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AUTHORIZATIONS FOR THE FTC

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HEARING

BEFORE THE

SUBCOMMITTEE FOR CONSUMERS

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

S. 1020

TO AUTHORIZE APPROPRIATIONS FOR THE FEDERAL TRADE COMMISSION

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CONTENTS

	Page
Opening statement by Senator Ford	1
Text of S. 1020	2

LIST OF WITNESSES

Pertschuk, Hon. Michael, Chairman, Federal Trade Commission; accompanied by Commissioners Paul Rand Dixon; David A. Clanton; Robert Pitofsky; and Michael N. Sohn, General Counsel	2
Prepared statement	7
Questions of the committee and the answers thereto	33, 35
Questions of Senator Ford and the answer thereto	36
Questions of Senators Packwood and Danforth and the answers thereto	49
Questions of Senator Warner and the answers thereto	124

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

American National Standards Institute, Inc., statement	181
Consumer Federation of America, statement	179
Gustini, Raymond J., assistant Washington counsel, U.S. League of Savings Association, letter of May 7, 1979	174
Halpern, Charles R., professor of law, Georgetown University Law Center and director, Institute for Public Representation, statement	204
Johnson, Jimmy D., Ph. D., executive director, Association of Physical Fitness Centers, letters of:	
May 1, 1979	167
May 1, 1979	168
Joseph, Jeffrey H., Chamber of Commerce of the United States, statement	200
Lewis, John, executive director, Small Business Legislative Council, National Small Business Association, letter of May 3, 1979	169
National Association of Manufacturers, statement	198
National Fire Protection, Inc., statement	203

AUTHORIZATIONS FOR THE FEDERAL TRADE COMMISSION

WEDNESDAY, MAY 2, 1979

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
SUBCOMMITTEE FOR CONSUMERS,
Washington, D.C.

The subcommittee met at 9:40 a.m., in room 6226, Dirksen Senate Office Building, Hon. Wendell H. Ford (chairman of the subcommittee) presiding.

OPENING STATEMENT BY SENATOR FORD

Senator FORD. Good morning, ladies and gentlemen.

I don't want to wait any longer. Senator Danforth, I suppose, will be here shortly and will have a brief opening statement.

This morning we direct our attention to the general operation of the Federal Trade Commission and the authorization levels in the FTC authorization bill, S. 1020, introduced by Senator Danforth and myself. We are facing our May 15 deadline for reporting authorization bills out of committee, and so today we will hear only from the FTC. However, we have invited all interested parties to submit testimony for today's hearing record, which we will carefully examine.

Furthermore, we will hold extensive oversight hearings in July, when we will review the report to Congress of the Administrative Conference of the United States, due June 30, 1979, on the procedures the Federal Trade Commission uses to make trade rules, regulation rules. At that time, we will also receive testimony on specific regulations, such as the children's advertising, and the standards and certification, rulemaking proceedings, as well as comments on substantive legislative proposals.

Since becoming chairman of the Consumer Subcommittee, I have emphasized the importance of oversight of the laws on the books on agency procedures. In the past 2 years the Consumer Subcommittee has conducted extensive oversight of the Consumer Product Safety Commission, National Highway Traffic Safety Administration, the Hazardous Materials Transportation and Pipeline Safety programs within the Department of Transportation, and the U.S. Fire Administration. I plan to continue this effort with the July hearings of the FTC.

We on Capitol Hill hear that the FTC is too powerful and is writing regulations with little attention to the costs to the consumer and the burden to the businessman. Recently, the FTC has taken on some highly controversial issues and is one of the most

criticized Federal agencies for its regulatory activity. Many of you endorse the legislative veto as a device to keep a rein on regulations that develop from legislation we pass here. I, however, believe that legislative veto is the wrong solution to this problem.

FTC rulemaking proceedings are complex and time consuming. They require a high level of technical expertise. Congress created the regulatory agencies to avoid the day-to-day regulatory function. The legislative veto would require enough new staffers to overflow the new Hart Senate Office Building and, as usual, the consumer would have to pay the price.

I believe that Congress should supervise these agencies' proceedings. This is the function of oversight. Congress has sufficient power to overturn any FTC rule it disapproves by passing a law. Carefully conducted oversight can, and should, achieve this result.

Along with thorough oversight, Congress must make some legislative decisions about regulatory reform. We will continue to examine regulatory reform proposals—for example, the public participation funding issue. The FTC has recently modified its program to move the control over selection of participants to the General Counsel's office. The Commission has also begun a program to inform potential small business participants about funding possibilities. I am encouraged by these changes in the administration of the program, but intend to continue to examine such issues as program auditing and independence of the selection process.

We will also be taking a hard look at the agency's efforts to measure the effectiveness of its actions as well as the cost and benefits—and I am aware of such problems as quantifying the benefits in this process. We want to know now about the level of funding for these activities and the Commission's future plans in the area. In July, we will look more closely at the impact analyses performed by the Commission for specific regulatory activity.

[The bill follows:]

[S. 1020, 96th Cong., 1st sess.]

A BILL To authorize appropriations for the Federal Trade Commission.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 20 of the Federal Trade Commission Act (15 U.S.C. 57c) is amended to read as follows:

"SEC. 20. There are authorized to be appropriated to carry out the functions, powers, and duties of the Federal Trade Commission not to exceed $72,500,000 for the fiscal year ending September 30, 1980; not to exceed $78,000,000 for the fiscal year ending September 30, 1981; and not to exceed $83,000,000 for the fiscal year ending September 30, 1982.".

Senator FORD. I see Senator Danforth coming in now. He is very timely.

My two distinguished colleagues do not have a statement to make, so we will proceed with the questions after we hear the testimony of Chairman Pertschuk.

STATEMENT OF HON. MICHAEL PERTSCHUK, CHAIRMAN, FEDERAL TRADE COMMISSION; ACCOMPANIED BY COMMISSIONERS PAUL RAND DIXON; DAVID A. CLANTON; ROBERT PITOFSKY; AND MICHAEL N. SOHN, GENERAL COUNSEL

Mr. PERTSCHUK. Thank you very much, Mr. Chairman.

I would ask that my complete statement be placed in the record, and I will try to highlight briefly some of our responses to the concerns that you have raised.

Senator FORD. Mr. Chairman, would you identify the gentlemen at the table.

Mr. PERTSCHUK. Yes; I would be pleased to do that.

On my immediate right is Commissioner Paul Rand Dixon, and on my far right, Commissioner David Clanton. I think this is David's first opportunity to appear before this committee since he left its employ.

Senator FORD. David, we have been looking forward to having you appear.

Mr. PERTSCHUK. On my immediate left, Mike Sohn, the Commission's General Counsel; and Commissioner Bob Pitofsky.

I would like to begin this morning by confessing that last month the Commission finished dead last in a competition conducted under the auspices of the Business Roundtable, and that was a race that we were delighted to lose, because it sought to measure the cost burdens imposed on business by a series of regulatory agencies.

The FTC's consumer protection activities accounted for less than 1 percent of those costs, and that was some $23 million, two-thirds of which were directly accountable to the credit statutes passed by Congress which we enforce.

I am not going to sit here and tell you that the FTC does not impose some costs or that it has not in the past imposed some unnecessary costs. But I will tell you, Mr. Chairman, that we are doing our to keep these costs to a minimum.

I think the figures also say something else. I have tried to make a point in the last few months that the FTC's primary role is to make competition work for the benefit of the consumer—and competition and truth rarely impose unproductive costs. When we put an end to the optometrists' self-imposed ban on advertising, we are not imposing costs on anyone. We are freeing those opticians and optometrists who want to advertise and exercise the freedom of the marketplace to do so. But where that freedom exists, it is used. And, for example, the optometrists who do decide to advertise have brought the price of eyeglasses down anywhere from 25 to 40 percent in those States which now allow advertising—some $400 million a year potential savings to consumers.

A few months ago I visited one of the members of the Appropriations Committee of the Senate, and he gave me the benefit of his impressions of what the FTC was and is doing. He said, "I have the image of you sitting down there with 1,000, maybe 5,000, lawyers, sitting around, and whenever there is a lull in the day somebody says, 'who can we regulate next?'"

Mr. Chairman, that's not what we are doing. No amount of pious posturing before this committee is going to erase that impression, but examination of the record, I think, will help.

We have targeted those marketplace transactions that hit the consumer hardest in his pocket. That's the way we set our priorities: Aiming at the critical sectors of health care, food, transportation, energy, and housing. In my written statement, I try to lay out

some of the areas in which we try to make competition work on behalf of the consumers, so I won't go over them now.

I do want to talk for a few minutes about our regulatory reform efforts and our response to regulatory reform. There is a lot of fine talk in the air about regulatory reform these days. Some of it is substance, and much of it is air.

What are we really doing about it as an agency? First, we are trying hard to make better sense of our rulemaking initiatives, both as proposals come up at the outset and after final measures are in place. For example, we have set up a separate division within the Bureau of Economics whose purpose is to give us at a very early level a hard analysis of all proposed rulemaking: What will it cost; how will consumers really benefit; are there less burdensome remedies that would get the job done; what kinds of questions do we need to have answered before we can go forward?

We are participating fully in the Regulatory Council set up by the President to make doubly sure that what we do does not overlap or conflict with the work of other agencies or that we don't inadvertently pile regulatory burdens on business and, especially, small business.

At the other end—and, Mr. Chairman, you referred to this activity—we have allocated some $825,000 in this budget alone this year to assess the real-life impact of our rules in the marketplace and to attempt to assess prospectively what the impact of proposed rules will be: Did they produce the benefits to consumers that we predicted; did they impose the burdens that business feared; how can we tighten them?

And, of course, we are looking at existing rules and evaluating their usefulness. Out of 152 old "trade practice rules" that we had on our books, we have taken 145 off. We are probably the only Government agency to reduce by more than two-thirds the number of pages our regulations take up in the Code of Federal Regulations. Members of this committee know far better than I that one of the hardest tasks for the managers of any agency is to stop a program or rulemaking once it gathers momentum. It takes guts to scratch the plans and go back to the drawing board.

But last year, we said "No" to a number of rules proposed by our staff: Proposed rules for warning labels on household plants; proposed rules for textile labels disclosing chemicals used in finishings; proposed rules creating regulation of the travel agencies—not because there weren't abuses there but because the CAB had taken jurisdiction of some of the most obvious abuses; proposed rules for pesticide warnings—and we may do the same for the proposed plastics warnings.

As for the rules that have already come through the regulatory process and have come before us for final action, we have cut back. These are the eyeglass rule, the vocational schools rule, the insulation disclosure, and the funeral rule. We have cut back on the proposals of the staff for more elaborate proposals, and attempted to zero in on simple self-enforcing market remedies, such as pro rata refunds for unsatisfied vocational school students.

As I have indicated, we have put an end to competition-choking bans on price advertising for eyeglasses and added only a simple

requirement that the consumer be given a copy of his prescription so he can comparison-shop if he wishes.

The Funeral rule will place primary reliance on information disclosures and freeing the market from private restraints rather than the full blanket of command and control regulations originally proposed.

Another example: For a number of years, the Commission has been seeking fair and workable rules to govern nutrition claims in food advertising. Our staff, drawing upon the best available consensus among nutritional scientists, has produced a set of proposed standards and disclosures for advertising claims known as Phase II and of he food advertising rule or, simply, Food II. The proposed standards are very complex. Like any complex scheme, they could produce some odd results. For example, advertisers who desire to make nutrition claims might be encouraged to overfortify their food products.

The Commission is now reaching out for a serious dialog with the food industry and with consumer groups, to see if there is a better way to deal with the problems. In the meantime we are suspending action on the Food II proposal until we can examine the full range of alternate options we hope will emerge from this process.

Of course, we haven't made final judgments on the food rule and the other rules I have mentioned. The point is that the Commission and the staff, under our direction, are committed to carefully weighing the burdens and the effectiveness of, and the alternatives to proposed regulations.

Let me talk now for a few moments about public participation, because I know that that has been a concern of this committee. In my judgment, one of the most important actions that we have taken to improve the regulatory process is the establishment under congressional direction of a public participation program in rulemaking.

I would like to spend a few moments on this because I believe it to be essential to meaningful regulatory reform.

The genesis of our compensation program is, of course, the Magnuson-Moss Act. In that Act, Congress confirmed the FTC's conclusion that when a practice is widespread in an industry, the most efficient and the fairest remedy is a rule that applies to the industry as a whole, instead of individual orders arrived at by case-by-case adjudication.

In order to make sure that the Commission has a full record before it whenever a rule is considered, Congress added some elements to ordinary notice and comment rulemaking, including the right to an oral hearing and the limited right to cross-examine on selected issues of disputed fact.

At the same time, Congress faced a reality of life in regulatory proceedings. That is, when an agency proposes a rule and holds hearings, those who will without fail come to plead their cause, to challenge the evidence and the proposed remedies, will be the representatives of the affected industry—the law firms that, through long experience, know how the regulatory gears turn—and, sometimes, where to throw sand in those gears. Of course, they have a right to advocate their position.

In Magnuson-Moss, Congress provided ample opportunity to exercise that right. But Congress also recognized that, in order to balance advocacy before the Commission and in order to make sure that we're hearing comments on a proposed rule, not only from an industry point of view but also a consumer or public interest or small-business point of view, Congress gave us the responsibility and the means to correct the likely imbalance.

Congress recognition of this Washington fact of life could not be any more specific: To insure that adequate funds are available for other groups, the statute says no more than 25 percent of the public participation funds may be provided to persons representing the industry subject to regulation.

So, it's clear that Magnuson-Moss gave us the responsibility to diversify the points of view heard in our rulemakings. Congress wanted more than an argumentative dialogue between industry and the Commission staff, and we believe that we are accomplishing that objective.

For example, in the food advertising proceeding—Phase I—the executive director of the Iowa Consumers League received funding to testify in Chicago. The presiding officer commented that she was an unusually articulate witness with interesting, important things to say about consumer attitudes, both for and against the proposed rule.

To take another example: We funded the National Council of Senior Citizens to represent consumers in the hearing aid rulemaking proceeding. That group presented firsthand evidence on consumer experience with the hearing aid industry. Our oversight committee in the House had this assessment of the Council's participation and the program generally:

> Because the hearing aid rule is not yet final, it is too early to tell what specific effects will result from the Council's participation. Clearly, however, the NSCS did provide consumer testimony which would not have been presented absent public funding and which has been of substantial benefit to the proceedings. To the extent that experienced groups such as the National Council of Senior Citizens are available, such direct funding will be useful to assure that consumers are represented before the Federal Trade Commission.

We have already funded eight small-business groups in various proceedings. In the mobile-home proceedings, for instance, a dealers trade association was reimbursed for part of its costs of participating, and they provided an explanation of how the warranty system for mobile homes works in practice, a perspective that neither consumer groups nor manufacturers were as well-equipped to supply.

We are particularly active now in seeking out small-business participants in the standards and certification proceeding. A senior citizen who operates a small retail business out of his home has already received a small award to testify at the San Francisco hearings on the implications of the proposed rule for his product and its purchasers.

Has the quality of our rulemakings been improved because of this program? I think the answer has to be "Yes." I base this, as I know my colleagues do, on personal experience. Just recently, we spent 8 hours sitting around the table at the final oral presentation on the funeral home rule, listening to the participants from indus-

try and the public participants as well. Of course, we heard from the funeral directors; they had adequate counsel who articulated their positions.

But we also heard from counsel representing consumers, memorial societies, pre-interment societies, and other affected groups who would not have had the funds to make the same kind of presentation without the availability of reimbursement from the Commission.

Each of those participants did what good advocates should do: They highlighted points of the record that concerned them. They summarized their position. And every single one of them without exception criticized the recommendations of the director of our Bureau of Consumer Protection and his staff, who had to sit there quietly.

The funeral directors said that the bureau had gone some way toward recommending what they considered a rational rule, but not far enough. Consumer representatives said the rule is worthless if the Commission follows the bureau's recommendations to cut back the terms of the rule. The bureau director had to sit there and take it.

But out of that process, the Commission basically got the kind of hard, tough advocacy arguments that helped us to focus on the disputed issues, to analyze those issues, and it enriched our judgment. And that has happened in the other rulemakings before it.

As you had indicated, Mr. Chairman, we have also, based upon our experience, made some changes, improvements in the way we evaluate funding applications, provide compensation, and ensure that the funds are spent well. The general counsel, Mr. Sohn, now administers the program and decides who is to receive compensation.

In addition, a full-time auditor systematically reviews the records of those who will receive funds, to see that all funds, A, are accounted for, and, B, have been expended only for approved purposes. These changes, I think, have served to strengthen the independence of a program that has become vital to the decisionmaking of the Commission.

Mr. Chairman, I have attempted to respond to some of the concerns of the committee, but I think I will close my oral remarks and offer the Commissioners up for your questions.

Senator FORD. Offer them up?

Well, I could probably take that and do with it what I think ought to be done, maybe. I will let you think about that for a while.

[The statement follows:]

STATEMENT OF HON. MICHAEL PERTSCHUK, CHAIRMAN, FEDERAL TRADE COMMISSION

Good morning. It's our pleasure to appear today on behalf of S. 1020, the measure which provides for Federal Trade Commission's authorization in fiscal years 1980, 1981 and 1982.

Mr. Chairman, this occasion provides us with an opportunity to respond to the recent expressions of concern by Congress and the public about the role the regulatory agencies play in our daily lives and the skepticism about whether on balance the federal agencies, such as the Commission, offer a net improvement to consumer welfare.

We recognize that the burden is on us to demonstrate that society is in fact better off from our efforts, that the consumer receives real benefits from our actions, that

in setting our priorities we choose the most important problems and propose realistic solutions, that the costs we impose on the marketplace are greatly outweighed by the benefits, and that our agency can and does continually reexamine its actions, correct its errors and learn from its history.

My colleagues and I have worked long and hard to improve our effectiveness while minimizing our regulatory burden. And this morning I'd like to outline—briefly in my oral remarks and at greater length in my written statement—the results of those efforts.

FTC ACCOMPLISHMENTS

First, we recognize that the most immediate and pressing public concern is the shrinking value of the dollar. And we've sought to focus on promoting competition in those sectors of the economy that are most important to the consumer and sensitive to inflationary pressures.

Our activities in the area of health care provide an excellent example. Recent FTC initiatives in this area include:

Removing restrictions on price advertising of eyeglasses, contact lenses, and eye exams and requiring that eye doctors provide consumers with prescriptions (thereby helping consumers to comparison shop).

Barring publication of relative value scales (which may tend to decrease competition and facilitate price fixing) by the Minnesota State Medical Association and the California Medical Association.

Barring the American Society of Anesthesiologists from prohibiting its members from accepting salaried, rather than potentially higher cost fee-for-service, employment.

Barring a medical testing laboratory company from giving kickbacks to physicians.

Barring the Indiana Dental Association from inducing its members not to cooperate with health insurers' cost containment programs.

A number of other activities in this area are now underway including: an investigation of physician control of Blue Shield plans, and a rulemaking to determine whether manufacturers of hearing aids should provide more information to consumers.

A chief inquiry of ours in the health care area is whether some professional self-regulation has anticompetitive consequences. We are actively involved in examining that same question with respect to the other professions. For example:

Our investigation of the legal profession seeks to determine whether there are unjustifiable restrictions on development of alternative, lower-cost legal delivery systems.

Our investigation into the real estate industry is examining whether broker commissions are determined in a manner that keeps prices artificially high.

And recent investigations of veterinarians and accountancy professional organization practices have resulted in voluntary actions on the part of both groups to remove restrictions on advertising that allegedly hamper full, free and fair competition.

I won't belabor the point. But I think a review of our activities in the other market sectors that are critical to consumers—energy, food, housing, transportation and clothing—demonstrates that we are targeting our efforts to those areas where inflation hits pocketbooks the hardest.

I think it noteworthy too that we are flexible in the way we approach these problems. The Magnuson-Moss Act encouraged us to look to alternatives to case-by-case litigation. While traditional administrative litigation remains an important law enforcement tool, it is augmented by other techniques.

For example, we are making increasing use of our mandate under Section 6 of the FTC Act to compile information about business structure and practice and make the information available to the public and the Congress. Recent examples of this activity include:

A consumer pamphlet on individual retirement accounts. The report analyzed sales practices in this rapidly growing industry and provided information consumers need to make informed decisions.

Reports to Congress on cargo preference, showing the cost of cargo preference legislation then being considered, and steel imports, describing the likely cost of pending steel import restrictions legislation.

The devlopment of a model state law concerning generic drug substitution. The model act is designed to save consumers' money by allowing pharmacists to substitute lower price generic equivalents for brand name drugs. It was proposed by the Commission and the Department of Health, Education, and Welfare for adoption by

the states. In fact, the President recently sent a letter to the Governors of every State, enclosing the model act and praising it as an "important initiative that the states in cooperation with the Federal Government can take to combat the spiralling cost of health care for Americans."

We've also sought to provide support and advice to other agencies. We've intervened before the ICC urging an end to antitrust immunities in the trucking industry and more rate and entry flexibility in order to lower prices. And we've participated in CAB proceedings arguing for deregulation of airlines.

In 1973 Congress authorized the FTC to seek injunctions in federal court when the Commission has reason to believe that such a remedy would be in the public interest. We are using this remedy increasingly as a support to both our competition and consumer protection missions. For example:

The Commission sought and obtained a preliminary injunciton blocking the planned acquisition by Rhinechem of another pigments maufacturer on the grounds that the merger could substantially lessen competition.

A maker of an acne preparation agreed to stop certain advertising after the Commission filed for an injunction, alleging the ads were false and deceptive; and

The manufacurer of cellulose insulation agreed to a permanent injunction to prevent the installation of hazardous flammable insulation.

The most direct evidence of whether the Commission is fulfilling its Congressional mandate—to root out abuses of market power, enhance the role of competition and preserve informed consumers as the true "regulators" of the marketplace—is to look to those actions that have provided tangible dollar benefits to consumers. Some recent examples are:

Eyeglasses.—Consumers spend $4 billion a year on eyeglasses and eyeglass examinations. In states where advertising was restricted, studies found that prices ranged 25 to 40 percent higher than in the states where advertising was permitted. Our first trade regulation rule issued under the Magnuson-Moss Act removed restriction on price advertising of eyeglasses, contact lenses, and eye exams and required that eye doctors provide consumers with prescriptions, thus allowing consumers to comparison shop. This action alone, by introducing price competition into states where previously there had been none, could save consumers an estimated $500 million a year.

Blue jeans.—The day the FTC sued Levi Strauss charging retail price fixing, Levi blue jeans were selling from $15.00 to $17.00. Today, after the Commission obtained an order prohibiting the practice, vigorous price competition exists and the price ranges from $10.00 to $14.00. A conservative estimate suggests that this development is saving consumers $50 million annually.

Audio equipment.—The Commission sued major manufacturers of audio equipment for allegedly engaging in resale price maintenance. It is estimated that the resulting FTC consent orders allowing retail price competition in audio equipment have saved consumers up to $15 million a year.

Consumer redress.—In the last year alone various companies were required by the Commission to pay out a total of over $10 million to redress consumer losses resulting from unfair or deceptive practices.

REGULATORY REFORM

We also recognize that we have an obligation to make our administrative process at the FTC more efficient and less burdensome, without sacrificing fairness, openness or accuracy. Since my arrival at the FTC, we've taken a number of major steps towards regulatory reform at the Commission.

Eliminating unnecessary regulations.—The Commission has completed its review of 152 pre-Magnuson-Moss trade practice rules (each affecting a major manufacturing or retailing industry) and rescinded 145 of them. I think this makes us unique among regulatory agencies in that we have actually reduced the number of pages our regulations take up in the Code of Federal Regulations.

Cutting down on reporting requirements.—The Commission has reduced the reporting requirement in its QFR program by eliminating 3100 smaller firms from the sample used to compile the Quarterly Financial Report and by streamlining the report requirements of 600 firms so that they no longer must report the same data separately to both the FTC and SEC.

Speeding up administrative litigation.—We have sought to extend our regulatory reform efforts to adjudicative litigation by revising our discovery rules, giving Administrative Law Judges more control over ongoing litigation and creating disincentives to delay by parties. We've also established a working group which has prepared detailed recommendations for streamlining complex litigation.

RULEMAKING

I would like to turn now to a review of our Magnuson-Moss rulemaking activities, a subject which I know is close to the hearts of the members of this subcommittee. Since my arrival at the Commission about 22 months ago, I have made examination and improvement of the rulemaking process a top priority. And, with the help of the members of this subcommittee, and my fellow Commissioners, I believe we have taken a number of significant steps to improve Magnuson-Moss rulemaking at the Commission.

We have developed new procedures to reduce the time required to conduct Magnuson-Moss rulemaking proceedings, as well as the size and redundancy of the evidentiary record generated in those proceedings. Hearings on the proposed rule on disclosure of insulation R-values were completed within four months after commencement of the proceeding compared to a previous average of eighteen months. Final staff recommendations on that rule were presented to the Commission within twelve months of the rule's proposal, also a record.

In the proposed children's advertising proceeding, with the help and encouragement of this subcommittee and the consumer protection subcommittee in the House, we employed a two-step hearing procedure that separates the hearing into two phases: a "legislative" phase where all witnesses testify and an "adjudicative" phase where certain witnesses are subject to appropriate Magnuson-Moss cross-examination. This procedure insures that all interested members of the public have the opportunity to present their views to the Commission. At the same time it reduces unnecessary and duplicative cross-examination by providing for examination only where the statutory criteria set out in the Magnuson-Moss Act are met: those disputed issues of material fact that must be resolved if the Commission is to make an informed judgement on the merits of the rule proposal.

We also have reversed the order of the presiding officer and staff reports so that the staff report, which contains the detailed summary of the factual record, is made available first. This allows the presiding officer to prepare a shorter report that focuses primarily on his differences with the staff analysis. In addition, we now publish at the outset a timetable for the completion of each proceeding. This small step has the healthy effect of committing all participants, including our staff, to avoid delay and proceed in an orderly fashion.

Improved readability of rules is another objective that I know we share with the members of this subcommittee. Our commitment to simple comprehensible rules remains strong, and the benefits are now being shown. The recently promulgated vocational school rule, for example, contains consumer notices that are vast improvements over the dense and turgid prose of earlier versions.

A number of these improvements resulted from recommendations of a Rulemaking Task Force chaired by the Commission's General Counsel, Mike Sohn. Another recommendation of that task force which we have implemented is the transfer of the presiding officers from the Bureau of Consumer Protection to the General Counsel. While the competence, independence and objectivity of the presiding officers who chair our rulemaking proceedings are above question, some participants in our rulemaking proceedings were concerned by the fact that our original structure located the presiding officers in the Bureau of Consumer Protection. By transferring the presiding officers from the Bureau I think we have alleviated that concern.

We also have implemented a procedure at the conclusion of each proceeding that allows persons who have participated in the rulemaking to present their views directly to the Commission before the Commission begins to act on the staff recommendations. We have used this procedure in our two final rules, the eyeglass rule and the vocational school rule, and in the two rules now pending before the Commission for final action, the R-Value insulation rule and the funeral rule.

