

STATE OF WISCONSIN

CIRCUIT COURT
Branch 9

DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

AMGEN, INC., et. al.

Defendants.

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Case No.: 04 CV 1709

**REPLY IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT OF
DEFENDANT NOVARTIS PHARMACEUTICALS CORPORATION SEEKING
DISMISSAL OF THE SECOND AMENDED COMPLAINT AS TO NOVARTIS**

Novartis Pharmaceuticals Corporation (“Novartis”) respectfully submits this reply in support of its cross-motion for summary judgment and joins in Defendants’ Reply in Support of Their Joint Cross-Motion for Summary Judgment (“Def. Jt. Reply”).

INTRODUCTION

Plaintiff’s argument in opposition to Novartis’s cross motion for summary judgment can be summed up in a single famous sentence: “Pay no attention to that man behind the curtain.”¹

Plaintiff claims that Novartis violated the Wisconsin Deceptive Trade Practices Act (“WDTPA”) by publishing “AWPs” that were not averages of transactional prices paid by pharmacies to wholesalers, and by publishing “WAC” prices that were Novartis’s list prices. To prevail, Plaintiff *must* establish that Novartis’ prices published in or to Wisconsin were “untrue,” “deceptive,” or “misleading.” As a matter of law, terms published to a market that fully understands their meaning cannot be “untrue,” “deceptive,” or “misleading,” no matter how many alternative meanings a plaintiff can imagine.

As Novartis demonstrated in its moving papers, the undisputed facts show that the market participants to which Novartis published its prices shared Novartis’s understanding of the meaning of those prices – an understanding Plaintiff itself shared – and not the alternative meaning Plaintiff now argues, without support, the Court should adopt. (*See, e.g.*, Defendants’ Additional Proposed Undisputed Facts (“DAPUF”) ¶¶ 7 n.5, 10, 16, 18, 122-24, 148, 190.) Plaintiff’s only response to these undisputed facts is to demand that the Court blind itself to them and redefine AWP and WAC in a way contrary to the way those terms have been used for more

¹ The Wizard of Oz (M-G-M 1939); <http://www.youtube.com/watch?v=YWyCCJ6B2WE>.

than twenty years, in service of its claim that prices labeled AWP or WAC were “untrue.”²

Plaintiff’s burden is to come forward with *evidence* of material disputed facts, which, if found in Plaintiff’s favor, would mandate denial of judgment for Novartis. *See, e.g., Moulas v. PBC Prods. Inc.*, 213 Wis.2d 406, 408-10, 570 N.W.2d 739, 740-41 (Ct. App. 1997), *aff’d per curiam*, 217 Wis. 2d 449 (1998); *Transp. Ins. Co. v. Hunzinger Constr. Co.*, 179 Wis.2d 281, 291, 507 N.W.2d 136, 139 (Ct. App. 1993). Plaintiff has failed to meet its burden to show that it or the market understood AWP to mean what its lawyers now claim, improperly seeking instead to place the definitional burden on Novartis. Having failed to establish that there is a single “true” definition of AWP, Plaintiff cannot show that AWPs defined differently were untrue, deceptive, or misleading. It has thus offered no facts that, if proven, would establish that Novartis’s published prices were untrue, deceptive, or misleading, relying instead on glib generalizations and unsupported assertions wholly unrelated to *Novartis*³, and begging the Court to ignore the undisputed facts entitling Novartis to judgment. Consequently, Counts I and II of the Complaint should be dismissed as to Novartis.

² As discussed further in Def. Jt. Reply (*see* Section IV at 9-12), Plaintiff offers no basis for its argument that the extensive evidence of its, and the market’s, understanding of pricing terminology is inadmissible and provides no basis for drawing any inference from that evidence other than that it at all relevant times knew that the actual acquisition price of pharmaceuticals was lower than AWP. (*See, e.g., Pl. Resp. to DAPUF* ¶¶ 21, 27.)

³ Thus, Plaintiff cites a finding in a case not involving Novartis to support its contention that “*some* defendants have in fact ‘marketed the spread’ of their drugs by urging providers to take advantage of the fact that they can acquire their drugs for far less than AWP.” (Pl. Resp. Br. at 18 (emphasis added).) Similarly, Plaintiff asserts that a “price labeled ‘average wholesale price’ that can be up to *twenty-seven* times the price at which the provider acquired it is not a ‘benchmark price.’” (*Id.* at 20 (emphasis in original).) Yet, Plaintiff never alleges how that is relevant to *Novartis*, as to whose products Plaintiff offers no evidence of AWPs with such markups over acquisition cost.

ARGUMENT

A. Plaintiff's "Plain Meaning" Argument Ignores the Case Law and Undisputed Facts

Plaintiff argues that the Court should apply a plain meaning definition of AWP but presents no evidence that this is *in fact* an appropriate definition, let alone the only legally accurate definition. Plaintiff must do more than simply point to a dictionary to satisfy its burden of demonstrating that the only legally acceptable definition of AWP is the plain meaning definition it asserts. Indeed, Plaintiff cannot dispute Novartis's fundamental premise that statements must be interpreted within the context in which they are used. (Nov. Mov. Br. at 33-38.) Instead, Plaintiff focuses solely on denying that AWP is a "term of art." Plaintiff misses the point entirely. Novartis is not required to prove that AWP is a "term of art," nor has Novartis ever suggested that it must. Rather, as the case law establishes (*id.* at 32-42), the Court's analysis begins and ends with a reading of AWP in its full and proper context and must, therefore, include consideration of what the target audience knew.⁴

Plaintiff unsuccessfully attempts to distinguish some of the cases Novartis cites, arguing that they only "use 'context' to decide among competing interpretations, each of which was at least plausible under the plain English meaning of the words in question." (Pl. Resp. Br. at 15, citing, e.g., *Avis Rent A Car Sys., Inc. v. Hertz Corp.*, 782 F.2d 381 (2d Cir. 1986) and *Princeton Graphics Operating, L.P. v. NEC Home Elecs. (U.S.A.) Inc.*, 732 F.Supp. 1258 (S.D.N.Y. 1990)). But those cases do not support this artificial distinction, nor is it logical. To the contrary, the *Avis* court admonished the district judge for "fail[ing] to heed the familiar warning

⁴ For example, the dictionary defines "prime rate" as "the most favorable interest rate charged by a commercial bank," *Webster's New World College Dictionary* (4th ed. 2004). Without focusing on whether it is a "term of art," the Third Circuit held that the bank industry's publication and use of the term is *not* fraudulent even though certain commercial customers are offered discounted rates that are more favorable than the "prime rate." *Lum v. Bank of Am.*, 361 F.3d 217, 226-27 (3d Cir. 2004).

of Judge Learned Hand that ‘there is no surer way to misread any document than to read it literally.’” 782 F.2d at 385 (citation omitted). And the *Princeton* court dismissed outright the dictionary and glossary definitions of the word at issue, finding them of “little probative value” given the relevant audience. 732 F.Supp. at 1262 n.11.

Notably, Plaintiff fails to address the many other cases Novartis cited, each of which confirms unconditionally that context – including the perspective of the relevant audience – is essential to determining meaning. For example, Plaintiff inexplicably ignores *Utah Medical Products, Inc. v. Clinical Innovations Assocs., Inc.*, in which the court explained:

While actual consumer confusion is not necessary to assert a claim of literal falsity, *the perspective of the relevant consumer population is necessary in determining whether the advertising could be viewed as false.* Thus, in order to assess whether an advertisement is literally false, *the Court must analyze the message conveyed within the full context of the advertisement. Making such a determination as to the full context requires the Court to look at the audience.*

79 F. Supp. 2d 1290, 1309 (D. Utah 1999) (emphasis added). The Eastern District of Wisconsin recently confirmed this principle, holding context essential to determining whether a statement on a pharmaceutical label was false, “because the target audience for the defendants’ products predominantly consists of licensed pharmacists, buyers who are trained as pharmacists, and other individuals with significant experience in the pharmaceutical industry.” *Schering Plough Healthcare Prods., Inc. v. Schwarz Pharma, Inc.*, No. 07-CV-642, 2008 WL 582738, at *3 (E.D. Wis. Feb. 29, 2008).

Plaintiff has not cited a single contrary Wisconsin or federal case. Instead, Plaintiff reiterates its misplaced reliance on *Tim Torres Enterprises, Inc. v. Linscott*, 142 Wis. 2d 56, 416 N.W.2d 670 (Ct. App. 1987), which holds that “a statement is untrue which does not express things exactly as they are.” (Pl. Resp. Br. at 12, *citing Linscott* at 65 n.3.) But as Novartis’s moving brief showed, *Linscott* confirms that the target audience’s actual or likely perception is

the paramount, if not only, relevant consideration in evaluating whether a statement “express[es] things exactly as they are.”⁵

Plaintiff’s reliance on *B. Sanfield, Inc. v. Finlay Fine Jewelry Corp.*, 168 F.3d 967 (7th Cir. 1999) is similarly misplaced. (Pl. Resp. Br. at 16.) There, a retailer regularly advertised jewelry at discounts of 40-60% off its “regular price.” *Sanfield*, 168 F. 3d at 969. The Seventh Circuit held that advertising to consumers a “regular price” that was not regularly available to them was deceptive in light of Illinois regulations and Federal Trade Commission guidelines that identified the relevant factors to consider in determining whether “*the very type of discount advertising at issue*” (*i.e.*, advertisements comparing the “discount” and “regular” price of merchandise) is deceptive. *Id.* at 973-74 (emphasis added). In contrast, the federal government and Wisconsin have known for decades that AWP’s are customarily set higher than providers’ actual or average acquisition costs, and have never promulgated regulations concerning the AWP’s at issue here similar to those present in *Sanfield*. This fact itself demonstrates that neither the federal government nor Wisconsin considered an AWP to be *per se* deceptive. *See also In re Pharm. Indus. Average Wholesale Price Litig.*, 491 F. Supp. 2d 20, 92, 95, 101-04 (D. Mass. 2007) (“*In re AWP IP*”) (branded AWP’s that exceed providers costs by 30% are not “unfair” or “deceptive”). Thus, unlike the discount advertising statements in *Sanfield*, there is simply no basis for concluding that Novartis’s AWP’s were *per se* deceptive.

⁵ Plaintiff also claims that neither context nor the target audience’s understanding of AWP’s are relevant because the term originated in “deliberate deception,” arguing that “inflating AWP’s indisputably started out as a deliberate practice of inflating price data over their real level” (Pl. Resp. Br. at 21.) Plaintiff’s sole support for that sweeping statement is a citation to a case in which Novartis was not a defendant and which addresses specific conduct in a physician-administered drug market – not the broad brush “reporting” claim as to a wholly different market here. Naked assertions do not meet Plaintiff’s burden in opposing summary judgment.

Moreover, in the very passage which Plaintiff quotes, *Sanfield* confirmed that the focus of federal and state consumer protection statutes alike is on whether a statement is likely to deceive or has deceived consumers. (Pl. Resp. Br. at 16-17, quoting *Sanfield*, 168 F. 3d at 974.) Thus, *Sanfield* in no way suggests that proof of consumer perception is irrelevant, particularly where, as here, the lack of proof of actual deception is coupled with affirmative proof that a substantial portion of the target audience – including Plaintiff – was not deceived. (See, e.g., DAPUF ¶¶ 7 n.5 10, 16, 18, 122-24, 148, 190.)⁶

In sum, Plaintiff offers nothing to support its claim other than its own unsupported “definitions” of AWP and WAC, despite undisputed evidence that the market, including Plaintiff, understood those terms differently. No legal authority requires a court to consciously disregard the context from which a statement derives its meaning and resort exclusively to a dictionary as the sole arbiter of a section 100.18 claim.⁷ Indeed, such a requirement would be illogical.

⁶ Plaintiff argues that Novartis’s AWP’s are prohibited by section 100.18(10)(b), which makes it deceptive “to represent the price of any merchandise as a manufacturers or wholesalers price, or a price equal thereto, unless the price is not more than the price which retailers regularly pay for the merchandise.” But Plaintiff proffers no evidence that Novartis ever represented that AWP’s “represent the price of any merchandise.”

⁷ Nor would it help Plaintiff to resort to a dictionary. Although Plaintiff simply presumes that there is just one plausible “plain English meaning” for “Average Wholesale Price,” the term is literally ambiguous as to whether it means Average Wholesale *Transaction* Price, as Plaintiff presumes, or Average Wholesale *List* Price – a definition consistent with First DataBank’s (“FDB”) definition of the Blue Book AWP’s used by Plaintiff in its reimbursement calculations. (DAPUF ¶ 232.) Language that is susceptible to more than one interpretation cannot be deemed “untrue.” (Nov. Mov. Br. at 36 n.7.) Similarly, the FDB definitions of AWP to which Plaintiff points – purportedly to demonstrate that FDB defined AWP as an average of transaction prices – are equally ambiguous. (Pl. Resp. Br. at 20-21.) Indeed, Plaintiff’s insistence that AWP must reflect transaction prices cannot be reconciled with other statements by FDB in the documents Plaintiff cites, explaining that FDB Blue Book AWP’s are based on the “markup factor” applied by wholesalers to manufacturers’ list prices – a “markup factor” yields a list price, not a transaction price. (See, e.g., Pl. Resp. Br., Appendix H, Tab 1.) Finally, Plaintiff’s reference (*id.* at 21) to the glossary definition of AWP in a 2001 Pharmaceutical Benefit Report (*see* Novartis’s Additional Proposed Undisputed Facts (“NAPUF”) ¶ 44) is equally unavailing, because it plainly states that “[t]here are *many AWP’s* available within the industry” and that “[h]ealth plans also use AWP – (continued...)

B. Judge Saris's Decisions Do Not Support Plaintiff's Position

Plaintiff relies heavily on Judge Saris's *In re Pharm. Indus. Average Wholesale Price Litig.*, 460 F. Supp. 2d 277 (D. Mass. 2006) ("*In re AWP I*") decision to support its "plain meaning" argument that the Court should ignore the factual record. (*Cf.*, DAPUF ¶¶ 7 n.5, 10, 16, 18, 122-24, 148, 190.) However, as established in Novartis's moving brief, Judge Saris later held, after a lengthy bench trial well grounded in the real world facts that Plaintiff asks this Court to ignore, that the marketplace has long been aware that a defendant is not liable for "unfair" or "deceptive" conduct if the alleged spreads between AWP and the actual acquisition cost to providers for a branded drug were equal to or less than 30%. *In re AWP II*, 491 F. Supp. 2d at 94. Indeed, Judge Saris's post-trial decision explicitly states that she had not considered the well known industry practice of calculating AWP's for brand name drugs by applying a 20-25% markup to WAC before issuing her earlier *In re AWP I* decision on which Plaintiff so heavily relies. *Id.* at 97 n.72.

Not surprisingly, Plaintiff's opposition wholly fails to address this aspect of Judge Saris's subsequent decision because it negates entirely any inference that Judge Saris's first opinion would dictate adoption of the alleged "plain meaning" as the only legally acceptable use of the term AWP. Yet *In re AWP I* is Plaintiff's sole "authority" for its proposed redefinition of AWP as an average transaction price, and it falls far short of satisfying the evidentiary burden that Plaintiff must meet.

Having no legal authority for the proposition that the Court should ignore context in deciding whether terms could be deceptive, Plaintiff resorts to the "parade of horrors,"

usually discounted – as the basis for reimbursement of covered medications." (Emphasis added.) None of these statements is consistent with Plaintiff's position that AWP must always mean one thing – an average of transaction prices.

asserting that rejection of the plain meaning interpretation would result in AWP meaning whatever Defendants want it to mean. (Pl. Resp. Br. at 16, 18-19.) But Plaintiff attacks a straw man Novartis never proffered. Novartis's position is, as it clearly established in its motion, that AWP has a well understood meaning in the markets for brand name prescription drugs – a meaning consistent with Judge Saris's recognition that the marketplace for prescription drugs has long known that brand name drugs' AWPs are calculated by applying a 20% to 25% markup to WAC. Plaintiff does not dispute that Novartis's AWPs were typically set at 20% above WAC for most products, and at 25% above WAC for a few exceptions. (Pl. Resp. to NAPUF ¶ 81.) Nor does Plaintiff dispute that, between 1997 and 2005 (the year it stopped reporting AWP on its price lists), Novartis's policy was to state on all external communications that included AWPs that Novartis's AWPs “were set as a percentage above the price at which each product is offered generally to wholesalers.” (Pl. Resp. to NAPUF ¶¶ 87-88.) Therefore, Plaintiff cannot establish that Novartis represented its AWPs to be averages of actual transaction prices or that they were untrue, deceptive, or misleading.

Plaintiff also cherry-picks from Judge Saris's decisions regarding WAC in an effort to refute the undisputed evidence that WAC is broadly understood by the participants in the market for brand name drugs and is, in fact, defined both by Congress and Plaintiff to be a manufacturer's list price that does not include discounts or rebates. (DAPUF ¶¶ 46-49.) Plaintiff concedes that the evidence on which Novartis relies shows that “certain people understood that WACs were list prices that could be discounted for things such as ‘volume purchasing.’” (Pl. Resp. Br. at 50-51.) But Plaintiff argues that the issue is whether anyone actually pays the list price, and wrongly characterizes Judge Saris's *In Re AWP II* decision as holding that it is

deceptive to represent a price as a “list price” when virtually everyone pays much less than that price. (*Id.* at 51.) Plaintiff’s argument is meritless.

Judge Saris held only that “if more than 50 percent of all sales were made at *or about* the list price, the list price will not be deemed fictitious,” acknowledging that “for list prices . . . it is expected that there may be some discounting.” *In re AWP II* at 105 (emphasis added). Plaintiff conveniently omits this holding from its discussion of WAC and its analysis. Instead, Plaintiff relies on pure rhetoric, asserting that “[t]he WACs that *some defendants* reported to First DataBank were not the amounts it cost wholesalers to acquire those drugs; they were much higher.” (Pl. Resp. Br. at 50.)

This motion is not about “some defendants,” it is about Novartis. Plaintiff offers *no* evidence that Novartis’s WACs were “much higher” than the prices wholesalers paid Novartis for drugs, and it cannot.⁸ Plaintiff’s vague and unsupported assertions fail to meet Plaintiff’s burden to advance *specific evidence* of material disputed facts *as to Novartis*, which, if found in Plaintiff’s favor, would mandate denial of judgment for Novartis.

C. Plaintiff’s Reliance On Outdated, Inapplicable FTC Guides Is Misplaced

Plaintiff argues that it has long been unlawful under the Federal Trade Commission Act, “to publish a price, regardless of the name attributed to it, where the price does not truly represent a price at which significant sales are made.” (Pl. Rep. Br. at 13-14.) This contention is as inaccurate as it is irrelevant.

⁸ Plaintiff’s supposed “contrary evidence” (Pl. Resp. to NAPUF ¶¶ 61, 82) – two documents (not produced or written by Novartis) – merely define WAC as the price at which a wholesaler purchases a drug from a manufacturer. Plaintiff has thus failed to meet its burden to come forward with evidence with, if proven, would establish that Novartis’s list prices were at any time “much higher” than the prices wholesalers paid it more than 50% of the time, even if one accepted Plaintiff’s argument that the standard for determining the legitimacy of a list price is as Judge Saris articulated.

First, as noted above, Plaintiff offered no evidence to show that Novartis does not make substantial sales at WAC, despite its obligation to do so in opposition to Novartis’s motion. Second, the 1964 Guides do not provide the standard to be applied here. They have never been a statement of the law – they are merely *guidelines*. See, e.g., *FTC v. Mary Carter Paint Co.*, 382 U.S. 46, 48 (1965). Moreover, the FTC itself abandoned the cited policy, concluding that it was more harmful than helpful to the consumers it was intended to protect. See, e.g., Robert Pitofsky et al., *Pricing Laws Are No Bargain For Consumers*, *Antitrust*, Summer 2004, at 63 (Grimmer Aff., Ex. 43); Miles W. Kirkpatrick et al., *Report of the American Bar Association of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 *Antitrust L.J.* 43, 75 (Apr. 1989) (attached as Ex. A). Instead, FTC enforcement is limited to cases in which there is actual deception or a likelihood that a *reasonable* consumer will be misled. See *FTC Policy Statement on Deceptive Acts and Practices*, 1983 *Trade Reg. Reporter* 13,205, at 20,911 (Oct. 14, 1983) (attached as Ex. B).⁹ Finally, the Guides were never intended to apply to the circumstances here. Rather, they were designed to avoid deception of the *consuming public*. (See *Nov. Mov. Br.* at 41 n.10.) Plaintiff’s contention that it is more vulnerable than the “consuming public” (*Pl. Reply Br.* at 62) is absurd on its face, especially given the hard evidence of its knowledge of the terminology at issue here. The FTC Guides do not support its claim.

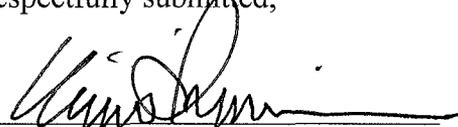
⁹ Several decisions relied on by Plaintiff were decided under the more stringent “usual and customary retail price” standard in the FTC’s 1958 Guides. See, e.g., *Giant Food, Inc. v. FTC*, 322 F.2d 977, 982 (D.C. Cir. 1963); *In the Matter of Regina Corp.*, 1962 F.T.C. Lexis 92, at *34-35 (FTC 1962); *Baltimore Luggage Co. v. FTC*, 296 F.2d 608, 609-10 (4th Cir. 1961); *Clinton Watch Co. v. FTC*, 291 F.2d 838, 840 (7th Cir. 1961). That standard was overruled when the FTC adopted the more lenient “substantial sales” standard in the 1964 Guides. See, e.g., *Majestic Elec. Supply Co.*, 64 F.T.C. 1166, 1964 WL 72895, at *16 (Feb. 28, 1964); *In re Filderman Corp.*, 64 F.T.C. 427, 1964 WL 73194, at *15 (Jan. 28, 1964).

CONCLUSION

In light of the foregoing, Novartis's original moving papers, and Defendants' Joint Cross-Motion for Summary Judgment, the Second Amended Complaint should be dismissed in its entirety as to Novartis.

Dated: April 28, 2008

Respectfully submitted,



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STATE OF WISCONSIN

CIRCUIT COURT
Branch 7

DANE COUNTY

STATE OF WISCONSIN,

Plaintiff,

Case No. 04-CV-1709

Unclassified - Civil: 30703

v.

ABBOTT LABORATORIES, INC., et al.,

Defendants.

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the Reply in Support of Cross Motion for Summary Judgment of Defendant Novartis Pharmaceuticals Corporation Seeking Dismissal of the Second Amended Complaint as to Novartis to be served by First Class Mail to the following:

Atty. Charles Barnhill
Atty. Frank D. Remington

I also certify that on this 28th day of April 2008, a true and correct copy of the foregoing was served on all counsel of record via LexisNexis File and Serve.

Dated this 28th day of April 2008.



Kim Grimmer

C

Antitrust Law Journal
1989

37th Annual Spring Meeting (Part I)

Kirkpatrick Committee Report

*43 REPORT OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW SPECIAL COMMITTEE TO STUDY THE ROLE OF THE FEDERAL TRADE COMMISSION [FN^a]

Miles W. Kirkpatrick, Chairman, Joan Z. Bernstein, Robert Pitofsky, Michael F. Brockmeyer, James F. Rill, Nancy L. Buc, Edwin S. Rockefeller, Calvin J. Collier, J. Thomas Rosch, Kenneth G. Elzinga, Alan H. Silberman, Ernest Gellhorn, Cass R. Sunstein, Caswell O. Hobbs III, William L. Webster, Basil J. Mezinès, Alan B. Morrison, Timothy J. Muris and Stephen Calkins, Committee Counsel.

Members of the special Committee

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*45 LETTER OF TRANSMITTAL

April 7, 1989

Irving Scher, Chair

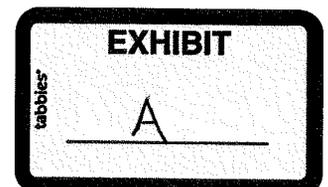
ABA Section of Antitrust Law

Dear Mr. Scher:

It is my privilege to submit herewith the Report of this Section's Special Committee to Study the Role of the Federal Trade Commission.

As you know, this Special Committee was appointed last year by the Immediate Past Chair with the approval of this Section's Council. The Special Committee was given the mission to study the FTC and to formulate recommendations as to its appropriate role as a federal governmental agency. The Special Committee has now completed its study, and I believe that the Report which is submitted herewith constitutes a document worthy of careful consideration as to the FTC's future role.

Although not all members of the Committee were in agreement as to every aspect of the Report, the views reported therein constitute a consensus, and all members have joined in the Report. Two members have, however, submitted separate statements with respect to particular aspects of the Report; those statements are included as appendices of the Report. It should also be noted that the members of the Special Committee were a



hard-working group and gave greatly of their time, skills and expertise to the Committee's common purpose. There was full discussion of the views of all members on the matters before the Committee. I feel honored, indeed, to have served with such an outstanding group.

Also, I wish to express the appreciation of the entire Committee to Professor Stephen Calkins, the Committee's counsel, and to his assistants, Kathleen M.H. Wallman and Sandra Spear, for the devotion of the highest professional skills to the preparation of the Report.

I hope that the Special Committee Report will be found to be a useful contribution to the shaping of the FTC's future role.

Sincerely yours,

Miles W. Kirkpatrick

*47 ACKNOWLEDGMENTS

The work of the Special Committee was made possible by contributions to the American Bar Association Fund for Justice and Education by a group of distinguished antitrust practitioners-each of whom has served the Section of Antitrust Law as a past Chairman-and their law firms:

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James T. Halverson Shearman & Sterling
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(Cite as: 58 Antitrust L.J. 43)

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*53 I. SUMMARY

Twenty years after the 1969 Report of the American Bar Association Commission to Study the Federal Trade Commission, questions about the FTC's role persist. Accordingly, James F. Rill, Chairman of the American Bar Association Section of Antitrust Law, with the approval of the ABA Board of Governors, appointed a Special Committee to Study the Role of the Federal Trade Commission. The Committee was not intended to critique the performance of the FTC or its leaders, past or present, or to resolve disputes about various views on legal issues. Rather, the Committee was to consider how the FTC should fit into our system of government regulation.

The FTC today bears little resemblance to the FTC of 1969. Partly in response to the ABA Report, Congress entrusted the FTC with broad authority to petition federal courts for injunctions, civil penalties, and consumer redress, and enhanced the FTC's (and the Antitrust Division's) ability to obtain preliminary injunctions against proposed mergers. Congress also expressly conferred rulemaking authority on the FTC, which the Commission used, primarily in the 1970s, to consider numerous trade regulation rules. More recently, the FTC has devoted an increasing share of its resources to federal court litigation, challenging mergers and consumer fraud, and seeking civil penalties for violations of rules, statutes, and orders.

Leadership: We do not believe it would be productive to attempt to list the ideal credentials of the commissioners. A diversity of background can be a source of strength. Nonetheless, the leadership of the FTC is critical to the effectiveness of its performance. We therefore urge that the President carefully evaluate the qualities and qualifications of the commissioners, and in particular of the chairman. In doing so, the President should consider the legal, business, academic, and governmental experience and knowledge that will enable the appointees to administer *54 the FTC's work in antitrust, consumer protection, and economics. Above all, the commissioners should be persons of recognized stature. This is necessary for the Commission to receive respect in Congress, to attract talented staff, and to enjoy the confidence of the businesses it regulates and the consumers it protects.

Antitrust: Merger enforcement is probably the FTC's most important antitrust assignment. However, we also see an agenda of significant non-merger civil enforcement that the Commission should pursue. It should, consistent with sound economic principles, identify other cases not subject to easy application of the per se rule, and for which criminal penalties or treble damages may be overly severe sanctions because, for instance, the challenged conduct is arguably exempt, the industry is newly exposed to the antitrust laws, or the legal theory is uncertain.

Consumer Protection: FTC administrative adjudication can be useful in resolving factually and legally complex deception cases. Although the Committee is not in agreement on whether the agency is prosecuting its share of advertising cases, we believe that the FTC should do more to articulate its advertising law-enforcement agenda. Most of us agree that the FTC is properly concerned about the risk of suppressing truthful advertising, but the public has not always received the message that the FTC believes it is important to move aggressively against deceptive advertising.

In combating consumer fraud, the FTC has effectively used its newly established authority under FTC Act Section 13(b) to obtain affirmative relief, including asset freezes and monetary damages. The Commission also has an important consumer protection role to play in enforcing a series of specific statutes and in bringing administrative consumer unfairness cases that involve interstate conduct, less egregious than fraud, that is likely to continue absent FTC challenge.

Guidance: One of the FTC's most important functions is to provide guidance to business. Adjudicated cease-and-desist orders are a form of mandatory, firm-specific guidance. The Commission can also provide guidance informally, and through guides, policy statements, Magnuson-Moss trade regulation rules, and advisory opinions. In choosing among these alternatives, the Commission should, in general, treat similarly situated firms alike. It should regularly speak publicly as a body. The Committee is impressed by the potential significance of guides and policy statements in the FTC's enforcement program. However, the FTC should modify or repeal some existing guides to bring them in line with current policy, and then enforce its guides and rules.

*55 There are few opportunities for broad rulemaking, although the FTC should be able to identify candidates. The FTC should embark on rulemaking only when it is contemplating a particular solution to a widespread problem and when sound legal theory supports its proposed rule. The Committee is particularly impressed with the possibilities for consumer protection rules that are grounded in competition concepts. Finally, the FTC should specifically address the issue of state law preemption whenever it promulgates a trade regulation rule.

Competition and Consumer Advocacy: We believe that the Commission's program to press for competition and consumer interests has been valuable. It should be continued.

Economics: Economists are, and should be, treated as colleagues in the FTC's antitrust, consumer protection, and competition advocacy programs. The Commission should consider the views of economists in deciding whether to initiate action, and should be cautious about proceeding when the economists are opposed. Because of their training and professional incentives, economists are likely to be particularly effective in fashioning and monitoring relief.

The Committee also recommends a reorientation of the FTC's economic research mission. The FTC's research should be directly relevant to the agency's agenda of protecting consumers, and the agency should concentrate on becoming the single most important repository of knowledge about the actual operation of major U.S. industries. The FTC also should seek to improve our understanding of the economic consequences of the

American antitrust and consumer protection systems.

Resources: FTC workyears are 53 percent of what they were a decade ago. Although the Commission was overstaffed then, and no longer is involved in some of the labor-intensive projects that once consumed it, the current staff level is cause for serious concern. We are also concerned that as the FTC has been reduced in size, it has become top-heavy, both in the operating bureaus and at the Commission level. We urge that the Commission make better use of its resources, that the decline in real resources be halted, and that an increase in resources be provided.

Organization and Structure: The Committee has reviewed the long-standing debate over the wisdom of dividing federal antitrust enforcement between two agencies, and of combining the roles of prosecutor and adjudicator in the FTC. Many of us would favor unitary antitrust enforcement were we writing on a clean slate, although some would consolidate antitrust in the Justice Department whereas others would consolidate civil antitrust and consumer protection in the FTC. But while dual enforcement*56 imposes some costs, it also provides some benefits. Dual enforcement has wide support and, as a consequence, we believe that any structural change in federal antitrust enforcement is unlikely. A majority of the Committee conclude that the case for proposing abolition of dual enforcement has not been made. Similarly, a majority of the Committee conclude that the current unity of functions, although troubling in concept, in fact provides flexibility and control and is thus superior to the alternatives.

Congress: The Commission should keep Congress fully informed of its programs and plans. Congress should limit its review of such programs and plans to general policies, and, except where it acts through legislation, leave specific case and rule oversight to the courts. The Commission's decisional process must remain confidential while matters are pending. Congress should review or overturn FTC policy only through the responsible substantive committees. Exemptions, if any, should be substantive exemptions, e.g., from the antitrust laws, and not just from FTC supervision.

The States: The Committee considered the relationship between the FTC and state attorneys general as part of its review of advertising and of trade regulation rules, although the principles discussed in these sections have more general applicability. In recent years the states have become more aggressive in antitrust enforcement and consumer protection. Although most of us have some reservations about this trend and concerns about particular actions, we believe that state activity can be beneficial. The states and the FTC have much to learn from each other, and each has an important role to play. The FTC should be the primary enforcement agency with respect to practices and restraints that are regional or national in scope; the states should have primary responsibility for prosecuting activities that predominantly affect one state. The states and the FTC should work together to aid consumers, in part by referring cases, in the first instance, to the preferable enforcer. The states and the FTC also should attempt to shape a common enforcement agenda, by listening to shared concerns, by explaining reasons for actions taken or not taken (where possible), and, when the occasion demands it, by engaging in respectful criticism.

II. INTRODUCTION

This year marks the twentieth anniversary of the Report of the American Bar Association Commission to study the Federal Trade Commission ('1969 Report'). During the past two decades, many of its recommendations have been followed, Congress has enacted a number of statutes *57 strengthening the FTC, [FN1] and the FTC has been led by some individuals of considerable distinction.

(Cite as: 58 Antitrust L.J. 43)

Despite these encouraging reforms, questions about the FTC's place in American government persist, and the proper role of the FTC remains ill-defined. Newly appointed antitrust enforcers regularly are asked whether they support the existence of two antitrust agencies (the FTC and the Department of Justice's Antitrust Division). Observers continue to be uneasy about the FTC's twin roles as prosecutor and judge and to question whether administrative adjudication is superior to adjudication in the federal courts. Tensions arise from the overlapping responsibilities of the FTC, other federal agencies, and, increasingly, state governments. Congress's ambivalence about the agency's role is symbolized by its repeated failure to reauthorize the FTC, which has been functioning without formal authorization since 1982. Because these questions persisted as the twentieth anniversary of the 1969 ABA Report approached, and in view of the then-forthcoming change in Presidential Administrations, Chairman James F. Rill of the American Bar Association Section of Antitrust Law, with the approval of the ABA Board of Governors, appointed a Special Committee to Study the Role of the Federal Trade Commission.

A. PURPOSE OF THE STUDY

The ABA Section of Antitrust Law charged the Committee with considering the appropriate role of the FTC—including whether there is a useful role for such an agency. The Committee was not charged with updating the 1969 Report, or with critiquing the performance of the FTC or its leaders, past or present. Nor was the Committee charged with resolving disputes about the legal scope of antitrust and consumer protection law. Instead, the Committee was to consider how the FTC should fit into our system of government regulation.

The FTC possesses an unusual set of attributes. Its mandate encompasses both competition policy and consumer protection. It combines, in a single agency, law enforcement, regulation, and reporting responsibilities. It litigates cases in the federal courts and also internally before administrative law judges and, eventually, the commissioners. It has substantial staffs of lawyers and economists, based in Washington and in regional offices in ten cities. Several statutes give it unusual substantive and procedural authority. Yet, while the FTC is unique in many respects, in many other ways it duplicates or complements the work of other governmental units—most obviously the Antitrust Division of the Department*58 of Justice, but also other federal agencies, state and local enforcement authorities, and private litigants.

The Committee's task was to determine whether the FTC has, or could have, an advantage over alternative enforcement instruments, and—assuming there is a role for the agency—to identify the sort of endeavors in which the FTC is most likely to be effective. The Committee was also charged with asking whether fundamental structural changes would improve the FTC.

B. COMMITTEE HISTORY AND WORKING PROCEDURES

At the 1988 Spring Meeting of the ABA Section of Antitrust Law, Section Chairman James F. Rill preliminarily announced the Section's intention to form this Committee. He indicated that Committee members would 'consist of acknowledged experts in the field who will bring to the work of the task force experience in the management of the Commission, viewpoints from all across the spectrum of the antitrust policy debate, and a diverse orientation including economics and consumer as well as legal backgrounds.' [FN2] After ABA approval was obtained, the Committee and its membership were formally announced on June 29, 1988.

Chairman Rill appointed as head of the Committee, Miles Kirkpatrick, who chaired the 1969 ABA Commis-

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sion and subsequently served as Chairman of the FTC. Ten members of the Committee are private lawyers, four are academics, two are lawyers representing states, and one is the Director of the Public Citizen Litigation Group. Professor Stephen Calkins was appointed Committee counsel. [FN3] Kathleen M. H. Wallman and Sandra L. Spear were appointed deputy counsel and assistant counsel, respectively. [FN4]

The members of the Committee and its staff did not perform their duties as representatives of any organization or other group, but as individuals. The contributions of the members and the staff of the Committee to this Report are reflections of their own independent, personal *59 views. The Report represents a consensus and synthesis of these individual contributions, rather than an expression of each member's individual viewpoint as to each aspect or detail of the Report.

The Committee publicly invited outsiders to offer comments, and it solicited suggestions from former FTC chairmen, selected merger practitioners, and other experts. Representatives of the Committee spoke with sitting commissioners and the heads of the Commission's three Bureaus. The FTC and the Justice Department's Antitrust Division each appointed a liaison to the Committee. At the Committee's request, the FTC provided information about a number of its programs, including computer-readable data files extracted from FTC computer tapes. [FN5]

The Committee met six times, usually for a day, and attempted to form a consensus on selected issues. Various Committee members prepared papers on assigned topics. Consensus decisions were recorded in Committee drafts, which eventually formed this Report. By design, the Report does not survey and critique the growing literature on the FTC. [FN6] Rather, it draws upon the diverse expertise of its members and offers their judgment, after careful reflection, on the appropriate role of the FTC.

III. LEADERSHIP OF THE COMMISSION

The Commission functions best when the commissioners as a group bring to the job a mix of legal and economic expertise in government and business. We do not attempt, therefore, to list the ideal credentials of a commissioner. The only universal prerequisite is a mind sufficiently keen and open to permit mastery of complicated facts and sophisticated concepts.

*60 The FTC's leadership is critical to the agency's effective performance of its mission, however. The FTC has difficulty giving its staff specific direction, for three reasons. First, its statutory mandate is broad and imprecise. Second, as a collegial body, its views necessarily tend to be amorphous. Third, any time the persons responsible for an agency cannot directly supervise its work, staff uncertainty is likely. The Commission functions well only when commissioners in general, and the chairman in particular, exert strong leadership. Only when the Commission's leaders have enunciated a clear agenda will the staff know what kinds of cases to pursue. Only when its leaders make clear their belief in the agency and its mission can morale be maintained. Commissioners must be free to disagree about policy issues, but they should disagree in ways that engender respect for the seriousness with which they take their responsibilities.

Whenever the President considers the appointment of a commissioner-especially a chairman-he should consider carefully the qualities and qualifications of the candidates, and especially their leadership skills. The determinants of effective leadership are difficult to define, of course, but weight should be given to legal, economics, business, and governmental experience and knowledge that will allow an appointee to administer the FTC effectively and contribute to its work.

(Cite as: 58 Antitrust L.J. 43)

Although the commissioners as individuals should be diverse, an ideal Commission, as a group, normally would possess certain attributes. A majority of its members would begin service with specific expertise in some aspect of the Commission's work. At least one of its members would possess expertise in economics, whether or not certified by advanced degrees. A majority of its members would possess the skill in addressing procedural issues that normally is acquired through legal training.

Above all, the commissioners should be persons of recognized stature who will be respected by Congress, the businesses the Commission regulates, and the consumers it protects. With recognized leaders at its helm, the Commission will benefit from improved relations with Congress, increased deference from the courts, and acceptance by, if not cooperation from, the business community. In addition, a Commission composed of individuals of recognized stature will more readily recruit, retain, and motivate talented staff.

During our investigation, we heard complaints about the morale of the Commission staff. Except for considering the obvious problems created by budget reductions and uncertainty, we did not attempt to determine whether these complaints were valid or, if so, to identify their causes. We urge the Commission to look into the question and to deal promptly with any problems that exist.

*61 IV. THE ANTITRUST PROGRAM

Questions about the FTC's antitrust role are not new. To overgeneralize only slightly, the FTC's non-merger antitrust plate was once filled with Robinson-Patman enforcement. That era ended around the time of the 1969 Report, and few commentators have lamented its passing. Ever since, observers have debated the FTC's antitrust role. Early in our deliberations we reviewed the long-standing debates over the wisdom of dividing federal antitrust enforcement between two agencies, and of combining the roles of prosecutor and adjudicator. A majority of the Committee concluded that the case for proposing major structural change had not been made. The majority's reasoning is set forth in Sections XI and XII. In this Section, we assume the continued existence of an FTC antitrust program, and discuss what that program should be. [FN7]

Federal antitrust enforcement can be divided into three categories: criminal cases, mergers, and all else. The first category traditionally has been reserved to the Department of Justice, and this should not change. The second category is shared by Justice and the FTC; this is healthy and should continue. The recurring question for the FTC is whether, for the third category, the game is worth the candle: Is there a substantial amount of beneficial federal civil antitrust work, other than merger enforcement? We believe there is, and offer some suggestions for identifying appropriate cases.

The FTC's most important antitrust program is merger enforcement. One can debate which mergers are anti-competitive, and how permanent is their harm, but all agree that anticompetitive mergers inflict serious harm on the economy and on consumers. Moreover, merger enforcement requires substantial resources. Because of the Hart-Scott-Rodino process, an antitrust agency must evaluate proposed mergers under tight time limits. Agency merger lawyers, like private merger lawyers, often have to work 'around the clock' investigating transactions and preparing cases. But unlike some private lawyers, agency lawyers rarely have advance warning. The FTC appropriately devotes more resources to merger enforcement than to any other single program. [FN8]

However, it is in the 'all other' category of non-criminal, non-merger enforcement that the FTC has a special role. In part this role has been *62 created by default, since the Antitrust Division devotes more than 75 percent of its resources to criminal and merger enforcement. [FN9] But this role should also be viewed as a creature of

the FTC's special attributes: an ability to seek injunctions without establishing antitrust liability for purposes of private damages actions, an ability to devote substantial time to litigating complicated economic questions, and an ability to consider a variety of remedies for competitive harms. The challenge is to identify the kinds of non-merger antitrust cases for which these attributes make the FTC particularly well suited. In the following discussion, we suggest some principles that may help identify such cases.

