Bureau of Consumer Protection began to place new emphasis on rulemaking. In its fiscal year 1977 Program Budget Justification to the Congress, the Commission said:

> The passage of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act of 1975 substantially enhances and strengthens the Commission's ability both to promulgate trade regulation rules and to initiate more effective enforcement actions. By fiscal 1977, the Commission will have designed a major part of its consumer protection mission around the Magnuson-Moss Act to take advantage of its potential for cost-effective law enforcement. Increased reliance on trade regulation rules and codification of prior law will allow the Commission to capitalize on material already on hand and to increase output without increasing manpower.[1]

The budget request itself supports this increased emphasis on rulemaking. A $100,000 increase for rulemaking activities was sought for fiscal 1977.[2] In fiscal 1978, the budget request remained at fiscal year 1977 levels.[3]

With rulemaking becoming a more significant aspect of Bureau activity, it was important that the process as well as the access to it, be examined in detail.

In addition to increasing the emphasis on rulemaking, the Federal Trade Commission Improvements Act makes it the FTC's most valuable and effective tool in dealing with unfair and deceptive practices in the consumer protection area. Rules afford the Commission the opportunity to attack problems on an industrywide basis. They put an industry on notice of what is an unfair and deceptive practice. They reduce the cost to industry and the Commission of determining whether a particular practice violates the law, and the new statute provides for strict civil penalties for violators including fines and, in appropriate cases, recission, reformation and refund.

But the subcommittee found rulemaking in the FTC's Bureau of Consumer Protection characterized by delay, postponement and extension at every level of the process. Press releases issued by the Commission announced investigation after investigation. Proposed rules were announced. Hearings were announced, but very few final rules

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[1] "Federal Trade Commission Program Budget Justification to the Congress fiscal year 1977," p. 2.
[2] Ibid., p. 105.
[3] "Federal Trade Commission Program Budget Justification to the Congress fiscal year 1978," p. 34.

were announced. The subcommittee investigation revealed that delays sometimes resulted from the attempt by companies to stymie the initial FTC investigation by refusing to supply information and forcing the Commission to seek subpenas. Delays also resulted from the Commissioners' failure to approve proposed rules in a timely fashion once they are forwarded. Delays resulted from extensions sought both by respondents and FTC bureaus during the rulemaking proceedings—extensions of comment time and postponement of hearing dates. The subcommittee concluded that some delay is unavoidable; but much of it is not.

The subcommittee's investigation was carried on during the latter part of 1975 and early 1976. Hearings were held on February 26, 1976, to examine the problem of citizen access to the rulemaking process and the reasons for delay.[4] The witnesses included:

Paul Rand Dixon, Acting Chairman, Federal Trade Commission;

Joan Z. Bernstein, Acting Director, Bureau of Consumer Protection, Federal Trade Commission;

William Dixon, Special Assistant for Rulemaking, Federal Trade Commission;

Peggy Charren, President, Action for Children's Television; and

Lois Schiffer, Attorney, Center for Law and Social Policy.

B. Findings and Conclusions

1. The advantages of the rulemaking approach are that it represents a more comprehensive approach to the subject matter, it applies to all of the participants in the industry rather than an individual litigant, provides greater guidance to businesses and on the whole acts as a greater deterrent against unfair business practices.

2. The rulemaking process in the FTC's Bureau of Consumer Protection is characterized by extensions, postponements and inactivity, all of which results in needless and excessive delays.

(*a*) During 1974 and 1975, the FTC publicly announced Commission activity on 25 pending rules, 8 of which had been proposed between 1970 and 1973. Hearings were held on five of these rules, postponed on three others and comment time extended as to seven more. During 1974 and 1975, three rules and two industry guides became final.

(*b*) The average length of an investigation preceding the publishing of a proposed rule in the Federal Register is 19 months. After a rule has been so published, the average length of a rulemaking proceeding is 41 months.

(*c*) For the three rules and two guides which became final during 1974 and 1975, the average length of time between initial investigation and final rule was 42 months.

(*d*) The average length of time rules awaited approval at the Commissioner level was 4 months.

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[4] "Oversight Hearings Into the Federal Trade Commission—Bureau of Consumer Protection (Delays In Rulemaking-Regulation of Advertising)" held before the Commerce, Consumer, and Monetary Affairs Subcommittee of the House Government Operations Committee, Feb. 25, June 22 and 24, 1976 (hereinafter referred to as "Hearings").

3. Delay is caused by (1) routine grants of respondent and Commission staff requests for extensions during a rulemaking proceeding by the presiding officer, (2) failure of the Commission to consider proposed rules submitted to it by staff in a timely fashion, and (3) occasional need to resort to compulsory process during investigations.

4. The procedural requirements for rulemaking under the Federal Trade Commission Improvements Act impose minimum timetables for the various stages of the proceeding. However, neither the existence of the timetables nor the fact that four trade regulation rules were republished to conform to the new procedures, have contributed to the delays noted above.

5. The announcement of a staff investigation which could ultimately result in an industry rule raises the expectations of businesses and consumers. Accordingly, excessive delay between the announcement of the investigation and promulgation of the rule is to be considered a serious failure by the agency.

C. Recommendations

The Subcommittee recommends that:

1. The Commission take immediate action to reduce delays associated with the rulemaking process in the following ways:

(*a*) The wide discretion presently allowed presiding officers in rulemaking proceedings to extend comment time and postpone hearing dates should be narrowed, extensions and postponements should be permitted only when hardship to participants can be demonstrated.

(*b*) Commissioners should be required to vote on rulemaking proposals within 30 days after submission by the staff.

(*c*) Rulemaking investigations should be limited to 1 year from the date on which a determination has been made that a rule would be appropriate.

(*d*) Make greater use of outside petitioners in the investigatory process.

2. The subcommittee urges the House adoption of section 2 of H.R. 3816 (95th Congress) which would help to reduce investigatory delays in the rulemaking process by providing for civil penalties for failure to comply with Commission subpenas and more carefully defining the criteria for review of such subpenas.

D. The FTC Rulemaking Process

The rulemaking process begins with an industry-wide investigation authorized by the Commission.[5] When an investigation is complete, the staff drafts a proposed rule and submits it to the Commission. The Commission votes to issue the proposed rule either as submitted or modified as appropriate. The proposed rule is then published in the Federal Register. Before publication of the rule, decisions relating to what industries should be investigated, whether to go with a rule or a case, what practices should be covered by the rule, are made by the Bureau. Following publication the responsibility for procedural aspects of rulemaking shifts to the Rulemaking Division.

[5] Preliminary investigations may be authorized by the Bureau. All industry-wide investigation must be authorized by the Commission.

After an investigation is complete and a rule is proposed, statutory timetables are imposed.[6] Sixty days must be allowed between the notice of the proposed rule and designation of issues. Following the close of the rulemaking record, 60 days must elapse until final version of the rule is published. The Rulemaking Division collects and analyzes comments submitted, conducts the hearings, and reports its findings and recommendations to the Commission at the conclusion of the proceedings. The Commission then publishes a final rule.

When evaluating the progress and efficiency of an ongoing process, it is important that the process be evaluated as it is viewed by those it purports to serve. From January 1974 [7] to December 1975, the FTC issued press releases announcing investigations of problems in various industries. As Chairman Rosenthal pointed out at the hearings:

> I did not announce [these investigations] . . . You people did. Most of them received a lot of publicity and the public thought something was going to happen.[8]

Indeed, the number of press releases issued during that 2 year period indicated the promise of action by the FTC in many significant areas. Where the action involved rulemaking, there seemed to be great disparity between promise and performance. To illustrate the delays in the rulemaking process, the subcommittee prepared a chart [9] which traced the progress of Commission rules and guides which were the subject of public announcement in 1974 and 1975. Investigations announced during that period were traced forward to find the results. Rules that were proposed during that period were traced backward to find out how long they had been in preparation and investigation.

The subcommittee chart reflects only rulemaking activity by the Bureau of Consumer Protection and only rules which were the subject of press releases at some state in their development during 1974–1975. Investigations which resulted in cases or consent orders, rules required to be promulgated by statutes and proposed amendments to existing rules were not included on the chart.

The focus of subcommittee concern was the total length of time between initial investigation and final rule. Although a public announcement by the Commission of an industrywide investigation is not a commitment to rulemaking, where the end result of an investigation is a rule that investigation must be included in an evaluation of the rulemaking process. If a market place practice is sufficiently suspect and important to justify the public announcement of an industrywide investigation, the investigation cannot be divorced from the final product.

1. FACTORS AFFECTING DELAY—MAGNUSON-MOSS AND THE OCTANE CASE

At the February 25 hearing, Acting FTC Chairman Paul Rand Dixon testified that the primary reasons for delay in the rulemaking process were the Octane Case and the passage of the Federal Trade Commission Improvements Act:

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[6] 16 CFR § 1.7–1.20.
[7] Public announcement of investigations by the Commission began in early 1974. These were initiated as part of Chairman Engman's "sunshine policy".
[8] Hearings, p. 42.
[9] See app. 1. See also hearings, app. 1.

Mr. ROSENTHAL. . . . On September 28, 1971, you announced a mail order merchandise proposed rule and 4 years later you adopted a rule. It took you 4 years to adopt that rule.

Why did it take 4 years?

Mr. DIXON. Because in 1971 we did not know whether we were going to win the right to issue a trade regulation rule. That is the reason that octane ruling review by the court and the final denial of certiorari by the Supreme Court established that we could do this * * *.

In the meantime, we are up on Capitol Hill before the Commerce Committee, which ultimately resulted in Magnuson-Moss. No one knew exactly whether we were going to be sustained or not, reversed, or what kind of procedures were going to be imposed.

Mr. ROSENTHAL. In other words, your testimony is that all of these matters were held in abeyance for 2 years prior to the octane decision and after the octane decision for another 2 years waiting to see what happened in Magnuson-Moss?

Mr. DIXON. They were vested in the Bureau and they were working on them.[10]

The *Octane* case began on March 29, 1971, when the National Petroleum Refiners Association challenged the FTC's authority to issue a trade regulation requiring the posting of octane content of gasoline at gasoline stations (the *Octane* case). On April 4, 1972, the District Court found that the Commission did not have rulemaking authority.[11] On June 27, 1973, the Court of Appeals for the District of Columbia reversed the District court, affirming the rulemaking power.[12] The Supreme Court denied certiorari on February 25, 1974,[13] letting stand the Court of Appeals decision. Despite the 3 years in litigation, the Commission had always maintained that it had the power to promulgate industrywide rules.[14] The Commission's explanation that rulemaking delays were the result of waiting for a court decision or congressional action was not satisfactory to several members of the subcommittee:

Mr. LEVITAS. Let me tell you this, Mr. Dixon: In all my experience with any Federal agency, that is the first time I have ever heard a Federal rulemaker or a regulatory agency person say that they held back doing something because they thought they did not know what the outcome of a suit might be on another matter.

The presumption is that laws passed by the Congress are constitutional until held otherwise. The presumption is that the assertion of authority under laws of Congress by an administrative or regulatory agency is a valid exercise of that authority. The burden of proving otherwise lies upon the persons who are affected by it.

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[10] Hearings, pp. 44–45.
[11] 340 F. Supp. 1343 (D.C. Cir. 1972).
[12] 482 F2nd 672 (D.C. Cir. 1973).
[13] 415 U.S. 951 (1974).
[14] See e.g., Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazard of Smoking, 29 Fed. Reg., pp. 8324, 8364 (July 2, 1965).

> I think it is a miserably feeble excuse to say that you waited from 1971 until 1973 because you were wondering about the outcome of another lawsuit.
>
> The traditional approach is that regulatory agencies make their decisions and enforce them, as long as they are acting in good faith believing they are doing their job, and wait until somebody says you cannot do that, whether it is the Congress or the court.[15]

Congress enacted the Federal Trade Commission Improvement Act on January 4, 1975.[16] The act affected FTC rulemaking activity in two important ways. First, it legislatively affirmed the Commission's rulemaking power. Second, it mandated strict procedural guidelines for rulemaking proceedings.

Following the passage of the Improvements Act, there were delays in rules which had to be republished in accordance with the new rulemaking procedures. However, the chart reveals that only 4 of the 23 rules were required to be republished.[17] While this might explain the long delays associated with these particular rules, it does not excuse equally long delays in the 19 other rules. In any event, the FTC's rulemaking authority is now clearly established. The two excuses of litigation and legislation will not be available in the future.

2. WHERE DELAYS OCCUR

There are several points in the rulemaking process where delay can occur. At the investigatory stage, delay was often blamed on the need to resort to compulsory process. However, in the 19 investigations which resulted in rules, only approximately 31 subpenas were issued. Only one resulted in court action; all the rest were eventually complied with. In almost half the investigations there were no subpenas issued at all. It is evident that all investigatory delay cannot be due to subpena enforcement efforts alone. The length of the delays indicate that most of it is due to agency inaction.

It should be pointed out, however, that delays caused by subpena enforcement are prevalent in other areas of Commission activity. Although the subcommittee found that delays in rulemaking investigations were not caused by the dilatory tactics employed by companies to avoid subpena requests, as a general proposition, it is critical that the Commission have stronger enforcement power over its subpena requests.

Once a rule is formulated by the staff in proposed form, it must go on to the Commission for approval. Often the proposals sit at the Commission, resulting in delays of some months. The following chart reflects the amount of time rules awaited approval at the Commission in 1974 and 1975:

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[15] Hearings, p. 54.
[16] Public Law 93-637.
[17] The republished rules were: "Mobile Homes," republished July 23, 1975; "Vocational Schools," republished May 15, 1975; "Food Nutrition Advertising," republished May 28, 1975, and "Flammability of Cellular Plastics," republished July 23, 1975.

Rule	Proposed rule sent to the Commission	Commission approval of proposed rule	Total time elapsed (months)
Vocational schools	July 22, 1974	Aug. 15, 1974	1
Warranty disclosures	May 23, 1975	July 15, 1975	2
Mobile homes	Oct. 11, 1974	May 29, 1975	8
Credit practices	Apr. 19, 1974	Apr. 11, 1975	12
Care labeling of textiles	June 24, 1974	Jan. 1976	6
Health spas	Oct. 29, 1975	Sept. 18, 1975	11
Protein supplements	July 15, 1975	Sept. 5, 1975	2
Warranty—Presale availability	May 23, 1975	July 15, 1975	2
Warranty dispute settlement	do	do	2
Creditors remedies (amendment)	May 14, 1975	July 29, 1975	2
Food advertising	Mar. 12, 1974	Nov. 7, 1974	8
Over-the-counter drugs	July 3, 1975	Aug. 11, 1975	1
Flammable plastics	July 9, 1974	Aug. 6, 1974	1
Air-conditioners	Mar. 4, 1975	Aug. 27, 1975	5
Gasoline mileage claims	Jan. 11, 1974	[1]	
Antacid products	July 3, 1975	Apr. 1976	9
Hearing aids	May 6, 1975	June 24, 1975	1
Funeral industry	July 18, 1975	Aug. 29, 1975	1
Prescription drug prices	Jan. 29, 1975	May 22, 1975	4

[1] Interim guide published.

Following approval by the Commission, a rule then goes to the Rulemaking Division. Although there are regulations which impose time restrictions on the proceedings, the presiding officer has the authority to "set the time and place of the informal hearing and change any time periods prescribed in this subpart." [18] It is often in the rulemaking proceeding itself that much needless delay occurs. The Commission, in its submission for the hearing record, estimated that from initial notice to final rule a minimum of 300 days are required. This, said the Commission, includes:

> Sixty days for the proposal of designated issues, 30 days for the presiding officer to review these proposals and publish a final notice, 60 days notice of the oral hearing, 30 days for the presiding officers' review of the record, 30 days for staff report, 60 days for postrecord comments, and 30 days for the Commission to consider the rulemaking record.[19]

The subcommittee found, though, that 2 years was a more realistic estimate.[20] Delay during the proceedings is a result of time-consuming procedural requirements, the numbers of people involved in the proceeding, discretion afforded the presiding officer by the regulations and, on occasion, the complexity of the proposed rule.

For example, subcommittee investigation revealed that in 1974 and 1975 the comment period was extended at least seven times. The regulations allow comments proposing issues for 60 days following initial notice "or such other period as the Commission may establish in the initial notice." [21] In addition, written submission of data, views and arguments on all issues of fact, law or policy are accepted until 45 days prior to commencement of hearings.[22] At the point in the process where

[18] 16 CFR § 1.13(c)(1)(iii).
[19] Hearing, appendix, p. 196.
[20] Hearing, see chart, p. 3.
[21] 16 CFR § 1.13(b).
[22] 16 CFR § 1.13(A).

comments are invited, the problem or practice involved has been investigated for a period of at least 18 months, sat at the Commission for several more months and been published in proposed form in the Federal Register. Presumably, hearings could begin 2 months following the initial notice. The subcommittee found, however, that hearings were held on an average of 6.5 months following the announcement of a proposed rule.

While it is important that the rulemaking record represent the views of as many affected parties as possible and that as many issues as possible be resolved in the rulemaking proceeding, extensions of comment time and hearing postponements present the potential for abuse. Although some extensions can be explained by the institution of new procedures due to the FTC Improvements Act or the Octane case,[23] there are instances of requests for extensions which were granted which might have been closely scrutinized. Industry trade associations requested an extension of comment time on at least three occasions.[24] Such an industry trade association's primary responsibility is to be aware of Government regulations affecting their industry and to be prepared to represent industry views in regulatory hearings, extension requests from these groups should not be routinely granted.

Opportunity to be heard in rulemaking proceedings should be granted to all interested parties. But the Commission has the responsibility to balance those interests with the interests of promulgating a rule to prohibit practices which presumably continue until a rule is final. The rulemaking regulations impose scrupulous and often time-consuming requirements to allow views to be heard and interests to be represented.[25] While rulemaking is inherently time consuming, additional delays contribute to making the process longer, more costly and more complicated than it was designed to be.[26]

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[23] Extensions in the following rules were the result of the FTC Improvements Act or the Octane case: mail order merchandise, vocational schools, cellular plastics.

[24] Industry extension requests occurred in the detergent labeling rule, the used car rule and the OTC drugs rule.

[25] Section 202A of title II of the FTC Improvements Act sets out the procedures to be followed in a rulemaking proceeding.

[26] See app. 2.

III. REGULATION OF ADVERTISING

A. Introduction and Background

The Federal Trade Commission is the only Federal agency empowered by statute to prevent unfair and deceptive advertising,[27] and because of the enormous influence advertisers exercise over consumers, this regulatory function is vitally important.

The amount of money spent by American advertisers to promote their products to consumers has risen dramatically in recent years—from $19 billion in 1970 to $25 billion in 1976. In contrast, the FTC has spent approximately $3 million to prevent advertising abuses and that figure has remained unchanged in 3 years.

In addition to the recent increase in advertising expenditures, the nature of advertising has changed. It has become sophisticated; claims are implied rather than made directly. Products are distinguished from each other by claims wholly unrelated to product performances. The subcommittee became concerned that the FTC was not keeping up with its regulatory responsibilities in this area. Two questions prompted subcommittee oversight into the activities of the Federal Trade Commission's Division of National Advertising. First, what was the Commission doing to prevent unfair and deceptive advertising practices? In evaluating advertising programs, the subcommittee examined the ad substantiation program, suits against national advertisers, affirmative disclosure programs, the use of corrective advertising, and the response to consumer complaints in the advertising area.

Second, was the level and scope of activity, in the advertising area and the resource commitment to advertising matters commensurate with increased expenditures by the advertising industry and the changing nature of the advertising itself?

The subcommittee scheduled 3 days of hearings to explore these questions. In an effort to evaluate the Commission's performance from a balanced perspective, the subcommittee invited representatives from consumer and public interest groups and advertising industry representatives and the National Advertising Review Board as well as FTC Commissioners. The following representatives of the advertising industry were requested to appear: The American Association of Advertising Agencies, the Association of National Advertisers and the American Advertising Federation. All three groups refused to testify. The letters of refusal appear in appendix 3.

The National Advertising Review Board was also asked to send a nonpublic member of the Board to testify along with the trade associations. NARB refused to testify but volunteered to cooperate with the subcommittee inquiry by submitting a written statement for the record.[28]

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[27] 15 U.S.C. § 45, § 52 (1970).
[28] Hearings, app. 4, p. 219.

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On Tuesday, June 22, the witnesses included:

Tom Ryan, Missouri Public Interest Research Group;

Mark Silbergeld, Consumers Union;

Tracy Westen, Communications Law Program, UCLA;

Benny Kass, Attorney, former National Advertising Review Board Member; and

Carolyn Shaw Bell, Public Member, National Advertising Review Board Member.

On Thursday, June 24, testimony was received from FTC Chairman Calvin Collier and Commissioners Paul Rand Dixon and Elizabeth Hanford Dole.

B. Findings and Conclusions

GENERAL

1. The present resources allocated to FTC advertising programs are insufficient to successfully deal with advertising abuses.

2. Although difficult to calculate in exact dollar amounts, the economic loss to consumers from misleading, inaccurate and insufficient information contained in advertising is significant. The FTC's current advertising program is inadequate for the economically important purposes of requiring ad substantiation, correcting misinformation and increasing overall information to consumers.

THE AD SUBSTANTIATION PROGRAM

1. (*a*) The number of industry-wide ad substantiation requests has steadily declined since 1973. In 1973 four industries were asked to submit substantiating data. In 1976, one industry was asked to submit data.

(*b*) This has resulted in the loss of a deterrent effect on which the program is dependent.

2. The Commission has failed to develop a means for making public the substantiating material it receives from industry-wide requests.

3. Although the number of complaints per year resulting from ad substantiation rounds has increased, the number of resulting complaints per industry round has only averaged three since 1973.

4. The average length of time elapsing from the first substantiation request to the issuance of a complaint is 1 year.

5. Following the issuance of a complaint, final action often takes over 18 months.

6. In up to two-thirds of ad substantiation requests, the advertising has stopped before the substantiation material is received.

7. The monitoring of national advertising by the National Advertising Division is reasonably effective.

8. Monitoring of local and regional advertising by FTC regional offices is inadequate.

CORRECTIVE ADVERTISING

1. Since 1974, corrective advertising was sought in five cases.

2. Since the Warner-Lambert decision in December 1975, no corrective advertising orders have been sought.

3. The staff has not sought to develop cases seeking corrective advertising so as to clarify the boundaries of the law.

4. The standard for the issuance of corrective advertising is now so restrictive there is a danger that this important remedial tool may be available in only very unique circumstances.

AFFIRMATIVE DISCLOSURE

1. An effective affirmative disclosure program has never been fully implemented despite Commission staff estimates of millions of dollars which could be saved by consumers as a result of more complete consumer produce information.

2. Affirmative disclosure in advertising has never been a focus of advertising regulation despite the increased favorable impact such disclosure requirements could have.

NATIONAL ADVERTISING LITIGATION

1. Since 1973, the National Advertising Division has issue 41 complaints against national advertisers and their advertising agencies.

2. Of 41 complaints issued, 33 were settled prior to trial—a consent rate of over 80 percent.

3. (*a*) The Commission maintains a hard line in negotiating consent orders. To the extent that consent orders cover future conduct and are followed up by an effective compliance program, consent orders are a useful regulatory tool.

(*b*) However, without future coverage and follow-up and because advertisers' consent is often based on an ad no longer being run, their effectiveness is questionable.

4. The advertising case selection protocol is so encompassing in terms of the questions that must be addressed before selecting a case that it offers little or no guidance and is self-defeating.

NATIONAL ADVERTISING REVIEW BOARD (NARB)

1. Closer cooperation between the NARB and the FTC could result in savings to the industry and the taxpayer of an estimated $50,000 by the elimination of overlapping effort.

C. Recommendations

The subcommittee recommends that:

1. Resources allocated to advertising programs be increased.

2. Regional offices be instructed to develop an effective monitoring program of local and regional advertising.

3. The Commission make more effective use of its ad substantiation program by:

(*a*) selectively increasing ad substantiation requests,

(*b*) developing a mechanism for making public useful information contained in substantiation responses, and

(*c*) reducing the time it takes to issue a complaint based on un-substantiated ads.