I am pleased to report that this procedure has worked exceptionally well, winning substantial praise from those who have participated in it. For example, recently the Commission spent eight hours hearing the views of those interested in our funeral rule proposal, including the funeral directors, the Small Business Administration, interested consumer groups, and a Member of Congress. I was delighted to find that those who appeared, including industry members, praised the procedure and the responsiveness that the Bureau and the Commission demonstrated. We intend to continue to provide for oral presentations in the rules we will consider in the next few months, including used cars, hearing aids, and others.

We also are in the process of revising our rule concerning ex parte contacts in rulemaking. The new rule will open up our proceedings still more without sacrificing their integrity. Outside parties will be allowed to meet with Commissioners so long as a transcript of that meeting is kept and later placed on the public record. This revision will provide for more direct access to the Commission while maintain-

ing procedures that are consistent with recent court decisions concerning ex parte contacts.

We have also sought over the course of the last two years to devote substantially greater resources to analyzing the real world economic impact of our final rules. Throughout the rulemaking proceedings we received extensive submissions on the likely economic impact of these proposals. And, before the Commission makes a final determination on the rule, we study that evidence and make our best judgment as to the economic consequences—including the likely impact on small business and the consumer. But we realize that that is not enough, that we have a responsibility to consumers and affected industries alike to monitor what happens once a rule goes into effect. Thus, for example, this year we are conducting the first phase of a study of the vocational school rule's economic impact. We will gather additional data which will assist in determining the cost to the affected schools, and the impact the rule has had on advertising and sales practices in the industry. We plan similar detailed impact analysis of future Magnuson-Moss rules.

We have also come to recognize that even before a rule is proposed by the Commission, we must do all we can to determine what that rule's cost might be. And we have set up new internal procedures to ensure that we get the best economic analysis available before the Commission acts to propose a rule. For example, the Commission recently proposed a rule concerning standards and certification. While the staff proposal was still in the developmental stage, economists worked closely with consumer protection staff attorneys to assist in the drafting of the proposal and to identify potential problems. Before the proposal reached the Commission for consideration, it was examined in detail by our Bureau of Consumer Protection Evaluation Committee, which includes economists, lawyers from the Bureau of Competition and the Office of Policy Planning as well as senior staff from the Bureau of Consumer Protection. The rule also was subsequently analyzed in detail by the Bureau of Competition to insure that it took into account competitive considerations. By the time the rule reached the Commission for our consideration, we have a diversity of views to consider and the best available analysis on economic impact. This is the model we intend to follow in the future.

PUBLIC PARTICIPATION

In my judgment, the single most important action we have taken to improve the regulatory process is the establishment of a public participation in rulemaking program. I'd like to spend a few moments on this, because I believe it to be essential to meaningful regulatory reform.

The genesis of our compensation program is, of course, the Magnuson-Moss Act. In that Act, Congress confirmed the FTC's conclusion that when a practice is widespread in an industry, the most efficient and fairest remedy is a rule that applies to the industry as a whole, instead of case-by-case adjudication. In order to make sure that the Commission has a full record before it whenever a rule is considered, Congress added some elements to ordinary notice and comment rulemaking, like the right to an oral hearing.

At the same time, Congress faced a reality of life in regulatory proceedings. That is, when an agency proposes a rule and holds hearings, those who will without fail come to plead their cause, to challenge the assumptions and the evidence on which a proposed rule is based, are the representatives of the affected industry—the law firms that, through long experience, know how the regulatory gears turn (and, sometimes, where to throw the sand). Of course they have a right to advocate their position. In Magnuson-Moss, Congress provided ample opportunities to exercise that right.

But Congress also believed that in order to balance the advocacy before the Commission, in order to make sure that we were hearing comments on a proposed rule not only from an industry point of view but also from a consumer or public interest or small business point of view, Congress gave us the responsibility and the means to correct the imbalance. Congress' recognition of this Washington fact of life could not have been more explicit: To ensure that adequate funds were available for other groups, the statute says that no more than 25 percent of the public participation funds may be provided to persons representing the industry subject to regulation.

So it is clear that the Magnuson-Moss Act gave us the responsibility to diversify the points of view heard in our rulemakings. Congress wanted more than an argumentative dialogue between industry giants and the Commission staff. We believe that has been accomplished. For example, in the food advertising proceeding, the Executive Director of the Iowa Consumers League received funding to testify at the hearings in Chicago. The presiding officer commented that she was an unusual-

ly articulate witness with interesting and important things to say about consumer attitudes, both for and against the proposed rule.

To take another example, we funded the National Council of Senior Citizens to represent consumers in the hearing aid rulemaking proceeding. That group presented first-hand evidence on consumer experience with the hearing aid industry. Our oversight committee in the House had this assessment of the Council's participation and the program generally:

"Because the hearing aid rule is not yet final, it is too early to tell what specific effects will result from the Council's participation. Clearly, however, the NSCS did provide consumer testimony which would not have been presented absent public funding and which has been of substantial benefit to the proceedings. To the extent that experienced groups such as the National Council of Senior Citizens are available, such direct funding will be useful to assure that consumers are represented before the Federal Trade Commission." [1]

We've already funded eight small business groups in various proceedings. In the mobile homes proceeding, for instance, a dealers' trade association was reimbursed for part of its costs of participation and provided an explanation of how the warranty system for mobile homes works in practice, a perspective that neither consumer groups nor manufacturers were as well-equipped to provide.

We are particularly active in seeking small business participants in our standards and certification proceeding. A senior citizen who operates a retail business out of his home hase already received a small award to testify at the San Francisco hearings on the implications of the rule for his product and its purchasers.

Has the quality of our rulemakings been improved because of this program? Yes, emphatically. I know this from personal experience. Just recently, we spent eight hours sitting around the table at the Commission listening to oral presentations on the funeral rule. Thirteen different spokesmen were there: Congressman Russo, who has taken a deep interest in this particular rule, industry representatives—and representatives of consumer groups and small memorial societies who simply could never have afforded to participate were it not for the Magnuson-Moss compensation program. Each representative had half an hour to argue about the recommendations of the staff and about the record. The interesting thing was that everyone, without exception, criticized the staff's recommendation.

They were generally good advocates. They did what good lawyers should do: summarized their position, highlighted particular parts of the record, and analyzed the impact of the proposed rule and various alternatives. I'm convinced that as a Commisioner, I was in a much better position as a result of their presentations to make an informed judgment, to take that record and deal with it, than I would have been if the only people participating were the funeral directors and the staff of the Bureau of Consumer Portection. The decisionmaking process was enormously enriched by the participation of those who could never have afforded to participate effectively but for Magnuson-Moss funding.

Based on a few years experience with the program, we also have made improvements in the way in which we evaluate funding applications, provide compensation, and ensure that the funds are spent properly. The General counsel now administers the program and decides who is to receive compensation. In addition, a full time auditor systematically reviews the records of those who have received funds to insure that all funds (a) are accounted for, and (b) have been expended only for approved purposes. These changes, I think, further strengthen a program that has become vital to informed decision-making at the Commission.

I have sought this morning to review briefly the state of the Commission. In summary, the Commission is vital and active. It is pursuing vigorously its statutory mission to make the consumer sovereign in the marketplace by promoting vigorous and fair competition, but in a manner that is sensitive to the public's concern about over-regulation.

My fellow Commissioners and I would be pleased to respond to your questions.

Senator FORD. Mr. Chairman, I appreciate you summarizing your statement.

Let me start off with a good question. How do you justify your authorization request for fiscal year 1980 which is $6 million above the $69 million Congress budgeted?

Mr. PERTSCHUK. Well, Mr. Chairman, as you noted, the $69 million is our fiscal 1980 budget request. To that amount we have added the costs of a pending supplemental at OMB for our Nation-

[1] H.R. Rep. No. 95-134, 95th Cong., 1st Sess. 108 (1977).

al Energy Act responsibilities and the costs of an anticipated supplemental pay raise in the fall. In addition, we have allowed for possible supplementals covering any new legislative responsibilities that may be given to us, or to cover any uncontrollable cost increase of programs now in litigations. Specifically, what we have in mind is the one aspect in our budget which is not subject to our direct control, developments in litigation.

It is conceivable that any one of the major cases in which the Commission is involved might experience a sudden need for more resources. We try to project the realities of court decisions on disputed issues, but it may very well be that there is a decision which requires that the trial or discovery move forward in such a way that we need more resources without delay. But the amount we are requesting for this is very small. It does not contemplate any increase in program levels for fiscal years 1981 and 1982. It essentially provides a safeguard for costs beyond our control. It does not provide for increased levels of staffing or program activity in those years—unfortunately.

Senator FORD. Mr. Chairman, in your opening remarks—or as you stated in your opening remarks, since 1975 your agency has been funding public participation in rulemaking. And you spent some time talking about that.

I want to ask a number of questions on conjunction with that program, and my concern over the administration of the program. There have been allegations that FTC rulemaking staff improperly influenced funding decisions. You've heard it, I've heard it, others have heard it.

What kind of response do you have to that?

Mr. PERTSCHUK. Well, there were some specific allegations several years ago, actually before I had come to the Commission. And these allegations were examined in a series of hearings 2 years ago, and I believe that those committees did not find any substance in them.

More important than the specific allegations, as early as 1976 the Commission directed its staff to avoid any effort to intervene improperly in the decision as to who would be funded, to exert influence on it, to exert bias on it, or to tamper with the public participants.

Now, we have sought, as I indicated, in several ways to strengthen that independence. The structural way in which we have done that is to move the public participation decisionmaking to the Office of General Counsel. And, although it was not intended simply to insulate the public participation funding, at the same time we also transferred the presiding officers in rulemaking—who make the recommendations on public participation—from the Bureau of Consumer Protection to the General Counsel's Office, again, to further insulate their decisionmaking.

I think there's another answer to your question, too, and that is that in the directives to our staff and to the managers of the staff, we have hammered away at the point that the staff for the Commission, in developing the record of the rulemaking proceeding, are not advocates in a trial. They have a responsibility to the Commission and to the public generally to develop that record as fully as possible, but to avoid the kind of trial tactics which may be tempt-

45-804 O - 79 - 2

ing to those who feel zealously that they have a commitment to a particular cause.

It's also a question of management supervision, and I think that we are succeeding. I have not heard within the last year or two the kinds of allegations with respect to our ongoing rulemakings of the kind of improper influence to which you refer. So I think this is a problem which today does not exist.

Senator FORD. Does this also include the charge that the funding groups always support the staff position? Are you very careful about that one?

Mr. PERTSCHUK. Yes, sir. As I indicated to you, at least in the final stages of the rulemaking, everybody who appeared attacked the staff position. Now, in a sense, of course——

Senator FORD. Even those that are for them sometimes attack that position.

Mr. PERTSCHUK. Well, I think that's right. And I think to be honest, you are not going to have, except in the case of the small business groups—and I indicated our increasing solicitation of small business groups—you're not going to have a balance between people who favor some kind of rule and people who oppose any kind of rule, because the basic purpose of the public participation funding was to fund those groups that did not have sufficient economic resources to present their position.

For the most part, the industries affected cannot meet the statutory test of showing that they don't have sufficient resources to present their position. It's really only the smaller groups—dealers and small dealers and perhaps small manufacturers—who can meet the statutory standard. So you're not going to have an equal balance.

But the fact is that there is no single consumer position or public interest position. We know that. It's a balancing of interests. There are different groups that have different concerns. And the purpose is to allow the Commission to hear perspectives representing the interests of significant sectors of the community that would not otherwise be heard.

Senator FORD. I want to say to the other Commissioners that if you want to participate in any of the comments or any of the questions that I solicit, don't just sit there and worry about it. If you don't like what's being said, why, come forward. I want to assure them that if they have a comment they want to make, I want to hear them.

Mr. PITOFSKY. I'll say a word on this. I haven't been silent because I dislike what's been said. On the contrary, I support it entirely.

Let me say something about public participation. I've only been at the Commission a little less than a year. I sat in on two or three of these rulemaking hearings. In every one of them there was a public participant present, sometimes two or three.

In every single case, they disagreed with the staff. In every single case, they disagreed with each other. I would say in most instances their position did not prevail. And yet there's not been an occasion in which they didn't sharpen the analysis. They come at these issues in a different way, from a different angle. And at times, their positions may be extreme, but they expose consider-

ations which would not otherwise come to the surface. And on the basis of the small sample I've seen, I would say that their participation is extraordinarily helpful in rulemaking.

Senator FORD. Have they helped you in making your decision?

Mr. PITOFSKY. Absolutely, although I would have to say that in the overwhelming number of instances, in my own mind I did not come around to their position. They did not persuade me. But they helped in the analysis. That, it seems to me, is the role that they play very effectively.

Senator FORD. Like don't confuse me with the facts; my mind is already made up.

Mr. PITOFSKY. I didn't mean it that way. My mind was not made up, and they did confuse me with the facts, which was a good thing. And they confused me with analysis. But out of that confusion, out of that conflict, out of this adversary system it seems to me we get more informed decisionmaking.

Senator FORD. Mr. Chairman, what is the total amount in the fiscal year 1979 budget that you are funding for participation?

Mr. PERTSCHUK. $750,000.

Senator FORD. What is your request for 1980?

Mr. PERTSCHUK. The same.

Senator FORD. No change?

Mr. PERTSCHUK. No change.

Senator FORD. It seems to me that this program should be of great benefit to the small businessmen—and I think you alluded to that earlier—who on their own cannot afford the cost of participating in the rulemaking process. And if my information is correct and my figures are correct, less than 10 percent of the public participation funds have been awarded since the start of the program to small business people. Why is that?

Mr. PERTSCHUK. I think there are two reasons. One is that we didn't have the applicants. Small business groups that came in and asked for money, I believe, were given money, all of them.

Now, that's not enough of an answer, because one of the reasons why they didn't ask for money is because I don't think that we did enough of a job in getting the word out to potentially-interested small business groups that there were rules out there that could affect them and that these funds to participate were available. And that's a problem, both in legislation, as we experienced from the work on the committee, and in regulation. The larger businesses, who have Washington representatives, know what's on the horizon and can move to respond to it. Small businesses tend to learn too late.

So we have adopted several programs to try to cure this particular problem. In the first place, we have adopted voluntarily that portion of the President's regulatory reform Executive order in which we publish in advance every 6 months a regulatory agenda showing what's going to come up.

And we have been working with the small business ombudsman, small business counsel, Milt Stewart at SBA, to make sure that the word gets out to the small businesses that might be affected, so they know ahead of time what's happening.

We have instructed our staff to get out information, as soon as the Commission proposes a rulemaking, both on the rulemaking

and availability of public participation funds to all of the small business groups and others who might be affected by it.

And we held some seminars out in the field—in Chicago, New York, San Francisco—to which we have invited small businesses generally, to let them know about the public participation funding.

I understand that this work has borne fruit in the standards and certification proceeding, and that we have some nine applications from small businesses in that proceeding. Is that right?

Mr. SOHN. I don't know what the total number is, but we have expended a lot of effort in connection with the standards and certification proceeding, because it is a rulemaking which does directly affect small businesses. And a number of my people are working very hard to increase the number of applications. We are starting to get them now.

Senator FORD. It seems important to me that the Commission exercise its own oversight over the program.

Mr. PERTSCHUK. Yes, sir.

Senator FORD. This oversight should insure that the work products of groups is not duplicative of other work, and that money allocated is used for the work requested.

Have you taken any steps to prevent duplication of work?

Mr. PERTSCHUK. I beg your pardon?

Senator FORD. Have you taken any steps to prevent duplication of work?

Mr. PERTSCHUK. Well, yes. In the decisionmaking on the applications, the evaluation of the applications is made with a view toward assuring that each group will present a distinct and separate viewpoint or information to the Commission. That's part of the selection process. Mike Sohn may want to talk as to how he goes about doing that.

Senator FORD. While we're doing that, let's see if he can speak to the whole question I have.

Are you doing any auditing of the program? Have you had any results from the auditing of the program?

Mr. PERTSCHUK. Let me just say on the auditing, the auditing is also done separately and outside of both the Bureau and the General Accounting Office. The auditing is done by our executive director. We hired a full-time auditing service on the public participation program. We have now audited 25 percent of the public participation contracts. We're aiming for 50 percent, and that program is well underway.

Mr. SOHN. Well, as the chairman indicated, one of the statutory criteria for determining whether to grant a funding application is whether the applicant will make a contribution to the proceeding, present a viewpoint or perspective that would otherwise not be presented.

Senator FORD. That automatically opens you up to criticism, because you have to make the judgment as to whether it does or not, and your judgment then gives you a chance to tilt it, doesn't it?

Mr. PERTSCHUK. Except that initial judgment is made by the presiding officer in that rulemaking.

Senator FORD. What I'm saying, is that the very fact that the Commission staff is proposing rules make you suspect. Is that correct?

Mr. SOHN. I think that's right. It's a hot seat, as I've learned since the chairman transferred this function to my office. But nonetheless, as I view the function, it is not to be judgmental in terms of the merits of the rulemaking, but to be judgmental in terms of the completeness of the record which the Commission will ultimately have before it when it makes the decision. And so I rely on the presiding officer, who has got a feel for the proceeding and what particular interest is needed in it, to let me know of whether there is an additional contribution that may likely be made if I grant the application.

Also, to the extent that the application involves requests for a study, I rely on people in our Office of Policy Planning who have experience in the design and interpretation of surveys. They are in a position to let me know whether the survey is likely to yield data which will be of value to the Commission in assessing the record. So, I don't make this decision myself. I rely on various kinds expertise within the agency.

Mr. PERTSCHUK. Mr. Chairman, I might add that we support, as part of the regulatory reform legislation which we testified on last week before the Government Operations Committee, giving the Administrative Conference the responsibility for evaluating the public participation programs of the various agencies—that is, from their perspective, take a look at the procedures, the implementation of those procedures, to see whether they have succeeded in keeping the kind of bias which concerns you out of the process.

Senator FORD. Would you care to comment on the criticism of the FTC's public participation program contained in the preliminary report of the Administrative Conference of the United States?

Mr. PERTSCHUK. I have had only brief discussions about that preliminary report. But those discussions basically revealed that the criticisms go to the earlier efforts of the Commission to get the program into place and not to our existing procedures and structure. But I can, if you would like, Mr. Chairman, I can review that and respond further in writing for you.

[The following information was subsequently received for the record:]

The Administrative Conference of the United States has not prepared a "preliminary report" on the FTC's public participation program. Instead, what was referred to as a "preliminary report" by the Chamber of Commerce in its testimony before the House Commerce Committee, Subcommittee on Consumer Protection and Finance (February 28, 1979) was actually a topical outline prepared for the Administrative Conference's internal use by one of its consultants. Robert Anthony, Chairman of the Administrative Conference, has corrected the hearing record on the Chamber of Commerce's misuse of this internal "outline" in a letter to Chairman Scheuer, dated March 16, 1979, with a copy going to Mr. Jeffrey Joseph of the Chamber of Commerce (see attachments). The Commission will, of course, comment on the Conference's report when it becomes available.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES,
Washington, D.C., March 16, 1979.

Mr. JEFFREY JOSEPH,
U.S. Chamber of Commerce,
Washington, D.C.

DEAR MR. JOSEPH: Chairman Anthony has asked me to send you a copy of this letter to Chairman Scheuer. It is not intended to "take sides" on any legislative question, but merely to set the record straight on a matter of considerable importance to the Conference.

Sincerely yours,

RICHARD K. BERG,
Executive Secretary.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES,
OFFICE OF THE CHAIRMAN,
Washington, D.C., March 16, 1979.

Hon. JAMES SCHEUER,
Chairman, Subcommittee on Consumer Protection and Finance,
House Office Building, Washington, D.C.

DEAR CHAIRMAN SCHEUER: Pursuant to the mandate of the Magnuson-Moss Act, the Administrative Conference over the past three years has been engaged in a comprehensive study of FTC rulemaking. It has come to my attention that a preliminary document prepared in the course of this study has been cited to your committee as evidence of shortcomings in the FTC's program of compensating participants in its rulemaking proceedings.

I have no wish, and it would not be proper for me, to express any view on the legislative matters before you, but I think it important I place on the record the status and nature of the document cited. The document, dated November 27, 1978, is entitled "Topical Outline of Report Section Relating to Compensation." It was prepared by the Conference's consultant, Professor Barry B. Boyer for consideration by the Conference's Committee on Rulemaking and Public Information, which is overseeing the study project. It is a preliminary document, representing the early stage of a process of inquiry, and it was intended primarily to indicate questions and issues to be investigated and considered more fully in later reports. It would be a disservice to the Conference and to Professor Boyer and misleading to your committee to characterize as evidence or findings what are no more than preliminary hypotheses.

Although the Topical Outline was not prepared for public distribution, to enable you better to evaluate the material cited to you, I am enclosing a copy of the entire document.

Our Conference committee meetings are open to the public. Perforce, Committee deliberations often focus on preliminary and draft documents. A risk is that hypotheses and tentative conclusions may be cited as having more authority than they intend to convey. I hope that this letter may help to put the matter in a proper perspective.

Sincerely yours,

ROBERT A. ANTHONY, *Chairman.*

Mr. SOHN. Let me just add that it's my understanding that the initial report which the Administrative Conference will file by June 30 will not address the public participation program. They plan to do that in a second report. So, I believe any material emanating from the conference at this point on public participation will be preliminary staff material.

Senator FORD. I have it.

Mr. PERTSCHUK. We'd be happy to comment on it, Mr. Chairman.

Senator FORD. I am going to quit here now in just a minute. But I have a couple of other questions before I turn it over to my colleagues.

Senator Tower introduced the Federal Trade Commission Regulatory Review Act, which is S. 193, a particular guide for legislative

veto of each rule proposed by the FTC. This legislative veto is called a 1½ house veto bill.

Do you have any Commission response to this veto provision?

Mr. PERTSCHUK. We're not flattered to be singled out for legislative veto. We have sought to respond in a number of ways to the whole legislative veto question.

I think the first and most appropriate response for us is to conduct our rulemaking in such a way as to convince you and the committee that we have gone about it responsibly, in the way which Congress has intended, and that our actions have been responsible and responsive to our general mandate. So, that I don't believe, frankly, that a case has been made that the Commission has abused its rulemaking authority in such a way as to justify the rather extraordinary remedy of legislative veto.

I can understand the appeal of legislative veto, the appeal that some Congressmen feel that they don't have the opportunity and the oversight to make the agencies effect congressional will. But legislative veto already exists. And, as you know, Mr. Chairman, this committee was very quick to overrule the FTC in 1964 when this committee and the House committee thought the Commission had gone too far with rulemaking on cigarettes. Congress vetoed that action by legislation.

Senator FORD. And I happen to agree with them.

Mr. PERTSCHUK. I'm not surprised.

And with saccharine, the saccharine rule and the safety air bag. Congress exercised the legislative veto by legislating. I think if anyone thinks we're not responsive to oversight such as the oversight of this committee and the appropriations committees, they have not watched this agency perform over the last 2 years. Congressional oversight is real and effective.

Finally, we do support the legislative reform legislation introduced by Senators Ribicoff, Percy, and Javits, and the administration, as providing some further safeguards against the abuse of rulemaking powers by the agency.

Senator FORD. Mr. Chairman, you have been in the position of staff seeing the operation from this side. You are now in the position of seeing the agencies perform, one that possibly could be more criticized by others because you are making regulation and rules. Do you have any idea what legislative veto would cost and how many additional people would be required just for the Senators' offices and committee staffers to look at all the rules and regulations coming down and what is going to apply?

I said in my opening statement that it would require more staff than we could put in the new Hart Building.

Mr. PERTSCHUK. I would only take as an example our ongoing proceeding on standards and certifications—it is an enormously complex proceeding and, of course, one that we won't reach a decision on for at least a year or so. That proposal is a result——

Senator FORD. How long has that been going on?

Mr. PERTSCHUK. It took the staff 4 years to investigate and to develop a proposal before the rulemaking commenced last fall. And I don't think that was too long, because it's an enormously complicated, sensitive, and difficult area—an important one. The rulemaking will involve enormous numbers of very difficult and techni-

cal facts and issues. And we will, of course, develop a full record and be guided by the record.

I can't imagine how that kind of record and those kinds of issues can be dealt with in a 30-day or 60-day period. I think it will pose enormous difficulties, and, I think, in fact, what would happen—and I guess this is a basic concern I have with legislative veto—is that you will not have adequate staff. What you will get is the one-sided presentation by lobbyists who are concerned about the impact of a rulemaking on their industry, whispered at a cocktail meeting or a quick meeting or on the floor. And that's not a very healthy, open deliberative process.

I do think that the Commission is capable of exceeding its authority, but there are procedures already in place, both of judicial review and through legislative review, to discipline those possible abuses.

Senator FORD. Senator Danforth.

Senator DANFORTH. Yes.

Commissioner Dixon, how long have you been on the Commission?

Mr. DIXON. Forever, I think.

Mr. PERTSCHUK. We gave Commissioner Dixon a party to celebrate his 40th year as a staff member and commissioner with the Commission.

Mr. DIXON. I have been a commissioner since 1961.

Senator DANFORTH. I will tell you—and I have told this to Chairman Pertschuk—when I go back to my State and speak to Rotary or Kiwanis, or similar service clubs at a luncheon or dinner, typically about half the questions I get in the question-and-answer period are complaints about the FTC.

My understanding is that oversight hearings are scheduled in July, so there will be ample time to get into this in greater depth. But when my constituents are up in arms about an agency, when a disproportionate number of complaints comes in about an agency, obviously that is something that is a concern to me.

What I would like to ask about is this public participation program. Now, you have been a commissioner since 1960.

Mr. DIXON. Yes.

Senator DANFORTH. Do you feel that your ability to do your job has been materially improved by this public participation program?

Mr. DIXON. I am not sure of that. When it was first mentioned, I took a rather jaundiced view of it. I once described it as a potential bill for young unemployed lawyers. I am not sure that it has developed that way. Rulemaking does put a tremendous burden on the Commission. You merely assigned us another one of your jobs in specific language. We had a case pending at the time that Magnuson-Moss was being debated and actually was passed. We won that case. We didn't need Magnuson-Moss. Magnuson-Moss merely made it a lot tougher, because what we were using was the old Administrative Procedure Act, section 4 approach, instead of section 8 approach, to cover the constitutional question.

But that is not the question you are talking about. You are talking about the question of whether you can go out into the public with public money and pay some parties for participation in

rulemaking in order to help make a complete record upon which to ultimately base a decision. The instant you do this you get the accusations Chairman Ford mentioned. The instant you pick, you have the accusation.

Senator DANFORTH. But let me just say, it seems to me to be a very, very strange operation. Now, maybe I am wrong on this, but let's just go back to the beginning.

Supposing that I am in some industry. I am a business person and I am in, say, the funeral industry. You've gotten involved in that; right?

Mr. PERTSCHUK. Yes, sir.

Senator DANFORTH. When did you get involved with the funeral industry?

Mr. PERTSCHUK. Well, sir, I wasn't there, but I believe the funeral rule began at least 4 or 5 years ago. 1975 is when the initial——

Senator DANFORTH. At some point in history, maybe, say, 1974, 1975. Just using the funeral industry as an example. I don't want to get bogged down in dates or details or one industry.