A. PRINCIPLES OF NON-MERGER CASE SELECTION

The Commission should file a case only when it can anticipate relief that is practical, likely to remedy the perceived harm, and not unduly burdensome. Cases for which the FTC is particularly well-suited are likely to exhibit several of the following characteristics (which are numbered only for clarity, not to suggest that they are of equal weight or that the majority or any particular number of them must be present):

1. The cases require application of the rule of reason, of a 'truncated' rule of reason, or at least of a 'thoughtful per se rule.' In some of these cases the FTC may eventually condemn the challenged conduct under the per se rule. This would be particularly likely where defendants have engaged in a naked restraint of trade but can assert a colorable claim of immunity from the antitrust laws. The point is not that the FTC should never bring a per se case, but rather that for truly naked restraints not on the periphery of an antitrust exemption, FTC action generally will be inappropriate (because criminal sanctions apply) or unnecessary (because private parties will have sued). [FN10]

2. The cases may involve development and application of uncertain legal theories. The FTC is a less dangerous forum than the federal courts for testing legal theories and considering their application in difficult cases since the FTC's sanctions are civil and prospective and its decisions cannot be used as prima facie evidence to support treble damages awards.

3. The cases may involve conduct arguably entitled to an antitrust exemption. For instance, a claim that state regulation unduly interferes with competition poses the kind of factually and analytically complex issues for which Commission review can be helpful. Criminal enforcement and treble damages actions may be overly severe sanctions for conduct that is arguably exempt.

4. The cases may involve industries newly exposed to the antitrust laws through deregulation, or in which restraints arguably are justified by the need to further technological innovation or to advance other public purposes. Here, also, criminal enforcement and treble damages actions may be excessively severe. On the other hand, in some instances the Antitrust Division may have developed superior expertise by participating in regulatory processes.

5. The cases should have a firm foundation in economics. For years, the soul of antitrust has been torn between those preferring an exclusively economic approach and those preferring an approach that considers other values. Even those on the Committee who subscribe to the latter view believe that economics must be antitrust's rudder, and that antitrust enforcement at the FTC should reflect, as a guiding principle, a concern for encouraging and protecting efficiency. At the same time, however, the Committee recognizes that economists do not always agree; by recognizing the vital role of economics we do not mean to endorse any particular economic school.

6. The FTC's strengths are best employed in cases that challenge conduct in an industry in which the FTC

has gained experience by using its full panoply of powers, by publishing studies and by giving guidance in various forms. Resources are conserved, quality is improved, and consistency is increased by agency specialization.

7. It may be desirable to investigate practices and industries about which there is substantial public concern. Rather than embarking on exhaustive, unfocused reviews of industries, however, the FTC should search for particular anticompetitive practices. The soundest approach is likely to be incremental, building on past learning. The most dubious cases are those brought to respond to a perceived problem, but which lack a carefully considered theory of violation and remedy.

8. Although the FTC should look for anticompetitive conduct currently unchallenged under the antitrust laws, most cases will not flow from any special breadth of Section 5 as compared to the antitrust laws. Although we have varying views on how far Section 5 extends, [FN11] we agree that the *64 source and special nature of the FTC's antitrust assignment are derived from its structure and available sanctions, not any special reach of Section 5.

B. CASE EXAMPLES

There are, and will continue to be, a substantial number of cases that satisfy several of these principles. In order to illustrate our views, there follows a group of cases exemplifying the kinds of non-merger antitrust cases that the FTC should at least consider bringing, assuming the FTC would have jurisdiction. By listing the cases, we do not necessarily endorse any particular complaint or the merits of any proceeding.

FTC v. Indiana Federation of Dentists. [FN12] The FTC found that a collective refusal by dentists to make patients' X-rays freely available to insurance companies violated Section 5. The court upheld the Commission and condemned the dentists' refusal to compete on the available package of goods and services, absent some pro-competitive justification. The Court found actual harm to competition, which made unnecessary any finding of market power.

United Air Lines, Inc. v. CAB. [FN13] This case was brought under Section 411 of the Federal Aviation Act, which parallels Section 5. The court upheld the CAB's regulations forbidding airlines to bias computerized reservation systems, even if this practice would not violate the Sherman Act. The challenged conduct was sufficiently similar to monopolization to withstand claims that the CAB was overreaching.

United States v. American Airlines, Inc. [FN14] This was the successful Justice Department civil challenge to rather blatant attempted price stabilization by a telephone call between two chief executive officers. The court condemned the request to fix prices as attempted monopolization, finding the required 'dangerous probability of success' from the two firms' high combined local market shares. Some of us believe that, with this *65 precedent now established, the next challenge to similar conduct could be criminal.

E.I. du Pont de Nemours & Co. v. FTC. [FN15] The FTC challenged the use of several 'facilitating practices'-exclusive use of delivered prices, advance announcements of price changes, and use of 'most favored nations clauses'-by the leading firms in the industry. The Commission found that, under the facts of the case, this violated Section 5. [FN16] The court of appeals reversed. It rules that unilateral conduct by members of an oligopoly may be 'unfair' only if there is '(1) evidence of anticompetitive intent or purpose on the part of the producer charged, or (2) the absence of an independent legitimate business reason for its conduct.' The court also found that no anticompetitive effects had been demonstrated.

Detroit Auto Dealers Association. [FN17] The FTC condemned a trade association agreement that discouraged auto dealers from being open weekends. It rejected the argument that any such agreement was protected by the labor exemption because it resulted from labor pressure and an interest in avoiding unionization.

Massachusetts Board of Registration in Optometry. [FN18] The FTC struck down, as violative of the anti-trust laws, a state board's ban of even truthful advertising of affiliations and discounts. The Commission ruled that restraints on advertising are inherently suspect and found no plausible efficiency justifications. It held that a state board is a 'person' covered by the FTC Act, and it rejected an asserted state action defense, reasoning that a state board is not sovereign and finding that the state legislature had not clearly intended to displace competition.

Amerco. [FN19] This complaint challenged U-Haul's allegedly sham litigation designed to interfere with a competitor's reorganization in bankruptcy. The complaint was part of the FTC's efforts to address anticompetitive non-price predation. The consent order prohibits U-Haul and its corporate parent from engaging in litigation intended to harass or injure competitors.

*66 *City of Minneapolis and City of New Orleans.* [FN20] The Commission challenged alleged agreements between taxicab companies and these two cities to limit taxicab competition. The FTC withdrew the complaints after Minneapolis increased the number of authorized taxicabs and Louisiana clarified its requirement that municipalities regulate taxicabs.

Michigan State Medical Society. [FN21] The Commission condemned a physician boycott designed to raise the reimbursement rates of a state Medicaid program. It found the boycott illegal under a rule of reason application of Section 5, and not entitled to protection under the *Noerr-Pennington* doctrine.

Ticor Title Insurance Co. [FN22] ALJ Needelman found that five major title insurance companies had illegally fixed prices by participating in rate bureaus, and that the McCarran-Ferguson exemption did not protect this activity since it was not principally the business of insurance.

Three observations about the cases are worth noting. First, the cases' virtue is also their vulnerability. Some cases were unsuccessful—which is not surprising, since almost by definition the cases are not easy. For several reasons, defeat does not prove that a case should not have been brought: (1) cases can be decided wrongly; (2) development of facts or advances in economic learning may make appropriate the dismissal of a complaint that was sensible when filed; (3) knowledge is advanced by exploring new theories, although by itself this would not justify litigation; (4) it is preferable for the FTC to explore new theories than for private plaintiffs or state attorneys general to do so, since they may lack the FTC's resources and economic sophistication, and since treble damages may be excessively punitive where the law is unclear; and (5) it also may be preferable for the FTC to address an economic problem or an uncertain theory than for Congress to legislate based on incomplete information. [FN23] On the other hand, the FTC's involvement in controversial cases leaves it open to criticism from Congress and others.

*67 Second, several of the cases involved the health care industry. This is a critical industry in which anti-trust enforcement is relatively new. The FTC's experience illustrates the anti-trust role it can play. The Commission has devoted substantial resources to this industry [FN24] and has not limited its actions to litigation. The Commission also has engaged in rulemaking, through the two 'Eyeglasses Rules' [FN25] which were adopted under the Commission's consumer protection authority but address perceived competitive restraints. In addition, the Commission has studied the industry, [FN26] engaged in competition advocacy, and regularly given inform-

al advice on antitrust compliance. Without judging the merits of all the positions the FTC has advanced, one can say that this combination of approaches should serve as a model. On the other hand, some health care restraints have predominantly local effects. Before challenging such a restraint, the Commission should conserve its resources by ascertaining the interest of state enforcers in pursuing the matter, where doing so would not compromise an investigation.

Finally, none of the cases involves purely vertical restraints. This is not surprising, given the increased recognition that many vertical restraints are procompetitive. [FN27] Nonetheless, many commentators note that certain vertical restraints lessen competition and should be illegal. Given fewer private challenges to vertical restraints, it would be helpful for the FTC to identify those vertical restraints it considers illegal, and, where appropriate, to challenge them.

C. CONCLUSION

Many practices deserve antitrust scrutiny by the FTC. The application of antitrust to deregulated industries continues to be challenging. The scope of numerous antitrust exemptions continues to be undecided, because Congress is considering important legislation and the Commission and the courts are struggling to demark the edges of exemptions *68 (e.g., *Noerr*, state action, labor). The importance of policing those edges is increasingly recognized. Finally, the expanding importance of the rule of reason and proof of market power emphasizes the importance of the FTC's role and may suggest that the significance of criminal antitrust could decline. Fewer and fewer antitrust cases are decided under easily-adjudicated per se rules. Even when adjudicators apply per se rules, they often do so only after considering competitive consequences.

V. THE CONSUMER PROTECTION PROGRAM

The FTC's consumer protection program monitors and regulates a wide range of practices. Most of the Commission's activity is concerned with advertising practices, consumer fraud, and a smorgasbord of specific statutory provisions (equal credit, truth in lending, debt collection). During the 1970s, although less so recently, the Commission devoted substantial resources to rulemaking. [FN28] Finally, the Commission has brought a few administrative cases under its authority to prohibit unfair acts or practices.

Discussions of the Commission's advertising and consumer fraud programs follow. Rulemaking is discussed as part of the Commission's program for giving guidance to business. Before turning to these topics, however, we want to discuss briefly the Commission's 'unfairness' enforcement authority. [FN29]

Broad authority must be exercised judiciously. The Commission's unfairness authority has long been a source of controversy. [FN30] Some, but not all, controversy ended with the Commission issuing its policy statement on its consumer unfairness jurisdiction. [FN31] This policy statement made a major contribution to Commission jurisprudence, but it still must be fleshed out through careful application in cases.

The Commission cannot expect to bring many administrative consumer unfairness cases. When unfairness is so egregious that it borders on fraud, the Commission should challenge it in federal court using its Section 13(b) authority. [FN32] When other questioned practices are widespread,*69 the Commission should seek to end them through some combination of guides, policy statements, and rulemaking. Some other practices will be best challenged by state attorneys general or private parties.

A case that illustrates the kinds of administrative consumer unfairness cases the Commission should consider bringing is *Orkin Exterminating Co. v. FTC*. [FN33] (Obviously, we mention this and other cases without necessarily endorsing the Commission's position, in part because we have not read the records and the files in the cases.) Orkin, the world's largest termite and pest control company, had used a standard contract providing lifetime termite protection in return for payment of annual inspection fees of amounts specified in the contract. After inflation made this uneconomic, Orkin, with the tentative blessing of counsel, began to impose substantial, unilateral increases in the annual fees. Orkin's practice had at least a colorable justification, and individual injuries were small, so the practice was an unlikely candidate for private litigation. The Commission challenged the systematic violation of contract provisions as an unfair act or practice, and its order was recently upheld. Although *Orkin* fits our suggested principles unusually well, there are other examples of the kinds of administrative consumer unfairness cases that the Commission should consider bringing. [FN34]

A. ADVERTISING PRACTICES

The most controversial part of the FTC's consumer protection mission is its advertising practices program. Few doubt the importance of this program. False and deceptive advertisements prevent markets from functioning properly and harm consumers and competitors alike. FTC administrative adjudication can be an advantageous method of resolving factually and legally complex deception cases. The FTC's advertising program is also symbolically important, as one of the agency's more visible activities. However, there is much debate over the sufficiency of the FTC's activities and the role the FTC should play in the regulation of advertising.

At one time, the FTC was the dominant regulator of advertising. Today, however, the FTC is merely one of several players. A single false advertisement may be challenged by industry self-regulation groups (the National Advertising Review Board ('NARB') and the National Advertising*70 Division Council of Better Business Bureaus ('NAD')), by the media in which the advertisement is sought to be placed, [FN35] by a competitor's Lanham Act suit, [FN36] or by a state attorney general, [FN37] as well as by the FTC or another federal regulatory authority. [FN38]

1. *Sufficiency of the FTC's Program*

Rightly or wrongly, the media has conveyed the perception that the FTC has largely abandoned the regulation of advertising, especially national advertising. [FN39] State attorneys general cite this perceived void to explain their heightened activities. Much of the dispute concerns two issues: the interpretation of allegedly implied claims, and the seriousness of the risk that overly aggressive enforcement will suppress truthful advertising.

We are not of one mind on whether the FTC is bringing a sufficient number of advertising cases. Those who defend the FTC note that it is currently adjudicating complicated suits against Kraft, R.J. Reynolds, and Campbell Soup, [FN40] and that during 1984 through 1988 it filed 25 *71 complaints challenging advertisements seen throughout the country. These supporters argue that truthful advertising would have been deterred had the agency found implied claims without evidence of actual consumer perception, and had it pursued the children's advertising and other rulemaking activities that were a prominent part of FTC efforts in the 1970s. Critics respond that the Commission has failed to bring cases of consequence, and that it has devoted insufficient attention and resources to advertising enforcement. [FN41] They note that of those 25 complaints, 12 involved diet or health supplements, baldness cures, or tanning devices, whereas only six challenged network television advertising (of which four involved air or water cleaners).

Although we have differences on whether the FTC is prosecuting its share of advertising suits, we are united in our belief that the FTC can and should do more to articulate its advertising law-enforcement agenda. Most of us believe that the FTC properly hesitates before finding implied advertising claims, and is properly concerned about the risk of suppressing truthful advertising. But too rarely has the public received the message that the FTC believes it is important to move aggressively against false and deceptive advertising.

2. State Advertising Programs

The state attorneys general have responded to the perceived slackening of FTC enforcement with vigorous advertising programs of their own. Many individual states regularly file suits challenging deceptive and fraudulent practices. A number of states have proposed or enacted special advertising statutes. In 1987 the National Association of Attorneys General ('NAAG') adopted airline advertising and marketing guidelines. [FN42] More recently, NAAG approved guidelines on advertising and other business practices in the car rental industry. [FN43]

*72 The states play an essential role in challenging deceptive and fraudulent practices. Frequently, a state attorney general will be the public official best able to end a harmful practice and to redress injury. The attorneys general know local needs and concerns, are experienced in using local court systems, and sometimes enjoy procedural or remedial advantages not shared by the FTC. State officials often will be the best enforcers of laws against consumer fraud.

In addition to their efforts against fraud, state officials bring other important deception cases. Without judging the merits of any particular matter, examples of cases that states should consider filing include the following:

Illinois won an agreement from a Chicago firm to stop misrepresenting food as kosher, and to refund the money of customers. [FN44]

Although not a lawsuit, the Iowa Attorney General has criticized car rental price advertisements that exclude mandatory fees. [FN45]

Missouri won a consent order against 34 tanning centers that prohibits telling customers that the use of tanning devices is safe, will not cause aging of the skin, will not increase the risk of skin cancer, or is safer than tanning under the sun. [FN46]

Ohio sued two firms that mailed advertisements offering a motor cycle or a motorboat to persons who would test the product, failing to mention that the shipping charge often exceeded the product's value. [FN47]

On the other hand, we are troubled by aspects of some of the states' activity. For instance, one state is considering a legislative rule that would, among other things, limit the use of the term 'discount store,' ban claims of low prices unless all competitors had been surveyed, and prohibit 'sales' where prices are reduced less than 10 percent. Another state has proposed pricing claim regulations that, among other things, would strictly regulate the use of 'Buy One-Get One Free' solicitations, and *73 would prohibit reference to 'list prices' except where those prices were charged by a significant number of competitors.

Excessive regulation of pricing claims can harm consumers, as experts on advertising have come to appreciate in the past two decades. [FN48] It is all too easy to drive useful information out of advertisements, and this is

likely to happen if compliance with pricing claim regulations becomes onerous. For instance, prohibiting 'sales' featuring less than 10 percent price reductions could increase pricing rigidity.

We are also troubled by aspects of the NAAG guidelines on car rental and airline advertising practices. The most disturbing aspect of the former is the recommendation that states adopt statutes ordering car rental firms to provide insurance coverage for all rented cars. [FN49] Such laws would be likely to encourage price rigidity to the disadvantage of smaller competitors and consumers alike. NAAG's airline advertising guidelines also may tend to discourage price advertising. [FN50] But wholly apart from the particulars of the guidelines, car rental companies and airlines typically mount national advertising campaigns, for which a uniform national enforcement policy is desirable. Although NAAG has sought to bring consistency to state enforcement of advertising restrictions-and, commendably, has invited widespread comment on its proposals-uniform national standards, vigorously enforced and consistently interpreted, would be preferable.

3. *The FTC and the States* [FN51]

Although we have reservations about some of the states' advertising practices enforcement, we believe that the pattern of increased activity by the states will continue, and that much state enforcement can be beneficial. In advertising practices-and, indeed, in other consumer protection*74 matters-the states are likely to play active roles and can make important contributions. Accordingly, the FTC should assist the states in better serving consumers. The current liaison arrangement between the FTC and the states should be improved. Where possible, the FTC should share its economic expertise with the states. The FTC should seek to assist the states by, for example, coordinating the states' exchanges with other federal agencies and by performing model evaluations of substantiation evidence and model consumer surveys. The FTC should also recognize that the state attorneys general, being closer to consumers, can be an invaluable resource as a repository of information about issues of consumer concern and as a sounding board for proposed enforcement initiatives.

The states and FTC each have important roles to play. To overgeneralize, the states' primary mission should be those practices that harm consumers within a single state; the FTC's special mission should be those practices that harm consumers in many states. These are not firm boundaries, of course, but they represent the ideal. [FN52] Where the FTC is challenging what is essentially a local practice, the enforcement process may be unduly expensive and insufficiently responsive to local concerns. Conversely, where one or more states challenge what are essentially interstate practices, there is a significant risk that the enforcement process will be unnecessarily cumbersome, that inconsistent standards will create uncertainty, and that the interests of consumers nationwide will not be optimally served.

Even local advertising practices often have substantial interstate effects. Many media markets are interstate. Advertisers often use a single advertisement in several states. Yet advertising practices tend to be matters of considerable local concern, and it is unrealistic to expect that the states will refrain from challenging any advertisement with an interstate effect.

Overlapping scrutiny of advertisements would not present difficulties if all reviewers used a common standard or if excessive enforcement were benign. However, neither is the case. The FTC's views of appropriate advertising enforcement standards have changed over time, but the views of some state enforcers more closely resemble the FTC's earlier views. [FN53] *75 Moreover, challenges to certain procompetitive advertisements can harm consumers and the competitive process.

In the first instance, advertising practices should be addressed by the preferable enforcer. When the FTC learns of a questionable advertisement with a principally local effect, the FTC should refer the matter to the appropriate state and offer to help. When a deceptive advertising campaign has substantial interstate effects, the FTC presumptively should be the government enforcement agency. [FN54] The FTC should encourage states to come forward with advertising concerns: suggestions should be taken seriously and should trigger prompt investigations. [FN55] The referring state should be consulted actively during the decision-making process. If the FTC elects not to challenge the advertisement, the FTC should explain its reasoning to the referring state in as much detail as the confidentiality statutes permit. (For such a referral process to work, of course, the FTC would have to commit itself to making an enforcement decision promptly enough to allow a state to proceed if the FTC does not.)

The FTC and the states will inevitably disagree about the wisdom of challenging certain advertisements. When a state declines to challenge a predominantly intrastate advertisement, federalism requires the FTC normally to defer to the state's decision. Even when states challenge interstate advertisements that the FTC has declined to proceed against, the FTC's usual response should be silence where, for instance, its decision was based on resource allocation or involved a close judgment call about the meaning of an advertisement. Little would be gained and much FTC-state harmony would be jeopardized if the FTC were to participate in such a suit. However, if the FTC decides that a particular advertising practice with substantially interstate effects is beneficial to consumers and to the competitive process—not just neutral, but positively beneficial—and that a state challenge to it would interfere with the FTC's agenda for improving information dissemination, the FTC should consider taking a public position supporting the challenged advertisement, either through public statements or by amicus participation in the lawsuit. This should *76 not be done lightly, but the FTC should not hesitate to make its views known in appropriate cases. [FN56]

4. Shaping a Common Agenda

The FTC should not routinely criticize the states, which are its allies in protecting consumers. Instead, the FTC should work with the states to shape a common advertising agenda. The FTC should work with the states lead in this, but the relationship between the states and the FTC should not be a one-way street: the states have much to teach the FTC.

The pricing claims cases are an illustration of this. In reviewing reports of state challenges to advertisements, one is struck by the number of suits that involve pricing claims. This was once true of FTC advertising cases, as well. [FN57] The Commission subsequently came to appreciate the importance of encouraging pricing claims, and to understand that increasing the legal risk of making such claims could deprive consumers of valuable information. Challenges to pricing claims fell into disfavor.

We regard the heightened activity of the states as a cry for greater FTC attention to pricing claims. The FTC's abandonment of this field has created two problems. First, the FTC's 1964 pricing guides, although unenforced for over a decade and not an accurate statement of Commission views, remain as published expressions of national policy, available for citation. Indeed, one can read standard reference works and not begin to appreciate the changes in FTC policy since the 1960s. [FN58] Second, as the state attorneys general understand, pricing misrepresentations offend and may harm. For instance, some car rental firms have misrepresented prices by advertising rates that failed to include significant mandatory charges. [FN59] Until recently, the FTC has not prevented this sort of advertising. The FTC appears to have little interest in price advertising, which has created

a void that the states are rushing to fill. The FTC should eliminate this void by bringing meritorious pricing suits, such as *Alamo Rent-A-Car*, [FN60] and setting forth more aggressively its advertising enforcement agenda.

*77 The pricing experience teaches a larger lesson. The FTC must not forget that it is only one player in advertising enforcement. Perhaps at one time it could leave guidelines unenforced, without rescinding them and without explaining the reasons behind its decision not to bring cases. No longer. The pricing guidelines in their current form are a source of confusion and should be amended immediately to reflect current FTC thinking. When the FTC investigates a significant advertisement, whether or not concerning price, and finds it lawful (not just that the FTC's resources could be better used elsewhere), the FTC should seek, consistent with confidentiality requirements, to make public its decision not to challenge the advertisement, and the reasons for that decision. A skeptical public, including the states and consumer groups, is entitled to an explanation. In addition, the advertising community and other enforcers would be educated and reassured by a better understanding of the FTC's reasoning.

B. CONSUMER FRAUD

The 1969 Report criticized the FTC for failing to address retail fraud adequately. The FTC advanced two defenses to its cautious approach, the same arguments that critics of the FTC's current program to prevent consumer fraud advance today: retail fraud frequently is a criminal offense and the Commission's sanctions are a poor substitute for criminal penalties, and retail fraud tends to be a local problem. [FN61] The Report rejected these justifications, arguing that the FTC's flexible equitable powers could be effective against fraud, and should be used, especially against firms operating across state lines. [FN62]

The FTC's lack of effective enforcement tools was a more serious deficiency than the Report indicated. The tools available to the FTC today, however, are far superior to those available in 1969. In 1973, Congress added Section 13(b) to the FTC Act, [FN63] thereby authorizing the Commission to petition district courts for preliminary injunctions to enforce its statutory mandate. Although the Commission's best known use of this authority has been to preserve the premerger status of corporate assets pending Commission review of proposed mergers, Section *78 13(b) has become the foundation of the Commission's consumer fraud program.

Section 13(b) is an attractive method of winning preliminary and permanent relief. The Commission has successfully used it to seek *ex parte* asset freezes and asset escrow arrangements. [FN64] Section 13(b) also permits the Commission in a 'proper' case to seek a permanent injunction to enforce any provision of a law within the Commission's jurisdiction. 'Proper cases' include those in which the FTC relies on established precedent and 'does not desire to further expand upon the prohibitions of the Federal Trade Commission Act through the issuance of a cease-and-desist order.' [FN65] With increasing frequency, the Commission has successfully used its authority under Section 13(b) to obtain affirmative relief, including monetary damages, through suits for permanent injunctions. Courts have consistently exercised their equitable authority to award monetary equitable relief in these actions. [FN66] The affirmative relief granted has included not only resitiation to defrauded consumers, [FN67] but *79 also contract rescission and permanent asset freezes or receiverships to preserve the possibility of further monetary relief. [FN68] Largely because Section 13(b) offers a faster and more complete remedy than that available through traditional administrative action, the number of consumer protection cases pursued in federal court has eclipsed the number in administrative adjudication. [FN69]

1. *Development of Program*

The 1970s witnessed a large amount of consumer fraud, particularly in land sales and vocational schools. The FTC used its administrative enforcement weapons to combat these types of fraud. The relative slowness of the FTC's administrative procedure was less of a hindrance in these kinds of fraud cases. The Commission saw some success in combating fraud as it won, at least on paper, significant amounts of consumer redress.

In the 1980s, as the Commission's authority under Section 13(b) became clearer, the FTC's fraud enforcement efforts shifted to federal court, taking advantage of its greater power by expanding the scope of remedies it seeks in consumer fraud cases. While the Commission continues to attack basic consumer fraud, such as in land sales, the Commission has also expanded its use of consumer redress and injunctive remedies to challenge other types of fraud as well, most notably telemarketing fraud. [FN70] Its new enforcement powers offered the advantages of speed and the ability to tie up assets quickly, making consumer redress a more realistic future possibility. In addition to the consumer redress actually ordered by the courts, the Commission has obtained increasing numbers of consent orders in consumer fraud cases in which the respondent agrees to pay significant amounts of consumer redress.

Land Sales Fraud: The Federal Trade Commission has issued 12 final orders against land developers since 1972. These cases involve charges of misrepresentation that the purchase of land is a sound financial investment, involving title or no monetary risk. Seven of these cases resulted *80 in sizable monetary awards as well as final Commission orders. These monetary damages included both consumer redress and payment for certain improvements. The potential value of the redress, improvements, and canceled contracts in all of the land cases since 1972 amount to \$147,855,092.

Vocational Schools Fraud: Eleven of the orders issued since 1970 in vocational schools cases provide for a total of \$3,691,504 in refunds to 22,341 students. Compliance with these orders, however, has proved to be a serious problem. Of the 84 orders issued since 1959, 16 compliance reports have been rejected or not filed, 25 compliance investigations have been conducted, and three civil penalty actions have been filed (resulting in awards of \$113,000).

Telemarketing Fraud: The Commission has prosecuted an increasing number of telemarketing fraud cases in the 1980s, expending greater amounts of shrinking agency resources to combat the problem. In FY 1983, the Commission spent 17,817 hours investigating and prosecuting telemarketing fraud cases. This number increased each year to a high of 55,631 hours in FY 1987 and then dipped slightly to 47,502 in FY 1988. The amount of the Commission's budget devoted to telemarketing fraud cases increased annually from \$410,964 in FY 1983 to \$2,282,110 in FY 1988.

The Commission typically proceeds against telemarketing fraud through Section 13(b) injunction actions, since they can be initiated *ex parte*. Speed is essential in telemarketing cases because defendants and their assets vanish at the first hint of enforcement activity.

The Commission has enjoyed some success in its attack on telemarketing fraud. Of the 85 investigations of telemarketing fraud initiated by the Commission since June 1, 1983, 17 have resulted in orders requiring consumer redress. The consumer redress ordered in these cases totals \$85,632,000, of which \$4,337,500 has actually been distributed to consumers, \$3,795,000 is on deposit in a bank, and \$15,228,000 is being held by receivers. Most of the cases have arisen in the areas of investment coins and art (23), mineral leasing (14), con-

sumer goods (11), and travel (11). [FN71]

The most significant recent development in the FTC telemarketing effort has been the increasing cooperation between FTC and the state attorneys general. In August 1987, the FTC and the NAAG created an automated databank on telemarketing fraud. This data bank is intended to pool the information compiled by the participating offices in order to *81 identify and prosecute the most flagrant law violators, and to identify trends in telemarketing that require closer monitoring by enforcement agencies. To date, 22 states have agreed to participate in this data bank and two others are in the process of joining.

2. An Appraisal

The current Commission has targeted for special attention cases of outright consumer fraud; the high level of Commission commitment to combating telemarketing fraud is the most salient example of this enforcement focus. Telemarketing schemes are a particularly appropriate enforcement target because they often involve clever and sophisticated proposals of 'good' deals and 'safe' investments. Individual consumers have lost an average of \$5,000 to \$10,000 in these schemes, money often taken from savings or from equity built up in their homes.

Clearly our legal system should provide remedies for this type of fraud. The question is whether the FTC is an appropriate body to procure those remedies. Significant barriers to private causes of action make individual lawsuits an unrealistic option for most of these fraud victims. The costs of maintaining a lawsuit can be prohibitively expensive compared to the potential gains. Each individual loss is likely to be too small to merit the cost of pursuing it. In addition, the legal and practical barriers to a class action suit are often formidable.

State enforcers play a valuable role in attacking consumer fraud. Frequently a state attorney general will be the official best situated to bring a suit. However, fraudulent schemes often operate across state lines, which can make state enforcement difficult. Optimal enforcement requires a federal presence to bring certain suits and to help coordinate multi-state enforcement efforts. Finally, because the Commission receives complaints from all over the country, it is in a good position to identify trends and to detect major fraud schemes.

FTC enforcement also has advantages compared to criminal prosecution. By using Section 13(b), the Commission is able to go into court *ex parte* to obtain an order freezing assets, and is also able to obtain consumer redress. Neither of these remedies is available through traditional criminal prosecution. In addition, criminal intent is often difficult to prove to a jury beyond a reasonable doubt. The FTC's burden is easier: it need only prove a statement's falsity by a preponderance of the evidence.

These advantages of FTC enforcement suggest that the FTC should bring cases that cut across state lines and where criminal prosecution is not a good option, or where there is reason to supplement criminal prosecution. Optimal use of FTC prosecutorial advantages requires the *82 FTC to move quickly, however. Currently, a typical case takes three to six months from the time the staff hears about the alleged wrongdoing until an *ex parte* asset freeze can be ordered. Some cases are slower, and the Commission should be encouraged to improve its performance.

Deterring potential consumer fraud is an important enforcement objective. The supply of fraud is not perfectly elastic. At the margin, the Commission can have some deterrent effect by raising the costs of defrauding consumers. The Commission currently wields some of the most effective means of raising these costs: freezing assets, obtaining sizable consumer redress orders quickly, and then collecting them.

(Cite as: 58 Antitrust L.J. 43)

Whether the Commission has pursued the optimal number of consumer fraud cases over the last 20 years is impossible to determine. But by refining the use of Section 13(b) to move quickly to freeze assets and impose penalties, and Commission has progressed well. Further improvement depends on cooperation with other law enforcement agencies. Given the large amount of consumer fraud presently practiced, there is room for improvement in the enforcement effort. The ongoing cooperative effort between the FTC and several states to develop a telemarketing data bank is one example of the future direction of consumer fraud enforcement.

VI. PROVIDING GUIDANCE

One of the distinguishing features of the FTC is its array of remedies. Staff members and individual commissioners can offer informal guidance; the Commission can issue guides, policy statements, or advisory opinions; it can file administrative complaints seeking cease and desist orders; it can file federal court actions seeking injunctions and consumer redress; it can file federal court actions for civil penalties against those who knowingly engage in an act or practice previously found to be unfair or deceptive; and it can promulgate binding trade regulation rules, enforceable by civil penalty and consumer redress actions. The Commission's role as a federal court litigator was discussed above. This section discusses the Commission's role in providing guidance-including mandatory guidance-through cease and desist orders and rule-making.

The various forms of guidance offer different costs and benefits, and one approach may preclude another. In choosing among them, the Commission should apply four principles. The first is simply that the Commission should work aggressively to provide guidance. At one time, the Commission regularly addressed many of the issues within its jurisdiction in adjudicative opinions. The number of opinions issued annually has *83 fallen sharply, however, in part because the FTC brings so many of its cases in federal court. Unless this practice will change, which seems unlikely, the Commission should pursue other means of disseminating its views.

Second, the best guidance is public. Public pronouncements invite widespread adherence and only public pronouncements invite widespread evaluation, which is essential if good policies are to be promoted and flawed ones reformed.

Third, guidance is best provided by the Commission acting as a whole, rather than by individual commissioners or staff members. There is always a risk that the views of a collegial body will be ambiguous. Only by speaking with one voice (even with dissent) can the Commission give authoritative guidance to business and to its own staff. When the Commission speaks regularly, its staff only fills in the interstices in policy; when it speaks more rarely, the 'interstices' can be too large.

Fourth, it is generally desirable to treat similarly-situated firms alike. This is more than a matter of simple fairness. When only one competitor is handicapped, competition is distorted. Unless the market is perfectly competitive, such distortion also will injure consumers, who will face less choice, higher prices, or lower quality than they would otherwise. [FN72]

A. INFORMAL GUIDANCE

FTC employees provide an extraordinary amount of informal guidance, the range and importance of which is underappreciated. One of the major responsibilities of FTC professionals is to give speeches on competition and consumer protection matters. This is valuable, since persons can only comply with what they understand. When

education is accompanied by enforcement of enunciated standards, the antitrust and consumer protection systems work well.

Although informal advice is important, it can be overused. Informal advice is frequently rendered by staff members, in private. [FN73] The advice *84 does not formally bind the Commission. This causes at least two problems. First, businesses cannot completely rely on the advice. Second, the nonbinding nature of the advice creates a risk that it may be given to casually, even though, as a practical matter, the Commission would hesitate before challenging a person who relied on informal advice.

B. ADVISORY OPINIONS

Commission advisory opinions do not have the inherent defects in informal advice. Only by public majority vote may the Commission render an advisory opinion, which is the strength but also the weakness of this method of giving guidance.

At one time, the Commission regularly issued advisory opinions. As recently as 1977 and 1978, the Commission issued more than 13 per year. [FN74] Since then, the Commission has issued a substantial number of advisory opinions in only one year. In the other years, the Commission issued an average of less than one a year, and it has issued only one advisory opinion since 1983. [FN75]

The recent scarcity of advisory opinions is regrettable. Law enforcement benefits from advisory opinions. They represent the public views of the Commission as a whole and can provide important guidance. [FN76] For instance, the Commission's health care advisory opinions have become part of the core library of references in that field. [FN77]

*85 While advisory opinions offer substantial advantages to the legal system as a whole, individual parties no longer see them as a source of effective guidance. There are at least three reasons for this. First, the Commission has frequently issued opinions too slowly. [FN78] Second, the response to a request for an advisory opinion is uncertain. Antitrust Division business review letters are more predictable, because predictions of how one person will decide are easier than predictions about five. Third, businesses have many alternative sources of guidance, such as informal advice from the Commission or its staff, informal advice from the Division, and business review letters. So long as these alternatives are available, there is little reason to subject oneself to the risks and delays of obtaining an advisory opinion.

For these reasons, we understand but nevertheless regret the scarcity of advisory opinions. While we do not anticipate a boom in advisory opinions, the FTC should make the advisory opinion process as attractive as possible, by responding quickly and decisively. The Commission also should consider reminding its staff that requests for advice should be declined sometimes, and, with the questioner's permission, referred to the Commission.

C. OTHER FORMAL COMMISSION GUIDANCE

The Commission has several choices when it wants to change a practice that is not so clearly illegal as to merit suit in federal court: administrative orders (after trial), guides, policy statements, and trade regulation rules. [FN79] Each of these is a public declaration by the Commission, acting as a whole. Properly used, the Commission's array of powers should complement each other, each being deployed according to its special at-

tributes. We will briefly describe the nature and current use of each of these powers, and identify the situations in which each should be employed. We then offer some additional comments about cease and desist orders and trade regulation rules.

**86 1. Cease and Desist Orders*

Administrative cease and desist orders are the bread and butter of Commission activity outside of federal court litigation. These orders are a form of firm-specific, prospective mandatory guidance or regulation. They are enforceable by civil penalty actions. [FN80]

The use of cease and desist orders should be informed by the fourth principle discussed above, cautioning against unnecessarily handicapping a competitor. Cease and desist orders are well-suited for four situations: where an unfair or deceptive practice is not common in an industry; where, although the practice is common, a handful of firms account for the bulk of violations or there are one or two leading offenders; [FN81] where a practice is common but remedies must be custom-tailored to individual situations; and where the Commission has warned firms that it regards practices as unfair or deceptive, and now seeks to establish this as a matter of law. [FN82]

2. Guides and Policy Statements

A guide is 'an administrative interpretation by the Commission of the laws it administers. . . . [A] guide does *not* have the force or effect of law and is not legally binding . . . in an enforcement action.' [FN83] Between 1955 and 1980, the Commission issued more than 30 guides. As is true with advisory opinions, however, guides have fallen into disuse, [FN84] traced in part to the perceived greater attractiveness of rulemaking; both guides and rules are challenging to draft, but only the latter can result in penalties for noncompliance. Existing guides have gone largely unrevised and *87 unenforced. [FN85] Although rulemaking has recently fallen into disfavor, guides have not regained their former popularity.

In the late 1960s the Commission issued policy statements addressing mergers in several specific industries. All but one have been rescinded. [FN86] In recent years the FTC has issued important policy statements on consumer unfairness, deception, and merger policy. [FN87] These are broad, generally applicable declarations of the Commission's approach to recurring, important issues. As with a guide, violation of a policy statement is not a violation of law.

Even though the illegality of conduct violative of a guide or a policy statement must be proven at trial, we believe that guides and policy statements could play an important role in FTC law enforcement. They apply equally to all persons, put all on notice of possible enforcement action, and can contribute to greater public understanding of the Commission's method of analyzing competition and consumer protection issues. [FN88] Public comment can (and should) be part of the promulgating process, whether or not required by statute. [FN89]

*88 If guides are to become an important FTC guidance tool, they must be taken seriously. This would require modifying or repealing existing guides to comport with the views of the current Commission, and, once accomplished, a vigorous program of enforcement. [FN90] Each guide should be reviewed regularly to see whether it continues to reflect Commission policy.

The Commission's recent use of policy statements is a positive development. They soften the image of an

agency with unbridled discretion. The issuance of such statements should be encouraged. [FN91] The existing statements should be reviewed on a regular schedule and modified if they do not reflect current views; inaccurate statements are worse than none at all.

3. Trade Regulation Rules

The Commission has gone through two phases of activism in trade regulation rulemaking. During the first phase, between 1962 and 1974, the Commission issued a score of trade regulation rules by applying general administrative law principles. [FN92] In 1975, the Magnuson-Moss amendments authorized the Commission to engage in rulemaking pursuant to that Act's more onerous provisions, but also specified that once a Magnuson-Moss rule was promulgated, violators would be subject to a civil penalty. [FN93] During the next five years, the Commission initiated more *89 than a dozen Magnuson-Moss rulemaking proceedings. [FN94] Although the Commission continues to modify, interpret, and review existing rules, [FN95] in recent years new rulemaking initiatives have dramatically declined. The FTC has promulgated only two new rules since 1980. [FN96]

Magnuson-Moss rulemaking is a costly and uncertain tool. The ponderous nature of the process has been the subject of much comment and criticism. [FN97] (Indeed, some of us believe that the Magnuson-Moss procedures should be legislatively repealed. [FN98]) Nothing galvanizes an industry to defend itself like an industry-wide assault such as broad rulemaking. Congress is never more sympathetic than when it is hearing from constituents across the country, as may result from rulemaking. Congress is rarely less deferential than when an agency is engaging in a broad rulemaking process that, unlike law enforcement, resembles activity that is the traditional province of Congress.

*90 Given this, good candidates for broad new rulemaking will be scarce. Rulemaking is not a sensible response to an unfocused belief that the market is working imperfectly. Rather, the FTC should embark on rulemaking only when it is contemplating a particular solution to a widespread problem and where it has a legal theory that supports its proposed rule. [FN99] Restraint is required in selecting rulemaking targets and in defining a rulemaking's scope. The Commission frequently will find that a mix of guides, policy statements, and administrative proceedings will be superior to Magnuson-Moss rulemaking.

Nonetheless, appropriate targets for rulemaking continue to exist. The Mail Order Rule—a pre-Magnuson-Moss trade regulation rule that was ‘grandfathered in’—is a good example of a sensible trade regulation rule. There were widespread consumer abuses that were not quickly self-correcting. The FTC was able to craft a remedy that was easy to administer, not unduly burdensome, and sufficiently precise to justify enforcing with penalties.

The Commission should be able to identify other problems that would benefit from a similar rule. Suitable candidates are industry-wide problems involving perpetrators too numerous to sue individually. Rulemaking also may be appropriate where there is a need to explore complex and confusing issues in hearings.