4. Increase the use of corrective advertising by:

(*a*) developing more cases for which corrective advertising is appropriate, and

(*b*) developing an advertising rule which would require the imposition of corrective advertising in specific cases where the Commission has determined that a false claim has been made.[29]

5. Institute a comprehensive affirmative disclosure program using advertising as well as labeling and point-of-sales disclosures to increase the flow of useful product information to consumers.

6. (*a*) Wherever possible advertising consent orders be used to cover the future conduct of advertisers.

(*b*) Advertising consent orders be strictly monitored for compliance.

7. Priorities be assigned to the advertising case selection protocol to indicate which of the criteria should be considered most important in case selection.

8. The Commission maintain a closer relationship with the National Advertising Review Board in order to eliminate duplication.

D. The Economic Impact of Advertising

At the June 22 hearing, Chairman Rosenthal asked several of the public witnesses to assess the impact of $25 billion spent on advertising:

> Mr. Rosenthal. I understand that. But I am trying to define this in a basic way. What are the negative impacts of the $25 billion-a-year advertising budget? Is it economic waste, cultural deprivation—anything you would like to call it? But I would like somebody to tell us for the record what his views are.[30]

The witnesses responded in several ways. Tracy Westen testified that:

> Mr. Westen. My answer to your question would be that advertising has an absolutely staggering impact upon many facets of our lives. Some of them are hidden, but are, nonetheless, very important.
>
> First of all, in an economic sense, some economists have concluded that consumer decisions made on the basis of advertising costs consumers half of their purchasing power. If consumers had access only to existing information, without developing new information about products, they would increase their purchasing power by about 50 percent. So all you have to do is calculate the billions and billions of dollars that are wasted every year by consumers making decisions on faulty information and you have some sense of the economic impact.
>
> Mr. Rosenthal. Has anybody calculated that?
>
> Mr. Westen. I do not know that anybody has calculated it. Obviously, that is a difficult calculation to make. But let me give you an example. In my statement, I cited Anacin. It is just aspirin with a little irrelevant caffeine, and often costs $1.75 or $2.00 per hundred. Yet you can obtain exactly the

[29] On July 12, 1976, the Institute for Public Interest Representation, Georgetown University Law Center filed a petition with the FTC requesting such a rule. The Commission is seriously considering its implementation. The subcommittee concurs with the reasoning expressed in the petition.

[30] Hearings, p. 107.

same thing for 29 or 30 cents. The cost/saving ratio there is 6 to 1. And over $100 million a year is spent in purchasing Anacin. So five-sixths the amount that is spent on Anacin alone could be saved.

Mr. ROSENTHAL. Has anybody made that kind of projection about the whole economy?

Mr. WESTEN. I am not aware of it; it is possible that it could have been done.[31]

Mark Silbergeld, in the following colloquy with Chairman Rosenthal indicated the difficulty in defining the problem:

Mr. ROSENTHAL. Let me restate the question. Is there an economic loss to the general public? If so, what is it? And if the public is really concerned, is it a legitimate concern?

Mr. SILBERGELD. Yes; there is an economic loss from certain kinds of advertising. There is not from others. The *Profile Bread* case which we previously discussed is my idea of a case in which there is no significant economic loss to the public. And the public should not be concerned about the situation where somebody tells you a bread has fewer calories without telling you that it is because it is sliced thinner.

But again, with the proposed regulations of the hearing aid or funeral industry, the staff of the Commission indicates, as its reason for proposing these rules, that a tremendous number of people, for instance, spend $50 or $150 or $250—two or three times at least—in attempting to find a hearing aid, for example, when they may not need a hearing aid at all. Maybe their hearing cannot be improved with a hearing aid. Or maybe they need the $50 model instead of the one for $250. That is the economic loss.

Mr. ROSENTHAL. The industry is spending $25 billion a year in advertising. What impact is that having on our society—economically or otherwise?

Mr. SILBERGELD. The societal impacts are tremendous. What they are is a different question.

Mr. ROSENTHAL. Are they negative?

Mr. SILBERGELD. Some of them are negative; some of them are positive.

Mr. ROSENTHAL. I am trying to get some kind of an evaluation of how serious the problem is.

Mr. SILBERGELD. I do not know how to evaluate that in the absence of very carefully controlled studies. We also get into the question of values. That is something which I do not think the Federal Trade Commission or Government regulation is necessarily equipped to deal with.

For example, let's look at children's advertising. If you want to talk about whether an advertisement is deceptive and makes kids think they are going to get something which they do not get when they get the toy, that is one thing. But if you want to talk about whether the collection of all of these Saturday morning ads for toys teaches children that they

[31] Hearings, p. 106.

> can have happiness if only they get their parents to buy this, that, and the other toy, and that they have a constant pattern of purchasing new toys every week or every month as a source of their entertainment and as a source of things to play with, you are getting into a lot of value and cultural questions to which I do not have an answer. And I am not sure of the exact extent to which Government should be concerned with that.[32]

These witnesses are not alone in perceiving a difficult problem in defining the economic or sociological impact of advertising. Gerald R. Butters, Assistant Professor of Economics at Princeton, noted that:

> The economics of advertising is marked by the same emotional commitment to conflicting schools of thought that is usually associated with monetary theory and the economics of speculation. To all appearances, the choice of both the axioms used and data to be interpreted has been made in order to justify preexisting conclusions rather than to make an unbiased test between alternative theories. How else is one to explain the vehemence and fixity of many economists' views in the face of gradually accumulating, but still sparse, evidence? [33]

Indeed a subcommittee survey of current studies to assess the economic impact of advertising confirmed Professor Butter's assessment. What meager statistical evidence exists can be used to argue both great economic loss to consumers or great economic benefit from advertising. However, in terms of the assistance such information, in however small amounts, could be to the FTC, it is necessary to define the problem in such a way that the FTC's ability to affect it is clear. The testimony received by the public witnesses indicates that when trying to assess the economic impact of advertising as it relates to the FTC, the question should be framed in this way: What is the cost to consumers of the failure of advertising to disclose consumer product information?

Contrary to what current advertising activities at the Commission suggest, a thorough analysis of the lack of consumer information problem was prepared by the FTC's Bureau of Consumer Protection in December of 1972.[34] In its Analytical Program Guide (APG) concerning Disclosures of Consumer Product Information, the Bureau concluded inter alia:

1. Today's marketplace is woefully deficient in the amount and utility of available consumer product information it provides. (p. 5)

2. Millions of dollars are spent on products which would be spent on different products or not spent at all if consumers received adequate information to choose their products wisely.

3. From the vantage of economic theory, there is no difference in debilitating effect upon market performance between the absence of

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[32] Hearings, pp. 105–106.
[33] Gerard R. Butters, "New Developments in the Theory of Monopolistic Competition: A Survey of Advertising and Market Structure," 66 Am. Econ. Rev. 392 (May 1976).
[34] Analytical Program Guide Concerning Disclosures of Consumer Product Information, Bureau of Consumer Protection (December 1972).

information and the presence of false, misleading or deceptive information. While false advertising may pose the additional problem of deflecting profits from honest to dishonest competitors and may therefore present separate or additional policy considerations (explaining the traditional allocation of FTC enforcement resources), from the standpoint of the efficient functioning of the market mechanism and the maximization of consumer welfare, this is a distinction without a difference.

4. The present structure of consumer goods markets presents sellers with no economic incentive to invest their capital in the production or communication of useful consumer information. Other alternatives, such as product differentiation advertising and nonprice forms of promotion (sweepstakes, trading stamps, gifts, and coupons, for example) are clearly perceived by business decisionmakers as assuring better return on investment than providing better product performance/price information.

5. There are studies which measure consumer welfare losses attributable to sub-optimal information supply. They use similar methodolgy and arrive at similar conclusions. One study estimates potential consumer welfare gains of 50 percent from more perfect consumer information. Even if the estimate is questionable, a savings of some fraction of 1 percent of all consumer spending represents an enormous dollar amount and would justify strong FTC commitment to an informational program.

6. Whatever the social utility of present advertising expenditures, aggregate social welfare would increase to the extent that these resources were devoted to lower prices, informational advertisements or real product development.

7. It should be clear, however, that the order of magnitude is huge in dollar terms. If we could increase the efficiency of the consumer marketplace by one-tenth of 1 percent, the money value would be one-half billion dollars. It is possible that the most significant effect of an informational program will be the stimulation of true quality competition and an increase in real research and innovation.

These findings indicate that the Commission has been ignoring a significant cost effective way to improve the regulation of advertising by failing to develop a comprehensive consumer information disclosure program which includes advertising.

The Commission has a legal mandate to prosecute violators of the FTC Act. In the case of advertising, this mandate results in cases brought against false and misleading advertising. However, as the APG indicated and as Mr. Westen pointed out in his testimony:

> The FTC could theoretically eliminate all deceptive advertising and still not provide consumers with the information they really need.[35]

Increasing the flow of information to consumers through advertising should be the twin bulwark of the FTC's advertising program along with the prosecution of advertising law violators.

[35] Hearings, p. 74.

E. FTC Advertising Programs

The Federal Trade Commission's National Advertising Division performs two separate roles. First, it is the prosecutor of violations of section 5 and the promulgator of rules defining unfair and deceptive practices. Second, it develops programs which act as a deterrent to abusive advertising practices. In order to evaluate the performance of the Commission, it is necessary to look at the programs, case selection and remedies in terms of these dual purposes.

1. AD SUBSTANTIATION

The FTC's ad substantiation program began in July 1971. A description of the program appears in the 1971 Annual Report to Congress:

> Under this program, the Commission announced plans to select numerous important industries each year, and to require major advertisers in those industries to submit whatever documentation they have to substantiate those aspects of their advertising which constitutes measurable claims of safety, performance, efficacy, quality and comparative price.

The original purpose of the program was to determine whether the failure to substantiate claims was an unfair and deceptive trade practice under section 5 and to make available to the public the substantiating material submitted to the Commission.

Requests for ad substantiation materials are made in "rounds." A "round" consists of formal investigative demands served on companies on an industry-wide basis. The results of the "rounds" are placed on the public record.

In 1972, the Commission decided *Pfizer Inc.*[36] which required that advertisers have a reasonable basis for making claims *before* the claims are made. *Pfizer* created a legal basis under section 5 for suits against advertisers who failed to substantiate claims. The documentation of the failure to substantiate claims came from the ad substantiation program.

In 1974, the ad substantiation program was restructured to make it a more effective vehicle for developing cases for litigation and to shorten the interval between the publication of an advertisement and the staff analysis of the materials substantiating the ad.[37]

The *Pfizer* decision and the modification of the program have led to the ad substantiation program being used in two ways. One way, based on its original purpose, is to request substantiation from whole industries based on current claims in advertising involving the same product or technique. The second way, using *Pfizer*, is to request the substantiation from individual companies who make a single specific claim in their advertising.

It is important to distinguish these two uses of the program when evaluating it. The use of substantiating data in the development of litigation against specific companies using *Pfizer* as its legal basis is different from monitoring whole industries in an attempt to assure that industrywide claims are actually substantiated.

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[36] 81 FTC 23 (1972).
[37] 1974 Annual Report to Congress.

In its evaluation of the ad substantiation program, the subcommittee focused on the program's industrywide requests rather than its use in the development of litigation.[38] The subcommittee examined monitoring, the level of activity, the length of the process, and the effectiveness of the program.

a. Monitoring

The National Advertising Division monitors advertising of all media forms. All three networks submit the storyboards of commercials with their first broadcast. The actual film prints of commercials are also made available. The Division purchased a professional television monitor which allows it to tape ads directly off the air. This enables the Division to monitor advertising spot efforts for which storyboards are not available.

In addition, the Division subscribes to approximately 45 magazines and newspapers which are reviewed by a staff of monitors and reviewed on a bi-weekly basis by attorneys. The print ads are categorized by current staff interest in a particular problem, i.e., a particular product or technique.

The monitoring of national advertising by the Division is reasonably effective. However, approximately 50 percent of all Commission advertising cases are brought by FTC regional offices. Chairman Collier testified that:

> Until recently, local and regional advertising was monitored exclusively by the regional offices.
>
> Although practices in this regard are not uniform, regional offices regularly review local print media advertising.
>
> Monitoring of broadcast advertising at the local level has, in the past, been complicated by the fact that, unlike network broadcast advertising, the so-called story boards are not prepared by or for local stations or local advertisers.
>
> The Division of National Advertising has, however, recently purchased a subscription to a commercial service which will provide the names of firms using local and regional television advertising in 10 market areas, the brand names advertised, the advertising volume for each brand, and the time and place of broadcast for each advertisement during the monitoring periods. This information will allow the staff to identify users of local and regional television in order to request particular scripts for evaluation.[39]

Since so many advertising cases are brought by the regional offices, a monitoring system for the regional offices is essential. A subscription to a service by the FTC's Washington office which provides the names of advertisers who use local and regional outlets for advertising does not solve the basic monitoring problem. There is no way for the Washington office to know which advertisements may be misleading from the names of the advertisers. The subcommittee has not studied the monitoring procedures of the regional offices in sufficient detail to elaborate on the difficulties involved. But if 50 percent of advertising cases are brought by the regional offices without an adequate

[38] Hearings, p. 141.
[39] Ibid.

monitoring system, the subcommittee is concerned that these cases may not represent an attack on the most significant advertising abuses.[40]

b. Level of activity

The number of industrywide ad substantiation requests has decreased steadily since 1973. In 1973 four industries were asked to submit substantiating data. In 1974 three industries and in 1975 only two. Thus far in 1976, there has been one industrywide request for substantiation.

Chairman Collier gave the subcommittee the following explanation for the decrease in the number of substantiation requests:

> The relatively smaller number of ad substantiation rounds since 1973 resulted from a number of factors.
>
> First, the number of industries that appear appropriate for industrywide advertising substantiation requests has decreased since 1973.
>
> For example, the food and OTC drug industries which account for a large portion of overall national advertising expenditures and for a major part of the traditional law enforcement activity of the Division of National Advertising—indeed, the Division was once called the Division of Food and Drug Advertising—are presently the subject of industrywide rulemaking procedures which seek, in part, to establish rules for permissible advertising claims.
>
> Although monitoring of these areas continues and individual requests for substantiation have been made, it would be difficult to develop an industrywide ad substantiation round that would not involve duplication with the rulemaking proceedings. * * *
>
> In addition to the above factors, it should be noted that in December of 1973 the Commission approved of a more careful focus of the ad substantiation program for the development of cases.[41]

The "number of factors" responsible for the decrease in ad substantiation rounds all boil down to one: the Division has become more selective in its choice of industries from which to demand substantiation of claims. Careful selection of "rounds" is to be encouraged, and has been. In his testimony, Mark Silbergeld, an attorney with Consumers Union remarked that:

> * * * the Commission should be issuing fewer, but more carefully selected, substantiation demands. And those demands should select the kinds of product claims which will be recurring and which will be used again and again by the industry—even if the particular claim happens to go off the air and does not recur for another 2 or 3 years. The Commission should know that that kind of claims will be used again in the next few years because it is associated by consumers with the performance of that product.[42]

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[40] See Program Budget Mid-year Review, advertising monitoring and substantiation, vol. 2, p. 4.
[41] Hearings, pp. 148–149.
[42] Hearings, p. 89.

There is a drawback, however, to fewer numbers of requests for substantiation. In a March 9, 1976, letter to the subcommittee, Joan Bernstein, Acting Director of the Bureau of Consumer Protection, said that with respect to the results of the ad substantiation program:

> It should be kept in mind that, in our view, the advertising substantiation program produces a beneficial deterrent effect regardless of specific Commission action taken pursuant to a particular round.[43]

The deterrence function of the ad substantiation program cannot be underestimated. The Division has estimated that in two-thirds of the substantiation requests, the advertising has stopped by the time the substantiating material has been received. The effect, then, of the law enforcement aspect of the ad substantiation program is not to prevent the specific unsubstantiated claim from appearing in an ad. The withdrawal of an ad does not affect the decision to prosecute the violation, precisely because the Commission and the National Advertising Division see violations as a basis for the opportunity to prevent similar kinds of conduct from occurring in the future.[44]

In light of the difficulties the Commission faces in responding to advertising abuses as they occur, the deterrence aspect of any advertising program must be of primary importance. If the number of ad substantiation rounds decreases, the deterrent value also decreases. This is true even if individual substantiation requests are made because if only one advertiser is making a specific claim, there is little, if any, impact on other advertisers of similar products.

So despite the laudable effort of the Commission to be more selective in its ad substantiation request, an important value of the program is being lost.

In addition to a decline in requests for substantiation resulting in a loss of deterrent value of the program, another valuable original aspect of the program seems to have gotten lost in the shuffle. Originally, the ad substantiation program was designed to make available to the public the substantiating material which were submitted to the Commission. It is in this area that the program has clearly failed.

The GAO evaluated the program 1 year after its inception. It concluded, inter alia, that: "most data submitted in substantiation of automobile and television set advertised claims is too technical for the average consumer to understand." [45]

> * * * much of this material is of a technical and scientific nature and is difficult to comprehend. We have to hire experts to do that and often these questions are not very simple.
>
> So, almost inherently, there is a limitation on how effective it is to the general consuming public.
>
> We had hoped initially, when the program was adopted, that there would be institutions, such as publications or other trade organizations, which would pick up this material and make an effort to make it available in a more comprehensi-

[43] Letter from Joan Z. Bernstein to Chairman Rosenthal, Mar. 9, 1976, p. 3.
[44] See sec. 4, National advertising cases, infra.
[45] Advertising substantiation program report to the Commerce Subcommittee, Committee on Commerce, U.S. Senate, June 2, 1972.

ble form. Apparently, that has not proven feasible, given the substantial cost which attends each such effort.[46]

The problem of putting the substantiating data in a form which would be usable to examiners has plagued the program since it began and yet there has been no effort to solve it. Chairman Collier offered the following explanation for the failure to make the substantiating materials available to consumers:

> If we invest a lot of effort, cash, people and resources, and we substantiate a claim which happens to be current in one particular year, the next year they may be selling that product with a whole new theme. So how much effort do you want to put into that to translate into simple consumer language something with which it is hard to keep up. Short of prohibiting them from making new products or advertising new features of the products which consumers may demand at a particular time, it is very difficult to keep up with that.
>
> Mr. ROSENTHAL. So they know they can always stay one step ahead of you.
>
> Mr. COLLIER. They can do that only to the extent that consumers are interested in the features they are advertising.[47]

As Congressman Rosenthal implied, this timing problem presents a serious problem. Two solutions were proposed by the representatives of the consumer groups who testified at the hearings. In his criticism of the ad substantiation program, Mark Silbergeld said, "I don't think the Commission is doing a very good job of analyzing [the substantiating material] in a systematic way and making the analysis available to the public."[48] He suggested a consumer guide to the advertised characteristics which should be relied on in purchasing the particular product. Tracy Weston, communications law professor at UCLA suggested that "if the FTC lacks the resources to analyze and compile the substantiating data in a usable form, it should contract with consumer groups to perform this task for it."[49]

In fact for 2 years the Commission has been contracting with the Arthur D. Little (ADL) Company to provide professional and technical services in support of the ad substantiation program. ADL assists the Division staff in the selection of ads, the preparation of requests for substantiating material and the analysis of the material when it is submitted. There is no question that this service is essential to the functioning of the program. What is questionable is Mr. Collier's statement that it would be difficult for the Commission to make available to consumers in a usable form the results of the analysis by ADL.

The following example will illustrate. Beginning in July of 1975, ADL was paid $7,500 to provide assistance to the Division in the analysis of ad substantiation documents in preparation for the issuance of a complaint against Matsushita Electric Corporation. Matsushita had been asked to substantiate the claim that:

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[46] Hearings, p. 171.
[47] Ibid.
[48] Ibid., p. 89.
[49] Ibid., p. 75.

> The National Electronics Association rated the Quatrecolor CT–701 as the easiest to service of all color televisions they tested in plants through June 1973.[50]

As a result of the material submitted by Matsushita, and presumably as a result of the analysis provided by ADL, the complaint charged that the tests referred to in the ad did not establish that the Quatrecolor was the easiest to service of all color TVs tested. In addition, the complaint alleges that the test referred to in the ad was invalid and thus unreliable.[51] Although all consumers may not have the technical expertise to judge for themselves whether or not the test was valid, the purchaser of a color television set might be very interested in knowing whether or not the claim is true and whether or not to rely on the tests used by advertisers to add credibility to their claims.

The kind of information which is submitted in the course of an ad substantiation round also suggests that the data could be compiled in usable form which would be extremely useful to consumers. For example, documents submitted by manufacturers of automobiles indicate the existence of detailed vehicle maintenance cost surveys which have been done by the manufacturers. Any such survey would be valuable in the car selection process and any comparative data would be invaluable. If, in the analysis of this information, close attention was paid to the nontechnical information which would be useful to consumers, the ad substantiation program could provide the basis for increasing consumer information in the areas it covers.

In answer to a question from Chairman Rosenthal regarding efforts to make public the substantiating material, Chairman Collier commented that, "* * * rather than publicity when there is no substantiation, we sue." [52]

Mr. Collier went on to point out that the failure to substantiate is made public in the complaint.[53] But such information is often buried in the complaint in language which is not readily comprehensible to a layman who takes the trouble to look at a complaint. It is not the most effective way to make the information known to the public.

Because of the difficulty of being able to sue in time to affect the advertising of the claim, suing is not enough. For the money spent on outside contractors in connection with the ad substantiation program, the public deserves more than just a law suit. It is entitled to the information.

c. Results

The following chart traces the results of the ad substantiation rounds from 1973–1975. There has been one round in 1976 which has not yet been made public.

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[50] In the matter of Matsushita Electric Co., Docket No. 9048, p. 2.
[51] Ibid., p. 3.
[52] Hearings, p. 171.
[53] Ibid.

Industries request to submit substantiation	Action taken as a result of materials submitted: Complaints	Consent orders obtained	Cease and desist orders obtained
1973:			
Automobiles		GM and Darcy M'Manus	
Antiperspirants			
Shampoos			
Acne preparations		Organic Masque and Savoy Chemical	
1974:			
Automobiles	Ford and Chrysler		Chrysler
Tires		Bridgestone Tire and Parker Advertising	
Dental products	Block Drug		
1975:			
Dishwashers			
Televisions	Matsushita and GE	Matsushita and GE	

Chairman Collier was quick to point out that "since 1973 the number of ad substantiation requests has declined, but the number of ad substantiation cases generated per round has increased." [54] He explained:

> One complaint, arising out of an ad substantiation round was issued each in 1972 and 1973; nine such complaints were issued in 1974; and 14 complaints in 1975. Two complaints have been issued so far in 1976.
>
> The increase in the number of complaints since 1973 is consistent with the Commission's decision in December of 1973 to emphasize the law enforcement aspect of the ad substantiation program.
>
> The increased number of cases has been accompanied by a similar increase in the percentage of ad substantiation requests that ultimately result in law enforcement action.
>
> Of the approximately 200 separate ad substantiation orders issued between 1971 and 1973, 18—or about 10 percent—resulted in cases.
>
> In contrast, the 30 ad substantiation orders issued since January 1974 have already resulted in 9 cases—a rate of 30 percent, or 3 times that in the pre-1974 period.[55]

Subcommittee investigation revealed that while the number of complaints *per year* resulting from ad substantiation rounds had increased, no such increase could be discerned by tracing the number of complaints generated *per round*. The chart reveals an average of three complaints *per round* for 1973–1975. The figures quoted by Mr. Collier for 1973, 1974 and 1975 include complaints generated from rounds which were initiated in 1971 and 1972.[56] Since the decision in December of 1973 to emphasize the law enforcement aspect of the ad substantiation program, an average of 3 complaints per round is not significant enough to offset the decreases in the number of rounds initiated each year.

d. Timing

It generally takes the Commission at least 1 year to issue a complaint as a result of an ad substantiation round. Following the filing

[54] Hearings, p. 146.
[55] Ibid., p. 148.
[56] See app. 4. The six hearing aid complaints were a result of a 1972 round. Two complaints against air conditioners resulted from a 1971 round. One complaint against General Foods resulted from a 1971 Pet Food round.

of a complaint, final action often does not result for another year. The following chart represents the length of time it took for the results of rounds beginning in 1973 to reach the complaint and final action:

[In months]

Respondent	Length of time		
	From date of 1st request to date of complaint	From complaint to 1st action, if any	From 1st request to final action, if any
Ford	9	[1] 20	29
Chrysler	9	[2] 17	28
GM [3]	7		7
Matsushita	12	[1] 13	25
General Electric	12	[1] 13	25
Block Drug	19	[1] 13	32
Bridgestone Tire [3]	[4] 17		17

[1] No final action.
[2] Cease and desist.
[3] The advertising agency which prepared the ads were also named in the action.
[4] Consent order obtained—no complaint issued.