But here is an industry that the FTC didn't pay any attention to at all. Then, all of a sudden, somebody proposes FTC rules.

Let's take another hypothetical. Let's take the widget industry; OK?

Mr. PERTSCHUK. And your assumption would be——

Senator DANFORTH. The FTC has had nothing to do with this business of making widgets, and I have never heard from the FTC before. Is that right? Then, all of a sudden, somebody proposes—somebody has the idea, "Hey, let's do something about the widget industry." Right?

Mr. DIXON. Sir, may I interrupt?

Senator DANFORTH. Just wait a minute.

Isn't this right?

Mr. PERTSCHUK. No.

Senator DANFORTH. No? OK.

Is it possible for me to be in the widget industry and have no rules or regulations promulgated about me from the FTC?

Mr. PERTSCHUK. I think—and I would have to review all of the rules—I think that there probably is not a case in which there is not a history of Commission involvement in terms of cases of unfair or deceptive practices against firms in the industries for which rulemaking is proposed.

I don't believe that there exists a rule—and I will go back and look at all of them—in which suddenly, without any pattern, historic pattern of abuse or violations of the Federal Trade Commission Act, the Commission suddenly proposed the rule.

Senator DANFORTH. Then let me then put it this way: Is it true that the Commission can make a determination to get more deeply involved, much more deeply involved, with a particular industry than it has been heretofore?

Mr. PERTSCHUK. Yes.

Senator DANFORTH. Does that happen?

Mr. PERTSCHUK. Yes; by a proposed rule.

Senator DANFORTH. And what industries has that occurred in in the last, say, 4 years?

Mr. PERTSCHUK. The insulation industry; standards and certification; children's advertising.

Senator DANFORTH. Funeral directors.

Mr. PERTSCHUK. The funeral rule was begun in the last 4 years, I think, back in 1975.

Senator DANFORTH. Used cars.

Mr. PERTSCHUK. Used cars was under a directive by Congress in 1974. Congress directed the used-car rule.

Senator DANFORTH. OK. So, you are dealing with home insulation and what else?

Mr. PERTSCHUK. Home insulation, standards, certification, and children's advertising.

Senator DANFORTH. Let's take, say, home insulation or anything.

Mr. PERTSCHUK. Appliance labeling is another.

Senator DANFORTH. All of a sudden, somebody on the staff decides, "Let's get involved in home insulation." Right?

Mr. PERTSCHUK. Well, no.

Senator DANFORTH. What happens?

Mr. PERTSCHUK. What happened was the President submitted his energy program, and we set up a task force to review what our responsibilities should be at a time when there was an outpouring of insulation ads, many of which we had reason to believe were not substantiated. And so the Commission directed the staff to prepare a labeling rule on insulation. So it was the Commission.

Senator DANFORTH. And then the Commission directs the staff to prepare a labeling rule.

Mr. PERTSCHUK. That's right.

Senator DANFORTH. And then what happens? Are there hearings?

Mr. PERTSCHUK. The staff comes back with a proposal which the Commission evaluates independently and then publishes in the Federal Register, a notice of a proposed rulemaking. And there have been discussions with the industries, informal discussions, throughout this process to try to identify problem areas.

Senator DANFORTH. Basically, the industry takes the position, "We don't want that rule." Right?

Mr. PERTSCHUK. Sometimes. In this case, in the insulation case, there was some industry support for rules defining the terms because some industry competitors were hurt by the complaints. But generally speaking, you are right.

Senator DANFORTH. When does this public participation come into play?

Mr. PERTSCHUK. Let me ask Mike Sohn to give you the exact sequence of public participation following the publication of the notice of proposed rulemaking.

Mr. SOHN. The basic decision to deny or grant applications would come between the notice of proposed rulemaking which initiates the rulemaking proceeding, and the time for filing of written submissions. A written submission period occurs, generally speaking, before the oral hearings. So that's when the application would come in, right after the notice of proposed rulemaking.

Senator DANFORTH. What application?

Mr. SOHN. Applications from people who have read the Federal Register notice proposing the rule or otherwise learned of the fact that there is going to be a rulemaking.

Senator DANFORTH. You don't solicit these people?

Mr. SOHN. We do not solicit them individually. We have outreach programs which attempt to explain the rule and indicate what the impact will be. As the chairman indicated, we would not use the word "solicit," as such. We are trying to involve small business more in our rulemaking process.

Senator DANFORTH. How do you decide who these people are who get these funds?

Mr. SOHN. We decide that, as I tried to indicate earlier, on the basis of the statutory criteria, which are: Whether they can afford to participate, whether they represent an interest which would otherwise go unrepresented, and whether they have something essential to contribute to the proceeding.

Mr. PERTSCHUK. I think your question may be something else. How do we solicit, or who solicits the public participants. Let me make it very clear——

Senator DANFORTH. How are they found, and how are they selected? Is everybody—I mean, supposing my wife decides she is interested in some field and she wants to come in, she wants to be paid for it. Can she get it?

Mr. PERTSCHUK. Let me make one very careful distinction. We will go through the process. The staff who have developed the proposed rulemaking are under instructions not to selectively solicit persons or groups who they think would support a particular version of the rule. They are under instructions to notify everyone who has been in touch with them during the investigative stage, that the Commission has issued a notice of proposed rulemaking, and the public participation funds are available.

Now, out of that process will come applications which then—and Mike will describe how those applications are handled.

Senator DANFORTH. Does everybody who applies get money?

Mr. SOHN. Oh, no, sir.

Senator DANFORTH. What percentage get money?

Mr. SOHN. I don't know the answer to that, but I certainly turn a number of them down. And I would consider their experience in the field, their expertise, their particular plan for how they are going to participate. They don't just request money in the abstract. They have to submit a fairly detailed explanation of what it is they intend to do, and that explanation is appraised in the manner indicated earlier to Senator Ford.

Senator DANFORTH. How about the Council on Children, Media, and Merchandising; how do you know if that's a good outfit? They want to come in and talk about the antiacid rule. How do you know if that's worth hearing?

Mr. SOHN. I can't recall that particular application now. But we would appraise it in the way in which I indicated. Whether others were going to present the same perspective, what they intended to present, what previous experience they had in that particular field.

Mr. PERTSCHUK. Their application, incidentally, Senator, and all of the documents involved in their applications, and the basis on which we make the decision is available for you with respect to all

applicants. We can submit to you for the record the records on every single application, the basis for their application, and the grounds on which it was decided.

Senator DANFORTH. Isn't this essentially what happens: The Commission, through its staff, makes a determination to get involved in rulemaking within a particular area?

Mr. PERTSCHUK. Let me say it's the Commission that makes that decision.

Senator DANFORTH. The Commission makes that decision.

The industry basically opposes it. It's going to be hurt by it; right?

[Mr. Pertschuk nods affirmatively.]

Senator DANFORTH. It wants to make its case against that.

[Mr. Pertschuk nods affirmatively.]

Senator DANFORTH. And then someone like the Council on Children, Media, and Merchandising wants to come in and say, "Well, we agree with the Commission. We maybe think the Commission should have gone further."

Mr. PERTSCHUK. Or differently.

I am not disagreeing with you.

Senator DANFORTH. But it basically is——

Mr. PERTSCHUK. Wants to do something——

Senator DANFORTH [continuing]. Basically, these outside groups are not adversaries of the Commission's point of view; they are basically adversaries of the industry which is going to be regulated. Isn't that right?

Mr. PERTSCHUK. The latter is right. The former is not necessarily right.

Senator DANFORTH. But their gripe with the Commission is the Commission doesn't go far enough, not being tough enough.

Mr. PERTSCHUK. Or it may be that they disagree with the Commission's remedy. I agree with you.

Senator DANFORTH. But as far as the business is concerned it is in the following position, if you look at it from their standpoint: The FTC is about to hurt them, and the FTC is paying witnesses to come in to tell them to hurt them even more. Isn't that right?

Mr. PERTSCHUK. Sure. As a summary, sure, that is right.

Senator DANFORTH. Do you ever pay any witnesses to come in and say the FTC is all wet, you should stay out of this area?

Mr. PERTSCHUK. Yes. Small-business witnesses.

Senator DANFORTH. That's 10 percent.

Mr. PERTSCHUK. Well, it was 10 percent, but everyone who asks——

Senator DANFORTH. They come in and say stay out of the area entirely?

Mr. PERTSCHUK. Some do.

Senator DANFORTH. How much of your money goes to people who say stay out of this area?

Mr. PERTSCHUK. Well, the 10 percent was the amount that was given in the past. I can't tell you with respect to current spending.

But, Senator, that was the purpose for which Congress gave us the money.

Senator DANFORTH. Maybe it's a bad purpose. I wasn't here when this crazy thing was done.

Mr. PERTSCHUK. The point is that even with this funding, Senator, even with this funding, the ratio of those who testify against the regulation to those who support it is still at least 3 to 1, industry as against other public groups.

Senator DANFORTH. But why should we pay people, subsidize people to come in and take basically the Commission's point of view, except, to say, the Commission should go further? And how do you make a decision as to whether these people make sense?

What is the Council on Children, Media, and Merchandising?

Mr. PERTSCHUK. That we can supply for you.

Senator DANFORTH. I am told it's a one-man band.

Mr. PERTSCHUK. We will supply whatever information was available to us upon which the decision was made.

[The following information was subsequently received for the record:]

COUNCIL ON CHILDREN, MEDIA, AND MERCHANDISING

The Council on Children, Media and Merchandising (Council), a non-profit organization, was formed in 1970 and has 15 members on its Board of Directors. The President of the Council is Robert B. Choate. In addition to Mr. Choate there are several other full-time employees. Members of the Board of Directors are: Janie Boyd; Paul Cornely, M.D.; Geoffrey Cowan, Esq.; Andrew Freeman; Charles Goodell, Esq.; Mildred Jeffrey; Norge Jerome, Ph.D.; Dawn Ann Kurth; Stephen Kurzman, Esq.; Michael C. Latham, M.D.; Leo Lutwak, M.D., Ph.D.; Carlotta Miles, M.D.; Abraham Nizel, D.M.D., M.S.D.; Sondra Raspberry; and James S. Turner, Esq.

The Council is dedicated to (1) studying advertising and merchandising practices in the United States directed to those under 12 years of age, and (2) educating children and parents about present marketing practices so that they may become more prudent consumers. The Council's special concern is that of advertising and merchandising of food products to children and the resultant effects on the children's nutritional habits and health.

In the case of the rulemaking proceeding on Over-the-Counter Antacid Advertising, the Council requested and was granted $26,644.00 to develop expert studies to determine the need and best means for making warning disclosures in antacid advertising to warn children and their parents against unsupervised consumption of antacids by children. The contraindicated and/or unsupervised consumption of over-the-counter drugs by young children is an important issue in this proceeding, and the Council represented a viewpoint on this issue that otherwise would not have been available to the Commission.

Senator DANFORTH. Does anybody here know about this Council on Children, Media, and Merchandising?

Mr. SOHN. We have a brief description of the organization.

Senator DANFORTH. Is it a "him" or "her"? It's an individual; isn't it?

Mr. SOHN. I don't know at this time. I would have to look at our records.

We know it's a nonprofit organization. We know it's had experience in this area.

But I would like to make two points: It seems to me, Senator, that when the National Council of Senior Citizens tells us about the experience of the elderly concerning hearing aids, they bring a perspective to that proceeding that our FTC staff cannot bring, and they will not be able to effectively participate in the absence of the funding.

Senator DANFORTH. Here we are in the Congress of the United States. We don't go out onto the highways and byways and pay people to come in to lobby us. Have we made a mistake?

Mr. SOHN. No; you delegated to us the rulemaking——

Senator DANFORTH. We pay the American Agricultural Movement, or the VFW, or some group to come in and lobby us?

Mr. SOHN. I believe if you were involved in the kind of detailed rulemaking that we were involved in, you would find that useful.

The essence of rulemaking in an area such as the one we are in is to get as many different perspectives from as many different people as possible. Congress made a judgment which I think is correct: In the absence of public funding, that simply wasn't happening and wasn't likely to happen.

Mr. PERTSCHUK. Actually, Senator, you did do that. I was on the Commerce Committee staff when there were issues similar to the kinds of issues you just raised, legislation in which all of the witnesses who appeared were witnesses who essentially had Washington residences and substantial economic resources. So the committee paid witnesses to come and present testimony from a public interest or academic point of view.

Mr. PITOFSKY. Senator, may I make a point——

Senator DANFORTH. Did the Congress, to your knowledge, ever pay the Americans for Democratic Action to come in and lobby Congress?

Mr. PERTSCHUK. I do not know, but I suspect not.

Senator DANFORTH. Has the FTC ever paid them? My information is that in four different instances they paid them an aggregate of $147,000.

Mr. PERTSCHUK. Actually, I do remember Senator Magnuson contributing $50 to the Washington Chapter of the ADA, which is a consumer group, for doing a survey of supermarket prices in the District area. That group, which is not the national ADA and a lobbying group, is a local consumer group which has concentrated its efforts on finding out about comparable prices in supermarkets and drugstores as a local consumer group.

Senator DANFORTH. Was it worth it?

Mr. PERTSCHUK. They did an interesting survey—well, I don't mean to be facetious—it was one of the underlying studies that helped to bring open generic pricing in the District, because the District now has a substitution law, and they were one of the prime advocates of it, and the District is one place in the country in which you can get competition in drugs and the elderly can get generic drugs. And they were one of the groups that contributed to that.

I don't mean to be argumentative, Senator.

Senator DANFORTH. They must be experts on health spas. You have a rule on health spas; is that right?

Mr. PERTSCHUK. We have a proposed rule. I do not know their expertise on health spas.

Senator DANFORTH. Thank you.

Mr. PITOFSKY. Senator, may I reply to one of the very legitimate questions you raised. The framework in which you analyzed this program is one in which you assume that the Commission is opposed to the business community.

Senator DANFORTH. Listen. I have never had any dealings with the Commission, never, ever. All I am saying is that when I go back to my State, people are up in arms about the FTC—up in arms about it.

Mr. PITOFSKY. Let me say a word about that. I don't think because many people back in your State are concerned about what the FTC is doing that it necessarily follows that the FTC is doing a bad job. I think that if a Senator from your State in the 1920's, 1930's, 1940's, went back, they would never hear a word about the FTC. Part of the problem is that this FTC, I believe, is taking on some very controversial issues, and it therefore follows that many people will be concerned. You can't get into questions like advertising by doctors, into funeral marketing practices, into the mergers we are taking on, without raising some people's hackles.

As far as the public participation program is concerned, I would like to say clearly as a Commissioner that I do not regard a proposed rule to be a statement of Commission position as opposed to the business position. Most of the business community has always said case-by-case litigation is unfair because it singles out one company and leaves the others free to do what they were doing before. Rulemaking is an effort to investigate and to try to establish certain levels of business conduct across the board. But it's an investigation; it's not a determination.

The problem that the public participation program is designed to address is that the resources available to the business community participating in that investigation are enormous compared to the resources of others.

Senator DANFORTH. How big a staff does the FTC have?

Mr. PERTSCHUK. In the Bureau of Consumer Protection—under rulemaking—there are about 300.

Senator DANFORTH. What's the total staff of the FTC?

Mr. PERTSCHUK. 1,760.

Senator DANFORTH. How many regional offices do you have?

Mr. PERTSCHUK. We have 10.

Senator DANFORTH. What's you annual budget?

Mr. PERTSCHUK. $69 million.

Senator DANFORTH. Do you know any lobbyist that has a $69 million budget?

Mr. PERTSCHUK. The reported expenditures on children's advertising——

Senator DANFORTH. I'm not concerned about the expenditures on advertising. I'm talking about money spent to lobby the Congress.

Mr. PERTSCHUK. The lobbying kitty of those opposing the children's advertising rule—reported by the Washington Star—is $15 to $30 million. The source for that is the Star.

We have a Commission budget, for staff I think about $377,000, and public participation funds about $300,000—roughly about $600,000 for staff plus public participation. I think that's about right.

Senator, one more point, if I may—in every rulemaking—every rulemaking that we have reached a final decision on, we have cut back substantially on the initial proposal made by the staff, and the reason we have done that is because we listened to the testimony and the arguments of the industry. We listened not because we were afraid of them, but because they made sense.

Again, in each of those arguments, the public participants have said, "Wait a minute, before you cut back in the way in which it's proposed, think about these things." And in some of those cases, I

myself have felt that some of the particular things that the staff had proposed we do in cutting back went too far.

And so, what Commissioner Pitofsky is saying is right. It's not as if the Commission hangs on for dear life and we bring in public participation to add weight. We really do listen to that record. Decisions are formed, judgments are made at the end of that process.

Mr. CLANTON. Senator, let me add a couple of comments.

It seems to me there are two issues, two separate issues on the public participation program. The first is whether we should have it at all, either as the FTC or as to other agencies.

Congress left the decision specifically to us, and they have not really expanded it beyond that. I think that, in concept, the idea is very good. I have been able to view the program since it first went into effect, having seen several of the records, several of the proceedings come back to the Commission. It strikes me simply that the analysis presented by a variety of these groups gives us a perspective on what's on the record. For example, the vocational school record had upwards of 100,000 pages. A number of the other rules are of a similar order.

I'm not suggesting they should be that long. In some ways I think there hasn't been a severe enough effort to circumscribe, to keep those records manageable and make them intelligible for the Commission.

But I do think that simply the analysis of these records and the different perspectives of the evidence has been very helpful.

The second question is: Who should administer the program if there is a public participation program? Is the Commission in the best position, given the fact that we appear to have self interests in helping participants who may be inclined to go along with the Commission's point of view? Does that present an inherent problem of apparent bias by having the Commission regulate and administer the program?

I think there are two answers to that. First, I think the question is how good are the criteria that are set up in the statute and our own regulations. Do they insure that our discretion is minimized so that we cannot have a great degree of discretion to say that we don't want this particular witness to be coming in and we're going to exclude another, not because of economic ability, but because we don't like their viewpoint.

And I do think that our criteria, both in the statute and in terms of the regulations, go a long way to minimize that.

The other side of the question is which agency is in the best position to administer the program—let's say we give to GAO or the Administrative Conference the authority to determine who should get funds. That certainly is an alternative and, indeed, it's an alternative that was considered last year when legislation was considered to have this program expanded across the board to all Federal agencies.

And I think if that were the case, it might make a lot of sense to have a centralized agency administer, whether it be GAO, Justice, or somebody.

The only problem I would raise in that respect is if you are going to make sure that the party has an interest in making a contribu-

tion. It's difficult for another agency that has no feel of the record or the issues to make that judgment. And, indeed, that's one of the reasons why we are in a position, administering our own program, and admittedly with the problems of appearance that it presents, to know whether or not that person can make a contribution and to do it in a way which substantially contributes to the record.

But I understand some of the concerns. I think some of those concerns are inherent in terms of our active administration of the program.

Senator DANFORTH. My problem is a very simple one, if you're going to subsidize some people that come in and state their case, how is the decision made as to who to subsidize and who not to subsidize?

And I think that that really presents a very fundamental question of Government. But I am finished.

Senator FORD. I don't want to break in here, but Senator Warner has some questions he would like——

Senator WARNER. Thank you, Mr. Chairman.

First, I would like to compliment the Chairman of the FTC in his style of congressional relations. It's obviously predicated on long experience, but I appreciate your visit.

We had what I felt was a very friendly and frank exchange of viewpoints, and I told you that I asked to be on this subcommittee for the reason that I was intensely interested in the development of consumer affairs and particularly, for the time being, I am of the opinion that we should encourage, to the extent possible, participation by citizens and various groups in all phases of our government life.

I fully recognize that we're going to have a lot of growing pains with this concept. I am going to continue to take an active role in it, and for the time being, see what we can do to foster improvements and further encourage people.

Do I understand that you have an internal study relating to the operations of this public interest intervenor funding program?

Mr. SOHN. Well, when the Chairman first came into office, he asked me to take a look at the program and to suggest changes if I thought any were warranted. He has already touched on two of the major changes which were made. We transferred the public participation program from the Bureau of Consumer Protection, which was also responsible for our rulemaking, to the Office of General Counsel in an effort to respond to some of the appearance questions which were broached earlier in this hearing.

At that time, we also transferred the Presiding Officer Section to the General Counsel's Office. As I've described, these people are involved in the funding application process.

I would add that we understood the appearance problem and responded, in part, to that. I found no abuses of the type that are currently charged at the time we came in.

Senator WARNER. Now, will certain portions of this study be made available to us, Mr. Chairman, in due course——

Mr. PERTSCHUK. Absolutely.

Senator WARNER [continuing]. So that we can share in the findings of your staff and counsel with respect to how this program might be improved?

45-804 O - 79 - 3

Mr. PERTSCHUK. Yes, sir.

Senator WARNER. A statistic has come to my attention—I believe it was elicited in the Appropriations Subcommittee—that 85 percent of those funded for intervention basically took a position in agreement with the FTC.

Would you care to comment on that statistic? Is it accurate——

Mr. PERTSCHUK. I assume that that figure is accurate insofar as it reflects the basic dichotomy that we were talking about. Essentially, 85 percent went to groups who wanted the FTC to do something, as opposed to industry groups who wanted the FTC to do nothing.

Senator WARNER. Well, on its face, it seems like it's disproportionate, and I think one of the biggest hurdles we have to overcome to make this program effective is to have a public perception that the program is evenhanded, and I presume that you give us your assurances this morning that you are going to continue to pursue a policy of evenhandedness.

Mr. PERTSCHUK. The statutory limit on the amounts of money we can give to industry groups is 25 percent, but we have only been giving out 10 percent. We are going to try very hard to find business groups and to get the word to them that they are encouraged to apply and participate up to the full availability of that funding; yes, sir.

Senator WARNER. Are you satisfied at present with the statutory criteria, or are you suggesting that changes be made?

Mr. PERTSCHUK. I think they are working. I think Senator Danforth is quite right that there are inherent difficulties in the administration of this program. They are very painful and difficult issues.

Senator WARNER. Do you think we need improvement in the means in which notification is given?

Mr. PERTSCHUK. Certainly improvement was needed.

I think that we are getting the word out. I am encouraged by the role of the Small Business Chief Counsel Ombudsman and his undertaking, as part of his responsibility—which is a statutory appointment—to get the word out to small business groups, but we'll pursue more of it. And it may be that we ought to hold some more of these regional seminars for small business, just generally educating groups to the availability of these funds.

Senator WARNER. I'm also interested in, as you said, the ongoing study and rulemaking procedure on standards and certification, and I would like to submit for the record some questions on that point, Mr. Chairman. They're rather extensive, and you'll likely need to take time to respond. And I hope that response can be achieved prior to our markup, because they will influence my decision and deliberation on the markup.

Mr. PERTSCHUK. Thank you.

Senator WARNER. Thank you, Mr. Chairman.

Senator FORD. Mr. Chairman, I have just one or two things left. And if my colleagues can think of anything—Senator Cannon, I believe, Mr. Chairman, sent you a detailed questionnaire regarding the public participation funding at FTC. It's my understanding that that has not been received by the Chairman. It's a letter that went down to the Commission from the Chairman, Chairman Cannon.

Mr. PERTSCHUK. When was that sent?

Senator FORD. Mike, I think it's 2 or 3 weeks ago.

Mr. PERTSCHUK. I will make sure that we have it and respond to it forthwith.

Senator FORD. I can understand why you would want to.

I believe he asked for a response before May 15

Mr. PERTSCHUK. Yes, sir.

I won't blame the mails, but we will respond.

Senator FORD. Of course, you can't blame the mails, because it's in-house somewhere.

Senator Danforth made a point, and others have made points that you start a proposed rulemaking. The industry to which this rule will apply will probably be vigorously opposed to it.

If that industry is doing something wrong and they don't want to be bothered, they want to keep it up, we're just going to have to take the bit in our teeth and go ahead and try to develop that rule so that you can eliminate some of the problems.

You know, I understand the harshness of it. And those with an imposition imposed on them, don't want you to bother. They want to continue just like they're going. They don't want anybody to come in and look at safety. They don't want anybody to come in and look at health. They just want you to leave us alone. We'll run it any way we want to, pay any price we want to—that sort of thing.

I just looked at the things in the last 3 or 4 years we've given your Commission to do.

Whatever we might fuss at you about, we need to go back and look at the legislation we passed and sent to you.

Now, if we're going to be critical of FTC, we've got to stop sending you things to do.

Mr. DIXON. You sent us a lot to do in 1950. You passed a law that said we have the responsibility to investigate, proceed against unfair methods of competition. And all the rulemaking that we're involved in now is nothing except a fulfillment of that basic mission.

If something is cluttering up or deterring competition, we have an obligation to look at it. If it appears to be an unfair, deceptive, or misleading practice, we have an obligation to look at it.

Senator Danforth, I'm not surprised that you're hearing from your constituents. The Federal Trade Commission is a prosecution agency. We are not a regulator. Our rulemaking is merely an attempt to bring equitable principles into play.

A rule is nothing but an announcement of a remedy. You must have a basis and purpose, and that means a record.

Now if we use our section 9 powers, we can spend all the money that's necessary to investigate a problem under oath, and then we can make that public as a basis for beginning the hearing.

Now, if anybody wants to take a shot at it they may I'm surprised that we're not being criticized on rulemaking more than this, because I served up here for 4 years with the Judiciary Committee before I went to the Commission as Chairman, and I'll tell you I found out very early that Congressmen and Senators know that Presidential appointees don't run for office and nobody votes for them.

When you do your job writing laws, you begin to ask some very good questions. That's what we're getting right now. I appreciate it. I urge you to have oversight. In fact, I think you should. I think you should have oversight, because the Constitution puts the burden on you to regulate foreign and interstate commerce. You just invented many ways to do it. One of them is the Federal Trade Commission, and all we're doing is trying to carry out our mandate. We're not trying to take your place. We're mandated to prevent unfair and deceptive practices, and we're trying to do it equitably.

And if you have 100 or several hundred individuals to proceed against for a particular problem, it's much more practical to proceed by rulemaking.

Senator FORD. Mr. Dixon, when the record is printed, I'm going to get your statement out, and I'm going to pass it along to a lot of people fussing at me. It might be very interesting for them to read your statement that you have just made.

Let's just go back to the insulation problem, for instance. That's a Consumer Product Safety Commission problem also, the Consumer Subcommittee's problem, and we had no standard out there to protect the consumer against flammability and corrosiveness. We have an energy crisis. Everybody is being encouraged to insulate their house, reduce consumption, and all those things.

All of a sudden we see these machines being advertised and in the process you cut up trees to put paper in, throw it in the back of the truck—sprinkle some boric acid over it, stir it around, blow it in your house, and you've got inflammable material in your house. We had to do something about that.

Of course, many of the industry didn't want us in their lives. Some wanted to go out and rip off the consumer.

But we had to do something to stop unsafe practices, and we intended to do that to protect the consumer. We have a way of life in this country today that we think everything we buy off the shelf is all right, that it's safe, that we can use it, we can eat it, we can drink it, we can do all those things because this is America and the Government has protected us from anything that would be harmful; and we are continuing to find things that are harmful and beginning to have the ability to take if off the market—rightfully so.