Consumer protection rules grounded in competition concepts are also promising subjects for rulemaking. The Eyeglasses Rules are good examples of rules intended to benefit consumers by improving market performance. The FTC's first Eyeglasses Rule pre-empted state laws restricting price advertising of eyeglasses and eye examinations, and proscribed advertising bans adopted by professional and trade associations. [FN100] The Eyeglasses II Rule removes restraints imposed by state law and bars certain state restrictions on commercial practices. [FN101] The Funeral Industry Rule, at least in its origins, was designed to address regulatory and in-

dustry restrictions on competition in that industry. [FN102] Given the share *91 of the economy regulated by government bodies (and the accompanying state-action antitrust exemptions), other possibilities for using rules to address competition-oriented consumer protection issues undoubtedly exist. [FN103]

The FTC periodically reviews trade regulation rules under a plan developed in 1981 pursuant to the Regulatory Flexibility Act. [FN104] Trade regulation rules, like guides, must be enforced. Although we are unable to measure the extent of voluntary compliance with rules, we note that until recently the Commission had filed relatively few enforcement proceedings. [FN105] The Commission should consider accelerating the review of any rules that have gone unenforced.

4. Additional Observations on Cease and Desist Orders and Trade Regulation Rules

a. Cease and Desist Orders

Cease and desist orders must not be punitive. This is especially true now that the Commission can seek consumer redress in federal court actions. In crafting relief, each provision should be sufficiently beneficial to competition and consumers to offset costs. Unnecessary compliance expenses harm not just a firm but its customers, to whom part of all costs are passed. Similarly, any meaningful limitation on a firm's conduct may impose costs on consumers. [FN106]

*92 We are troubled by the duration of typical Commission orders, which continue to lack sunset provisions except for specific documentation requirements. Administrative orders should have sunset provisions. If legal standards permit other firms to engage in practices that harm consumers, the standards should be changed-for all firms-through legislation, rulemaking, or guides. A firm-specific order must be justified as removing harm, restoring competition, or preventing likely recidivism; it should last only as long as necessary to prevent the likely resumption of the illegal practices. [FN107] Orders preventing firms from freely participating in acquisitions usually should expire after five years, because most acquisitions of antitrust significance are subject to the Hart-Scott-Rodino reporting requirements. Orders in excess of five years can be justified only when there is a significant chance that the firm would otherwise engage in illegal activity not subject to the Hart-Scott-Rodino reporting requirements.

b. Trade Regulation Rules

Displacing state law enforcement activity through the pre-emptive effect of trade regulation rules is an issue of continuing controversy in federal-state relations. The Commission's authority to pre-empt the states in this area remains unsettled, although the FTC routinely asserts it. [FN108]

To date, trade regulation rules have pre-empted only state laws and regulations providing less protection than the FTC rule, but not those providing more. [FN109] Such one-way pre-emption can be sound policy, properly recognizing important federalism values. However, whenever the Commission promulgates a final trade regulation rule it should address *93 the pre-emption issue specifically, and, in doing so, consider whether the rule should pre-empt all inconsistent state regulations. [FN110] Whether complete pre-emption is advisable will depend on the nature of the rule. For example, when the rule merely labels a particular industry practice as unfair, there is no reason to preclude states from identifying other industry practices as unfair as a matter of state law. On the other hand, when the Commission's rule prescribes optimal disclosure guidelines, the benefits of that

rule may be undermined by state requirements of additional disclosures; because information clutter imposes costs and dilutes messages, more is *not* always better. In this situation, the Commission should consider whether its rule, promulgated with the benefit of a detailed examination of a problem's many facets, should pre-empt more demanding disclosure requirements as well as more lenient ones. [FN111]

VII. THE ADVOCACY PROGRAM

One of the FTC's more visible roles is that of an advocate for competition and consumers. This activity dates back to the Commission's early years. [FN112] As early as 1917, the FTC offered comments to the U.S. Fuel Administration on coal pricing policies. [FN113] During the 1970s and 1980s, under Democratic and then Republican leadership, the FTC began to expand its advocacy program. At first, this program centered on federal *94 regulatory activity. The past several years have seen a trend toward increased state filings and appearances. However, advocacy activity declined sharply in 1988. [FN114]

The FTC's Competition and Consumer Advocacy Program is one of the most important of the FTC's various projects. [FN115] Only two other federal government entities, the Antitrust Division and the Council of Economic Advisors, also serve consistently in this capacity. Of these three, the FTC devotes the most intellectual energy and resources to the task. The FTC has consistently, and on the whole correctly, pursued the objective of promoting consumer welfare. It has generally provided quality advice about issues of consequence.

The FTC's competition advocacy program permits it to accomplish for consumers what prohibitive costs prevent them from tackling individually. It is the potential for the FTC to undo governmentally imposed restraints that lessen consumer welfare, and to prevent their imposition, that warrants the program's continuance and expansion. Because ill-advised governmental restraints can impose staggering costs on consumers, the potential benefits from an advocacy program exceed the Commission's entire budget. [FN116]

The limited available evidence suggests that the FTC's program has generally been successful. In a few instances, decision-makers announcing outcomes have indicated that the FTC's participation was important. [FN117] Moreover, a recent survey of state and local officials who received Commission comments on regulatory proposals showed that in 39 percent of the decisions, action was generally consistent with at least some of the FTC recommendations, and was taken largely or partly because of those recommendations. [FN118] In 75 percent of the proceedings, the FTC presented information that the decision-maker had not previously understood well and that was not thoroughly presented by other participants. [FN119] Despite the difficulty of measuring the effectiveness of FTC *95 participation in a proceeding, these results suggest that the program has substantial value. [FN120]

The success of the program is especially impressive in light of the modest resources it consumes. The FTC has estimated the cost of the program in recent years to be two to four percent of budget. [FN121] The resources devoted to the program appear especially modest given the number of times the FTC has participated in proceedings: between 1978 and 1987, the Commission averaged more than 30 filings a year. [FN122]

The FTC's advocacy program has elicited criticism from members of Congress and from certain industries. [FN123] Each house of Congress has passed bills designed to limit the program. [FN124] Criticism of the program, in general, reflects concern that the Commission is inappropriately spreading a message of economic deregulation at the state and federal levels. Critics also have suggested that the program is draining resources from the FTC's law enforcement mission, although given its modest costs these criticisms seem overstated.

*96 Although competition advocacy is obviously not the FTC's primary mission, the proposed restrictions are ill-advised. The advocacy program is salutary because it allows the FTC to share with other regulators and legislators information that the Commission has gathered through its other activities. Even if its advice were not often accepted, information sharing is valuable. In the whirl of activity that precedes the adoption of federal or state regulations, or the enactment of state legislation, the FTC can offer an important, sometimes lonely, voice for the consumer. This should be encouraged, not arbitrarily restricted. Indeed, the extent to which the program is attacked by those with interests adverse to consumers may best reflect the program's success. Unfortunately, the more successful the program becomes, the more likely it will be subjected to such attacks.

VII. THE ROLE OF ECONOMIC ANALYSIS

The founders of the Federal Trade Commission anticipated that it would have economics expertise. There is no hint that the FTC's economic expertise was to be reserved for a few individuals or confined to a separate bureau. Instead, a knowledge of economics was to pervade the organization, from the commissioners' offices on down. This expertise was to inform the FTC in its own decision-making. The FTC was also to educate by offering accurate and objective information about the operation of the United States economy. As the 1969 Report put it, 'a principal function of the FTC was to serve as a fact-finding body that would study the economy, investigate industries, and expose corporate practices harmful to the economy.' [FN125] In short, paying attention to the economics of a matter was to be a first principle of FTC behavior. Informing the nation about the operation of the economy was to be a second. These remain worthy operative principles for the agency today.

A. ECONOMIC ANALYSIS AND THE FTC'S ENFORCEMENT PROGRAM

Today, most of the FTC's economic research and analysis is conducted by staff people for whom economic analysis is their primary if not sole responsibility at the agency. In a world increasingly populated by specialists, this is inevitable. Because of this compartmentalization, defining the proper role of economic analysis in the FTC's enforcement activities becomes a problem of defining the proper working relationships between the agency's attorneys and economists.

Before the 1970s, FTC economists had relatively little substantive impact. In the years since, their role has been transformed. Rather than *97 simply gathering statistics to support pre-existing positions, economists are increasingly involved in selecting cases, developing theories by which they may be prosecuted, and formulating appropriate remedies.

We applaud this transformation. Economists should be treated as colleagues in the enforcement process. A collegial relationship between attorneys and economists fits the statutory design and, perhaps more significantly, ensures that the FTC will benefit from the broader lessons that economic analysis offers.

These lessons are fourfold. First, economists bring an empirical bent to a problem. They can locate and organize data crucial to antitrust and consumer protection enforcement.

Second, economists generally bring a cost-benefit mentality to a problem. In an agency with fixed resources, staff economists can rein in cases and investigations that have little prospect of helping consumers. They can identify and encourage those cases with the greatest potential of generating consumer welfare gains. Some critics of economic analysis contend that a cost-benefit mentality inevitably serves as a brake on

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the FTC's enforcement program, but this is not necessarily so. To be sure, in some areas-especially concerning vertical restraints and price discrimination-economic input has deterred some antitrust cases. But it can also serve as a throttle. Economic analysis has promoted activity in certain key areas (such as advertising restraints by professions) that the FTC did not address until the lessons of economics were brought to bear. Furthermore, if economists at the FTC assume the more focused research responsibilities proposed below, economists should become more frequent generators of proposed complaints.

Third, economists bring to certain problems an organizing paradigm that might otherwise be absent. This surfaces of broad problem areas, such as compiling guidelines for merger enforcement, and in narrower problem areas, such as delineating tests for defining markets. The influence of this paradigm is suggested by a comparison of early predatory pricing cases with cases brought since publication of the seminal Areeda-Turner article. While attorneys have helped formulate merger guidelines, and, obviously, have contributed to the literature on predatory pricing, their contributions have been made against the backdrop of economic analysis.

Fourth, economists within the FTC are an important link to the outside world of economic research. Just as some attorneys contribute to the mission of the FTC by their link to the organized bar, to Congress, or to other government attorneys, economists at the FTC link the agency to *98 the scholarly literature and ongoing research in industrial organization. A government body charged with disseminating accurate and objective information about the American economy needs ties to the academy which also generates information of this character.

Just as it would be irresponsible for the Environmental Protection Agency to be unaware of research on important environmental issues, it would be irresponsible for the FTC to be unaware of important findings on the state of competition and monopoly. The FTC should contribute to and monitor these findings. By hiring first-rate economists, the FTC assures itself of a staff that is informed by and communicates with the current state of research in industrial organization and related fields.

1. *Antitrust Enforcement*

Economists play a central role in the FTC's antitrust enforcement mission. [FN126] They should be involved, as colleagues, in case selection, case prosecution, and remedy formulation and supervision.

a. Case Selection

Representatives from the Bureau of Competition and the Bureau of Economics should work together in assessing proposed antitrust action. To be sure, attorneys have a comparative advantage in assessing the legal basis of an action. But it is important to hold attorneys to a high standard of economic analysis in case selection. The FTC, like most law enforcement agencies, exercises prosecutorial discretion. Cases that can be won should not always be brought. Economic input is important in assessing the actual consequences of a business practice and the benefits to consumers of bringing it to a halt.

The obligation to justify a proposed action in terms of its economic consequences strengthens the agency's case selection process as attorneys seek out and work with economists in determining the merits of possible actions. The Commission should consider the views of economists as well as attorneys in deciding whether to initiate action, and should be cautious about initiating action where the economists are opposed.

A sensible procedure for combining attorneys and economists in an investigation is for those assigned to an

investigation to write jointly the fact memo based on their research. If they disagree as to a final recommendation, those conclusions should be separately explained. The FTC's Hart-Scott-Rodino review process provides a good example of a healthy working relationship between economists and lawyers. Attorneys *99 and economists both assess possible antitrust consequences. They cooperate in formulating the investigation and in studying the material filed. As a consequence, they virtually can assure that the Commission will seek to block a merger if both support such action.

b. Prosecuting Cases

After the FTC decides to prosecute a case, economists should not be relegated to a purely supporting role, but should continue to work alongside attorneys as colleagues. Of course, economists are needed to perform such conventional tasks as gathering industry data, preparing economic affidavits, testifying (or helping to prepare economic testimony of an outside expert), and assisting in the investigational hearings of respondent's economic experts. However, we believe economists should not be limited to these roles, but instead should also be involved in framing the overall theory of a case, drafting interrogatories, helping ensure that briefs accurately communicate a case's theory, and formulating a case's remedy.

As colleagues, FTC economists should not be expected to act contrary to their principles. If the Commissioners decide to file a complaint contrary to the advice of the economists, awkwardness is inevitable. But while economists should keep their disagreements confidential and not undermine the Commission, they should not be expected to endorse an action they believe to be harmful. If an economic witness is desired and a private economic consulting firm is willing to provide such testimony, the Commission remains free to retain an outside expert. [FN127] But only by treating economists as respected, professional colleagues will the FTC continue to be able to recruit and retain first-rate economic talent.

c. Formulating and Supervising Remedies

Both the FTC and the Antitrust Division have been criticized for garnering pyrrhic antitrust victories, where a case is won or a settlement is achieved, but competition is not restored. One of the explanations *100 given for this phenomenon is the inadequacy of incentives for attorneys to be concerned with what happens after a case has been won.

Economists do not face the same set of incentives, in terms of their performance within the agency and their job prospects outside. Because of different professional signals, FTC economists can be invaluable in fashioning and monitoring relief.

First, economists charged with considering relief can ensure that the proposed remedy squares with the economic theory of the case. Their knowledge of an industry, and their ability to understand how an industry would be affected by possible changes, should inform the selection of possible remedies. [FN128] Just as expert economic analysis should support every case brought, so should it support every relief decree.

Second, economists can play key roles in the administration of antitrust remedies. Many lawyers find greater satisfaction in litigating cases than in monitoring compliance with decrees already won. In contrast, an economist's professional instinct is to study resource allocation, and resource allocation can be affected as much by compliance as by litigation. Thus, economists deserve leading roles in monitoring compliance.

2. Consumer Protection

The contribution of economists to the FTC's consumer protection efforts has, over the years, been limited by the relative scarcity of academic research on the economic issues raised by consumer protection. Rationality in the marketplace is closely studied by economists; baseness and mendacity are not. [FN129]

There are exceptions. Economic analysis has demonstrated the procompetitive potential of advertising. Economic analysis also suggests that consumers are better off if they know a product's qualities before deciding whether to purchase it, and that sellers are less likely to deceive consumers when repeat purchases of a product are common. These illustrations suggest avenues of economic inquiry. But there is relatively little significant economic research on, for example, the costs and benefits of mandated octane posting or mandated cooling-off periods.

*101 As a result, economists have played a modest role in the FTC's consumer protection activities. The FTC can best encourage greater involvement by devoting more resources to basic research on consumer protection issues. (In addition, the reasons why economists should have important roles in fashioning and supervising antitrust decrees also apply to consumer protection decrees.) Much remains to be done. It is important for economists at the FTC to learn how retail markets for consumer goods actually work. It also is important for consumer protection attorneys to learn, or be reminded, how seemingly sensible remedies in these markets may have unexpected costs and drawbacks. Properly harnessed, economic analysis has the potential to shape consumer protection policy in much the same fashion as it influenced antitrust.

B. ECONOMIC ANALYSIS AND THE ADVOCACY PROGRAM

Economists have played, and should continue to play, an integral part in the FTC's successful competition and consumer advocacy program. It was economic research in the 1960s and 1970s, originally conducted outside the confines of the FTC, that began documenting and tallying the costs to consumers of many government regulations that hindered or eliminated competition. Economists at the FTC, familiar with this literature and operating in an environment where exposure to these regulations was common, were among those who realized that consumers could benefit more from successful competition advocacy than from some antitrust cases.

In the competition advocacy program, economists should continue to serve as partners with the legal staff. Attorneys generally will know how best to achieve the removal of an anticompetitive regulation, or to prevent its adoption. Attorneys also may have a comparative advantage in sniffing out anticonsumer regulations. But economists generally are better suited to sorting out the economic consequences, direct and secondary, of particular regulations; indeed, because estimating the economic burden of regulations is often difficult, advocacy may require more economic sophistication than litigation. Since advocacy cannot be carried out adequately without substantial economic input, criticism of the FTC's allocation of resources to economists, tied, as it occasionally is, to economists' participation in the advocacy program, is misplaced. [FN130]

C. ECONOMIC RESEARCH

The FTC has succeeded in attracting some unusually talented economists. Their impact has been evident in the central role played by economic*102 analysis in case selection and prosecution, and competition advocacy. It has not been as evident in improving the FTC's economic research mission, however, largely because staff

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economists have shortchanged inquiry into the structure and conduct of actual industries in favor of more purely academic topics. [FN131]

The 'working papers' of the FTC's Bureau of Economics, along with the publication of research reports, monographs, and conference volumes, [FN132] represent the pure research contribution of economists at the agency. Scrutiny of the Bureau's working papers, however, reveals that some papers concern topics far removed from actual industry organization and conduct. Further, they have little impact on antitrust scholarship or judicial opinions. A study of 165 numerically-sequenced working papers found that only eighteen had been cited in law reviews, only one in a judicial opinion. [FN133]

The FTC's research should have a different orientation, one that closely conforms to the agency's mandate 'to gather and compile information concerning . . . the organization, business, conduct, practices and management of any person . . . whose business affects commerce.' [FN134] In tune with this mandate, the FTC should not significantly fund research at the frontiers of economic theory, econometrics, or even industrial organization. [FN135] Instead, the FTC should concentrate on becoming the single most important repository of knowledge about the actual operation *103 of major U.S. industries. [FN136] Economists at the FTC regularly should be researching these industries, updating older studies, and publishing their results. As an example, the FTC's influential study of the brewing industry was unlikely to have been done by academic economists. [FN137] Studies such as this may be a source of antitrust action, or a justification for antitrust inaction, and can increase confidence that correct decisions are being made.

In addition to striving to understand the functioning of American industry, FTC economists, working with lawyers where appropriate, should seek to improve our understanding of the economic consequences of the American antitrust system. For instance, the debate about resale price maintenance has been enriched by an FTC study of all 203 private and public resale price maintenance cases reported during 1976-1982. [FN138] This kind of study should be the norm, rather than the exception. Too rarely have economists systematically studied the consequences of blocking or permitting controversial mergers. With one major exception, [FN139] our knowledge of the consequences of private antitrust enforcement-which still constitutes the great bulk of antitrust activity-remains largely anecdotal. Part of the FTC's research mission should be to improve our understanding of the antitrust system, and to identify and learn from its successes and failures. That mission should include improving our understanding of consumer protection enforcement.

A focus on the functioning of various industries, and on America's antitrust system, is simply a matter of good stewardship. Absent FTC support, research at the frontiers of economic theory will continue to flourish in universities across the country. On the other hand, modern academic research in industrial organization rarely undertakes the sort of systematic, institutional study of real-world industries and activities that we are suggesting for the FTC. If FTC economists do not undertake the task, it is difficult to see who else will. Moreover, FTC economists could then use this information, and modern economic theory, to consider and propose new antitrust enforcement directions.

Some argue that the economic outlet for pure research by economists at the FTC is important for recruiting and retaining high quality staff. *104 The case is easily overstated. Some of the best economists at the FTC have not been aggressive in publishing papers for academic consumption. If internal advancement within the Bureau of Economics is seen to come from research that results in solid industry studies, instead of publications on topics outside the scope of antitrust and consumer protection, economists at the FTC will respond.

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To be sure, economists who see the Bureau of Economics as a stepping stone to an academic position will be less likely to join the Bureau with such a change in its research focus. Historically, however, few economists depart staff positions in economics at the FTC for academic positions. Most who leave enter private sector economic consulting or shift laterally to other government agencies. For these, a reorientation of economic research at the FTC will not pose occupational costs. And for those FTC economists whose professional advancement requires forays into nonantitrust and non-consumer protection research, or who wish to publish articles in mainstream economic journals, the Bureau of Economics could adopt a leave of absence program that would allow them to take visiting appointments at universities or with research organizations. While at the FTC, however, economists engaged in research should endeavor to understand how actual market processes work themselves out in the myriad industries that make up the American commercial landscape, and the role that antitrust litigation plays in influencing these industries.

D. CONCLUSION

Not without some controversy, the role of economists at the FTC has evolved; they are now respected, professional colleagues of FTC lawyers. We applaud this development. It must continue if the Commission is to bring important cases that make economic sense. The most important change for the Commission to make concerns its research agenda. FTC economists should use their comparative advantage in understanding how industries actually function to make the FTC the major repository of knowledge about the operation of American industry-including retail markets for consumer goods-and of antitrust and consumer protection enforcement.

IX. RESOURCES

For fiscal year 1979, which ended September 30, 1979, the Commission employed 1,746 workyears. A decade earlier the FTC had employed 1,311 workyears, but the number of FTC workyears increased steadily during the 1970s. Since 1979, Congress has provided funds for significantly fewer people; 1,719 in 1980, 1,491 in 1982, 1,238 in 1984, 1,107 *105 in 1986, 986 in 1988, and 923 (projected) for 1989. [FN140] Today there are 124 lawyers in the Bureau of Competition, 118 lawyers in the Bureau of Consumer Protection, and 115 lawyers in the regional offices. [FN141] Economist workyears fell 21 percent from 1980 to 1989. [FN142] Of course, many of the tasks on which Commission employees worked 10 years ago, such as large structural antitrust cases and ambitious rulemaking proceedings, are unlikely to be prominent in the future. But even though the Commission could not find useful employment for all of its staff 10 years ago, the current employee level is cause for serious concern.

The Commission's changes in enforcement direction in recent years cannot be attributed solely to declining resources. These changes stem in part from conscious choices about enforcement policy. But even if one agrees with those choices, additional resources, as well as better use of its resources, would aid the FTC's mission. This would allow the FTC to undertake new enforcement initiatives. It would permit the FTC to better develop and apply its economics expertise. [FN143] The Hart-Scott-Rodino process, with its repeated demands for quick legal and economic investigation and judgment (and court challenge, if necessary), has imposed unprecedented burdens on the staff, especially because of the recent increase in merger activity. The staff participants in that process need more relief than is currently available-relief that should come in the form of energetic, entry-level hires.

The Commission needs a stable environment in which to pursue its mission, and the budget problems of re-

cent years, with the resulting reductions in force, have not provided that environment. [FN144] The decline ***106** in real resources should be halted, and an increase in resources provided. If Congress does appropriate more resources, the increase should be phased in over a two-or three-year period to allow the Commission to hire attorneys and economists at a junior level.

Although the Commission should not have had such reduced resources in the last few years, we doubt that the FTC has spent its money as wisely as possible. As the Commission has shrunk in size, its staffing patterns have made it top-heavy, both in the operating bureaus and at the Commission level. Moreover, an excessive percentage of supervisors is not just a waste of resources. It also can interfere with an agency's effectiveness by making the decision-making process more cumbersome. Although we did not study this issue in depth, we received enough complaints to persuade us that the Commission should give this problem serious attention.

At least in very recent years, the Commission also appears to have disproportionately allocated resources to the regional offices. Regional office workyears were about 12 percent higher in 1988 than in 1987, even though overall Commission workyears declined. [FN145] This was probably not the most prudent response to budget difficulties. Regional office investigations take longer, and few observers would argue the regional office staffs are superior to those in Washington. [FN146] Moreover, most of the regional offices are small, and at a certain level of staffing, offices simply are not cost-effective. [FN147]

***107** Especially in the current resource bind, regional offices should not be operated as independent units providing the full range of Commission activities, and it will rarely make sense to base national programs in those offices. Instead, regional offices should be the Commission's presence in their areas. Their staffs should work closely with headquarters personnel on a specified range of activities, and concentrate on credit, fraud, and other matters for which their greater accessibility to consumers is particularly valuable. [FN148]

X. THE CONGRESS [FN149]

The 1969 Report recognized that, if its proposals were to be implemented and the FTC were to play the important role that was anticipated, the FTC 'must have the continuous vigorous support of the President and the Congress.' [FN150] During much of the 1970s the FTC enjoyed this kind of support. Those days ended, however, and since then the FTC has been criticized for attempting either too much or too little. The brief period of enthusiastic support turns out to have been an exception. [FN151]

Several factors contributed to the Commission's fall from favor. Legislative preferences changed, in part because of changes in the leadership of the congressional committees responsible for the FTC. Partly in response to the congressional grant of new powers, the Commission had launched a series of litigating and rulemaking initiatives which taxed its resources, raised questions about its judgment, and stirred up a hornet's nest of soft-drink bottlers, funeral directors, used car dealers, and others. As a result, the Senate Commerce Committee concluded oversight hearings by observing that 'in many instances the FTC had taken actions beyond the intent of Congress.' [FN152]

***108** The Commission has been unable to ignore this criticism. Moreover, since 1980 Congress has failed to reauthorize the Commission, and has enacted numerous restrictions on the FTC, both in substantive law and in appropriations bills. [FN153] The FTC's vulnerability to criticism is particularly troubling because of its potential impact on the role of the FTC described above.

Several of the FTC's characteristics work together to make it unusually vulnerable to congressional criticism. The FTC's broad authority makes it an inviting target. Section 5 is deceptively simple, and its elasticity tempts members of Congress to urge an expansionist enforcement program—a program that may be subsequently attacked. The FTC's array of alternatives for enforcement and guidance makes less compelling a claim of impotence. One of these alternatives, rulemaking, resembles legislative drafting more than law enforcement, and thus is a process that Congress may feel especially qualified to critique. Moreover, the prospect of an industry-wide rule is likely to stimulate an adverse political response.

The Commission has no natural constituency. Few important, organized groups depend on the FTC to provide an essential service. On the other hand, the Commission has selected some politically powerful and motivated targets, such as professionals, funeral directors, used car dealers, and state and local government agencies.

Finally, the FTC's structure handicaps its defenses. Because it is an independent agency, the White House may hesitate to support the Commission. Because they are adjudicators, commissioners must be guarded in discussing particular cases and even legal issues; yet because commissioners*109 also serve as prosecutors, respondents complain of unfair prejudgment. And the Commission's diversity—among commissioners, who are appointed at different times and cannot all be from the same party, and among professionals, who come from varying disciplines—invites internal disagreement and dissent that, although healthy in most respects, may weaken the agency in its dealings with other bodies, including Congress.

For several reasons, therefore, the FTC is unusually vulnerable to congressional criticism. Not all congressional criticism is unhealthy, of course. In the discussion that follows, we discuss appropriate and inappropriate interaction between Congress and the FTC. We also offer some suggestions for promoting beneficial interaction.

A. APPROPRIATE FTC-CONGRESSIONAL INTERACTION

Congress has an important role to play by conducting broad reviews of Commission programs and plans. When Commission enforcement policy has changed in some fundamental way, it is sensible for Congress to request an explanation; this occurred when the FTC curtailed vertical restraint litigation. Such an inquiry could include a discussion of why the agency decided not to bring a particular case, assuming that a final decision had been made. When the Commission has too little power (or too much), Congress should engage in its traditional role by enacting legislation. Congress made an important contribution, for instance, by expanding the Commission's powers during the 1970s.

Members of Congress, just as other citizens, should be free to call illegal activities to the Commission's attention, and to suggest litigation, rulemaking, and other action. So also, at least before formal proceedings begin, members of Congress should feel free to communicate their opposition to contemplated action. When the FTC has promulgated a trade regulation rule, Congress may consider its desirability and, if Congress and the President think that the rule is harmful, enact substantive legislation undoing it. [FN154]

*110 Congress should encourage the Commission to undertake important investigative and reporting projects. For instance, we understand that the Commission's useful study of its vertical restraints cases was stimulated by a congressional request. This is a good example of healthy interaction.

B. INAPPROPRIATE CONGRESSIONAL INTERFERENCE

In general, Congress should limit its review to general policies and, unless it decides to enact substantive legislation, leave specific case and rule oversight to the courts. Although its discretion is not unlimited, the FTC should discourage improper interference. Excessively detailed review and congressional or other outside intervention increase agency timidity, lessen respect for the agency, encourage circumvention of the agency's procedures, and, in short, undermine the exercise of discretion that is the agency's very rationale.

Certain congressional interference is barred by law: Congress may not investigate 'the mental decisional process of a Commission in a case which is pending before it.' [FN155] In *Pillsbury Co. v. FTC*, the Senate Judiciary Committee subjected the FTC's chairman to a 'searching examination as to how and why he reached' an interlocutory decision in a still-pending case, and criticized him 'for reaching the 'wrong' decision.' [FN156] The Fifth Circuit ruled that this behavior undermined the appearance of Commission impartiality, and set aside an order subsequently entered against Pillsbury.

Although *Pillsbury* was limited to adjudication, the concern that the Commission's mental decisional process remain inviolate extends further, as a matter of policy if not law. To the extent possible, the Commission should resist detailed review of specific deliberative decisions concerning possible litigation. More is at issue than merely a concern with the appearance of impartiality. Congress entrusted a body of experts with broad discretion because it believed that this would accomplish more than legislation could. The antitrust program that this Report has outlined for the FTC is risky. When Commission deliberations on particular pending or proposed law enforcement matters are subjected to detailed, public scrutiny, our recommended program becomes more difficult to achieve and the Commission's very purpose may be defeated. Although it is *111 proper for Congress to suggest that the Commission consider certain kinds of cases, Congress assumes too much the role of prosecutor when it goes further by holding hearings, demanding detailed information, and otherwise pressuring the FTC to bring particular cases. [FN157]

The legal restraints on congressional participation in rulemaking are less strict, and appropriately so. The Commission is required to make copies or summaries of such communications and make them part of the rulemaking record. [FN158] Congressional participation in agency rulemaking may lead to the overturning of a rule only where the participation was 'designed to force the agency to decide upon factors not made relevant by Congress in the applicable statute,' and where the agency's determination was 'affected by those extraneous considerations.' [FN159] Nonetheless, the concern with protecting the mental deliberative process of the Commission remains, and the kind of searching predecisional scrutiny that was objectionable in *Pillsbury* would be objectionable in a rulemaking context as well. With rulemaking, too, excessive interference can defeat the agency's purpose.

Congress should act by passing generally applicable, substantive legislation, with the participation of the appropriate substantive committees. [FN160] If part of the economy should be exempt from antitrust scrutiny, Congress should immunize it from attack by all government and private litigators. But it makes no sense, and is harmful to the FTC, to Congress, and to our system of government, to disable only that agency from enforcing rules that continue to be generally applicable. Congress also causes damage whenever it circumvents the committees responsible for the FTC by acting through appropriations bills. These committees are the principal repositories of FTC expertise, and it is with these committees*112 that the Commission should be regularly consulting. Efforts to achieve effective oversight are frustrated when these committees do not participate in making important changes.

C. SUGGESTIONS FOR IMPROVING FTC-CONGRESSIONAL RELATIONS

The Commission should take the following steps to maintain and improve its relations with Congress:

1. The FTC should take the initiative to keep Congress apprised of its activities and initiatives. It rarely makes sense to surprise congressional leaders.

2. Conversely, it is important for commissioners to consider whether congressional inquiries are appropriate. Leadership of the Commission is a trust. When Congress is intervening in Commission affairs in excessive detail, the leadership must protest, whether or not a particular matter is of immediate importance. Even if current Commission leaders are unconcerned about the matter being addressed, their duty to future commissioners obligates them to encourage Congress to limit itself to appropriate oversight. It is important that harmful requests and actions be identified as such and brought to Congress' attention. [FN161]

3. The Commission should make its policies more clear through increased use of rules, guides, and policy statements, as was recommended in Section VI.

4. Prompt decision-making helps. Long delay, whether justified or not, is a source of constant irritation to respondents, lawyers, and the public. People lose respect for an agency that does not function well, and delay is an easily measurable test of efficiency, if not of ultimate effectiveness. Promptness also reduces the chance that congressional leadership will change during the pendency of a proceeding, and thus lessens the chance of opposition by new congressional leaders.

5. Respect is critical to congressional relations, and avoiding unnecessary delay is only part of the story. Congressional relations are likely to be smoother if Congress respects the agency's leaders. [FN162]

*113 XI. DUAL FEDERAL ANTITRUST ENFORCEMENT

This Committee does not pretend to bring novel insight to the debate about the wisdom of dual enforcement of the antitrust laws. Nonetheless, we considered the issue, and we record here our thinking. We share the common unease about whether the ideal federal antitrust structure would feature two enforcement agencies. But while dual enforcement imposes some costs, it also provides some benefits. It has wide political support and change is unlikely. A majority of us conclude that the case for proposing abolition of dual enforcement has not been made. What follows is an exposition of that majority position.

A. VIRTUES OF UNITARY ENFORCEMENT

Were we writing on a clean slate, many of us would favor a single federal antitrust enforcer. It would save some resources, since support services could be consolidated and top-level overhead could be reduced. It would eliminate the inherent potential of two federal agencies adopting differing views of antitrust law, thereby holding companies to different standards. Enforcement officials would enjoy easier access to all of the federal antitrust expertise on particular industries. These and other reasons have been developed elsewhere, [FN163] and need not be discussed in detail here.

Those favoring a single antitrust enforcer note that federal law enforcement generally is under unitary control, and conclude that antitrust is not so exceptional as to justify departing from this model. Dual enforcement

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may present advantages in specific situations, but these advantages are seen as insufficient to depart from the basic federal model, were the enforcement system being designed anew.

B. ALTERNATIVE STRUCTURES FOR UNIFICATION

Those of us attracted to unitary enforcement are divided on where it should be consolidated. Some Committee members would favor consolidating antitrust and consumer protection in the Justice Department, some would consolidate consumer protection and civil antitrust in the FTC or another separate agency, and some would consolidate antitrust in the Justice Department and establish a federal consumer protection agency.

*114 There is substantial agreement on the value of combining antitrust and consumer protection responsibilities. Both programs are improved by inclusion in a single agency. Occasionally it will be valuable to debate whether a particular problem is better solved by antitrust or consumer protection tools. [FN164] More routinely, the quality of decision-making about one kind of issue will be increased by a sensitivity to the concerns and approaches of the other program. It is particularly beneficial for consumer protection decisions to be informed by an understanding of antitrust's concerns with economic efficiency. [FN165] Benefits also occur from the exchange of personnel between programs. Economists attracted by an interest in antitrust can teach valuable consumer protection lessons; lawyers can benefit from litigating a variety of cases, some of which require lengthy development of facts and analysis, some of which require appearances in court. Antitrust and consumer protection complement each other; indeed, antitrust is a particularly potent form of consumer protection.

Some Committee members would have combined antitrust and consumer protection in the Justice Department. These members argue that it would be a mistake to separate civil enforcement from criminal enforcement, which must remain at Justice. They note that criminal and civil experience develop complementary skills, and that the path an investigation will take is not always obvious at the beginning. These Committee members also value presidential accountability. They argue that the FTC's vaunted independence has been bought at a steep price. Rather than being liberating, the absence of direct presidential accountability has made the FTC unduly subject to pressure from Congress and from competitors and other special interests.

Other Committee members would have separated criminal from civil antitrust, and given the latter responsibility to a separate agency also charged with consumer protection. They note that the Antitrust Division's Director of Operations primarily handles criminal matters, while *115 his deputy primarily handles civil matters. Over time the criminal efforts of the Division have come to resemble those of other criminal prosecuting teams. [FN166] Civil and criminal enforcement differ markedly in their procedures (CIDs and the like instead of grand juries) and their inquiry (economic consequences instead of the existence of an agreement). Although combining civil and criminal antitrust has advantages, it is not nearly as essential as combining antitrust and consumer protection.

These Committee members also are impressed by the possible advantages offered by administrative adjudication (see discussion below), and accordingly continue to believe that the ideal structure would offer an alternative to federal court adjudication. For some, the preferred model would be a multi-member special trade court. For others, the ideal would be a single administrator, similar in function to the head of the Environmental Protection Agency. Whatever the exact structure preferred, these members agree that antitrust adjudication before economically sophisticated experts—assuming such individuals could be appointed—would be superior to adjudication in the federal courts.

Thus, various Committee members would have preferred a number of different structures as the ideal. Most members are impressed by the virtues of entrusting federal consumer protection, civil antitrust enforcement, and perhaps criminal antitrust enforcement to a single division or agency-if the question were being decided for the first time.

C. VIRTUES OF DUAL ENFORCEMENT

The benefits or possible benefits of the existing system concern resources, reassurance, and expertise. There is some risk that abolishing an antitrust agency would reduce antitrust enforcement resources, either because only part of the formerly available resources would be shifted or because, if the Division were the surviving entity, resources might subsequently be redirected to other enforcement priorities. The availability of adequate resources is especially critical given the many major mergers currently proposed. The Hart-Scott-Rodino merger review process does not permit delay. Dual enforcement offers flexibility because both agencies engage in merger enforcement; if one agency is unable to *116 shift adequate resources into merger enforcement, the other may be able to do so.

The second benefit is reassurance. Antitrust enforcement is important, and many of us see value in having one federal antitrust agency backstop another. Substantial harm could occur were antitrust consolidated into a single agency that then failed to function effectively.

There also may be value in reassuring Congress. The antitrust statutes and the FTC Act are unusually broad. Congress has trusted the courts and the FTC to provide detailed guidance. Congress may have done this in part because it expected a special relationship with the FTC. Where it not for that relationship, and the outlet for congressional concerns that it provides, Congress might feel compelled to legislate in the antitrust area with greater specificity-which would generally be unfortunate.

The third possible benefit of dual enforcement is expertise in judging and prosecuting. Although the FTC's record as an adjudicator is mixed, [FN167] many Committee members believe that the FTC continues to have the potential to conduct economically sophisticated adjudication, or at least to serve as an alternative adjudicatory forum that can function as satisfactorily as federal courts. In part because of the decline of per se rules, an understanding of economics is becoming essential to sound antitrust adjudication. Even an economically sophisticated jurist has trouble applying the rule of reason well without the luxury of time. Yet all too often federal judges lack both economic expertise and time.

There also are advantages in having antitrust enforcement decisions made by a multi-member agency. The best example is provided by merger enforcement. Frequently, the critical question in merger litigation*117 is whether a complaint will be filed. Time and again, parties abandon or restructure proposed transactions in the face of a federal complaint; when they proceed, they often lose in court, at least when the FTC sues. Our system of government traditionally has entrusted many critical legal decisions to multi-member panels (e.g., three-member courts of appeals panels, the nine-member Supreme Court, and multi-member independent agencies). Multiple voices may improve quality and increase public trust. With the critical merger enforcement decision having moved from the courts to the prosecutors, there is virtue in preserving a multi-member prosecuting agency. [FN168]

In addition to the benefits and possible benefits of dual enforcement, those Committee members favoring its retention are impressed by the apparent absence of real harm. Critics of dual enforcement usually point to the

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waste that stems from having two federal agencies, to increased uncertainty, to questionable case selection, to flawed adjudication processes, and to the lack of any genuine expertise. These points are worth considering briefly.

Most Committee members doubt that dual enforcement wastes substantial resources. Consolidation of support services such as libraries could save only a little. Even if there is a minimum efficient size for antitrust enforcement agencies, below which agency leadership resources would inevitably be used inefficiently, many Committee members doubt the FTC and the Antitrust Division have shrunk below this threshold.

Many Committee members also doubt that dual enforcement presents substantial problems of uncertainty. Although Section 5's wording differs from that of the antitrust laws, the FTC has interpreted them as being the same or very similar, and recent court decisions have rebuffed the FTC when it interpreted Section 5 expansively. [FN169] The area of greatest interagency overlap is merger enforcement, but a Committee survey of leading merger lawyers found almost unanimous agreement that dual enforcement has created little uncertainty and has prevented very few transactions. Most lawyers surveyed perceive that the two agencies evaluate mergers by similar standards. Moreover, the Hart-Scott-Rodino process permits relatively quick, inexpensive government merger reviews, and thus clients are undeterred by uncertainty. Of course, uncertainty *118 costs would rise were the areas of overlap between the agencies to increase, and the agencies to adopt significantly different antitrust policies. In part because the agencies are aware of this risk, most Committee members are not persuaded that the uncertainty cost of dual enforcement is high. [FN170] Moreover, if the agencies adopted substantially different policies, the President might be able to use his supervisory authority to encourage greater consistency. [FN171]

There is general agreement that the FTC has engaged in some questionable case selection over its history. Some on the Committee believe that this has been caused in part by the agency's rather amorphous mandate and by its vulnerability to congressional pressure. Others point to the cases that were brought by the Antitrust Division that have now fallen from favor, [FN172] noting that the FTC has not had any monopoly on prosecutorial misjudgment. The Committee is not persuaded that the likely costs from future questionable case selection are sufficiently great to justify abolishing the FTC's antitrust role.

FTC adjudication is considered above as a possible strength, but the agency's perceived lack of expertise is a greater concern. The agency is at the mercy of the presidential appointment process, and without first-rate commissioners the agency cannot serve its intended role. [FN173] Although the Committee is troubled by the uneven quality of FTC appointments, our concern is insufficient to persuade a majority of us that the FTC's role in antitrust enforcement should be ended.

A majority of the Committee have concluded that, on balance, it should not recommended consolidating antitrust enforcement in a single agency. Dual enforcement has certain benefits and imposes only limited costs. Moreover, antitrust enforcement is less 'dual' than sometimes thought. The Antitrust Division generally limits its activities to criminal antitrust *119 enforcement and merger enforcement, and ever greater percentages of federal merger cases are brought by the FTC, not Justice. To a large extent, therefore, the United States has shared, not dual, antitrust enforcement. Perhaps this trend should continue; in any event, a majority of the Committee believe that the case for ending the FTC's role has not been made.