The ad substantiation process begins when claims are brought to the attention of the staff through monitoring or other means. The application of the protocol and the drafting of requests for substantiation (6B letters) takes approximately 2 months. The return date of the letters is 30–60 days depending on the complexity of the material. Compliance with the return date is high, although extensions are given when requested. After the materials have been received, they are sent to an outside contractor to be evaluated which takes about 6 weeks depending on how many industries have been asked to send materials. If the contractor and the Division staff determine that a claim is unsubstantiated, preparation begins to issue a complaint.

It takes 6 months to accumulate the substantiating materials prior to the decision to issue a complaint. Following the decision to sue, further investigation may be required. Requests for clarification, subpenas, if necessary, collection of market surveys or investigatory hearings are all done prior to the issuance of a complaint. In addition, after all the data is collected, the APA requires that reasonable effort be made to settle before a complaint is issued. If a settlement is reached, a consent order results.

Because of the complex technical nature of the results for substantiation and the analysis of the submitted materials, the ad substantiation process is necessarily time consuming. One result of the delay in bringing substantiation cases is that the ad has almost always stopped running by the time the 6B letters are returned. This means that the ads have stopped well before the decision is made to sue the advertiser.

2. CORRECTIVE ADVERTISING

Since 1974, the Commission has sought corrective advertising in only five cases.[57] In a March 9, 1976 letter to the subcommittee, the paucity of corrective advertising cases was blamed on the "uncertainty sur-

[57] Travel King (Docket 8949); Lens Craft Research and Development Co., et al (docket 8950); Wasem's Inc. (docket L–2524); Yamaha International Corp. (docket L–2747); Firestone Tire and Rubber, Inc. (docket 8818) civil penalty settlement.

rounding the requisite factual and legal basis required by the Commission."

On December 9, 1975, the Commission decided that the Warner-Lambert had engaged in false and misleading advertising when it claimed that Listerine mouthwash prevented colds.[58] *Warner-Lambert* was the first litigated corrective advertising order in a national advertising case. It is currently on appeal to the U.S. Court of Appeals for the D.C. Circuit. If it is upheld, the authority for the future issuance of corrective advertising orders will be confirmed.

The Commission, in its decision, articulated the following standard:

> If a deceptive advertisement has played a substantial role in creating or reinforcing in the public's mind a false and material belief which lives on after the false advertising ceases, there is clear and continuing injury to competition and to the consuming public as consumers continue to make purchasing decisions based on the false belief. Since this injury cannot be averted by merely requiring respondent to cease disseminating the advertisement, we may appropriately order respondent to take affirmative action designed to terminate the otherwise continuing ill effects of the advertisement.[59]

Restating the standard, Chairman Collier testified that:

> Mr. COLLIER. * * * Since corrective advertising orders rest upon the existence of erroneous consumer beliefs about the advertised product that are likely to continue after advertising containing the deceptive or unfair representation has stopped, it is difficult to predict with what frequency corrective advertising orders will be issued in the future.[60]
>
> Mr. ROSENTHAL. Does the Commission anticipate more corrective advertising cases as the result of the *Listerine* decision?
>
> Mr. COLLIER. I don't know that we have in the pipeline cases I could identify for you or this committee that would say, "this is a candidate for that type of order."
>
> I think that the decision is helpful in the sense that it communicates to the staff the legal standards and proof standards which are going to be required in these cases.
>
> It should aid significantly in the investigation of advertising in the future.
>
> Let me say also that I think a decision of that kind, given the consequence that a company might perceive with regard to corrective advertising, would be of some use in deterrence.
>
> Now that we have established standards that the companies can see what might trigger this kind of relief, it is, of course, our hope in any situation of that kind that there will be a deterrent effect.
>
> But I don't know that I could put a number on which matters might be subject to that. I think that might depend on

[58] 1976 CCH Trade Regulation Reporter, Transfer Binder, 21,066 (1975).
[59] Ibid., pp. 20, 935.
[60] Hearings, p. 151.

proof of the requirements that are set forth in the standard enunciated in that case.

Mr. ROSENTHAL. I have to conclude that the Commission has been somewhat reluctant to order corrective advertising in the past. Isn't this a principal weapon against future deceptive advertising?

Mr. COLLIER. It's a very strong weapon where we can demonstrate that there is this lingering effect which needs to be cleared up in the public mind. It is one I have no hesitation to invoke, but one it would be difficult to make a quantitative prediction about.[61]

But the standard imposed by the Commission is stricter than Mr. Collier's statement implies and the frequency of corrective advertising orders is dependent not only on finding cases which meet the standard but also on testing the standard with cases for which the standard may be inappropriate.

The subcommittee is concerned that the standard is too strict; that a valuable and effective remedy is being spurned because of its controversiality.

The standard imposed by *Warner-Lambert* contains two major elements. First, the ad in question must play a "substantial" role in creating or reinforcing a false and material belief held by the public. Second, the false and material belief must continue after the advertising ceases.

In addition, the Commission indicated that it would look for clear and continuing injury to consumers and competitors as a result of purchase decisions based on false beliefs.

The requirement that advertising play a *substantial* role in creating the false belief imposes a significantly higher burden in establishing the relationship between the ad and consumer beliefs than is required by the law. In *Warner-Lambert*, respondents (WL) tried to argue that a corrective advertising order could not be issued unless the Commission finds the advertising was the sole source of the belief.[62] The Commission rejected the sole source standard by noting that it had "previously ordered affirmative relief to correct a false impression merely *in part* through respondent own efforts." [63] [Emphasis added.] It added further that "The Commission's mandate is to eliminate the effects of false advertising, and a sole source standard would effectively bury a remedy which is vital to the achievement of that goal." [64]

If affirmative relief is warranted to correct false impressions for which a respondent is only in *part* responsible, there is no reason why corrective advertising orders should be issued only when a respondent has *substantially* contributed to a false impression. Although it is difficult to foresee a situation in which the advertising could not be shown to be a substantial contributor to false beliefs, it seems unnecessarily burdensome to require a substantial relationship between the advertising and any false consumer beliefs.

[61] Hearings, p. 168.
[62] 1976 Trade Regulation Reporter, Transfer Binder 21,066 (1975).
[63] Ibid., pp. 20, 937.
[64] Ibid.

The second requirement for the issuance of corrective advertising orders is that false beliefs must continue after the advertising ceases. The whole rationale for corrective advertising is that a cease and desist order preventing future false advertising is ineffective if consumers still make purchases based on past false advertising. Put another way, if there is a continuing harm from false advertising, it must be corrected. However, the proof of the existence of erroneous consumer beliefs requires dependence on consumer surveys and other "belief data" which in many cases cannot be fulfilled by the current state of the art.[65] In *Warner-Lambert*, the advertising agency had engaged in extensive and costly market research which fully documented, to the extent possible, the continuing beliefs about Listerine. As the FTC staff pointed out in its answering brief:

> It is important that the Commission be aware that evidence as massive and as clear as that adduced in this proceeding, may be simply unavailable (or available only at enormous expense) in future cases. For example, the Product Q tests, which are "ideally suited," as respondent's ad agency put it, to provide guidance as to the effects of advertising on consumer memory and beliefs, cost respondent over $100,000, and would now cost about $12,000 per report (IDF 227); and we cannot expect always to find as in this case, revealing admissions in the respondent's own files.

The subcommittee is concerned that the standards set in *Warner-Lambert* for the use of corrective advertising may be so high as to make this remedy available only in very unique consequences. Contrary to Mr. Collier's prediction that the decision in *Warner-Lambert* will have a deterrent effect on advertisers, the subcommittee predicts that advertisers will have little to worry about if in order to obtain corrective advertising, the standards in *Warner-Lambert* must be met in every case.

3. AFFIRMATIVE DISCLOSURE

Although there may be difference of opinion as to the purpose of advertising, none would dispute that at least one of its purposes is to convey information. In addition to its authority to prevent deceptive advertising, the Commission has long asserted its authority to order affirmative relief when necessary to prevent deception and unfairness.

The importance of this ability was underscored by Tracy Weston in his testimony before the subcommittee:

> Most importantly, however, even successful deceptive advertising complaints do not solve the underlying consumer problem. They may eliminate false or misleading information, but they do not supply the consumer with the necessary positive information. In this sense, inaccurate information is

[65] In her dissent to a case brought against Firestone Tire & Rubber Co., 31 FTC 398, 423 (1972), Commissioner Mary Gardiner Jones summarized the expert testimony affirmed by both sides to determine the corrective advertising issues: "Finally, it was agreed that there is today very little research and virtually no empirical studies which can establish or demonstrate the actual way in which information gleaned from an advertisement which initially penetrated a consumer's memory operatis to trigger in that consumer an intent to purchase the advertised product."

> the same as no information. In both cases, the consumer is unable to make intelligent decisions . . . The FTC could theoretically eliminate all deceptive advertising, and still not provide consumers with the information they really need.[66]

Affirmative disclosure at the Commission takes three forms. There is a program entitled "Affirmative Disclosure of Material Product Information" which involves the development of uniform testing protocols by which to measure a variety of product performances. There are specific disclosures, such as warnings, which are required in the advertising of specific products as a result of a Commission order or a consent order. And, there are advertising disclosures required of entire industries as a result of industrywide rules.

Of all the tools available to the Commission to affect advertising, the ability to require affirmative disclosure is among the most valuable and effective. Yet, aside from a large amount of resources devoted to the food nutrition rule, little has been done to make affirmative disclosure truly effective.

The Affirmative Disclosure of Material Product Information Program was intended to initiate trade regulation rules requiring disclosure of product characteristics such as energy consumption, life expectancy, cost of operation and cost of repair.[67] The program was aimed particularly at high priced products.

Chairman Collier testified that:

> With respect to the affirmative disclosure of aspects of product performance, other than energy, substantial difficulties have been encountered.
>
> Fundamentally, the program has not been able to proceed on the scale originally contemplated because the technical difficulties in developing valid measures of performance have proven to be substantial, with the result that if the Commission were to undertake the development of such technical tests itself, the amounts of contract funds required would be enormous.
>
> Outside standard setting, organizations have not been able to develop test measures within the time periods originally contemplated, so that the staff has been unable to rely on such tests as the basis for its own proposals.[68]

In fact, however, the program has been floundering since its inception. The analytical guide concerning disclosures of Consumer Product Information was adopted in principle by the Commission January 12, 1973. The guide included an extensive analysis of the consumer information problem as well as recommendations for the design of an affirmative disclosure program and the creation of an organizational structure to implement the program. Although the affirmative disclosure program discussed by Chairman Collier was a response to the APG, the development of the program reflects a serious lack of commitment to the problems outlined in the guide. The 1973 and 1974 An-

[66] Hearings, p. 74.
[67] 1976 Midyear Program Budget Justification to Congress, p. 40.
[68] Hearings, p. 145.

nual Reports to Congress reveal no mention of an affirmative disclosure program. The program appears in the 1975 Budget Justification with program objectives including disclosure of performance characteristics such as cleaning ability, temperature maintenance, usable volume and efficiency of operation as well as life expectancy, cost of repair, etc. It includes, as well, an ambitious list of product categories including refrigerators, dishwashers, washing machines, vacuum cleaners and carpets. An overall increase in the budget was requested,[69] and supported by OPPE's 1975 Midyear Budget Review. When the 1975 program was reviewed by OPPE, however, it was found to have "fallen off the track" and proceeding "very slowly."[70] In the 1976 Budget Justification, the program objectives have been scaled down and a large decrease in budgeting for the program was requested. This seems to be inconsistent with both the 1975 and 1976 OPPE reviews which indicated that enormous consumer benefit could be gained from the program and directly contrary to the 1976 recommendation that the budget for the program, and specifically for program contracts to develop testing protocol, be substantially increased.

In 1975, the Commission brought 19 complaints against national advertisers. Specific forms of affirmative disclosure were required in only eight cases.[71] Of the eight orders, one involved corrective advertising, three involved conditional disclosures, i.e., if test results are advertised, the following things must be disclosed and 4 involved health or safety warning disclosures.

Much of the Division of National Advertising's affirmative disclosure efforts have recently been focused on Trade Regulation Rules, requiring industrywide disclosures in certain forms of advertising. The Food Nutrition Rule represents the largest resource commitment. Without commenting on the merits of that particular rule or any other advertising disclosure rule, the use of rules to make disclosures uniform and applicable to all advertisers in a particular industry seems to be the most effective way to deal with the disclosure problem.

With the exception of rulemaking, it is clear that programs for affirmative disclosure have not been fully implemented. Efforts at affirmative disclosure should be receiving higher priority for several reasons. First, affirmative disclosure is one of the few advertising remedies which specifically affects future conduct. Almost all other enforcement activity has limited prospective effect. Affirmative disclosure goes beyond the deterrence created by a straight cease-and-desist order by providing specific guidelines for future advertising. Second, the use of affirmative disclosure is an especially appropriate remedy in light of the way advertising has changed in recent years. Most advertising today is not misleading on its face. Most misleading advertising deceives by omission.[72] A sound advertising regulatory policy would dictate the use of remedies which most appropriately solves the problem.

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[69] See app. 5.
[70] 1976 Midyear Program Budget Review, pp. 2–4.
[71] C.E.B. Products, Inc., C–2650; Chrysler Corp., D-8995; General Electric Co., D–9049; Matsushita Electric Corp., D–9048; Morton-Norwich Products, Inc., C–2707; National Commission on Egg Nutrition, D–8987; STP Corp. C–2777; and Warner-Lambert Co., D–8891.
[72] See app. 4.

4. NATIONAL ADVERTISING CASES

The oldest tool the Commission has to combat false and misleading advertising is the cease and desist order. A cease and desist order is issued by the Commission when a practice has been found to violate the FTC Act.[73] Chairman Collier testified to the ability of the cease and desist order to control misleading advertising:

> Mr. MEZVINSKY. What's your most valuable tool to handle the misleading advertising?
> Mr. COLLIER. At this point?
> Mr. MEZVINSKY. Yes.
> Mr. COLLIER. The cease-and-desist order.
> That is the most basic tool we have * * *.
> I wouldn't rule out the old-fashioned cease-and-desist order. The reason is that to the extent that those orders cover more than the specific conduct that was involved, and cover broad practices and broad ranges of products, to the extent that they deal with techniques and not just with a particular claim, the deterrent that results from an individual violation is much broader. The effect on the operations of that company, including its screening processes, is much more effective in our view.[74]

Despite Mr. Collier's view of its value, cease and desist orders have serious drawbacks as an effective advertising regulatory tool. First, cease and desist orders cannot be issued fast enough to affect present conduct. Second, to the extent that future conduct is prohibited under the order, it is dependent on a future monitoring and compliance program for effect.

To evaluate the use of the cease and desist order, the subcommittee reviewed the level of national advertising case activity, consent order policy and the criteria for case selection.

a. Level of activity

Chairman Collier testified that:

> With respect to cases against national advertisers since the beginning of 1973, and again confining our response to cases conducted by the Division of National Advertising, the Commission has issued 41 complaints against national advertisers or their advertising agencies.
> Of these 41 complaints, 25 were settled prior to the commencement of pretrial proceedings. Another 8 were settled after a formal complaint had been issued and substantial pretrial proceedings—including discovery—had been conducted.[75]

The annual breakdown of activity follows: In 1973, nine complaints were issued, five were consented out. One case was brought all the way to the Commission and is currently on appeal in the second circuit and three cases are *still* in the pretrial stage.

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[73] 15 U.S.C. § 45(b), (1970).
[74] Hearings, p. 173.
[75] Ibid., p. 139.

In 1974, 11 complaints were issued, 4 cases were actually brought—three cases against the automakers for mileage claims, and a preliminary injunction against the Commission on Egg Nutrition. The other seven were consented out.

In 1975, 19 complaints were issued. Six of these cases are hearing aid cases which are currently before the Commission. One case is in the pretrial stage. Thirteen have been consented out.

The effect of a consent order rate of close to 80 percent of complaints issued, regardless of the impact of a consent order, is that very few advertisers are actually sued. In 1975, for example, the Division was suing advertisers in only two areas—dental adhesives and hearing aids. In addition, hearing aids are the subject of a trade regulation rule. This level of activity suggests two problems in FTC advertising regulation: (1) whether the extensive use of consent orders is in fact the most effective regulatory tool and (2) whether advertising case selection reflects a well-defined advertising regulatory policy.

b. Consent order policy

From a purely narrow cost/benefit analysis, there is no question that consent orders, as opposed to fully litigated orders, produce some benefit at relatively minimal cost. The APA requires that an effort be made to settle cases prior to the issuance of complaints and a policy to encourage settlement is a good one. The subcommittee's concern with the use of consent orders stems from the Commission's reliance on consent orders to the possible exclusion of other more effective and innovative administrative action.

The Commission has expanded the reach of consent orders by issuing orders which attempt to cover not only those claims and products present in the instant case, but future conduct and products which may be related. For example, in the Matsushita complaint [76] the violation consisted of misrepresenting in the advertising the service required on color television sets. The consent order, however, prohibits the misrepresenting by the use of *any* tests to imply that *any* Matsushita appliances, in addition to television sets, is superior to any other product.

Broad scope orders such as this one serve a useful purpose and should be encouraged for several reasons. One, it saves Commission resources from being spent relitigating cases against the same company for the same type of behavior. Two, it increases to some extent the risk associated with engaging in false advertising.

Although the subcommittee found that the Commission maintains a hard line in negotiating consent orders, the sheer number of consent orders indicates a readiness on the part of advertisers to accept the order. That readiness can be explained in part because the FTC has a solid case which the advertiser would rather avoid. But given the nature of advertising law enforcement, the more likely explanation is that since the ad has already been run and the advertisers don't plan to use it in the future, the cost of consenting to the order is very low. To the extent that this is the advertisers motivation in accepting consent orders, the subcommittee questions its effectiveness.

[76] In the matter of Matsushita Electric Co., docket No. 9048.

c. Case selection

In the 1975 mid-year Budget Review, OPPE recommended that criteria be developed for the selection of deceptive advertising cases and cases to be developed under the ad substantiation program. The result of that recommendation was a protocol to guide the Division of National Advertising in the selection of advertising cases.[77] The protocol embodies the principles of cost/benefit analysis which OPPE has attempted to apply to all Commission programs.

The protocol encompasses all the significant questions which should be asked in selecting advertising cases. However, as the preface to the protocol indicates, answers to several of these questions could be so burdensome or speculative as to make the protocol useless. For example, the protocol recommends an estimate of how many consumers would have purchased a product only at a lower cost if they knew that the representations made about the product were false. Even if such information were readily available, the added delay to get the information in order to make a decision to prosecute seems unwarranted. Although, the protocol includes most relevant considerations, it does not single out those factors which are most important and which should weigh most heavily in case selection.

The subcommittee finds the questions grouped under the heading "deterrence" the most significant in terms of case selection. Although cost/benefit analysis should be included in the determination of all FTC programs, advertising programs seem to lend themselves least to strict cost/benefit analysis. Questions such as the numbers of consumers purchasing a particular product and the price they paid, the size of the advertising budget and the volume of sales are appropriate and should be considered. Such questions, however, tend to emphasize the importance of large ticket items, high budget expenditures to the exclusion of a focus on the nature of the deception and the potential impact on consumers and advertisers. While the cost of a deceptive ad could conceivably be measured, placing a dollar amount on the consumer benefit of eliminating false advertising is almost entirely speculative. Despite the nature of the benefits, it is essential that case selection be made using factors other than only cost/benefit.

F. The National Advertising Review Board

The National Advertising Review Board (NARB) was established in 1972 as an industry supported [78] program for the self-regulation of advertising. Although the NARB declined to testify at the hearings, a 19-page report was submitted for the record by Ronald Campbell, senior vice president, NAD, CBB, and Ralph Alexander, director, NABB, responding to several questions prepared by the subcommittee.

The report states that the basic function of the self-regulatory mechanism is to "respond constructively to complaints of truth and accuracy of national advertising." [79] This function is carried out through a two-tier process involving the National Advertising Division (NAD) of the Council of Better Business Bureaus which receives

[77] Hearings, p. 161.
[78] The following industry organization initiated and maintain the NARB—the American Advertising Federation, the American Association of Advertising Agencies, the Association of National Advertisers, and the Council of Better Business Bureaus.
[79] Hearings, app. 2, p. 226.

and resolves complaints about national advertising and the NARB which hears appeals from NAD decisions.[80]

The subcommittee's interest in the NARB concerns the relationship between self-regulation by industry and government regulation of that same industry. The relationship between the NARB and the FTC provides a unique opportunity to determine whether self-regulation significantly relieves the government of excessive and costly regulatory burdens, whether there is overlap which could be eliminated or whether the existence of a relationship between them could operate for the benefit of both.

1. NARB CAPACITY AND RECORD

The following charts, published by the NARB in 1975, reflect the activity of the NAD and NARB from its inception in 1971 to 1975:

NAD statistical case record as of Aug. 31, 1975

	Cumulative (June 1971 to Present)
Total complaints	902
Disposition:	
Dismissed:	
Adequate Substantiation	317
Advertiser modified or discontinued	256
Administratively closed	257
Referred to NARB by NAD	[1]11
Pending	61

[1] Other cases appealed to NARB by outside complainants or advertisers.

Sources of complaints:	
Consumers	150
Consumer organizations	175
Competitors	87
Local better business bureaus	213
NAD monitoring	240
Other	37

NOTE.—Since 1971 NAD has logged a total of 34 reviews regarding Advertising to Children. 14 of these were in the current year, and of the cumulative total 21 were as a result of NAD monitoring.

NARB case record, 1972–75

Adjucative panels:	
Total	26.[1]
Advertising not substantiated	13.
Advertising not found misleading	11.

[1] Panels Nos. 25 and 26 had not reported decisions as of date report closed.

Consultive panels (5):	
Report subjects:	
1. Product advertising and consumer safety	Published.
2. Advertising and women	Do.
3. Environment and energy advertising	No report issued.
4. Comparative advertising	Under study.
5. Advertising and older people	Do.

[80] The by-laws of the National Advertising Review Council and the statement of organization and procedures of the NARB are contained in the hearing app. 2, p. 245.

The conclusions which can be drawn from this statistical information reveal some of the weaknesses in the self-regulation effort.

First, in 4 years only 150 individual consumers have submitted complaints to NAD. The number of consumer organizations submitting complaints is only slightly greater. This strongly indicates that the existence of NAD has not been widely publicized. Secondly, during 1971–1975 competitor complaints accounted for nearly 10 percent of NAD complaints and according to public member Carolyn Shaw Bell that number is increasing:

> * * * You have already been made aware that over the past 2 years there has been a significant rise in the number and proportion of complaints to the NAD/NARB procedure which have originated with sellers.
>
> The volume of consumer complaints, as initiators, has dropped off markedly, and now form only a small fraction of the total.
>
> There are some complaints that also originate with the monitoring procedures of the NAD staff itself, particularly with its program that monitors children's television. But advertisers themselves have discovered that the NAD/NARB procedure is a highly effective way of complaining about what their competitors are doing.[81]

This aspect of the self-regulation process presents the question whether competitor inspired complaints should be taking up so much of NAD's very limited resources. On the one hand, it could be argued that NAD should not be an arbiter of competitors complaints regarding each others advertising since the motivation may not be in the public interest. On the other hand, competitors can be relied upon to insist upon the strictest standards of truth in advertising for each other.