And so, Mr. Chairman, I understand some of the problems, and we're going to have some tough fights up here to try to look after your agency. And I intend to put things together the best I can to see that you do a good job. I think you're on the right track, but not completely right. If you were right, you wouldn't be there 100 percent of the time. If you were right 100 percent of the time, you'd be someplace else. They need you there.

Mr. Chairman, I have questions on regulatory reform, children's advertising proceedings, the franchising rule, all those good things we have talked about today.

And I believe Senator Warner has submitted questions, also Senator Heflin, and I wonder if you would send to Chairman Cannon—in addition, Senator Heflin and Senator Warner—answers to the questions that they sent. I'd appreciate that very much.

That's all on standards and certification proceedings.

Senator FORD. And then, Mr. Dixon, I will see you in July if you want to come by. We're going to get into your business pretty good.

Mr. DIXON. I'd be glad to come back anytime you want us.

Senator FORD. I think you can probably give some good answers.

Mr. DIXON. I will try.

Senator FORD. I do thank you all very much. I appreciate the Commissioners coming this morning.

Mr. PERTSCHUK. Thank you very much, Mr. Chairman.

[Whereupon, at 10:55 a.m., the hearing was adjourned.]

[The following information was subsequently received for the record:]

FEDERAL TRADE COMMISSION,
OFFICE OF THE CHAIRMAN,
Washington, D.C., May 4, 1979.

Hon. HOWARD W. CANNON,
Chairman, Committee on Commerce, Science, and Transportation,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I am submitting responses prepared by our staff to the questions that you raised concerning budgetary and procedural aspects of the Commission's Standards and Certification Rulemaking Proceeding.

Should you have further questions concerning this or any other matter, please feel free to contact me.

Sincerely yours,

MICHAEL PERTSCHUK, *Chairman.*

Enclosures.

Question 1. We respectfully request certain financial information relating to the Standards and Certification Trade Regulation Rulemaking including:

(*a*) The number of dollars budgeted and

(*b*) The actual dollars spent in the following categories for the fiscal years 1980, 1979, 1978, 1977, 1976, 1975, 1974, 1973, and 1972:

(1) Travel for commissioners;

(2) Travel for staff;

(3) Salaries and fringe benefits for staff;

(4) Number of legal staff personnel involved and man hours spent and budgeted;

(5) Number of professional personnel involved and man hours spent and budgeted.

Answer. The Standards and Certification Trade Regulation Rulemaking was formally initiated in August, 1974. As a result of changes in Commission program, budgeting, workload reporting, and accounting systems over the past six years, the data presented includes several estimations; however, these estimates represent reasonable approximations of actual expenditures.

(*a*) Number of dollars budgeted through 1980—$723,000 (includes salary and benefits, travel, and program contracts spent through 1978 plus budgeted amounts for fiscal years 1979 and 1980; does not include Presiding Officer and Public Participation agreement costs).

(*b*) Actual dollars spent by fiscal year and by category:

Fiscal year	Staff travel [1]		Salary and benefits	
	Budget	Actual	Budget	Actual
1980	$5,000	.....	$168,000	.....
1979	7,000	2,000	168,000	91,000
1978 [2]	.....	2,000	.....	104,000
1977 [2]	.....	300	.....	100,000
1976 [2]	.....	.....	.....	45,000
Prior years [2]	.....	.....	.....	[3] 40,000
	Legal staff hours [4]		Support staff hours	
1980	$9,360	.....	$2,288	.....
1979	9,360	[5] 4,992	2,288	[5] 1,220
1978 [2]	.....	6,240	.....	2,496

	Legal staff hours [4]	Support staff hours
1977 [2]	6,240	2,496
1976 [2]	2,704	1,248
Prior years [2]	[3] 2,496	[3] 1,040

[1] Item (b)(1)—no travel funds have been expended to date by Commissioners on this rulemaking proceeding.

[2] No budgets were formally established for this proceeding prior to fiscal 1979. Resources were budgeted as a part of the product reliability program and the standards and certification program component which includes other activities in this area.

[3] Estimate.

[4] Item (b)(6)—the number of professional work years is the same as legal staff work years.

[5] Mar. 30, 1979.

Question 2. Has the Commission authorized the conduct of the Trade Regulation Rulemaking on Standards and Certification without complying with the requirements of 15 U.S.C. § 57a(b) and (c) which require that it identify "disputed issues of material fact" to be the subject of cross-examination at the hearing? If so, what legal authority is there for the conclusion that such a trade regulation rulemaking may be conducted lawfully under the statute?

Answer. In the Standards and Certification rulemaking proceeding, announced by the Commission on December 7, 1978 (43 Fed. Reg. 57269), the Commission has determined not to limit cross-examination. The intent of the provisions of Section 18 (15 U.S.C. § 57a) that refer to disputed issues was to permit the Commission if it chose, to limit the scope of cross-examination to disputed issues of material fact. In the Standards and Certification proceeding, participants have been afforded far greater rights to cross-examination than the Commission is required to provide under Section 18; the Commission has thus expanded rather than limited cross-examination rights.

Question 3. Does the Commission believe that the Staff Report recommending the Standards and Certification Trade Regulation Rulemaking should be placed in evidence for the truth of the matters asserted as factual conclusions without affording the interested persons involved an opportunity to cross-examine the staff in the factual assertions contained therein particularity when those factual assertions are "disputed" by interested persons?

Answer. The Staff report details the Staff's reasons for urging the Commission to commence the rulemaking proceeding. Section 18 of the FTC Act requires that the Commission publish a notice of proposed rulemaking "stating with particularity the reason for the proposed rule." 15 U.S.C. § 57a(b)(1). In its Notice of Proposed Rulemaking commencing the Standards and Certification rulemaking proceeding the Commission stated that the staff report "contains a detailed analysis of the proposed rule and the reasons for each rule provision." 43 Fed. Reg. 57269 (1978). While the staff report was thus placed on the rulemaking record, it does not follow that interested persons are entitled to cross-examine the staff as to its contents. As the Presiding Officer in the Standard and Certification Proceeding noted:

"The Staff Report, entitled "Standards and Certification" and dated December 1978, was placed on the rulemaking record at the direction of the Presiding Officer by a transmittal memorandum (Record Submission B–1) of January 10, 1978. Thus the entire report is a part of the rulemaking record of this proceeding and by virtue of the definition found in section 18(e)(3) constitutes evidence. However, this does not mean that all parts of the Staff Report should or will be used by the Commission as the basis for the issuance of a final rule. There are many materials in the rulemaking record, including portions of the Staff Report, that are not evidence in the ordinary sense. Such materials include the rulemaking notice, petitions by interested persons and rulings thereon, and the reports of the Presiding Officer and the Staff required by section 1.13(f) and (g) of the Rules, to name only a few. Also in that category are memorandums of law whether filed separately or included in written comment. There are many other examples. The unsupported factual assertions and conclusions, which Petitioners allege are included in the Staff Report and to which they refer in the supporting memorandum at pages 16–20, have little probative value and could not, therefore, be used by the Commission as a basis for promulgation of a rule in final form.

"There is every opportunity in this proceeding for any unsubstantial factual assertions and conclusions in the Staff Report to be specifically identified and attacked by means of written comment, oral testimony, or the presentation of rebuttal submissions if the Petitioners deem it necessary or appropriate to do so. In these circumstances, cross-examination of the authors of the Staff Report is not necessary or required for a full and true disclosure with respect to the relevant issues in this proceeding."

The right of cross-examination in Section 18 is limited to cross-examination of witnesses at the hearings; the staff members are not witnesses. The function of the staff is to gather information for presentation to the Commission to make a determination with regard to the advisability of issuing a final rule. Since they are not themselves offering testimony to be used as "evidence" which might form the basis for the issuance of a rule, cross-examination would be inappropriate. Any final rule would be subject to judicial review, and if a court finds that the rule is not supported by substantial evidence or the Commission improperly restricted cross-examination it can be set aside. 15 U.S.C. § 57a(e)(3).

FEDERAL TRADE COMMISSION,
OFFICE OF THE CHAIRMAN,
Washington, D.C., May 4, 1979.

Hon. HOWARD W. CANNON,
Chairman, Committee on Commerce, Science, and Transportation,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I am submitting answers prepared by the Bureau rulemaking staff to the questions you raised concerning the Standards and Certification Rulemaking Proceeding.

I want to emphasize that the Commission is in a very early phase of this rulemaking proceeding. On December 7, 1978, the Commission issued a notice of proposed rulemaking which sets out the text of a proposed rule and raises 37 questions with regard to the proposal and the subject matter of the rulemaking. The Commission's final decision on whether to issue a rule and, if so, what the substance of that rule should be, will be made only after extensive administrative proceedings, including submission of written comments, oral hearings, cross-examination where appropriate, rebuttal submissions, and oral presentations directly to the Commissioners. In short, at this stage, the Commission has only concluded that there is sufficient basis for commencing a rulemaking inquiry. More definitive answers to the questions you raise and a host of other issues relating to this proceeding must await development and analysis of the rulemaking record.

Sincerely yours,

MICHAEL PERTSCHUK, *Chairman.*

Enclosures.

Question 1. Would the proposed FTC rule on Standards and Certification achieve substantive benefits for American exporters?

Answer. The proposed rule on Standards and Certification is addressed to the development and use of product standards, and the related activity of product certification, in the domestic U.S. economy. The Commission described its reason for commencing this rulemaking inquiry as follows:

"Standards and certifications are relied on extensively in commerce to facilitate communication between sellers and buyers, promote the interchangeability of products and components, transfer technology, assure the safety, fitness and energy efficiency of products, and help achieve efficiencies in design, production and inventory. Despite these benefits, standards development and certification activities have frequently caused or contributed to substantial consumer and competitive injuries. The injuries include, among others, denial to consumers of the benefits of superior or lower cost technology, denial to businesses of the opportunity to enter and compete in profitable industries, inadequate product safety levels, unnecessary costs, and failure to provide for disclosure of important product hazard or use information."

The proposal would require that notice and an opportunity to participate in private standards development activities be provided to affected parties, and would establish an avenue by which overly restrictive standards could be challenged. Therefore, the proposal is not directed specifically at the export activities of American manufacturers; it is aimed primarily at the domestic effects of private standards and certification activities.

However, an indirect benefit may result from U.S. producers being able to attack those restrictive U.S. private standards that currently operate to create a disincentive to innovation. An improved domestic climate for innovation could be expected to increase the incentives and opportunities of American exporters in international markets. We understand that the Department of Commerce Domestic Policy Review of Innovation is looking at the adverse effects of restrictive product standards on rates of innovation. The FTC Standards and Certification hearings should also

provide some insights on the magnitude of the problem and perhaps its potential significance in terms of export markets.

In addition, should the Standards Code be adopted and an implementing bill enacted by the Congress, the FTC proposal could contribute to mutual lowering of technical barriers to trade. This is discussed more fully in response to Question 2.

Question 2. With respect to international trade alone, would the effect of the proposed FTC rule not be to maintain U.S. markets open to imports without guaranteeing equivalent benefits to U.S. exporters?

Answer. The Commission is sensitive to the concerns that would be raised if rights were created for foreign persons in U.S. standards development and certification activities without equivalent rights being made available to American producers in foreign countries. Prior to the issuance of the Notice of Proposed Rulemaking, the Commission directed its staff to consult with the Office of the Special Trade Representative (STR) on this very issue. Based on those consultations, the Commission included a question in the Federal Register notice to focus comment and analysis on this issue in the FTC hearings. Highlights from the question (the full text appears in the attached copy of the Commission's Federal Register notice) follow:

36. Should exercise of the procedural, challenge, and other rights and benefits established by the proposed rule, by persons or on behalf of products from foreign countries, be conditioned on the availability of substantially equivalent rights and benefits in such countries to persons or on behalf of products from the United States? The purpose of such a condition would be to encourage the elimination by other countries of technical barriers to international trade which might operate against products from the United States.

Such a condition could be accomplished by making revisions in the proposed rule such as the following * * *.

"(b) The standards developer shall have no obligation under this subpart with respect to persons or interests from countries in which procedural safeguards, challenge opportunities, and other benefits substantially equivalent to those provided under this subpart are not available to United States interests * * *.

For purposes of this section, adherence of a country to an international standards code for preventing technical barriers to trade to which the United States has agreed, shall be deemed to result in the availability of substantially equivalent benefits * * *."

The Commission has explicitly requested comment on this subject from affected parties, including those who would be adversely affected by a lack of reciprocity.

Question 3. Insofar as the implementing bill for the Standards Code is concerned, is it the view of the Commission that the continued availability of imports should have a higher priority than encouraging the establishment of international norms in standards-making and certification through reciprocal acceptance of the Code?

Answer. The Commission has reached no conclusion on the question of whether there should be a reciprocity requirement in the bill and, if so, what its content should be. Insofar as its rulemaking proceeding is concerned, as described in response to Question 2, the Commission is actively seeking the participation of parties affected by this question to aid it in its ultimate determination. It may be possible to devise a scheme that will provide incentives toward the reduction of trade barriers created by standards development and certification activities and simultaneously preserve the benefits to consumer welfare (in price, choice and innovation) of vigorous competition. The Commission would of course be happy to comment on this aspect of implementing legislation for the Standards Code should a draft of such a bill be available.

Questions of Senator Ford and Answers Thereto

STANDARDS AND CERTIFICATION TRADE REGULATION RULEMAKING

Question. If the proposed rule on standards is adopted will the proposed Office of Management and Budget Circular duplicate what the rule addresses on a voluntary basis?

Answer. Although both the draft circular and the proposed rule would impact on the procedures of private standards developers, the primary purposes of the two documents differ. The rule would mandate certain procedural safeguards to correct abuses resulting from the operation of private standards on the marketplace. The circular, on the other hand, is intended to increase federal agency efficiency by encouraging use of adequate private standards as an alternative to agency in-house standards development. An indirect effect of the circular would be to improve the

procedures of some organizations and thereby presumably improve the quality of their standards.

As for possible overlap or duplication between the FTC proposal and the draft circular it is important to note that both are simply proposals currently under development. One explicit goal of the FTC proceeding is to explore the relationship between the FTC proposal and the circular, as well as private sector and other reform efforts now underway with the purpose of avoiding duplication or unnecessary burdens.

Attached is a recent letter to Congressman John Dingell from Albert Kramer, Director of the Bureau of Consumer Protection, that explains in detail the relationship between the circular and the rule.

FEDERAL TRADE COMMISSION,
BUREAU OF CONSUMER PROTECTION,
Washington, D.C., March 13, 1979.

Hon. JOHN D. DINGELL,
Chairman, Subcommittee on Energy and Power, Committee on Interstate and Foreign, Commerce, U.S. House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: Chairman Pertschuk has asked me to respond to your letter of January 17, 1979 regarding the Office of Management and Budget proposed Circular on voluntary product standards. You requested that we assess the extent of conflicts or differences between the Circular and the Federal Trade Commission proposed rules on Standards and Certification, and identify significant provisions in the FTC proposal not included in the Circular. You also requested our comments on the need for the Circular, and its possible impact on the FTC proposed rule.

On the extent of differences or conflicts, I think it is important to recognize at the outset the fundamentally different purposes of the Circular and the FTC proposal. The Circular, as you know, originated in the Interagency Committee on Standards Policy as an attempt by several federal agencies to reduce the cost of in-house standards development. In moving toward greater use of standards originating in the private sector, and greater federal support in their development, the drafters recognized a need to take into account other values and policies. Due procees in standards, development and conflict of interest questions received the most attention. The Circular also recognizes national security, health and safety, competition, international trade, and other interests that may come into play.

Requirements in the Federal Trade Commission proposal were arrived at through a different route: fair process, effective channels to challenge restrictive or deceptive standards, disclosures and other requirements are proposed as a means to intercept or prevent specific consumer and competitive injuries that were seen to result from the operation of these private sector standards in the marketplace.

It is, of course, in the area of due process requirements that the Circular and the FTC proposal are closest in concept. With some exceptions, which I will discuss below, the major difference is in the level of detail in setting out the safeguards that ought to apply in private sector self-regulation through product standards. The Circular simply basic principles or lists the objectives to be achieved. The FTC proposal sets these out with considerably more specificity.

For example, both the Circular and the FTC proposal recognize the need for effective dispute resolution channels. The Circular states simply that organizations would not be eligible for federal employee participation unless they maintained "adequate and impartial mechanisms for handling substantive and procedural complaints and appeals." The FTC proposal, in contrast, sets out a definite dispute settlement process, substantive principles drawn from existing competition and consumer protection case law, evidentiary standards (with the evidentiary burdens allocated between complainants and standards organizations to achieve a number of policy objectives), time limits, and sanctions. The complaint process is further supplemented with extensive interpretive notes based on actual case studies as a way to give guidance as to its intended operation.

In general the FTC proposal reflects the view that a due process scheme must go considerably beyond mere statements of principle if it is to achieve its pro-consumer, pro-competitive objectives. I note for example that several standards organizations currently have procedures for adjudicating "unresolved negatives", but the rule's complaint process is premised at least in part on staff's finding that these processes often fail to resolve meritorious complaints. The same points can be made with respect to "adequate notice", "preference for performance standards" and other exhortations in the Circular. It appears that the OMB shares this view, in that the Circular contemplates issuance by the Department of Commerce of more detailed implementing regulations.

This raises a separate concern, applicable to both the FTC proposal and the Circular. If not well thought out, detailed due process requirements could result in costs and disruption to private standards development, that would outweigh benefits to consumers and competitors, and to the government in its reliance on private standards. Relating that to the FTC proposal, though the staff has demonstrated a factual and legal basis for the proposed rule, we recognize that as a matter of sound policy we must await the development of a full record in the rulemaking proceeding before making specific final recommendations to the Commission. In short, while many of the specific provisions may sound like good ideas in the abstract, the rulemaking proceeding may point the way to less costly or disruptive avenues to achieving the underlying objectives. Hopefully the Department of Commerce would share this concern as it begins to prepare implementing regulations.

There are important differences that are apparent even absent DOC implementation proposals. Paragraph 6.c.(4) of the Circular adopts the current "consensus" definition of substantial agreement: "more than a simple majority but not necessarily unanimity." The FTC proposal, by contrast, is silent as to how decisions are to be made routinely in standards proceedings, relying instead on an open process and good recordkeeping, coupled with the threat that a meritorious position of a single participant could prevail under the rule's challenge process. I mentioned above that standards organizations currently have procedures for considering minority viewpoints, but that these processes may fail to overturn "majority" positions that simply reflect undue influence by one or another interest group. If the Circular does not go beyond this current form of decision-making, at least as to matters genuinely in dispute following a proceeding, then that would be an important difference between the Circular and the FTC rule. I note that the Department of Commerce appeal process under paragraph 7.a.(6) would consider only procedural complaints. Thus in a given instance, if "more than a majority" of participants had voted in favor of a standard alleged, for example, to unreasonably restrain trade, there might be no meaningful review.

Another difference is that the Circular focuses attention on an organization's published procedures as a basis for "listing" by commerce, rather than on discrete standards development activities, or on the proposed adoption of individual standards on a case-by-case basis. By contrast, the FTC proposal would focus on the conduct of standards organizations in fact, and on the resulting market effects of individual standards. A more relevant focus could be achieved in the Circular if the approach were more like that taken in the Federal Energy Administration Authorization Act of 1978. Our underlying concern here is that the sole remedy, delisting of an entire organization, is so draconian that it would seldom if ever be invoked.

You asked about significant coverage by the FTC proposal that goes beyond the Circular. In general, the Circular will only affect those organizations that choose to comply with its requirements as a means to obtain federal participation in their activities. While this could be extensive coverage, the Circular would not affect trade associations, model code groups and others who did not opt for federal participation, even though the standards of those organizations may play a significant role in government procurement or regulatory programs.

The Circular does not address federal reliance on private sector product certification activities. Earlier drafts of the Circular recognized the integral relationship of certification to standards development. Apparently there is some discussion that a separate Circular on certification would be developed by the same Interagency Committee. The FTC proposal would hold laboratories to the truthfulness and reliability of their seals of approval and product listings. There would be some obligation established to require laboratories to police the use of their seals and listings to assure that sellers do not use them deceptively. Monopoly laboratories would be subject to some additional requirements relating generally to assuring their fair and non-disciminatory operation.

Finally, the FTC proposal has provisions that apply directly to sellers who reference standards or who use seals of approval to market their products. These are aimed generally at assuring proper and non-deceptive use of the standards and certifications. The investigation revealed some deceptive uses—such as misrepresenting conformance of a product to a standard—which resulted in personal injury or economic loss to buyers, as well as diversion of business from honest sellers. The Circular perhaps could address use of governmental standards by sellers in non-governmental markets (e.g. "HUD/FHA approved").

Please understand that I am not advocating that the Circular be extended to include certification and marketing. I only point these out as differences in coverage between the FTC proposal and the Circular.

You asked that we comment on ambiguities. I will just cover one point that did not seem to fall into one of the other categories you asked about. Paragraph 4.a. of the Circular defines executive agency to include the "municipal government of the District of Columbia." This was not in the earlier published version of the Circular, and I do not believe that it has received sufficient attention. To the extent that this might impose substantially new burdens on the District of Columbia government, the intended scope of this inclusion probably ought to be set out, and the District government and others given an opportunity to comment. I think we could agree that the municipal government is different in kind from other agencies included in the Circular. Though the cost-adding or exclusionary effects of private standards adopted into local building codes may be an extremely fertile area for scrutiny, it deserves more focused consideration.

With respect to our views on the need for and desirability of the Circular, I refer you to the Commission's official comment to OMB on the last published version. The Commission supported the Circular in principle, and made a number of suggestions for changes.

There is a new provision in the current draft that may weaken the due process safeguards. Paragraph 6.a.(1) states that adoption and use of voluntary standards is not contingent upon those standards having been developed in accordance with the due process criteria that govern federal participation. From our point of view, the Circular should attempt more in the way of constraining federal use of standards that may have objectionable features. To be sure, there are provisions in the Circular that attempt to alert agencies using private standards to their potential to impinge on other national policies relating to antitrust, small business and other areas. Our concern is that these policy suggestions would be slim predicate should an aggrieved party wish to challenge agency adoption of a private standard. In our view, this is a deficiency in the proposal.

As for the possible impact of the Circular on the FTC proposal, you were correct in your comment to OMB that groups opposing the FTC proceeding have argued that the Circular negates the need for FTC action. I can only say at this point that the view is not widely shared, and we see no reason why the FTC proceeding would be impeded by issuance of the Circular. Of course, an important goal of the proceeding will be to explore the relationship between the FTC proposal and the Circular, as well as private sector and other reform efforts now underway, with the purpose of avoiding duplicative or unnecessary burdens.

On your question of the application of the Circular to independent agencies like the Federal Trade Commission, the Commission has not taken an official position. However, we did raise the issue in a number of specific contexts. For example, we questioned the authority (as well as the wisdom) of the Circular directing that there be a unified federal agency position on standards questions (paragraph 7.b.(4)), given the sometimes competing agency mandates established by Congress. Paragraph 7.a.(6) of the Circular, which requires the Secretary of Commerce to establish a dispute resolution service, may also raise problems. One requirement of the service would be that parties to a complaint would consent to accept Commerce's determinations as the "sole administration review by the executive branch." If applied literally, a complainant would then be precluded from supplying information to the Federal Trade Commission, Consumer Product Safety Commission, Food and Drug Administration, and any other regulatory agency that might otherwise want to conduct administrative proceedings in an area within its Congressionally mandated jurisdiction. We do believe that there is case law that preserves the enforcement prerogatives of independent agencies. Our concern is that to the extent that the Circular invites challenges, its utility as a government-wide policy will be diminished.

We very much appreciate your continuing interest in private standards development. As you requested, we are forwarding a copy of this response to Mr. McIntyre.

Sincerely,

ALBERT H. KRAMER,
Director, Bureau of Consumer Protection.

Question. What is your existing authority to deal with abuses in the voluntary standards and certification system?

Answer. The standards and certification rulemaking proceeding was begun under the authority contained in Sections 5 and 18 of the Federal Trade Commission Act. Section 5, which prohibits unfair methods of competition and unfair or deceptive acts or practices, authorizes the Commission to initiate an action involving the voluntary standards and certification system if it has "reason to believe" that violations of that legal standard are occurring. Section 18 of the Act authorizes the Commission to promulgate rules which define with specificity acts or practices that

the Commission finds to be unfair or deceptive within the meaning of Section 5. The standards and certification rulemaking proceeding was initiated pursuant to this Section 18 authority.

REGULATORY REFORM

Question. Does the Federal Trade Commission experience the problem of conflicting and overlapping regulations with other agencies?

Answer. No. Wherever there is a substantial possibility of overlap or duplication with another agency—for example, with the Department of Justice, the Federal Communications Commission, and the Food and Drug Administration—formal or informal interagency agreements insure against the problem.

Question. Although you have indicated your interest in participating with the Regulatory Council, I noticed that you did not have any regulations for the first Regulatory Calendar which was recently issued. Could you comment?

Answer. We have now published two semiannual regulatory agendas, but you are correct that we had no entries in the first Regulatory Calendar. The problem was that in the short time between the Council's request for submission and the publication deadline, the Commission did not have an opportunity to formally consider what materials might appropriately be submitted. We will shortly be considering the nature of our submission to the next edition of the Calendar.

Question. What economic impact analyses were required by the Magnuson-Moss Act? How would the regulatory reform provisions in Congressman Broyhill's authorization bill differ from the requirements already imposed on the Commission? What do you think the effect of judicial review as required by his bill will be?

Answer. The Magnuson-Moss Act requires that the statement of basis and purpose accompanying a final rule contain "a statement as to the economic effect of the rule, taking into account the effect on small business and consumers." While Congressman Broyhill's original bill would have imposed numerous additional requirements, at both the proposal and promulgation stages, the amendment that he later offered, and that has been approved by the House Commerce Committee, would require instead the initial and final regulatory analyses proposed by the Administration in its regulatory reform bill. These requirements would essentially formalize, and make slightly more detailed, the kinds of analysis that the Commission now undertakes in its rulemakings.

With respect to judicial review, we prefer a judicial review provision such as the one in the Administration's or Senator Ribicoff's regulatory reform bill that would recognize the managerial and oversight objective of regulatory analysis and not subject it to judicial review at all. As Charles Schultze, Chairman of the Council of Economic Advisers, stated recently before the Senate Governmental Affairs Committee:

"If these documents are to become the basis for invalidating an agency action then they are likely to become litigation-oriented briefs rather than candid attempts to illuminate the difficult choices that regulation inevitably involves. Their value to agency decision makers as well as to the Congress and the public could be severely impaired." [Statement on Regulatory Reform, April 6, 1979, at 18.]

We believe that any provision for direct review of economic impact analyses would raise the potential for burdensome litigation and unnecessary delay without providing compensatory benefits to the regulatory decision-maker process.

Question. How much money have you allocated for the study of existing regulations and how much did you allocate last year?