XII. UNITY OF FUNCTIONS

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The debate about the merits and problems of the FTC's dual roles as prosecutor and adjudicator has raged for years. [FN174] Nothing would be served by repeating the standard arguments at great length. Instead, we set out briefly the considerations that motivate a majority of us to conclude that the current unity of functions, although troubling, is superior to the alternatives and, indeed, flows logically from our conception of the Commission as an adjudicator of difficult antitrust issues. No thoughtful observer is entirely comfortable with the FTC's (or other agencies') combining of prosecutory and adjudicatory functions. Whenever the same people who issued a complaint later decide whether it should be dismissed, concern about at least the appearance of fairness is inevitable. The distinction between deciding whether a complaint should be issued and whether it should be dismissed, even if real, is subtle. The slenderness of this distinction is made more acute by the FTC's annual obligation to justify its expenditures. Tension may arise when an agency that has cited an important proceeding as part of its budget requests is asked to dismiss that proceeding as unwarranted. Finally, commissioners who have recruited and promoted lawyers and other professionals, and who encounter these professionals daily, may be uncomfortable ruling against them.

Those who argue that the Commission's unity of functions should be ended suggest two principal alternatives. One would direct the Commission to bring all of its cases in federal court; [FN175] the other would remove the prosecutorial function from the control of the Commission. The 1969 Report urged that the Commission staff be given the authority to file complaints; [FN176] others have advocated assigning the role of prosecutor to a Commission lawyer, who would be appointed by the President. This is the NLRB model, which was recently endorsed by Commissioner Terry Calvani. Rulemaking authority could lie with the prosecutor, with the commissioners, or with the prosecutor subject to Commission review. *120 Another alternative would involve reconstituting the Commission as a special trade court, perhaps to hear cases brought by the Antitrust Division or even private litigants, as well as by the FTC prosecutor. [FN177] Combinations of these models and other alternatives also are possible.

A. THE ADJUDICATIVE ROLE

Those who favor requiring the Commission to file its cases in federal court—and there is little support on the Committee for this position—argue that courts are specialists in adjudication, whereas the Commission specializes in the kind of policy balancing identified with rulemaking and prosecutorial discretion. Those who favor this model point to the examples of merger enforcement and consumer fraud, where the Commission operates principally as a prosecutor: deciding which cases to bring, settling cases, and litigating cases before federal judges. The process works well. In each instance the decision of which cases to bring is important and often outcome-determinative, since the FTC settles many cases and loses relatively few. Moreover, the Commission is free to issue guidelines and policy statements and to intervene before various governmental bodies. If anything, its ability to do so would be enhanced by abandoning its adjudicative function. Finally, federal courts have talented judges with impressive credentials, who know the rules of procedure, enforce discipline, and resolve cases with some dispatch.

Nonetheless, most Committee members do not favor ending the FTC's adjudicative role. This conclusion stems from our conception of the Commission's antitrust role and, in part, its consumer protection role. As discussed in Section IV, FTC administrative adjudication is well suited to pursuing challenging cases, usually applying the rule of reason, or, for per se rule cases, requiring the initial resolution of difficult legal issues. These cases often require the careful development of a factual record and a sensitive application of difficult legal principles. This takes time and expertise. It cannot be done at the preliminary stage when one is deciding whether

to issue a complaint; it can only be done through adjudication. Accordingly, to strip the Commission of its adjudicative role *121 would frustrate one of its principal functions. Similarly, administrative adjudication can be an effective method of addressing complicated consumer protection issues, such as may be present in deception or unfairness cases. Particularly for these rather vague legal standards, there can be virtue in the consistency that can be generated by administrative adjudication.

B. THE PROSECUTORIAL ROLE

Several members of the Committee favor eliminating the commissioners' prosecutorial role through one of the approaches noted above. They argue that the commissioners' most important role is as adjudicators, and this should be preserved at the cost of delegating their prosecutorial responsibilities. They reject the suggestion that federal courts are superior adjudicators, arguing that district judges lack the time, temperament, and expertise to learn the kind of sophisticated economics that ought to be considered in many FTC cases. Indeed, these Committee members hope that limiting the Commission to an adjudicative role might further enhance its expertise by attracting commissioners with judicial dispositions and by encouraging them to help shape and manage litigation. They also argue that the Commission's trial staff is entitled to the full support of (and supervision by) top management, which is impossible today but which could occur if the staff were headed by a presidentially-appointed prosecutor. These Committee members argue that the current unity of functions creates an unacceptable perception of unfairness that taints the agency's decisions; they would solve this by eliminating the agency's prosecutorial function.

A majority of Committee members are unpersuaded. In 1988, the FTC filed more than half its complaints in federal court. [FN178] Shifting to an exclusively adjudicatory model would eliminate the commissioners' role in these cases—typically merger, fraud, and credit practices cases, and cases challenging violations of rules—which are among the most important cases brought by the Commission. Merger cases, especially, call for the kind of expertise and balanced reflection that the Commission is supposed to bring to its work. Relinquishing this responsibility would be too large a price to pay.

Shifting to an exclusively adjudicatory model would also hamper the varied and creative use of the broad range of tools that characterizes the Commission's work at its best. A trade court would presumably not issue guidelines or policy statements. Further, the impact on the Commission's *122 rulemaking function is unclear: it might shift to the prosecutor, thus following the OSHA model, or it might remain with the commissioners. Either way, each decision-making person or body would have fewer remedies from which to choose. Also, some members of the Committee worry that limiting the Commission to adjudication might make it more difficult to attract talented, experienced commissioners.

C. UNITY OF FUNCTIONS

Largely for the reasons suggested above, a majority of Committee members believe that the current unity of functions should continue. This conclusion is not reached without some uneasiness. In reaching it, however, the Committee is comforted by several factors:

1. FTC administrative adjudication inevitably takes time. [FN179] Indeed, simple matters are inappropriate for FTC administrative adjudication. Given this, and the regular turnover of commissioners, the unfairness argument is often only theoretical; it would be even more theoretical were terms shortened, as some suggest.

2. Given the length of time that adjudication takes, it would be quite plausible for a commissioner who voted for a complaint to conclude that changes in market conditions, in the law, or in economic learning make ill-advised what once seemed sound.

3. The Commission has not hesitated to dismiss its complaints. During the 1980s, for instance, the Commission dismissed 45 percent of its complaints, including approximately 60 percent of its antitrust complaints, partly because of changing views about antitrust policy. [FN180]

4. The argument that commissioners will worry about budgetary implications when deciding cases is unconvincing. [FN181] The increasing predominance of federal court cases lessens its force. Moreover, the argument is remotely plausible only for very large, complex cases, yet it is these cases that are most likely to take sufficiently long for turnover to reduce the appearance of bias.

Accordingly, a majority of the Committee's members believe that the FTC should retain its unity of functions. All of us recognize that this is awkward, and the Commission should continue to be sensitive to the *123 awkwardness. When a commissioner has unduly prejudged an issue, he or she should consider recusing him- or herself, as a matter of discretion. With sensitivity, however, the problems can be made manageable, and the substantial benefits of a unity of functions can be preserved.

D. POSSIBLE STRUCTURAL CHANGES

The Committee considered two minor structural changes that might improve the functioning of the FTC: changing the length and timing of commissioner terms to coincide with those of SEC commissioners, thereby reducing FTC commissioner terms from seven to five years, and reducing the number of commissioners from five to three. The Committee was unable to achieve consensus on these changes. The reasoning of supporters and opponents is noted here.

1. *Commissioner Terms*

Some Committee members believe that the agency would function better if the length and timing of its members' terms were patterned after those of SEC commissioners. Each of the SEC's five commissioners has a five-year term, so a term expires every June. FTC commissioners are authorized to serve seven-year terms, so for five years a term expires each autumn, and then for two years no term expires. In actual practice, however, most commissioners have served less than seven years.

Committee members favoring the SEC model cite four advantages. First, it assures that shortly after his inauguration a new President will be able to appoint a commissioner who may be designated chairman. In contrast, a President may not be able to name even a single FTC commissioner until the autumn of his second or even third year in office. A presidential election should result in the possibility of prompt new FTC leadership. Second, the SEC model guarantees that each President will have appointed a majority of commissioners shortly after his term is half over. In contrast, a President can leave office without appointing a majority of FTC commissioners, which can hinder the gradual evolution of FTC policy.

Third, seven-year terms are so long that no one expects commissioners to serve them. If terms were shorter that expectation might change, which might improve the Commission by lengthening the average period of service. Fourth, the frequent availability of partially expired terms means that many commissioners are appointed

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to truncated terms. For instance, only one of the five current commissioners began with a guarantee*124 of a seven-year term. [FN182] Commissioners appointed to very short terms inevitably begin their service by contemplating renomination and confirmation, which threatens the FTC's independence. If shorter terms resulted in a higher percentage of commissioners serving them out, this problem would be reduced.

On the other hand, some Committee members prefer the existing seven-year terms. They observe that because so many commissioners resign without serving full terms, Presidents are virtually assured of the opportunity to appoint a commissioner during their first year in office. These Committee members doubt that shortening the length of terms would induce commissioners who otherwise would have served less than five years to serve full terms. They also note that the change would shorten the length of service of those commissioners who do serve full terms. Finally, they worry that the change might reduce the independence of commissioners interested in long tenures, by requiring more frequent renomination.

2. Number of Commissioners

Some Committee members would prefer to have only three commissioners. This reduction would increase each commissioner's responsibility, which might make the positions more attractive and probably would increase the seriousness with which appointments are made and accepted. It would permit the agency to reverse the gradual increase in the percentage of its resources (and of its more talented personnel) devoted to management and supervision. It might increase accountability. Presidential accountability would be especially increased if, as these members prefer, the reduction in numbers were accompanied by a change in the chairman's conditions of service, so that he or she served at the pleasure of the President and could be removed from the Commission without cause.

Other Committee members prefer five commissioners. The larger size permits greater diversity. It also may enhance collegiality since commissioners can form shifting coalitions. These Committee members also worry about recusal problems with a three-member FTC, especially in an era with so many dual-career couples. They fear that between recusals and delays in nominations and confirmations, a three-member FTC frequently*125 could result in two-member deadlocks. Finally, they prefer that the FTC chairman be removable from the Commission only for cause. This poses little problem with a five-member Commission, since terms regularly expire and the President can choose any commissioner to serve as chairman, but, as advocates of a three-member Commission concede, would be difficult with fewer commissioners.

XIII. CONCLUSION

Our study of the FTC has not generated recommendations for major structural changes. We declined to endorse suggestions that the FTC relinquish its antitrust enforcement mission to the Antitrust Division. A majority of us concluded that, on balance, the antitrust enforcement efforts of the FTC are a worthwhile complement to those of the Division, and that the administrative procedures available within the FTC provide valuable opportunities for the Commission to bring cases founded on new and emerging theories of antitrust.

We also declined to propose severing the agency's prosecutorial and adjudicative functions. Most of us did not feel that the union of these functions seriously impedes the FTC's work or deprives respondents of fair adjudication of complaints brought against them. The majority did not deem it necessary, therefore, to propose the creation of a trade court to adjudicate antitrust and consumer protection cases.

In the consumer protection area, we focused our attention on two generic issues: the relationship between FTC enforcement and state enforcement, and the manner in which the agency should divide its enforcement efforts between administrative actions and those brought directly in federal court. We ventured some observations on these subjects and attempted to provide advice as to how the FTC should allocate its resources and assist the states. In addition, we voiced our strong support for the Competition and Consumer Advocacy Program.

We also emphasized that it is important to both the public and the agency that the FTC provide guidance as to its current thinking on antitrust and consumer protection. 'Guidance,' as we defined it, includes a range of activities, cease and desist orders, guides, policy statements, advisory opinions, and Magnuson-Moss rules.

We urged that economists continue to participate in all aspects of the Commission's work—not only in deciding the cases or projects to be undertaken, but throughout the proceedings. We recommended that studies by FTC economists should focus on the operation of U.S. industries and the U.S. antitrust and consumer protection systems, rather than on abstract economic research.

*126 The Report also examined two other topics essential to the FTC's success: obtaining adequate resources and ensuring that Congress exercises a proper role with respect to the FTC's work. On the former topic, without selecting specific budget figures or personnel numbers, we expressed our belief that current resources are insufficient and should be gradually increased. On the latter, while we recognize Congress's obligation to oversee FTC activities, we expressed concern that Congress may have unduly interfered with the details of FTC proceedings, particularly in pending matters. Congress should continue to review the general policies of the FTC, but it should not become involved in pending proceedings, nor alter the outcome of specific decisions except by substantive legislation.

Respectfully submitted,

*127 APPENDIX A

MEMBERS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW SPECIAL COMMITTEE TO STUDY THE ROLE OF THE FEDERAL TRADE COMMISSION

Miles W. Kirkpatrick (Chairman), a Philadelphia, Pa., attorney and a member of the Advisory Board to BNA's Antitrust and Trade Regulation Report, and formerly Chairman of the ABA Antitrust Section, Chairman of the 1969 ABA Commission to Study the Federal Trade Commission, and Chairman of the FTC.

Joan Z. Bernstein, Vice President and General Counsel of Chemical Waste Management, Inc., and formerly a Washington, D.C., attorney who served as General Counsel to the Environmental Protection Administration and to the Department of Health, Education, and Welfare, and as Director of the FTC's Bureau of Consumer Protection.

Michael F. Brockmeyer, Assistant Attorney General and Chief of Maryland's Antitrust Division, and Chairman of the Multistate Antitrust Task Force of the National Association of Attorneys General.

Nancy L. Buc, a Washington, D.C., attorney and a Fellow of Brown University, who has served as Chief Counsel to the Food and Drug Administration and as Assistant Director of the FTC's Bureau of Consumer Protection.

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Calvin J. Collier, Senior Vice President, General Counsel and Secretary, Kraft General Foods, who has been Chairman and General Counsel of the FTC, Associate Director of the Office of Management and Budget, and Deputy Under Secretary of the Commerce Department.

Dr. Kenneth G. Elzinga, professor of economics at the University of Virginia, co-author of *The Antitrust Penalties: A Study in Law and Economics*, co-editor of *The Antitrust Casebook: Milestones in Economic Regulation*, and *The Morality of the Market: Religious and Economic Implications*, and a member of the Board of Trustees of Hope College.

*128 Ernest Gellhorn, a Washington, D.C., attorney, co-author of *The Administrative Process* (1st, 2d, & 3d eds.), a public member and Chair of the Rulemaking Committee of the Administrative Conference of the United States, and a member of the American Law Institute, who has served as a professor of administrative law and antitrust law at Duke University and the University of Virginia, and as dean of the law schools at Arizona State University, Case Western Reserve University, and the University of Washington.

Caswell O. Hobbs, a Washington, D.C., attorney, author of articles on antitrust and trade regulation, and a member of the Council (and formerly an officer) of the ABA Antitrust Section, who has served as Director of the FTC's Office of Policy, Planning, and Evaluation.

Basil J. Mezines, a Washington, D.C., attorney, author of *Administrative Law and Trade Associations and the Antitrust Laws*, and a member of the Advisory Board to the BNA Antitrust and Trade Regulation Report, who has served as Executive Director of the FTC and as Director of its Bureau of Competition.

Alan B. Morrison, Director of the Public Citizen Litigation Group and a member of the Administrative Conference of the United States, and formerly a visiting professor at Harvard Law School and a member of the Board of Governors of the District of Columbia Bar.

Timothy J. Muris, George Mason University Foundation Professor of Law at George Mason University Law School, co-editor of *The Federal Trade Commission Since 1970: Economic Regulation and Bureaucratic Behavior*, and formerly Executive Associate Director of the Office of Management and Budget and Director of the FTC's Bureaus of Competition and Consumer Protection.

Robert Pitofsky, Dean and Executive Vice President for Law Center Affairs, Georgetown University Law Center, co-author of *Cases and Materials on Trade Regulation*, a member of the Council of the ABA Antitrust Section, and a member of the Advisory Board to BNA's Antitrust and Trade Regulation Report, and formerly an FTC Commissioner and Director of its Bureau of Consumer Protection.

James F. Rill, a Washington, D.C., attorney, Immediate Past Chair of the ABA Antitrust Section, author of articles on antitrust and trade regulation, and a member of the Advisory Board to BNA's Antitrust and Trade Regulation Report.

Edwin S. Rockefeller, a Washington, D.C., attorney and Chairman of the Advisory Board to BNA's Antitrust and Trade Regulation Report, *129 author of *Antitrust Counseling for the 1980s* and *Desk Book of FTC Practice and Procedure*, and formerly Chairman of the ABA Antitrust Section and an FTC staff member.

J. Thomas Rosch, a San Francisco attorney who is Vice-Chair of the ABA Antitrust Section, a Fellow of the American College of Trial Lawyers, a member of the Advisory Board to BNA's Antitrust and Trade Regulation

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Report, and author of *Manual of Federal Trade Commission Practice*, and who formerly served as Director of the FTC's Bureau of Consumer Protection.

Alan H. Silberman, a Chicago attorney who is Finance Officer of the ABA Antitrust Section and a member of the Advisory Board to BNA's Antitrust and Trade Regulation Report, and who was editorial chairman of *The FTC as an Antitrust Enforcement Agency: The Role of Section 5 of the FTC Act in Antitrust Law* and coordinating editor of *The FTC as an Antitrust Enforcement Agency: Its Structure, Powers and Procedures*.

Cass R. Sunstein, a professor of administrative law and constitutional law at the University of Chicago Law School and the University of Chicago's Department of Political Science, co-author of *Constitutional Law*, and a member of the Council of the ABA Section of Administrative Law.

William L. Webster, Attorney General of Missouri and Chairman of the Consumer Protection Committee of the National Association of Attorneys General.

COMMITTEE COUNSEL: Stephen Calkins, Professor of Law at Wayne State University Law School, a member of the American Law Institute and of the Council of the ABA Antitrust Section, co-editor of *Antitrust Law Developments* (2d ed.), Secretary to the Antitrust Section of the American Association of Law Schools, and formerly an attorney advisor to FTC Commissioner Stephen Nye.

COMMITTEE DEPUTY COUNSEL: Kathleen M. H. Wallman, a Washington, D.C., attorney, and formerly a law clerk to Judges Laurence Silberman and Edward Tamm of the District of Columbia Circuit, and Judge Pauline Newman of the Federal Circuit.

COMMITTEE ASSISTANT COUNSEL: Sandra L. Spear, a Washington, D.C., attorney.

*131 APPENDIX B

CHANGES IN FTC'S STATUTORY POWERS SINCE THE 1969 REPORT [FN183]

The two decades since the 1969 Report have witnessed a number of changes in the Commission's statutory powers. Most of these changes have resulted from four statutes. [FN184] Three of these statutes generally broadened the Commission's power. However, in reaction to the Commission's use of many of these powers, the 1980 Act amendments imposed several significant substantive and procedural restrictions. The four statutes changed the Commission's remedies, rulemaking authority, investigational powers, ability to challenge mergers before consummation, and jurisdiction.

A. REMEDIES

1. *Injunctive Relief*

In 1973, the Commission was empowered to obtain preliminary injunctions in federal district court to prevent violations of FTC-enforced statutes pending disposition of the Commission's administrative proceedings. [FN185] One of the more striking developments of the past twenty years has been the FTC's increasing reliance on Section 13(b)'s second proviso, which states that 'in proper cases, the Commission may seek, and after proper

proof, the court may issue, a permanent injunction.’ [FN186] The FTC *132 has persuaded the courts to order, pursuant to Section 13(b), not only permanent injunctions, but also to enter other remedial equitable relief, including consumer redress. [FN187]

Since 1980, the FTC has invoked Section 13(b) with increasing frequency. The result has been a transformation of the FTC’s practice, particularly for consumer protection. [FN188] From 1981 through 1986, FTC complaints in federal court represented about 30 percent of all FTC complaints. In 1987, court complaints represented approximately 40 percent of the total; in 1988, more than half. [FN189] FTC workyears spent on court and administrative litigation have been comparable since 1985, and in 1988 court workyears were greater. [FN190] In the Bureau of Consumer Protection, workyears spent on court litigation have exceeded workyears spent on administrative litigation in every year, 1984 to 1988. [FN191] Not surprisingly, the number of cases pending before FTC ALJs has declined sharply during the past decade, and the number of FTC ALJs has also been declining steadily, from 13 in 1980 to three today. [FN192]

2. *Consumer Redress*

The 1975 Magnuson-Moss amendments gave the Commission the power to obtain consumer redress from federal or state courts in cases involving unfair or deceptive acts or practices. Redress may include (but is not limited to) rescission or reformation of contracts, restitution, return of property, payment of damages, and ‘public notification’ of the violation.*133 [FN193] The amendments authorize redress when the Commission proves a violation of a trade regulation rule. They also authorize court-ordered redress after an administrative proceeding has been successfully completed, but only if the challenged practice was one ‘a reasonable man would have known under the circumstances was dishonest or fraudulent.’ [FN194]

As described immediately above and in Section V.B, the FTC has increasingly used Section 13(b) to obtain consumer redress in cases involving unfair or deceptive acts or practices. Given the much greater speed of Section 13(b) litigation, it is not surprising that in recent years the Commission has relied on its authority to seek redress following an administrative case in only a handful of reported cases. [FN195] Since 1976, the FTC has won consumer redress valued at hundreds of millions of dollars in dozens of cases. [FN196]

3. *Civil Penalties*

The Commission’s civil penalty sanction has been augmented in three respects since 1969. [FN197] In 1973 the maximum penalty was increased from \$5,000 to \$10,000 per violation (\$10,000 a day for continuing violations). [FN198] In 1975 the Commission was authorized to seek civil penalties for violations of trade regulation rules. [FN199] Also in 1975 the Commission was given the controversial power to request a court to order the payment of a civil penalty by a person engaging in conduct the Commission has previously determined to be unfair or deceptive and has prohibited in a final cease-and-desist order entered against someone else, provided that the person had actual knowledge that the conduct is unfair or deceptive and is unlawful. [FN200] The Commission has invoked this power in only a few cases. [FN201]

*134 B. RULEMAKING

In 1975 the Commission gained explicit authority to issue substantive rules defining specific conduct constituting ‘unfair or deceptive acts or practices’ under Section 5. Congress detailed the rulemaking procedures to be

followed, including requirements for published notice, submission of written comments, an informal hearing, cross-examination of witnesses, scope of review and reimbursement of expenses for certain participants. [FN202]

The Commission's rulemaking authorization proved a mixed blessing, however. [FN203] In 1980 Congress erected additional procedural safeguards for rulemaking. Congress called for more detailed advance notice and for meetings between Commissioners and outside parties concerning proposed rules, and it limited compensation for outside participants. [FN204] In reaction to particularly controversial rulemaking proceedings, Congress prohibited the FTC from continuing its children's advertising and its standards and certification rulemakings, and it limited the content of the Commission's funeral industry rule. [FN205] Finally, Congress enacted a legislative veto, [FN206] which was later held unconstitutional under the separation of powers doctrine. [FN207]

C. INVESTIGATIONAL POWERS AND PROCEDURES

The scope of the Commission's investigative authority has been expanded in several respects since 1969, but it has also been narrowed in one respect. In 1973 the Commission gained the power to extract information from banks and common carriers in connection with investigations of other firms. [FN208] In 1975 the Commission's general investigative authority was enlarged beyond 'corporations' to include partnerships *135 and other legal entities as well. [FN209] In 1980, however, Congress revoked the Commission's power to investigate the insurance industry. [FN210]

Procedurally, in 1980 the Commission was authorized to issue civil investigative demands to compel oral testimony and production of documents in consumer protection ('unfair or deceptive acts or practices') investigations [FN211] The 1980 Improvements Act imposed stringent requirements to protect the confidentiality of investigational materials. [FN212]

D. PREMERGER NOTIFICATION

One of the most significant powers conferred on the Commission has been the premerger review procedure enacted in the Hart-Scott-Rodino Antitrust Improvements Act of 1976. [FN213] The Act requires parties to substantial transactions to notify the Commission and the Justice Department about the transaction, provide further information if requested, and observe a specified waiting period before consummating the transaction. The program has fundamentally changed the nature of merger enforcement by giving the antitrust agencies the necessary information to seek a preliminary injunction before most acquisitions are consummated.

E. JURISDICTION

The principal change in the Commission's jurisdiction was in 1975, to expand the scope of its subject matter jurisdiction and investigational powers from matters 'in commerce' to matters 'in or affecting commerce.' [FN214] The amendments also authorized the Commission to regulate warranties. [FN215] Congress also narrowed the Commission's jurisdiction in one minor area. [FN216]

*137 APPENDIX C

The graphs and tables included in Appendix C were developed from data provided by the Federal Trade Commission in response to a Freedom of Information Act request. The notes at the end of the graphs are an integral part of the graphs themselves. Three points deserve special attention:

First, except for 1988 data, the data for the competition mission do not reliably depict competition mission either according to industry (e.g., Health Care) or according to kind of violation (e.g., horizontal). *See Note 3.* We are told that the trends in the data are accurate, however.

Second, in designing the graphs, we have used differing scales in order to increase legibility. In reading the graphs, pay particular attention to the Y-axis scale.

Third, the time period covered by the individual graph was determined by the availability of data. When data sources reporting comparable data for different missions or bureaus were not available for the same period of time, graphs comparing the two missions only addressed the common time period.

***163 NOTE 1:** Source: Time By Activity Reports, run by FTC in December 1988 from archive tapes. Tape for 1983 was missing. Report lists hours reported by professional staff, excluding clerical and senior management staff, spent in various activities. Also, certain support offices do not report time through this system. Graph 1 shows the percentage of total Commission non-support-function professional workyears represented by each bureau and the regional offices. The legend abbreviations, from left to right, are: Bureau of Competition, Bureau of Consumer Protection, Bureau of Economics, and Regional Offices.

NOTE 2: Source: Program Status Summary Reports based on FTC time sheets. Data for each mission include workyears from Regional Office and Headquarters personnel. Graph includes only 1981 through 1987 data. Competition data were available from 1981 through 1988, but the FTC changed its reporting system for Competition workyears effective fiscal year 1988 to program codes that are incompatible with previous years' codes.

NOTE 3: Source: Program Status Summary Report for FY 88 based on FTC time sheets. Data include workyears from Regional Office and Headquarters personnel. Incompatible program codes for the competition mission preclude comparison of 1988 data with that from prior years. Before 1988, the FTC tracked Competition resources through 12 different programs: 6 industry-specific programs (Health Care, Food Industries, Petroleum, Non-Petroleum Energy, Transportation, International Antitrust (beginning in 1983)), 5 violation-specific programs (Market Power, Mergers & Joint Ventures, Horizontal Restraints, Vertical Restraints, and Compliance) and Support Functions. Commission policy preferred tracking, for example, all activity related to health care under that program, irrespective of the alleged violation. However, personnel working on matters involving one of the six industries above occasionally reported their time under violation-specific programs. Therefore, no individual program figure accurately reports all time for that activity.

Beginning in 1988, the FTC changed to six programs, with industry-specific subcategories in each. Those programs are: Pre-Merger Notification, Mergers & Joint Ventures, Horizontal Restraints, Distributional Arrangements, Single-Firm Violations (Monopoly and Predation), and Support Functions.

NOTE 4: Source: *See Note 3.* Graph 4 + Graph 5 + Graph 6 + Graph 7 + Support Functions = Total Competition Workyears. International Antitrust was added as an industry category in 1983.

NOTE 5: Source: *See Notes 3 & 4.* Natural Resources includes non-petroleum energy and other natural re-

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sources.

*164 NOTE 6: Source: *See* Notes 3 & 4. Many workyears spent on market power, mergers, or joint ventures in one of the six industries (*see* Note 3) will not appear in these numbers.

NOTE 7: Source: *See* Notes 3 & 4. Many workyears spent on horizontal and vertical restraints or compliance in one of the six industries (*se* Note 3) will not appear in these numbers.

NOTE 8: Source: Data file provided by FTC, listing all investigations opened, the date opened, the source of the investigation, the violation, program code, and organization code. Graph 8 tallies all investigations opened under program codes corresponding to the industries the FTC tracks. It includes investigations opened at headquarters and in regional offices. Investigations under each are understated to the extent they appear under a violation grouping in Graph 9. To arrive at total investigations from the Competition mission, add the numbers from Graphs 8 and 9. Energy includes non-energy natural resources.

NOTE 9: Source: *See* Note 8. Graph 9 tallies investigations opened under non-industry-specific program codes. Legend abbreviations, from left to right, are: Distributional Restraints, Horizontal Restraints, Mergers & Joint Ventures, Monopoly or Predation, and Premerger. Investigations under each may be understated to the extent they appear under an industry grouping in Graph 8.

NOTE 10: Source: List of Competition Mission Accomplishments, 1972 to 1988. Report lists violation code. From violation codes, Complaints were categorized as horizontal, vertical, and other (monopoly, etc.). Fiscal Year 1976 data include the transitional quarter, July 1 to September 30, 1976, between the June 30 fiscal year end and the October 1 fiscal year beginning.

NOTE 11: Source: *See* Note 10. Graph 11 tallies the number of Part II Consents entered per fiscal year.

NOTE 12: Source: *See* Note 10. Graph 12 tallies the number of Part III Consents entered per fiscal year.

NOTE 13: Source: *See* Note 10. Graph 13 tallies the Complaints, Parts II Consents, Part III Consents, and Preliminary Injunctions Authorized against mergers, both horizontal and vertical.

NOTE 14: Source: Program Status Summary Reports based on FTC time sheets. Data for each mission include workyears from Regional Office and Headquarters personnel. Graph 14 + Graph 15 + Graph 16 + Program Management = Total Consumer Protection Mission Workyears. Advertising Practices include general advertising, food and drug, *165 cigarette, and energy advertising. Advertising workyears also includes time spent on rulemaking for advertising. Enforcement includes rule and statute enforcement and compliance.

NOTE 15: Source: *See* Note 14. Service Industries Practices includes credence goods and services, professional services, and standards and certification. Marketing Practices includes product information, deceptive sales practices, and warranties and reliability. Both include workyears for rulemaking in their totals.

NOTE 16: Source: *See* Note 14. Credit Practices includes general credit, Equal Credit Opportunity Act, credit information, and Fair Credit Reporting Act issues. It also includes workyears for rulemaking in the totals.

NOTE 17: Source: Rulemaking Resource History Estimates (Report prepared by FTC). Report lists workyears, by Fiscal Year, spent on each Consumer Protection Rule. This graph tallies those workyears by Fiscal Year. These figures do not include enforcement of rules. They are the combined rulemaking workyears

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from Advertising, Service Industries, Marketing, and Credit reported in Graphs 14 through 16.

NOTE 18: Source: Report prepared by FTC. Tallies staff time devoted to consumer fraud investigation and compliance. These numbers are included in Graphs 14, 15, and 16.

NOTE 19: Source: Data file provided by FTC, listing all investigations opened, the date opened, the source of the investigation, the violation, program code, and organization code. Graph 19 tallies all investigations opened under Consumer Protection program codes. It includes investigations opened at Headquarters and in Regional Offices. Legend abbreviations from left to right: Advertising, Credit Practices, Enforcement, Marketing Practices, and Service Industry Practices.

NOTE 20: Source: Data file provided by FTC, listing all investigations opened, the date opened, the source of the investigation, the violation, program code, and organization code. Graph 20 tallies the number of investigations prompted by referrals from local or state governments.

NOTE 21: Source: ALJ Caseload Summary, 1979-1988, prepared by FTC. Graph shows the total number of FTC cases on the ALJ docket each fiscal year. Total = number of cases pending at the beginning of the fiscal year, plus the number of cases added to its docket during the fiscal year.

NOTE 22: Source: Internally-prepared FTC report. Graph 22 tallies total interventions per year in all non-FTC-initiated proceedings.

*166 NOTE 23: Source: *See* Note 22. Graph 23 tallies all interventions in state proceedings. Data for FY 88 were not available.

NOTE 24: Source: Time By Activity Reports, run by FTC in December 1988 from archive tapes. Tape for 1983 was missing. Report lists hours reported by professional staff, excluding clerical and senior management staff, spent in various activities. Also, certain support offices do not report time through this system. Graph 24 tallies professional time spent in Administrative Litigation by the Bureau of Competition, the Bureau of Consumer Protection, the Bureau of Economics, and Regional Offices. It excludes time spent by the General Counsel's Office.

NOTE 25: Source: *See* Note 24. Graph 25 tallies professional time spent in court proceedings by the Bureau of Competition, the Bureau of Consumer Protection, and Regional Offices. It excludes all time reported by the General Counsel's Office. Bureau of Economics personnel spent less than one-half workyear per year in this activity, so their time is excluded from the graph.

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 FN2 Dollar amounts for annual sales of business investigated, redress ordered and redress paid are in thousands.

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| Fiscal Year | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 | 1986 | 1987 | 1988 | 1989 ^{FN} | Percent Change 1980-89 |
|-------------|------|------|------|------|------|------|------|------|------|--------------------|------------------------|
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(Workyears)

| Antitrust | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 | 1986 | 1987 | 1988 | 1989 | Percent Change |
|-----------|------|------|------|------|------|------|------|------|------|------|----------------|
| ..... | 33.1 | 38.9 | 33.7 | 33.4 | 31.8 | 32.0 | 35.7 | 31.6 | 35.9 | 39.0 | +18 |

| Consumer Protection | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 | 1986 | 1987 | 1988 | 1989 | Percent Change |
|---------------------|------|------|------|------|------|------|------|------|------|------|----------------|
| ..... | 12.6 | 16.4 | 14.3 | 13.3 | 13.4 | 16.3 | 15.2 | 12.2 | 12.4 | 10.7 | -15 |

| Research | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 | 1986 | 1987 | 1988 | 1989 | Percent Change |
|----------|------|------|------|------|------|------|------|------|------|------|----------------|
| ..... | 22.9 | 22.2 | 25.9 | 29.6 | 25.8 | 24.3 | 18.1 | 15.7 | 12.1 | 7.3 | -68 |

| Advocacy | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 | 1986 | 1987 | 1988 | 1989 | Percent Change |
|----------|------|------|------|------|------|------|------|------|------|------|----------------|
| ..... | 3.8 | 4.2 | 6.1 | 7.4 | 5.4 | 6.1 | 8.1 | 6.0 | 5.2 | 3.0 | -21 |

| Part III | 1980 | 1981 | 1982 | 1983 | 1984 | 1985 | 1986 | 1987 | 1988 | 1989 | Percent Change |
|----------|------|------|------|------|------|------|------|------|------|------|----------------|
| | 6 | 6 | 6 | 3 | 6 | 1.3 | 5 | 2 | 0.0 | 0.0 | -100 |

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 FN1 Excludes Office of the Director. The sum of the rows for each year may not add to the total workyears be-
 cause of rounding.

FN2 Planned for FY 89

TABLE 3

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 AVERAG
 E MONTHS
 BETWEEN
 EVENTS
 1975-1988

| EVENT PAIRS | | AVG. MONTHS | CONSUMER PROTECTION | | COMPETITION | | |
|---------------------------|-------------------------|-------------|---------------------|-----|-------------|-----|-----|
| SOURCE EVENT | TARGET EVENT | AVG. MONTHS | ... | NUM | AVG. MONTHS | ... | NUM |
| (A) Initial Phase Invest. | Converted to Full Phase | 10 | ... | 841 | 7 | ... | 536 |

| | | | | | | |
|--|------------------------------------|----|----------|----------|----------|-------|
| | | | | | | |
| (B) Initial Phase Invest. Converted to Full Phase. | Part III Compl. or Part II Consent | 15 | ..... | ..... | ..... | ..... |
| | | | ... 185 | 12 | ... 159 | |
| | | | | | | |
| (C) Full Phase Invest. Opened. | Part III Compl. or Part II Consent | 13 | ..... | ..... | ..... | ..... |
| | | | ... 295 | 12 | ... 244 | |
| | | | | | | |
| (D) Part III Compl. | Final Order | 28 | ..... | ..... | ..... | ..... |
| | | | ... 175 | 34 | ... 171 | |
| | | | | | | |
| (E) Oral Argument | Final Order | 13 | ..... | ..... | ..... | ..... |
| | | | 22 | 16 | 45 | |
| | | | | | | |
| TOTAL (A + B + D) | | 53 | ..... | ..... | ..... | ..... |
| | | | | 53 | | |
| | | | | | | |
| TOTAL (C + D) | | 41 | ..... | ..... | ..... | ..... |
| | | | | 46 | | |
| | | | | | | |

Table 4

CONSUMER PROTECTION AWARDS

| Fiscal Year | Consumer Redress ^{FN [FN1]} | Civil Penalties |
|-------------|--------------------------------------|------------------|
| 1977 | \$ 51,790,431 | \$ 515,000 |
| 1978 | 1,524,203 | 1,108,000 |
| 1979 | 49,403,236 | 576,000 |

| | | | | |
|--------------------------|-------|-------------|-------|-----------|
| 1980 | . | 113,122,854 | ..... | 2,743,000 |
| 1981 | .... | 15,274,492 | ..... | 1,391,500 |
| 1982 | .... | 58,370,305 | ..... | 537,000 |
| 1983 | .... | 30,375,000 | ..... | 1,209,200 |
| 1984 | ..... | 7,282,000 | ..... | 709,800 |
| 1985 | ..... | 7,248,000 | ..... | 2,999,300 |
| 1986 | ..... | 6,035,000 | ..... | 1,267,000 |
| 1987 ^{FN [FN2]} | .... | 16,584,400 | ..... | 3,788,000 |
| 1988 | .... | 33,838,500 | ..... | 1,040,000 |

FN1 The listed amounts represent the sum of redress dollars ordered during a fiscal year. Redress may actually be paid out over several years, and may be in the form of goods or services for which estimated values may vary. Some redress was never paid; the amount actually paid is unavailable. This does not include redress ordered through arbitration or through fulfillment of warranty claims.

FN2 FY 1987 Consumer Redress total includes \$4,400,000 in accounts receivable that will not be collected as part of redress orders.

***171 SEPARATE STATEMENT OF EDWIN S. ROCKEFELLER**

I agree with the Committee's basic recommendation to leave things pretty much as they are, so my disagreement with many opinions contained in the Report is of no consequence. There is one point, however, on which it would be irresponsible to remain silent—the matter of 'resources.' The Report recommends an increase but does not explain why, for what, or from where the money is to come (the Justice Department? Social Security? new taxes?). The Report contains no basis for evaluating whether the present spending level is too low, too high, or just right, except for the pronouncements that the staff is 'top-heavy' and money is being 'disproportionately allocated' to regional offices.

The Committee was appointed to consider how the FTC should fit into our system of government, not how much money to spend on it. The recommendation for a spending increase is without foundation, illogical, and beyond the Committee's reason for existence.

***173 SEPARATE STATEMENT OF ALAN H. SILBERMAN**

The separate statement which follows is submitted with extreme reluctance. The work of the Special Com-

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mittee has been accomplished with extraordinary collegiality, with a sense of respect for divergent views and the fullest possible exposition and debat  of issues. It has been a signal privilege to participate in that process. In addition, the Report fairly reflects positions which were advanced but did not attain majority support, and I do not hesitate to concede that at the moment of decision the comments set forth below were supported by the very smallest of minorities (albeit a passionate few). Nonetheless, I believe it is useful to detail a separate position on the issue of whether the FTC should continue to combine prosecutorial and adjudicative functions so that the record will continue to reflect the fact that (at least in the view of a few Committee members) this question continues to be one which merits detailed consideration.

The Committee majority notes that '[n]o thoughtful observer is entirely comfortable' with an agency which combines prosecutorial and adjudicative functions. Indeed, the FTC's current 'unity of functions' is characterized as 'troubling.' Despite these doubts, and a debate which has 'raged for years,' the majority opts for a continuation of the status quo.

The majority acts in the belief that the dual prosecutorial-adjudicative function (1) is superior and (2) flows logically from a conception of the Federal Trade Commission as an agency which will, in the future, deal with challenging antitrust issues. I share those objectives: the FTC should have an organizational structure which can fairly be called 'superior' and it should be one which is particularly appropriate to an agency dealing with antitrust and consumer protection issues of major significance. However, I believe that the pursuit of those objectives points toward a different conclusion; viz., the development of separate, specialized prosecutorial and adjudicative units within the present agency.

Appearance of impropriety and the possibility of unfairness which attends the dual role arrangement are the concerns most commonly voiced, and for good reason. As the Antitrust Section noted long ago, *174 an organizational structure of this type is 'conceptually wrong.' [FN217] More importantly, I believe it limits the Commission's ability to act more efficiently.

The Committee correctly notes that the FTC can have a special role in complex antitrust and consumer protection issues. If we expect the FTC to function as an adjudicator of serious (and hotly debated) issues; if we expect it to function by using expertise to focus and guide adversary inquiry; and if we expect the FTC to carefully articulate the scope and rationale of its decisions, we should give those who carry out these functions an organizational structure which confers the same degree of status and respect as is accorded others who discharge similar functions. The principle that 'form follows function' applies beyond architecture. It is a salutary rule for organizing government.

The focus of those who see no need for a change is that the FTC's past performance in a dual role has been acceptable—that given delay, turnover in personnel and the fact that a significant percentage of the fully-adjudicated antitrust complaints are dismissed at the Commission level, the dual role has not been a problem. But this fails to address what ought to be a far more crucial issue; viz., is the dual role the best model for the future performance which we expect from the FTC?

The issue is not the 'appearance of unfairness' or the 'possibility of impropriety.' It is the prospect of achieving enhanced expertise and more focused public policy development appropriate to an agency which we expect to address issues on the 'cutting edge' of antitrust and consumer protection. We want a future FTC to specialize in applying the rule of reason in cases where the analysis is less than certain; we want it to become involved in matters which require detailed understanding of industry segments or where the focus may be on balancing of

competing *175 public policy concerns; and we expect the caseload to involve evaluation of novel legal theory. These goals can best be achieved by establishing a new organizational format: a 'Court of the Federal Trade Commission' consisting of three FTC judges who will serve for set terms (staggered to maintain continuity) and a separate Federal Trade Commission Directorate, consisting of an overall Director and Deputy Directors for Competition Policy and Consumer Affairs, serving as Presidential appointees in the same manner as the leadership of the Department of Justice.