Third, the chart reveals that of 902 complaints received over 4 years, 564 were found to be adequately substantiated or administratively dismissed.[82] In addition, another 256 cases were dismissed because advertisers agreed to the NAD requested modification or because the advertising was discontinued anyway. The numbers indicate that the chances of an advertiser having to change advertising as a result of an NAD investigation is very slim.

Fourth, the NARB case record indicates that the only advertising found to be misleading is that which is unsubstantiated. The self-regulation mandate, however is to respond to complaints of truth as well as accuracy in advertising. Ads, unfair comparisons, artificial product distinctions and misrepresentations of fact constitute untruthful advertising as well as unsubstantiated claims.

NARB reported that the "estimated average time to resolve a complaint at the NAD is 3 to 4 months" and that the average time from the acceptance of an appeal by the NARB to the convening of the panel is about 3 to 4 months. However, Tom Ryan, research associate of MoPIRG, in his statement to the subcommittee testified to the results of a study of the NARB which MoPIRG had conducted in 1974 and 1975:

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[81] Hearings, p. 122.

[82] Cases are administratively closed if they are preempted by Government action or do not involve questions of truth or accuracy.

In the Missouri public interest research group study of the NARB, we have submitted 118 complaints. In reviewing 52 complaints, which were filed in 1972, we found that 26 had still been pending at the time of our tabulation. They had been pending for an average of 14.94 months.

Of the 26 completed investigations, it took the staff an average of 5.58 months to do the investigations. The overall average for the processing of individual complaints was 10.26 months.

Even though this is much faster than the complaint process of the Federal Trade Commission, it is not a good record.

In the fall of 1975, we reviewed 34 additional complaints. We found that 7 cases were still pending for an average of 13.83 months; that the average for the 27 completed cases was 4.8 months; and that the overall average was 6.67 months. This is on the low side considering the 7 pending cases averaged 13.83 months.

The above tabulations are for the NAD staff investigations only. They do not include the NARB, which is the appeals panel for the investigative staff. In one case, it took the NARB 8 months from the date of complaint to final panel review. In another case, it took them 21.63 months—close to 2 years.[83]

The ability of NAD and NARB to respond quickly to advertising complaints should be self-regulation's greatest attribute. Its timetable is an improvement over the FTC's lengthy litigation process. There are, however, a large number of complaints which become moot before NAD or NARB take any action.

2. FTC/NARB RELATIONSHIP

The relationship of Government regulation of advertising and self-regulation was described succinctly by Carolyn Bell. She testified that:

> * * * there is a very clear explanation for the amount of effort that the advertising industry gives to its self-regulating process. The commitment of the industry to self-regulation is a direct function of the industry's fear of increased Government regulation.
>
> The NARB was first set up in an effort to forestall congressional action that would require preclearance of advertising or some other stringent regulations. As congressional interest in tightening controls over advertising has waned, so the advertising industry's financial support has also waned.[84]

Professor Bell's observation is supported by the budget information submitted by the NARB. In 1975, $552,573 was budgeted for NARB/NAD expenses. In 1976 the total budget is $524,152.[85]

If industry interest in self-regulation declines with the degree of Government regulation, the inference can be drawn that in the past

[83] Hearings, p. 91.
[84] Ibid., p. 124.
[85] Ibid., app. 2, p. 243.

few years, the advertising industry has perceived little threat from the FTC and from Congress.[86] Support for self-regulation is a valuable indicator of FTC impact on advertising.

Regardless of what motivates the self-regulators, the relationship of self-regulation to Government regulation is an important issue when determining resource allocation. Both the FTC and the NARB could benefit from a clear delineation of responsibility.

At the hearings, NARB's relationship to the FTC was described by Ms. Bell:

> Mr. BROWN. How would you describe the relationship between the NARB and the NARC with the FTC?
>
> Ms. BELL. The NARB has no relationship at all with the FTC.[87]

In the report submitted to the subcommittee, the NARB described the relationship to the FTC as "cordial." [88] The report also notes that:

> The Commission * * * plays a vital role in the operation of the self-regulatory mechanism since it is the principal agency to which complaints that are incapable of resolution are to be referred.[89]

No case which has been brought before NAD or NARB has ever been referred to the FTC.

The Commission's attitude toward self-regulation is reflected in a response by Mr. Collier to a question from Chairman Rosenthal:

> Mr. ROSENTHAL. Can they be trusted? Do you think self-regulation has any validity or efficaciousness?
>
> Mr. COLLIER. It has up to a limit, but I would not rely on self-regulation exclusively, for two reasons: One, because it seems to me the exercise of these responsibilities are essentially governmental in nature and the Government should be there. Second, self-regulation turned loose can produce anti-competitive abuses.
>
> I don't think the Government could stand by and allow that to occur.
>
> So my feeling about self-regulation is that, yes, it has a place. It has to be watched. In particular, it has to be watched on both sides—both as to whether it satisfies the need to prevent abuses on the advertising side and from the standpoint of potential abuses on the competitive side.[90]

The subcommittee is concerned that less than maximum cooperation between the FTC and the NARB fails to make the best use of funds allocated to advertising regulation at the FTC. Despite the current drawbacks of the self-regulatory mechanism, closer cooperation is warranted.

An indication of the potential costs savings to both the FTC and the NARB from closer cooperation is illustrated by the overlap be-

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[86] Of the 23 bills submitted in the 94th Congress relating to advertising, none has been passed.
[87] Hearings, p. 135.
[88] Ibid., app. 2, p. 236.
[89] Ibid.
[90] Hearings, pp. 169–170.

tween the FTC's ad substantiation program and the NAD's requests for substantiation in the course of investigating complaints.

Since 1973 the FTC has requested substantiation from eight industries—automobiles, antiperspirant, shampoos, acne preparations, tires, dental products, dishwashers and televisions. In 1975 and 1976, almost 20 percent of requests for substantiation were in these areas. NAD reviewed many ads by Ford, Chrysler, GM, GE, all of whom were respondents in FTC cases for failure to substantiate claims. If the substantiation data accumulated and analyzed by NAD was regularly turned over to the FTC, the amount of money spent on 6B letters, contracts to outside companies, and staff time spent in analysis of the material could be saved. Conversely, if before going through the requests for substantiation, NAD checked accumulated FTC data, which is on public record, NAD staff time and resources could be saved. It is estimated, based on the budget figures of NAD and the FTC's ad substantiation program, that overlap in this area could be costing each organization at least 10 percent of its resources. Closer cooperation could result in savings to the Commission of approximately $50,000 and savings to NAD of approximately $30,000.[91]

[91] These estimates are based on the number of times the NAD requested substantiation in areas where the FTC had initiated substantiation rounds. The budget figures used are those for the FTC's ad substantiation program in 1975 and NAD's 1975 budget.

IV. CONSUMER ACCESS TO THE FTC

A. Introduction

With the emergence of the consumer movement in the 1960's, the constitutional right of Americans to petition the Government for redress of grievances took on added significance. Agencies such as the FTC, whose congressional mandate included protection of consumer interests, became the governmental entities to which organized consumer groups, as well as individual consumers, brought their complaints. What these groups found was that many Government agencies including the FTC were overgrown, insular, and ill-equipped to respond to active outside participation in their work.

The subcommittee received a number of complaints from public interest and consumer groups concerning access to the Federal regulatory process, particularly the FTC. In performing its oversight responsibilities in the substantive areas of rulemaking and advertising, the subcommittee was concerned over obstacles to participation in the initiation of regulatory efforts in these areas.

In March 1972 Action for Children's Television (ACT)[92] petitioned the Federal Trade Commission to enact a Trade Regulation Rule (TRR) prohibiting food advertising to children. In a long, well-documented petition, ACT outlined the argument that food advertising to children constituted unfair and misleading advertising. ACT received no response from the FTC.

In January 1973 ACT filed a supplement to its 1972 petition. Again, no response was received from the Commission.

On November 14, 1975, ACT went to the Federal District Court to sue the FTC for failure to respond to its petitions.

In January 1974 the Center for Law and Social Policy filed a petition before the FTC on behalf of the National Organization for Women. The petition sought a TRR which would require advertising disclosure of the possible health hazards associated with feminine hygiene sprays. The Center received no response on the petition until over a year after it was filed.

Several other consumer groups filed petitions to the FTC to initiate rulemaking proceedings[93] which met with similar inaction.[94]

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[92] ACT is a nonprofit corporation organized under Massachusetts law for the purpose of improving television's programing for children.

[93] Acting Chairman Paul Rand Dixon testified that from 1973 the Commission received 29 petitions for rulemaking.

[94] It should be noted here what the Commission's response has been to petitions submitted by industry representatives. While an industry does not petition the FTC to issue trade regulation rules; it does petition the Commission in other contexts. On Mar. 25, 1976, Edward Trait, Esq., petitioned the Commission on behalf of companies subject to the Corporate Patters Report Project requesting that APA rulemaking procedures be applied before the Patter report forms were instituted. The petition was denied May 12, 1975. Petitions to extend the implementation of the FTC Improvements Act were filed by Subaru, Inc. and the Association of Home Appliance Manufacturers in April and May of 1975. Both petitions were denied within 30 days.

In September 1975, 11 public interest and consumer groups petitioned the FTC to amend Commission rules to require that all petitions to initiate rulemaking proceedings be either granted or denied within 60 days. In June 1976, the Commission denied the petition. The subcommittee was concerned that access to the Commission was being denied to those consumers whose interests it was designed to protect.

B. Findings and Conclusions

1. Individual citizens and public interest group access to the initiation of the Commission's rulemaking process is inadequate.
2. The time limits recently imposed by the Commission for an initial response to rulemaking petitions does not solve the access problem because it does not cause the FTC to deal with the merits of a petition; nor does it grant petitioners a review mechanism on the merits.[95]
3. Several meritorious petitions for rulemaking were not responded to within a reasonable time and were denied without adequate explanation.
4. If properly formulated public interest group petitions could provide much of the informational basis for Commission action; however, the Commission has failed to use them as an investigatory tool or as a resource to help reduce investigatory delays.

C. Recommendations

The subcommittee recommends that:

1. The Commission's petitions response procedure include:
   (*a*) a requirement that all petition responses provide reasons for denial; and
   (*b*) an appeal process for those individuals or groups who feel that their petitions have been wrongly denied.
2. The Commission develop and make available to all potential petitioners a suggested format for rulemaking petitions. The suggested format should include:
   (*a*) the elements of a successful petition;
   (*b*) suggestions as to appropriate legal and factual data which would help the Commission determine whether or not to grant the petition;

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[95] The Bureau of Consumer Protection's internal procedures for handling responses to petitions are as follows:
Day 1. Receipt of petition by Secretary's Office.
Day 3. Referral by Secretary to Commissioner and to Bureau of Consumer Protection; assignment of member of Director's staff to monitor petition response; acknowledgement of receipt of petition by Bureau.
Day 6. Referral by Bureau Director's office to operating division for assigning recommendation for response; notification by division of assignment to Bureau Director's office.
Day 15. Informal prediction by staff of action to be taken. If petition is to be denied because information is insufficient for Commission determination (either because facts or legal basis of petition is insufficient) then the following schedule applies:
Day 25. Recommended answer to petition due to Bureau Director.
Day 30. Recommended answer to petition due to Commission.
Otherwise:
Day 75. Recommended answer to petition due to Bureau Director's office.
Day 90. Recommended answer to petition due to Commission.
If for any reason this schedule is not appropriate—if, for example, staff were engaged in an extensive investigation to determine whether a rulemaking proceeding should be indicated in an area that is the subject of the petition, then we would provide at a minimum an interim response to the petition within the time frame suggested above.
These procedures have been in effect since November 1975, and all petitions received since then are on target. Acknowledgement of receipt of the petitions has just recently been added to the schedule.

(*c*) procedural instructions such as where to file petitions, to whom they will be referred, when a response can be expected, with whom to speak regarding the status of a petition; and

(*d*) rights of review within the agency.

The suggested format should also include the existing timetable and existing criteria for the granting of petitions. This format should be revised periodically to reflect Commission needs and priorities.

3. An internal procedure be developed for keeping track of outside petitions within the Commission.

D. FTC Response to Citizen Petitions for Rulemaking

The right of interested persons to petition for the issuance, amendment or appeal of a rule is guaranteed by both the APA and the Commission's own rules of practice.[96] The right has little meaning, however, without a mechanism to integrate petitions for rulemaking into the entire administrative process. There is ample statutory and judicial support for the right to receive a prompt response to petitions.[97] But it must be the responsibility of each agency to see not only that a response is prompt, but that it is also meaningful. Meaningful access to the rulemaking process is important both because it is statutorily mandated and because it could be a cost-effective way to begin rulemaking proceedings.

In response to subcommittee inquiry and the Senate passage of S. 642,[98] the Bureau of Consumer Protection instituted internal procedures for handling responses to petitions for rulemaking. The procedures call for acknowledgement of the receipt of petitions within 3 days. If a petition is to be denied, it must be denied within 30 days. If the Commission is undecided on the merits of a petition but does not deny it within the 30-day period, it must take some action within 90 days.

While this timetable should assure that petitioners receive some response to their petitions, it does not address several problems associated with the Commission's relationship to the public and the public interest bar.

There is a threshold problem in the Commission's handling of public interest petitions which surfaced as a result of subcommittee examination. It is very difficult to locate petitions at the Commission once they have been received. Petitions are usually received by the Secretary's office and then forwarded to the appropriate Division for analysis and response. There is no log in the Secretary's office where petitions are recorded and no log in the Divisions to keep track of the petitions after they leave the Secretary's office. It is difficult for a petitioner to check on the progress of his petition and almost impossible for a third party to get information about a petition. An internal procedure for keeping track of petitions is essential.

The first limitation of the petition response procedures is that they do not deal with the substance of responses to petitions. More

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[96] See U.S.C. 553(e), 16 CFR 1.9.1.25.

[97] See e.g. 5 U.S.C. 555(b). *F.C.C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940), *E.D.F.* v. *Hardin*, 428 F. 2d 1093 (D.C. Cir. 1970).

[98] S. 642 amends several sections of the Federal Trade Commission Act. Sec. 9 of the bill would require Commission response to petitions within 120 days and allow civil actions in the District Court to compel action.

specifically, they do not include a requirement for a statement of the reasons for denial.

In response to an inquiry from one public interest group, Joan Bernstein, then-Acting Director of the Bureau of Consumer Protection, explained the response procedure in detail.[99] Ms. Bernstein pointed out that when there is no supporting data ("insufficient information"?) for a petition to regulate a practice, the matter would be returned for amplification. In addition, where the petitioner has expertise in the matter, the Commission will require greater specificity and detail of support data. In allocating the burden of investigation and in determining the sufficiency of supporting data, the expertise of the petitioner is the controlling factor. Ms. Bernstein noted, however, that much depends on the individual circumstances surrounding each petition.

This explanation of the procedures imply that a petition would only be denied because of insufficient information.[100] Clearly, petitions are also denied on their merits. Non-meritorious petitions should be denied, but a petitioner who has taken the trouble to write a petition deserves a timely and substantive response.

In addition to the timetable, the Commission voted to include in its *Operating Manual* a provision [101] designed to provide it with recommended responses to petitions for rulemaking. It appears, however, that this provision does not require substantive responses to rulemaking petitions, but rather sets out the criteria used to judge whether or not a petition should be accepted. These criteria include whether the Commission has jurisdiction over the subject matter, whether the rule would be beneficial, whether it could be enforced, whether it deserves high priority, and whether the time it would take to determine the usefulness and appropriateness of the rule is commensurate with Commission priority decisions.

The only aspect of this new provision which is troubling is the requirement that a rulemaking petition fit into an established list of priorities to which the Commission has committed itself to act. Tom Ryan of MoPirg defined the problem this way:

> * * * it appears that unless a consumer or consumer group comes to the FTC with a problem which already fits within the established priorities of the regional or national office, there is little hope of getting the FTC to do anything.[102]

FTC practices must be flexible enough to be able to incorporate meritorious petitions for rulemaking.

The second problem associated with the procedures is that it does not provide a prospective petitioner with the proper format for an acceptable petition. It is not clear, for example, what constitutes "insufficient information." If a particular petitioner has conducted an extensive investigation, would a summary of the evidence supporting a request for regulation be sufficient, or should all evidence be submitted with the petition? If an investigation has not been conducted,

[99] See app. 6.
[100] Hearings, p. 49.
[101] See app. 7.
[102] Letter from Tom Ryan to Jean Perwin, subcommittee staff.

should a petition include more than just a description of the problem to be investigated? If legal arguments support a petition, should they be included with legal documentation, or would a summary suffice?

At the hearings the problem was described by Peggy Charren in this way:

> On October 24 we submitted this petition to the Federal Trade Commission. It was carefully researched. It had a lot of data. I know you cannot tell much about a book from its cover, but we tried very hard to make our concerns clear. We even gave them alternatives.
>
> We offered them a petition to promulgate a rule prohibiting the advertising of vitamins on children's and family television programs and a request for a temporary injunction by the Federal Trade Commission against Hudson Pharmaceutical Corp. The alternative was a formal complaint against Hudson Pharmaceutical Corp. for failure to meet public interest obligations with respect to advertising to children.
>
> We got no official response from the Commission to this document at all.[103]

It was clear that with complex data to present and several means to correct the problem, ACT was not sure of the best way to present the material. The result was a waste of precious ACT resources. With respect to organized public interest organizations who regularly petition the FTC, it would seem that greater advantage could be taken of their investigatory effort and their direct relationship to consumers and consumer problems. By instituting a formal petition framework which requires some of the kinds of preparation that the Commission staff would have to do anyway, access would be improved, staff time could be saved and rulemaking would address specific consumer complaints as well as staff proposals.

Third, the existing procedure does not include an appeal process for those petitions which are denied. Although, according to Ms. Bernstein, a petitioner with insufficient facts in his petition would be asked to amplify his petition before it was denied, a petitioner who feels that a denial was unfair has no forum to appeal it. Without imposing a whole new bureaucratic layer on the petition process, a hearing process could be set up for those who feel that their petitions have been wrongfully denied.

E. FTC Response to Advertising Related Petitions

At the June 22 hearing, Chairman Collier testified that:

> * * * since January 1, 1975, approximately eight national advertising-related public interest group petitions. And between 10 and 15 national advertising-related complaints from competitors.
>
> Numerous of these letters and several of these complaints and petitions have coincided with staff actions concerning the matters that were the subject of the complaint.

[103] Hearings, p. 9.

> In such instances, the letter or complaints are made part of the ongoing investigation or rulemaking proceedings.
>
> In no instance, can we recall, since January 1, 1975, has a complaint letter, public interest petition, or complaint from a competitor resulted in the opening of an entirely new investigation into a matter that was not already a subject of interest to the staff.[104]

These eight petitions and the Commission's response to them illustrate the problems and limitations of the current Commission petition response procedure.

Of the eight public interest group petitions filed in the advertising area,[105] six were denied; one was referred to the Division of Special Statutes and one was incorporated into an ongoing investigation. In addition, many of these petitions were responded to only after delays of 1 year and longer. Presumably, the new timetable will result in future such petitions being responded to promptly.

The responses to these petitions indicate that all the denials contain at least some explanation of the reasons for denial. However, the adequacy of the response varies considerably. For example, the Council on Media, Children and Merchandising submitted a lengthy petition requesting a trade regulation rule to address problems with the private regulatory activities affecting children's advertising. The petition deals specifically with broadcaster codes which so narrowly define children's television advertising as to afford children little or no protection from television advertising. The Commission's denial of the petition does not respond in any way to the merits of the petitioners proposal. It acknowledged the significance of the problem and referred to a joint panel to be held by the FTC and the FCC regarding drug advertising to children. The identical letter was sent to Action for Children's Television in response to their petition to prohibit the advertising of drugs to children. These are not responses which give adequate reasons for the denial of a petition.

The advertising related petitions also illustrate the scope of petition forms. The eight petitions range from a 2-page request for a rule outlining the general area to be subject to the rule, to a formal petition stating the problem, applicable law, and including a draft of a proposed rule and voluminous supporting documents. The variation in the format underscores the need for some formal expression by the Commission of a preferred petition format. Such a suggested form for petitions would save both the petitioner and the Commission valuable resources.

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[104] Hearings, p. 140.

[105] These petitions include: A petition for the Promulgation of a TRR Requiring Disclosure of the Amount of Propellant in Aerosol Products, submitted by S.T.R.A.F.E. (Students Resisting Aerosol Fluorocarbon Emissions); a petition to Issue a TRR Governing the Private Regulation of Children's Television Advertising, submitted by Council on Children, Media and Merchandising; a petition to require Disclosure of Corporate Identify Information, submitted by Sen. James Abourezk and others; a Bread Labeling Petition, submitted by the Center for Science in the Public Interest; a petition to Ban Several Advertising and Promotional Practices by the Cigarette Industry; a petition to Promulgate a Rule Prohibiting the Advertising of Vitamins on Children's and Family Television Programs, submitted by Action for Children's Television; a petition for the Issuance of a TRR requiring Disclosures in Advertising of Feminine Deodorant Sprays, submitted by the Center for Law and Social Policy; a petition for the Disclosure of Heating Costs in New Homes, submitted by House Info (Home Owners Using Savings and Energy Information to Negotiate Fair Offers).

APPENDIXES

APPENDIX 1

PROGRESS OF FEDERAL TRADE COMMISSION RULES & GUIDES

INVESTIGATIONS ANNOUNCED	PROPOSED RULE ISSUED	DELAYS IN PROCESS	HEARINGS HELD	FINAL RULE OR GUIDE ADOPTED	REMARKS
1970 Franchise Disclosure	November 11, 1971		February 14 - March 1, 1972		The Rule was republished on August 22, 1974.
January 20, 1971 Detergent Ingredient Labeling	February 28, 1974	June 20, 1975 Public Record Re-opened July 20, 1975 Public Record Closed			
September 28, 1971 Mail Order Merchandise (first proposed rule)	March 8, 1974 (revised rule)	January 24, 1972 Hearings postponed April 15, 1974 Comment time extended	March 27-29, 1972	October 17, 1975	Rule first proposed in 1971. Investigation began earlier.
1971, 1972 Health Spas	August 15, 1975	November 1975 Comment time extended			Health Spa rule was derived from cases brought by the New York regional office.
1972 Vocational and Home Study Schools	August 15, 1974	November 25, 1974 Comment time extended January 8, 1975 Hearings Postponed	December - January 1976		On May 15, 1975 a new proposed rule was issued in accordance with the FTC Improvements Act.
September, 1972 Mobile Homes Sales & Service	May 28, 1975				The first proposed rule was announced on December 28, 1974. On November 7, 1975, a new staff statement was issued.
September 11, 1972 Endorsement & Testimonial Guide	December 1, 1972			August 8, 1975	
September 26, 1972 Flammability of Cellular Plastics	August 6, 1974	January 8, 1975 Hearings Postponed			On July 22, 1975 a new proposed rule was issued in accordance with the FTC Improvements Act.
November, 1972 Food Nutrition Advertising	November 11, 1974	Jan 31, 75 Closing date for written comments extended July 21, 75 Hearing Postponed Aug 18, 75 Rule Proceeding extended			On May 28, 1976, a new proposed rule was issued in accordance with the FTC Improvements Act.
January 30, 1973 Law Book Guide	February 28, 1973			August 8, 1975	On January 30, 1973 the commission minutes authorized the investigation. It had been ongoing since 1969.
November, 1973 Child Directed Premium Guide	June 27, 1974	July 3, 1975 Request for public comment September 9, 1975 Comment time extended			The child directed premium guide investigation was announced in a speech by Chairman Engman.
February 28, 1974 Funeral Practices	August 28, 1975				February 28, 1974 staff report issued. Investigation preceded the report.
Early 1974 Air Conditioner Labeling	August 20, 1975				The air conditioner rule has been terminated as a result of new energy legislation.
May 22, 1974 Hearing Aids	June 17, 1975		April 12, 1976 (Hearing Scheduled)		
May 30, 1974 Prescription Drug Advertising	June 2, 1975	August 18, 1975 Comment Period Extended	January 12, 1976		
July 1974 Over the Counter Drug Advertising	November 9, 1975	January 14, 1976 Comment Time Extended until March 12, 1976			
August 22, 1974 Protein Supplements	September 4, 1975		May 9, 1976 (Hearing Scheduled)		
September 18, 1974 Fuel Economy	September 10, 1975 (Guide published in Federal Register)				The fuel economy program began as a rule, but resulted in a guide.
April 25, 1975 Used Car Industry	January 2, 1976				
April 25, 1975 Growers, Wholesalers, Retailers of Plants					Ongoing Seattle regional office project.
September 23, 1975 Prescription Eyeglasses Pricing	December 23, 1975				On January 20, 1976 an investigation into commercial restrictions on prescription eyeglasses was announced. A staff report on eyeglasses was released on January 29, 1976.