Answer. In Fiscal Year 1979, $464,000 has been allocated for the study of existing regulations including trade regulation rules, litigated orders and consent agreements. Last year $240,000 was allocated for this purpose. These figures do not include monies allocated or budgeted for studies to determine whether or not regulations are required, or to predict the impact of proposed regulations, but do include studies to collect baseline data on rules that are likely to be promulgated in the near future

Question. You have a separate division in the Bureau of Economics for Economic Analysis of Consumer Protection Rules. How much of the total funding for this work is allocated for cost-benefit analysis before a rulemaking has begun?

Answer. Approximately 30 percent of the $661,000 budgeted for this division (or $198,300) is allocated for cost-effectiveness analyses of Consumer Protection rules.

Question. Senator Ribicoff's regulatory reform bill requires economic analysis after a rulemaking is concluded and the Administration's regulatory reform bill would have it submitted prior. How would these two provisions effect a change in the current procedure of the Federal Trade Commission?

Answer. As introduced, both bills require a preliminary assessment of projected economic and other effects at the time a rule is proposed, and both require a similar analysis at the time a rule is adopted.

Because the Commission already has an obligation under the Magnuson-Moss Act to accompany each final rule with "a statement as to the economic affect of the rule, taking into account the effect on small business and consumers," the requirement for final regulatory analysis will to a large extent simply recast into a new format information that the Commission already provides. The requirement for a preliminary analysis, on the other hand, may cause the Commission to examine in more detail at the outset alternatives to a staff proposal. Though this consideration may take more time, it will be salutary.

Question. How many economists do you now have for impact analysis?

Answer. There are currently approximately seven economists devoting 5 work-years to impact analyses. In addition, the agency has allocated over $800,000 for impact evaluation contract funding. Further, we have on our staff other kinds of specialists (*e.g.,* Ph.D. in marketing) who spend significant portions of time in impact analysis activities.

Question. How many economists would you need with the passage of the President's bill or the Ribicoff bill?

Answer. We estimate that the Division of Consumer Protection will, at a minimum, require a doubling of its resources to meet the obligations of S. 262 and S. 755. Approximately 12 additional economists would be needed to prepare analyses for all proposed trade regulation rules, and four to six economists would be required for a periodic review of the economic impact of existing rules. This estimate allows for any studies that we may wish to conduct on a contractual basis.

Question. Does the Federal Trade Commission carry on any analysis to determine the impact of regulation on small business?

Answer. The Commission, as a matter of law, is mandated to consider the impact of regulation on small businesses. As noted previously, the Magnuson-Moss Act requires that each rule be accompanied by a statement of basis and purpose that "shall include * * * a statement as to the economic effect of the rule taking into account the effect on small business * * *." 15 U.S.C. § 57a(d)(1).

The Commission regards the impact on small businesses of a regulation as an important aspect of each rulemaking inquiry. All Bureau of Consumer Protection rulemaking proposals are prepared in close cooperation with economists in the Bureau of Economics. In addition, staff proposals are reviewed for their competitive consequences by the Bureau of Competition before being submitted to the Commission for action. The public participation program provides another vehicle for assessing the impact on small business of a proposed rule. For example, nine small business representatives have had their applications for compensation approved in the Standards and Certification proceeding, and four other small business applications are pending.

Another method that the Commission employs to ensure it has information to evaluate the impact of its regulations on small business is through the initial notice of proposed rulemaking.

For instance, the Federal Register Notice of Proposed Rulemaking with regard to standards and certification urges interested persons to consider carefully the following questions:

3. What would be the cost of compliance for each of the groups covered by the proposed rule? To what degree would each of the requirements of the proposed rule raise costs, delay the adoption of new standards or delay the introduction of new products? Might the rule discourage smaller standards developers and certifiers from staying in the market? Would this have any adverse effects in the market? How might the procedures themselves be used by incumbent firms and/or standard setters to deter, delay, or raise the cost of entry for new products?

4. What economic or other effects upon small businesses and consumers, if any, would result from implementation of the proposed rule? [47 Fed. Reg. 57280.]

Throughout a rulemaking proceeding, the testimony and the comments focus on this issue. This includes continuing Bureau of Economics and Bureau of Competition review of the analysis of the impact on small businesses.

In addition, a central focus of the Commission's impact analysis program is impact on small business. For example, baseline studies of the impact of proposed regulations on funeral homes, vocational schools, and used car dealerships are currently being conducted. These studies will be repeated for rules after they have been promulgated and have been in effect for some time to determine whether repeal or modification is in order.

ENFORCEMENT

Question. What is the total amount budgeted for enforcement of rulemaking? How can the Commission effectively use these resources to enforce a rulemaking such as the Funeral Home Rulemaking where there are over twenty thousand funeral homes in the United States?

Answer. The attached chart shows BCP budget plans for each of the major Magnuson-Moss Rules. The amounts shown include expenditures for enforcing rules previously promulgated as well as expenditures for rules which may be promulgated between now and the end of fiscal 1980. For these latter proceedings, the amount shown reflects the time and costs for completing the final stages of the proceeding as well as the initial enforcement efforts.

Resource needs for enforcing a rule vary depending upon the nature and scope of the final rule. For example, rules that require standard format disclosures in advertisements consume only a few resources in order to monitor compliance (*e.g.*, the proposed OTC Drug Rule).

The Commission, mindful of both the FTC's enforcement costs and the compliance burden on industry, emphasizes rules which create incentives for compliance. For example, the Eyeglass Rule simply requires that consumers receive copies of their prescriptions after an examination and prohibits restrictions on advertising by sellers of eyeglasses and contact lenses. The Commission quite purposefully designed this rule to be simple and straightforward.

Similarly the Commission has revised the proposed funeral rule to place primary emphasis on information disclosures and the elimination of private restraints on competition.

The Commission recognizes that it could never hope to enforce any of its rules or statutes if every business within its jurisdiction decided not to obey the law. Our past experience, however, has shown that the vast majority of businesses want to comply with sensible regulations—those that are not burdensome and that promote sound business practices. To further this spirit of voluntary compliance, the initial phase of rule enforcement focuses upon educating the affected industry by means of articles, speeches, industry advisory opinions and working with trade associations. Our enforcement plans also emphasize educating consumers to their rights under our rules. An educated consumer through market incentives can exert added pressure on non-complying businesses to change their practices. In addition the Commission staff works closely with state agencies who, under their own "Little FTC Acts," may be able to assist in enforcement. Only when industry counseling and marketplace incentives have failed to bring about compliance, does the Commission rely upon its rule enforcement powers to initiate civil penalty and consumer redress suits against major violators. Again, our experience has taught us that such suits exert a multiplier effect and encourage other businesses to bring themselves into compliance with FTC rules.

FEDERAL TRADE COMMISSION—MAGNUSON-MOSS RULES

[Dollars in thousands]

	Fiscal year 1979		Fiscal year 1980	
	Work years	Amount	Work years	Amount
Product reliability: Used cars	1.8	$145	8.4	$264
Marketing abuses:				
Franchising disclosure[1]	9.1	269	11.2	387
Vocational schools[1]	2.3	80	9.6	289
Games of chance	1.4	41	.4	12
Professional services: Funeral Industry practices	4.5	114	9.0	309
Occupational deregulation: Eyeglass Rule I[1]	3.6	114	6.0	186
Food and drug:				
Hearing aids	1.4	42	5.7	246
Protein supplements	1.5	45	1.8	56
OTC drugs	1.7	51	2.8	102
Food ad rule I	1.3	41	3.5	192
Energy: "R" value insulation	8.7	261	8.5	311
Product information: Revised care labeling	2.3	64	2.8	120

FEDERAL TRADE COMMISSION—MAGNUSON-MOSS RULES—Continued

[Dollars in thousands]

	Fiscal year 1979		Fiscal year 1980	
	Work years	Amount	Work years	Amount
Credit practices:				
Holder amendment	1.6	53	8.7	299
Unfair credit practices	3.8	113	7.8	333
Total	45.0	1,433	86.2	3,106

[1] Rules which have been promulgated by the Commission as of May 15, 1979.

FTC FRANCHISE RULE

Question. Has an economic impact study been performed for this regulation?

Answer. The Bureau of Consumer Protection is currently planning to undertake a study in fiscal year 1980 or fiscal year 1981 to measure the impact of the rule after it goes into effect.

A different type of impact study was begun in 1977 but was discontinued because of an extremely low response rate by franchisors to a questionnaire. To avoid a reoccurrence of this problem, the Commission will resort, if necessary, to use of its compulsory process power to assure responses from recalcitrant franchisors. Moreover, this study will be monitored by a professional impact evaluation group, not in existence at the time of the earlier attempt to ensure the quality of the study.

Question. How many companies will this rule affect and how many are engaged in the abuses established by the record?

Answer. We estimate that approximately 1500 companies fall within the definition of "franchisor" and therefore will be required to make disclosures about themselves. A substantially greater number of persons and firms are "franchisees" within the meaning of the rule. Accordingly, they are entitled to receive the disclosures before being asked to purchase a franchise. The Commission determined that the general nature of the franchise relationship results in a serious informational imbalance between prospective franchisors and franchisees and that misrepresentations and failure to disclose material facts are widespread in franchising. While the public record contained complaints alleging abuses by over 170 franchisors, the Commission cannot make a finding from the record of how many companies are engaged in the abuses established on the record.

Question. Has an exemption been considered for sophisticated investors?

Answer. Under Section 18(g) of the Federal Trade Commission Act, 15 U.S.C. § 57a, the Commission may grant an exemption from the application of a rule if it determines that "the application of a rule * * * to any person or class of persons is not necessary to prevent the unfair or deceptive acts or practices to which the rule relates." Pursuant to this provision a number of petitions for exemptions from the franchise rule have been filed. Two of the petitions, from General Motors Corporation and the Automobile Importers of America, raised the sophisticated investors issue.

The Commission's staff is reviewing those petitions and shortly will forward recommendations to the Commission concerning the appropriateness of exempting so-called sophisticated investors from the application of the franchise rule.

CHILDREN'S ADVERTISING

Question. What is the dollar amounts in the fiscal year 1980 budget that you plan to allocate to the children's advertising proceeding?

Answer. $277,000.

Question. Exactly what is budgeted for legal assistance, para-legal assistance, for consulting fees, for public participation, and for the Bureau of Economics for impact studies in this proceeding?

Answer. The following amounts are budgeted for fiscal year 1980 in the listed classes:

Legal assistance	$165,000
Para-legal assistance (may include some consultants)	20,000
Contracts	35,000
Public participation	(1)
Impact studies	(2)

[1] The Commission does not budget specific amounts of public participation funds for individual rulemakings. Allocations will be made during fiscal year 1980 based on the applications received and the requirements of each rule. While we are unable to specify the amount that will be required, based on experience in prior proceedings we anticipate that it will be considerably smaller than the amounts spent in fiscal year 1978 and 1979, the evidence gathering phase of the proceeding.

[2] During fiscal year 1978, about $140,000 was spent for impact studies. During fiscal year 1979, about $38,000 is budgeted for impact studies. Because it is unlikely that a rule, if promulgated, would become effective during fiscal year 1980, the Commission does not presently contemplate additional impact studies during that fiscal year.

Question. What was spent in these different categories in fiscal year 1979?

Answer. For fiscal year 1979, as indicated, the following amounts have been spent or planned:

Legal assistance (estimated actual)	$201,000
Paralegal assistance	0
Contracts (including consultants) (actual plus, planned)	126,000
Public participation (actual)	113,328
Impact studies (planned)	38,000

EX PARTE CONTACTS IN RULEMAKING

Question. We've heard considerable criticism about the Commission's procedure for controlling ex parte contacts in rulemaking. What are those procedures and why don't the same restrictions apply to staff?

Answer. The Commission's Rules of Practice, Rule 1.18(c) (a copy of which is attached), regulate communications from persons not employed by the Commission to Commissioners or Commission advisors with respect to the merits of a pending trade regulation rulemaking proceeding. Written outside communications will be treated essentially the same as any written submissions concerning a proposed rule, *i.e.,* depending on their timing and contents they will be placed on either the rulemaking or the public record. Oral outside communications are permitted only if they are transcribed verbatim and only if they occur prior to the close of the post-record comment period. The transcripts will then be treated in the same manner as written communications. If an oral communication otherwise occurs, a memorandum summarizing the communication will be written and placed on the public record. Oral congressional communications are not subject to these requirements; such communications that do occur will be summarized in a memorandum and placed on the public record (written congressional communications and any transcripts of oral congressional communications will be treated in the same manner as other similar outside communications).

The Commission' rules do not impose similar limitations on contacts between Commissioners and rulemaking staff. The issue of staff communications has been carefully considered by the Commission and it has determined that such communications are both proper and desirable. Attached are two Federal Register notices setting forth in greater detail the Commission's position on staff communications.

TITLE 16—COMMERCIAL PRACTICES

CHAPTER 1—FEDERAL TRADE COMMISSION

Subchapter A—Organization, Procedures and Rules of Practice

PART I—GENERAL PROCEDURES

Subpart B—Rules and Rulemaking Under Sec. 18(a)(1)(B) of the FTC Act As Amended by Public Law 93-637

Subpart C—Rules and Rulemaking

§ *1.18 Rulemaking record.*

* * * * * * *

(c) COMMUNICATIONS TO COMMISSIONERS AND THEIR ADVISOR.—Except as otherwise provided in this subpart or by the Commission, after the Commission votes to issue an initial notice of proposed rulemaking, comment on the proposed rule should be

directed to the Presiding Officer pursuant to Rule 1.13. Communications with respect to the merits of that proceeding from any person not employed by the Commission to any Commissioner or Commissioner advisor shall be subject to the following treatment:

(1) WRITTEN COMMUNICATIONS.—Written communications, including written communications from members of Congress, received within the period for acceptance of initial written comments shall be forwarded promptly to the Presiding Officer for placement on the rulemaking record. Written communications received after the time period for acceptance of initial written comments but prior to any other deadline for the acceptance of written submissions will be forwarded promptly to the Presiding Officer, who will determine whether such communications comply with the applicable requirements for written submissions at that stage of the proceeding. Communications that comply with such requirements will be promptly placed on the rulemaking record. Noncomplying communications and all communications received after the time periods for acceptance of written submissions will be placed promptly on the public record.

(2) ORAL COMMUNICATIONS.—Oral communications are permitted only when such oral communications are transcribed verbatim and are promptly placed on the rulemaking record. Transcripts of oral communications which occur after the time period for acceptance of initial written comments but prior to any other deadline for the acceptance of written submissions will be forwarded promptly to the Presiding Officer, who will determine whether such transcribed oral communications comply with the applicable requirements for written submissions at that stage of the proceeding. Transcribed oral communications that comply with such requirements will be promptly placed on the rulemaking record. Transcribed noncomplying oral communications will be placed promptly on the public record. No oral communications are permitted subsequent to the close of the post-staff report comment period.

If an oral communication does otherwise occur, the Commissioner or Commissioner Advisor will promptly place on the public record either a transcript of the communication or a memorandum setting forth the contents of the communication and the circumstances thereof; this memorandum will not be part of the rulemaking record.

(3) CONGRESSIONAL COMMUNICATIONS.—The provisions of subsection (c)(2) do not apply to communications from members of Congress. Memoranda prepared by the Commissioner or Commissioner Advisor setting forth the contents of any oral congressional communications will be placed on the public record. If the communication occurs within the inital comment period and is transcribed verbatim, the transcript will be promptly placed on the rulemaking record. Transcripts of any oral communication which occurs after the time period for acceptance of initial written comments but prior to any other deadline for the acceptance of written submissions will be forwarded promptly to the Presiding Officer, who will determine whether such transcribed oral communications comply with the applicable requirements for written submissions at that stage of the proceeding. Transcribed oral communications that comply with such requirements will be promptly placed on the rulemaking record. Transcribed noncomplying oral communications will be placed on the public record.

2. By amending § 1.26(b) to read as follows:

§ 1.26 Procedure

* * * * * * *

(b) NOTICE.—General notice of proposed rulemaking will be published in the Federal Register and, to the extent practicable, otherwise made available to interested persons except when the Commission for good cause finds that notice and public procedure relating to the rule are impractical, unnecessary or contrary to the public interest and incorporates such finding and a brief statement of the reasons therefor in the rule. If the rulemaking proceeding was instituted pursuant to petition, a copy of the notice will be served on the petitioner. Such notice will include: (1) a statement of the time, place, and nature of the public proceedings; (2) reference to the authority under which the rule is proposed; (3) either the terms or substance of the proposed rule or description of the subjects and issues involved; (4) an opportunity for interested persons to participate in the proceeding through the submission of written data, views, or arguments, and (5) a statement setting forth such procedures for treatment of communications from persons not employed by the Commission to Commissioners or Commissioner Advisors with respect to the merits of the proceeding as will incorporate the requirements of § 1.18(c), including the transcription of oral communications required by § 1.18(c)(2), adapted in such form as may be appropriate to the circumstances of the particular proceeding.

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FRANCHISE RULE

Question. By statute, a statement is required by the Commission for Magnuson-Moss rulemaking on the prevalence of the acts or practices treated by the rule. What level of "prevalence of the acts or practices" must be presented before the Commission can act?

Answer. The Franchise Rule was promulgated under rulemaking procedures that existed prior to the enactment of the Magnuson-Moss law. Accordingly, the Commission did not follow the rulemaking procedures which are required by Magnuson-Moss, including application of a specific statement about the prevalence of the acts or practices addressed by the rule. Section 202(c) of Public Law 93-637 (Magnuson-Moss) provides for the "grandfathering" of proposed rules in which the "presentation of data, views and arguments were substantially completed" prior to the date the law was enacted. However, the absence of a specific statement of prevalence should in no way suggest that the rule is not supported by the record. The record consists of in excess of 30,000 pages, including 5,400 pages of consumer letters complaining of franchising practices. This record, the evidence supporting the rule in general, and adoption of each of its provisions in particular have been summarized in the Statement of Basis and Purpose, accompanying the publication of the final rule.

Question. In a rulemaking proceeding such as the franchise proposal, many different types of industries are covered. Must the Commission find "prevalence of the acts or practices" treated by the rule in each sector or type of industry or can it act to affect one sector if the abuse is only found in another sector?

Answer. The Franchise Rule was promulgated under rulemaking procedures that existed prior to the enactment of the Magnuson-Moss law. Section 202(c) of the Magnuson-Moss Act provides that "any proposed rule with respect to which presentation of data, views, and arguments were substantially completed before [the date of enactment] may be promulgated in the same manner and with the same validity as such rule could have been promulgated had this section not been enacted." The record of the Franchise rulemaking was closed before enactment of Magnuson-Moss so the Commission was not required to make a finding as to the prevalence of the acts or practices reached by the Rule.

However, in the Statement of Basis and Purpose Relating to Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, 43 Fed. Reg. 59621 et seq. (December 21, 1978), the Commission reviewed the evidence and concluded that misrepresentations and failure to disclose material facts are widespread in franchising and that complaints had been received about franchisors involved in the distribution of a broad spectrum of products and services. This evidence of abuse led the Commission to conclude that the special nature of the relationship between franchisors and franchisees—particularly the informational imbalance—warranted adoption of the Rule.

Question. What is your exemption policy in this situation?

Answer. Section 18(g) of the Federal Trade Commission Act grants the Commission authority to exempt any person or class of persons from the operation of a rule when the Commission finds that coverage is not necessary to prevent the unfair or deceptive acts or practices to which the rule relates. The Commission has widely publicized the availability of the exemption process and will give careful and timely review to all petitions filed.

BUDGET

Question. Have you made any significant changes in Commission policy in preparation for the fiscal year 1981 Budget Request?

Answer. No. In recent years, Commission policy in preparation for budget requests has been an evolving process through the quarterly budget review sessions and monthly policy review sessions. There have been, however, no significant changes in Commission policy in preparation for the fiscal year 1981 budget request. We have changed the parameters for zero-base decision package submissions. For the fiscal year 1981 budget, we are defining no more than 80 percent of current (fiscal year 1980) as the "minimum" mission total and no more than 110 percent of current as the "expanded" level. We expect this to provide a tighter focus for setting priorities among the Commission's enforcement programs.

Question. What are the significant differences in the President's request to Congress and the agency request to the OMB for fiscal year 1980?

Answer. The FTC Fiscal 1980 request to OMB was 1,864 work years and $70,390,000 of which OMB allowed 1,784 work years and $66,711,000 [1] a reduction of

[1] Figures do not reflect the October, 1978 pay raise which added $2,310,000 to the President's request to Congress; the current request to Congress is $69,021,000.

80 work years and $3,679,000. The allowance maintained FTC work years at the same level as fiscal 1979 and increased dollar resources to permit adjustments for various uncontrollable cost increases plus provide for a small program increase of $402,000. The resulting allowance did provide for increased efforts in some areas offset by decreases in other programs.

Areas where the Commission requested additional resources but which were denied included:

[Dollars in thousands]

Mission/program	Work years	Amount
Maintaining competition:		
Food industries	14	$474
Transportation	14	528
Mergers and joint ventures	5	193
Distributional restraints	4	162
Horizontal restraints	14	424
Subtotal	51	1,781
Consumer protection:		
Food and drug advertising	6	201
Occupational deregulation	7	265
Energy	4	145
Product reliability	4	115
Compliance	3	128
Subtotal	24	854
Economic activities:		
Industry studies	2	52
Support to consumer protection	3	89
Subtotal	5	141
Support activities:		
Public rulemaking participation		250
Office of policy planning		77
Other mission support		576
Subtotal		903
Total	80	3,679

BAR ASSOCIATION QUESTIONNAIRE

Question. What has the Commission done to lessen the burden of the questionnaire for state bar associations that was sent to GAO for review?

Answer. The Commission, in light of the comments received during the GAO comment period, is undertaking a number of steps to minimize the burden of the questionnaire. First, the Cleveland Regional Office staff is reviewing each question to insure that it asks for only information that is needed to make the study meaningful. Outside consultants, including economists with expertise in professional self regulation are being consulted.

Second, the staff is meeting with officials of state bar associations to discuss ways of lessening the burden of answering the questionnaire. Based on these meetings the staff will attempt to tailor the questionnaire to accommodate the differences in size and other characteristics among the various bar associations. And finally, the staff is exploring the availability of alternative sources of information. For example, staff is consulting with the Justice Department to determine whether the ABA investigation it closed last year produced relevant information.

Question. The Committee has received numerous questions regarding FTC rulemaking procedures which seek to supersede existing State regulatory statutes and regulations covering the same subject matter. I am particularly interested in your activities in the health field. How much money and staff time are being devoted to these activities at the present time?

Answer. In fiscal 1979, there are several rulemaking activities or other matters that involve potential rulemaking which may affect State regulatory statutes and regulations in the Health field:

	Fiscal 1979 estimates	
	Work years	Amount
Maintaining competition: Blue Shield TRR recommendation[1]	10.0	$320
Consumer protection:		
Nursing homes investigation	5.2	166
Eyeglasses I (Adv. of ophthalmic goods and services)	3.4	209
Eyeglasses II investigation (prescribers and suppliers of eyewear)	4.9	190
Hearing aid rulemaking proceeding	1.4	45
Dentists, dental hygienists and denturists investigations	8.1	300
Veterinarian investigation	2.0	64
Subtotal	25.0	770
Economic activity (in support of consumer protection):		
Denturist study	.3	60
Optometric study	3.2	82
Subtotal	3.5	142
Total	38.5	1,232

[1] Staff recommendation to Commission is to not issue a rule superseding state regulations; the Commission has not acted on staff proposal at this time.

With the exception of Eyeglasses I, none of these activities has progressed to a decision whether, and if so, to what extent there need be any impact on state regulatory schemes.

Question. For the record, does the FTC as a matter of agency policy, allow its employees, specifically its staff attorneys, to participate in public forums and take advocacy positions on issues that are the subject of current non-public FTC investigations and rulemaking procedures?

Answer. Situations of this type are governed by the Commission's Rules of Practice, Part 5—Standards of Conduct and Sections 17.4 and 17.5 of the Commission's Operating Manual. The Commission encourages employees to engage in teaching, lecturing, and writing that is not prohibited by law, Executive Order, or the Commission's internal rules. Such prohibitions might include Rules of Practice, Sections 5.12(c) (speaking or writing about Commission responsibilities, programs, or operations which draws substantially on official data or ideas which have not become part of the body of public information) and 5.16 (misuse of information which has not been made available to the general public). Federal statutory prohibitions include 18 U.S.C. 1905 (the disclosure of confidential information). Sections 17.4 and 17.5 of the Operating Manual require that speeches and articles must make clear that the opinions and views expressed are those of the particular staff member and do not necessarily reflect those of the Commission or any Commissioner. In most instances, requests to make speeches and write articles are reviewed by the Executive Director and respective Bureau Director. In summary, our staff are encouraged to participate in public forums, although they are prohibited from making use in any way of information that has otherwise not been made available to the public.

Question. According to the written submission to the Subcommittee from the National Association of Manufacturers, the Commission has not restricted its trade regulation rulemaking activity to alleged "unfair and deceptive acts or practices" but has proposed rules for standards-setting organizations which the staff report alleges are based on practices which may be "unfair or deceptive." Does the Commission have a formal definition of "unfairness," amd if so, has it instructed the staff with the definition?

Answer. The Commission's authority to prohibit "unfair * * * acts or practices" was explicitly added by the Wheeler-Lee Amendment in 1938 to the Commission's existing authority to deal with unfair methods of competition.[1] The most recent

[1] 52 Stat. 11. In an early line of cases, the Supreme Court held that injury *to competitors* was necessary before the Commission was authorized to act. See *FTC* v. *Gratz,* 253 U.S. 421 (1920); *FTC* v. *Raladam,* 283 U.S. 643 (1931). However, the Court, soon after that, did recognize the broad powers of the Commission to declare trade practices unfair in order to prevent *consumer*

Footnotes continued on next page

Supreme Court consideration of Commission authority to examine the "fairness" of a practice occurred in *FTC* v. *Sperry & Hutchinson Co. (S. & H).*[2] Here the Court rejected S & H's contention that its conduct was beyond the reach of § 5 in that the Commission could restrain only practices which are in violation of antitrust laws, or are deceptive or repugnant to public morals:

"[T]he Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spririt of the antitrust laws."[3]

The Court cited with approval the FTC's Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to Health Hazards of Smoking when the Commission identified the factors it employs to examine the fairness of a practice:

"(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)." [29 Fed. Reg. 8324, 8355 (1964), cited at 405 U.S. 244–245, n.5.]

The Commission has used these criteria in its adjudicative opinions, advisory opinions and Statements of Basis and Purpose for Trade Regulation Rules in which questions of "unfairness" have been raised in concrete factual contexts. Such prior Commission interpretations provide guidance to the Commission and its staff when new applications of the "unfairness standard" are considered. In addition, all proposed applications of the "unfairness standard," whether in proposed investigations, complaints or rulemakings are reviewed by the Commission, the Office of the General Counsel and senior managers in the Bureau of Consumer Protection. Final agency actions employing the standard are, of course, subject to review in the federal courts.

Questions of Senators Packwood and Danforth and the Answers Thereto

REGULATORY REFORM

Question. Describe in detail how the Commission sets its priorities.

Answer. Priority-setting at the Commission is accomplished on several levels.