A. THE FTC DIRECTORATE

Case selection and refinement (at both the investigation and the complaint stage); analysis of advocacy options (including studies, promulgations of guides and rulemaking) and management of an investigative and prosecutorial staff each involve significant public policy issues calling for high-level personnel. The men and women charged with this responsibility ought to be selected for their abilities in these specific areas. Thereafter, their exclusive focus should be toward doing the best possible job in these tasks. They should know that they will be judged by their successes (or failures) in these responsibilities.

Moreover, unlike those who judge, they are entitled to be (indeed, obligated to be) advocates for the public policy positions of the then-incumbent administration. The public debate on matters such as the contours of resale price maintenance; the competitive effects of certain types of price discrimination; or the actual impact of advertising restrictions on provision of consumer information and price levels should be vigorous, open and intense. These are not functions that are properly discharged by those who will sit in judgment in adversary proceedings.

Once an adjudicative proceeding is going to commence (if not before), the prosecutorial staff is entitled to full support of (and control from) its own top management—an objective which can hardly be enhanced when, e.g., the staff must proceed with an action in the face of a 3-2 vote in which the FTC Chairman and an influential commissioner are opposed to prosecution. There are also key judgments to be made as an adjudicative proceeding develops—not the least of which is the refinement or dismissal of all or part of the complaint. Again, these are policy judgments which ought to be made by top management on an ongoing basis, before a 'big' case becomes unmanageable or unduly protracted. The dual prosecutor-adjudicator role does not lend itself to this kind of detailed ongoing supervision.

*176 A position as 'Director of the Federal Trade Commission' will be undeniably attractive to a senior-level practitioner. The deputy appointments ('Deputy Director for Competition Policy' and 'Deputy Director for Consumer Affairs') would also be attractive high-profile leadership positions. The net result should be an investigative/prosecutorial organization that attracts talent at high levels and can attract and maintain talent at lower levels; investigatory and prosecutorial leadership that will be judged by the nature, quality and efficiency of its actions and policies in those areas; and an agency which is capable of maintaining that role on an ongoing basis.

B. THE COURT OF THE FEDERAL TRADE COMMISSION

The case for judges of a 'Court of the Federal Trade Commission' is similar. If the adjudicative docket of the FTC is composed of significant matters such as those recommended by the Commission (and described above), we should seek out economically sophisticated and procedurally sophisticated adjudicators equal to the task. Those who are charged with deciding those kinds of issues ought to be selected because they have those abilities

and because they are willing to devote their full efforts toward developing and improving a decision-making process appropriate to the blend of law and economics which is involved. That, to my mind, is the expertise that we seek.

Historically, the dual-function Commission has lagged *behind* the federal courts in developing techniques for complex cases. One thinks it should be the other way around, particularly when it comes to adjudicative proceedings involving economic and legal issues which are intellectually complex and precedentially significant. There should be a substantial opportunity for FTC judges to develop procedural techniques which will avoid protracted litigation and channel adversary inquiry so that it focuses on evidence which is truly probative. Indeed, it would seem that the potential for innovation and flexibility should be greater in FTC adjudication than in federal district courts where certain procedural devices may not be appropriate given the variety of types of general civil litigation and where many adjudicators do not have a specialized background in economically-linked questions.

Today, however, examples of innovation and flexibility are more often found in federal district court litigation: e.g., elimination in certain cases of the answer and interrogatory process as a means of framing issues; early summary disposition on issues framed by the court; quick-look analysis; or the framing of a specific issue for a mini-trial leading to a *177 factual/legal finding that serves as a foundation for further proceedings. One can see FTC Court adjudicators whose job is to focus on the adjudicative process fashioning novel procedures specifically appropriate to a particular case. [FN218]

In addition, the FTC today spends a substantial amount of time in federal district courts securing temporary restraining orders and other preliminary relief pursuant to FTCA § 13(b). Of course, the Commission could hardly be permitted to authorize a complaint and then be authorized to give itself preliminary relief! Judges of a separate adjudicative unit, on the other hand, could hear and decide such questions (and possibly others).

Judges of a Court of the Federal Trade Commission, like other judges, will be looked to solely for *judicial* performance; the reasoned explication of principle and precedent, its application to facts and the development of procedures which appropriately lead to such determinations. The position would be particularly attractive to persons whose skills and interests are focused on the adjudicative process. The FTC Court might also be assigned a validation role in the rulemaking process, hearing argument on the issue (if presented) of whether a rule provisionally adopted by the FTC Director after notice and hearing correctly states applicable law or meets due process requirements, and ruling accordingly.

If, on the other hand, the judges of the Court of the Federal Trade Commission do not enhance the agency's adjudicative process and do not reflect subject matter expertise beyond that achieved in federal district courts, then the adjudicative function at the Commission should be studied further. While I do not think that will be the case, if, after seeking out and gaining the full-time efforts of persons who wish to focus on the judicial function in matters coming before the FTC, it appears that there is no differentiable judicial function to be performed (i.e., if FTC *178 adjudication offers no benefit which cannot be achieved through federal district court litigation)⁸ it is appropriate to consider whether the organizational form ought to be adjusted further. We should not avoid the obligation to consider whether change is desirable, then or now.

[FNa] These views are being presented only on behalf of the Special Committee to Study the Role of the Federal Trade Commission, and have not been reviewed or approved by the Council of the Section of Antitrust Law or by the House of Delegates or the Board of Governors of the American Bar Association, and should not be con-

strued as representing the position of the Section or the ABA.

[FN1] See Appendix B.

[FN2] Rill, *Antitrust: Where We Stand Today*, 57 ANTITRUST L.J. 3, 11 (1988).

[FN3] The Committee is grateful to Wayne State University and Nancy Eisenstein for providing valuable secretarial assistance and support.

[FN4] The ABA Section of Antitrust Law is grateful to the law firms of Arnold & Porter and Covington & Burling, each of which authorized the participation of one of its associates in this public service project. For the affiliations and background of Committee members and Counsel, see Appendix A. Assistance also was provided by Geoffrey Calkins, Brian Cunningham, Laura S. Fitzgerald, and J. Theodore Gentry, by law students Barbara Heaphy, Kathleen Hunt, and Eric Miller, and by paralegal Jennifer Blum. Special drafting projects were performed by Professor William Kovacic, Phillip A. Proger, Andrew Sandler, Stephen A. Stack, Jr., and Elroy H. Wolff.

[FN5] See Appendix C. The information collection process was coordinated by James M. Giffin, Esq., Associate Executive Director of the FTC. The Committee appreciated his diligence, helpfulness, and good humor.

[FN6] See, e.g., ABA ANTITRUST SECTION, MONOGRAPH NO. 5, THE FTC AS AN ANTITRUST ENFORCEMENT AGENCY, VOLUMES I & II (1981) [hereinafter MONOGRAPH NO. 5]; THE FEDERAL TRADE COMMISSION SINCE 1970: ECONOMIC REGULATION AND BUREAUCRATIC BEHAVIOR (K. Clarkson & T. Muris eds. 1981); R. KATZMANN, REGULATORY BUREAUCRACY: THE FEDERAL TRADE COMMISSION AND ANTITRUST POLICY (1980); R. MACKAY, J. MILLER & B. YANDLE, PUBLIC CHOICE AND REGULATION: A VIEW FROM INSIDE THE FEDERAL TRADE COMMISSION (1987); J. MILLER, THE ECONOMIST AS REFORMER (forthcoming 1989); S. WAGNER, THE FEDERAL TRADE COMMISSION (1971); Braucher, *Defining Unfairness: Empathy and Economic Analysis at the Federal Trade Commission*, 68 BOSTON U.L. REV. 349 (1988); Gellhorn, *Regulatory Reform and the Federal Trade Commission's Antitrust Jurisdiction*, 49 TENN. L. REV. 471 (1982); Hobbs, *Antitrust in the Next Decade—A Role for the Federal Trade Commission?*, 31 ANTITRUST BULL. 451 (1986); Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661 (1977); J. Graham & V. Kramer, *Appointments to the Regulatory Agencies: The Federal Communications Commission and the Federal Trade Commission (1949-1974)*, Senate Committee on Commerce, 94th Cong., 2d Sess. (Committee Print 1976).

[FN7] Graphs 1 and 2 in Appendix C show that the Bureau of Competition has fairly consistently employed more workyears and professional workyears than the other bureaus.

[FN8] Graph 3 in Appendix C; see also Federal Trade Commission, Fiscal 1989 Budget Request, at 4 (1988) (workyears for 1988 and requested workyears for 1989) (substantial workyears also devoted to horizontal restraints). For the number of mergers challenged by the FTC each year, see Graph 13 in Appendix C.

[FN9] Telephone conversation between Judy L. Whalley, Deputy Assistant Attorney General, Antitrust Division, and Stephen Calkins (Apr. 4, 1989).

[FN10] Of course, FTC action against naked restraints could be more important where problems in showing antitrust standing prevented private enforcement. See generally *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S.

104 (1986); *Associated Gen'l Contractors of Cal. v. California State Council of Carpenters*, 459 U.S. 519 (1983); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

[FN11] FTC Act Section 5 provides as follows: 'Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.' 15 U.S.C. § 45 (1982). Conduct that violates the Clayton Act or the Sherman Act generally violates Section 5. The FTC also may enforce the Clayton Act directly. *See, e.g.*, *FTC v. Cement Inst.*, 333 U.S. 683, 694 (1948). Although it is well established that Section 5's ban on 'unfair methods of competition' permits the FTC to proscribe conduct not reached by prevailing interpretations of the Sherman and Clayton Acts, there is a debate about how far Section 5 reaches beyond those Acts. *See* ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 279-83 (2d ed. 1984 & Supp. 1988) [hereinafter ANTITRUST LAW DEVELOPMENTS]; MONOGRAPH NO. 5, *supra* note 6, Vol. I, at 40-56.

[FN12] 476 U.S. 447 (1986).

[FN13] 766 F.2d 1107 (7th Cir. 1985).

[FN14] 743 F.2d 1114 (5th Cir. 1984), *cert. dismissed*, 474 U.S. 1001 (1985).

[FN15] 729 F.2d 128 (2d Cir. 1984).

[FN16] *Ethyl Corp.*, 101 F.T.C. 425, 598, 601, 606 (1983).

[FN17] 5 Trade Reg. Rep. (CCH) ¶22,653 (FTC Feb. 22, 1989); *see also* *Cleveland Automobile Dealers' Ass'n*, File No. 851 0162 (FTC consent order announced Dec. 7, 1988), *reported in* 5 Trade Reg. Rep. (CCH) ¶22,629 (trade association agreed not to discourage its members from being open weekends and late weeknights). Mr. Rill and Mr. Mezines are counsel in this proceeding and did not participate in any consideration of the inclusion of this case in the Report. They do not share in the views expressed above.

[FN18] 5 Trade Reg. Rep. (CCH) ¶22,555 (FTC June 21, 1988).

[FN19] [1983-1987 Transfer Binder] Trade Reg. Rep. (CCH) ¶22,434 (consent order announced Feb. 26, 1987).

[FN20] Dkt. No. 9180 (FTC complaint withdrawn May 7, 1985), *reported in* [1983-1987 Transfer Binder] Trade Reg. Rep. (CCH) ¶22,250; Dkt. No. 9179 (FTC complaint withdrawn Jan. 3, 1985), *reported in* [1983-1987 Transfer Binder] Trade Reg. Rep. (CCH) ¶22,223.

[FN21] 101 F.T.C. 191 (1983); *see also* *American Medical Ass'n*, 94 F.T.C. 701 (1979) (the original FTC health care case, condemning an AMA ban on advertising and solicitation under Section 5, as a rule of reason violation), *aff'd sub nom.* *American Medical Ass'n v. FTC*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982).

[FN22] Dkt. No. 9190 [1983-1987 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,419 (FTC initial decision Jan. 6, 1987).

[FN23] For instance, the country might have been better served by a careful FTC study of the insurance industry, followed by litigation, rulemaking, or a detailed explanation of why action is unnecessary, then by massive litigation by states and private parties. Of course, an FTC proceeding does not absolutely preclude other

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challenges.

[FN24] *Cf.* Graph 4 in Appendix C (workyears for health care program). The graph suggests that the health care program has been accounting for increasing percentages of competition workyears, even though, as indicated in the note accompanying Graph 3, the reported numbers may not represent total health care workyears. For health care investigations, see Graph 8.

[FN25] Advertising of Ophthalmic Goods and Services, 43 Fed. Reg. 23,992 (1978), *suspended in part and remanded*, American Optometric Ass'n v. FTC, 626 F.2d 896 (D.C. Cir. 1980), *on remand*, Ophthalmic Practice Rules, 54 Fed. Reg. 10,285 (1989). For discussion of these rules, see Section VI.C.3.

[FN26] Examples of studies include the certificate-of-need regulation study, the hospital competition study, and the dental auxiliary study.

[FN27] The change in the FTC's enforcement priorities is suggested by Graphs 3-7 and 8-9 in Appendix C, showing workyears and investigations.

[FN28] For the FTC's allocation of consumer protection resources, see Graphs 14-18 (workyears) and Graph 19 (investigations) in Appendix C.

[FN29] We have little to say about the Commission's enforcement of specific statutes, although this is an important responsibility.

[FN30] *See, e.g.,* Gellhorn, *Trading Stamps, S&H, and the FTC's Unfairness Doctrine*, 1983 DUKE L.J. 903. For the history of the FTC's enforcement of this authority, *see* American Fin. Serv. v. FTC, 767 F.2d 957, 965-72 (D.C. Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986).

[FN31] Letter from Federal Trade Commission to Senators Ford and Danforth (Dec. 17, 1980), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,203 [hereinafter FTC Unfairness Statement]; *see also* Credit Practices Rule; Statement of Basis and Purpose and Regulatory Analysis, 49 Fed. Reg. 7740 (1984).

[FN32] *See infra* Section V.B.

[FN33] 849 F.2d 1354 (11th Cir. 1988), *cert. denied*, 109 S. Ct. 865 (1989).

[FN34] *See* Holland Furnce Co. v. FTC, 295 F.2d 302 (7th Cir. 1961) (unfair to sell home furnaces by dismantling existing furnaces without permission and then refusing to reassemble them promptly, falsely claiming that they were dangerous or not worth repairing); Uncle Ben's, Inc., 89 F.T.C. 131 (1977) (consent order) allegedly unsafe and unfair to broadcast an advertisement showing unsupervised young child hovering over a pan cooking on a gas range, and then claiming to have cooked food without assistance).

[FN35] Although self-regulation continues to be important, there are suggestions that the media are devoting fewer resources to this. *See, e.g.,* *The Media Business: Of Profanity and Profits: A Network's New Focus*, N.Y. Times, Aug. 29, 1988, at D6, col. 5 (city ed.) (NBC's broadcast standards department reduced from 60 to 20 people and consolidated into a 'program administration and marketing' unit; CBS and ABC have each reduced employees in program practices from 80 to about 30).

[FN36] 15 U.S.C. § 1125(a) (1982).

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[FN37] *See generally Kellogg Agrees It Won't Run Some Cereal Ads*, Wall St. J., Aug. 29, 1988, at 14, col. 1 (Rice Krispies promoted vitamin B); *States Assuming a New Role in Consumer Issues*, N.Y. Times, Feb. 8, 1988, at A17, col. 1; *New Cops on the Beat*, 19 Nat'l J. 1338 (May 23, 1987); *Deceptive Ads: The FTC's Laissez-Faire Approaches Backfiring*, BUS. WEEK, Dec. 2, 1985, at 136 (reviewing increased activity by states and by competitors); *Sponges for Birth Control: A Warning*, N.Y. Times, Mar. 30, 1985, § 1, at 48, col. 1 (in consent agreement with New York, contraceptive sponge maker agreed to change national advertising campaign); *Beef Trade Forced to Alter Ads*, N.Y. Times, Mar. 2, 1985, § 1, at 48, col. 1 ('For the fifth time in less than two years Robert Abrams, the New York State Attorney General, has been responsible for significant changes in a national advertising campaign') (discussing challenge to beef industry's 'Beef Gives Strength' ads, as well as to soft drink advertising of the use of NutraSweet, Campbell Soup's description of soup as 'health insurance,' and two major snack food companies' use of the term 'light').

[FN38] In addition to the FTC, federal agencies with authority over advertising and labeling include the Food and Drug Administration, the Bureau of Alcohol, Tobacco, and Firearms, the Department of Agriculture, the Environmental Protection Agency, and the Postal Service.

[FN39] *See, e.g., What Kind of FTC for the '90's'*, ADVERTISING AGE, May 2, 1988, at 16; *see also supra* note 37. In addition, Congress has regrettably interfered with the FTC's ability even to study the insurance industry. *See* 15 U.S.C. § 46(h) (1982).

[FN40] *R.J. Reynolds Tobacco Co. v. FTC*, Nos. 88-1355, 88-1392 (D.C. Cir. July 1, 1988) (dismissing petitions for stay of FTC Dkt. No. 9206 and for writ of mandamus), *noted in* 5 Trade Reg. Rep. (CCH) ¶22,565; *Campbell Soup Co.*, Dkt. No. 9223 (FTC complaint filed Jan. 26, 1989), *noted in* 5 Trade Reg. Rep. (CCH) ¶22,641; *Kraft, Inc.*, Dkt. No. 9208 (FTC complaint announced June 18, 1987), *noted in* 5 Trade Reg. Rep. (CCH) ¶22,454.

[FN41] The number of workyears devoted to 'advertising practices' has declined from 98 in fiscal 1978 to 56 in fiscal 1987, and, as a percentage of the FTC's resources devoted to substantive consumer protection work, advertising practices have fallen from 24 percent in fiscal 1978 to 17.3 percent in 1987. Graph 14 in Appendix C. FTC supporters in turn would respond that the agency has conserved resources by refraining from filing ill-advised cases. They also would note that the Commission's numerous consumer fraud suits (see Section V.B), which challenge the advertising and promotion of products that do not work at all, could be considered advertising suits. (The FTC records this activity as part of its 'enforcement' program rather than its 'advertising practices' program, and resources expended on 'enforcement' have been increasing. Graph 14 in Appendix C.)

[FN42] REPORT AND RECOMMENDATIONS OF NAAG TASK FORCE ON AIR TRAVEL INDUSTRY (adopted by NAAG Dec. 12, 1987), *reprinted in* 53 Antitrust & Trade Reg. Rep. (BNA) No. 1345 (Spec. Supp. Dec. 17, 1987) [hereinafter NAAG AIR TRAVEL GUIDELINES].

[FN43] FINAL REPORT AND RECOMMENDATIONS OF THE NATIONAL ASSOCIATION OF ATTORNEYS GENERAL TASK FORCE ON CAR RENTAL INDUSTRY ADVERTISING AND PRACTICES (adopted Mar. 14, 1989), *reprinted in* 56 Antitrust & Trade Reg. Rep. (BNA) No. 1407 (Spec. Supp. Mar. 16, 1989) [hereinafter NAAG CAR RENTAL GUIDELINES].

[FN44] *Suit Says Shelat Falsely Labeled Foods Kosher*, L.A. Times, Nov. 6, 1987, part 4, p. 4, col. 3. Similarly, Oregon won a consent order against a grocery store that substituted an inferior grade of salmon for the advertised grade, *United Press Int'l*, Dec. 16, 1986, *available on* NEXIS, and Missouri won a consent order and con-

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sumer redress from a seed purveyor who misrepresented the quality of his seed, News from Attorney General William L. Webster (May 27, 1988).

[FN45] *Regulation by the States is Debated*, N.Y. Times, Dec. 15, 1988, at D19, col. 1. The FTC subsequently announced consent orders condemning these practices. Alamo Rent-A-Car, Inc., 5 Trade Reg. Rep. (CCH) ¶22,633 (FTC proposed consent order Dec. 29, 1988); Budget Rent-A-Car Corp., 5 Trade Reg. Rep. (CCH) ¶22,632 (FTC proposed consent order Dec. 28, 1988).

[FN46] News from Attorney General William L. Webster (Mar. 10, 1988).

[FN47] *Companies Accused of Deceptive Advertising*, United Press Int'l, Oct. 1, 1987, available on NEXIS.

[FN48] *E.g.*, Pitosky, *supra* note 6.

[FN49] NAAG CAR RENTAL GUIDELINES, *supra* note 43, at 45-46 (first of three alternatives).

[FN50] For instance, they require that '[a]ny advertised fare must be available in sufficient quantity so as to meet reasonably foreseeable demand on every flight each day for the market in which the advertisement appears, beginning on the day on which the advertisement appears and continuing for at least three days after the advertisement terminates.' NAAG AIR TRAVEL GUIDELINES, *supra* note 42, § 2.4. The onerousness of this is mitigated by an exception, but the net effect is to make price advertising more difficult.

A deputy attorney general who served on the NAAG airline guide task force suggested that the broadcast media may not be suitable vehicles for price advertising: 'There just may be too many limitations in broadcast for fare advertising. Broadcast may be better suited for image rather than price ads. . . . People either don't hear or don't understand that restrictions apply.' *Airlines Lash out at Guidelines*, ADVERTISING AGE, Sept. 28, 1987, at 28. Most of us disagree. Informative advertising should not be discouraged.

[FN51] Although the comments that follow are addressed to the regulation of advertising, the suggestions for harmony among the states and the FTC should generally be applicable to other consumer protection (and, indeed, competition) activities.

[FN52] For instance, although the FTC's consumer fraud program is generally laudable, see Section IV.B, the FTC should refer complaints about local frauds to state enforcers, in the first instance. Similarly, although the Commission's professions antitrust program has made important contributions, many of these cases are intrastate in principal effect and normally should be brought by state enforcers, assuming they are willing and able.

[FN53] Compare, for instance, some state enforcement actions with the FTC's Guides Against Deceptive Pricing, 16 C.F.R. Part 233 (1988) (issued 1967), and with *FTC v. Mary Carter Paint Co.*, 382 U.S. 46 (1965).

[FN54] The FTC could file an administrative suit or, where an advertisement's illegality is clear, a suit in federal court seeking an injunction and, possibly, consumer redress. Where a particular state's laws permit to obtain financial penalties, that suit easily could follow on the FTC action. However, if the success of a state suit to obtain financial penalties would be jeopardized by waiting for FTC action, the state would be more justified in proceeding promptly.

[FN55] Increased referrals by states, in general, is suggested by FTC data showing that from 1981 to 1988 the number of investigations triggered by state and local referrals increased steadily from 14 to 31. See Graph 20 in Appendix C.

[FN56] In those cases where a state has worked with the FTC to review the merits of an advertisement, the FTC should participate in a subsequent suit by the state only where the FTC is certain of the importance of protecting the challenged advertising. And obviously the FTC should do everything in its power to preserve inviolate the confidentiality of exchanges with state officials.

[FN57] The FTC devoted considerable effort to adopting and enforcing Guides Against Deceptive Pricing, 16 C.F.R. § 233 (1988) (issued 1967); *see also* Proposed Revised Guides Against Deceptive Pricing, 39 Fed. Reg. 21,059 (1974).

[FN58] *See* ANTITRUST LAW DEVELOPMENTS, *supra* note 11, at 290-91.

[FN59] *See* references in note 45, *supra*.

[FN60] 5 Trade Reg. Rep. (CCH) ¶22,633 (FTC proposed consent order Dec. 29, 1988).

[FN61] 1969 Report at 50-51. The FTC also was uncertain whether it had jurisdiction over local retail fraud.

[FN62] 1969 Report at 52. The Report also dismissed the FTC's reliance upon a 1941 Supreme Court decision, *FTC v. Bunte Bros.*, 312 U.S. 349 (1941) which found that the FTC did not have jurisdiction to enforce Section 5 against a localized fraud.

[FN63] 15 U.S.C. § 53(b) (1982). The pertinent language is quoted in Appendix B, *infra*, at note 4.

[FN64] The Commission's authority to seek and the district court's authority to award such relief was sustained in *FTC v. Southwest Sunsites, Inc.*, 655 F.2d 711 (5th Cir.), *cert. denied*, 456 U.S. 973 (1982); *see also, e.g.*, *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1024-26 (7th Cir. 1988) (upholding asset freeze); *FTC v. Pannos Mining Co.*, Civ. No. 88-06453R (C.D. Cal. Nov. 22, 1988) (imposing asset freeze and appointing permanent receiver), *noted in* 5 Trade Reg. Rep. (CCH) ¶22,631; *FTC v. Overseas Unlimited Agency, Inc.*, Civ. No. 88-2583 (C.D. Cal. June 6, 1988), *noted in* 5 Trade Reg. Rep. (CCH) ¶22,552.

[FN65] *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107, 1111 (9th Cir. 1982); *see also* *FTC v. World Travel Vacation Brokers, Inc.*, 861 F.2d 1020, 1028 (7th Cir. 1988) ('Congress at least expected that the FTC could rely on this proviso when it sought to halt a straightforward violation of Section 5 that required no application of the FTC's expertise to a novel regulatory issue through administrative proceedings').

[FN66] *See* *FTC v. U.S. Oil & Gas Corp.*, 748 F.2d 1431 (11th Cir. 1984) (appellate court held that district court has inherent equitable powers to grant ancillary monetary relief incident to its express statutory authority to issue permanent injunctions under the FTC Act); *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107 (9th Cir. 1982) (upholding authority of district court to freeze assets in a Section 13(b) action, but acknowledging authority to order broad ancillary relief); *FTC v. Solar Michigan, Inc.*, 7 Trade Reg. Rep. (CCH) ¶ 68,339 (E.D. Mich. Sept. 27, 1988) (asset freeze under Section 13(b) was warranted to preserve the possibility of future monetary relief; consumer redress was also appropriate); *FTC v. International Diamond Corp.*, 1983-2 Trade Cas. (CCH) ¶65,506 (N.D. Cal. 1983) (holding that district courts possess ancillary jurisdiction under Section 13(b) to grant consumer redress, including rescission of contracts); *see also* Paul, *The FTC's Increased Reliance on Section 13(b) in Court Litigation*, 57 ANTITRUST L.J. 141, 143-44 & nn.9-11 (1988) (citing cases).

[FN67] *See, e.g.*, *FTC v. Schoolhouse Coins, Inc.*, Civ. No. 8705415KN (C.D. Cal. announced Sept. 28, 1988), *noted in* 5 Trade Reg. Rep. (CCH) ¶22,602; *FTC v. Rainbow Enzymes, Inc.*, Civ. No. CIV-87-1522 (D. Ariz.

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Sept. 2, 1988), *noted in* 5 Trade Reg. Rep. (CCH) ¶22,595; *FTC v. Amy Travel Servs., Inc.*, Civ. No. 87C6776 (N.D. Ill. May 4, 1988), *noted in* 5 Trade Reg. Rep. (CCH) ¶22,546; *FTC v. Atlantex Assocs.*, 1987-2 Trade Cas. (CCH) ¶67,788 (S.D. Fla. 1987) (\$12 million in consumer redress ordered); *FTC v. Trans-Alaska Energy Corp.*, Civ. No. 84 2001 (C.D. Cal. Apr. 27, 1987) (\$2.1 million in consumer redress ordered), *noted in* [1983-1987 Transfer Binder] Trade Reg. Rep. (CCH) ¶22,446; *FTC v. New England Rare Coin Galleries*, Civ. No. 842 3144 (D. Mass. announced Feb. 13, 1987) (restitution payment required), *noted in* [1983-1987 Transfer Binder] Trade Reg. Rep. (CCH) ¶22,431; *Evans Products Co.*, Civ. No. 812 3222 (S.D. Fla. announced June 17, 1986) (bankruptcy court required debtor to pay \$2.4 million in consumer redress pursuant to an FTC claim), *noted in* [1983-1987 Transfer Binder] Trade Reg. Rep. (CCH) ¶22,372; *FTC v. Leland Indus., Inc.*, Civ. No. 83-3589 (C.D. Cal. announced Oct. 11, 1985) (restitution payment required by settlement), *noted in* [1983-1987 Transfer Binder] Trade Reg. Rep. (CCH) ¶22,297; *FTC v. Kitco, Inc.*, 612 F. Supp. 1282 (D. Minn. 1985).

[FN68] *See, e.g., FTC v. Rare Coin Galleries of Am. Inc.*, 1986-2 Trade Cas. (CCH) ¶67,338 (D. Mass. 1986).

[FN69] *See* Appendix B.

[FN70] *See* Table 1 and Graph 18 in Appendix C.

[FN71] *See* Table 1 in Appendix C.

[FN72] The presumption against selective enforcement should be as a matter of administrative policy, not law. The Commission is entitled to broad discretion in its choice of remedies. *See infra* note 81.

[FN73] In the Hart-Scott-Rodino Act area, for instance, the staff has interpreted the statute and regulations in important ways, but an interpretation is disclosed only to the person who requests it. This has worked to the benefit of merger specialists, who repeatedly consult the premerger office, but to the disadvantage of others—and, perhaps, of the legal system. The problem has been mitigated by publication of a collection of informal interpretations. ABA ANTITRUST SECTION, *PREMERGER NOTIFICATION PRACTICE MANUAL* (1985). In the debt collection and credit practices areas similar problems have been mitigated by publication of staff interpretations. Proposed Official Staff Commentary on Fair Debt Collection Practices Act, 51 Fed. Reg. 8,107 (1986), *revised and issued*, 53 Fed. Reg. 50,097 (1988) (consolidating almost 1,000 pages of informal staff interpretations); Fair Credit Reporting Act; Statements of General Policy or Interpretation; Proposed Official Commentary, 53 Fed. Reg. 29,696 (1988).

[FN74] All figures on advisory opinions are based on reports contained in the CCH Trade Regulation Reporter Service, and exclude advisory opinions that interpreted FTC orders. We included advisory opinions that were issued but later rescinded or amended. (Where an order was rescinded, we counted the issuance of the opinion only; where an order was amended, we counted the issuance and also the amendment).

[FN75] There is one exception to the general decline in the issuance of advisory opinions. Before the FTC and the Division may terminate a waiting period under the Hart-Scott-Rodino Act, they must conclude that neither intends to challenge the transaction during the statutory waiting period. Thus, grants of early termination are a form of quasi-advisory opinion/business review letter. In 1985, the most recent year for which the FTC provided data, early termination was granted in 1,077 proposed acquisitions, and it was denied in 338. Ninth Annual Report to Congress Pursuant to Section 201 of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, at App. A (Nov. 12, 1986).

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[FN76] This guidance can occur through reconsideration of previous opinions. *E.g.*, Advisory Op. Nos. 147 & 483, 85 F.T.C. 1174 (1975) (reconsidering issue of 'back-haul' freight allowances under the Robinson-Patman Act); Advisory Op. No. 483, 83 F.T.C. 1843 (1973) (same); *see also* Advisory Op. No. 198, 73 F.T.C. 1312 (1968) (earlier opinion); Advisory Op. No. 194, 73 F.T.C. 1309 (1968) (same); Advisory Op. No. 147, 72 F.T.C. 1050 (1967) (same).

[FN77] See ABA ANTITRUST SECTION, THE ANTITRUST HEALTH CARE HANDBOOK 20, 24, 33 (1988) (citing FTC Advisory Opinion to Health Care Management Associates, [1983-1988 Transfer Binder] Trade Reg. Rep. (CCH) ¶22,036 (June 8, 1983); FTC Advisory Opinion to Burnham Hospital, [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶22,005 (Feb. 24, 1983); FTC Advisory Opinion to Iowa Dental Ass'n, [1983-1988 Transfer Binder] Trade Reg. Rep. (CCH) ¶22,025 (Apr. 88 1982)) (volume also cites numerous FTC Staff Advisory Opinions and Antitrust Division Business Review Letters, and the FTC Statement of Enforcement Policy Regarding Physician Agreements to Control Medical Prepayment Plans, 46 Fed. Reg. 48,982 (1982)).

[FN78] During the ten years ending 1987 (the last year for which published reports are available), more than half of all advisory opinions were issued more than nine months after a request was filed. Several took more than two years. Many companies will not run the risk of encountering such substantial delays, which makes the advisory opinion process something of a dead letter. We see no reason why the Commission could not issue advisory opinions within a couple of months.

[FN79] Another option, which we do not discuss but which the FTC should occasionally consider, is proposing legislation.

[FN80] For the possibility that a cease and desist order entered against one person could be used to obtain penalties from certain other persons, see Appendix B.

[FN81] *Ford Motor Co. v. FTC*, 673 F.2d 1008 (9th Cir. 1981), *cert. denied*, 459 U.S. 999 (1982), which suggested that principles of general application may be developed only through rulemaking, disregards the basic principle that 'the choice between rulemaking and adjudication lies in the first instance within the [agency's] discretion.' *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974); *see also* *SEC v. Chenery Corp.*, 332 U.S. 194 (1947). *Ford Motor Co.* generally has not been followed. *See, e.g.*, *Stotler & Co. v. Commodity Futures Trading Comm'n*, 855 F.2d 1288, 1294 (7th Cir. 1988); *Colorado Dep't of Social Servs. v. Department of Health and Human Servs.*, 585 F. Supp. 522, 525 (D. Colo. 1984), *aff'd*, 771 F.2d 1422 (10th Cir. 1985).

[FN82] There also may be situations when codification of standards is ill-advised because legal standards are changing and economic learning is in flux. For example, it would have been imprudent to promulgate a guide or policy statement on predatory pricing immediately after publication of the seminal Areeda-Turner article.

[FN83] FTC Operating Manual § 8.3.2 (1978) (emphasis in original) (adding that 'a case brought to enforce a guide, or which embodies the theory of a guide, must plead a violation of the underlying statute on which the guide is based, not a violation of the guide itself').

[FN84] *See* 6 Trade Reg. Rep. (CCH) ¶38,006 (Nov. 8, 1988) (listing guides). *But cf.* Proposed Revised Guides for Advertising Allowances and Other Merchandising Payments and Services, 53 Fed. Reg. 43,233 (1988).

[FN85] ANTITRUST LAW DEVELOPMENTS, *supra* note 11, at 328 ('Although there are exceptions, many of

the guides that remain in effect appear to carry little or no evidentiary or legal significance') (noting exceptions).

[FN86] Resolution Directing Special Report on Mergers and Acquisitions in the Dairy Industry (FTC July 27, 1988), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,210; *see also* Rescission of Enforcement Policy with Respect to Vertical Mergers in the Cement Industry, 50 Fed. Reg. 21,507 (1985) (rescinding policy issued in 1967); Rescission of Enforcement Policy with Respect to Mergers in the Food Distribution Industries, 50 Fed. Reg. 21,508 (1985) (rescinding policy issued in 1968); Rescission of Enforcement Policy with Respect to [Grocery Products Manufacturing] Product Extension Mergers, 41 Fed. Reg. 51,076 (1976) (rescinding policy issued in 1968); Rescission of Enforcement Policy with Respect to Mergers in the Textile Mill Products Industry, 40 Fed. Reg. 21,078 (1975) (rescinding policy issued in 1968 and clarified in 1969).

[FN87] Policy Statement on Deceptive Acts and Practices, 4 Trade Reg. Rep. (CCH) ¶13,205 (issued in 1983); FTC Unfairness Statement, *supra* note 31; FTC Statement Concerning Horizontal Mergers, 4 Trade Reg. Rep. (CCH) ¶13,200 (issued in 1982). *See generally* Statement of Enforcement Policy Regarding Physician Agreements to Control Medical Prepayment Plans, 46 Fed. Reg. 48,982, *corrected*, 46 Fed. Reg. 51,033 (1981), *reprinted in* 6 Trade Reg. Rep. (CCH) ¶39,058; Policy Statement Regarding Advertising Substantiation Program, 49 Fed. Reg. 30,999 (1984), *reprinted in* 6 Trade Reg. Rep. (CCH) ¶ 39,060.

[FN88] The weakness of guides has not changed, of course; they still are not legally binding. However, administrative orders can be rejected by courts, as has happened with some of the FTC's more controversial decisions. Were the FTC to use guides or policy statements to signal a change in policy, businesses might adjust their conduct without litigation, and the process of issuing a guide or policy statement might improve the chances that FTC litigation would succeed, by establishing a record supporting change and by eliminating any concern that a particular respondent is being treated unfairly.

[FN89] The Magnuson-Moss amendments authorized the Commission to issue 'interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices.' 15 U.S.C. § 57a(a)(1)(A) (1982). The amendments set forth a notice and comment procedure for promulgating such rules and policy statements. 15 U.S.C. § 57a(b)(2) (1982). The FTC normally will publish and invite comments on a proposed guide, even though Magnuson-Moss does not specifically require this. FTC Operating Manual § 8.3.6.4 (1978). Because guides have the same effect as Magnuson-Moss 'interpretive rules,' we do not separately address the desirability of issuing such rules.

[FN90] One lesson, of course, is that even if the Commission does not issue new guides, it should review its old ones. For example, the potential importance of guides is suggested by the state advertising initiatives that the Commission finds troubling. Some of these are based upon the Commission's old guides concerning pricing claims, bait and switch practices, and use of the word 'free'-guides with which the current Commission probably disagrees. Had these guides been updated (and then enforced), there might have been fewer state initiatives of the kind the Commission finds objectionable.

[FN91] Ideally, when the statement is addressed to an issue for which enforcement responsibility is shared with the Antitrust Division, the Commission should negotiate a joint statement. Industry is more interested in guidance as to what is illegal than as to what a single enforcer will challenge.

[FN92] 6 Trade Reg. Rep. (CCH) ¶38,004 (Mar. 21, 1989) (listing final pre-Magnuson-Moss Trade Regulation Rules).

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[FN93] 15 U.S.C. §§ 57a-57b (1982); *see id.* § 57a(a)(2) ('The Commission shall have no authority under [this Act], other than its authority under this section, to prescribe any rule with respect to unfair or deceptive acts or practices. . . . The preceding sentence shall not affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition. . . .'). Earlier trade regulation rules were 'grandfathered in.'

[FN94] 6 Trade Reg. Rep. (CCH) ¶¶38,001-03 (Mar. 21, 1989).

[FN95] For instance, the Commission is considering amending or terminating the Funeral Industry Practice Rule, *see* 53 Fed. Reg. 19,864 (1988), and the Transistor Count of Radio Receiving Sets Rule, *see* 54 Fed. Reg. 5,090 (1989), and is considering broadening the Mail Order Rule to cover telemarketing, *see* 53 Fed. Reg. 43,448-49 (Oct. 27, 1988); *see also* Semiannual Regulatory Agenda, 53 Fed. Reg. 42,818 (1988).

[FN96] *See* 6 Trade Reg. Rep. (CCH) ¶38,001-03 (Mar. 21, 1989) (Funeral Industry Practices Rule, issued 1982, first hearing noticed 1976; Sale of Used Motor Vehicles Rule, issued 1985, disputed issues considered starting in 1976); *see also* Ophthalmic Practice Rules, *supra* note 25. For the declining workyears devoted to rulemaking, *see* Graph 17 in Appendix C. The FTC appears unlikely to embark on major new rulemaking initiatives, since recent staff reductions reduced its rulemaking presiding officer staff to a single individual.

[FN97] *See* Boyer, Bowers, Toiv, Edelman, Cartwright, DeVita & Bennett, Trade Regulation Rulemaking Procedures of the Federal Trade Commission, A Report to the Administrative Conference of the United States by the Special Project for the Study of Rulemaking Procedures Under the Magnuson-Moss Warranty-Federal Trade Commission Act (May 1979) [hereinafter *1979 Report to the Administrative Conference*], which documents the dramatic expansion of rulemaking records associated with the Magnuson-Moss changes. The largest pre-Magnuson-Moss rulemaking record contained 25,285 pages (Franchising Disclosures), whereas the largest Magnuson-Moss record as of that date contained 261,405 pages (Mobile Homes). No Magnuson-Moss rulemaking record contained fewer than 8,000 pages, as of that date. *Id.* at Data Appendix (June 1979) 38, 40, 55.

[FN98] These Committee members reason that normal Administrative Procedure Act rulemaking provides ample protections for affected interests. Others of us believe that the 'judicialization' of the FTC rulemaking process is not necessarily bad. The imposition of an industry-wide rule is a matter of some gravity. If the factual and legal issues are complex, it can be appropriate for the process to resemble adjudication more than legislation, and for the affected parties to have ample opportunity to be heard. Moreover, sharply focused rulemaking proceedings of the kind that we recommend should be more manageable than some of the rather amorphous attempts that characterized some earlier Magnuson-Moss proceedings. Finally, we note that the Federal Trade Commission Improvements Act, Pub. L. No. 96-252 (1980), addressed some of the important concerns about prior FTC rulemaking, *see Administrative Conference of the United States, Report to the Congress of the United States Pursuant to Section 202(d) of Public Law 93-637 (as amended by P.L. 95-558)*. Antitrust Section of the American Bar Association, Report Concerning FTC Trade Regulation Rulemaking Procedures Pursuant to the Magnuson-Moss Act (Feb. 1980).

[FN99] *Accord 1979 Administrative Conference Report, supra* note 97, at 5.

[FN100] *See supra* note 25.

[FN101] *See supra* note 25. The rule bars (1) prohibitions on the employment of optometrists by drug stores and optical chains, (2) limitations on the number of branch offices that optometrists may own or operate, (3) prohibi-

tions on the practice of optometry in commercial locations, and (4) prohibitions on the use of trade names by optometrists. The rule also incorporates the prescription release requirement originally promulgated in the Eyeglasses I Rule.

[FN102] Trade Regulation Rule Relating to Funeral Industry Practices, 16 C.F.R. Part 453 (1988); *see* Ellis, *Legislative Powers: FTC Rule Making* in K. Clarkson & T. Muris, *supra* note 6, at 166-68 (1981).