Prepared for the Subcommittee on Commerce, Consumer and Monetary Affairs.

APPENDIX 2

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

BUREAU OF
CONSUMER PROTECTION

April 7, 1977

The Honorable Benjamin S. Rosenthal
Chairman, Subcommittee on Commerce,
Consumer and Monetary Affairs
Committee on Government Operations
Rayburn House Office Building, Rm. B-350
Washington, D.C. 20519

Dear Mr. Chairman:

On February 25, 1976, members of the Federal Trade Commission testified before the Subcommittee on Commerce, Consumer and Monetary Affairs, Committee on Government Operations on the status of trade regulation rulemaking being conducted pursuant to Section 18(a)(1)(B) of the Federal Trade Commission Act, as amended by the Magnuson-Moss Warranty - Federal Trade Commission Improvement Act. In a March 10 letter to you, Acting Chairman Dixon submitted a chart that summarized the progress of trade regulation rulemaking provided estimates of dates for the issuance of the Final Notice of rulemaking and the completion of the Staff Report.

Since then it has become apparent to the Commission that the estimates did not take into account several steps necessary to the rulemaking process and that it will not be possible to complete many of the rules on the schedules that were provided to you. Because of the interest your Subcommittee has expressed in our rulemaking efforts, I thought it important that you be kept informed of the current status of ongoing rulemaking proceedings and the current schedule for completion of the rules.

Currently, 15 proposed trade regulation rules are in process pursuant to Section 18(a)(1)(B) of the Federal Trade Commission Act. 1/ In addition, other rules are being

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1/ These are Cellular Plastics, Protein Supplements, Vocational Schools, Credit Practices, Food Advertising, Prescription Drugs, Health Spas, OTC Drugs, Hearing Aids, Funeral Homes, Mobile Homes, Prescription Eyeglasses, Used Cars, Care Labeling and OTC Antacids.

developed pursuant to Title I of the Magnuson-Moss Warranty - Federal Trade Commission Improvement Act. 2/ and the Energy Policy and Conservation Act 3/. The Franchise Rule is the one remaining pre-Magnuson-Moss Rule still under consideration.

Hearings have been completed in eight of the fifteen TRR's; final notices have been issued in two others, one of which is now in hearings, the other of which will commerce hearings shortly. The Bureau anticipates that Final Notices in at least four of the five remaining rules will issue shortly. Exhibit I summarizes briefly the status of each of the trade regulation rules proposed pursuant to Section 18(a)(1)(B).

The discussion in Exhibit I makes it clear that trade regulation rulemaking is considerably more time and resource consumptive than believed when the earlier estimates were made to your Subcommittee. In making the original estimates the staff was handicapped by their lack of prior experience with Section 18 rulemaking. As a result, they did not account for a number of time-consuming tasks that are integral parts of Section 18 proceedings. These include rebuttal periods, review of staff reports by Assistant Directors and the Bureau Director, and Commission consideration of the staff report, the presiding officer's report and public comment on both prior to taking final action.

To enable the Commission to keep itself fully apprised of the status of each rule and to allow it to project future personnel utilization requirements, the Commission now requires the staff assigned to each trade regualtion rule to project completion dates for each of the 19 tasks and to update those projections on a monthly basis. The staff estimates are provided to the Commission in a monthly status report. A copy of the latest staff estimates of completion dates for pending trade regulation rules is attached as Exhibit II to this letter.

2/ One proposed warranty rule before the Commission concerning refunds is currently pending. In addition, two of the Section 18 (a) (1)(B) TRR's, Used Cars and Mobile Homes, are mandated by Title I of the Magnuson-Moss Act.

3/ The Commission staff anticipates that the first seven energy rules will be published for comment in May, 1977.

Our earlier projections also failed to account for a number of other factors that in practice have combined to lengthen considerably the time required to complete action on Section 18 trade regulation rules. The most important of these are discussed below.

Size of the Records

The single most important time consuming factor has been the size of the rulemaking records. In three typical rulemaking proceedings, involving funeral homes, vocational schools and hearing aids, written comments were received from 8,500, 900 and 6,500 individuals and oral testimony was heard from 400, 340 and 200 witnesses respectively. The public record in the vocational school rule now exceeds 100,000 pages. The public records in hearing aids and funeral homes number over 60,000 and 40,000 pages respectively.

In order to process records of this size, considerable staff time is required. Each document must be read, evaluated, categorized and processed into a data retrieval system. Later the information must be retrieved and accounted for in the recommendations of the presiding officer and the staff. In many rules, this task was not undertaken until after the hearings were completed. And insufficient funds often required processing by hand rather than by computer.

The experience of the Vocational School TRR staff is illustrative. In February 1976, after the completion of nine weeks of public hearings and a 30-day rebuttal period, the public record consisted of written comments by more than 900 individuals, complete with documentary exhibits, and the testimony of over 400 witnesses that filled over 12,000 pages of hearing transcript. Compilation of an adequate index of the public record required an almost full-time commitment of four professionals (three attorneys and one research analyst) for a five-month period. Completion of the staff report, including review by the Assistant Director, required a comparable resource commitment for an additional five months.

Even more processing time is required for rules based predominantly on scientific or technical evidence, such as the Food Nutrition and Hearing Aid Rules, where over 60% of the witnesses who appeared at the hearings and a comparable percentage of written submissions provided expert testimony on the merits of the proposed rules.

Procedural Motions

The requirements of the statute have provided the grist for a host of procedural motions by parties to the proceedings. Until a body of precedent is developed, it is predictable that the motions will be made, and regardless of their merit, time and effort that could otherwise be devoted to other essential tasks is consumed in briefing and resolving these motions.

In particular, the presiding officers have had to respond to motions and certification petitions at the expense of their other substantive responsibilities. One result has been extensions of comment periods and delays in commencement of hearings. For example, in the OTC Drug Rule, the commencement of the hearings have been extended nearly four months because of two extensions of time granted to a trade association.

A related problem has been Freedom of Information Act requests filed by interested parties shortly after publication of a rule proposal. For the early Magnuson-Moss rules, these requests were unanticipated. As a result, staff members were diverted from preparation for hearings to segregating documents responsive to the requests. In part, this problem has been alleviated through administrative changes which require staff to segregate documents as they are generated. However, the segregation process remains a substantial drain on staff time.

Resource Inadequacies

Another factor that affects the Bureau's ability to complete rulemaking as expeditiously as we all would like is the current personnel ceiling. The responsibility of trade

regulation rulemaking coupled with the addition of new statutory duties has stretched the remaining resources. Most rules are staffed at less than optimal levels.

An inadequate supply of contract funds in fiscal year 1977 to support rulemaking has also contributed to delays. Many of the rulemaking records must be processed manually because the Bureau does not have the funds available to utilize data processing support systems. Where data processing has been available, for example in the Prescription Eyeglass Rule, it generally has reduced considerably the time required to draft the staff report.

Procedural Modifications

Based on its experience with the first Section 18 TRR's, the Bureau is implementing certain procedures to streamline its rulemaking proceedings and decrease, to the extent possible, the overall time and resource commitments required.

To avoid delay caused by Freedom of Information Act requests, staff has been instructed to segregate all documentary materials at the time an Initial Notice is published and to place all supporting information on the public record shortly thereafter. In addition, a proposed change to Section 1.18(a) of the Rules of Practice is currently under consideration by the Commission that would obligate staff, in future proceedings, to place on the public record all relevant material that is not exempt under the Freedom of Information Act.

Staff also has been instructed to publish, with Commission approval, the staff memorandum in support of proposed rulemaking at approximately the same time as the Initial Notice appears in the Federal Register. These procedures have been followed in the most recent rulemaking proceedings and have worked satisfactorily.

In the future, the Bureau staff also will be able to rely upon the Commission's new data processing support systems. When fully operational our computed based word processing system will allow for efficient means of indexing

the written record and should enable staff to work with large rulemaking records with greater facility.

In addition to these measures, the Commission's recent decision to make available a microfilm of the Vocational School record and release staff prepared indices of the public record should be of great assistance to interested parties and should obviate the need for extensions of time during the comment period following publication of the staff and presiding officer reports.

The Bureau also has implemented a procedural change that will allow the the Bureau Director to exert more control over TRR hearing schedules, including the number of hearings sites and the total hearing days. Hearings have been held on a number of TRR proceedings in five or more cities. While agreeing that widespread participation by business and consumers from all areas of the country is important, the Bureau is not convinced that the benefits of multi-site hearings outweigh the costs in time and money. In most proceedings, it will be less expensive for staff to pay the travel expenses of the most important witnesses to come to Washington than to pay the cost of hearings in five or six cities across the country. Reducing the number of hearing sites should also result in time savings. Most TRR proceedings are adjourned for a one- to three-week period between hearing sites. By limiting hearings to one or two sites, the number of recesses can be reduced considerably.

The Commission also intends to consider the need for amendment to the Magnuson-Moss Warranty - Federal Trade Commission Improvement Act. However, consideration of these changes should probably be deferred until after the Commission has completed action on at least one TRR and our rulemaking procedures have been examined by the judiciary on appeal. Because the Act obligates the Commission and the Administrative Conference to submit separate reports to Congress on trade regulation rulemaking, 4/ it is anticipated that any recommended legislative changes will be most appropriately made by the Commission at that time.

4/ The Magnuson-Moss Warranty - Federal Trade Commission Act specified that the reports be completed within 18 months after passage of the Act. By P.L. 94-299, the Congress changed this date to July 5, 1978.

In closing, let me state my personal view that while trade regulation rulemaking is proving to be considerably more expensive and time-consuming than originally anticipated, I believe our procedures to be sound and workable. Over the long run, I am convinced that trade regulation rulemaking will be an effective and efficient enforcement tool that will provide meaningful protection from unfair and deceptive practices to consumers while affording business greater certainty as to the requirements of the law as well as a meaningful opportunity to participate in its formulation.

I hope this information will be helpful and if I can be of any assistance, please do not hesitate to contact me.

Sincerely,

Calvin J. Collier
Chairman

EXHIBIT I.—PROPOSED RULES

PROPOSED RULE: HEARING AIDS

The Hearing Aid Rule proposes to eliminate misimpressions about the performance of hearing aids that are perpetuated in advertising and at the point of sale. Specifically, the Rule would (1) provide all purchasers of a hearing aid with a 30 days trial use period; returned aids would be subject to a rental fee; (2) require disclosure in advertising that not all hearing losses can be helped by a hearing aid; and (3) ban certain statements that misrepresent the performance potential of hearing aids.

The Hearing Aid Rule was proposed on June 24, 1975. Hearings were held between April and August 1976; the rebuttal period closed in October 1976. Currently staff and the presiding officer are preparing their respective reports.

This proceeding has been slowed by three major factors: the size and complexity of the record, the stance of the hearing aid industry and the unavailability of sufficient staff. The record in the hearing aid rule exceeds 60,000 pages, most of which is scientific, medical and technical evidence on the nature of hearing loss and the performance of hearing aids. The record is being processed manually; staff estimates that at least seven months is needed to evaluate the record and that another three to four months will be required to complete the staff report.

In addition, the presiding officer and staff assigned to this rule have been inundated with motions filed by the two principal trade associations opposing the rule. Consideration of the motions—including responding to FOIA requests—has consumed time that otherwise would be devoted to completion of the proceeding.

Resource inadequacies also have slowed progress on this rule. While staff has sought to use law students on a part-time basis to expedite public record processing, substantive drafting responsibility lies with two attorneys, both of whom have other duties requiring part-time commitments.

PROPOSED RULE: VOCATIONAL SCHOOLS

The Proposed Vocational School Rule would require vocational and technical schools that enroll more than 75 students per year to: (1) disclose drop-out rates; (2) disclose placement and salary statistics in the event schools make job or earnings claims; (3) provide an affirmation period between the time a student receives the disclosures required by the rule and the time student enrolls; and (4) establish a pro rata refund policy.

The original publication of the Vocational School Rules occurred on August 15, 1974. Republication pursuant to § 18(a)(1)(B) took place on May 15, 1975. This is the first rule in which both the presiding officer and staff reports have been completed and placed on the public record for comment prior to final Commission action.

The difficulties encountered by staff are typical of those confronting other proposed TRRs. The public record, including written comment, transcript and hearing exhibits, exceeds 100,000 pages. Staff

required approximately five months to process the record and an additional five months to ready the staff report for public comment.

Because of the recent decision to release staff prepared indices and to microfilm the public record, the public comment period has been extended to April 15, 1977. Commission consideration of the rule should take place in May 1977.

PROPOSED RULE: HEALTH SPAS

The Health Spas Rule proposes to provide a cooling-off period and a pro rata refund to consumers who enter into contracts with health spas. In addition, the Rule requires that certain information be disclosed to consumers before a contract is signed and limits the duration of contracts to two years.

The Initial Notice of rulemaking in the Health Spas Rule was issued on August 15, 1975. Shortly after publication of the proposed rule, responsibility for its development was transferred to the New York Regional Office.

The need for NYRO staff to familiarize itself with the investigatory records and undertake supplemental investigation slowed the proceeding initially. In addition, unexpected FOIA requests required staff to segregate the over 90 volumes of the investigating records.

Staff expects that a final notice will issue within 60 days and that hearings will commence this summer. Staff forecasts that its report will be complete in early 1978.

PROPOSED RULE: FUNERAL INDUSTRY

The Proposed Funeral Practices Rule would require full disclosure of price and of the information to consumers. It would override contrary state laws with respect to itemized price disclosures, price advertising restraints and the requirement of a casket for cremation. The rule also would prohibit embalming without permission, profit on cash advance items and misrepresentations concerning the legal or public health necessitiy for or preservative utility of embalming, caskets or burial vaults.

The Commission proposed the Funeral Practices Rule on August 29, 1975. The Final Notice issued on February 20, 1976. Hearings concluded in August 1976.

Widespread participation by funeral associations and consumers has lengthened the time required to complete action in this proceeding. The record currently numbers over 40,000 pages and contains the oral testimony of over 340 individuals and 8,500 other written comments. Processing the public record required the almost full time commitment of 5 professionals in addition to law students assistance for a five month period.

The staff expects that the presiding officers' report will be completed in April 1977 and that the staff report will be ready for public comment two or three months later.

PROPOSED RULE: PRESCRIPTION DRUGS

The Prescription Drug Rule proposes to eliminate state restrictions on price advertising for prescription drugs. It was to have been the

first test of the Commission's authority to adopt a trade regulation rule under § 18 that preempts state and local laws.

The Rule was proposed on June 4, 1975. Work on the Rule was suspended following the Supreme Court's decision in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumers Council*. Currently the regional offices are investigating the states' response to that decision. In the meantime, the public record is being kept open until April 1, 1977, for comment on the need for further Commission action. Shortly thereafter, staff will forward its recommendations on the matter to the Commission.

PROPOSED RULE: CREDIT PRACTICES

The proposed Unfair Credit Practices TRR would restrict or ban the use of a variety of legal and contractual remedies used by lenders against borrowers. Contractual remedies affected include confessions of judgment, waivers of state exemptions of property from attachment, late and extension charges, attorney fee provisions, assignments of wages, and broad security interests. The proposed Rule would also bar most communications with persons other than the debtor for debt collection purposes, require that debtors whose property has been repossessed be credited with the fair market retail value of the property taken, and provide a cooling-off period and certain other protection for co-signers.

The Credit Practices Rule was published on April 11, 1975. The progress of this proceeding has been slowed by a combination of factors. First, shortly after publication, an FOIA request required staff to segregate all its investigatory records, a process that consumed many months. Second, staff commissioned a major econometric study to respond to a number of the cost/benefit questions raised in the Initial Notice. For a time staff requested the presiding officer to delay publication of the Final Notice until the results of that study became available. That study itself has been delayed and staff now plans to proceed with issuance of a Final Notice without waiting for its completion. Third, the business and consumer reaction to promulgation of the Rule on Preservation of Consumers' Claims and Defenses necessitated diverting staff resources away from the Credit Practices Rule to assist in the implementation of the former. That work largely has been completed.

Staff now projects that a final notice will be published within 60 days and that rulemaking hearings will commence in June or July 1977. Publication of a final staff report is scheduled for January 1978.

PROPOSED RULE: USED CARS

The Used Car Rule would provide consumers with written information concerning the existence of known unrepaired defects, the warranty terms, if the car is warranted, the meaning of the terms "as is" if the car is sold under that condition, the type of prior usage, *e.g.*, police, rental car, the prior mileage and any repairs by the seller in getting the car ready for sale. The Rule also bans certain oral misrepresentations by the sellers that would dilute or detract from the required disclosures.

The Initial Notice in the Used Car TRR was issued on January 2, 1976. Hearings currently are underway and are scheduled for completion in May 1977.

Two factors have slowed completion of this proceeding. First, based on written comment received in response to the Initial Notice, staff proposed that additional questions be published for public comment on the need for disclosure of defects; the Commission agreed to extend the comment period. Second, staff in this proceeding also has been preoccupied with extensive FOIA requests filed shortly after publication of the Initial Notice.

The staff estimates that its report will be completed by the end of 1977.

PROPOSED RULE: FOOD ADVERTISING RULE

The proposed Trade Regulation Rule on Food Advertising issued as one document on November 11, 1974; it was divided into three phases for hearing purposes by the Presiding Officer in his Final Notice in March 1976. The following is a summary of the three phases and their status.

Phase I involves staff proposals (not endorsed by the Commission) governing natural and organic food claims, claims relating to the fat, fatty acid or cholesterol content of a food, and health related claims (including claims that a food is a "health food"), and Commission proposals concerning energy and calorie claims and various sections governing definitions and form, content and method of disclosure.

Phase II includes Commission proposals governing various claims for the nutrient content of a food including content statements, emphatic claims, comparative claims, nourishment claims and claims regarding the nutrient quality of combination foods (Hamburger Helper, Instant Breakfast, etc.). Also included are additional Commission proposals on definitions and form, content and method of disclosure. In the Final Notice it was announced that the staff was considering recommending revisions of these sections to the Commission for republication prior to hearings. It is likely that the staff will make such a recommendation in the near future.

Phase III involves a staff proposal that virtually all food advertising (that which makes a nutrition claim or for foods which carry a nutrient label or contain added nutrients) contain information regarding the nutrient content of the food. Research is currently in progress to gain some insight into the ability of consumers to perceive, understand and utilize this information in the context of 30-second television ads.

The rule was proposed originally in November 1974 and republished pursuant to the Magnuson-Moss Act on May 28, 1975. Since republication a number of factors have combined to slow completion of the rule.

First, in response to public comment and its own investigation, staff reassessed the proposed rule provisions and concluded that the most effective and efficient procedure would be to separate the rule provisions into three groups and conduct sequential rulemaking proceedings.

Second, this rule is among the largest and most complex of the TRRs proposed to date. Participation by the affected industries—food manufacturers and retailers and advertising agencies—has been extensive. Almost 40 groups have registered as interested parties and the

presiding officer has designated eight groups for the purpose of examination. To date the public record contains almost 20,000 pages including 8,000 pages of transcript taken from the testimony of 135 witnesses at the Group I hearings.

Third, massive FOIA requests by interested parties, shortly after publication of the Initial Notice, tied up staff members for a number of months. The entire record, public and nonpublic, had to be reviewed in response to the request. Current FOIA requests also demand regular commitments of staff time to the document segregation process.

Hearings on Group I rule provisions were completed in January 1976. April 15, 1977, is the deadline for rebuttal submissions. Staff currently estimates that the presiding officer's report in Group I will be completed in November 1977 and that the staff report will be completed in December 1977. Completion of the staff reports for Group II and Group III rule provisions are now forecast for June and December 1979 respectively.

PROPOSED RULE: PRESCRIPTION EYEGLASSES

The Prescription Eyeglasses Rule would eliminate restraints placed in the dissemination of information imposed by states and private associations. It would allow providers of ophthalmic goods and services to advertise if they so choose.

The Prescription Eyeglasses Rule has been developed more expeditiously than any other. The formal investigation was begun in September 1975, the rule proposed in December 1975, and hearings completed in September 1976. Staff estimates that the staff report will be completed by April 1977. Two factors contribute to the relative speed with which this rule has been developed: the rule provisions are less complicated than most other TRRs, thus the proceeding itself has been more streamlined, and the presiding officer was able to rely upon the model of an almost identical proceeding (Prescription Drugs) which he had conducted earlier.

Nonetheless, staff has encountered a number of the typical difficulties. The record is voluminous, numbering over 30,000 pages. Although Commission data processing facilities were utilized, early problems were encountered in developing a suitable index format. These problems increased the time required to process the record.

The availability of staff also posed problems. A majority of the professionals assigned to this rule also were responsible for the Vocational School Rule; these individuals had to divide their time between completing the Vocational School Rule staff report and participating in the Prescription Eyeglasses proceeding.

PROPOSED RULE: OTC ANTACIDS

The OTC Antacids Rule is exploring whether any of the warnings that FDA now requires to be placed on labels for antacids should be required to be disclosed in advertising for antacids. The Commission has not proposed specific rulemaking; instead it has solicited comment on the concept. If the Commission decides to proceed with a rule, it is anticipated that similar rules will be proposed for other categories of OTC drugs.

The OTC Antacids Rule was proposed in April 1976. Progress toward issuance of the Final Notice has been slow due primarily to the unavailability of adequate staff resources. The professionals responsible for this rule are also responsible for the development of the OTC Drug Advertising Rule. Although investigatory work continues on the OTC Antacids Rule, primary emphasis has been placed on completing the OTC Drug Advertising proceedings.

In addition, because the Commission recently decided to use transition quarter contract funds for a study of the effect of OTC drug warning disclosures on consumer behavior, staff believes that hearings should await the completion of that study, scheduled for Fall 1977. Under this revised schedule, hearings would take place in late 1977 and early 1978.

PROPOSED RULE: OTC DRUG ADVERTISING

The OTC Drug Advertising Rule would prohibit, in advertisement, any claim that FDA will not allow to appear on the label for that drug. This portion of the Rule is relatively noncontroversial. However, for some OTC Drug claim FDA permits them to be made only if certain specified terms are employed. The key disputed issue in this proceeding is whether the FTC's Rule should also require advertising containing those claims to be limited without exception to the specific language approved by the FDA.

The Initial Notice of rulemaking in the OTC Drug Advertising Rule issued on November 11, 1975; the Final Notice issued on September 16, 1976. Hearings are scheduled to begin on February 28, 1977.

Much of the time that has elapsed between the Initial Notice and the start of the hearings is accounted for by two extensions of time granted to the Proprietary Association, one of the principal trade associations involved in the proceeding. The first extended by 60 days the period for filing proposed disputed issues. The second delayed the start of hearings by 45 days pending the resolution of the Proprietary Association's designated issues appeal.

Staff anticipates that the hearings and rebuttal period will conclude in May 1977 and that the staff report will be published for public comment by the end of 1977.

PROPOSED RULE: CELLULAR PLASTICS

The Cellular Plastics Rule aims to cure information deficiencies in the marketing of cellular plastics. Specifically, it would require disclosure of the combustion characteristics of plastics and would prevent misleading use of test results purporting to show combustibility and other safety characteristics in different use situations.

This rule originally was proposed in November 1974. It was republished pursuant to § 18(a)(1)(B) of the FTC Act on July 23, 1975. Progress on this rule has been delayed due to revisions in certain provisions and negotiations with industry over a conditional stipulation.