At the broadest level, four times each year the Commission scrutinizes the 42 program areas into which the consumer protection and competition missions are divided, and attempts to ensure that each program is "on track"—that its planned goals are being achieved, that it is within anticipated budget, and that its strategies continue to be relevant and coherent. The Commission also reviews and approves future program plans which are contained in the Commission's budget submission to Congress.

At a more particularized level, the Commission economists and lawyers from the operating bureaus and the Office of Policy Planning have sought to develop protocols and case selection criteria in program areas in which it is felt that staff need such guidance. Protocols or case selection criteria exist for five consumer protection programs and three competition programs.

Any proposed case or rule within a program area must, in addition, survive a rigorous evaluation process. If a staff attorney wants to continue an investigation beyond 100 hours, his investigation must be screened by an evaluation committee, comprised of lawyers and economists, which attempts to ensure that the advantages (or benefits) of any initiatives beyond 100 hours are likely to exceed the cost of continuing the investigation, including costs to the government, to affected businesses, and also costs to consumers. The Commission itself undertakes a similar screen-

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Footnotes continued from last page

injury. See *FTC* v. *R. F. Keppel & Bro., Inc.,* 291 U.S. 304 (1934). The perspective of *Keppel* was confirmed by the Wheeler-Lea Amendment.

"[T]his amendment makes the consumer, who may be injured by an unfair trade practice, of equal concern, before the law, with the merchant or manufacturer injured by the unfair methods of a dishonest competitor." H.R. Rep. No. 1613, 75th Cong., 1st Sess., 3 (1937), cited in *FTC* v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1971).

Gratz and its progeny were formally laid to rest when the Court adopted Justice Brandeis' dissent in *Gratz* in *FTC* v. *Brown Shoe Co.,* 384 U.S. 316, 320–21 (1966).

[2] 405 U.S. 233 (1971).

[3] Id., at 244.

ing function when the investigation requires compulsory process, or staff recommends that a complaint or a proposed rule be issued.

Once a complaint or proposed rule has issued, the evaluation process continues. Bureau Directors periodically review the status of all matters in litigation, to ensure that continued litigation is in the public interest. During the rulemaking process, evidence is submitted by staff, by the affected industry, and often by public interest intervenors, showing expected costs and benefits of the proposed rule. When a final rule issues, the Commission's Statement of Basis and Purpose summarizes this evidence and explains why the Commission is of the opinion that the advantages of issuing the rule exceed whatever disadvantages may accrue from issuance.

Evaluation efforts continue beyond issuance of final rules and orders. During the past few years the Commission has allocated several million dollars of its budget toward evaluating the real world impact of selected rules these impact evaluations strategies. Information gleaned from these impact evaluations helps shape the future priority-setting of the Commission.

During the past 18 months, in an effort to ensure an even greater degree of cost-effectiveness and coordination among Commission initiatives, the Commission's Office of Policy Planning has convened agencywide task forces in each major sector of the economy in which the Commission's consumer and competition missions are active—health care, transportation, energy, housing, and foods. Each task force, comprised of key attorneys and economists engaged in specific investigations, rulemakings, or litigation, seeks to integrate FTC strategies within the area, minimize overlap, and ensure that Commission intervention in that sector is the least necessary to achieve desired goals of competition and consumer information. The task forces also seek to coordinate with other government agencies at both the state and federal level to further ensure that the Commission is undertaking initiatives only when it has a comparative advantage in so doing, and that other agencies are alerted to problems which they may be better equipped at remedying. Each task force also attempts to develop long-range planning options for the Commission, which are presented to the Commission at policy review sessions six times each year.

Question. The Commission earmarks $700,000 for systematic evaluation of the economic impact of its rulemakings. Please describe how these evaluations are prepared, and provide copies of the evaluations prepared during FY 1978 and FY 1979.

Answer. Economic impact evaluation [1] in the Bureau of Consumer Protection is coordinated by the Bureau's Impact Evaluation Group. The Group consists of three professionals assigned full-time to coordinate the Impact Evaluation Program. Two are professors on leaves of absence, one with a consumer behavior and marketing research background, and the other with an economics and cost benefit analysis background. The third person has an M.B.A. with a marketing research orientation.

To identify potential areas for impact evaluations of FTC activities, members of the Impact Evaluation Group meet with personnel from each of the Bureau of Consumer Protection divisions. Ideas for impact evaluation projects also are solicited from the Bureau of Economics and the Office of Policy Planning. The information gathered at this step is then used by the BCP Impact Evaluation Group and the Office of the Director to assess the feasibility of the various projects and to develop a list of high, medium and low priority projects. After approval of Bureau recommendations by the Commission at the beginning of each year, work commences under the management of the Impact Evaluation Group.

A number of different methodologies are used to conduct the impact evaluation studies. The specific methodology used depends on the type of impact evaluation being conducted and on the type of data being collected and analyzed. For example, a prospective impact evaluation of the proposed Antacid Rule (a rule proposal that would require warnings in advertisements) utilized an experimental design. Using a laboratory environment, commercials containing the proposed warnings were shown to a randomly assigned experimental group, while a control group was shown commercials without the warnings. Differences in beliefs, attitudes and behavior

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[1] There are several different types of impact evaluations currently being conducted in the Bureau of Consumer Protection: cost-benefit analysis which compares all relevant costs and benefits of FTC actions; and cost effectiveness analysis which attempts to determine the least costly remedy, assuming the need for a remedy has been previously determined. An impact evaluation study can be a cost-benefit analysis, a cost effectiveness analysis, or something less comprehensive than either of these (measuring, for example, only one or several of the impacts rather than all of the impacts as required in a full cost-benefit analysis). Impact evaluations can be prospective studies (to predict the impact of a regulation), retrospective studies (to measure the impact after the rule has been promulgated), or compliance monitoring (to determine if firms are complying with the regulations).

between the two groups were then measured to determine the likely impact of the proposed rule.

An ongoing study to enable a retrospective impact evaluation of the proposed Used Car Trade Regulation Rule utilizes a different methodology. Here, baseline data are being collected via a survey of private buyers and sellers of used cars and of dealers to determine prices paid, repairs made by consumers and by dealers after the sale, the cost to dealers of inspecting the vehicles and complying with the provisions of the regulation, market shares of the private and dealer markets, and other varibles necessary for a retrospective cost-benefit analysis.

As a final example, to evaluate the likely impact of proposed Credit Practices Regulations, an econometric model was developed to predict the impact of the proposed TRR on the annual percentage rate of interest (APR). The model developed was empirically tested using an existing data base.

Attached are copies of each impact evaluation study completed during 1978 and 1979. There are 27 other projects in progress which should be completed in the next year. (Impact evaluation studies on file—Consumer Subcommittee, 130 Russell Senate Office Building.)

INTERNATIONAL TRADE

Question. What has the Commission accomplished in the area of international trade policy?

Answer. The Federal Trade Commission is not charged with the establishment of international trade policy. Rather, the Commission seeks to insure that U.S. corporations competing abroad do not engage in unfair practices which would be considered anticompetitive towards other U.S. corporations. Additionally, the Commission seeks to ensure that foreign corporations doing business in the United States do not engage in unfair practices to the detriment of United States concerns.

In this vein, the Commission has recently accepted consent agreements from three primary aircraft manufacturers. The agreements prohibit the payment of monies to foreign officials or concerns when such payments would act toward the detriment of competing U.S. concerns.

Question. What is your assessment of the various proposals currently before the Congress for regulatory reform? Which do you favor and why?

Answer. The Commission has testified in support of the two major regulatory reform bills, the Administration's (S. 755) and Senator Ribicoff's (S. 262). Though the cumulative requirements in either of these two bills would entail considerable cost in time and money, we support them because we believe that they will produce a significant improvement in the quality of agency decisionmaking. We also strongly support the provisions on public participation and competition improvements in a draft bill circulated by Senator Kennedy and about which he recently held hearings.

We must note that many proposals which would seriously disrupt administrative decisionmaking are couched in the rhetoric of regulatory reform. We have in mind proposals that would require mammoth econometric studies, or that would undermine health and safety regulation by requiring the quantification of essentially nonquantifiable benefits, or that would undermine the rulemaking process through legislative veto mechanism. We will oppose devices that work to the benefit of those in our society who now hold unfair advantage by imposing unproductive costs and endless delay on regulation to reduce that unfair advantage.

Question. What is the Commission's position on continued extension of the Webb-Pomerene exemption?

Answer. The Commissioners have not been called upon to formulate a position with respect to the export trade association immunity.

Chairman Pertschuk, individually and not as official spokesman for the Commission, voted with the majority of the National Commission for the Review of Antitrust Laws and Procedures on its report to the President and the Attorney General (January 22, 1979). That report recommended re-examination of the Webb-Pomerene exemption by Congress. If it is retained, the report concluded, it should be amended in at least two ways: (1) immunity should be made contingent upon a showing of particularized need; and (2) services should be included in the definition of export trade and within the coverage of the Act.

Previous testimony on behalf of the Commission with respect to earlier proposals to amend the Webb-Pomerene Act took a similar position.

ANALYSIS OF THE BUDGET REQUEST

Question. Please provide a detailed financial analysis of program increases and decreases and work years for the following support organizations: General Counsel, Office of the Secretary, Administrative Law Judge, Office of Public Information, Commissioners, Executive Director, Policy Planning, Administration and Management and Regional Offices.

Answer. See attachments.

FEDERAL TRADE COMMISSION
FINANCIAL ANALYSIS
(dollars in thousands)

	Total Wkyrs	Personnel Compensation: Perm. Empl.	Temp. Empl.	Over-time	Sub-Total	Per. Bene.	Travel	Printing	Other Services	Supplies	Equip-ment	Total Amount
Commissioners:												
1979 Budget.....	47	$1,269	28	10	1,307	119	40	2	5	10	24	1,507
Adj. to Base.....	...	+27	...	...	+27	+1	...	...	...	...	...	+28[1]
1980 Request.....	47	1,296	28	10	1,334	120	40	2	5	10	24	1,535
Office of Public Information:												
1979 Budget.....	12	$254	14	5	273	23	7	35	19	4	3	370
Adj. to Base.....	...	+11	...	...	+11	+2	...	...	...	...	...	+13[2]
1980 Request.....	12	265	14	5	284	25	7	35	25	4	3	383
Office of Policy Planning:												
1979 Budget.....	21	$459	78	3	540	48	10	...	23	3	...	624
Adj. to Base.....	...	+10	...	...	+10	+1	...	...	...	...	...	+11[3]
1980 Request.....	21	469	78	3	550	49	10	...	23	3	...	635
General Counsel												
1979 Budget.....	105	$2,482	72	15	2,569	223	49	17	795	14	8	3,675
Adj. to Base.....	...	+46	...	...	+46	+5	...	...	...	...	...	+51[4]
1980 Request.....	105	2,528	72	15	2,615	228	49	17	795	14	8	3,726
Office of the Secretary												
1979 Budget.....	103	$1,461	45	19	1,525	135	17	100	...	34	50	1,861
Adj. to Base.....	...	+43	...	...	+43	+11	...	...	...	...	...	+54[5]
1980 Request.....	103	1,504	45	19	1,568	146	17	100	...	34	50	1,915
Executive Director												
1979 Budget.....	20	$525	84	6	615	56	56	55	...	6	5	793
Adj. to Base.....	...	+17	...	...	+17	...	...	...	...	...	...	+17[6]
1980 Request.....	20	542	84	6	632	56	56	55	...	6	5	810

Includes these uncontrollable increases to base:	1	2	3	4	5	6
Two extra compensable days.....	$ 10	$ 3	$ 4	$ 21	$ 14	$ 5
Within-grade step increases.....	9	3	4	12	29	6
Annualization of October, 1978 pay increase.....	9	7	3	18	1	6
Total.....	28	13	11	51	54	17

FEDERAL TRADE COMMISSION
FINANCIAL ANALYSIS
(dollars in thousands)

	Total Wkyrs	Personnel Compensation: Perm. Empl.	Temp. Empl.	Over-time	Witness Fees	Sub-Total	Per. Bene.	Travel	Printing	Other Services	Supplies	Equip-ment	Total Amount
Regional Offices:													
1979 Budget.....	355	$8,579	331	14	10	8,934	779	672	30	448	60	63	10,986
Adj. to Base.....	...	+170	...	...	...	+170	+33	...	...	+46	...	...	+249[1]
Program Change....	-6	-181	...	...	+19	-162	-17	+48	...	+50	...	+8	-73[2]
1980 Request.....	349	8,568	331	14	29	8,942	795	720	30	544	60	71	11,162
Administrative Law Judges:													
1979 Budget.....	31	$ 923	36	6	...	965	86	35	...	+20	2	12	1,120
Adj. to Base.....	...	+35	...	...	...	+35	+10	...	...	...	...	...	+45[3]
Program Change....	...	...	...	...	...	...	...	...	...	-20	...	...	-20[4]
1980 Request.....	31	958	36	6	...	1,000	96	35	...	...	2	12	1,145
Administration & Management:													
1979 Budget.....	190	$3,305	149	52	...	3,506	301	24	37	1,388	49	48	5,353
Adj. to Base.....	...	+101	...	...	...	+101	+6	...	...	...	...	...	+107[5]
Program Change....	...	...	...	...	...	...	...	+13	...	+29	...	+29	+71[6]
1980 Request.....	190	3,406	149	52	...	3,607	307	37	37	1,417	49	77	5,531

[1]Includes these uncontrollable increases to base: two extra compensable days ($75); within-grade step increases ($54); Health insurance benefits ($10); annualization of October, 1978 pay raise ($64); stenographic services ($46).
[2]Includes these program changes: Salaries and Benefits related to 6 position decrease (-198); and in support of litigation in the Maintaining Competition area: travel ($48); program contracts ($50); equipment ($8); witness fees ($19). [3]Includes these uncontrollable increases to base: two extra compensable days ($10); within-grade step increase ($27); annualization of October, 1978 pay raise ($8). [4]Reflects decreased need (Kellog case). [5]Includes these uncontrollable increases to base: two extra compensable days ($30); within-grade step increases ($48); annualization of October, 1978 pay raise ($24); Health benefits ($5). [6]Includes increased travel for support of Regional Offices 13); increased program contracts to implement Bachman decision and Civil Service Reform Act ($29); increased equipment for Print Shop and for increased office equipment ($29).

Question. As part of the Commission's Product Information Program, an analysis of the consumer losses from the purchase of dangerous products is contemplated. How does this program differ from the mission of the Consumer Product Safety Commission?

Answer. The Commission's Product Information Program, among other activities, focuses on advertising that fails to disclose health or safety risks. One factor relevant to a decision to bring an enforcement action is the extent of consumer harm or loss.

While to a great extent the responsibility to deal with potentially harmful products—in particular with regard to marketing and distribution—is that of such agencies as the CPSC or the FDA, these agencies, either because of statutory limitations or pursuant to interagency agreements, do not focus on areas of particular Commission concerns such as advertising. In this regard, Commission activity complements rather than overlaps other agencies' mission. An example of this type of activity occurred when the Commission cooperated with Consumer Product Safety Commission on the asbestos in hairdryers controversy.

Question. The Bureau [of Economics] proposes to conduct a study of Market Structure, Behavioral Motivations of the Firm and Wage and Employment Discrimination.

In short, it proposes to determine whether the antitrust policy can be uses to improve opportunities for minorities. What are the details of this program? How much will it cost?

Answer. It is often suggested that the operation of competitive market forces should lead to the provision of fair and efficient opportunities for all workers including minorities. The converse possibility is that in situations where discretionary monopoly power is present, opportunities for minorities may be restricted. Although ther is some pre-existing empirical research on this question, the evidence is quite sketchy. We intend to survey this research and determine whether and how existing evidence could be substantially improved, and to assess empirically the impact of successful antitrust policy on this important social goal.

The effort should consume no more than one-half economist work year in 1980.

LOCATION OF FTC FIELD HEARINGS ON TRADE REGULATION RULES

Question. Most of your regional offies are in large metropolitan areas, but why must all your field hearings be in large cities? It appears that San Francisco, Chicago and Los Angeles are popular hearing locations but since 1976 you have not held hearings in Denver where you have a regional office and only two in Cleveland and Boston. Why this imbalance? Why can't you conduct hearings in other cities?

Answer. The Commission has instructed its staff that the following general factors should be considered in recommending locations to Presiding Officers:

(1) Location of witnesses.

(2) Availability of resources, *i.e.,* both operating expenses and personnel.

(3) Regional office expertise and/or ability to provide rooms and/or support staff.

After consultation with staff and other interested persons, the rulemaking proceeding Presiding Officer has final authority as to dates and places of hearings. In choosing hearing sites outside of Washington, D.C., presiding officers have chosen large cities in which regional offices are located because federal facilities there provide hearing rooms, offices, secretaries, legal materials, equipment and telephone lines which would have to be rented, at greater expense, in some other location. Moreover, there has been a preference for those offices which have especially good transportation facilities and regionally central locations, such as Chicago, San Francisco, New York and Los Angeles.

Depending on the nature and scope of future rulemaking proceedings, other cities may be selected to the extent that they are suitable.

USE OF CONTRACT FUNDS

Question. Please explain how the Commission determines the need for consultants?

Answer. The Commission uses consultants via the program contract and OPM Personal Services methods. Consultants are used in this agency to provide specialized, subject matter expertise that we do not have available among our staff. Such services are generally needed for a finite period of time to engage in specific work activities. Upon completion of the work, the consultants' services are terminated. Given the short-term needs that consultants fill, and the highly specialized disciplinary knowledge they need to bring, to maintain an internal capability would be prohibitively expensive. Examples of the needs for which we use consultants include: scientific input regarding pharmaceuticals; engineering analyses of product

performance claims; data gathering and financial/statistical analysis of the data regarding foreign automobile manufacturers; and medical professionals input with regard to a variety of health care concerns.

The Deputy Executive Director's Office approves all contracts for professional services. Prior to approval, the Deputy Executive Director verifies that a bona fide requirement for the service exists; that procedures have been followed to ensure competitive procurement; that the proposed contract contains a statement of work and a schedule for product delivery in sufficient detail to support contract management and contractor performance evaluation; that the contractor has the requisite skills and resources to successfully execute the contract; that the cost of the contract is consistent with specified scope and deliverables; that work specified in the contract does not duplicate previous or current activities; that personnel within the FTC are designated to manage and evaluate the contractor's work; and that there does not exist a conflict of interest problem relating to the contract relationship. Once the contract is awarded, the Executive Director reviews the performance of the contract on a periodic basis to ensure contract compliance.

The funds for professional service contracts are budgeted and managed at both the organizational and program levels. The Commission, as part of the FTC planning/budgeting process, approves the allocation of program contract funds to programs and reviews the use of all program contract funds on a quarterly basis.

The Executive Director's Office approves all consultants obtained under OPM appointments. Prior to approving an appointment, the Executive Director verifies that there is a bona fide requirement for the service to be provided; that those services should be performed by a consultant (*i.e.,* work is temporary in nature, requires a high level of expertise not available within the agency, is purely advisory in nature and does not entail the performance or supervision of operating functions); that the proposed consultant possesses the kind and level of expertise which will permit him to render the required services; that the proposed daily rate is commensurate with the level of work to be performed and the qualifications of the consultant; that there does not exist a conflict of interest problem resulting from the proposed arrangement; and that the services do not duplicate prior or current activities of the FTC. Once appointed, all consultants are reviewed once a quarter by the Executive Director to ensure that the services are being provided as specified and that there still exists a requirement to continue the services in the next quarter.

The funds for paying personal services consultants are currently budgeted and managed at both the organizational and program levels.

The Commission adheres to the policy of OMB Bulletin 78–11 in this area. All requests for consultants are evaluated to determine whether the services are appropriate (*e.g.,* when specialized opinions or technical advice not obtainable within the government is needed, advice is needed regarding developments in industry, university, or foundation research, and opinions are needed of noted experts whose national or international prestige can contribute to the success of important projects). As evidenced by the above process for hiring consultants, the Commission has the necessary management controls in place to evaluate and monitor requests for consultants.

Question. How does the work of these consultants differ or compare with that of the public participation fund recipients? Are there overlaps? How do you justify individual groups receiving funds from both accounts?

Answer. Consultants called in by the staff because of their expertise are reimbursed for their costs of testifying through the Commission's operating budget. This is done in a variety of proceedings, including adjudicative actions, as part of the staff's mandate to ensure that the record contains sufficient testimony on all issues.

Public participation fund recipients, on the other hand, independently represent their interests in rulemaking proceedings. Often these participants are opposed to all or many of the provisions in proposed rules, and they often differ substantially with staff positions in proceedings. For instance, the National Hearing Aid Society, a trade association of hearing aid dealers, was approved nearly $50,000 reimbursement for their costs of preparing post-hearing comments in which they argued rigorously against the proposed rule on the hearing aid industry.

It would be inconsistent with the purpose of the public participation program for a group to be both a recipient of public participation funds *and* a consultant to the staff. It should be noted, however, that in two instances groups which received public participation funds also engaged in other projects for the Commission. Of course, in both instances the projects were completely separate from the rulemaking proceeding in which the groups received public participation funding.

MANAGEMENT OF AGENCY

Question. What is your response to the criticism that the Commission has created an excessive bureaucracy in the operating Bureaus? Can you describe the function of these supervisory positions? For the record, provide copies of the position descriptions of the Bureau Director, deputy directors, assistant directors, deputy assistant directors, and special assistants.

Answer. The reorganization of the Commission's operating bureaus has served to focus the role of managerial staff on specific program areas, rather than on the activities of staff crossing various program lines. This has resulted in more comprehensive planning and execution of program activities in each mission, and has served to integrate the activities of the regional offices into mission programs. As a result of this reorganization, the Bureaus of Consumer Protection and Competition each have two deputy directors. One serves as Deputy Director for Operations, maintaining fiscal control of all mission resources. The second serves as Deputy Director for Policy and Evaluation. These Deputy Directors' duties include overall supervision of the evaluation process, oversight of several program areas, liaison with the other Bureaus and the Office of Policy Planning, and coordination of legislative activities. Because of its smaller size, the Bureau of Economics has one Deputy Director who performs these functions.

Assistant Directors have responsibilty for supervising specific program areas, and are accountable for achieving Congressional and Commission goals in these programs. They supervise staffs of attorneys (15–25, depending on division), other professionals, and support staff. Additionally, they are required to see that enforcement resources of the regional offices are directed properly, and meet agency goals. In the Bureau of Consumer Protection, Assistant Directors supervise groups of related programs, many mandated by the Congress. For example, the Division of Product Information includes these programs: Disclosure of Substantial Risk or Inadequancy (I–16); Energy Policy and Conservation Act (I–14); Packaging and Labeling (M03); Textile, Wool and Fur Labeling (M04); and Hobby Protection Act (M05). In the Bureau of Competition, Assistant Directors supervise groups of programs generally relating to specific economic sectors, such as Energy, Food, and Transportation. In the Bureau of Economics, Assistant Directors are responsible for functional areas, including economic support to the competition mission and to the consumer protection mission, market structure and industry studies, and statistical reporting programs. In the Bureaus, each Assistant Director has one or two serve as line managers and senior trial staff for ongoing matters.

Assistants to the Directors have responsibility for review of matters in the Directors' offices. Matters reviewed by their staff members may include law enforcement recommendations to the Commission, Congressional testimony, and interaction of the bureau staff with other units in the Commission.

As requested, position descriptions are attached. (Position descriptions on file—Consumer Subcommittee, 130 Russell Senate Office Building)

Question. How has the Commission streamlined the decisionmaking process by reorganizing the Bureaus?

Answer. The recent reorganizations of the Commission's operating bureaus have produced a number of positive changes that have streamlined the agency's decisionmaking process. The reorganizations have clarified the roles of agency units, and thus facilitated task and work distribution, with a resultant increase in accountability for achieving Congressional and Commission goals, improvement in the management of resources and an increase in intra-and inter-agency communications. This has decreased duplication of efforts, and the resultant burden on business. For example, prior to its reorganization into divisions overseeing specific practices, the Bureau of Consumer Protection had similar projects or investigations in several programs. Additionally, the reorganization has enabled the Bureau of Competition to focus resources on critical economic sectors, and to allocate the resources to the more important matters within each program. In the Bureau of Economics, the reorganization has resulted in increased economic analysis of consumer protection matters, including assistance to the rulemaking staffs.

The overall impact of reorganization has led to more careful screening of resource allocations, specific attention to types of practices or economic sectors, and the level of resources devoted to each, and increased accountability for meeting agency objectives.

Question. What about the decisionmaking process in the regional offices? At one time, it was estimated privately by commission lawyers that between 80 and 90 percent of consumer protection work in some field offices was devoted to internal justification rather than to actual cases. What is the current situation?

Answer. Although headquarters-directed "advocacy" efforts may have consumed a disproportionate amount of regional office staff time in the past, the time commitments never approached the 80 and 90 percent estimates quoted in the question. Currently, the majority of workhours are directly case-related. Internal justification and coordination, though necessary to ensure adequate safeguards over the administrative process, are only a small part of the work of attorneys in the regional offices. Examples of efforts to improve include the Bureau of Consumer Protection's automated assignment tracking system within the Office of the Director that ensures that regional office matters do not get bogged down in review. The system provides for specific time limits to review matters submitted by the regional offices. Also, the introduction of program advisors has provided a central contact for regional matters, substantially improving the Bureau's ability to respond to regional office needs. Further, the Executive Director periodically reviews the length of regional office matters pending in the Director's Office to ensure that matters are reviewed expeditiously.

In addition, the Bureau of Competition has assigned an assistant director to full-time regional activities. this has resulted in exceptional efficiency in carrying out the necessary coordination and liaison on antitrust matters.

Question. One reason cited for delays in rulemaking has been an inadequate number of presiding officers. Has this situation been corrected?

Answer. The Commission is not aware of any problems of delay caused by the number of presiding officers. In those rulemaking proceedings commenced since 1977, individuals assigned as presiding officers have been responsible for only a single proceeding at any one time.

Question. Why has the Commission encountered such delay and apparent disorganization in the large and complicated cases it has undertaken, such as the Exxon case which began in 1973 and will not be completed until 1983?

Answer. The very nature of large, legally complex antitrust cases requires the expenditure of significant work years and dollars. In certain instances, these complex cases precipitate collateral court litigation which further delays an investigation.

The Commission is cognizant of the problem inherent in these time-consuming matters, and has endeavored to analyze such cases and determine if new procedures could or should be implemented in an effort to expedite a final resolution.

For example, the Commission set up an agencywide task force—The Working Group on Complex Antitrust Case Procedures—that issued a report containing a variety of constructive suggestions for the more efficient and expeditious handling of major antitrust litigation within the Commission. The Commission has also formulated new rules that establish a scope of discovery, which minimizes the possibility of abuse and also strengthens the Administrative Law Judge's control of the process so as to prevent dilatory or excessive discovery.

Question. Please describe the steps the Commission must take after a citizen complaint is filed before it can act. In particular, describe the review process at the Bureau level.

Answer. Letters of complaint, upon receipt, are logged in by the Correspondence Section of the Office of the Secretary. They are then forwarded to the appropriate bureau (Competition or Consumer Protection) for evaluation.