[FN103] Although the Commission retains its pre-Magnuson-Moss authority to engage in competition rulemaking, we are not optimistic about the chances that the FTC could codify antitrust-oriented prohibitions on specific types of business conduct. Only one pre-Magnuson-Moss trade regulation rule expressly addressed antitrust issues. *See* Discriminatory Practices in Men's and Boys' Tailored Clothing Industry, 16 C.F.R. Part 412 (1988). During the 1970s, the FTC's Bureau of Competition searched aggressively but unsuccessfully for candidates for antitrust rules. *See, e.g.*, Lempert, *FTC Rulemaking Not Beginning of Deluge*, Legal Times of Wash., Apr. 30, 1979, at 1, 7; 884 Antitrust & Trade Reg. Rep. (BNA) at A-13-15 (Oct. 12, 1978) (reporting that rules were being considered pertaining to delivered pricing in the cement industry, shopping center lease restrictions, physician influence over health insurance payments, and mergers affecting potential competition).

[FN104] Pub. L. No. 96-354 (codified at 5 U.S.C. §§ 601-12); *see* 46 Fed. Reg. 35,118 (1981).

[FN105] A review of the FTC's annual reports and of the CCH Trade Regulation Reporter showed that, although the data is not unambiguous, from 1978 through 1986 the FTC appears to have filed, on average, about a half-dozen rule enforcement complaints a year. The rate at which complaints were filed increased significantly in 1987 and 1988. *Cf.* FTC v. Dudley M. Hughes, 7 Trade Reg. Rep. (CCH) ¶68,429 (N.D. Tex. Feb. 7, 1989) (\$80,000 civil penalty imposed in first litigated case challenging violation of funeral rule).

[FN106] Crafting relief requires the combined efforts of lawyers and economists. Moreover, evidence of the efficacy and efficiency of various relief alternatives should be developed during any proceedings.

[FN107] Except in unusual cases this period is unlikely to exceed 10 years. By way of comparison, we understand that state antitrust orders typically are limited to 5 years.

[FN108] *See, e.g.*, Advertising of Ophthalmic Goods and Services, *supra* note 25, 43 Fed. Reg. at 24,003-04 n.180 & App. (Statement of Basis and Purpose); Funeral Industry Practices Rule, 16 C.F.R. § 453.9 (1988). *Compare* Katherine Gibbs School (Inc.) v. FTC, 612 F.2d 658, 666-67 (2d Cir. 1979) (rejecting pre-emption argument based on theory that Congress intended the FTC's regulation to 'occupy the field') *with* American Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 989-990 (D.C. Cir. 1985) (upholding pre-emptive effect of Credit Practice Rules where pre-emption argument not based on 'occupying the field' theory), *cert. denied*, 475 U.S. 1011 (1986).

[FN109] *See, e.g.*, National Funeral Servs., Inc. v. Rockefeller, 7 Trade Reg. Rep. (CCH) ¶68,472, at 60,595 (4th Cir. Mar. 7, 1989) (FTC's funeral rule did not pre-empt West Virginia code):

[T]here is no language in the Funeral Rule that even alludes to an intent to preempt state regulation in the area it does cover. In fact, the Rule expressly states that where a state law is applicable to any transaction that the Rule covers, and that state law affords at least the same level of protection to consumers that federal law provides, the Rule will not be in effect in that state. 16 C.F.R. § 453.9.

[FN110] *Accord* Administrative Conference of the United States, Recommendation No. 84-5, Preemption of

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State Regulation by Federal Agencies, 1 C.F.R. § 305.84-5 (1988) ('Each Federal agency should establish procedures to ensure consideration of the need to preempt state laws or regulations that harm federally protected interests in the areas of regulatory responsibility . . . , and each agency should clearly and explicitly address preemption issues in the course of regulatory decision-making'). As did the Administrative Conference, we recommend that when the FTC foresees possible conflicts between proposed regulations and state interests, it should consult informally with state authorities, and also should provide them with 'an opportunity for appropriate participation' in rulemaking proceedings. *See id.*

There have been suggestions that state attorneys general should be authorized to enforce the FTC trade regulation rules. Most of us do not support such suggestions. We note, however, that the suggestion would be most persuasive if the FTC in fact 'occupied the field' of regulating a particular industry.

[FN111] *Cf.* Advance notice of proposed rulemaking and extension of time, 54 Fed. Reg. 7,041 (Feb. 16, 1989) (FTC is considering broadening the pre-emptive effect of its trade regulation rule concerning franchising and business opportunity ventures).

[FN112] Federal Trade Commission, History of Section 6 Report-Writing At The Federal Trade Commission (April 1981). Section 6 of the Federal Trade Commission Act authorizes the Commission to prepare reports and publicize its findings. Other statutory provisions require the FTC to indicate its views. For discussion of the FTC's authority, see B. Yandle, T. Muris, T. Campbell & R. Tollison, Competition and Consumer Advocacy: Policy Review Session 2-7 (May 24, 1982).

[FN113] Randolph W. Tritell, The Federal Trade Commission's Competition and Consumer Advocacy Program 2 (unpublished manuscript July 20, 1988).

[FN114] *See* Graphs 22 and 23 in Appendix C (note that Graph 23 includes data only up to 1987).

[FN115] As has the Commission, this Report will refer variously to this program by its full current title, as 'competition advocacy,' and as simply 'advocacy.'

[FN116] *See* Tritell, *supra* note 113, at 11 (noting that consumers are estimated to have saved \$100 million a year when New York eased its milk-retailing restrictions, in which decision the FTC played a prominent role).

[FN117] Memorandum from James M. Giffin to Federal Trade Commission, *Report on Successful Competition Advocacy Efforts* (Jan. 21, 1987).

[FN118] A. Celnickier, The Federal Trade Commission's Competition and Consumer Advocacy Program 15-16 (unpublished manuscript 1988), forthcoming in ST. LOUIS U.L.J. (sample size: 36).

[FN119] *Id.* at 16 (sample size: 37).

[FN120] The survey also found that '47 percent of the respondents gave the comment substantial weight or consideration because it came from the FTC,' whereas 20 percent gave the comment only limited weight because of its source. Celnickier, *supra* note 118, at 16-17. Only by maintaining high quality will the Commission be able to preserve and improve its credibility.

[FN121] Response of Emily Rock, Secretary to the FTC, on behalf of the FTC, to questions posed by Rep. John Dingell, dated July 8, 1987, reprinted in *Federal Trade Commission Authorization Hearings Before the Subcomm. on Transportation, Tourism, and Hazardous Materials of the House Comm. on Energy and Commerce*,

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100th Cong., 1st Sess. 257, 261 (1987) (estimate for 1987); *see also* Celnicker, *supra* note 118, at 24-25 (estimating, based on FTC representations, that 3 to 5 percent of budget, or \$2 to \$3 million, was devoted to advocacy 'in recent years'). Since some of the best advocacy efforts flows from other Commission activities, any accounting for expenses must be imprecise.

[FN122] *See* Graph 22 in Appendix C. The Commission's activities during 1985 to 1987 included participation in lawmaking or rulemaking proceedings on a wide variety of issues, including metropolitan taxicab licensing, regulations affecting the practice of dental hygienists and other allied professionals, solicitation by lawyers, and motor vehicle dealership franchising. *See* Celnicker, *supra* note 118, at 11-12. Of course, some of these filings required substantial time commitments, whereas others were addressed to issues previously mastered and required little more than editorial work.

[FN123] For example, a witness testifying before a congressional subcommittee on behalf of the National Association of Retail Druggists objected to FTC comments supporting proposals to allow physicians to dispense prescription drugs. *Federal Trade Commission Authorization Hearings Before the Subcomm. on Transportation, Tourism, and Hazardous Materials of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 164 (1987) (Statement of John M. Rector on behalf of the National Association of Retail Druggists). Congressional criticism may be partly responsible for the decline in advocacy activity in 1988.

[FN124] The FTC Reauthorization bills separately passed by the House (H.R. 2897) and Senate (S. 677) during the 100th Congress would have imposed restrictions on the program. The more stringent restrictions were in the House bill, which, among other things, would have restricted Commission expenditures on the advocacy program to 5% of the Commission's budget.

[FN125] 1969 Report at 69.

[FN126] For the distribution of economist workyears by area, see Table 2 in Appendix C.

[FN127] The Commission currently retains outside economists as witnesses, and this is altogether appropriate. In addition, the Commission should follow more regularly the 1969 Report's recommendation that 'advisory panels' be used to assist the Bureau of Economics. Particularly when the FTC is mired in a complicated or protracted matter, or where the legal and economic staff finds itself divided or uncertain, a panel of outside experts may serve to dislodge the dispute or clarify contending positions. For example, the panel of outside economists gathered to assess the *Exxon* case served not only to guide the FTC in its disposition of that controversial litigation, but also to explain to congressional critics the rationale for the action finally taken. Of course, to the extent that the Federal Advisory Committee Act applies to such a consultative relationship, certain procedural requirements, such as 'Sunshine Act' rules, would regulate these economists' work. *See* 5 U.S.C. App. §§ 1-15 (1982 & Supp. V 1987).

[FN128] W. BREIT & K. ELZINGA, *ANTITRUST PENALTY REFORM: AN ECONOMIC ANALYSIS* (1986).

[FN129] An FTC conference volume on consumer protection explained that while a substantial body of economics literature 'supports the view that information asymmetries can be a substantial force in market performance, it is inconclusive on the appropriate role for consumer protection policy. . . . The literature to date has very little guidance to offer policy makers who ideally seek to implement policy remedies only when they are more efficient than private responses,' *in* Ippolito, *Consumer Protection Economics: A Selective Survey*, *in* EMPIRICAL

APPROACHES TO CONSUMER PROTECTION ECONOMICS 1, 3 (P. Ippolito & D. Scheffman eds. 1986).

[FN130] Economist workyears devoted to advocacy are indicated in Table 2 in Appendix C.

[FN131] We also note the recent decline in economist workyears devoted to research, Table 2 in Appendix C.

[FN132] Working papers are 'preliminary materials circulated to stimulate discussion and critical comment,' according to the form description they bear, and usually are drawn from particular FTC projects or an FTC economist's independent research. Monographs and reports typically involve a substantial research effort by more than one staff economist. The published report itself puts forth the Bureau's findings on some topic of direct concern to FTC responsibility. Conference volumes are the result of seminars and conferences the Bureau has convened where a major issue in antitrust economics or consumer protection is studied. These Bureau publications generally contain the invited papers presented at these gatherings.

[FN133] Citation searches were conducted on the LEXIS legal data base and the Social Science Citation Index (which covers most economics journals). The modest number of citations is biased downwards to the extent these papers are cited as papers published elsewhere under different titles (or with a different set of authors). The standard cover for working papers states that references to them 'should be cleared with the author.'

[FN134] 15 U.S.C. § 46(a) (1982) (also noting an exception for certain financial institutions and common carriers).

[FN135] There will be instances in which an FTC economist's antitrust enforcement responsibilities will require him or her to survey and comment on the literature on a particular issue. Publication of such surveys can be useful. (For a good example, see Pautler, *A Review of the Economic Basis for Broad-Based Horizontal Merger Policy*, 28 ANTITRUST BULL. 571 (1983).) Academic economists are unlikely to publish comparable papers, because they lack the exposure to enforcement decision-making, and such papers may earn little academic credit.

[FN136] *See also* 1969 Report at 71 ('the fundamental economic research falling in the broad field of industrial organization, as well as the study of specific industries and trade practices, is a proper function of the FTC's economic staff').

[FN137] BUREAU OF ECONOMICS STAFF REPORT TO THE FEDERAL TRADE COMMISSION, THE BREWING INDUSTRY (1978).

[FN138] P. Ippolito, *Resale Price Maintenance: Economic Evidence from Litigation* (FTC Bureau of Economics Staff Report 1988).

[FN139] PRIVATE ANTITRUST LITIGATION: NEW EVIDENCE, NEW LEARNING (L. White ed. 1988).

[FN140] Source: U.S. Government Budget (Office of the President and OMB).

[FN141] Figures provided by FTC. They are current as of Jan. 1989.

[FN142] Table 2 in Appendix C.

[FN143] Resources allocated to the Bureau of Economics have declined fairly steadily since 1982. Table 2 in

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Appendix C; *see also* Graph 1 in Appendix C (percentage of FTC's professional workyears). This decline has generally not affected the workyears devoted to antitrust matters, largely because of the urgent need to analyze Hart-Scott-Rodino filings. Because these filings command priority, economic input into consumer protection issues, the competition advocacy program, and research must play second fiddle.

Although economics resources devoted to consumer protection and to competition advocacy have fallen in recent years, the decline in research workyears has been particularly stark: from 22.9 in 1980 and a high of 29.6 in 1983, to 12.1 in 1988 and a projected 7.3 in 1989. Table 2 in Appendix C. While we have recommended a re-direction of the FTC's economic research agenda, we have not recommended a reduction. Indeed, we recommend an expanded research agenda. This cannot be achieved without an increase in resources devoted to economic research.

[FN144] In the last few years the FTC has requested more people than Congress eventually funded. For 1988, for example, the budget proposed funding for 1,048 workyears, but Congress funded only 986.

[FN145] *See generally* Graph 1 in Appendix C. Regional office professional workyears increased from 101 in 1987 to 113 in 1988.

[FN146] FTC data for 1975-1988 shows the following for headquarters (HQ) and regional office (RO) cases:

| | |
|--|--------------------------|
| Initial Phase Investigation To Full Phase | 6.90 mo HQ, 7.32 mo RO |
| | |
| Full Phase Conversion to Complaint/Consent | 11.05 mo HQ, 16.88 mo RO |
| | |
| Full Phase Opened to Complaint/Consent | 11.00 mo HQ, 16.19 mo RO |
| | |
| Complaint to Final Order | 40.55 mo HQ, 35.62 mo RO |
| | |

Of course, regional office partisans presumably would argue that the lengthier investigative process is partly caused by headquarters' supervisory delays. These partisans also would note that by most statistical measures, regional offices appear to be more productive than headquarters. *See* FTC Resource Allocation Study 19-21 (Apr. 3, 1987). For instance, FTC data show that regional offices opened 43.16% of all investigations, 1981-88, despite their size. On the other hand, headquarters partisans would dismiss data about investigations and complaints by arguing that headquarters cases tend to be more complicated and offer greater potential consumer benefit per case, and by noting that headquarters staffs assist the regional offices.

[FN147] The Denver office has employed as few as three attorneys, Memorandum from Claude C. Wild III, Director, FTC Denver Regional Office at 6 (Mar. 13, 19870, *reprinted in* FTC Resource Allocation Study (Apr. 3, 1987), although it currently employs eight. While we do not advocate the closing of any particular office, it is important for the Commission to have the practical ability to reduce the number of offices so they can be maintained at a reasonable size without unduly draining agency resources.

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[FN148] FTC data show that between 1981 and 1988 regional offices opened 562 investigations triggered by consumer complaints, compared to 570 for headquarters.

[FN149] This section is in part based upon a paper prepared for the Committee by Professor William E. Kovacic. We gratefully acknowledge his contribution.

[FN150] 1969 Report at 35.

[FN151] The FTC's relations with Congress have been uneven, at best. On several occasions, FTC reporting efforts have triggered dramatic political protests. *E.g.*, R. CUSHMAN, THE INDEPENDENT REGULATORY AGENCIES 219-20 (1941); E.P. HERRING, PUBLIC ADMINISTRATION AND THE PUBLIC INTEREST 116-28 (1936); Stevens, *The Federal Trade Commission's Contribution to Industrial and Economic Analysis: The Work of the Economic Division*, 8 GEO. WASH. L. REV. 545, 547-53 (1940). For instance, publications of the 1919 meatpacking report nearly put the FTC out of business, and ultimately cost the FTC its jurisdiction over packing operations and stockyards. E.P. HERRING, *supra* at 118-20.

[FN152] Senate Commerce Comm. Rep. No. 500, 96th Cong., 2d Sess. 2 (1979). For more exhaustive discussion of this saga, M. PERTSCHUK, REVOLT AGAINST REGULATION: THE RISE AND PAUSE OF THE CONSUMER MOVEMENT (1982); R. KATZMANN, *supra* note 6; Baer, *Where to From Here: Reflection on the Recent Saga of the Federal Trade Commission*, 39 OKLA. L. REV. 51 (1986); Gellhorn, *The Wages of Zealotry: The FTC Under Siege*, Jan./Feb. 1980 AEI J. ON GOV'T AND SOC'Y 33; Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement: A Historical Perspective*, in MACKAY, MILLER & YANDLE, *supra* note 6, at 63; Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 587 (1982); *Debate: The Federal Trade Commission Under Attack: Should the Commission's Role Be Changed?*, 49 ANTITRUST L.J. 1481 (1982).

[FN153] For example, Congress approved an appropriations measure prohibiting the Commission from using its fiscal year 1985 funds to prosecute antitrust cases against cities. CCH Trade Reg. Rep. No. 666, at 7 (Sept. 4, 1984); CCH Trade Reg. Rep. No. 674, at 4 (Oct. 31, 1984) (lifting restriction). The Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980) [hereinafter FTC Improvements Act] prohibited the FTC from seeking cancellation of a trademark 'on the ground that such mark has become the common descriptive name of an article or substance.' FTC Improvements Act § 18, 15 U.S.C. § 57c note (1982). The Act also imposed a number of limitations upon the FTC's authority in the rulemaking area. The FTC was barred from issuing any rule in its then-pending proceeding on children's advertising or in any new proceeding based on a determination that children's advertising is an 'unfair act or practice in or affecting commerce.' FTC Improvements Act § 11, 15 U.S.C. § 57a (1982). The FTC was also barred from issuing trade regulation rules on private bodies' standards and certifications. FTC Improvements Act § 7, 15 U.S.C. § 57a(a)(1)(B) (1982).

[FN154] The current dispute concerning congressional review of trade regulation rules is quite narrow. Although Congress earlier provided for a legislative veto of FTC rules (which was held unconstitutional in *Consumers Union of United States v. FTC*, 691 F.2d 575 (D.C. Cir. 1982), *aff'd sub nom.* *United States House of Representatives v. FTC*, 463 U.S. 1216 (1983)), the current issue concerns only whether there should be automatic 'fast track' congressional review. The FTC reauthorization bills in the 100th Congress (H.R. 2897, 100th Cong., 1st Sess. § 106(a) (1987) and S. 677, 100th Cong., 1st Sess. (1987)) would have required the Commission to submit final rules to Congress for a 90-day review period. A rule would become effective unless a joint resolution disapproving it, passed by Congress and signed by the President, was enacted during this period. Al-

though this procedure would be constitutional, we are not in agreement on whether it would be desirable. Several of us worry that the procedure would politicize FTC rulemaking, but others believe that it is difficult to object in principle to affirmative decisions by the two elected branches of government. In any event, it is clear that fast-track congressional review of proposed rules is preferable to review through avenues such as the appropriations process, in which important policy issues may not receive adequate attention.

[FN155] 354 F.2d 952, 964 (5th Cir. 1966) (original emphasis deleted).

[FN156] *Id.*

[FN157] The Commission also should resist congressional overtures during the period that a case is withdrawn from adjudication for consideration of settlement. Since the case may be returned to adjudication, it is as inappropriate for Congress to examine Commission deliberations at that point as it was in *Pillsbury*. Of course, once a consent order has been tentatively approved, Congress and others are invited to comment on the proposed order through normal channels, and, once a case is finally over, more searching congressional inquiries are appropriate.

[FN158] 15 U.S.C. § 57a(j) (1982); *see also* 16 C.F.R. § 1.18(c)(1)(iii) (1988). If the FTC's statutes and rules did not regulate *ex parte* contacts during rulemaking, such contacts would be subject to the normal administrative law limitations. *Compare* Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977) with *Action for Children's Television v. FCC*, 564 F.2d 458 (D.C. Cir. 1977) and *Sierra Club v. Costle*, 657 F.2d 298 (D.C. Cir. 1981).

[FN159] *Sierra Club v. Costle*, 657 F.2d 298, 409 (D.C. Cir. 1981) (relying on *D.C. Fed'n of Civil Ass'ns v. Volpe*, 459 F.2d 1231 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972)).

[FN160] It also is important for the FTC to remember that it is obligated to consider the views of Congress as a whole, not of particular members of Congress.

[FN161] This could be done by the Commission or, perhaps with less political risk, by bar associations and other outside observers. *Cf.* Antitrust & Trade Reg. Rep. (BNA) No. 1380, at 317-18 (Aug. 25, 1988); (ABA responded to discovery dispute between Congress and FTC commissioner by urging Congress to use restraint in exercising its power to compel production of internal agency documents); Antitrust & Trade Reg. Rep. (BNA) No. 1354, at 318 (Feb. 25, 1988) (describing dispute).

[FN162] This issue was discussed in Section III. Congress obviously is more likely to have confidence in and to defer to persons of stature. For instance, respect for SEC personnel regularly is cited as an important factor in that agency's relatively harmonious relations with Congress. *E.g.*, NATIONAL ACADEMY OF PUBLIC ADMINISTRATION PANEL ON CONGRESSIONAL OVERSIGHT, CONGRESSIONAL OVERSIGHT OF REGULATORY AGENCIES: THE NEED TO STRIKE A BALANCE AND FOCUS ON PERFORMANCE 35 (1988).

[FN163] *E.g.*, Pogue, Gellhorn & Sims, *Has Antitrust Outgrown Dual Enforcement: A Rationalization Proposal*, 33 ANTITRUST BULL. (forthcoming 1989).

[FN164] For example, the FTC recently took action to prohibit as unfair acts or practices certain restraints imposed by state law on ophthalmic practice. *See supra* note 25. The FTC also might have challenged these re-

straints as unfair methods of competition. However, because the restraints were imposed by state law, the FTC would have been confronted by a defense based on the state action doctrine established in *Parker v. Brown*, 317 U.S. 341 (1943). Without prejudging any challenge to this trade regulation rule, one can say that the Commission's consumer protection powers may have permitted it to improve competition in ways normally unavailable to antitrust enforcers.

[FN165] The FTC's combination of antitrust and consumer protection expertise is perhaps indispensable to promulgating consumer protection rules grounded in competition concepts, as we recommended below. Moreover, agencies that lack antitrust sophistication, such as the Consumer Product Safety Commission or the Food and Drug Administration, lack an appreciation of the efficacy of market-oriented rules and may tend to overregulate.

[FN166] *See, e.g., C. Rule, Antitrust Agenda for the New Administration: Pressures for New Perspectives*, Remarks before New England Antitrust Conf. (Oct. 28, 1988) (First of five recommendations for successor is to pursue the 'abundance of good' criminal investigations, and 'to improve the Division's relationships with federal investigators and U.S. attorneys.' Second recommendation is to expand the use of criminal investigative techniques and to charge antitrust defendants with other criminal violations.), *as reprinted in part in CCH Trade Reg. Rep. No. 23*, at 11-12 (Nov. 2, 1988).

[FN167] It is disappointing that the Commission, which ought to offer the potential for innovation and flexibility, and for custom-tailoring trial procedures, historically has lagged behind the federal courts in developing techniques for complex cases. It also is disappointing that the Commission continues to have problems of delay. The 1969 Report found that '[p]roblems of delay have vexed the FTC ever since it was established.' 1969 Report at 28-32. External exigencies have prodded the Commission to move quickly in its prosecutorial role on Hart-Scott-Rodino matters and, with some exceptions, on proposed federal court consumer fraud challenges. The Commission also has improved the speed with which it disposes of discovery disputes. For most other matters, however, delay continues to be a problem at the FTC. *See* Table 3 in Appendix C.

Particularly troubling is the length of time between oral argument and issuance of an opinion. Data provided to us by the FTC show that between 1975 and 1988 the Commission took an average of 15.1 months from oral argument to issuance of an FTC final order (not counting subsequent appeals). This period was 13.5 months for consumer protection cases, 15.9 months for competition cases. There is no excuse for taking more than a year to write an opinion. Only partly in jest do we suggest that the commissioners announce an official annual period of summer recess, and then, as does the Supreme Court, discipline themselves by delaying its commencement until they have decided that term's cases.

[FN168] This argument counsels in favor of shifting all civil antitrust enforcement to the FTC. This seems unlikely to occur and the Committee did not discuss the possibility at any length.

[FN169] *See E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir. 1984); *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920 (2d Cir. 1980), *cert. denied*, 450 U.S. 917 (1981). *But cf. United Air Lines, Inc. v. CAB*, 766 F.2d 1107 (7th Cir. 1985) (interpreting Section 411 of Federal Aviation Act, which parallels Section 5).

[FN170] Other Committee members are more concerned about possible uncertainty, for the reasons stated earlier. The Committee is in agreement that, assuming dual enforcement will continue, both agencies should strive to adopt consistent enforcement policies.

[FN171] *See generally* American Bar Association Recommendation, *reprinted in* 38 ADMIN. L. REV. 206 (1986) (supporting executive oversight of agency rulemaking); Strauss & Sunstein, *The Role of the President*

and OMB in *Informal Rulemaking*, 38 ADMIN. L. REV. 181, 200-201 (1986) (arguing that the President 'may consult with and demand answers from' independent agencies, and exercise supervisory authority, although the 'ultimate power to decide rests with the relevant agency').

[FN172] *E.g.*, *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *United States v. International Business Machines Corp.*, Civ. No. 69 Civ. 200 (S.D.N.Y. 1982) (dismissed by stipulation); *United States v. Cuisinarts, Inc.*, Crim. No. H-8--49 (D. Conn. Dec. 19, 1980) (nolo contendere plea accepted and \$250,000 fine ordered in criminal resale price maintenance case).

[FN173] It is trite but true that the Commission can be no better than its leaders. The importance of strong leadership is addressed above at Section III.

[FN174] For review of the debate see MONOGRAPH NO. 5, *supra* note 6, Vol. II, at 67-71.

[FN175] For suggestions to this effect, see S. 1980, 96th Cong., 1st Sess. (1979); H.R. 6589, 96th Cong., 2d Sess. (1980); White, *FTC: Wrong Agency for the Job of Adjudication*, 61 A.B.A. J. 1242 (1975).

[FN176] 1969 Report at 82-83.

[FN177] The 1971 Ash Council Report proposed that the FTC's antitrust enforcement function be transferred to a newly constituted federal antitrust board that would (1) provide research and analysis and economic advice to the Department of Justice and affected industries; (2) 'merge considerations of economics and law in establishing policy and deciding particular cases'; and (3) 'assure that antitrust enforcement policies are consistent with the broad and long-range economic interests of the nation.' The Board was to consist of a chairman and two economic administrators, one responsible for research and analysis and the other a member of the Council of Economic Advisors whose function would be to provide economic advice. The President's Advisory Council on Executive Organization, *Report on Selected Independent Regulatory Agencies* 93-95 (Jan. 1971).

[FN178] Appendix B; *see also* Graphs 24 and 25 in Appendix C (more 1988 workyears expended on court litigation than on administrative litigation).

[FN179] *See* Table 3 in Appendix C.

[FN180] Source: Computed from FTC Reports. Some complaints were dismissed because of changed circumstances, but more than 40% of the antitrust complaints appear to have been dismissed on the merits.

[FN181] To be sure, Congress and the White House should understand that the Commission is *supposed* to dismiss some cases, and that there is cause for concern if it does not.

[FN182] The exception was Commissioner Calvani. Commissioner Azcuenaga took office November 1984, by recess appointment, and was confirmed in March 1985 for a seat whose term expires in September 1991. Commissioner Machol was nominated by recess appointment in November 1988. If she is confirmed during the current session of Congress, her term will expire in 1994. Chairman Oliver was confirmed in 1986 for a term that expired in 1988. Commissioner Strenio was confirmed in 1986 for a term that expires in 1989.

[FN183] This Section was in part based upon or taken from a paper prepared for the Committee by Stephen Stack, Jr. We are grateful for his contribution.

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[FN184] The Trans-Alaska Oil Pipeline Authorization Act of 1973, Pub. L. No. 93-153, 87 Stat. 576 (1973); the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1975, Pub. L. No. 93-637, 88 Stat. 2183 (1975); the Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, 90 Stat. 1383 (1976); and the Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980).

[FN185] Pub. L. No. 93-153, § 408(f), 87 Stat. 592 (1973) (codified at 15 U.S.C. § 53(b) (1982)). Previously, the FTC could obtain a preliminary injunction only from a court of appeals under the All Writs Act—a power limited to where an injunction was necessary to protect the court's jurisdiction. *See* FTC v. Dean Foods Co., 384 U.S. 597 (1966).

[FN186] 15 U.S.C. § 53(b) (1982):

Whenever the Commission has reason to believe-

(1) that any person . . . is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public-

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however, . . .* That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. . . .

[FN187] *See* authorities cited *supra* notes 64-68.

[FN188] The FTC has not invoked Section 13(b)'s permanent injunction powers in its antitrust mission, in part because litigated antitrust cases tend to present more difficult legal issues. Paul, *The FTC's Increased Reliance on Section 13(b) in Court Litigation*, 57 ANTITRUST L.J. 141, 142 (1988). Graphs 24 and 25 in Appendix C also show that regional offices have devoted most of their litigation resources to federal court proceedings.

[FN189] These figures were derived by examining the FTC's annual reports and the CCH Trade Regulation Reporter.

[FN190] *See* Graphs 24 and 25 in Appendix C.

[FN191] *See* Graphs 24 and 25 in Appendix C; *see also* Paul, *supra* note 6 (In 1988, the Bureau of Consumer Protection had more enforcement actions in progress in federal courts than in Part III before ALJs).

[FN192] Graph 21 in Appendix C; number of ALJs provided by FTC.

[FN193] Pub. L. No. 93-637, § 206(a), 88 Stat. 2201 (1975) (codified at 15 U.S.C. § 57b (1982)).

[FN194] *Id.*

[FN195] *Cf.* Carley, *FTC Muscle Evident in Its Settlements*, Legal Times, Nov. 7, 1983, at 11 (FTC had filed three to date) (also arguing that Section 19(a)(2), with Section 13(b), helped the FTC win settlements).

- [FN196] See Table 4 in Appendix C (also noting that not all amounts awarded have been collected).
- [FN197] For civil penalties awarded during the past decade, see Table 4 in Appendix C.
- [FN198] Pub. L. No. 93-153, § 408(c), 87 Stat. 591 (1973) (codified at 15 U.S.C. § 45(1) (1982)).
- [FN199] Pub. L. No. 93-637, § 205(a), 88 Stat. 2200 (1975) (codified at 15 U.S.C. § 43(m)(1)(A) (1982)).
- [FN200] Pub. L. No. 93-637, § 205(a), 88 Stat. 2200 (1975) (codified at 15 U.S.C. § 45(m)(1)(B) (1982)).
- [FN201] Cf. *United States v. Hopkins Dodge, Inc.*, 849 F.2d 311 (8th Cir. 1988); *United States v. Allied Publishers Serv., Inc.*, 1982-83 Trade Cas. (CCH) ¶64,983 (E.D. Cal. 1982); *Audubon Life Ins. Co. v. FTC*, 543 F. Supp. 1362 (M.D. La. 1982).
- [FN202] Pub. L. No. 93-637, § 202, 88 Stat. 2193-2198 (codified as amended at 15 U.S.C.A. § 57a (West Supp. 1989)).
- [FN203] See *supra* Section X.
- [FN204] Pub. L. No. 96-252, §§ 8, 9, 10, 12, 15, 94 Stat. 376-388 (1980) (codified as amended at 15 U.S.C.A. § 57a (West Supp. 1989)).
- [FN205] Pub. L. No. 96-252, §§ 7, 11, 19, 94 Stat. 376-393 (1980) (codified as amended at 15 U.S.C. § 57a (1982)).
- [FN206] Pub. L. No. 96-252, § 21, 94 Stat. 393 (1980) (subsequently terminated).
- [FN207] *Consumers Union of United States v. FTC*, 691 F.2d 575 (D.C. Cir. 1982), *aff'd sub nom. United States House of Representatives v. FTC*, 463 U.S. 1216 (1983); see also *INS v. Chadha*, 462 U.S. 919 (1983).
- [FN208] Pub. L. No. 93-153, § 408(e), 87 Stat. 592 (codified as amended at 15 U.S.C.A. § 46(h) (West Supp. 1989)). The Commission does not have substantive jurisdiction over banks or regulated common carriers. 15 U.S.C.A. § 45(a)(2) (West Supp. 1989).
- [FN209] Pub. L. No. 93-637, § 203(a)(3), 88 Stat. 2198 (1975) (codified as amended at 15 U.S.C.A. § 46(a) (West Supp. 1989)).
- [FN210] Pub. L. No. 96-252, § 5, 94 Stat. 375 (1980) (codified as amended at 15 U.S.C.A. § 46(h) (West Supp. 1989)).
- [FN211] Pub. L. No. 96-252, § 13, 94 Stat. 380 (1980) (codified at 15 U.S.C. § 57b-1 (1982)). Congress has not authorized this form of compulsory process in competition investigations.
- [FN212] Pub. L. No. 96-252, §§ 3, 14, 94 Stat. 374, 385 (1980) (codified at 15 U.S.C. §§ 46(f), 57b-2 (1982)).
- [FN213] Pub. L. No. 94-435, § 201, 90 Stat. 1390 (1976) (codified at 15 U.S.C. § 18a (1982)).
- [FN214] Pub. L. No. 93-637, § 201, 88 Stat. 2193 (1975) (codified at 15 U.S.C. § 45(a)(1) (1982)).
- [FN215] Pub. L. No. 93-637, Title I, 88 Stat. 2183 (1975) (codified at 15 U.S.C. § 2301 et seq. (1982)). Sub-

sequent legislation also expanded the FTC's jurisdiction in other areas. *See, e.g.*, Pub. L. No. 99-252, § 5, 100 Stat. 33 (codified as amended at 15 U.S.C. § 4404 (Supp. IV 1986)) (smokeless tobacco).

[FN216] In response to an FTC director interlock complaint against a savings and loan, Congress exempted savings and loan associations from FTC jurisdiction. Pub. L. No. 96-37, 93 Stat. 95 (1973) (codified as amended at 15 U.S.C.A. § 45(a)(2) (West Supp. 1989)).

[FN217] Would we accept trial before a federal district judge who had already announced that he or she had 'reason to believe' that the law had been violated, directed the United States Attorney to proceed with prosecution, and then controlled the expenditure of funds-determining what resources will be put behind the effort? We disqualify judges for far less. If we take the FTC's adjudicative role seriously (and if we see it as in increasingly serious function in the future) we should not accept that arrangement at the FTC. Of course, the principle that it is possible for a dual functioning prosecutor-adjudicator to navigate the waters without going aground on the shoals of due process is established by precedent. One must also acknowledge, at the outset, that despite comments which surface from time to time concerning the unseemliness of the dual prosecutor-adjudicator role, there is no basis for asserting that it has led to actual demonstrable due process violations in the course of the Commission's work. But successful navigations of a rock-strewn course do not make the route 'superior,' especially when it is relatively easy to chart a different course which avoids any perception of impropriety and which holds the promise for improved performance.

[FN218] For example, it is possible for an adjudicator who has not previously considered issuing a complaint and has no responsibility to the staff initiating it to review a complaint, to hear the theoretical bases for the allegations on a preliminary basis, and suggest that the legal sufficiency of the theory should be tested (and resolved) preliminarily, or that specific factual issues should be served and made the subject of a focused evidentiary hearing before an Administrative Law Judge who would report to the Court (as opposed to authorizing plenary ALJ proceedings) or that a procedure for a 'quick look' at key questions should be employed. There may be (indeed, I suspect, there are) cases in which certain issues are best probed in a manner other than the traditional 'witness/opposing witness; direct examination/cross examination' process. Judges can introduce these procedures; dual prosecutor-adjudicators do not (and, in light of due process considerations, most likely cannot).
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¶ 13,205 Deceptive Acts and Practices

On October 14, 1983, the FTC issued a policy statement regarding its enforcement of the FTC Act against deceptive acts or practices (as distinct from unfairness toward consumers), together with a concurrence and two dissents, in the form of a letter to the House Committee on Energy and Commerce and the Senate Committee on Commerce. This policy statement was appended to the Commission opinion in *Cliffdale Associates, Inc.*, 103 FTC 110 (1984).

(Policy Statement)

This letter responds to the inquiry of the Committee on Energy and Commerce of the House of Representatives regarding the Commission's enforcement policy against deceptive acts or practices. We also hope this letter will provide guidance to the public.

Section 5 of the FTC Act declares unfair or deceptive acts or practices unlawful. Section 12 specifically prohibits false ads likely to induce the purchase of food, drugs, devices or cosmetics. Section 15 defines a false ad for purposes of Section 12 as one which is "misleading in a material respect."² Numerous Commission and judicial decisions have defined and elaborated on the phrase "deceptive acts or practices" under both Sections 5 and 12. Nowhere, however, is there a single definitive statement of the Commission's view of its authority. The Commission believes that such a statement would be useful to the public, as well as your Committee in its continuing review of our jurisdiction.

S. Rep. No. 97-451, 97th Cong., 2d Sess. 116; H.R. Rep. No. 98-156, Part I, 98th Cong., 1st Sess. 6 (1983). The Commission's enforcement policy against unfair acts or practices is set forth in a letter to Senators Ford and Danforth, dated December 17, 1980.

In determining whether an ad is misleading, Section 15 requires that the Commission take into account "representations made or suggested" as well as "the extent to which the advertisement fails to reveal facts material in light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement relates under the conditions prescribed in said advertisement or under such conditions as are customary or usual."³ 15 U.S.C. § 55. If an act or practice violates Section 12, it also violates Section 5. *Simeon Management Corp.*, 87 F.T.C. 1184, 1219 (1976), aff'd [1978-2 Trade Cases ¶62,282], 579 F.2d 1137 (9th Cir. 1978); *Porter & Dietsch*, 90 F.T.C. 770, 873-74 (1977), aff'd [1979-2 Trade Cases ¶62,796], 605 F.2d 294 (7th Cir. 1979), cert. denied, 445 U.S. 950 (1980).

Chairman Miller has proposed that Section 5 be amended to define deceptive acts. Hearing Before the Subcommittee for Consumers of the Committee on Commerce, Science, and Transportation, United States Senate, 97th Cong., 2d Sess., *FTC's Authority Over Deceptive Advertising*, July 22, 1982, Serial No. 97-134, p. 9. Three Commissioners believe a legislative definition is unnecessary. *Id.* at 45 (Commissioner Clanton), at 51 (Commissioner Bailey) and at 76 (Commissioner Pertschuk). Commissioner Douglas supports a statutory definition of deception. Prepared statement by Commissioner George W. Douglas, Hearing Before the Subcommittee for Consumers of the Committee on Commerce, Science and Transportation, United States Senate, 98th Cong., 1st Sess. (March 16, 1983), p. 2.

A misrepresentation is an express or implied statement contrary to fact. A misleading omission occurs when qualifying information necessary to prevent a practice, claim, representation, or reasonable expectation or belief from be-

We have therefore reviewed the decided cases to synthesize the most important principles of general applicability. We have attempted to provide a concrete indication of the manner in which the Commission will enforce its deception mandate. In so doing, we intend to address the concerns that have been raised about the meaning of deception, and thereby attempt to provide a greater sense of certainty as to how the concept will be applied.⁴

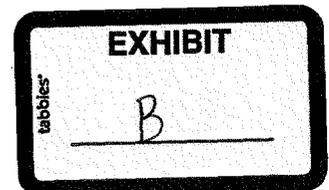
I. Summary

Certain elements undergird all deception cases. First, there must be a representation, omission or practice that is likely to mislead the consumer.⁵ Practices that have been found misleading or deceptive in specific cases include false oral or written representations, misleading price claims, sales of hazardous or systematically defective products or services without adequate disclosures, failure to disclose information regarding pyramid sales, use of bait and switch techniques, failure to perform promised services, and failure to meet warranty obligations.⁶

ing misleading is not disclosed. Not all omissions are deceptive, even if providing the information would benefit consumers. As the Commission noted in rejecting a proposed requirement for nutrition disclosures:⁷ "In the final analysis, the question whether an advertisement requires affirmative disclosure would depend on the nature and extent of the nutritional claim made in the advertisement." *177 Conventional Baking Co., Inc.*, 83 P.T.C. 885, 965 (1976). In determining whether an omission is deceptive, the Commission will examine the overall impression created by a practice, claim, or representation. For example, the practice of offering a product for sale creates an implied representation that it is fit for the purposes for which it is sold. Failure to disclose that the product is not fit constitutes a deceptive omission. [See discussion below at 5-6.] Omissions may also be deceptive where the representations made are not literally misleading, if those representations create a reasonable expectation of benefit among consumers which is misleading, absent the omitted disclosure.

Non-deceptive omissions may still violate Section 5, if they are unfair. For instance, the R-Value Rule, 16 C.F.R. § 460.5 (1983), establishes a specific method for testing insulation ability, and requires disclosure of the figure in advertising. The Statement of Basis and Purpose, 44 Fed. Reg. 50,242 (1979), refers to a deception theory to support disclosure requirements when certain misleading claims are made, but the rule's general disclosure requirement is premised on an unfairness theory. Consumers could not reasonably avoid injury in selecting insulation because no standard method of measurement existed.

Advertising that lacks a reasonable basis is also deceptive. *Firestone*, 81 F.T.C. 398, 451-52 (1972); aff'd [1973-1 Trade Cases ¶74,588], 481 F.2d 246 (6th Cir.), cert. denied, 414 U.S. 1112 (1973). *National Dynamics*, 82 F.T.C. 488, 549-50 (1973); aff'd and remanded on other grounds [1974-1 Trade Cases ¶74,947], 492 F.2d 1333 (2d Cir.), cert. denied, 419 U.S. 993 (1974), reissued, 85 F.T.C. 391 (1976). *National Commission on Egg Nutrition*, 88 F.T.C. 89,



Second, we examine the practice from the perspective of a consumer acting reasonably in the circumstances. If the representation or practice affects or is directed primarily to a particular group, the Commission examines reasonableness from the perspective of that group.