Shortly after republication, industry members began discussing with staff the possibility of entering into a stipulation of proposed rulemaking. Staff forwarded a proposed stipulation to the Commission in July 1976. Shortly thereafter, the Commission requested that the Gen-

eral Counsel review the stipulation and communicate his suggestions to staff. A revised stipulation incorporating recommendations to the General Counsel is now pending before the Commission.

During this same time period staff reexamined rule provisions which would require the testing of all products to determine if toxic gases are emitted during combustion and concluded that insufficient evidence exists to support such a testing requirement. In the papers now before the Commission, staff recommends that the rule be modified to eliminate that and certain other provisions.

If the Commission accepts the conditional stipulation, staff expects that the proceeding will be expedited considerably. Staff now projects that a staff report will be completed by the end of fiscal year 1977.

PROPOSED RULE: CARE LABELING

The proposed amendment to the Care Labeling Rule proposes to extend coverage of the Rule to household furnishings and certain items of wearing apparel not covered by the current rule. In addition, the proposed amendment would require that certain care labeling instructions to make more complete and explicit and that the availability of alternative care methods, e.g., drycleaning or machine washing, be fully disclosed.

The Care Labeling proceeding was commenced in January 1976 to amend certain portions of the Rule Concerning Care Labeling of Textile Wearing Apparel, 16 C.F.R. § 423. Hearings were completed one year later in January 1977. Staff anticipates that its report will be finished in late July 1977 and that release of the presiding officer's report will occur 30 days earlier.

This rule has not encountered substantial delay. Nonetheless, active participation by industry and the procedural requirements of § 18 will forestall final Commission consideration until the latter part of this year.

PROPOSED RULE: PROTEIN SUPPLEMENTS

The proposed Protein Supplements TRR would impose certain affirmative disclosure requirements and ban certain deceptive representations. The disclosures concern health hazards posed by protein supplements for infants and those with liver or kidney disorders. In addition, all advertising would be required to state: "Protein supplements are unnecessary for most Americans; The U.S. Public Health Service has determined that the daily diet of most Americans provides adequate protein." The Rule also would ban misleading representations concerning the nutritional and overall health benefits of protein supplements.

This rule was proposed in July 1975. Hearings were held between May and November 1976. The length of time for hearings is due largely to the highly technical nature of the evidence; over 90% of the witnesses offered expert testimony and staff requested and received recesses of six weeks between hearing dates in order to ensure adequate preparation time for each hearing. The rebuttal period has just closed in this proceeding. Staff anticipates that its report will be ready by the end of July 1977.

PROPOSED RULE: MOBILE HOMES

The proposed rule seeks to correct certain problems associated with warranties for mobile homes. Warrantors would be required to establish and maintain effective warranty performance systems or to police systems maintained by third parties to service the warrantor's products. They also would be forbidden from imposing restrictions on servicing that would render warranties mostly valueless.

The Mobile Homes Rule originally was proposed in December of 1974. Republication under § 18 of the FTC Act occurred on May 19, 1975.

To ensure that interested parties had an adequate understanding of the evidence underlying the rule, staff drafted and released, in November 1975, a staff statement of over 100 pages.

In addition, because this rule is based largely upon the evidence contained in 250,000 documents subpenaed during the formal investigation that preceded issuance of the Initial Notice, a determination had to be made as to which of the documents were to be placed on the public record. The Commission made that determination in August of 1976. Staff required an additional three months to segregate the documents in compliance with the Commission's determination.

Staff anticipates that the presiding officer will issue a final notice within 60 days and that the staff report will be complete in early 1978.

EXHIBIT II.–TRADE REGULATION RULEMAKING TASK PLANS

RULEMAKING TASK PLANS

Trade Regulation Rule	1. Conduct Preliminary Investigation	2. Obtain Commission Resolution & Conduct Seven-Digit Investigation	3. Develop Proposed Rule	4. Develop Compliance Plan, NEPA Statement & Impact Evaluation Component	5. Prepare Proposed Rule with Supporting Memorandum & Staff Report; & Commission Issue Proposed Rule	6. Issue Initial Notice	7. Place Documents on Public Record	8. Review Comments on Proposed Rule & Identify Disputed Issues	9. Presiding Officer (& Comm. on Appeal) Designate Disputed Issues & Give Final Notice	10. Complete Investigation & Preparation for Hearings	11. Conduct Public Hearings	12. Rebuttal Period Based on Record Developed During Hearings	13. Prepare & Submit Presiding Official Report	14. Prepare & Submit Staff Report	15. Public Comment on Presiding Official & Staff Report	16. Commission Consideration – Promulgation, Rejection or Other Action	17. Develop Final Compliance & Education Plan	18. Implement Rule & Monitor	19. Conduct Impact Evaluation
A. Cellular Plastics Flammability		SCHEDULE NOT AVAILABLE AT PRESENT TIME																	
B. Advertising & Labeling of Protein Supplements	Complete / 8-74	Complete / 12-73	Complete / 6-73	NA	Complete / 7-75	Complete / 9-75	Complete / 4-76	Complete / 2-76	Complete / 3-76	Complete / 6-76	Complete / 11-76	11-76 / 4-77	2-77 / 5-77	5-77 / 7-77	8-77 / 9-77	10-77 / 12-77	1-78 / 3-78	6-78 / 8-78	TBD 1/
C. Vocational Schools	Complete / 3-73	Complete / 3-74	Complete / 3-74	NA	Complete / 7-74	Complete / 3-75	Complete / 5-75	Complete / 9-75	Complete / 11-75	Complete / 11-75	Complete / 12-75	Complete / 3-76	Complete / 9-76	Complete / 12-76	12-76 / 3-77	2-77 / 4-77	4-77 / 5-77	5-77 / 11-77	TBD
D. Credit Practices	Complete / 11-72	Complete / 12-72	Complete / 3-74	NA	Complete / 4-74	Complete / 4-74	Complete / 10-75	Complete / 12-75	12-75 / 1-77	1-77 / 4-77	4-77 / 5-77	5-77 / 6-77	6-77 / 8-77	8-77	8-77 / 10-77	10-77 / 11-77	11-77 / 1-78	1-78 / 2-78	TBD
E. Food Advertising Group 1 1/	Complete / 3-72	Complete / 11-74	Complete / 11-74	NA	Complete / 11-74	Complete / 11-74	Complete / 4-76	Complete / 3-76	Complete / 3-76	Complete / 7-76	7-76 / 1-77	1-77 / 3-77	3-77 / 11-77	3-77 / 12-77	12-77 / 3-78	3-78 / 8-78	8-78 / 3-79	3-79 / 2-80	TBD
F. Food Advertising Group 2 2/	Complete / 3-72	Complete / 11-74	3-76 / 6-77	NA	1-74 / 4-77	6-77	6-77 / 8-77	8-77 / 10-77	11-77	11-76 / 2-78	2-78 / 6-78	6-78 / 9-78	9-78 / 5-79	5-78 / 6-79	6-79 / 8-79	8-79 / 12-79	12-79 / 7-80	7-80 / 7-81	TBD
G. Food Advertising Group 3 2/	Complete / 3-72	Complete / 11-74	7-75 / 8-77	NA	9-77 / 12-77	1-78	1-78 / 3-78	3-78 / 5-78	6-78	6-78 / 9-78	9-78 / 12-78	1-79 / 4-79	4-79 / 12-79	4-79 / 12-79	1-80 / 3-80	3-80 / 8-80	8-80 / 2-81	2-80 / 3-82	TBD
H. Retail Prices for Prescription Drugs	Complete / -73	Complete / -74	Complete / -74	Complete / -74	Complete / 1-75	Complete / 6-75	Complete / 6-75	Complete / 10-75	Complete / 11-75	Complete / 11-75	Complete / 1-76	Complete / 1-76	Complete / 4-76	7-76 / 4-77	6-77 / 8-77	9-77 / 9-78	7-77	11-77 / 2-78	TBD
I. Health Spas	Complete / -73	Complete / 3-74	Complete / 3-75	NA	NA	Complete / 8-75	Complete / 8-75	Complete / 8-76	8-76 / 12-76	12-76 / 3-77	3-77 / 7-77	7-77 / 8-77	8-77 / 11-77	11-77 / 1-78	1-78 / 3-78	TBD	TBD	TBD	TBD
J. Over-the Counter Drugs	1-72 / 5-75	NA	2-75 / 5-75	Imp. Eval. TBD	1-75 / 11-75	11-75	11-75 / 1-77	6-75 / 7-75	9-76	1-77 / 2-77	2-77 / 3-77	3-77 / 5-77	5-77 / 8-77	5-77 / 10-77	10-77 / 1-78	1-78 / 3-78	3-78 / 5-78	5-78 / 5-78	TBD
K. Hearing Aid Industry	Complete / 4-74	Complete / 3-75	Complete / 5-75	NA	Complete / 6-75	Complete / 6-75	Complete / 2-75	Complete / 9-75	Complete / 2-76	Complete / 4-76	Complete / 8-76	Complete / 10-76	10-76 / 6-77	10-76 / 9-77	5-77 / 11-77	11-77 / 2-78	3-78 / 7-78	7-78 / 7-79	TBD
L. Funeral Industry	Complete / 12-72	Complete / 7-73	Complete / 4-75	NA	Complete / 8-75	Complete / 8-75	Complete / 12-75	Complete / 12-75	Complete / 3-76	Complete / 4-76	Complete / 8-76	Complete / 11-76	11-76 / 1-77	1-77 / 3-77	3-77 / 5-77	5-77 / 6-77	6-77 / 6-77	6-77 / 7-77	TBD

1/ Start data / completion

EXHIBIT II.–TRADE REGULATION RULEMAKING TASK PLANS

RULEMAKING TASK PLANS

TRADE REGULATION RULE	1. Conduct Preliminary Investigation	2. Obtain Commission Resolution & Conduct Seven-Digit Investigation	3. Develop Proposed Rule	4. Develop Compliance Plan, EIS, Statement & Impact Evaluation Component	5. Prepare Proposed Rule with Supporting Memorandum & Staff Reports & Commission Issue Proposed Rule	6. Issue Initial Notice	7. Place Documents on Public Record	8. Review Comments on Proposed Rule & Identify Disputed Issues	9. Presiding Officer (& Comm. on Appeal) Designate Disputed Issues & Give Final Notice	10. Complete Investigation & Preparation for Hearings	11. Conduct Public Hearings	12. Rebuttal Period Based on Record Developed During Hearings	13. Prepare & Submit Presiding Official Report	14. Prepare & Submit Staff Report	15. Public Comment on Presiding Official & Staff Report	16. Commission Consideration – Promulgation, Rejection or Other Action	17. Develop Final Compliance & Education Plan	18. Implement Rule & Monitor	19. Conduct Impact Evaluation
M. Mobile Home Sales & Service	Complete / -72	Complete / -72	Complete / 5-75	NA	/ 8-75	/ 5-75	Complete / 10-76	10-76 / 12-76	12-76 / 12-76	12-76 / 3-77	3-77 / 4-77	4-77 / 6-77	4-77 / 8-77	4-77 / 9-77	8-77 / 10-77	8-77 / 11-77	11-77 / 5-78	5-78 / 12-78	TBD
N. Prescription Eyeglasses	Complete / 9-75	Complete / 9-75	Complete / 12-75	NA	Complete / 1-76	Complete / 1-76	Complete / 1-76	Complete / 4-76	Complete / 4-76	Complete / 5-76	Complete / 9-76	Complete / 11-76	11-76 / 12-76	12-76 / 1-77	1-77 / 3-77	/ 4-77	4-77 / 7-77	4-77 / 3-77	TBD
O. Used Cars	Complete / 3-75	Complete / 12-75	Complete / 12-75	Complete / 11-75	Complete / 1-76	Complete / 12-75	Complete / 10-76	Complete / 8-76	Complete / 11-76	1-76 / 4-77	12-76 / 5-77	5-77 / 6-77	6-77 / 9-77	9-77 / 11-77	11-77 / 1-78	/ 4-78	9-78 / 9-79	4-78	TBD
P. Care Labeling of Textiles & Wear'g Apparel (Amendment)	Complete / 6-75	NA	Complete / 6-75	NA	Complete / 1-76	Complete / 1-76	Complete / 9-76	Complete / 6-76	Complete / 8-76	Complete / 9-76	Complete / 1-76	1-77 / 3-77	2-77 / 6-77	2-77 / 7-77	7-77 / 9-77	9-77 / 12-77	TBD	1-78	TBD
Q. Over-the Counter Antacids	1-72 / 5-75	NA	3-75 / 5-75	NA	1-75 / 4-76	/ 4-76	/ 4-76	4-76 / 10-76	/ 1-77	1-77 / 11-77	12-77 / 2-78	3-78 / 4-78	4-78 / 8-78	4-78 / 9-78	9-78 / 11-78	11-78 / 2-79	3-79 / 6-79	6-79	TBD
R. Warranties: Refunds	Complete / 3-75	NA	Complete / 7-75	Imp. Eval TBD	Complete / 5-76	NA	NA	NA	NA	Complete / 8-76	NA	NA	NA	9-76 / 12-76	NA	12-75 3/ / 2-77	NA	NA	NA
S. Franchising Disclosure	Complete / -70	Complete / -71	-71 / 12-76	Imp. Eval TBD	Complete / 2-71	Complete / 11-71	-70 / -74	NA	NA	Complete / 2-72	Complete / 3-72	Complete / 5-72	NA	8-75 / 12-76	NA	1-77 / 2-77	2-77 / 5-77	8-77 / 2-78	TBD
T. Energy Efficiency Labeling Group 1 4/	12-75 / 5-76	/ 5-76	5-76 / 2-77	3-77 / 3-77	3-77 / 5-77	/ 5-77	5-77 / 6-77	6-77 / 7-77	NA	7-77 / 7-77	7-77 / 7-77	NA	NA	7-77 / 9-77	NA	9-77 / 10-77	10-77 / 12-77	/ 12-77	TBD

EXHIBIT II.–TRADE REGULATION RULEMAKING TASK PLANS

RULEMAKING TASK PLANS

TRADE REGULATION RULE	1. Conduct Preliminary Investigation	2. Obtain Commission Resolution & Conduct Seven-Digit Investigation	3. Develop Proposed Rule	4. Develop Compliance Plan, EIS, Statement & Impact Evaluation Component	5. Prepare Proposed Rule with Supporting Memorandum & Staff Reports & Commission Issue Proposed Rule	6. Issue Initial Notice	7. Place Documents on Public Record	8. Review Comments on Proposed Rule & Identify Disputed Issues	9. Presiding Officer (& Comm. on Appeal) Designate Disputed Issues & Give Final Notice	10. Complete Investigation & Preparation for Hearings	11. Conduct Public Hearings	12. Rebuttal Period Based on Record Developed During Hearings	13. Prepare & Submit Presiding Official Report	14. Prepare & Submit Staff Report	15. Public Comment on Presiding Official & Staff Report	16. Commission Consideration – Promulgation, Rejection or Other Action	17. Develop Final Compliance & Education Plan	18. Implement Rule & Monitor	19. Conduct Impact Evaluation
U. Energy Efficiency Labeling Group 2 4/	12-75 / 12-76	/ 12-76	12-76 / 3-77	4-77 / 4-77	4-77 / 6-77	/ 6-77	6-77 / 7-77	7-77 / 8-77	NA	8-77 / 9-77	8-77 / 8-77	NA	NA	3-77 / 10-77	NA	10-77 / 11-77	11-77 / 11-78	1-78	TBD
V. Energy Labeling Efficiency Group 3 4/	12-75 / 1-77	/ 1-77	1-77 / 5-77	6-77 / 6-77	6-77 / 7-77	/ 7-77	8-77 / 9-77	9-77 / 10-77	NA	10-77 / 10-77	10-77 / 10-77	NA	NA	10-77 / 12-77	NA	12-77 / 1-78	1-78 / 3-78	3-78	TBD
W. Pesticides	Complete / 10-76	Complete / 3-69	10-77 / 3-77	3-77 / 5-77	5-77 / 6-77	/ 6-77	/ 6-77	8-77 / 9-77	9-77 / 10-77	10-77 / 11-77	11-77 / 12-77	12-77 / 1-78	1-78 / 3-78	1-78 / 3-78	3-78 / 6-78	3-78 / 6-78	4-77 / 8-78	6-78	TBD

1/ To Be Determined

2/ The Food Rule is being conducted in three distinct parts:

Group 1 deals with organic & natural food claims, health claims, cholesterol claims, and energy claims.
Group 2 deals in a more general way with nutritional representations for the purpose of defining guidelines & for making general nutritional claims.
Group 3 deals with affirmative disclosure issues regarding the nutritional content of a food.

3/ Recommendation to terminate the proceeding.

4/ Group 1 – Refrigerators & refrigerator freezers, freezers, dishwashers, clothes dryers, water heaters, room airconditioners, TV sets.
Group 2 – Home-heating equipment, not including furnaces, kitchen ranges and ovens.
Group 3 – Humidifiers, dehumidifiers, central airconditioning, furnaces, clothes washers.

APPENDIX 3

AMERICAN ASSOCIATION of ADVERTISING AGENCIES
INCORPORATED

WASHINGTON OFFICE

1730 M STREET, N. W., SUITE 805, WASHINGTON, D. C. 20036 • (202) 331-7345

WILLIAM R. HESSE
LAWRENCE D. REEDY

June 8, 1976

Honorable Benjamin S. Rosenthal, Chairman
Commerce, Consumer, and Monetary Affairs
Subcommittee
Committee on Government Operations
Rayburn House Office Building
Room B-350-A-B
Washington, D.C. 20515

Dear Congressman Rosenthal:

This is to acknowledge receipt of your letter of June 4 concerning the hearings to be held Wednesday, June 23rd into the Federal Trade Commission's Division of National Advertising.

I must respectfully decline. I am certain it is your wish that these hearings bring forward well documented, scholarly testimony, useful to you and your committee pursuant to oversight responsibilities.

I am familiar enough with the facts, complexities and significance of the topics to realize the impracticality of providing anything more than a superficial view on such a vast range of subjects. I feel such testimony would not advance the understanding so important to the economic system or to consumers.

Cordially,

William R. Hesse
Senior Vice President

WRH:kaw

cc: Peter Barash
Jean Perwin

ASSOCIATION OF NATIONAL ADVERTISERS, INC.

1725 K STREET, N.W.
WASHINGTON, D.C. 20006
AREA CODE 202
785-1525

June 17, 1976

Honorable Benjamin S. Rosenthal
House of Representatives
Washington, D.C. 20515

Dear Mr. Rosenthal:

As Chairman of the Subcommittee on Commerce, Consumer and Monetary Affairs, you recently requested my appearance before the Subcommittee on Wednesday, June 23, 1976, to present the views of the advertising industry on the industry's self-regulatory efforts and the performance and activities of the Federal Trade Commission. I must respectfully decline the invitation.

I believe the self-regulatory issues can be better answered by the National Advertising Review Board and the National Advertising Division of the Council of Better Business Bureaus. I understand that they have had a similar request to appear before your Subcommittee. These institutions have a greater knowledge and source of information on advertising self-regulation.

The questions you pose concerning the Federal Trade Commission are perhaps more complex than you might realize. It is difficult to evaluate the performance of the Federal Trade Commission until one knows the objectives to be achieved. Then it would be necessary to develop criteria for quantifying the degree of performance.

To evaluate the Federal Trade Commission activities would involve surveys which we are not equipped to make. It would be essential to catalog what they have done, analyze the results of these activities, and determine the meaningfulness of these results. The Association of National Advertisers has little expertise in this area, nor do we have the facilities or the resources to develop them. I would suggest that your questions be submitted to the appropriate

committee of the American Bar Association, probably in its section on administrative law. Perhaps more substantitive answers could be obtained by your Committee from these other sources.

Sincerely yours,

Samuel Thurm

Samuel Thurm
Senior Vice President

AMERICAN ADVERTISING FEDERATION

HEADQUARTERS: 1225 Connecticut Avenue, N.W., Washington, D.C. 20036 (Area Code 202) 659-1800

HOWARD H BELL
President

Benjamin S. R.
June 17, 1976

Honorable Benjamin S. Rosenthal
Chairman
Commerce, Consumer, and Monetary Affairs Subcommittee
of the Committee on Government Operations
Rayburn House Office Building
Room B 350 A-B
Washington, D. C. 20515

Dear Mr. Chairman:

We very much appreciate the invitation to present our views at the subcommittee hearings on Wednesday, June 23 on industry self-regulation as well as Federal Trade Commission matters.

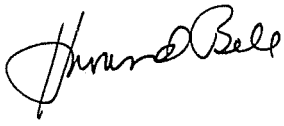
As you may know we are a participating sponsor of the National Advertising Review Board program and are fully supportive of the work of the NARB/NAD. I have received a copy of Mr. Alexander's letter to you of June 16 and fully endorse his expression of cooperation with the inquiry of your committee as it relates to industry self-regulation. Since we are part of the corporation which administers this program the information which will be supplied to you is a response on our behalf as well on that subject. If you are in agreement with the approach outlined in Mr. Alexander's letter and would like additional comments from the Federation at the time the NARB/NAD information is supplied, we shall be most happy to cooperate.

We believe that the NARB/NAD program of advertising self-regulation, including its special children's advertising unit, has performed well and that the material supplied to the subcommittee will fortify that view.

With respect to that portion of your letter dealing with the performance of the Federal Trade Commission, many of these subject areas are currently undergoing policymaking review and consideration at the AAF.

In view of the above, we do not believe an appearance before the subcommittee at this time would be productive. We wish to assure you of our continuing desire to be helpful whenever possible.

Sincerely,



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APPENDIX 4

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

BUREAU OF
CONSUMER PROTECTION

March 9, 1976

Dear Congressman Rosenthal:

This letter is in response to your letter of February 13, 1976, in which you addressed a number of questions to Mr. Richard B. Herzog, Assistant Director for National Advertising within the Bureau of Consumer Protection, relating to various advertising matters.

As several of the questions related to activities that are not within the Division of National Advertising, I have undertaken to coordinate the responses and, accordingly, am responding to your letter inquiry. As requested in your letter, all responses relate to the time period January 1, 1973 to date, except where otherwise indicated.

1. a. & b. Since January 1, 1973 the following industries have been asked to substantiate advertising claims, as part of the Commission's Advertising Substantiation Program, in which formal investigational demands are served on an industrywide basis and the responses are placed on the public record:

Automobiles (March 20, 1973)
Anti-perspirants/Deodorants (May 24, 1973)
Shampoos (June 18, 1973)
Acne Preparations (November 2, 1973)
Automobiles (March 5, April 4, 1974)
Tires (April 4, 1974)
Color Televisions (July 30, 1974, January, 10, 1975)
Dental Products (September 4, 1974)
Dishwashers (July 10, 1975)

In connection with the Commission's general monitoring and law enforcement effort, many other advertisers have been asked to substantiate claims as part of non-public investigations that have been commenced with respect to individual advertisers.

All companies in all industries which received substantiation requests have submitted materials.

c. As a result of analysis of substantiating materials received as a result of requests made during the period in question, contested complaints have been issued against the following companies:

Ford Motor Co. (Dkt. 9001)
Chrysler Corp. (Dkt. 8995)
Matsushita Electric Corp. (Dkt. 9048)
General Electric Corp. (Dkt. 9049)
Block Drug (Dkt. 9050)

Initial Decisions have been filed in the Ford and Chrysler matters, which are presently pending before the Commission on appeals by the respondents. The other cases are in the pretrial stage.

Also a result of analysis of substantiating materials received from requests during the relevant time period, consent orders have been obtained against the following companies:

Ford Motor Co. (C-2582) */
American Image Corp. (C-2787)
Organic Masque (C-2645)
Savoy Chemical Co. (C-2743)
General Motors Corp. (C-2564)
D'Arcy McManus (C-2767)

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*/ The validity of this order has been challenged by Ford in a matter now pending in the U.S. Court of Appeals for the Sixth Circuit.

Bridgestone Tire Co. (C-2734)
Parker Advertising (C-2778)

On June 24, 1975, the Commission proposed a Trade Regulation Rule for the Hearing Aid Industry. Certain elements of this proposal cover areas which were the subject of an earlier advertising substantiation "round."