Each application is then assigned to appropriate staff for handling. If it relates to a matter already in an active status or within an already authorized enforcement project or program, it will be referred to the responsible Assistant Director or Regional Office Director for initial action determination. Applications are also directly received and acted upon by the Commission's Regional Offices. The Assistant Directors and Regional Office Directors have authority to initiate preliminary 100-hour investigations within their assigned areas of enforcement responsibility.

Where questions are presented as to the appropriateness of preliminary investigations; where such an investigation would oblige the use of compulsory process; where the acts or practices in question would involve investigations of the news media or other areas where the Commission has issued special instructions to, or restrictions upon, staff, the decision of whether or not to initiate an investigation is referred to the Office of the Bureau Director.

In the Bureau of Competition, complaints not falling within any pre-assigned enforcement area are evaluated by the Bureau's Office of Evaluation. Preliminary or 100-hour investigations may be initiated, with approval of the Bureau Director or his Deputy, pursuant to that Office's recommendation.

All matters involving full or extensive investigations, use of compulsory process, investigations on an industrywide basis, new major enforcement initiatives or areas

where the Commission has issued special instructions to, or restrictions upon, staff, must be submitted to the Bureau's Evaluation Committee.

Industrywide investigations, investigations calling for the use of compulsory process, investigations on an industrywide basis and other matters in which the Commission has so directed, must be submitted to the Commission.

The Evaluation Committee is comprised of the Bureau Director, or his representative, the Assistant Directors, representatives from the Commission's Bureau of Economics and Regional Office representatives having an interest in the matter under consideration.

Close coordination is maintained at all times between the Bureau's Evaluation Office, the Evaluation Committee, the Bureau Director and other staff units to assure efficiency and maximum promptness in the handling of citizen complaints and complaints from the business community. The Bureau of Economics furnishes advice concerning economic evidence and industry analysis.

Before any investigation is initiated in the antitrust or competition field, contact is made with the Antitrust Division of the Department of Justice (and other departments as appropriate) to ensure that conflict or duplication of enforcement efforts does not occur.

Within the Bureau of Consumer Protection, the Deputy Director for Policy and Evaluation has responsibility for case evaluation and policy planning. Recommendations for investigations requiring Commission approval (large scale investigations and investigations of publishers and broadcasters), investigations over 100 hours, requests for compulsory process and complaint recommendations are submitted to the Deputy Director for review. Through the Bureau's Evaluation Committee the Deputy Director consults with persons in the Bureau who have expertise relevant to the recommendations and representatives from the Bureau of Economics, Office of Policy Planning, and Office of General Counsel. Matters that are routine and not complex are decided in a few days. More complex matters may require up to thirty days for disposition, including formal meetings of the Evaluation Committee. In addition to permanent representatives from the Bureau of Economics, Office of Policy Planning, Office of General Counsel and Bureau Director's office, personnel from the Divisions and Regional Offices having expertise relevant to a recommendation participate.

Question. What has the Commission done to improve its case record management? For example, in the Used Car Rule, the record was 54,000 pages and the staff report 564 pages; the Mobile Home record is 250,000 pages. How is it possible for the Commission to make a decision based upon such voluminous records?

Answer. The Commission has taken a number of steps to reduce the length and facilitate the use of its rulemaking records. The size of the rulemaking records has been substantially reduced by new requirements that allow staff to place only the information most relevant to the proceeding on the rulemaking record. A separate record is created for background and reference materials. To facilitate the use of this material, the Commission now requires (through its Operating Manual) that each rulemaking record be paginated, comprehensively indexed by subject matter, and readily available in its redesigned public record room. The records are also available on microfilm and microfiche.

The Commission also employs procedures in the rulemaking decisionmaking process that highlight the key issues and ensure that the most important evidence is brought to the Commission's attention. The initial notice of proposed rulemaking specifically asks for comment on key factual, policy and legal questions. The oral hearings and the examination and rebuttal that are provided further sharpen and define the issues. After the close of the hearings, the rulemaking staff writes a report summarizing the evidence on the issues and making a recommendation. The Presiding Officer, similarly, writes a report summarizing the evidence and making findings on the designated issues. These reports are then placed on the public record for comment by the participants and the public generally. Before making a decision, the Commission permits group representatives to present their views on the issues and evidence directly to the Commission. This enables the Commission to focus on the key issues in dispute and the positions of those affected before making its final decision in any rulemaking.

LEGISLATIVE VETO

Question. Senator Schmitt introduced S. 193, a bill which would amend the Federal Trade Commission Act to provide for congessional review of each rule proposed by the FTC. What is your view of this proposal and similar proposals?

Answer. Senator Schmitt's bill, S. 193, introduced on January 23 (Legislative day, January 15), 1979, provides for a modified one-House veto that would become part of

§ 18 of the FTC Act. Under S. 193, a final rule will not become effective if one House passes a resolution of disapproval within 60 days after the rule is prescribed and the other House does not reject an identical resolution within 30 days or if both Houses pass such a resolution. However, a rule may become effective 60 days after it is prescribed if no committee of either House of Congress has reported or been discharged from further consideration of a resolution of disapproval, and neither House has adopted such a resolution.

The Commission understands and agrees that effective congressional oversight is crucial to efficient government. However, the Commission questions whether this particular veto provision will enhance congressional oversight or improve the agency's rulemaking process. In addition, there are some that would allege that the legislative veto raises serious constitutional questions. See the President's message to the Congress, "Legislative Vetoes," June 21, 1978. The kind of legislative veto procedures contained in S. 193, it is said, may be inconsistent with the constitutional principle of bicameralism, the principle that requires the participation of both Houses of Congress in legislative decisionmaking. The veto also may be inconsistent with the separation of powers doctrine and violative of the President's own veto authority under Art. I, § 7, Clause 3.

Moreover, it should be noted that the two congressional committees that have studied the legislative veto have found such a mechanism to be unsatisfactory. (Senate Committee on Governmental Operations, Study on Federal Regulation (1977); House Subcommittee on Oversight and Investigations, A Report of Federal Regulation and Regulatory Reform (1976).) The committees noted that Congress could not possibly conduct a meaningful review of the many rules issued by government agencies. This concern about overburdening Congress is especially applicable to FTC rules, not because the Commission issues so many rules—it issues comparatively few—but rather because its rulemaking records are so large. For example, the record in the Mobile Home Proceeding is approximately a quarter of a million pages in length.

The Commission's main concern, however, is that the legislative veto could undermine the very FTC rulemaking procedures that Congress so carefully crafted just a few years ago. The Magnuson-Moss procedures were designed to encourage full public participation in developing a complete rulemaking record, so that the Commission would issue rules on an informed basis. The addition of a legislative veto provision could very well undermine the rulemaking process because many individuals and groups, rather than participating in the rulemaking, will instead devote their energies to securing a legislative veto.

Aside from the constitutional issue, the Commission shares in the President's reservations about the veto's practical utility. In his recent message to Congress announcing regulatory reform legislation that would affect both independent and executive agencies, the President asked Congress to:

"* * * refrain from seeking authority to veto individual regulatory decisions and thereby to administer the laws itself. The legislative veto is an illusory solution to the problems of regulation. In some cases it would make rules weaker; in others it would make them stricter. But in all cases, it would increase delay, undermine fair procedures, and fragment responsibilities. It would disrupt our effort to manage the regulatory process, and it would distract Congress from the fundamental job of reforming underlying statutes. Any serious effort to administer the legislative veto would require a major increase in congressional staff and threaten the Constitutional division of power." [Message to Congress, March 1979.]

Question. If you do not support legislative veto, what would you offer as a compromise position?

Answer. The Commission believes that Congress has alternative means of overseeing FTC activity—through direct legislation,[1] through oversight inquries and, most prominently, through the authorization and appropriation process, the scrutiny that the Commission's programs have undergone in the last two sessions, and the Commission's demonstrated responsiveness to these congressional concerns, reflect the efficacy of the normal legislative process. The already available alternatives to the veto coupled with the President's new proposals argue against the adoption of veto legislation at this time.

In sum, the Commission is unable to endorse any legislative veto provision that by-passes any of the elements essential to the normal legislative process. The Commission also believes that it is not the appropriate agency for Congress to test the legislative veto. The purpose of the legislative veto, as the Commission under-

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[1] For example, Congress prohibited a Commission rule relating to cigarette advertising during the pendency of the proceeding. See Section 7(a) of the Federal Cigarette Labeling and Advertising Act of 1965.

stands it, is to increase agency accountability to the public. Congress, by enacting the Magnuson-Moss, has already provided the public with full access to Commission rulemaking and required the Commission to respond to public concerns.

Question. What current and proposed rules would be affected by such legislation?

Answer. The provisions of S. 193 would apply to any rule prescribed under the FTC Act which has not become effective on or before the date the veto bill is enacted (see §§ 2(b)(i)(1) and 2(c) of S. 193). Because S. 193 would not become effective until enactment, it is difficult to identify with certainty the rules that would be subject to veto.

Presently, there are sixteen rulemaking proceedings in various stages at the Commission. In addition to these proceedings, all of which concern proposed rules, the Commission's most recent "Semiannual Agenda of Reports and Regulations" (attached) identifies four internal rules or procedures upon which the Commission is expected to take action and eleven ongoing investigations which may result in recommendations by the staff to the Commission for a rule or report.

Federal Trade Commission

SEMIANNUAL AGENDA OF REPORTS AND REGULATIONS

AGENCY: Federal Trade Commission.

ACTION: Notice of Semiannual Agenda.

SUMMARY: The following agenda of reports and regulations is published voluntarily by the Federal Trade Commission in connection with Executive Order 12044, issued by the President on March 24, 1978. The agenda has been divided into four categories: (A) The general subject matter of reports expected to be made public within the next six months, (B) The general subject matter of internal rules of operating procedures upon which the Commission is expected to take action within the next six months, (C) A list of investigations that are expected to result within the next six months in recommendations to the Commission for proposed rules or reports, and (D) A list of rules already proposed by the Commission with target dates for completion of significant steps in their development. Each item on the list includes the name and telephone number of a person to contact for further information.

It should be noted that these lists are based on projections at the time of this publication of the subject matter and timing of future Commission action. Discovery of new information, changes in circumstances or personnel and changes in the law may alter the projected dates of matters listed in this document. All matters are subject to review and approval by the Commission.

FOR FURTHER INFORMATION CONTACT: Office of Policy Planning, Federal Trade Commission, Washington, D.C. 20580, (202) 523-1447. For information about any specific item on the agenda, call or write the "contact person" indicated.

A. Reports expected to be made public:

1. The Development and Structure of the U.S. Electric Lamp Industry

This report is an industry study of electric lamp manufacturing. It discusses the technology of lamp production, and investigates market structure, business conduct, economic performance, and their interrelationships in the industry.

2. Brand Performance in the Cigarette Industry and the Advantage of Early Entry

This report examine the importance of rank and timing of "entry" on subsequent brand "success" in consumer product submarkets.

3. Grocery Retailing Concentrations in Metropolitan Areas, Economic Census Years, 1954-1972

This is a statistical report describing changing patterns of seller concentration in food retailing within individual urban markets over the period 1954-1972.

4. Consumer Reaction to Government Provision of Information: the Impact of Health Information on Nicotine and Tobacco Consumption

This report is an econometric study of the impact of health warning information on the cigarette smoking behavior of individuals.

5. Economic Structure and Behavior in the Natural Gas Production Industry

This study describes concentration in natural gas reserves and production (both onshore and offshore) in 1974 and in selected earlier years. It also describes the

impact of outer continental shelf joint ventures on concentration measures, as well as the motivations for joint ventures. Finally, it analyzes the evidence that nonproducing shut in leases were a result of monopolistic behavior.

6. Analysis of the Ban on Intra-Major Joint Ventures in OCS Petroleum Lease Sales

This study analyzes the impact of the Department of Interior ban on joint ventures on the outer continental shelf by the largest oil companies. It compares the number of bids, size of partners and concentration in bidding and in the winning bids before and after the joint venture took place. It also considers the probable effect of changing the definition of which firms are included in the joint venture ban.

7. Competition in the Nuclear Fuel Industry

This study describes the structure of the nuclear fuel industry including concentration in production, reserves, acreage, and drilling, It also lists mergers and acquisitions, joint ventures, new entry, and the significance of reserves and production accounted for by oil and gas companies. It briefly describes such other topics as economies of scale and vertical integration, recent uranium price increases, government price guarantees, foreign sources of uranium, and the breeder reactor.

8. Professional Advertising: An Empirical Study of the Relationship Between Advertising and the Price and Quality of Optometric Services

This study empirically investigates the question of whether the price and quality of professional services are associated with advertising and commercial practice. It focuses on optometry, a licensed profession for which considerable variation among the states concerning restrictions on advertising and professional practice has existed for some time.

Contact person for the preceding eight reports: P. David Qualls (202) 254-7750; Bureau of Economics.

9. Fair Debt Collection Practices Act (15 U.S.C. 1692)

Publication of Annual Report to Congress setting forth the Commission's enforcement experience under the Act.

Contact person: Alan Reffkin (202) 724-1187; Bureau of Consumer Protection.

10. Unavailability of Advertised Specials (16 C.F.R. 424)

A report examining the impact of the Commission's trade regulation rule governing retail food store advertising and marketing practices.

Contact person: Ken Bernhardt (202) 724-1878; Bureau of Consumer Protection.

11. Warranties (15 U.S.C. 2301)

A report gathering base line date a with which to examine the impact of regulations issued under the Magnuson-Moss Warranty Act.

Contact Person: Ken Bernhardt (202) 724-1878; Bureau of Consumer Protection.

12. Antitrust Implications of Voluntary Agreements Among Oil Producers to formulate Plans for the International Allocation of Oil in the Event of Emergency Supply Disruptions

A seminannual report to Congress and to the President pursuant to Section 252 of the Energy Policy and Conservation Act, Pub. L. No. 94-163, § 252(i), 89 Stat. 871, 895 (1975).

Contact Person: Ronald B. Rowe (202) 724-1442; Bureau of Competition.

13. Cigarettes

Annual Report to Congress on marketing and advertising of cigarette companies for 1978.

Contact Person: Jane Dalkart (202) 724-1499; Bureau of Consumer Protection.

14. Cigarettes

Report of the results of testing cigarettes for tar, nicotine, carbon monoxide levels.

B. Internal rules or procedures upon which the Commission is is expected to take action:

1. Restrictions on Practice Before the Commission by Former Members and Employees

The Commission is expected to publish final rules specifying the period of time during which former members and employees will be required to seek permission prior to representing a client before the agency. The rule which had previously been published for comment, will also clarify the standards that the Commission used to decide whether, in a given matter, participation by a former member of employee would be proper.

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Contact Person: Jack Schwartz (202) 523-3615; Office of General Counsel.

2. Standards of Conduct for Attorneys Practicing Before the Commission

The Commission is expected to publish for comment a proposed amendment to its rules that will clarify the standards of ethical conduct expected of lawyers who practice before the Commission and will set out in more detail the procedure to be followed when there is an allegation that a lawyer has not conformed to those standards.

Contact Person: Oliver J. Trytell (202) 523-3442; Office of General Counsel.

3. Procedures for Requesting Confidential Treatment of Information Submitted to the Commission

The Commission is expected to publish final rules which will announce procedures for persons requested or required to submit information to the Commission to obtain confidential treatment of that information. This proposal has previously been published for comment.

Contact Person: Barry Rubin (202) 523-3520; Office of General Counsel.

4. Fair Debt Collection Practices Act (15 U.S.C. 1962)—State Exemptions

The Commission is expected to publish proposed rules specifying exemptions for classes of debt collection practices within any state that meets the statutory requirements.

Contact Person: Alan Reffkin (202) 724-1187; Bureau of Consumer Protection.

C. Investigations which may result in a recommendation to the Commission for a rule or report:

1. Blue Shield

An investigation of the extent to which physicians influence or control the conduct of Blue Shield plans, expecially with respect to reimbursement of physicians, and the extent to which such influence or control may impede the ability of Blue Shield plans to hold down reimburement levels and costs generally.

Contact Person: Walter T. Winslow (202) 724-1341: Bureau of Competition.

2. Written Warranties

An investigation of warrantly advertising, the form of warrantly titles and text, the disclosure of warranty terms and delayed warranty service performance.

Contact Person: Rachel Miller (202) 523-0425; Bureau of Consumer Protection.

3. Eyeglasses II

An investigation of private and state restrictions on ownership of and operations of opthalmic good dispensaries.

Contact Person: Christine Latsey (202) 523-3431; Bureau of Consumer Protection.

4. Dental Laboratories Investigation

An investigation of restrictions on the ability of denture laboratories to provide dental care directly to the public.

Contact Person: Ann Grover (415) 556-1270; San Francisco Regional Office.

5. Recycled Oil for Use as a Burner Fuel

An investigation to determine how to encourage the recycling of used oil as a burner fuel by measuring whether the used oil is substantially equivalent to new oil.

Contact Person: Carthon Aldhizer (202) 724-1491; Bureau of Consumer Protection.

6. Insurance Cost Disclosure

This report examines: (1) the extent to which consumers lack adequate cost information to comparison shop for whole life insurance; and (2) the adequacy of various proposed cost disclosure systems.

Contact Person: David Fix (202) 523-3812; Bureau of Consumer Protection.

7. Arbitration

A report on the use of arbitration to resolve consumer disputes.

Contact Person: John O'Brien (212) 264-1207; New York Regional Office.

8. Cigarettes

An investigation of the advertising practices of cigarette companies.

Contact Person: Jane Dalkart (202) 724-1499; Bureau of Consumer Protection.

9. Test Preparation Services

A report on the effects of coaching on standardized admission examinations.

Contact Person: Harry Garfield II (617) 223-6621; Boston Regional Office.

10. Buying Clubs

A report examining consumer problems connected with the sale of memberships in buying clubs.

Contact Person: Alan Krause (312) 353-5546; Chicago Regional Office.

11. Public Accounting Profession

An investigation of private and state restrictions on advertising, solicitation and delivery of services by accountants.

Contact Person: John M. Peterson (312) 353-8522; Chicago Regional Office.

D. Target Dates of the Development of Rules Already Proposed

1. Used Motor Vehicle Sales, 41 Fed. Reg. 1089 (Jan. 6, 1976)

End of post record comment period on or before February 14, 1979. Oral presentation, before the Commission during May 1979, if determined necessary by the Commission. Commission consideration of the rule on or before June 30, 1979.

Contact Person: Bernard J. Phillips (202) 523-1642; Bureau of Consumer Protection.

2. Reasonable Duties Under a Full Warranty, 42 Fed. Reg. 39223 (Aug. 3, 1977)

Commission consideration of the rule on or before June 30, 1979.

Contact Person: Jeffrey M. Karp (202) 523-1753; Bureau of Consumer Protection.

3. Funeral Industry Practices, 40 Fed. Reg. 39901 (Aug. 29, 1975)

Oral presentation if determined necessary by the Commission, and Commission consideration of the rule on or before February 28, 1979.

Contact Person: Michael Rodemeyer (202) 523-1753; Bureau of Consumer Protection.

4. Food Advertising (Phase I), 39 Fed. Reg. 39842 (Nov. 11, 1974); 41 Fed. Reg. 8980 (Mar. 19, 1976)

End of post record comment period on or before January 29, 1979. Oral presentation, before the Commission during May 1979, if determined necessary by the Commission. Commission consideration of the rule on or before June 15, 1979.

Contact Person: Judith A. Neibrief (202) 724-1496; Bureau of Consumer Protection.

5. Food Advertising (Phase II), 39 Fed. Reg. 39842 (Nov. 11, 1974); 41 Fed. Reg. 8980 (Mar. 19, 1976)

Commission consideration of staff recommendations to publish a revised proposed rule during January, 1979.

Contact Person: Judith A. Neibrief (202) 724-1496; Bureau of Consumer Protection.

6. Over-the-Counter Drugs, 41 Fed. Reg. 39768 (Sept. 16, 1976)

Publication of staff report on or before March 1, 1979. End of post record comment period on or before May 1, 1979.

Contact Person: Joel Brewer (202) 724-1530; Bureau of Consumer Protection.

7. Advertising for Over-the-Counter Antacids, 41 Fed. Reg. 14534 (Apr. 16, 1976)

Public hearings end on or before January 31, 1979. Rebuttal ends on or before March 31, 1979.

Contact Person: Joel Brewer (202) 724-1530; Bureau of Consumer Protection.

8. Hearing Aid Industry, 40 Fed. Reg. 26646 (Jan. 24, 1975)

End of post record comment period on or before February 19, 1979. Oral presentation before the Commission during June 1979 if determined necessary by the Commission. Commission consideration of the rule on or before July 15, 1979.

Contact Person: Robert Patterson (202) 724-1497; Bureau of Consumer Protection.

9. Credit Practices, 40 Fed. Reg. 16347 (Apr. 11, 1974)

Publication of staff report on or before April 15, 1979. End of post record comment period on or before June 15, 1979.

Contact Person: David H. Williams (202) 724-1100; Bureau of Consumer Protection.

10. Amendment to Preservation of Consumers' Claims and Defenses, 40 Fed. Reg. 53530 (Nov. 18, 1975)

End of post record comment period on or before January 24, 1979. Oral presentation before the Commission during April 1979 if determined necessary by the Commission. Commission consideration of the amendment on or before April 30, 1979.

Contact Person: Sarah Jane Hughes (202) 724-1567; Bureau of Consumer Protection

11. Children's Television Advertising, 43 Fed. Reg. 17967 (Apr. 27, 1978)

Commencement of legislative hearings in San Francisco on January 15, 1979. Continuation of legislative hearings in Washington, D.C. on March 5, 1979. Designation of disputed issues by the Commission on or before June 30, 1979.

Contact Person: Katherine Mazzaferri (202) 724-1499; Bureau of Consumer Protection.

12. Labeling and Advertising of Residential Thermal Insulation Materials, 42 Fed. Reg. 59678 (Nov. 18, 1977)

Commission consideration of rule on or before February 28, 1979.

Contact Person: Paul J. Petruccelli (202) 724-1508; Bureau of Consumer Protection.

13. Health Spas, 40 Fed. Reg. 34615 (Aug. 18, 1975)

Publication of Presiding Officer's report on or before May 1, 1979.

Contact Person: John Crowley (212) 264-7150; New York Regional Office.

14. Disclosure Requirements and Prohibitions Concerning the Flammability of Plastics, 39 Fed. Reg. 28292 (Aug. 6, 1974)

Commission consideration of whether to terminate this proceeding on or before March 30, 1979.

Contact Person: Kent C. Howerton (202) 724-1514; Bureau of Consumer Protection.

15. Appliance Labeling, 43 Fed. Reg. 21806 (July 21, 1978)

Publication of staff report on or before February 28, 1979. End of post record comment period on or before March 28, 1979. Oral presentation, before the Commission during June 1979, if determined necessary by the Commission. Commission consideration of the rule on or before July 15, 1979.

Contact Person: Andrew Wolf (202) 724-1453; Bureau of Consumer Protection.

16. Amendments to the Care Labeling of Textile Wearing Apparel, 41 Fed. Reg. 3747 (Jan. 26, 1976)

Oral presentation before the Commission during February 1979, if determined necessary by the Commission. Commission consideration of the rule on or before March 15, 1979.

Contact Person: Earl Johnson (202) 724-1362; Bureau of Consumer Protection.

17. Octane Posting, 43 Fed. Reg. 34028 (Sept. 22, 1978)

End of post record comment period on or before January 29, 1979. Oral presentation before the Commission during February 1979 if determined necessary by the Commission. Commission consideration of the rule on or before February 28, 1979.

Contact Person: James Mills (202) 724-1967; Bureau of Consumer Protection.

18. Standards and Certification, 43 Fed. Reg. 57269 (Dec. 7, 1978)

Written comment period ends March 16, 1979. Public hearings commencing on April 30, 1979 in San Francisco on or before May 21, 1979 in Washington, D.C.

Contact Person: Robert J. Schroeder (202) 523-3936; Bureau of Consumer Protection.

19. Mobile Home Sales and Service, 40 Fed. Reg. 28334 (May 29, 1975)

Publication of Presiding Officer's report on or before April 30, 1979.

Contact Person: Pamela Stuart (202) 523-3933; Bureau of Consumer Protection.

20. Amendment to Games of Chance in Food Retailing and Gasoline Industries, 43 Fed. Reg. 48654 (Oct. 19, 1978)

Publication of staff report on or before April 15, 1979. Publication of Presiding Officer's report on or before June 1, 1979. End of post record comment period on or before July 1, 1979.

Contact Person: Noble F. Jones (216) 552-4207; Cleveland Regional Office.

21. Advertising and Labeling of Protein Supplements, 40 Fed. Reg. 41144 (Sept. 5, 1975); 41 Fed. Reg. 22593 (June 4, 1976)

Publication of staff report on or before April 1, 1979. End of post record comment period on or before June 1, 1979.

Contact Person: Karen Chandler (414) 556–1270; San Francisco Regional Office.

By the Commission dated December 29, 1978.

CAROL M. THOMAS, *Secretary.*

PUBLIC PARTICIPATION

Question. Please describe your past and present procedures for screening individual applicants for public participation funds. Also, briefly describe the intent of this program.

Answer. The Commission's General Counsel, who has no responsibility for the presentation of the rule to the Commission, administers the program and makes all decisions on the eligibility of applicants for reimbursement of their costs of participation. Before September 1978 the program was located in the Bureau of Consumer Protection, and the Director of that Bureau made the final determinations. Eligibility is based on whether participants in Commission rulemaking proceedings

(1) have or represent an interest which would not otherwise be adequately represented in the proceeding;

(2) have an interest, representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole; and

(3) are unable to participate effectively in the proceeding without reimbursement.

To insure that applicants approved for reimbursement of their costs meet these statutory requirements, the General Counsel requires information on the applicant's ability to pay for the costs of its presentation, to describe the nature of its contribution to the proceeding and to determine whether that interest is necessary for a fair determination of the proceeding taken as a whole or any of its major issues. The Presiding Officer, as required by Rule 1.17, makes an initial recommendation on the application. The application is then reviewed by a series of Commission officials before the General Counsel makes his final decision.

The premise underlying this program is that effective public participation in government decisionmaking is critically important. Without it, citizens are powerless to affect government decisions that may have dramatic impact on their lives, but meaningful participation in agency decisions is expensive, and until now only well-funded interests could afford to muster facts and make arguments in support of their points of view. Congress sought to correct this imbalance by directing the Federal Trade Commission to reimburse qualified participants, including small businesses and consumers, for their costs of participation in its rulemakings.

The FTC's reimbursement program has ensured that traditionally unrepresented citizens' interests have the means for adequate presentations. The Senate Committee on Governmental Affairs' July 1977 Study on Federal Regulation (Vol. II, p. 118) cited the effectiveness of the reimbursement program, and the Moss Report on Federal Regulation and Regulatory Reform (September 1976) agreed with this assessment.

The attached letter from Senators Magnuson and Kennedy elaborates on the congressional intent of the FTC's statutory authority for this program.

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE,
Washington, D.C., October 27, 1976.

MS. MARGERY WAXMAN SMITH,
Acting Director, Bureau of Consumer Protection,
Federal Trade Commission,
Washington, D.C.