Third, the representation, omission, or practice must be a "material" one. The basic question is whether the act or practice is likely to affect the consumer's conduct or decision with regard to a product or service. If so, the practice is material, and consumer injury is likely, because consumers are likely to have chosen differently but for the deception. In many instances, materiality, and hence injury, can be presumed from the nature of the practice. In other instances, evidence of materiality may be necessary.

Thus, the Commission will find deception if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment. We discuss each of these elements below.

II. There Must Be a Representation, Omission, or Practice That Is Likely To Mislead The Consumer.

Most deception involves written or oral misrepresentations, or omissions of material information. Deception may also occur in other forms of conduct associated with a sales transaction. The en-

tire advertisement, transaction or course of dealing will be considered. The issue is whether the act or practice is likely to mislead, rather than whether it causes actual deception.

Of course, the Commission must find that a representation, omission, or practice occurred. In cases of express claims, the representation itself establishes the meaning. In cases of implied claims, the Commission will often be able to determine meaning through an examination of the representation itself, including an evaluation of such factors as the entire document, the juxtaposition of various phrases in the document, the nature of the claim, and the nature of the transaction. In other situations, the Commission will require extrinsic evidence that reasonable consumers reach the implied claims.⁸ In all instances, the Commission will carefully consider any extrinsic evidence that is introduced.

Some cases involve omission of material information, the disclosure of which is necessary to prevent the claim, practice, or sale from being misleading. Information may be omitted from written or oral representations or from the commercial transaction.

In some circumstances, the Commission can presume that consumers are likely to reach false beliefs about the product or service because of an omission. At other times, however, the Commis-

(Footnote Continued) ... 191 (1976), aff'd [1977-2 TRADE CASES] 61,751, 570 F.2d 157 (7th Cir.), cert. denied, 439 U.S. 821, reissued, 92 F.T.C. 848 (1978). The deception theory is based on the fact that most ads making objective claims imply, and many expressly state, that an advertiser has certain specific grounds for the claims. If the advertiser does not, the consumer is acting under a false impression. The consumer might have perceived the advertising differently had he or she known the advertiser had no basis for the claim. This letter does not address the nuances of the reasonable basis doctrine, which the Commission is currently reviewing. 48 Fed. Reg. 10,421 (March 11, 1983).

⁸ In *Beneficial Corp. v. FTC*, [1976-2 TRADE CASES] 61,066, 542 F.2d 611, 612 (3d Cir. 1976), the court noted "the likelihood or propensity of deception is the criterion by which advertising is measured."

⁹ On evaluation of the entire document.

¹⁰ The Commission finds that many of the challenged Anacin advertisements, when viewed in their entirety, did convey the message that the superiority of this product has been proven [footnote omitted]. It is immaterial that the word "established," which was used in the complaint, generally did not appear in the ads; the important consideration is the net impression conveyed to the public. *American Home Products*, 98 F.T.C. 136, 374 (1981), aff'd (1982-83 TRADE CASES] 65,081, 695 F.2d (3d Cir. 1982).

¹¹ On the juxtaposition of phrases.

¹² On this label, the statement "Kills Germs By Millions On Contact" immediately precedes the assertion "For General Oral Hygiene, Bad Breath, Colds and Resultant Sore Throats" [footnote omitted]. By placing these two statements in close proximity, respondent has conveyed the message that since Listerine can kill millions of germs, it can cure, prevent and ameliorate colds and sore throats [footnote omitted]. *Warner-Lambert*, 86 F.T.C. 1398, 1489-90 (1975), aff'd [1977-2 TRADE CASES] 61,563, 562 F.2d 749 (D.C. Cir. 1977), cert. enied, 435 U.S. 950 (1978) (emphasis in original).

¹³ On the nature of the claim, *Firestone* is relevant. There the Commission noted that the alleged misrepresentation concerned the safety of respondent's product, "an issue of great significance to consumers. On this issue, the Commis-

... How an individual or group or groups from its use to women and children. The Commission has required scrupulous accuracy in advertising claims; for obvious reasons. ... 81 F.T.C. 398, 456 (1972), aff'd [1973-1 TRADE CASES] 74,588, 481 F.2d 246 (6th Cir.), cert. denied, 414 U.S. 112 (1973).

¹⁴ In each of these cases, other factors, including in some instances surveys, were in evidence on the meaning of the ad.

¹⁵ The evidence can consist of expert opinion, consumer testimony (particularly in cases involving oral representations), copy tests, surveys, or any other reliable evidence of consumer interpretation.

¹⁶ As the Commission noted in the *Cigarette Rule*: "The nature, appearance, or intended use of a product may create an impression in the mind of the consumer, and if the impression is false, and if the seller does not take adequate steps to correct it, he is responsible for an unlawful deception." *Cigarette Rule*, Statement of Basis and Purpose, 29 Fed. Reg. 8324, 8352 (July 2, 1964).

¹⁷ *Porter & Dietsch*, 90 F.T.C. 770, 873-74 (1977), aff'd [1979-2 TRADE CASES] 62,796, 605 F.2d 294 (7th Cir. 1979), cert. denied, 445 U.S. 950 (1980); *Simon Management Corp.*, 87 F.T.C. 1184, 1230 (1976), aff'd [1978-2 TRADE CASES] 62,282, 579 F.2d 1137 (9th Cir. 1978).

¹⁸ See, e.g., *Grolter*, 91 F.T.C. 315, 480 (1978), remanded on other grounds [1980-1 TRADE CASES] 63,153, 615 F.2d 1215 (9th Cir. 1980), modified on other grounds, 98 F.T.C. 882 (1981), reissued, 99 F.T.C. 379 (1982).

¹⁹ In *Peacock Buick*, 86 F.T.C. 1532 (1975), aff'd, 553 F.2d 97 (4th Cir. 1977), the Commission held that

absent a clear and early disclosure of the prior use of a late model car, deception can result from the setting in which a sale is made and the expectations of the buyer. *Id.* at 1555.

[E]ven in the absence of affirmative misrepresentations, it is misleading for the seller of late model used cars to fail to reveal the particularized uses to which they have been put. . . . When a later model used car is sold at close to list price . . . the assumption likely to be made by some purchasers is that absent disclosure to the contrary, such car has not previously been used in a way that might substantially impair its value. In such circumstances, failure to disclose a disfavored prior use may tend to mislead." *Id.* at 1557-58.

sion may require evidence on consumers' expectations.¹³

Marketing and point-of-sales practices that are likely to mislead consumers are also deceptive. For instance, in bait and switch cases, a violation occurs when the offer to sell the product is not a bona fide offer.¹⁴ The Commission has also found deception where a sales representative misrepresented the purpose of the initial contact with customers.¹⁵ When a product is sold, there is an implied representation that the product is fit for the purposes for which it is sold. When it is not, deception occurs.¹⁶ There may be a concern about the way a product or service is marketed, such as where inaccurate or incomplete information is provided.¹⁷ A failure to perform services promised under a warranty or by contract can also be deceptive.¹⁸

III. The Act or Practice Must Be Considered From the Perspective of the Reasonable Consumer.

The Commission believes that to be deceptive the representation, omission or practice must be likely to mislead reasonable consumers under the circumstances.¹⁹ The test is whether the consumer's interpretation or reaction is reasonable.²⁰ When representations or sales practices are targeted to a specific audience, the Commission determines the effect of the practice on a reasonable member of that group. In evaluating a particular practice, the Commission considers the totality of the practice in determining how reasonable consumers are likely to respond.

A company is not liable for every interpretation or action by a consumer. In an advertising context, this principle has been well-stated:

An advertiser cannot be charged with liability with respect to every conceivable misconception, however outlandish, to which his representations might be subject among the foolish or feeble-minded. Some people, because of ignorance or incomprehension, may be misled by even a scrupulously honest claim. Perhaps a few misguided souls believe, for example, that all "Danish pastry" is made in Denmark. Is it therefore an actionable deception to advertise "Danish pastry" when it is made in this country? Of course not. A representation does not become "false and deceptive" merely because it will be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed. *Heinz W. Kirchner*, 63 F.T.C. 1282, 1290 (1963).

To be considered reasonable, the interpretation or reaction does not have to be the only one.²¹ When a seller's representation conveys more than one meaning to reasonable consumers, one of which is false, the seller is liable for the misleading interpretation.²² An interpretation will be presumed reasonable if it is the one the respondent intended to convey.

The Commission has used this standard in its past decisions.²³ The test applied by the Commission is whether the interpretation is reasonable in light of the claim.²³ In the *Listerine* case, the Commission evaluated the claim from the per-

¹³In *Leonard Porter*, the Commission dismissed a complaint alleging that respondents' sale of unmarked products in Alaska led consumers to believe erroneously that they were handmade in Alaska by natives. Complaint counsel had failed to show that consumers of Alaskan craft assumed respondents' products were handmade by Alaskans in Alaska. The Commission was unwilling, absent evidence, to infer from a viewing of the items that the products would tend to mislead consumers.

¹⁴By requiring such evidence, we do not imply that elaborate proof of consumer beliefs or behavior is necessary, even in a case such as this, to establish the requisite capacity to deceive. However, where visual inspection is inadequate, some extrinsic testimonial evidence must be added." 88 F.T.C. 546, 626 n. 5 (1976).

¹⁵*Bait and Switch Policy Protocol*, December 10, 1975; *Guides Against Bait Advertising*, 16 C.F.R. § 238.0 (1967), 32 Fed. Reg. 15,540.

¹⁶*Encyclopedia Britannica*, 87 F.T.C. 421, 497 (1976), aff'd [1979-2 TRADE CASES ¶ 62,793], 605 F.2d 964 (7th Cir. 1979), cert. denied, 445 U.S. 934 (1980), modified, 100 F.T.C. 500 (1982).

¹⁷See the complaints in *Bayley Suit*, C-3117 (consent agreement) (September 30, 1983); *Figgie International, Inc.*, D. 9166 (May 17, 1983).

¹⁸The Commission's complaints in *Chrysler Corporation*, 99 F.T.C. 347 (1982); and *Volkswagen of America*, 99 F.T.C. 446 (1982), alleged the failure to disclose accurate use and care instructions for replacing oil filters was deceptive. The complaint in *Ford Motor Co.*, D. 9154, 96 F.T.C. 362 (1980), charged Ford with failing to disclose a "piston scuffing" defect to purchasers and owners which was allegedly widespread and costly to repair. See also *General Motors*, D. 9145 (provisionally-accepted consent agreement, April 26, 1983).

¹⁹See *Jay Norris Corp.*, 91 F.T.C. 751 (1978), aff'd with modified language in order [1979-1 TRADE CASES ¶ 62,623],

598 F.2d 1244 (2d Cir. 1979), cert. denied, 444 U.S. 980 (1979) (failure to consistently meet guarantee claims of "immediate and prompt" delivery as well as moneyback guarantees); *Southern States Distributing Co.*, 83 F.T.C. 1126 (1973) (failure to honor oral and written product maintenance guarantees, as represented); *Skylark Originals, Inc.*, 80 F.T.C. 337 (1972), aff'd 475 F.2d 1396 (3d Cir. 1973) (failure to promptly honor moneyback guarantee as represented in advertisements and catalogs); *Capitol Manufacturing Corp.*, 73 F.T.C. 872 (1968) (failure to fully, satisfactorily and promptly meet all obligations and requirements under terms of service guarantee certificate).

²⁰The evidence necessary to determine how reasonable consumers understand a representation is discussed in Section II of this letter.

²¹An interpretation may be reasonable even though it is not shared by a majority of consumers in the relevant class, or by particularly sophisticated consumers. A material practice that misleads a significant minority of reasonable consumers is deceptive. See *Heinz W. Kirchner*, 63 F.T.C. 1282 (1963).

²²A secondary message understood by reasonable consumers is actionable if deceptive even though the primary message is accurate. *Sears, Roebuck & Co.*, 95 F.T.C. 406, 511 (1980) aff'd [1982-2 TRADE CASES ¶ 64,752], 676 F.2d 385, (9th Cir. 1982); *Chrysler*, 87 F.T.C. 749 (1976), aff'd [1977-1 TRADE CASES ¶ 61,510], 561 F.2d 357 (D.C. Cir.), reissued 90 F.T.C. 606 (1977); *Rhodes Pharmacal Co.* [1953 TRADE CASES ¶ 67,607], 208 F.2d 382, 387 (7th Cir. 1953), aff'd [1955 TRADE CASES ¶ 67,956], 348 U.S. 940 (1955).

²³*National Comm'n on Egg Nutrition*, 88 F.T.C. 89, 185 (1976), enforced in part [1978-1 TRADE CASES ¶ 61,877], 570 F.2d 157 (7th Cir. 1977); *Jay Norris Corp.*, 91 F.T.C. 751, 836 (1978), aff'd [1979-1 TRADE CASES ¶ 62,623], 598 F.2d 1244 (2d Cir. 1979).

²⁴*National Dynamics*, 82 F.T.C. 488, 524, 548 (1973), aff'd [1974-1 TRADE CASES ¶ 74,947], 492 F.2d 1333 (2d

spective of the "average listener."²⁴ In a case involving the sale of encyclopedias, the Commission observed "[i]n determining the meaning of an advertisement, a piece of promotional material or a sales presentation, the important criterion is the net impression that it is likely to make on the general populace."²⁵ The decisions in *American Home Products*, *Bristol Myers*, and *Sterling Drug* are replete with references to reasonable consumer interpretations.²⁶ In a land sales case, the Commission evaluated the oral statements and written representations "in light of the sophistication and understanding of the persons to whom they were directed."²⁷ Omission cases are no different: the Commission examines the failure to disclose in light of expectations and understandings of the typical buyer²⁸ regarding the claims made.

When representations or sales practices are targeted to a specific audience, such as children, the elderly, or the terminally ill, the Commission determines the effect of the practice on a reasonable member of that group.²⁹ For instance, if a company markets a cure to the terminally ill, the practice will be evaluated from the perspective of how it affects the ordinary member of that group. Thus, terminally ill consumers might be particu-

larly susceptible to exaggerated cure claims. By the same token, a practice or representation directed to a well-educated group, such as a prescription drug advertisement to doctors, would be judged in light of the knowledge and sophistication of that group.³⁰

As it has in the past, the Commission will evaluate the entire advertisement, transaction, or course of dealing in determining how reasonable consumers are likely to respond. Thus, in advertising the Commission will examine "the entire mosaic, rather than each tile separately."³¹ As explained by a court of appeals in a recent case:

The Commission's right to scrutinize the visual and aural imagery of advertisements follows from the principle that the Commission looks to the impression made by the advertisements as a whole. Without this mode of examination, the Commission would have limited recourse against crafty advertisers whose deceptive messages were conveyed by means other than, or in addition to, spoken words. *American Home Products* [1982-83 TRADE CASES ¶ 65,081], 695 F.2d 681, 688 (3d Cir. Dec. 3, 1982).³²

(Footnote Continued)

Cir.), cert. denied, 419 U.S. 993 (1974), reissued 85 F.T.C. 391 (1976).

²⁴ *Warner-Lambert*, 86 F.T.C. 1398, 1415 n. 4 (1975), aff'd [1977-2 TRADE CASES ¶ 61,563], 562 F.2d 749 (D.C. Cir. 1977), cert. denied, 435 U.S. 950 (1978).

²⁵ *Grolier*, 91 F.T.C. 315, 430 (1978), remanded on other grounds [1980-1 TRADE CASES ¶ 63,153], 615 F.2d 1215 (9th Cir. 1980), modified on other grounds, 98 F.T.C. 882 (1981), reissued, 99 F.T.C. 379 (1982).

²⁶ *American Home Products*, 98 F.T.C. 136 (1981), aff'd [1982-83 TRADE CASES ¶ 65,081], 695 F.2d 681 (3d Cir. 1982). "... consumers may be led to expect, quite reasonably..." (at 386); "... consumers may reasonably believe..." (id. n. 52); "... would reasonably have been understood by consumers..." (at 371); "The record shows that consumers could reasonably have understood this language..." (at 372). See also, pp. 373, 374, 375. *Bristol-Myers*, D. 8917 (July 5, 1983), appeal docketed, No. 83-4167 (2nd Cir. Sept. 12, 1983). "... ads must be judged by the impression they make on reasonable members of the public..." (Slip Op. at 4); "consumers could reasonably have understood..." (Slip Op. at 7); "... consumers could reasonably infer..." (Slip Op. at 11). *Sterling Drug, Inc.*, D. 8919 (July 5, 1983), appeal docketed, No. 83-7700 (9th Cir. Sept. 14, 1983). "... consumers could reasonably assume..." (Slip Op. at 9); "... consumers could reasonably interpret the ads..." (Slip Op. at 33).

²⁷ *Horizon Corp.*, 97 F.T.C. 464, 810 n. 13 (1981).

²⁸ *Simon Management*, 87 F.T.C. 1184, 1230 (1976).

²⁹ The listed categories are merely examples. Whether children, terminally ill patients, or any other subgroup of the population will be considered a special audience depends on the specific factual context of the claim or the practice.

The Supreme Court has affirmed this approach. "The determination whether an advertisement is misleading requires consideration of the legal sophistication of its audience." *Bates v. Arizona* [1977-2 TRADE CASES ¶ 61,573], 433 U.S. 350, 383 n. 37 (1977).

³⁰ In one case, the Commission's complaint focused on seriously ill persons. The ALJ summarized:

"According to the complaint, the frustrations and hopes of the seriously-ill and their families were exploited, and the representations had the tendency and capacity to induce the seriously ill to forego conventional medical treatment worsening their condition and in some cases hastening death, or to cause them to spend large amounts of money

and to undergo the inconvenience of traveling for a non-existent 'operation.'" *Travel King*, 85 F.T.C. 715, 719 (1975).

In a case involving a weight loss product, the Commission observed:

"It is obvious that dieting is the conventional method of losing weight. But it is equally obvious that many people who need or want to lose weight regard dieting as bitter medicine. To these corpulent consumers the promises of weight loss without dieting are the Siren's call, and advertising that heralds unrestrained consumption while muting the inevitable need for temperance, if not abstinence, simply does not pass muster." *Porter & Dietsch*, 90 F.T.C. 770, 864-865 (1977), aff'd [1979-2 TRADE CASES ¶ 62,796], 605 F.2d 294 (7th Cir. 1979), cert. denied, 445 U.S. 950 (1980).

Children have also been the specific target of ads or practices. In *Ideal Toy*, the Commission adopted the Hearing Examiner's conclusion that:

"False, misleading and deceptive advertising claims beamed at children tend to exploit unfairly a consumer group unqualified by age or experience to anticipate or appreciate the possibility that representations may be exaggerated or untrue." *Ideal Toy*, 64 F.T.C. 297, 310 (1964).

See also, *Avalon Industries Inc.*, 83 F.T.C. 1728, 1750 (1974).

³¹ *FTC v. Sterling Drug* [1963 TRADE CASES ¶ 70,771], 317 F.2d 669, 674 (2d Cir. 1963).

³² Numerous cases exemplify this point. For instance, in *Pfizer*, the Commission ruled that "the net impression of the advertisement, evaluated from the perspective of the audience to whom the advertisement is directed, is controlling." 81 F.T.C. 23, 58 (1972).

In a subsequent case, the Commission explained that "[i]n evaluating advertising representations, we are required to look at the complete advertisement and formulate our opinions on them on the basis of the net general impression conveyed by them and not on isolated excerpts." *Standard Oil of Calif.*, 84 F.T.C. 1401, 1471 (1974), aff'd as modified [1978-2 TRADE CASES ¶ 62,145], 577 F.2d 653 (9th Cir. 1978), reissued, 96 F.T.C. 380 (1980).

The Third Circuit stated succinctly the Commissioner's standard. "The tendency of the advertising to deceive must be judged by viewing it as a whole, without emphasizing isolated words or phrases apart from their context." *Beneficial Corp. v. FTC* [1976-2 TRADE CASES ¶ 61,066], 542 F.2d 611, 617 (3d Cir. 1976), cert. denied, 430 U.S. 983 (1977).

Commission cases reveal specific guidelines. Depending on the circumstances, accurate information in the text may not remedy a false headline because reasonable consumers may glance only at the headline.³³ Written disclosures or fine print may be insufficient to correct a misleading representation.³⁴ Other practices of the company may direct consumers' attention away from the qualifying disclosures.³⁵ Oral statements, label disclosures or point-of-sale material will not necessarily correct a deceptive representation or omission.³⁶ Thus, when the first contact between a seller and a buyer occurs through a deceptive practice, the law may be violated, even if the truth is subsequently made known to the purchaser.³⁷ *Pro forma* statements or disclaimers may not cure otherwise deceptive messages or practices.³⁸

Qualifying disclosures must be legible and understandable. In evaluating such disclosures, the Commission recognizes that in many circum-

stances, reasonable consumers do not read the entirety of an ad or are directed away from the importance of the qualifying phrase by the acts or statements of the seller. Disclosures that conform to the Commission's Statement of Enforcement Policy regarding clear and conspicuous disclosures, which applies to television advertising, are generally adequate. CCH TRADE REGULATION REPORTER, ¶ 7569.09 (Oct. 21, 1970). Less elaborate disclosures may also suffice.³⁹

Certain practices, however, are unlikely to deceive consumers acting reasonably. Thus, the Commission generally will not bring advertising cases based on subjective claims: (taste, feel, appearance, smell) or on correctly stated opinion claims if consumers understand the source and limitations of the opinion.⁴⁰ Claims phrased as opinions are actionable, however, if they are not honestly held, if they misrepresent the qualifications of the holder or the basis of his opinion or if

³³ In *Litton Industries*, the Commission held that fine print disclosures that the surveys included only "Litton authorized" agencies were inadequate to remedy the deceptive characterization of the survey population in the headline. 97 F.T.C. 1, 71, n.6 (1981), aff'd as modified [1982-2 TRADE CASES ¶ 64,751], 676 F.2d 364 (9th Cir. 1982). Compare the Commission's note in the same case that the fine print disclosure "Litton and one other brand" was reasonable to qualify the claim that independent service technicians had been surveyed. "[F]ine print was a reasonable medium for disclosing a qualification of only limited relevance." 97 F.T.C. 1, 70, n. 5 (1981).

In another case, the Commission held that the body of the ad corrected the possibly misleading headline because in order to enter the contest, the consumer had to read the text, and the text would eliminate any false impression stemming from the headline. *D.L. Blair*, 82 F.T.C. 234, 255-256 (1973).

In one case, respondent's expert witness testified that the headline (and accompanying picture) of an ad would be the focus point of the first glance. He also told the administrative law judge that a consumer would spend "[t]ypically a few seconds at most" on the ads at issue. *Crown Central*, 84 F.T.C. 1493, 1543 nn. 14-15 (1974).

³⁴ In *Giant Food*, the Commission agreed with the examiner that the fine print disclaimer was inadequate to correct a deceptive impression. The Commission quoted from the examiner's finding that "very few if any of the persons who could read Giant's advertisements would take the trouble to, or did, read the fine print disclaimer." 61 F.T.C. 326, 348 (1962).

Cf. *Beneficial Corp. v. FTC* [1976-2 TRADE CASES ¶ 61,066], 542 F.2d 611, 618 (3d Cir. 1976), where the court reversed the Commission's opinion that no qualifying language could eliminate the deception stemming from use of the slogan "Instant Tax Refund."

³⁵ Respondents argue that the contracts consumers signed indicated that credit life insurance was not required for financing, and that this disclosure obviated the possibility of deception. We disagree. It is clear from consumer testimony that oral deception was employed in some instances to cause consumers to ignore the warning in their sales agreement. . . . *Peacock Buick*, 86 F.T.C. 1532, 1558-59 (1974).

³⁶ *Exposition Press* [1961 TRADE CASES ¶ 70,164], 295 F.2d 869, 873 (2d Cir. 1961); *Gimbel Bros.*, 61 F.T.C. 1051, 1066 (1962); *Carter Products* [1950-1951 TRADE CASES ¶ 62,796], 186 F.2d 821, 824 (1951).

By the same token, money-back guarantees do not eliminate deception. In *Sears*, the Commission observed:

"A money-back guarantee is no defense to a charge of deceptive advertising. . . . A money-back guarantee does not

compensate the consumer for the often considerable time and expense incident to returning a major-ticket item and obtaining a replacement."

Sears, Roebuck and Co., 95 F.T.C. 406, 518 (1980), aff'd [1982-2 TRADE CASES ¶ 64,752], 676 F.2d 385 (9th Cir. 1982). However, the existence of a guarantee, if honored, has a bearing on whether the Commission should exercise its discretion to prosecute. See Deceptive and Unsubstantiated Claims Policy Protocol, 1975.

³⁷ See *American Home Products*, 98 F.T.C. 136, 370 (1981), aff'd [1982-83 TRADE CASES ¶ 65,081], 695 F.2d 681, 688 (3d Cir. Dec. 3, 1982). Whether a disclosure on the label cures deception in advertising depends on the circumstances:

"It is well settled that dishonest advertising is not cured or excused by honest labeling [footnote omitted]. Whether the ill-effects of deceptive nondisclosure can be cured by a disclosure requirement limited to labeling, or whether a further requirement of disclosure in advertising should be imposed, is essentially a question of remedy. As such it is a matter within the sound discretion of the Commission [footnote omitted]. The question of whether in a particular case to require disclosure in advertising cannot be answered by application of any hard-and-fast principle. The test is simple and pragmatic: Is it likely that, unless such disclosure is made, a substantial body of consumers will be misled to their detriment?" *Statement of Basis and Purpose for the Cigarette Advertising and Labeling Trade Regulation Rule*, 1965, pp. 89-90, 29 Fed. Reg. 8325 (1964).

Misleading "door openers" have also been found deceptive (*Encyclopedia Britannica*, 87 F.T.C. 421, (1976), aff'd [1979-2 TRADE CASES ¶ 62,793], 605 F.2d 964 (7th Cir. 1979), cert. denied, 445 U.S. 934 (1980), as modified, 100 F.T.C. 500 (1982)), as have offers to sell that are not bona fide offers (*Seekonk Freezer Meats, Inc.*, 82 F.T.C. 1025 (1973)). In each of these instances, the truth is made known prior to purchase.

³⁸ In the *Listerine* case, the Commission held that *pro forma* statements of no absolute prevention followed by promises of fewer colds did not cure or correct the false message that Listerine will prevent colds. *Warner Lambert*, 86 F.T.C. 1398, 1414 (1975), aff'd [1977-2 TRADE CASES ¶ 61,646], 562 F.2d 749 (D.C. Cir. 1977), cert. denied, 435 U.S. 950 (1978).

³⁹ *Chicago Metropolitan Pontiac Dealers' Ass'n*, C. 3110 (June 9, 1983).

⁴⁰ An opinion is a representation that expresses only the belief of the maker, without certainty, as to the existence of a fact or his judgment as to quality, value, authenticity, or other matters of judgment. *American Law Institute, Restatement on Torts, Second* ¶ 538A.

the recipient reasonably interprets them as implied statements of fact.⁴¹

The Commission generally will not pursue cases involving obviously exaggerated or puffing representations, *i.e.*, those that the ordinary consumers do not take seriously.⁴² Some exaggerated claims, however, may be taken seriously by consumers and are actionable. For instance, in rejecting a respondent's argument that use of the words "electronic miracle" to describe a television antenna was puffery, the Commission stated:

Although not insensitive to respondent's concern that the term miracle is commonly used in situations short of changing water into wine, we must conclude that the use of "electronic miracle" in the context of respondent's grossly exaggerated claims would lead consumers to give added credence to the overall suggestion that this device is superior to other types of antennae. *Jay Norris*, 91 F.T.C. 751, 847 n. 20 (1978), *aff'd*, 598 F.2d 1244 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979).

Finally, as a matter of policy, when consumers can easily evaluate the product or service, it is inexpensive, and it is frequently purchased, the Commission will examine the practice closely before issuing a complaint based on deception. There is little incentive for sellers to misrepresent (either by an explicit false statement or a deliberate false implied statement) in these circumstances since they normally would seek to encourage repeat purchases. Where, as here, market incentives place strong constraints on the likelihood of deception, the Commission will examine a practice closely before proceeding.

In sum, the Commission will consider many factors in determining the reaction of the ordinary

consumer to a claim or practice. As would any trier of fact, the Commission will evaluate the totality of the ad or the practice and ask questions such as: how clear is the representation? how conspicuous is any qualifying information? how important is the omitted information? do other sources for the omitted information exist? how familiar is the public with the product or service?⁴³

IV. The Representation, Omission or Practice Must be Material

The third element of deception is materiality. That is, a representation, omission or practice must be a material one for deception to occur.⁴⁴ A "material" misrepresentation or practice is one which is likely to affect a consumer's choice of or conduct regarding a product.⁴⁵ In other words, it is information that is important to consumers. If inaccurate or omitted information is material, injury is likely.⁴⁶

The Commission considers certain categories of information presumptively material.⁴⁷ First, the Commission presumes that express claims are material.⁴⁸ As the Supreme Court stated recently, "[in] the absence of factors that would distort the decision to advertise, we may assume that the willingness of a business to promote its products reflects a belief that consumers are interested in the advertising."⁴⁹ Where the seller knew, or should have known, that an ordinary consumer would need omitted information to evaluate the product or service, or that the claim was false, materiality will be presumed because the manufacturer intended the information or omission to

⁴¹ *Id.* ¶ 539. At common law, a consumer can generally rely on an expert opinion. *Id.* ¶ 542(a). For this reason, representations of expert opinion will generally be regarded as representations of fact.

⁴² "[T]here is a category of advertising themes, in the nature of puffing or other hyperbole, which do not amount to the type of affirmative product claims for which either the Commission or the consumer would expect documentation." *Pfizer, Inc.*, 81 F.T.C. 23, 64 (1972).

⁴³ The term "puffing" refers generally to an expression of opinion not made as a representation of fact. A seller has some latitude in puffing his goods, but he is not authorized to misrepresent them or to assign to them benefits they do not possess [cite omitted]. Statements made for the purpose of deceiving prospective purchasers cannot properly be characterized as mere puffing." *Wilmington Chemical*, 69 F.T.C. 828, 865 (1966).

⁴⁴ In *Avalon Industries*, the ALJ observed that the "ordinary person with a common degree of familiarity with industrial civilization" would expect a reasonable relationship between the size of package and the size or quantity of the contents. He would have no reason to anticipate slack filling." 83 F.T.C. 1728, 1750 (1974) (I.D.).

⁴⁵ A misleading claim or omission in advertising will violate Section 5 or Section 12, however, only if the omitted information would be a material factor in the consumer's decision to purchase the product." *American Home Products Corp.*, 98 F.T.C. 136, 368 (1981), *aff'd* [1979-2 TRADE CASES ¶ 62,793], 695 F.2d 681 (3d Cir. 1982). A claim is material if it is likely to affect consumer behavior. "Is it likely to affect the average consumer in deciding whether to purchase the advertised product—is there a material deception, in other words?" Statement of Basis and Purpose,

Cigarette Advertising and Labeling Rule, 1965, pp. 86-87. 29 Fed. Reg. 8325 (1964).

⁴⁶ Material information may affect conduct other than the decision to purchase a product. The Commission's complaint in *Volkswagen of America*, 99 F.T.C. 446 (1982), for example, was based on provision of inaccurate instructions for oil filter installation. In its *Restatement on Torts, Second*, the American Law Institute defines a material misrepresentation or omission as one which the reasonable person would regard as important in deciding how to act, or one which the maker knows that the recipient, because of his or her own peculiarities, is likely to consider important. Section 538(2). The Restatement explains that a material fact does not necessarily have to affect the finances of a transaction. "There are many more-or-less sentimental considerations that the ordinary man regards as important." Comment on Clause 2(a)(d).

⁴⁷ In evaluating materiality, the Commission takes consumer preferences as given. Thus, if consumers prefer one product to another, the Commission need not determine whether that preference is objectively justified. See *Algoma Lumber*, 291 U.S. 54, 78 (1933). Similarly, objective differences among products are not material if the difference is not likely to affect consumer choices.

⁴⁸ The Commission will always consider relevant and competent evidence offered to rebut presumptions of materiality.

⁴⁹ Because this presumption is absent for some implied claims, the Commission will take special caution to ensure materiality exists in such cases.

⁵⁰ *Central Hudson Gas & Electric Co. v. PSC*, 447 U.S. 557, 567 (1800).

have an effect.⁵⁰ Similarly, when evidence exists that a seller intended to make an implied claim, the Commission will infer materiality.⁵¹

The Commission also considers claims or omissions material if they significantly involve health, safety, or other areas with which the reasonable consumer would be concerned. Depending on the facts, information pertaining to the central characteristics of the product or service will be presumed material. Information has been found material where it concerns the purpose,⁵² safety,⁵³ efficacy,⁵⁴ or cost⁵⁵ of the product or service. Information is also likely to be material if it concerns durability; performance, warranties or quality. Information pertaining to a finding by another agency regarding the product may also be material.⁵⁶

Where the Commission cannot find materiality based on the above analysis, the Commission may require evidence that the claim or omission is likely to be considered important by consumers. This evidence can be the fact that the product or service with the feature represented costs more than an otherwise comparable product without the feature, a reliable survey of consumers, or credible testimony.⁵⁷

A finding of materiality is also a finding that injury is likely to exist because of the representation, omission, sales practice, or marketing technique. Injury to consumers can take many forms.⁵⁸ Injury exists if consumers would have chosen differently but for the deception. If different choices are likely, the claim is material, and injury is likely as well. Thus, injury and materiality are different names for the same concept.

V. Conclusion

The Commission will find an act or practice deceptive if there is a misrepresentation, omission, or other practice, that misleads the consumer acting reasonably in the circumstances, to the consumer's detriment. The Commission will not generally require extrinsic evidence concerning the representations understood by reasonable consumers or the materiality of a challenged claim, but in some instances extrinsic evidence will be necessary.

The Commission intends to enforce the FTC Act vigorously. We will investigate, and prosecute where appropriate, acts or practices that are deceptive. We hope this letter will help provide you and the public with a greater sense of certainty concerning how the Commission will exercise its jurisdiction over deception. Please do not hesitate to call if we can be of any further assistance.

By direction of the Commission, Commissioners Pertschuk and Bailey dissenting, with separate statements attached, and with separate response to the request of the Commission on Energy and Commerce of the House of Representatives for a legal analysis to follow.

Chairman Miller, Response on Deception

In response to a Congressional request that we indicate the dimensions of our enforcement policy regarding deceptive acts and practices, I move Commission approval of the attached letters to Congressman Dingell and Senator Packwood.

As you know, our enforcement policy regarding deception has been a subject of considerable discussion since we all testified before the Senate

⁵⁰ *CF: Restatement on Contracts, Second* ¶ 162(1).

⁵¹ In *American Home Products*, the evidence was that the company intended to differentiate its products from aspirin. "The very fact that AHP sought to distinguish its products from aspirin strongly implies that knowledge of the true ingredients of those products would be material to purchasers." *American Home Products*, 98 F.T.C. 136, 368 (1981), aff'd [1978-2 TRADE CASES ¶ 62,793], 695 F.2d 681 (3d Cir. 1982).

⁵² In *Fedders*, the ads represented that only Fedders gave the assurance of cooling on extra hot, humid days. "Such a representation is the *raison d'être* for an air conditioning unit—it is an extremely material representation." 85 F.T.C. 38, 61 (1975) (I.D.), petition dismissed [1976-1 TRADE CASES ¶ 60,695], 529 F.2d 1398 (2d Cir.), cert. denied, 429 U.S. 818 (1976).

⁵³ "We note at the outset that both alleged misrepresentations go to the issue of the safety of respondent's product, and issue of great significance to consumers." *Firestone*, 81 F.T.C. 398, 456 (1972), aff'd [1973-1 TRADE CASES ¶ 74,588], 481 F.2d 246 (6th Cir.), cert. denied, 414 U.S. 1112 (1973).

⁵⁴ The Commission found that information that a product was effective in only the small minority of cases where tiredness symptoms are due to an iron deficiency, and that it was of no benefit in all other cases, was material. *J.B. Williams Co.*, 68 F.T.C. 481, 546 (1965), aff'd [1967 TRADE CASES ¶ 72,182], 381 F.2d 884 (6th Cir. 1967).

⁵⁵ As the Commission noted in *MacMillan, Inc.*:

"In marketing their courses, respondents failed to adequately disclose the number of lesson assignments to be submitted in a course. These were material facts necessary for the student to calculate his tuition obligation, which was based on the number of lesson assignments he submitted for

grading. The nondisclosure of these material facts combined with the confusion arising from LaSalle's inconsistent use of terminology had the capacity to mislead students about the nature and extent of their tuition obligation." *MacMillan, Inc.*, 96 F.T.C. 208, 303-304 (1980).

See also, *Peacock Buick*, 86 F.T.C. 1532, 1562 (1975), aff'd, 553 F.2d 97 (4th Cir. 1977).

⁵⁶ *Simeon Management Corp.*, 87 F.T.C. 1184 (1976), aff'd [1978-2 TRADE CASES ¶ 62,282], 579 F.2d 1137, 1168, n. 10 (9th Cir. 1978).

⁵⁷ In *American Home Products*, the Commission approved the ALJ's finding of materiality from an economic perspective:

"If the record contained evidence of a significant disparity between the prices of Anacin and plain aspirin, it would form a further basis for a finding of materiality. That is, there is a reason to believe consumers are willing to pay a premium for a product believed to contain a special analgesic ingredient, but not for a product whose analgesic is ordinary aspirin." *American Home Products*, 98 F.T.C. 136, 369 (1981), aff'd [1982-83 TRADE CASES ¶ 65,081], 695 F.2d 681 (3d Cir. 1982).

⁵⁸ The prohibitions of Section 5 are intended to prevent injury to competitors as well as to consumers. The Commission regards injury to competitors as identical to injury to consumers. Advertising and legitimate marketing techniques are intended to "injure" competitors by directing business to the advertiser. In fact, vigorous competitive advertising can actually benefit consumers by lowering prices, encouraging product innovation, and increasing the specificity and amount of information available to consumers. Deceptive practices injure both competitors and consumers because consumers who preferred the competitors' product are wrongly diverted.

Subcommittee for Consumers of the Committee on Commerce, Science and Transportation on July 22, 1982. Last April 13th, a very detailed, 21-page outline, forming the basis for the attached letters, was circulated to you by the Bureau of Consumer Protection. Then, on September 16th, I circulated a draft version of the attached letters and, since then we and our staffs have engaged in extensive discussions leading to improvements in the initial draft.

I believe that it is now time for the Commission to render a decision on this matter. To afford Commissioners an opportunity to prepare separate statements should they so desire, I plan to deliver the attached letters (together with any separate statements) one week from today—that is, October 21st.

**Dissenting Statement of Commissioner
Patricia P. Bailey Concerning the
Commission's Statement on Deception**

Last year, the House Committee on Energy and Commerce requested that the Commission prepare and submit "an analysis of its deception jurisdiction as presently applied by the Commission and interpreted in case law." One month ago, on September 16, 1983, the Chairman circulated to the members of the Commission a draft statement in response to that request. That statement, which the Commission is receiving today in the form of a letter addressed to Chairman Dingell from Chairman Miller, is an ill-conceived and frankly radical attempt to change the law of deception and to create new and restrictive legal standards which would constrain the Commission's traditional and important law enforcement activities. Chairman Miller's letter is a confusing combination of law and policy rather than an analysis of the law of deception and as such is not responsive to the Committee's request. I have dissented from its issuance and am preparing, together with Commissioner Pertschuk, a separate and responsive legal analysis which will be forwarded to the Commission shortly.

As a preliminary matter, I regret the manner in which this statement was rushed to a premature decision. It is being released to the Commission without the benefit of thorough, thoughtful consideration, without much-needed revisions and without comment from the state Attorneys General who urgently requested an opportunity to comment before the document was put into final form.

The way this matter was handled stands in stark contrast to the lengthy and careful process which was followed when the Commission undertook the analysis of "unfairness" over three years

ago. The resulting document in that case was six months in the drafting and was the subject of countless staff and Commissioner negotiations and two Commission meetings. The result, as the Commission knows, was a unanimous statement of the Commission's view of its authority under the "unfairness" law. In this case, two-week old negotiations with my office which were on the point we thought of achieving some significant revisions to the statement were suddenly terminated. A new draft of the statement was circulated for a vote late in the day October 14, 1983. It immediately received three votes, including that of a Commissioner whose term of office ended on that day. It is distressing that a document so central and so important to the Commission's future work was rushed to premature decision and release.

In my view the document the Committee receives today is totally inadequate and, indeed, an embarrassing effort to analyze and discuss a substantial body of Commission law. Sweeping generalizations in the statement are unsupported. Assertions purporting to derive from established precedent are misread, misstated, or presented in a disingenuous fashion. Serious inconsistencies appear throughout the document, while landmark cases, including decisions of the United States Supreme Court, are entirely ignored.

Moreover, the statement rewrites fundamental concepts of the law in a way that would raise to new and extreme levels the burden the Commission faces in prosecuting law violators. The principles it describes bear a distinct resemblance to the proposed statutory definition of deception which Chairman Miller has offered and which he has acknowledged was intended to alter the law of deception. It is a source of no small concern to me that this statement could be used to deprive consumers of the protection accorded to them under the Commission's statute and by forty-five years of Commission and judicial precedent. I highlight below some important examples of its shortcomings and inadequacies.

The majority statement summarizes legal deception as a three part formula: it asserts that deception consists of a representation, omission or practice that (1) is likely to mislead consumers (2) acting reasonably (3) to their detriment.¹ As a statement of the existing standard, this three part test is clearly flawed. Each of these parts misstates the law.²

The first element, as it now stands, creates confusion. The Commission and the courts have through the years asked whether an act or practice had the tendency or capacity to mislead consumers before finding deception.³ This statement

¹ See Letter from Chairman James C. Miller III to Hon. John D. Dingell at 4, 19 (Oct. 14, 1983).