2. With respect to formal actions resulting from ad substantiation requests made during the relevant time period, and as part of an ad substantiation round rather than a non-public investigation, no other formal actions other than the cases and rule described above have been commenced. Several matters arising out of the diswasher round are currently under active investigation.

It should be kept in mind that, in our view, the advertising substantiation program produces a beneficial deterrent effect, regardless of specific Commission action taken pursuant to a particular round.

3. In addition to the Hearing Aid Rule mentioned above, on May 14, 1974, the Commission proposed a rule that would have the effect of excluding from any administrative proceeding in which it is alleged that a company lacked adequate substantiation for an advertising claim, evidence which was required to be submitted under a Commission investigational order but was not submitted. The rule is presently being revised by the staff in light of the substantial number of comments received after it was proposed.

4. The 1974 Advertising Substantiation Requests concerning gasoline mileage claims resulted in the Ford, Chrysler and General Motor cases. The General Motors case was settled; the charges in the Chrysler and Ford complaints were sustained by the Administrative Law Judges; in the Ford matter, the Administrative Law Judge granted complaint counsel's motion for summary judgment. Both of these Initial Decisions were appealed to the Commission, have been briefed and argued, and are now before the Commission for its decision. Moreover, a Trade Regulation Rule Proceeding Concerning Gasoline Fuel Economy Claims was commenced in September, 1974, but this matter was returned to the staff for further study in December 1975.

a. The Fuel Economy Guide became effective on October 15, 1975, and the staff is presently monitoring complaince with that Guide.

5. Enforcement actions have been undertaken and consent orders have been issued with regard to the following advertisers in the food and nutrition area (in addition to advertisers of vitamin or mineral supplements): Standard Brands, (Dkt. C-2377), April 9, 1973 (cholesterol claims for Fleischmann's Margarine); RJR Foods, (Dkt. C-2424), July 13, 1973 (juice content of Hawaiian Punch); American Dairy Association, (Dkt. C-2459), September 25, 1973 (dietary claims for whole milk); Carnation Co., (Dkt. C-2522) July 25, 1974 (nutrition claims for dry milk); Thomas Lipton Co., (Dkt. C-2408), May 29, 1973 (protein claims for gelatin); Morton-Norwich Co., (Dkt. C-2707), July 21, 1975 (sodium content of "Morton Lite Salt").

Currently pending is National Commission on Egg Nutrition (Dkt. 8987), which was commenced on July 23, 1974. An Initial Decision sustaining the complaint was filed November 24, 1975. The matter is presently pending before the Commission on the respondent's appeal. Oral argument is scheduled for April 28, 1976.

The vast bulk of the efforts of the Division of National Advertising in the food and nutrition advertising areas has been concentrated on the proposed 'Trade' Regulation Rule on Food Advertising, published November 11, 1974. Also underway is the rulemaking proceeding on the Commission's proposed Protein Supplement rule, which originated in the San Francisco Regional Office, and was published on September 4, 1975.

6. I have already mentioned, in response to question 1.c., above, the three consent orders involving acne claims (American Image, Organic Masque, Savoy Chemical). The Commission also obtained a consent decree involving an eye lash darkener called "Dark Eyes" in C.E.B. Products, Inc. (C-2650). This consent decree became final in March of 1975. Regional offices have obtained several additional consent agreements involving hair straightener products advertised to black consumers. Lustrasilk Corp. of America

(Dkt. C-2784); Perma-Strate Co. (Dkt. C-2785); and Softsheen Co. (Dkt. C-2786), and Johnson Products Co. (Dkt. C-2788) in which consent decrees became final in January and February of 1976.

7. Material fact disclosures have been required of C.E.B. Products, Inc., the manufacturer of "Dark Eyes" (Dkt. C-2650). The required disclosure is that the product can cause severe pain to the eye for a substantial period of time. Disclosures concerning skin and scalp irritation, hair breakage and eye injury have been required in each of the hair straightener cases mentioned in the response to Question 6.

8. The staff of the Division of Marketing Practices is preparing a revised proposed Trade Regulation Rule regarding the Advertising of Economic Poisons. Also being prepared is a staff report to the Commission analyzing the need for regulation in this area and providing the bases for staff's views with respect to withdrawing the present rule proposal and substituting for it the version being prepared. Staff's investigation (which must now develop information to meet the more rigorous requirements of Magnuson-Moss rulemaking) will be completed shortly. The revised rule

and the staff report will be completed by October 1, 1976 and forwarded to the Commission immediately thereafter.

a. Since at least 1940, the Commission has been actively engaged in law enforcement, including investigating, in the area of the marketing of economic poisons. See e.g., Gulf Oil Corp. v. F.T.C., 150 F.2d 106 (5th Cir. 1945) (affirming Commission order enjoining deceptive representations in the sale of an insecticide); D-Con Company, Inc., 50 FTC 92 (1953) (order enjoining misrepresentations as to the effectiveness of three rodenticide preparations); Bostwick Laboratories, Inc., 49 FTC 1230 (1953) (order enjoining misrepresentations in the sale of insecticides); Imperial Chemical Co., 31 FTC 1685 (1940)(stipulation concerning claim that "Bug-Dust-O-Cide" was non-poisonous to humans).

In the late 1960's, staff began to investigate the need for a trade regulation rule to regulate advertising of economic poisons. In 1968 a proposed rule was published for comment, 33 Fed. Reg. 918. Subsequently, two revised versions of that proposal were published for comment, 34 Fed. Reg. 1773 (1969); 35 Fed. Reg. 12727 (1970). Comments were received in response to these notices and a hearing was held on April 3, 1969.

Thereafter, drafts of a final rule together with a statement of basis and purpose were prepared for promulgation. On April 4, 1972, before the recommended rule was acted upon, the District Court for the District of Columbia held that the Commission did not have authority to promulgate trade regulation rules with substantive effect. National Petroleum Refiners Ass'n v. FTC, 340 F. Supp. 1343 (D.D.C. 1972) reversed 482 F.2d 672 (D.C. Cir. 1973), cert. denied 415 U.S. 951 (1974). Pending appeal of this case the Commission had little choice but to hold in abeyance its pending rulemaking proceedings. To have continued would have invited numerous collateral attacks and would have risked the expenditure of enormous amounts of resources in proceedings which would have been subject to judicial reversal.

Therefore, the Commission switched from rulemaking to a case by case approach and on Nobember 11, 1973, it issued proposed administrative complaints against three large manufacturers and distributors of economic poisons -- Hercules, Inc., Union Carbide Corp., and FMC Corp. -- based in substantial part on evidence developed during the investigation conducted in anticipation of rulemaking. Consent orders were then negotiated with these three companies, Hercules, Inc., Union Carbide Corp., 3 CCH Trade

Reg. Rep. ¶ 20,584 (1974); FMC Corp., 3 CCH Trade Reg. Rep. ¶ 20,949 (1975).

As indicated previously, following the completion of these individual matters, staff turned to updating its industry-wide investigation to determine whether a trade regulation rule was needed, and if so, what form that rule should take.

9. Appendix A sets forth the most significant, publicly-announced actions taken by the Commission with regard to advertising and marketing practices with safety implications.*/ The matters named in Appendix A can be categorized generally as follows:

1. cases and a proposed trade regulation rule regarding misrepresentation and the failure to disclose the flammability of plastic construction materials (Appendix A, items 26 and 27);
2. cases and a proposed rule challenging misrepresentation and the failure to disclose the dangers associated with the use of economic poisons

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*/ Citations are to CCH Trade Reg. Rep. paragraph numbers.

(Appendix A, items 9 and 30; also see response to question 8, supra).

3. cases challenging misrepresentations and the failure to disclose the dangers associated with weight-reducing devices, complexion-enhancing processes, hair implant treatments and other products and services designed to improve personal appearance (Appendix A, items 2, 3, 7, 8, 11, 14, 15, 16, 18, 19, 20, 22, 24, 25, 28, 29, 31, 32, 34, 36).
4. cases challenging misrepresentation and the failure to disclose salient facts concerning purported cures (e.g., "psychic surgery," inhalation of radon gas), for serious illnesses (appendix A, items 5 and 17).
5. cases challenging unsubstantiated claims concerning the safety features of various products (Appendix A, items 4, 10, 27, and 66).
6. cases brought to enforce the Flammable Fabrics Act when this agency had responsibility for enforcing that statute (Appendix A, items 37-65).

7. miscellaneous other cases.

10. On January 20, 1976 the Commission issued a complaint against Service Corporation International alleging that SCI has engaged in a number of unfair and deceptive practices. The complaint charges SCI with profiting on cash advances, requiring a casket for cremation, misrepresenting the utility of sealer caskets, performing embalming and other services without permission, and paying municipal officials to steer business to SCI.

In addition, of course, the proposed rule on Funeral Industry Practices is pending.

11. As Appendix B indicates, during the period in question, 70 separate proceedings challenging deceptive pricing were initiated and 58 cease and desist orders enjoining deceptive pricing were issued.

In addition, many states have enacted consumer legislation which makes it a violation of state law to engage in acts and practices prohibited by FTC rules and guides.

Thus, as a result of state enforcement, the actual impact of the Guides has been even greater than the very substantial commitment of Commisson resources in this area would suggest.

12. Consumer redress has been or is being sought as follows:

a) Direct selling: This is not an area which has been enforced by redress actions. Rather we are relying on codification and civil penalty enforcement actions.

b) Land Sales:

Horizon Corp. (Dkt. 9017) (Mar. 11, 1975)
Amrep Corp. (Dkt. 9018) (Mar. 11, 1975)
Cavanagh Corp. (Dkt. 9055) (Sept. 16, 1975)
Rio Grande Ranches of Colorado (Feb. 26, 1976)

All complaints allege misrepresentations and material nondisclosures to sell land which was of little use as homesites and little value as investments. Prior to the enactment of §206, redress was ordered in GAC Corp., Dkt. C-2523.

c) Vocational Schools: Cases in this program area fall roughly into two categories: (1) cases brought after January 4, 1975 with notice that §206 of the Magnuson-Moss Act may be appropriate, and (2) cases brought prior to January 4, 1975 which are being treated as redress cases under the "grandfather" provisions of §206(b). In addition, numerous investigations are nearing completion in which redress will be sought.

(1) American Tractor Trailer (Dkt. 9025) (Jan. 27, 1975)
New England Tractor Trailer Inc. (Dkt. 9026) (Jan. 27, 1975)
Commercial Programming Unlimited (Dkt. 9029) (Apr. 23, 1975)
Driver Training Institute (Dkt. 9060) (Oct. 3, 1975)
Jetma Technical Institute (Dkt. 9061) (Oct. 28, 1975)

(2) Control Data Corp. (Dkt. 8940) (Oct. 3, 1973)
E.C.P.I., Inc. (Dkt. 8952) (Jan. 24, 1974)
Lafayette United Corp. (Dkt. 8963) (May 2, 1974)

Lear Siegler, Dkt. 8953 (complaint Jan. 24, 1974), has signed a consent order providing for $750,000 in refunds. Fuqua Industries, Inc., Dkt. C-2626 (final order Jan. 21, 1975), has signed an order providing for up to $1.5 million in refunds. All vocational schools cases involve misrepresentations in advertising and by sales persons to market vocational training which was of little value to students in obtaining employment.

d) Business Opportunity Schemes:

Raymond Lee Organization (Dkt. 9045) (Aug. 14, 1975)
Idea Research and Development (Dkt. 9032) (May 6, 1975)
Koscot Interplanetary (Dkt. 8888) (May 24, 1972)

These cases involve misrepresentations and nondisclosures to induce persons to purchase business interests (Koscot) or to pay advance fees to firms which provide allegedly worthless services to market ideas and inventions. (Raymond Lee; Idea Research and Development.)

e) National Advertising Campaigns:

Other remedies, e.g., corrective advertising have been used to redress injury in this area. There have been no §206 cases to date.

Because §206 is remedial and not substantive in nature, many investigations are in progress which will lead to "redress" complaints but which are not in the five requested program areas.

13. No further rules or guides have been proposed in addition to the Premium Guide.

Issues concerning children's advertising are being actively pursued through other mechanisms, however. On February 25, 1976, the FCC announced that it, in cooperation with the FTC, was scheduling three panels to inquire into the possible impact on children of televised ads for over-the-counter drugs. The panels will be held on May 20 and 21, 1976.

The FCC is creating those panels as a specific response to the Bellotti petition, which asks it to take action against such ads. The FTC is cooperating because of its general interest in the area and because of its concern with petitions filed by Action for Children's Television and Council on Children, Media, and Merchandising, which

raise issues similar to those raised by the Bellotti Petition.

In addition, the general nonpublic investigation into techniques used in children's advertising is being pursued.

14. Since January 1974, the Commission has sought corrective advertising in: Travel King, Inc. (Dkt 8949); Lens Craft Research and Development Co., et al., (Dkt 8950); Wasem's, Inc. (Dkt C-2524); Yamaha International Corp. (Dkt C-2747); Firestone Tire & Rubber, Inc. (Dkt 8818) (civil penalty settlement).

The appropriateness of corrective advertising as a remedy has recently been confirmed by the Commission in Warner-Lambert, December 1975 (appeal pending in D.C. Circuit). Prior to Warner-Lambert, more corrective advertising complaints were not filed because of uncertainty surrounding the requisite factual and legal basis that would be required by the Commission. Insofar as corrective advertising orders may in the future rest upon the existence of erroneous consumer beliefs about the advertised product that are likely to continue even after the advertising has stopped, it cannot be predicted with what frequency such orders will be found to be appropriate.

15. Since January 1974, the Commission has sought a preliminary injunction against an advertising campaign in: Simeon Management Corporation (Dkt. 8996), injunction denied in FTC v. Simeon Management Corporation, CCH 1975 Trade Cases, ¶60,223 (N.D. Cal. 1975), affirmed, 9th Cir., No. 75-2363 (filed March 2, 1976); National Commission on Egg Nutrition, (Dkt. 8987), injunction granted in FTC v. National Commission on Egg Nutrition, CCH 1975 Trade Cases, ¶60,320 (7th Cir. 1975) petition for cert. pending; Travel King, Inc., (Dkt. 8949), injunction granted in FTC v. Travel King, Inc., (W.D. Wash., 1974) (unreported); Lens Craft Research and Development Co., (Dkt. 8950), injunction stipulated in FTC v. Lens Craft Research and Development Co., (S.D. Cal. 1974).

Several factors have had a bearing upon decisions not to seek injunctive relief in more advertising matters. First, it is generally the case that large national advertisers, once they are aware that a complaint is about to issue, voluntarily discontinue the advertising giving rise to the complaint. Such discontinuance in no way lessens the public interest in seeking a broad cease and desist order covering practices reasonably related to the particular acts or practices in question.

But the discontinuance does remove a major reason for seeking injunctive relief since, in the ordinary case, there is no reason to believe that the advertiser, having discontinued, will engage during the pendency of the administrative litigation in a related practice that itself would injure the public.

Moreover, during the time period about which you inquire, the Commission's enforcement efforts with respect to national advertising have tended to involve not express claims, but, rather, representations made by implication in the ad. Determining the existence and content of implied representations in advertising often involves difficult and technical issues of communication as to which the Commission, with a substantial experience in the field, has acquired considerable expertise. If a preliminary injunction in a national advertising matter is sought, then the determination in the first instance of the meaning of the advertisement is made not by the Commission, but, rather, by the particular district judge. A preliminary injunction hearing is not generally a suitable circumstance in which to undertake an inquiry into implied meanings in an advertisement, particularly where that issue might turn on the resolution of conflicting expert testimony interpreting consumer survey data. Given the concern with implied claims, it has seemed preferable for the determination of the meaning of the advertisement to be made in the first instance by the Commission.

More generally, as a matter of policy the Commission has considered it desirable to look, among other things, to the clearness of the violation and the extent of injury in determining whether to seek a preliminary injunction, and to view both elements on a sliding scale so that, for example, if the violation is very clear, the extent of injury might be less. In advertising matters, it is often difficult to ascertain the extent of injury, and the violation is often not clear, not only because of the question of implied meaning to which I have already referred, but also because of technical subject matter, for example, drug efficacy, and underlying questions as to the appropriateness of the concept of deception or unfairness -- the standard of substantiation or accuracy -- sought to be imposed.

Finally, adverse court decisions, such as Simeon, make it all the more important that the Commission select its injunction cases with great care.

I should point out that, as you are aware, the Commission currently is engaged in a number of rulemaking proceedings. If these result in the issuance of rules by the Commission, it is quite possible that there will be an increase in injunction cases. Rules, by deciding in advance what is deceptive and unfair, should vastly simplify enforcement proceedings. By simplifying the issues, rules should increase the practical opportunities for obtaining preliminary injunctions.

16. In 1973 the following nine complaints against national advertisers or advertising agencies were issued: American Dairy Association, C-2459, September 25, 1973; American Home Products Corporation, et al., Dkt. 8917; Benton & Bowles, Inc., Dkt. C-2403, May 22, 1973; Bristol-Myers Company, et al., Dkt. 8917, February 23, 1973; Fedders Corporation, Dkt. 8932, June 11, 1973; RJR Foods, et al., Dkt. C-2424, July 13, 1973; Standard Brands, Inc., et al., Dkt. C-2377, April 9, 1973; Sterling Drug, Inc., et al., Dkt. 8919, February 23, 1973; and Thomas Lipton Co., C-2408, May 29, 1973.

In 1974 the following 11 complaints were issued against national advertisers or advertising agencies: Chrysler Corporation, Dkt. 8995, October 9, 1974; Doyle Dane Bernbach, Inc., Dkt. 2516, June 25, 1974; Carnation Co., Dkt. C-2522, July 15, 1974; Ford Motor Company, Dkt. 9001, December 10, 1974; Ford Motor Company, Dkt. C-2582, October 7, 1974; General Motors Corporation, Dkt. C-2564, October 7, 1974; J. Walter Thompson Company, Dkt. C-2595, October 8, 1974; Lorillard, et al., Dkt. C-2486, January 7, 1974; National Commission on Egg Nutrition,

Dkt. 8987, July 23, 1974; General Foods (Gainesburgers), Dkt. C-2606, December 3, 1974; and Whirlpool Corporation, Dkt. C-2515, June 25, 1974.

In 1975, the following 19 complaints were issued against national advertisers or advertising agencies: A. Eicoff & Co., Dkt. C-2651, March 17, 1975; Beltone Electronics Corporation, et al., Dkt. 9014, January 29, 1975; Block Drug Company, Inc., et al., Dkt. 9050, July 29, 1975; Bridgestone Tire Co. of America, Inc., Dkt. C-2734, September 30, 1975; C.E.E. Products, Inc., et al., Dkt. C-2650, March 17, 1975; City Investing Co., et al., Dkt. C-2478, December 3, 1975; D'Arcy McManus, Dkt. C-2787, August 21, 1975; Dahlberg Electronics, Inc., Dkt. 9013, January 29, 1975; Firestone Tire and Rubber Company, Dkt. 9056, September 9, 1975; General Foods Corporation, Dkt. C-2733, October 1, 1975; General Electric Company, Dkt. 9049, July 29, 1975; Maico Hearing Instruments, Inc., name changed from Textron, Inc., Dkt. 9011, January 29, 1975; Morton Norwich Co., Dkt. C-2707, July 21, 1975; Matsushita Electric Corporation of America, Dkt. 9048, July 22, 1975; Organic Masque Company, Dkt. C-2645, March 6, 1975; Qualitone, Inc. (name changed from Seeburg Industries, Inc.), Dkt. 9010,

January 29, 1975; Radioear Corporation, (Dkt. 9012), January 29, 1975; Savoy Drug and Chemical Co., (Dkt. C-2743), October 21, 1975; and Sonotone Corporation, (Dkt. 9009), January 29, 1975.

Two complaints have been issued so far in 1976: Parker Advertising, Inc., (Dkt. C-2778), January 12, 1976; and STP Corporation, et al. (Dkt. 2777).

I trust that the foregoing is responsive to your questions.

Very truly yours,

Joan Z. Bernstein

Joan Z. Bernstein
Acting Director
Bureau of Consumer Protection

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CONTINUED

1 OF 2

APPENDIX 5

Mid-Year Review
January 1975

Bureau of Consumer Protection Program: Affirmative Disclosure of Material Product Information -- I11

Resources:

	Professional Man-Years
FY 75	15.3
FY 76	12.1

General Description:

The Bureau proposes to require by rule the disclosure of performance characteristics of the following products:

1. Refrigerators, as to the cost of operation and the amount of usable space (other than cubic feet);
2. Air conditioners, as to the energy efficiency ratio;
3. Automobiles, as to mileage */ and possibly the frequency of repair; and
4. Hearing aids, as to general performance limitations. **/

Although plans are apparently not as well settled as the Program Status Report might suggest, the Bureau may also propose the disclosure of performance characteristics of the following products:

5. Vacuum cleaners, as to cleaning ability and durability; and
6. Dishwashers and washing machines, as to cleaning ability.

Plans have been dropped to require disclosure of performance characteristics of carpets as to durability and hair dryers.

*/ Hearings have been held.

**/ See attached.

The Bureau's current thinking is that the hearing aid performance information would not need to be disclosed all the time, but would be triggered by a particular kind of claim. In fact, performance characteristics would not be measured. Instead, the seller would have to disclosre a caveat about performance for a particular purpose if he makes a claim that the hearing aid is suited to that purpose. For example, if a telephone pick-up option is advertised, he would have to disclose that the pick-up does not work on all phones.

Estimate of Consumer Benefit:

No such estimate has been made by the Bureau, although the APG claims that it could be huge. */ This may well be the case, especially if products and qualities to be disclosed are selected with close regard to the APG criteria and those additional criteria that we suggest below.

Discussion:

We are in general agreement with the Analytical Program Guide Concerning Disclosures of Consumer Product Information **/ that defines this program. The Commission adopted it in principle on January 12, 1973, and at that time directed the Bureau to implement the program.

A. Why the Market May Fail to Produce Enough Information

In the Bureau's view ***/ the problem of inadequate information comes from the fact that information is a "public good." ****/ This means that one who acquires information derives no less satisfaction from it if he shares it with others.

This benign attribute, however, has an unfortunate consequence. If those who have acquired it from the one who produced it have no incentive to refuse to give it away for the asking, others who want it will have inadequate incentive to reveal their demands to the producer. It will, in other words, be difficult for the producer of

*/ Analytical Program Guide Concerning Disclosures of Consumer Product Information (December, 1972), at 31 et seq.

**/ Dated December 1972; adopted in principle by Commission, January 12, 1973.

***/ At least as of two years ago.

****/ Product Information APG at 22.

the information to obtain prices that cover his costs of production. Information will tend to be available at a price sufficient to cover the cost, to someone who has already obtained it, of passing it along.

This leads to a socially inadequate incentive for the producer. Normally, we want producers of a good to produce it in such a quantity so that the cost of the last unit is exactly equal to what people would be willing to pay to have that last unit. Producers of most goods have an incentive to do this. If they stop production when there are some who would still be willing to pay more than the cost, possible profits will be lost and society will lose.

But with public goods, the producer will never receive the amount at which the incremental unit of output is valued by consumers. He will receive at maximum only an amount equal to the greater inconvenience of getting information from someone who has previously purchased.

This is why, economists agree, we have a very small product information industry in view of the fact that almost everyone concedes that additional product information in a convenient form is frequently more valuable to consumers than it costs to produce. */ Because of this public goods problem, entrepreneurs are not likely to organize firms to produce product information.

*/ Thus, Consumer Reports cannot be run as a profitable enterprise like most businesses that produce a valuable good. Some economists say that it is misleading to speak of public goods, since the real problem is the failure of the legal system to define a property right full enough to exclude free riders. In other words, we would solve this public good problem by establishing the rule that it is unlawful to receive information from one who acquired it for consideration from the producer. We do not establish such a rule, these economists theorize, because the cure is worse than the disease, for obvious reasons.

We note that Consumers Union does attempt to exclude free riders by its policy against the republication of its reports by affected manufacturers. We suspect that Consumers Union has adopted this policy precisely for the reason of increasing the inconvenience of acquiring from third parties, without paying CU, the information that CU produced.