² A more accurate summary of the law of deception would provide, instead that a representation, omission or practice is deceptive, and violates Section 5 of the Federal Trade Commission Act, if it has a tendency or capacity to mislead substantial numbers of consumers and it is material to consumers.

³ See *U.S. Retail Credit Ass'n v. FTC* [1962 TRADE CASES ¶ 70,253], 300 F.2d 212, 221 (4th Cir. 1962); *Bockenstette*

v. FTC [1940-1943 TRADE CASES ¶ 56,325], 134 F.2d 369, 371 (10th Cir. 1943); *American Home Products Corp.*, 98 F.T.C. 136, 387 & n. 54 (1981), aff'd [1982-1983 TRADE CASES ¶ 65,081], 695 F.2d 681 (3d Cir. 1982); *Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 450-51 (1972), aff'd [1973-1 TRADE CASES ¶ 74,588], 481 F.2d 246 (6th Cir.), cert. denied, 414 U.S. 1112 (1973).

substitutes for that concept the *likelihood* that the act of practice will mislead consumers. Without explanation, one is left to wonder whether these two perhaps similar ideas are indeed the same, and if so why the traditional "tendency or capacity" phrasing was not used. On the other hand if the "likelihood" standard is intended to describe a different standard, is it a higher or a lower standard? If higher, or more restrictive, then the statement should but does not contain any reference to conduct the Commission apparently can now but would be unable to reach under an elevated standard.

Proceeding through the document does not dispel the confusion. In elaborating on the first element of this new definition the statement describes a "misrepresentation" as an express or implied statement contrary to fact. How will that definition affect cases involving half-truths, or literal truths, presented in a misleading fashion? What about claims that employ entirely accurate but unrepresentative statistics or test results? Consider also the "bait" in a "bait and switch" promotion or the pitch in a high pressure sales presentation, both of which commonly involve factually accurate statements. I do not doubt that agile minds will be able to fit these situations into the statement's construct, but I question the wisdom of requiring that effort and risking the elimination from the Commission's reach of a long list of heretofore deceptive practices.

The second element of this new definition of deception is even more troubling. The Commission and the courts have traditionally ruled that an act or practice may be deceptive even if it does not mislead sophisticated or wary consumers.⁴ The statement contained in the Chairman's letter, however, would limit the Commission's reach to those cases involving deception of "reasonable" consumers, a concept otherwise undefined. I have asked before and must ask again: is it "reasonable" to buy undeveloped land sight unseen? Is it "reasonable" for a consumer to permit him or herself to be baited and switched to a more expensive product than he or she went into a store to buy? Is it "reasonable" to rely on oral representations in transactions involving large sums of money when written contracts deny or disclaim any oral misrepresentations? Different minds might reach different answers to these questions. Yet the Commission has traditionally chosen to protect consumers in these circumstances. Moreover, it is not at all clear to me that some of the

most recent lawsuits initiated by a unanimous Commission could meet the "reasonableness" standard created by this definition. I foresee a great harm to the public interest if this standard prevents the Commission from continuing important work that has in the past resulted in numerous lawsuits on behalf of literally thousands of injured consumers and substantial monetary redress.⁵

Scholars familiar with the law of deception will undoubtedly be surprised at the omission from this portion of the statement of any mention of the seminal Supreme Court case, *FTC v. Standard Education Society*.⁶ At issue there was the deceptive nature of price claims made to prospective purchasers of encyclopedias and the Commission's ability to protect consumers from clearly misleading practices. The Court of Appeals found that consumers would not be "fatuous enough to be misled" by the claims, and dismissed the case. The Supreme Court reversed this ruling, holding that "the fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced."⁷ It is interesting and perhaps revealing to note that the standard the Supreme Court reversed in that case virtually parallels the standard this statement cites as a necessary element of deception.

The third and final element of the new deception definition suggests that an act or practice is deceptive only if it is material. Material acts or practices are those that are likely to affect a consumer's conduct, including conduct other than the consumer's decision to purchase a product, as the statement correctly notes.⁸ Yet the statement equates materiality and injury, suggesting that actual injury must be shown before a finding of materiality is made. This proposition is inconsistent not only with other portions of the statement, but also with a substantial body of law holding that the Commission need not show actual injury or prejudice to consumers in order to find an act or practice material.⁹

Actual injury as a prerequisite to a finding of deception is bad policy as well as bad law. This standard could in my view severely and unacceptably narrow the Commission's advertising substantiation doctrine. If actual injury is a necessary element of every case, the Commission might have to prove that a claim is not simply unsubstantiated but false as well, since the Com-

⁴ See *FTC v. Standard Educ. Soc.* [1932-1939 TRADE CASES ¶ 55,170], 302 U.S. 112, 115-16 (1937); *Aronberg v. FTC*, 132 F.2d 165, 167 (7th Cir. 1942); *Sun Oil Co.*, 84 F.T.C. 247, 270 (1974); *New York Jewelry Co.*, 74 F.T.C. 1361, 1406 (1968), aff'd sub nom. *Tashof v. FTC* [1971 TRADE CASES ¶ 73,417], 437 F.2d 707 (D.C. Cir. 1970).

⁵ See, e.g., *Horizon Corp.*, 97 F.T.C. 464, 839 (1981) (deceptive land sales); *Seckonk Freezer Meats, Inc.*, 82 F.T.C. 1025, 1055 (1973) (deceptive advertising in sale of meat and meat products); *Lear Siegler, Inc.*, 86 F.T.C. 860 (1975) (deceptive advertising for vocational school); *Koscot Interplanetary, Inc.*, 86 F.T.C. 1106, 1180 (1975) (deceptive "pyramid" sales and recruitment), modified, 87 F.T.C. 75 (1976); *New York Jewelry Co.*, 74 F.T.C. 1361 (1968),

aff'd sub nom. *Tashof v. FTC* [1971 TRADE CASES ¶ 73,417], 437 F.2d 707 (D.C. Cir. 1970).

⁶ [1932-1939 TRADE CASES ¶ 55,170], 302 U.S. 112 (1937).

⁷ *Id.* at 115-16.

⁸ See Letter from Chairman James C. Miller III to Hon. John D. Dingell at 16-17 (Oct. 14, 1983).

⁹ See *FTC v. Colgate-Palmolive Co.* [1965 TRADE CASES ¶ 71,409], 380 U.S. 374, 391-92 (1965); *Litton Indus., Inc.*, 97 F.T.C. 1, 39-40 (1981), aff'd as modified [1982-2 TRADE CASES ¶ 64,751], 676 F.2d 364 (9th Cir. 1982); *Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 451 (1972), aff'd [1973-1 TRADE CASES ¶ 74,588], 481 F.2d 246 (6th Cir.), cert. denied, 414 U.S. 1112 (1973).

mission might be unable to establish that an unsubstantiated claim—one lacking a reasonable basis but not demonstrably false—has caused the kind of concrete harm or detriment that is suggested by the injury-materiality standard contained in the statement. It would be truly unconscionable were such a result to occur as the by-product of haste.

I have dissented from the publication of the attached statement because I can see no benefit to the Committee on Energy and Commerce, to the Federal Trade Commission, or to the public from its release. Rather than clarifying for the Committee the law of deception, the statement writes new law that is destined to confuse and confound its readers. The three part definition of deception, if applied literally, could substantially narrow the Commission's authority to prosecute a wide range of dishonest and deceptive conduct, while creating enormous complications and uncertainty about the legitimacy of those cases we do bring.

The Commission's statutory authority to police the marketplace against deceptive acts or practices has been virtually untouched in forty-five years. Court decisions throughout that period have been remarkably consistent. Commissioner Pertschuk and I have undertaken a joint effort to provide the Committee with an analysis of the law of deception which assesses as accurately as possible this comprehensive and stable body of law. We will transmit it to the Committee shortly.

Dissenting Statement of Commissioner Pertschuk Concerning the Commission's Statement on Deception

Of all the destructive, anticonsumer efforts this administration has pursued, none of them has been potentially more disastrous for the Federal Trade Commission and consumer protection enforcement than the attempt to change the law of deception. Had Chairman Miller's proposal to define "deceptive acts or practices" been enacted, the Commission would have been hamstrung by a series of evidentiary hurdles and new defenses in even simple misleading advertising cases. Fortunately, his efforts were met by Congress with an unenthusiastic yawn. A majority of the Commission, however, has now adopted a statement which purports to analyze the law of deception, but which actually adopts much of the Chairman's policy prescriptions for cutting back the Commission's authority to protect consumers. While this statement will be far less damaging to consumers than a permanent statutory change, it promises to foster a great deal of mischief until it can be corrected by some future Commission.

Before I comment on the substance of the statement, a word about the process by which the Commission issued this document is in order. A draft letter was forwarded to Commissioner Bailey and myself in the latter part of September for our comments. After we saw the draft statement, both Commissioner Bailey and I submitted extensive comments and expressed a willingness to explore a consensus statement of the law of decep-

tion. Rather than pursue the concededly tedious and difficult, but necessary, task of attempting to build a consensus, however, the Chairman insisted on finalizing on a statement on October 14, the last day of Commissioner Clanton's term. Insisting on final Commission action on a document of this significance while internal review and negotiations among offices are proceeding is inconsistent with sound administrative practice, the tradition of Commission decision-making and the new voting procedures recently adopted by the Commission at the Chairman's urging.

In addition to the inadequacies in the Commission's internal decision-making process, we should have allowed the public, particularly the State Attorneys General, to comment on our statement. In a telegram to Chairman Miller on October 14, the consumer protection subcommittee of the National Association of Attorneys General requested the opportunity to meet with the Commission and to comment before we released a final statement. We did not solicit public comment on our December 1980 Policy Statement on our "unfairness" jurisdiction, and in retrospect, it seems clear that we could have benefited from the views of those outside the Commission, particularly the Attorneys General, most of whom enforce statutes modeled after the FTC Act. The subsequent debate on the statutory proposal to define "unfairness" provided a good lesson about the AG's concerns. In the case of a "deception" statement, comment is even more appropriate because the concept of "deceptive practices" is at the core of the AG's consumer protection enforcement responsibilities. Commissioner Bailey and I voted to allow comment, Chairman Miller and Commissioner Douglas opposed it. Consequently, the motion to seek comment and to meet with representatives of the AG's failed 2-2.

As for the substance of the deception statement, it contains some discussion which appears to state the law correctly, but these statements are interspersed with propositions which are assertions about the way the Chairman *wishes* the law to be. To be sure, the statement is far better than the draft originally proposed because of revisions at the Commission level. However, the statement remains internally inconsistent, confusing, and slipshod in use of legal precedent. Many of the key assertions have no legal citations because there are none; they are ideological propositions about the way the majority wants the law to be and little more. One will look in vain in Commission and court cases for phrases which seem to be used in the statement as reflecting well-established precedent.

Commissioner Bailey and I plan to cooperate in preparing a legal analysis of deception to forward to the Senate and House Commerce Committees as soon as possible, which will provide our analysis of the law and will point out more specifically the inadequacies in the majority statement. However, I summarize below my principal disagreements with majority's statement.

The statement concludes: "The Commission will find an act or practice deceptive if there is a misrepresentation, omission, or other practice that misleads the consumer acting reasonably in the circumstances, to the consumer's detriment." (p. 19) Not surprisingly, this language is nearly identical to the Chairman's proposed statutory definition which provided:

A deceptive act or practice is a material representation that:

(a) Is likely to mislead consumers, acting reasonably in the circumstances, to their detriment, or

(b) the representor knew or should have known would be misleading.¹

There is, of course, more than a little inconsistency in failing to persuade Congress that the law of deception should be changed, then concluding that the law was already the way the Chairman wanted it to be. In any event, the fundamental problems in the Chairman's initial proposal have been carried over into the deception statement.

The "Reasonable Consumer"

The courts have made clear that the Section 5 protects unsophisticated as well as "reasonable" consumers. The Supreme Court in *FTC v. Standard Education Society*² reversed the court of appeals which had failed to uphold a Commission order on the grounds that consumers should have been smart enough not to be fooled. The Court's reasoning is a good summary of this aspect of the law of deception:

The fact that a false statement may be obviously false to those who are trained and experienced does not protect its character, nor take away its power to deceive others less experienced. There is no duty resting on a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive enterprises and that the rule of caveat emptor should not be relied upon to reward fraud and deception.³

The Chairman's lament appears to be that the Commission goes too far in protecting the unsophisticated and the unsuspecting. There, of course, must be a limit on our ability to guard against every possible wrong interpretation of an advertising claim, and the Commission has recognized this.⁴ The legitimate concern of advertisers, that the Commission will insist on interpretations

of claims that are unrealistic, is addressed by our willingness to consider extrinsic evidence of consumers' understanding when there is a genuine factual dispute. But there is a marginal segment of American commercial life—promoters of instant weight loss, bust creams, and baldness remedies; purveyors of quick fortunes in land speculation and pyramid schemes; sellers of miracle cancer cures—which exists only because there are unsophisticated consumers. To introduce into the law the idea that the trusting don't deserve protection is "deregulation" in its most reckless and pointless form.

Materiality and Injury

Without a doubt the most harmful part of Chairman Miller's legislative proposal was the idea of requiring the Commission to prove actual substantial injury before a law violation could be found. The Chairman pointed to this supposed gap in the law is the culprit which allowed the Commission to stop Block Drug from falsely claiming its denture cream would allow denture wearers to eat tough foods without embarrassment.⁵ Perhaps sensing that his proposal tended to unnerve Congressional audiences, Chairman Miller and his staff's explanations of the injury requirement had a chameleon-like quality, changing depending on potential criticism of the result. The fundamental flaw in the proposal, however, was the concept that the Commission had to prove actual, substantial injury—a change in the law that would (1) make *legal* limited injury, (2) hamstring the Commission in preventing injury that had not yet occurred, and (3) introduce complex evidentiary problems in stopping even clearly misleading advertisements.

The law is quite clear that actual deception need not have occurred in order to stop a deceptive practice.⁶ This absence of a requirement to prove actual injury is the basis of the long recognized principle that the Commission need only find that there is a "tendency or capacity to deceive" for deception to be actionable under Section 5.⁷ The law requires that deception can be found only if the consumer is misled in a "material" way, but the concept of "materiality" has meant that the information which is the subject of the misrepresentation or omission is likely to matter to consumers. As the Commission stated in the Statement of Basis and Purpose for the Cigarette Rule: "Is it likely to affect the average consumer in deciding whether to purchase the advertised product—is there a material deception, in other words?"⁸

¹ Testimony of Chairman Miller before the Senate Committee on Commerce, Science, and Transportation, July 22, 1982, p. 4. The second part of the proposal, requiring a showing of negligence or intent, appears to be woven through the materiality discussion (see, e.g., p. 18) but it is not clearly stated.

² [1932-1939 TRADE CASES ¶ 55,170] 302 U.S. 112 (1937).

³ *Id.* at 116.

⁴ "A representation does not become 'false and deceptive' merely because it will be unreasonably understood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed." *Henry W. Kirchner*, 63 F.T.C. 1282, 1290 (1963).

⁵ See *Block Drug Co.*, 190 F.T.C. 893 (1977) and Chairman Miller's testimony, cited above, at p. 37.

⁶ "It is not necessary . . . for the Commission to find that actual deception resulted. It is sufficient to find that the natural and probable result of the challenged practice is to cause one to do that which he would not do otherwise." *Bockenstette v. FTC* [1940-1943 TRADE CASES ¶ 56,325], 134 F.2d 369 (10th Cir. 1943).

⁷ See *Charles of the Ritz v. FTC* [1944-1945 TRADE CASES ¶ 57,267], 143 F.2d 676 (2d Cir. 1944).

⁸ 29 Fed. Reg. 8325 (1964), pp. 86-87.

The majority statement does refer to "likely" rather than "actual" injury. Yet, one will find no reference to "tendency or capacity to deceive" anywhere in the statement. Moreover, there is the remarkable assertion that "injury and materiality are different names for the same concept." Finally, in the summary statement on p. 20, the majority restates the Chairman's legislative proposal which even he admits changes the result in some past cases. (see p. 20) This propensity to stuff round legal cases in square ideological holes is a recurring theme of the statement but nowhere more significant than on this issue.

There are a host of lesser problems in the statement as well. For example, one statement appears to write off the idea that a seller may be found liable for a deceptive omission even in the absence of an affirmative misrepresentation (see footnote 4, especially the last sentence beginning on p. 2). Later, however, the majority cites the Cigarette Rule Statement in fn. 9, p. 6, which makes clear that a seller has an obligation to correct a false impression even if it is not caused by affirmative representations. There are also occasional and vague references to the need for extrinsic evidence on various issues (e.g., pp. 5, 7) which threaten to increase the evidentiary complexity of cases and make it exceedingly difficult to establish even common sense factual conclusions.

With more work and a more faithful adherence to the law, the statement could have been useful. As it stands, however, it is a combination of correct statements of legal principles and assertions about the way the Chairman wants the law to be. Thus, much of the problem with the statement is internal inconsistency. The overriding problem, however, is that the drafters wanted to push the law in a new direction, one that would make it harder for the Commission to act and loosen the reins on dishonesty and unscrupulous behavior.

Concurring Statement of Commissioner George W. Douglas Concerning the Commission's Statement on Deception

Today the Federal Trade Commission will send to members of the House and Senate a statement clarifying the way in which it will enforce its mandate to prevent deceptive acts or practices. The statement is the result of considerable effort and months of consultation within the Commission. The results demonstrate the care with which this document was prepared. It distills the best of past Commission case precedent and theory into three easy-to-apply conditions which in the future must be met for the Commission to find that acts or practices are deceptive. There must be:

- (1) A representation, omission, or practice which
- (2) from the perspective of a reasonable consumer,

(3) is material, i.e., likely to mislead the consumer to his or her detriment.

The statement will benefit both consumers and the business community by providing a specific source of guidance as to what conduct is permissible in advertising and similar activities.

Unfortunately, the deception statement has not received unanimous support within the Commission. Instead, two Commissioners have made clear that they will attempt to portray it as a hurried effort to cut back on the Federal Trade Commission's consumer protection role. That attempt to mischaracterize the deception statement deserves some response.

The core of this charge is a claim that the "reasonable consumer" standard will make it harder to attack deception aimed at specially vulnerable consumers. This is not the case. On the contrary, the deception statement makes clear that:

When representation or sales practices are targeted to a specific audience, such as children, the elderly or the terminally ill, the Commission determined the effect of the practice on a reasonable member of that group. (Statement, p. 9.)

The purpose of the reasonable consumer standard is simply to ensure that the Commission does not prevent most consumers from hearing useful information because an unrepresentative minority misunderstand it. As an earlier Commission case put it: "Perhaps a few misguided souls believe, for example, that all 'Danish pastry' is made in Denmark. Is it therefore an actionable deception to advertise 'Danish pastry' when it is made in this country? Of course not."¹

It's hard to believe that even a minority of the Commission wants the ability to test advertisements by the standard of an unreasonable consumer. It's even harder to believe that such an "unreasonable consumer" standard will benefit the American public in the long run. Rather, it will allow members of the Commission to block useful advertising at their whim and whimsy, as long as they can argue that a few people somewhere might misunderstand it. This is the same misguided approach to consumer protection which prohibited a manufacturer from claiming its hair coloring product was permanent on the theory that some consumers might believe it would color hair that had not yet grown out.² I will concede that such a standard imposes the least possible restraint upon the Commission—essentially none. However, this is a situation where self-restraint is called for.

The other charge leveled at the deception statement is that it was rushed through without enough internal dialogue. The same Commissioners whose substantive positions were diametrically opposed to the reasonable consumer standard

¹ *Heinz W. Kirchner*, 63 F.T.C. 1282, 1290 (1963).

² *Gelb*, 33 F.T.C. 1450 (1941), *aff'd* as modified [1944-1945 TRADE CASES ¶ 57,279], 144 F.3d 580 (2d Cir. 1944).

nonetheless requested that the fruitless internal discussion over it should continue for at least a little while longer.

Outsiders may wonder such a paradoxical position. As it happens, however, the deception statement was voted for on the last day of the term of office of departing Commissioner David Clanton. Commissioner Clanton, an appointee of President Ford, supported the deception statement and desired to vote on it. His endorsement demonstrates as clearly as anything can that the statement is not a radical departure from past Commission precedent.

Similar failed attempts to obtain a tactical advantage are par for the course among Washington bureaucrats and politicians. But they should be recognized for what they are. In this case, those supporting an unreasonable consumer standard for deception never suggested during a month of strenuous discussion at the Commission level that they were willing to compromise on this point. After-the-fact claims that continued discussion might have bridged the gap slightly are not believable.

There is much else I could say about the deception statement and the opposition to it. I am sure that the various issues surrounding the statement will be aired fully in coming weeks and months and therefore need not be dealt with by me now. However, there is one additional point which I feel should be made at this time. The controversy now surrounding the deception statement bears out Chairman Miller's past observations that FTC law on deception has been confused. Our action today is a positive step toward removing that confusion. It should not be the only one. I continue to support an amendment of Section 5 to define deception acts and practices. The controversy surrounding our deception statement lends further weight to the argument that such statutory redefinition is necessary.

Text of October 25, 1983 Letter from Representative John Dingell, Chairman of the House Committee on Energy and Commerce, to Chairman Miller

Dear Chairman Miller:

On Friday, October 21, 1983, the Committee on Energy and Commerce received a letter from the Commission purporting to respond to the directives contained in the Committee's report last year, House Report 98-156, Part I. The letter is not responsive and is, therefore, rejected and returned.

The Commission's charge had been to analyze its jurisdiction over deceptive practices and then to suggest specific changes in the statute, if the Commission believed change was needed. Specifically, the report directed the Commission to:

prepare an analysis of its deception jurisdiction as presently applied by the Commission and interpreted in case law. If the Commission adopts this analysis, the Commission shall submit such analysis to the Committee. That analysis should include a discussion of whether a

need exists to provide a statutory definition of deception, and, if the Commission concludes that such a definition is necessary, the Commission shall provide the Committee with proposed language for such a definition.

You were directed to provide a definitive, neutral analysis of a nearly fifty-year old body of consumer protection law that has served as a model for the states and for this nation. We requested a disciplined, in-depth review of what decades of case law stand for, and of the nature and amount of evidence of deception considered by the Commission during fifty years of litigation in the public interest. What you delivered is a document that addresses not what the Commission's deception jurisdiction is, but what some now at the agency want it to be.

Because your letter bears no relation to the Committee's directive, it is returned to you with the instruction that you respond in a fashion designed to assist this Committee in its review, rather than to hinder us with unsupported assumptions and advocacy. Please provide the Committee with an accurate summary of the law of deception, in compliance with our directions. If new principles and legal standards are desired, please discuss them separately, as requested, and submit proposed statutory language.

Almost as regrettable as the inability to separate analysis from argument is the apparent decision to forego an attempt at Commission consensus in developing this document. You chose to withdraw from the effective, open process that successfully produced the unanimous Commission statement on unfairness in 1980, and to finalize and transmit this statement through a secretive process that casts doubt on its quality and integrity. The apparent maneuvering to secure a departing Commissioner's last-minute vote raises questions about your regard for the right of other Commissioners to debate these issues freely and effectively. I have directed that the Subcommittee on Oversight and Investigations conduct an inquiry on this and related points, including the numerous procedural questions raised by your agency's conduct in this matter.

Your prompt attention to this request will be appreciated.

Text of October 26, 1983 Letter from Chairman Miller to Chairman Dingell

Dear Mr. Chairman:

This morning I received a letter from you rejecting and returning the Commission's enforcement policy statement regarding its authority over deceptive acts or practices. I am surprised, to say the least, at your reaction to a statement that was prepared in response to a request from your Committee. Moreover, because of certain statements contained in your letter, I am concerned that you have been provided with inaccurate information about the process used to develop the policy statement, the substance of the statement and the effect the statement will have on future Commission actions. For this reason, I

want to take this opportunity to respond to your letter.

First, you question whether Commissioners were given the opportunity to negotiate over the content of the policy statement. A brief chronology reveals that each Commissioner who wished to had ample opportunity to participate in development of the statement.

The Commission's approach to its deception authority has been under discussion for quite some time. I first proposed to the Commissioners that we consider a definition of deception on February 22, 1982, some 20 months ago. There ensued a lively debate, culminating in testimony by each Commissioner before the Senate Committee on Commerce, Science and Transportation on July 22, 1982 at a hearing called for the express purpose of considering our deception authority. Our internal discussions continued thereafter, and led to the circulation by the Bureau of Consumer Protection of a very detailed 21-page outline (for a 19-page letter) on April 13, 1983. Then, on May 16, 1983 your Committee published its report on the FTC Authorization Act and formally requested the Commission to prepare an analysis of its deception authority. The staff continued to discuss this outline with each Commissioner's office and, based upon the comments received, the staff prepared a draft letter incorporating various changes. This letter was circulated to the Commission over a month ago and formed the basis for further negotiations among the Commissioners' offices.

The process of analyzing the Commission's deception authority, thus, continued for over a year and a half. It has afforded ample opportunity for a full airing of all of the issues regarding our policy concerning deceptive acts or practices. Unfortunately, as I believe the vitriolic nature of the minority's separate statements makes clear, there was little indication that we could arrive at any meaningful consensus on appropriate Commission policy against deceptive acts or practices.

You have also suggested that it was somehow inappropriate to finalize the policy statement on the last day of Commissioner Clanton's term. To the contrary, I believe that it was fully appropriate to provide Commissioner Clanton the opportunity to endorse the policy statement. It was Commissioner Clanton who first suggested that the Commission undertake this project. Moreover, during the past seven years, Commissioner Clanton has played an important role in shaping the law of deception as applied by the Commission and he was instrumental in developing this statement. Finally, by waiting until the last day of Commissioner Clanton's term, we afforded every opportunity for meaningful deliberations over the final letter.

With respect to the process used to develop the enforcement policy statement, I also want to note that Commissioners Pertschuk and Bailey, who

dissented from the statement, had suggested that the Commission should have solicited public comment before issuing its enforcement policy statement. This issue was raised first on October 14, 1983, when I received a telegram from the Consumer Protection Subcommittee of the National Association of Attorneys General (NAAG). That telegram suggested that it was necessary for the Commission to consult with the State Attorneys General before issuing our policy statement because the statement may have an effect on the interpretation of state consumer protection laws. Then, on October 17, 1983, Commissioner Pertschuk moved that we release the statement on a tentative basis in order to provide the public, and particularly the State Attorneys General, the opportunity to submit comments. I voted no on that motion because I believed—and continue to believe—that there simply is no valid justification for such action.

The Commission, of course, is fully aware of NAAG's position regarding further definition of our deception authority. Representatives of NAAG testified before the Senate Committee on Commerce, Science and Transportation in July, 1982, when the Commission's deception authority was considered. Surely, NAAG was aware of the House Committee's request for an enforcement policy statement on our deception authority, and they could have submitted any additional views to the Commission during the past year.

I also believe that it would have been misleading to release the statement to you on anything but a final basis. The policy statement was requested by your Committee and approved by a majority of the Commissioners. Hence, it represents the Commission's formal position on how it has exercised its deception authority in recent years.

More importantly, neither public comment nor consultation with representatives of NAAG was solicited when the Commission developed its policy statement on unfairness, transmitted to Congress on December 17, 1980. Of course, Commissioner Pertschuk now suggests that a public comment period would have been useful when the unfairness letter was developed. I question this conclusion; indeed, in my view, soliciting public comment on any enforcement policy statement is inappropriate.

An enforcement policy statement represents the Commission's view on how it will exercise its authority. Unlike many other matters that come before the Commission, policy statements do not turn on factual issues, where public comment is particularly useful.² Nor do these statements impose binding obligations on the public, like trade regulation rules or consent agreements, where public comment is required by law. Instead, policy statements bind the Commission in the exercise of its discretion. As such, these statements are more like decisions to vote out

² Public comment traditionally is solicited when the Commission needs facts not in its possession. This approach is

being followed, for example, in review of our advertising substantiation program.

complaints, and it has never been suggested that such decisions should be subject to public comment.

Of course, I fully agree that Commissioners are not the only persons who have views on how the Commission should exercise its deception authority. To the contrary, I am certain that there are many members of the public who can offer valuable contributions on this issue. However, I believe that the proper forum for this public debate is Congress and, for this reason, I continue to support legislation defining the Commission's authority over deceptive acts or practices.

You also have charged that the letter is not responsive to your request and that it "addresses not what the Commission's deception jurisdictions is, but what some now at the agency want it to be." Again, this is not the case. Early court opinions interpreting the statutory prohibition on deception articulated a standard that an act or practice was deceptive if it had a "tendency or capacity to deceive" a "substantial number" of consumers, including the "ignorant, the unthinking, and the credulous." These decisions were reached before commercial speech was regarded as subject to constitutional protection, and before the relationship between courts and administrative agencies had been codified by the Administrative Procedures Act. In response to these and other developments over the intervening years, in increasing numbers of cases, the Commission and the courts have refined their understanding of the statutory language. As early as 1963, the Commission recognized that an advertisement could not be considered deceptive merely because it would be "unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed." (*Heinz W. Kirchner*, 63 F.T.C. 1282, 1290). Even scrupulously honest advertising, now constitutionally protected, has the potential to mislead at least some consumers, and the Commission has recognized that the law should not be pushed to such an extreme. Since *Kirchner*, the Commission has increasingly emphasized the concept that interpretations of advertisements or other representations are not actionable unless those interpretations are reasonable, or shared by a significant and representative segment of the population exposed to the claim. Indeed, all of the Commission's most recent decisions hold a particular practice deceptive based upon a finding that a challenged interpretation was likely to mislead reasonable consumers concerning a material element of the transaction.

The model for the Commission's statement concerning deception was the Commission's statement regarding unfairness, issued in December, 1980. Neither statement is a simple recitation of past court decisions. Rather, each attempts to reflect the evolution of the legal standard over time as the Commission and the courts have gained increasing experience with the statutory standard. Like the unfairness statement, the deception statement draws on the best of past Commission case law, and synthesizes the under-

lying legal principles regarding the meaning of deception. No single decision by the Commission or the courts expresses the standard for unfairness in exactly the language used in the unfairness letter. Similarly, no single decision summarizes the deception standard in precisely the language used in the letter. The underlying concepts, however—that an act must be likely to mislead, that it must be evaluated from the perspective of reasonable consumers, and it must be important to consumers—are all clearly present. Only by ignoring recent Commission case law can these concepts be omitted from any discussion of the law of deception as it has been applied and interpreted.

Any reasonable reading of the statement the Commission has adopted will clearly indicate that the specific criticisms leveled by the dissents are without foundation. The Commission's statement makes quite clear that there is no need to establish actual injury, for example. A representation is material, and therefore actionable, if it "is likely to affect a consumer's choice of or conduct regarding a product." (Letter at 15-16.) The statement quotes approvingly the definition of materiality from the Cigarette rule (at note 9) upon which one dissent relies to contend that actual injury need not be established. I agree with the minority that a requirement to prove actual injury would be inappropriate. I disagree that the Commission's statement imposes any such burden. It quite clearly does not.

Similarly, the dissents express concern about the meaning of "reasonableness" in certain specific contexts. The Commission's statement indicates, however, that the concerns are groundless. Bait and switch cases are expressly included within the realm of actionable deception (at 6; at note 37), as are cases in which oral misrepresentations are contradicted by written disclaimers (at 12-13), and cases involving sales of undeveloped land (note 27). What is reasonable depends on the circumstances. The existing requirement that interpretations be reasonable, reflected in all of our recent decisions, does not require any particular level of sophistication on the part of consumers. It does require that the Commission interpret advertisements and other practices as ordinary people ordinarily do, without taking isolated words or phrases out of context.

I am firmly convinced that each of the actions I have supported during my tenure at the Commission meets the standard for deception that this policy statement articulates. The minority's efforts to portray the statement as "frankly radical" or "cutting back the Commission's authority" rely on deceptive characterizations of the statement itself. They are inconsistent with oft-repeated claims that the law of deception is perfectly clear. Moreover, the claims in the dissents are inconsistent with the prior statements of the minority that the standards set forth in the letter are an appropriate set of case selection criteria that the Commission has followed in the past.

I continue to believe that the Commission has, in good faith, responded to the request of your

Committee. Moreover, I am completely satisfied that the process used to develop our response was fair and open. Of course, I have instructed my staff to cooperate fully with your investigation.

Statement of Chairman Miller Regarding Policy Statement on Deception, October 26, 1983

The Federal Trade Commission Act does not define the terms "unfairness" and "deception." Instead, Congress merely stated that "unfair or deceptive acts or practices" are unlawful.

In 1980, pursuant to a request by the Senate Committee on Commerce, Science, and Transportation, the Commission sent a 13-page letter to Congress, explaining how it applied its "unfairness" authority. In 1982, we received another Congressional request, from the House Committee on Energy and Commerce, asking us to explain how we apply our "deception" authority.

On October 14, after 20 months of discussion, a majority of the Commission agreed on a 19-page letter explaining how "deception" currently is applied by the Commission. That letter was transmitted last week to the House Energy and Commerce Committee, chaired by Congressman Dingell, and to the Senate Committee on Commerce, Science and Transportation, chaired by Senator Packwood. Today, Chairman Dingell "rejected and returned" the letter.

Chairman Dingell's Committee asked us to prepare an analysis of our deception jurisdiction "as presently applied by the Commission." In response to the Committee's request, the Commission staff undertook a thorough and careful analysis of the Commission's deception jurisdiction and decisions. Staff circulated a detailed outline of its findings to each Commissioner over six months ago, and requested their comments and revisions. A draft letter was then circulated over a month ago, incorporating revisions based on comments received by staff from individual Commissioners.

The final letter sent to the Committee on October 21 represents a good-faith effort on the part of the Commission to provide the Committee with the analysis it requested. This statement accurately reflects the way the Commission's deception jurisdiction has been applied in recent years.

I believe that, whenever possible, Federal agencies should attempt to define vague terms such as "unfair" or "deceptive" with as much specificity as possible. Indeed, agency pronouncements regarding the meaning of their statutes have a special role in administrative law and, under well-established legal principles, are given considerable deference by courts.

It is, of course, the Congress that should ultimately specify the law that an administrative agency enforces. For the past two years, I have urged the House Commerce Committee to bring the Commission's authorization bill to the floor with a statutory definition of deception. I continue to favor a statutory definition of our deception authority. A statutory definition is particularly important because although our let-

ter to Congress presents sound principles, those principles would not be binding on future Commissions if they choose to repudiate them.

Unless Congress provides a definition of deception, our legal system places on the Commission the duty, in the first instance, to explain the meaning of deception. We will continue to discharge our lawful responsibilities, and apply the deception standards the Commission has issued.

Chronology of Events Regarding the Development of the Commission's Enforcement Policy Statement on Deception

February 22, 1982—Chairman Miller circulated a proposal to the Commissioners that the Commission address the meaning of deception in testimony on reauthorization; the other Commissioners responded.

March 18, 1982—Chairman Miller proposed a statutory definition of deception in testimony before the Senate Committee on Commerce, Science, and Transportation; the other Commissioners responded.

April 1, 1982—Chairman Miller proposed a statutory definition of deception in testimony before the House Committee on Energy and Commerce; the other Commissioners responded.

July 22, 1982—Hearings before the Subcommittee for Consumers of the Senate Committee on Commerce, Science, and Transportation concerning the Commission's authority over deceptive advertising; the other Commissioners responded.

September 15, 1982—The House Committee on Energy and Commerce published its report on the FTC Reauthorization Act of 1982 and formally requested the Commission to analyze its authority over deceptive acts or practices.

March 8, 1983—Chairman Miller explained his proposed statutory definition of deception in testimony before the House Committee on Energy and Commerce.

March 16, 1983—Chairman Miller explained his proposed statutory definition of deception in testimony before the Senate Committee on Commerce, Science and Transportation.

April 13, 1983—The Bureau of Consumer Protection circulated a 21-page outline of a proposed letter addressing the Commission's authority over deception.

May 16, 1983—The House Committee on Energy and Commerce published its report on the FTC Reauthorization Act of 1983 and again formally requested the Commission to analyze its authority over deceptive acts or practices.

May 1983—Staff began discussing the outline with each Commissioner's office.

September 16, 1983—Chairman Miller circulated a draft of the deception letter.

September-October, 1983—Staff and Commission engaged in extensive negotiations over the deception letter.

October 14, 1983—Commission approved deception letter by 3-2 vote; submission of letter

withheld to allow dissenting Commissioners to prepare statements.

October 21, 1983—Commission submitted deception letter, with dissenting and concurring.

statements, to the House Committee on Energy and Commerce and the Senate Committee on Commerce, Science and Transportation.

¶ 13,207 Law of Deception—Minority Views

After Congress declined to codify the FTC's majority view of deceptive acts and practices (see ¶ 13,205), two members of the Commission who had dissented from the majority view submitted their views of the law of deception. The two Commissioners concluded that no statutory definition of deception was needed. Text of their views, along with responses from two members of the majority, follows.

Analysis of the Law of Deception by Commissioners Patricia P. Bailey and Michael Pertschuk

The Committee on Energy and Commerce of the U.S. House of Representatives has asked the Commission to provide an analysis of the legal doctrine of deceptive acts and practices.¹ This document is submitted by Commissioners Patricia P. Bailey and Michael Pertschuk in accordance with the Committee's request.² In response to the Committee's particular request that the need for a statutory definition of deception be addressed, we conclude that the extensive Commission and judicial precedent defining and developing the law of deception consonantly with Congressional intentions makes such a definition unnecessary.

I. Historical Perspective

Preparing this analysis has involved a comprehensive review of case decisions, rules, and other legal materials produced since the Federal Trade Commission Act was enacted in 1914. Before we turn to an analysis of the law, however, some historical perspective is in order. This section discusses the origin and purpose of the Federal Trade Commission Act's prohibition of "deceptive acts or practices," the consistent development and application of this law during periods of dramatic changes in other areas of law, and the way in which the legal principles of deception fit into the overall operation of the Commission's law enforce-

ment mission and influence law enforcement activities in the states as well.

A. Origins of the Commission's Deception Authority

For over fifty years the Federal Trade Commission has acted in the public interest to prohibit commercial acts or practices that deceive consumers. Congressional enactment of the Wheeler-Lea Act in 1938 specifically conferred on the Commission jurisdiction to challenge "unfair or deceptive acts or practices."³ But even before this statutory amendment the Commission had undertaken numerous law enforcement actions to proscribe deceptive commercial conduct under its original authority to prevent "unfair methods of competition."⁴ Congress' selection of flexible language to proscribe deceptive trade practices had led over time to refinement and definition of this legal concept through individual cases.⁵ The result of this half-century of activity is an extensive and stable body of law in the form of Commission case precedent and judicial review of Commission decisions, as well as trade regulation rules and guidelines, defining deceptive acts or practices that violate the Federal Trade Commission Act.

The legislative history of the Federal Trade Commission Act shows that it was designed to extend the scope of the Commission's law enforcement authority beyond the protection afforded by the common law. Congressional delegation to the Commission in 1914 and 1938 of broad powers to protect consumers was in some measure a

¹ H.R. Rep. No. 156, 98th Cong., 1st Sess. 5 (1983).

² An earlier analysis, from which Commissioners Bailey and Pertschuk dissented, was rejected by the Committee and returned to the Commission in October 1983.

³ Wheeler-Lea Act, Pub. L. No. 75-447, 52 Stat. 111 (1938), codified at 15 U.S.C. § 45 (1982). Congress' grant of specific authority to prohibit unfair or deceptive acts or practices was designed to mitigate the effects of an early Supreme Court ruling holding such practices illegal under the original FTC Act only to the extent they were shown to injure competition by injuring competitors. See *FTC v. Raladam Co.*, 283 U.S. 643, 653 (1931); *Pep Boys—Manny, Moe & Jack, Inc. v. FTC* [1940-1943 TRADE CASES ¶ 56,311], 122 F.2d 158, 160-61 (3d Cir. 1941) (The Wheeler-Lea Act was intended to remove the procedural requirement imposed in the *Raladam* case and to allow the Commission to focus "on the direct protection of the consumer where formerly it could protect him only indirectly through the protection of the competitor." (emphasis in original)).

⁴ 15 U.S.C. § 45 (1982). See, e.g., *FTC v. Standard Education Society* [1932-1939 TRADE CASES ¶ 55,170], 302 U.S. 112, 116-17 (1937) (deceptive pricing of encyclopedias);

FTC v. Algoima Lumber Co. [1932-1939 TRADE CASES ¶ 55,041], 291 U.S. 67, 81 (1934) (misrepresenting nature and quality of pine products); *FTC v. Royal Milling Co.* [1932-1939 TRADE CASES ¶ 55,022], 288 U.S. 212, 216-17 (1933) (misrepresenting that companies ground wheat when they only processed wheat ground by others); *FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 493 (1922) (marketing primarily cotton underwear as wool).

⁵ *FTC v. Colgate-Palmolive Co.* [1965 TRADE CASES ¶ 71,409], 380 U.S. 374, 385 (1965) ("This statutory scheme necessarily gives the Commission an influential role in interpreting § 5 and in applying it to the facts of particular cases arising out of unprecedented situations."); see *FTC v. Motion Picture Advertising Service Co.* [1952-1953 TRADE CASES ¶ 67,426], 344 U.S. 392, 394-95 (1953) (Section 5 proscriptions are flexible and are "to be defined with particularity by the myriad of cases from the field of business."); *FTC v. R.F. Keppel & Bro., Inc.* [1932-1939 TRADE CASES ¶ 55,042], 291 U.S. 304, 312 (1934) (to define the Commission's powers Congress adopted a phrase the meaning and application of which must be arrived at through the gradual process of considering individual cases).