B. What Incentive Do Sellers Have to Produce Information

As noted elsewhere, there is not a complete failure of information merely because no one has a good incentive to sell it as a separate commodity. Producers of products other than information have an incentive to produce information that is favorable to their products. In addition, consumers have an incentive to produce information for themselves (by search and by experience). These methods may not, however, be wholly adequate in all cases.

It becomes important to know the circumstances under which alternative methods of producing information are most likely to fail if we want to derive the greatest benefit possible from the resources that the Commission wants to expend on affirmative disclosure.

Certain generalizations are possible. Sometimes a piece of information about a product is not likely to be meaningful unless presented in the context of comparison. The producer of a product, however, will have no incentive to produce the comparison unless it is favorable to his own product. Thus, ordinarily only one producer has the incentive to make the comparison--the producer which offers the product that performs best in terms of the characteristic being compared.

So long as there are producers with products that excel in some significant characteristic, there will presumably be adequate incentives for such producers to provide information about (advertise) such characteristic.

It is suggested that there may be problems as to adequate incentives for any particular producer to advertise the superior characteristics of his product in very specific terms. The problem is thought to arise when a competitor's product may be superior in other specific significant characteristics. It is said that there may be circumstances, where these factors are present, in which none of the firms in an industry will find it profitable to provide such information.

This is an interesting question. It deserves further attention. Be that as it may, however, we do see more and more of this kind of comparative advertising. It should be encouraged. */

*/ Special care should be taken to see that the Commission does not inadvertently reduce incentives to produce this kind of detailed product information. Cf. the Ad Substantiation Program Evaluation (I01).

One problem that may arise, however, is that there is an incentive to produce phony comparisons that rely on ambiguity for truth. The approach of the Bureau has been to require a full disclosure when a comparison is made. Obviously, such a rule can yield a net social benefit if the cost of producing the kind of information required is justified by the benefit that consumers derive from it and if the burden of compliance does not inhibit the flow of useful information. We would like to reserve comment in this area until we can get the facts straighter. */

Another problem is that it is possible for the retailer to capture a rent from ignorance. The retailer's incentive is to produce information favorable to the product that gives him a high margin. **/

Of course, no one can lie with impunity. Consumers find out over time, and the liar develops a reputation for dishonesty that imposes a real cost of business. Such a reputation will be least costly if a retailer does not depend on repeat purchase. Hence, we would expect that specialty stores would be the greatest rogues. ***/ We would expect department stores to have a great incentive to honesty.

Even though the manufacturer of the product with the best product characteristic has an incentive to advertise the comparison, he cannot make it available at the point of sale--where access costs may be lowest--without the retailer's consent. Moreover, if he does not want to paste the product characteristics of competing brands on his product, he cannot even make it inconvenient for the retailer to fail to disclose the comparison. Thus, under some circumstances net consumer benefit could well derive from requiring each manufacturer to paste his own product characteristics upon his own product. If the retailer could remove it only on pain of violating the laws, information would be readily available to consumers.

*/ We would like to emphasize that we have never had any difficulty in getting information from the Bureau of Consumer Protection upon a specific request.

**/ We suspect that this is part of the reason that manufacturers want fair trade. See Telser, Why Should Manufacturers Want Fair Trade, 3 J. Law & Econ. 86 (1960).

***/ E.g., sewing machine stores, carpet stores, appliance stores, used automobile stores (used because they sell many brands), etc.

There is a weights and measures problem, the solution to which could provide substantial benefits to society. The market did not define the pound.

This does not mean that we ought to require that every producer paste product characteristics on every product. We must be sure that the costs of disclosure are less than the benefit that consumers would derive from it.

C. Disclosure Criteria

The product or industry selection criteria that are embodied in the APG, */ and which were used to select the present enforcement mix, are excellent. We take them somewhat out of order for purposes of exposition.

1. Does the information considered for disclosure have direct, immediate and substantial bearing on sensible consumer choice, specifically providing a better understanding of:

(1) The economic value, or

(2) The health, safety or external social value consequences, of the consumption item in question? **/

Clearly, when one is considering whether to use up scarce social resources (those controlled by both industry and the Commission) in order to produce a piece of information, it must be determined at the threshold whether that information is likely to be worth anything to anyone.

4. Can consumers derive adequate product information and knowledge through:

(a) use experience

(b) pre-purchase inspection

(c) existing information sources (friends, ads, free market information services).

At a reasonable cost or through reasonable effort?

*/ Product Information APG at 85-89.

**/ Product Information APG at 85.

If the piece of information in question can already be acquired cheaply by consumers, there is no reason to make a federal case out of it. The APG correctly specifies the ways in which consumers can acquire information. Its taxonomy is almost identical to ours. We would call pre-purchase inspection, the pooling of information among friends, and the use of ads and free market services, */ all "search," since they can be accomplished prior to purchase. "Use experience" we would simply call "experience." As noted, knowledge is usually acquired by experience when search becomes too expensive in comparison.

2. What does the product cost?

Experience becomes more costly the more expensive the product. Thus, if important product qualities cannot be cheaply determined by search, all information becomes very expensive.

3. How frequently is the product purchased?

The more frequently the product is purchased, the larger the store of accumulated information about competing brands that consumers can be expected to have already. With frequent purchase, each individual will probably have better information than with infrequent purchase. Because of this, information can be more effectively pooled among consumers.

8. What range of variance exists among the performance of products in the market?

If the information in question would reveal no variance in the quality of competing goods, that information is largely worthless. No costs should be incurred to produce it.

5. Is there an existing standard by which to derive and verify the information?

One cannot disclose what cannot be expressed.

6. Can the product information be disclosed in an easily understandable format?

It is worthless to express what consumers cannot understand.

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*/ Services need not be "free" to be used at "reasonable cost or through reasonable effort." Unfortunately, Consumer Reports has a rather high access cost if one wants information about a particular product.

7. To what extent will consumers use the information disclosed?

See discussion of Question 1, supra.

Although there are five additional criteria specified in the APG, the eight discussed so far were to be primary; the rest were to be icing on the cake. */

In addition to these criteria, we suggest that the following two be added:

9. What is the cost of producing the information in comparison to the benefit that consumers would derive from having it?

The disclosure of some product characteristics might require very expensive testing equipment (or destructive testing). This in turn might create large economies of scale that would cause small producers to exit. **/ This

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*/ They are:

1. Is the product industry marked at any level by:

   a. high seller concentration
   b. high levels of advertising
   c. high advertising/sales ratios
   d. high profit rates
   e. high rate of growth in sales
   f. absence of price competition
   g. absence of innovation (quality competition)?

2. What income groups are affected by the information problem?

3. Have consumers expressed interest, dissatisfaction, or frustration concerning a product or information category?

4. Can the FTC enforce a disclosure requirement?

5. Is there a history of false advertising complaints within the industry? Product Information APG at 88-89.

**/ There is good evidence that the equipment needed to test mattress flammability (which costs only about $10,000) would have placed severe pressures on cottage mattress makers, of which there are a surprisingly large number. Naturally the program to require such testing was supported by large mattress manufacturers.

might facilitate collusion or it might increase production costs to such an extent that consumers would regard themselves better off paying lower prices while remaining in ignorance of the product characteristic in question.

10. Holding cost of production constant, can the product characteristic be enhanced by making some undisclosed product characteristic worse?

In this kind of situation the Bureau ought to be very careful. Given the constraint of cost, it is ordinarily not to the advantage of consumers if any one product characteristic is enhanced to its maximum; instead, it should be optimized, given the constraint imposed by other product characteristics and costs. In other words, consumers would not necessarily regard themselves better off if the disclosure of vacuum cleaning power resulted in the production of extremely powerful vacuum cleaners but also caused them to be less durable, noisier and heavier.

Restated, the product characteristic or the set of them selected ought to be fairly comprehensive of performance. Of course, a comprehensive disclosure may cost so much that it is not justified by the consumer benefit which it produces.

D. Present Enforcement Mix

Based on our present information, the product characteristics selected for disclosure pass muster against the criteria discussed. We would like to review this program more carefully before the next budget session to see whether consumer benefit could be increased by a different mix.

Recommendation:

We recommend that this program be maintained at the present level of commitment or expanded at the expense of other programs, e.g., Point of Sale Practices.

APPENDIX 6

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

BUREAU OF
CONSUMER PROTECTION

JUN - 7 1976

Mr. Tom W. Ryan, Jr.
Research Associate
MoPirg
P.O. Box 8276
St. Louis, Missouri 63156

Dear Mr. Ryan:

This is in response to your letter of April 23, relating to the internal procedures recently implemented for handling responses to petitions for rulemaking proceedings.

Specifically you have asked for an explanation as to what "facts" constitute sufficiency in support of a petition for rulemaking. You also asked advice as to who bears the burden of investigation -- petitioner or the Bureau staff -- in a situation where a petition for rulemaking is to be denied due to insufficient facts.

As you might expect, it is not possible to provide categorical answers to your questions. If a petition is received urging Commission regulation of a practice but furnishing absolutely no underlying data or facts supporting a need for action, the matter should be returned to the petitioner for amplification.

In addition, the nature or character of the petitioner is, of course, relevant in deciding whether the petitioner has provided an adequate basis for Commission action. The greater the expertise of the petitioner in the subject matter of the petition, the more specificity and detail would probably be expected in its request for Commission action.

The burden also varies depending on the Commission's own experience with the subject of the petition. If the petition is in an area where the Commission or staff has particular expertise, again, the burden on a petitioner coming forward with supporting information could possibly be somewhat less than what otherwise might be required.

As you can see, the matters raised by your questions are not easily resolvable; a great deal depends on the circumstances surrounding individual petitioners and the substance of the petition. In any event, denial of a petition for insufficient facts would normally include an opportunity for resubmission by the petitioner, with a greater demonstration of support for the action he urges the Commission to take.

I hope that you will find the foregoing to be of some assistance to you.

Sincerely,

Joan Z. Bernstein

Joan Z. Bernstein
Acting Director

APPENDIX 7

The Commission has directed the insertion in the Operating Manual of the following provision:

A petition requesting that the Commission initiate a rulemaking proceeding as to a particular practice or practices shall be referred by the Secretary to the appropriate Bureau or Office, which shall, within 90 days of receipt of the petition, recommend to the Commission that the petition be granted or denied. In reaching a determination as to this recommendation, the Bureau/Office shall consider, among other criteria:

(1) Whether the determination to issue the rule sought as the ultimate result of the petition would be within the Commission's jurisdiction;

(2) Whether issuance of the rule sought appears likely, insofar as can be determined before conducting a rulemaking proceeding, to have more or greater beneficial than detrimental effects, and otherwise to be in the public interest;

(3) Whether the rule sought could, if issued, be enforced to the extent necessary to realize its intended benefits, taking into consideration the Commission's resources and other duties and commitments;

(4) Whether the effort required to conduct the requested rulemaking proceeding would be consistent with the Commission's resources and other duties and commitments; and

(5) Whether the investigative and analytical effort required to answer questions (1) through (4) would be consistent with the Commission's resources and other duties and commitments, and the necessity for an expeditious response to the petition.

ADDITIONAL VIEWS OF HON. GARRY BROWN

I offer these additional comments to this report for the purpose of illustrating what I view as some disturbing trends at the Federal Trade Commission. In both the food nutrition rule and the shared monopoly suit agains the cereal industry, the FTC has exceeded its legislative mandate to restrict unfair and deceptive advertising. The FTC has wasted considerable time and money attempting in the first case to dictate the content of nutrition advertising, and in the second case, to argue illogically that active and successful advertising and promotion of a product constitute unfair competition. These trends in the regulation of advertising divert the FTC from its true mission of consumer protection.

FOOD NUTRITION RULE

There is a large amount of information about any product which some consumers might find relevant or informative, but to require the disclosure of all this information is not necessarily within the FTC authority. The proposed food nutrition rule would require all food manufacturers who advertise their product as having nutritional value (i.e., "good for you") to spell out the nutrition content in the ad. There is doubt whether the FTC can stretch its jurisdiction to find that an ad which contains a nutritional claim, which can be substantiated, is false and misleading if it does not also include disclosure of the nutritional value of each element as a percentage of minimum daily requirements.

Not only is the legal theory dubious, the procedural circumstances surrounding this case are appalling.

The FTC has adopted the industry rulemaking mode of enforcement in consumer protection and natioanl advertising areas many times in lieu of the case-by-case method. This switch has serious implications in terms of the time consumed by the proceedings, the budget and staff allocations, and the possible remedies to protect consumers. This report has documented these extensive delays and costs of the rulemaking procedures.

In the case of the food nutrition rule, the staff investigation was announced to the public in November 1972. It took the staff 2 years to prepare a proposed rule, issued November 11 1974. Since that time, the proceedings have been highlighted by a revised proposed rule, two extensions of time for comment, and two canceled hearings. In all, there has been little progress in more than 4½ years of work. The cost to the FTC for these proceedings in fiscal year 1976 alone amounted to $275,000.

All of this delay and expense might be considered acceptable if there were some resulting consumer benefit. However, there has been no such benefit. The substantive provisions of the rule force food companies to choose between the unreasonable alternatives of making no statements about nutrition at all or having to spend up to 12 to 13

seconds of a 30-second TV spot explaining their nutritional claims in terms of percentages of minimum daily requirements. The proposed rule does not have any middle ground.

It would be far more efficient and more informative to consumers if the FTC simply required advertisers making nutritional claims to direct consumers to read the labels on the product.

These labels contain the nutritional information required by the Food and Drug Administration. Indeed, my concern is shared by some of the FTC staff who have criticized the proposed rule and supported the "read the label" approach. In the January 1976, Program Budget Mid-Year Review, prepared by the FTC Office of Policy Planning and Evaluation, the analysis of the food nutrition rule states in part,

> There is some sentiment in the Bureau now that at least some of the currently proposed conditions may indeed be too strict to advance the consumer's interest, and for this reason the Bureau may recommend a republication. We recommend that there be a serious reconsideration of the philosophical underpinnings of the rule. It is not at all clear to us that consumers will be induced to purchase more nutritional foods unless they are induced to scrutinize the FDA's nutrient profile labeling, regardless of what they may be told in advertising.

It is still possible for the FTC to end the delay, reduce the enforcement costs, and eliminate the overregulation of nutrition advertising by terminating the proposed rule and adopting the "read the label" approach.

SHARED MONOPOLY SUIT

I would also like to express my serious concern over statements by former FTC staff officials concerning the shared monopoly suit brought by the FTC against the four largest cereal manufacturers. (This case was brought by the Bureau of Competition, not the Bureau of Consumer Protection, but it is founded primarily on objections to advertising by the cereal makers.) I have raised serious questions about the substance of this suit in the past. (See appendix.) However, statements appearing in the news media recently constitute further indictment of the FTC in this matter.

First, in an article in the Battle Creek Enquirer and News, April 27, 1976, concerning the suit against the cereal companies, Charles Mueller, the former FTC staff attorney who initiated the case, explained his case selection as follows: "I didn't pick the auto or petroleum industry because they have too much political clout. The cereal industry didn't have the political muscle to muddy the water." It would be unfortunate and unethical if the cereal industry was singled out on the basis of political circumstances, wholly unrelated to the consumer protection priorities of the agency.

The June 14, 1976, edition of Newsweek discussed the new "shared monopoly" theory which is employed in the cereal case. This term is not found in any of the statutes enforced by the FTC, or any other agency. The article quotes an anonymous FTC official as saying, "We are taking the law and stretching it a bit." And the article also quotes Mueller as stating that if the cereal case is successful, about one-third of the U.S. economy would be declared illegal.

I find these glib remarks, which go to the very soundness of the FTC suit, most disturbing in view of the fact that the case has now dragged on for over 5 years and cost the taxpayers over $2 million in expenses by the FTC. It has no doubt also cost the cereal companies several hundred thousand dollars in legal fees. The Congress should demand that the FTC spend its time on cases that have a better basis in legal theory and can be of greater benefit in a more timely way to the consumer.

[Representative Garry Brown's letter to FTC Commissioners to urge withholding complaint against cereal manufacturers.]

FEBRUARY 29, 1972.

DEAR MR. COMMISSIONER: I am writing to you and each of the other members of the Federal Trade Commission since the proposed complaint against the Kellogg Co. of Battle Creek, Mich., a constituent firm, has had an extremely disturbing effect upon not only the company, but its employees and the community itself; and my contacts with staff members of the Commission have failed to satisfy my interest, concern, and desire for greater edification regarding the pending proceeding.

My dissatisfaction with my contacts and discussion of this matter with staff personnel stems not from any apparent lack of desire on their part to be reasonably cooperative, but rather from what appears to me to be an unyielding commitment to a conclusion reached when the rationale therefor, as expressed by various staff personnel, appears to be ambivalent. Let me provide an example.

When this matter first came to my attention due to the "leak" of the existence of the staff report, I sought explanation thereof from Mr. Alan Ward, Director, Bureau of Competition, who in turn referred me to your General Counsel, Mr. Ronald M. Dietrich, with whom I had a rather extensive discussion. In this discussion, I requested that I be provided with a background paper on the origin of the study of the ready-to-eat cereal industry as well as a résumé of any similar actions heretofore undertaken by the Federal Trade Commission in which only a segment of an industry had been singled out for Commission investigation and action.

Pursuant to this request, I have been provided with a memo entitled "Background of Breakfast Cereal Case" which, among other things, states that following a preliminary study performed by the Commission's Bureau of Economics, the staff was ordered by the Commission to undertake a more detailed investigation and the basis for such investigation was discussed in the Commission's proposed budget for fiscal 1972. A portion of this discussion was incorporated in the material submitted to me relative to the origin of the study and in it appears the following:

> The breakfast cereal study provided a better understanding of the sources of high profits in a concentrated industry and the manner in which barriers to entry can be maintained through advertising. As a *pilot project* it provided experience which will be useful for study of major concentrated industries of a more complex nature, such as automobiles and steel. (Emphasis added.)

Despite the specific reference to the unique nature of the investigation and action as expressly stated by the Commission memo, an article in the Wall Street Journal of February 18, 1972, headlined, "FTC Aid Denies Move Against Cereal Makers Means More Attacks," reported that Mr. Lawrence G. Meyer, FTC Director of Policy Planning and Evaluation, had:

> . . . denied that the agency's proposed antitrust action against the Nation's four largest breakfast cereal makers is the "door opener" for an attack against all concentrated industries.

This statement, viewed in the context of the staff's memo, leads me to only one conclusion, that being that there is substantial lack of agreement at a staff level at least with respect to the underlying thrust of the present proceedings. This ambivalence is substantiated by discussions I have had with staff members and was reflected at the press conference held at the time of the issuance of the proposed complaint.

Without placing any great significance upon this ambivalence except to explain my writing to each member of the Commission rather than continue my pursuit of the matter at a staff level, let me proceed to further identify my concern about, and objections to, the pending action.

Although I have been away from the practice of law for some time now and never considered myself an expert, or even much of a practitioner before administrative tribunals, examination of the complaint and the substance set forth therein as a basis for the structural and licensing remedies advocated in the proposed orders leaves me cold. Even any reasonable extrapolation of the substantive allegations in the complaint provides no foundation for the structural and licensing remedies incorporated in the proposed order since all of the allegations in the complaint can be remedied and corrected, if the facts justify, through exercise by the Commission of its authority to correct "behavioral" misconduct by the offending companies.

Somewhat simplified, the proposed complaint makes substantive allegations of proliferation of brands and trademark promotion; artificial differentiation of products; unfair methods of competition in advertising and product promotion; and restrictive retail shelf-space control programs.

I submit that the complaint itself is a masterpiece of "artificial differentiation" of allegations.

However one views the practices or results upon which each allegation is based, it becomes apparent that each such practice or result has as its only basis for success or efficacy a behavioral matter: advertising!

There can be no effective proliferation of brands and trademark promotion; there can be no successful artificial differentiation of products; and there can be no unfair methods of competition and product promotion in advertising—unless there is advertising. As I understand the law, it is totally within the authority of the Federal Trade Commission, and heretofore has been more properly its role, to control, regulate, even prohibit, through cease and desist orders, those practices found to be unfair or deceptive. Resort to an unwarranted, and very possibly unauthorized, action such as the structural and licensing remedies contemplated by the proposed order is unnecessary at best.

Even the concern of the Commission, as that concern is expressed in the proposed complaint relative to "restrictive" retail shelf-space control programs, comes under and is equally subject to the above critique. If your staff has done an objective study of the allocation of shelf space in retail establishments, it has reported to you that shelf space is allocated according to sales volume; there is no specific allocation precedent to stocking of products except as is justified on this basis of sales. It is my understanding that whenever assistance is provided by, for instance, the Kellogg Co. to a retailer in computing the allocation of shelf space, it is done on the basis of sales volume information supplied by the retailer. Whether or not the retailer accepts the shelf-space allocation program recommended to him is within the retailers total discretion, and he may make modifications before installing the program. Since such allocations are made on the basis of sales volume, it is putting the cart before the horse to claim that depending upon shelf space allocated, sales will result in proportion thereto. Rather, again, advertising may create the interest in products which results in sales, and the extent of the volume of sales determines the extent of the allocation of shelf space.

Not only does the "cart before the horse" cliche apply to the shelf-space question, but I respectfully suggest that it applies to the whole argument set forth in the complaint and the proposed order insofar as they relate to structural and licensing remedial action. It would appear to me that by some mental acrobatics, advertising, the energy and motivating force—the horse—has somehow become the cart to an animated, energetic, powerful force—company structure! I can't believe the members of the Federal Trade Commission are ready to engage in such gymnastics.

I suggest Commissioner MacIntyre and Commissioner Dennison may have shared this doubt when they failed to concur in the issuance of the proposed complaint. Possibly a "concentrated industries" case may be made out wherein corporate or organizational structure plays a sufficient role to justify a structural attack, but I again respectfully submit it is not in the ready-to-eat cereal industry or in the Kellogg Co.

Before concluding, I would like to raise a further question which remains unanswered in my mind. It seems apparent to me that, however broad a view one might take of the Commission's mission and authority, Congress never intended the use of formal complaint and order proceedings against anything other than identifiable and provable behavior or misbehavior. I don't think it was an accident that the statute, granting but necessarily limiting the Commission's authority, uses the words "methods", "acts", and "practices". As pointed out above, if there is anything in the conduct of their business by the cereal companies which calls for correction under the law, I would fully support your action against them as the facts may warrant. But I am unable to understand the posture of the Commission as it is reflected in the complaint and proposed order which assumes a basis in law and congressional intent to reorganize corporate structures through divestiture and royalty-free licensing of the cereal industry or any other industry simply on the basis of the allegations contained in the proposed complaint.

I do not believe that such action by the Commission was intended by the Congress in its establishment of the agency or has ever been contemplated by the Congress in its continuing review of appropria-

tions for the agency. The fact that little support has been found in the Congress for a bill which has been introduced calling for nondiscriminatory action against "concentrated industries," seems to tell me—and I hope you—that there is little congressional support for that which the Commission is attempting, not in even a nondiscriminatory way, but in a selective, even possibly an arbitrary and capricious, way.

In conclusion, I am told that under your rules the release by the Commission of a proposed complaint does not necessarily mean that each of you, or even a majority, has decided to formally proceed on the basis of the complaint released. It has been suggested that this may be particularly true where the Commission does not appear to have reached any agreement on what relief might be appropriate even if all the allegations of the complaint were sustained. Trusting this is true, I urge you to reject proceeding formally on the complaint as presently proposed, particularly as it relates to the industry structure and royalty-free licensing provisions of the proposed order. If there is to be formalization of this proceeding, there should be stricken these references in both the complaint and the proposed order.

I apologize for the length and argumentativeness of this letter but knew of no other way to bring to your personal attention the sincere and serious concern I feel. I would much appreciate an opportunity to meet with you so that we might discuss firsthand any misunderstanding or misconception I may be laboring under relative to this matter. Pending the granting of an opportunity for such a discussion, I would greatly appreciate your sincere and careful consideration of the matter I have set forth herein.

With best regards,

Respectfully,

GARRY BROWN.

P.S. Although "the law does not require one to do a useless thing," I would again suggest that my access to a copy of the "staff report" might improve my understanding of at least the staff's view of the basis for the action. Receipt would be appreciated.

○

END