DEAR MS. SMITH: As senators who have long maintained an interest in the activities of the Federal Trade Commission, we welcome this opportunity to comment on the Commission's proposed guidelines for compensation of consumer representatives who participate in rulemaking proceedings. In our respective capacities as Chairman of the Senate Commerce Committee and as Chairman of the Senate Judiciary Subcommittee on Administrative Practice and Procedure, we are especially interested in seeing that the Commission gives full effect to the spirit and intent of those provisions of the FTC Improvement Act which govern citizen participation.

Section 202(h) of that Act constituted an important first step in what has become a major congressional effort to promote fuller participation by representatives of the general public in proceedings before all agencies of the Federal Government. Some

agencies, even without specific statutory direction, have initiated or proposed their own compensation programs to aid public participants in their proceedings. Among these are the Consumer Product Safety Commission, the National Science Foundation, and, just recently, the Food and Drug Administration. The Environmental Protection Agency was given authority to make free awards under the recently enacted Toxic Substances Act. Other aencies, including the Nuclear Regulatory Commission, are expected to initiate such programs in the near future. Provision of financial assistance to public participants in federal agency proceedings is, we believe, a practice that should and will be expanded.

Congress, for its part, has begun to respond to suggestions by many citizens and agencies—and in particular the General Accounting Office—to delineate the kinds of criteria agencies ought to employ to determine which citizen representatives should receive compensation and for which kinds of activities. Clearly, then, the experience of the Federal Trade Commission in administering the compensation provisions of the FTC Improvement Act will have great impact on the future course of public participation in agency proceedings.

We have now completed a review of the proposed guidelines. In general, we feel that the Bureau should be commended for the comprehensiveness of its proposal and for its overall efforts to effectuate the expressed will of Congress in its initial attempt to provide for effective representation of citizen interests within a federal agency. We realize that the paucity of legislative history accompanying the adoption of Section 202(h) makes it somewhat difficult to determine the exact parameters of the compensation program Congress intended the Commission to institute, and we therefore support the Bureau's efforts to adopt a generally broad program consistent with the spirit as well as specific requirements of the Act. We do feel, however, that in some instances the proposed guidelines reflect too narrow an interpretation of the Act; these are noted below.

Several interpretations given to the FTC Improvement Act in the proposed guidelines are particularly faithful to the overall purposes of the statute. We recognize, for the overall purpose of the statute. We recognize, for example, the generalized need for the Bureau to inquire into the particular abilities of an applicant for compensation in order to determine whether it will in fact be able to provide effective advocacy for the interest it seeks to represent. In addition, we agree that an applicant which is deemed capable of making a significant contribution to a Commission proceeding should receive compensation even though, by itself, its participation may not make representation of the interest completely adequate. The "significant contribution" test enunciated by the Bureau on page 23 of the proposed guidelines is an appropriate one to be utilized in these circumstances, and favored by many members of Congress. (See especially the discussion of S. 2715 in Senate Report 94-863, at p. 19.)

Furthermore, we can appreciate the reasons for the Bureau's stated desire to give preference to applicants who define their interest or point of view with specifically, as opposed to funding groups which merely claim to represent "all consumers." The Bureau correctly recognizes that not all consumer interests are identical, and that in many cases it may be desirable to compensate several consumer groups who may represent somewhat differing well-defined points of view. This would insure that the Commission, in conformity with the purpose of the Act, is presented with a wide range of viewpoints that will enable it to reach an informed decision.

Care should be taken, however, to insure that this concern for specificity of viewpoint does not become a bias toward groups with narrow constituencies. We believe that the size or diversity of a group's constituency—even in cases where a group claims to represent "all consumers"—does not presumptively diminish its ability to define with specificity its interest in a given proceeding. The guidelines state the broad consumer represenatation by a single group is preferable to none. While we essentially support this view, we would urge that the breadth of representation an applicant seeks to provide be deemed a minor factor in deciding whether it should receive compensation.

The rationale for providing advance compensation to consumer groups to enable them to participate in a proceeding is another area in which the Bureau has evidenced a commitment to fulfilling the purposes of the FTC Improvement Act. The Bureau correctly notes that the entire thrust of the compensation program is to aid persons who could not otherwise participate in a proceeding. This certainly implies that they would be unable to participate unless they receive advance disbursement of funds to which the Bureau has determined they are entitled. Indeed, it may well be that the great majority of citizens groups will be unable to participate in proceedings without advance payments. For those applicants who are able to sustain their participation pending reimbursement, however, it is our belief that the

guidelines should also set forth a specific timetable as to when they can expect to be reimbursed following the conclusion of their proceedings. (See, for example, § 2(f)(2) of S. 2715).

We also feel that the Bureau should be concerned with giving qualified applicants the earliest possible notice of the level of compensation they are to receive. It is unrealistic to expect public participants to be able to make effective presentations unless given sufficient time in which to prepare. The guidelines should therefore reflect a greater urgency on the part of the Bureau in reaching decisions on applications. They should also establish a minimum amount of "lead time" between notice to the applicant of its approved level of compensation and the commencement of the proceeding itself.

We differ with the Bureau's interpretation of the statute in several respects:

1. *The FTC Improvement Act does not preclude the Commission from providing compensation to approved participants for expenses involved in petitioning the Commission to initiate the rulemaking proceeding in which they participate.*

This is our most serious area of disagreement with the Commission's interpretation of the statute. While providing reimbursement for the expenses incurred in all rulemaking petitions, successful or unsuccessful, could multiply frivilous applications, we do not believe that reimbursing successful petitioners would "create a lottery effect that would encourage hard-pressed organizations to gamble funds in the hope of ultimate compensation." And most emphatically, we do not believe that such a rule would tend to "guarantee seriousness of interest and purpose and discourage speculative requests." The Bureau offers no evidence to support either contention.

In our view, Congress clearly intended that participants could be compensated for costs incurred in petitioning for rulemaking. This interpretation is supported by two portions of Section 202(h)(1). The first relates to the words ". . . costs of participating in a rulemaking proceeding under this section. . . ." The term "rulemaking proceeding" is defined by Section 551 (5) and (12) of the Administrative Procedure Act (Title 5, U.S. Code), read together. It means any "agency process for formulating, amending, or repealing a rule." A rulemaking proceeding therefore encompasses the entire process within an agency by which it is determined that rulemaking in a particular area should be commenced. One aspect of this process is the receipt and consideration by an agency of a rulemaking petition submitted by an interested person. Such a petition is an integral part of the agency's rulemaking process, part of the "proceeding," and expenses incurred in its preparation should therefore be compensable.

This interpretation is further buttressed by subsection (h)(1)(A)(ii), which permits compensation for representation of an interest "necessary for a fair determination of the rulemaking proceeding *taken as a whole.*" The phrase we have emphasized indicates that compensation awards should be made where the interest represented contributes to a fair resolution of the issues involved in the entire agency process, including that leading up to the formulation of a rule. This would certainly include the contribution of a participant whose efforts resulted in the Commission's undertaking the proceeding in the first place. In sum, we do not believe that the FTC Improvement Act can or should be read so narrowly as to exclude reimbursement for the costs of successful petitions to initiate a rulemaking proceeding.

2. *The FTC Improvement Act does not "raise questions about the Commission's authority to compensate an applicant with substantial resources which are being devoted to other causes." (p. 30)*

The statute, by its very language, is concerned solely with the necessity for representation of a particular interest or interests in a given proceeding. It does not require the Bureau to make judgements as to the value of an applicant's commitment of its own resources to *other* issues or endeavors. All the Bureau is required to do, once it has determined that an applicant represents an interest that would not otherwise be adequately represented and which is necessary for a fair determination of the proceeding, is to judge whether or not the applicant is able—based on its resources then available—to afford the costs of effective participation.

We do not challenge the Bureau's assetion that although "the statute is phrased in terms of the inability of the applicant, not the inability of the interest, to pay for participation, . . . it is essential to examine the position of the interest underlying the application." (p. 30.) Certainly it is appropriate for the Bureau to examine the relationship between the applicant and the interest to determine whether the interest could legitimately be expected to finance the applicant's participation. This does not mean, however, that the Bureau must consider the wisdom or utility of an applicant's involvement in areas unrelated to the subject proceeding as a factor in determining the applicant's eligibility for compensation.

Indeed, the Bureau itself seems to recognize the futility of trying to engage in such exercises when it notes exceptions to these rules for situations involving large total stakes divided among many separate individuals, or the special problems presented by established groups which may receive substantial funding from independent sources. We therefore agree with the Bureau's statement, on p. 33, that a group can be eligible to receive compensation even though it has devoted substantial resources to other causes. In our view, the statute cannot be interpreted to mean otherwise.

3. *The willingness of an applicant to spend some of its own money on a proceeding should not be a consideration in determining whether it is to receive funds under the compensation program.*

While we recognize that an applicant's willingness to expend some of its own funds may indicate that it believes the issue in which it seeks to become involved is significant to the interest it represents, we think this factor bears little relevance to its overall commitment. The limited funds on which most citizen groups operate hardly make their willingness to contribute some of these funds a dispositive indication of their seriousness of purpose. Indeed, this situation was a primary factor in motivating Congress' establishment of an FTC compensation program in the first place. An applicant should not, in effect, be penalized for stating, that it would be wholly unable to participate without receiving full compensation from the Commission.

4. *The Bureau should not assume that individual persons cannot meet the statutory criteria for compensation under the Act.*

The Administrative Procedure Act, as well as the FTC Improvement Act, clearly contemplate that an individual who is not part of any organized group should be able to participate in agency proceedings. Indeed, the very definition of "person" in Section 551(2) of the APA (not to mention the meaning of the word in common parlance) encompasses individuals. The central factor for the agency to consider, then, is not the numerical strength of the "person," but the nature of an its relationship to the interest sought to be represented. This would include in particular an individual's ability to provide effective representation for the interest.

An individual seeking to participate as a party to a rulemaking proceeding should not presumptively be relegated to the role of "expert" or "consultant." Compensation is to be provided under the Act to representatives of interests which ought to be heard in the context of a proceeding. Individuals may well be able to fulfill this role—particularly where no organized group is seeking to represent the interest.

Individual participants are not necessarily witnesses. They may be legitimate representatives of interests which need to be considered. As such, Commission programs to defray their travel or incidental expenses may be totally inadequate to their needs. The FTC Improvement Act clearly contemplates that individuals may be able to make significant contributions to agency proceedings, and that they may require substantial financial assistance in order to do so. Absent any specific indication in the Act's legislative history of Congress' intention to exclude their participation, the Bureau should give full consideration to their applications for compensation.

Again, we want to express our thanks to the Bureau for giving us this opportunity to comment on the proposed guidelines. We know that our views will be given full consideration by the Commission in developing final rules to implement the compensation program, and we would be happy to elaborate on any of the points we have raised.

Sincerely,

WARREN G. MAGNUSON,
Chairman, Commerce Committee.

EDWARD M. KENNEDY,
Chairman, Subcommittee on Administrative Practice and Procedure.

Question. The Commission has entered into public participation agreements totaling $1,866,126 since 1976. Have you performed financial audits on these funds? Please describe. Have you performed program audits on these agreements? How do you assess whether these public participants have been of value to a particular proceeding?

Answer. With regard to financial audits, when funding is approved for public participation in the rulemaking process, the participant receives a budget document from the FTC that specifies the portions of the proposed work which have been approved for funding and specifies the amount of funding associated with those activities. The participant is issued written guidelines which describe categories of allowable costs and the requirements for maintaining accounting records covering the receipt and expenditure of those funds.

Claims for reimbursement are first reviewed by the Office of the General Counsel to ascertain the appropriateness and reasonableness of the items of expense claimed. If approved for payment, the claim is processed by the Division of Budget and Finance in accordance with standard invoice audit and payment procedures.

As a final check, the FTC has assigned one full workyear to perform complete field audits on rulemaking agreements with public participants. This includes an in-depth review of the participant's financial management system and the documentation supporting the cost claims made against the subject agreements. As of May 1, 1979, audits of 25 of the approximately 87 agreements working since the program's inception have either been completed or are in progress. It is our intention to audit all rulemaking agreements.

Presently procedures for formal program audits are being developed to evaluate performances of each reimbursed participant. These procedures are being prepared in compliance with a committee directive and should be completed in July 1979. In the meantime, the value of the public participants to a particular rulemaking proceeding is assessed by means of discussions by the Special Assistant for Public Participation and the Presiding Officers and staff attorneys. In addition, to the extent possible, hearing transcripts and written submissions have been reviewed for this purpose. These performance evaluations are considered when a participant wishes to reapply for further participation.

Question. How do you determine whether a particular group is able to participate in more than one rulemaking at a time?

Answer. To determine whether a particular group is able to participate in more than one rulemaking at a time, the General Counsel's Office examines the level of proposed participation, and the personnel to be involved. The General Counsel also compares the timing of the involvement with the commitment to other proceedings. For example, in another proceeding there may be no opportunity for public involvement for some months because the Presiding Officer or staff may be preparing post-hearing reports. Thus, although a group is technically involved in one proceeding, it still may have the time and personnel to devote to another proceeding.

Question. Chairman Pertschuk. You stated, before the Senate Government Affairs Committee, in your prepared testimony before this Committee, that eight small business groups have applied for or received participation funds. Please name these groups, the status of their applications and which proceedings they are interested in participating.

Answer. As of May 25, 1979, sixteen small business groups have received public participation funds. They include:

American Council of Independent Laboratories, Inc. (Standards)

American Federation of Small Business (Standards)

Artists Equity Association (Standards)

Chanter, Warren J. (Standards)

Council of State Credit Institutes (Credit Practices)

Cremation Association of North America (Funeral Industry)

Electronic Specialists, Inc. (Standards)

Fitzgerald Management Corporation (Standards)

Min-Ell Company (Standards)

National Association of Home Insulation Contractors (Thermal Insulation)

National Hearing Aid Society (Hearing Aids)

National Manufactured Housing Federation (Mobile Homes)

Pre-Arrangement Interment Association of America (Funeral Industry)

Ream, Norman J. (Standards)

SAS Corporation (Standards)

Specialty Equipment Manufacturers Association Foundation, Inc. (Standards)

Six applications from business interests are pending: Specialty Equipment Manufacturers Association (Standards); National Selected Morticians (Funeral Industry); Johnson Gage Company (Standards); Association of Computing Machinery (Standards); Southern Building Code Congress International (Standards); and Colorado Masonry Institute (Standards).

Question. Mr. Chairman: In your prepared statement you cite the presiding officer in the food advertising proceeding as complimenting one of the publicly funded participants. However, in the Children's Advertising rule, the presiding officer, commented on the deficiencies of three of the publicly funded participants: the Safe Food Institute; the Community Nutrition Institute, and; the Society for Nutrition Education. How can the Commission prevent public participants from presenting

information which is not useful or in useful form? Can the Commission *ever* be expected to do this?

Answer. The Commission uses its application review process to insure that public participation funds are provided only to qualified groups and only for worthwhile projects. As we have noted in previous testimony and in responses to other questions, the General Counsel screens carefully each proposed expenditure of public participation funds. The presiding officer evaluates each proposed expenditure to determine whether or not it will provide information not otherwise available and be of assistance to the presiding officer and ultimately the Commission in making an informed decision on a need for the rule.

Of course, the real value of any proposed evidentiary submission cannot be evaluated fully until it is introduced into the record and the presiding officer, the staff, and the other interested parties have had an opportunity to examine and rebut the evidence submitted.

In the past, if a publicly funded group has not made a substantial contribution to a rulemaking proceeding, the Commission has weighed that fact in its determination with respect to a subsequent application for funds by that same group. As your Committee's report on our authorization directs, we are in the process of institutionalizing that procedure so that any subsequent application by a previously funded group will be evaluated in part on the basis of the quality of participation by that group in previous proceedings. We believe this procedure will increase the likelihood that publicly funded groups provide information which is useful to the Commission decisionmaking process.

Question. Please list all persons who have received compensation under Section 202(h) of the Improvement Act from fiscal year 1976 to May 15, 1979.

Answer. See attachments.

ACTION FOR CHILDREN'S TELEVISION
46 Austin Street
Newtonville, Massachusetts 02160
(617) 527-7870

PRINCIPAL OFFICERS AND EMPLOYEES:

President:	Ms. Peggy Charren
Executive Director:	Ms. Deborah First
Editor:	Ms. Maureen Harmonary
Project Director:	Ms. Jean Johnson
Community Outreach:	Ms. Susan Kaplan
Staff Attorney:	Ms. Molly Pauker
Legal Assistant:	Ms. Nancy Dietz
Assistant Staff Attorney:	Ms. Sara Trafton

and 12-15 other staff members, including Mr. Robert Krock and Ms. Natalie Rothstein.

BOARD OF DIRECTORS:

Edward L. Bernays
Peggy Charren
Nancy Codispoh
Dorothy Forbes
Christine Freedberg
Earl K. Moore
Priscilla Moulton
Robert O'Brien
Daniel Phillips
Chester Pierce
Frances Pratt
Student Members: Lawrence Dore
Deborah Selig

ADVISORY BOARD:

Charles Benton
John Condry
Joan Ganz Cooney
John Culkin
Richard Galdston
Chester Pierce
Hyman Golden
LaDonna Harris
Mary Gardiner Jones
Kenneth Kenington
Theodore Ledbetter
Letty Pogrebin
Albert Solmit
Elma Lewis
Richard Lewis
Maria Manner
Earl Moore
Grace Olivarez
Fred Rogers

Dues paying membership of approximately 13,000.

AMERICAN COUNCIL OF INDEPENDENT
LABORATORIES, INC.
1725 K Street, N.W.
Washington, D.C. 20006
(202) 659-3766

PRINCIPAL OFFICERS AND EMPLOYEES:

Volunteers:

Executive Committee President:	Mr. Harry Czyzewski
President-Elect:	Mr. Roger J. Amorosi
Secretary:	Mr. Ronald L. Harris
Treasurer:	Mr. Conway C. Burton
Past-President:	Mr. W.K. Johnson
Division Representatives:	Mr. Robert N. Corning
	Mr. Robert B. Bledsoe
	Mr. Richard T. Kanemaser
	Mr. Earl H. Hess

Chief Paid Official:

Executive Secretary: Mr. Douglas Dies

BOARD OF DIRECTORS:

Same as above.

Dues paying membership of approximately 211.

AMERICAN FEDERATION OF SMALL
BUSINESS
407 South Dearborn Street
Chicago, Illinois 60605
(312) 427-0207

PRINCIPAL OFFICERS AND EMPLOYEES:

See listing for Board of Directors.

BOARD OF DIRECTORS:

President:	Mr. James T. Little (In.)
Vice-Presidents:	Mr. Ira H. Latimer, Executive
	Mr. Edwin M. Blanchard (Ia.)
	Mr. William S. Compton (WV)
	Mr. Brooks Mellecker (Ar.)
Secretary:	Ms. Mary O'Brien
Treasurer:	Mr. Elmore Le Grand
Assistant Secretary-Treasurer:	Mr. Thomas H. Latimer
Counsel:	Mr. Melvin A. Brandt
Directors:	

Grover D. Allen (Wy.)
Jerome Berens (Il.)
Elbert Bicknell (NH)
Dave Black (Or.)
Carrell R. Blakely (Ks.)
Hubert L. Blanton (Ar.)
Frank Blevins (Tn.)
Edward L. Bonewitz (Ia.)
Roy F. Broyhill (Ne.)
Edward Buckland (Wi.)
William W. Bullock (Ut.)
Jack Burgess (Tx.)
G.F. Callahan, Jr. (Pa.)
Raymond Campbell (Va.)
William B. Carson (Fl.)
Galen L. Cole (Me.)
Orlin J. Conlon (Ia.)
Carlo Di Cicco, Jr. (Il.)
Hon. Paul Dietrich (Mo.)
Roy E. Dunn (Ks.)
Gene G. Eidem (Ak.)
William R. Eisele (Oh.)
W.J. Gerhold, Jr. (Ne.)
Patrick Gibbons (Il.)
Powell Glass, Jr. (Va.)
Roy Griffith (Tx.)
Frank Irey, Jr. (Pa.)
Edward D. Johnson (Mi.)
Thaddeus Kaminski (Il.)
Ira V. Lay, Jr. (Tn.)
Mrs. Elsie T. Lowe (Il.)
John Lunenschloss (Wi.)
Franklin L. Martin (Ca.)
John Mayfield, Jr. (Ms.)
K.J. Meyer (Ia.)
Donald L. Miller (D.C.)
R.D. Munger (Ar.)
Fermin Pacheco (NM)
James Pluymert (Il.)
Bob Pope (Fl.)
William V. Ritchie (Ca.)
Mercedes Robbert (Oh.)
Fred R. Sikyta (Ne.)
John W. Spear (Ca.)
William V. Stewart (Mn.)
Charles W. Stratton (Ky.)
H.B. Stroup, Jr. (NC)
Humphrey H. Swift (Ma.)
Bob Thompson (Tx.)
L.C. Trumbo (Tn.)
Jay Van Andel (Mi.)
Charles Williams (Ga.)
Walter A. Winter (Or.)
William H. Wood (Fl.)
Frederick K.S. Yee (Hi.)
J.L. Young (In.)

AMERICAN FEDERATION OF SMALL
BUSINESS [Cont'd]

Advisory Board:

Rep. Mark Andrews (ND)
Rep. Bill Archer (Tx.)
Rep. Robert E. Badham (Ca.)
Rep. L.A. "Skip" Bafalis (Fl.)
Rep. Robin Beard (Tn.)
Rep. John Breaux (La.)
Rep. William S. Broomfield (Mi.)
Hon. Omar Burleson (Tx.)
Rep. Tim Lee Carter (Ky.)
Rep. Bill Chappell (Fl.)
Hon. Donald D. Clancy (Oh.)
Rep. James C. Cleveland (NH)
Senator Thad Cochran (Ms.)
Rep. Robert Daniel, Jr. (Va.)
Rep. Samuel L. Devine (Oh.)
Herman H. Dinsmore (Tn.)
Senator Pete V. Domenici (NM)
Hon. Thomas N. Downing (Va.)
Hon. John J. Flynt, Jr. (Ga.)
Rep. Barry Goldwater, Jr. (Ca.)
Rep. Charles E. Grassley (Ia.)
Rep. Sam B. Hall, Jr. (Tx.)
Rep. John Hammerschmidt (Ar.)
Rep. George Hansen (Id.)
Senator Orrin B. Hatch (Ut.)
Senator Jesse Helms (NC)
Rep. Marjorie S. Holt (Md.)
Mayor William Hudnut (In.)
Rep. Richard H. Ichord (Mo.)
Rep. Jack Kemp (NY)
Howard Kershner (Tx.)
Hon. Phil M. Landrum (Ga.)
Rep. Delbert L. Latta (Oh.)
Rep. Norman F. Lent (NY)
Rep. Robert L. Livingston (La.)
Rep. Trent Lott (Ms.)
Rep. Dan Marriott (Ut.)
Rep. Dawson Mathis (Ga.)
Rep. Larry P. McDonald (Ga.)
Rep. Carlos J. Moorhead (Ca.)
Rep. G.V. Montgomery (Ms.)
Rep. John T. Myers (In.)
Hon. W.R. Poage (Tx.)
Rep. John J. Rhodes (Az.)
Rep. John H. Rousselot (Ca.)
Rep. Harold Runnels (NM)
Rep. Richard T. Schulze (Pa.)
Rep. E.G. Bud Shuster (Pa.)
Rep. Keith G. Sebelius (Ks.)
Rep. Virginia Smith (Ne.)
Rep. Gene Snyder (Ky.)
Rep. Gene Taylor (Mo.)
Rep. Guy Vander Jagt (Mi.)
Hon. Joe Waggoner, Jr. (La.)
Rep. G. William Whitehurst (Va.)
Rep. Jamie L. Whitten (Ms.)
Rep. Larry Winn, Jr. (Ks.)
Rep. John W. Wydler (NY)

Dues paying membership of approximately 3000 (optional).

ARIZONA CONSUMERS COUNCIL
1678 North Country Club
Tucson, Arizona 85716
(602) 327-2661

PRINCIPAL OFFICERS AND EMPLOYEES:

President:	Mr. Currin Shields
Vice Presidents:	Mr. Coldes Campbell
	Mr. Jeri Fornana
	Mr. Michael Morris
	Ms. Phyllis Rowe
	Mr. Albert Sterman
	Mr. Joseph Zashin
Secretary:	Mr. Joseph Montoya
Treasurer:	Ms. Aurora Pena

BOARD OF DIRECTORS:

Jo Ann Barnicle	Rose Hamill
David Berman	Frances Haworth
Frances and Robert Chasson	Emma Kemper
Lawrence DeLeon	Senator Manuel Pena
W.J. Eden	Ida T. Power
Otis Elliot	Sharon Riwt
Eugene Fifield	Margery Shields
Barbara Fisher	William Swineford
Geaning Gilmartin	C. Van Haaften
Rachelle Hall	Roger Yanlez

Danny Valenzuela

Dues paying membership of approximately 800 members.

ARKANSAS COMMUNITY ORGANIZATIONS
FOR REFORM NOW
523 W. 15th Street
Little Rock, Arkansas 72202
(501) 376-7151

PRINCIPAL OFFICERS AND EMPLOYEES:

There are 15 full-time staff, including:

Staff Director:	Mr. Wade Rathke
Project Director:	Mr. Kenneth L. Schoor, Esq.

EXECUTIVE BOARD:

There are 32 affiliate organizations. One member from each organization is represented on the Board. These organizations include:

Nine-Seventeen Community Organization
East End Drive
MacArthur Park Neighborhood Association
Oak Forest Property Owners Association
Garden Homes Community Organization
Oak Hurst Community Organization
Mills Expressway Residents Committee
South Highlands Community Improvement Organization
Woodrow to Pine Neighborhood Organization
Lawson Community Improvement Organization
Hemlock Courts Welfare Rights Organization
Shorter Gardens Community Organization
Centennial Neighborhood Action Group
Eastgate Terrace Welfare Rights Organization
Levy Community Organization
Jefferson County Improvement Organization
Dollarway Improvement Group
Hoboken Community Improvement Organization
ACORN Women for Action
Ragon Homes Improvement Association
Elm Grove Community Organization
Bonneville Neighborhood Association

and others.

Dues paying membership of approximately 5000.

ARKANSAS CONSUMER RESEARCH
1919 W. 7th Street
Little Rock, Arkansas 72202
(501) 374-2394

PRINCIPAL OFFICERS AND EMPLOYEES:

Executive Director:	Mr. Fred Cowan
Assistant Director:	Mr. Glenn Nishimura
Citizens Utility Project Coordinator:	Mr. Tim Holcomb
Food Project Coordinator:	Ms. Judy Thurmond
Food Research Associate:	Ms. Carolyn Gettler
Membership Director:	Ms. Pam Brewer
Membership Drive Coordinator:	Ms. Nan Brown

BOARD OF DIRECTORS:

President:	Mr. Hurley M. Jone
Vice-President:	Mr. Mart Vehik
Secretary-Treasurer:	Ms. Linda Bilheimer
Members:	Ms. Daphne Doster
	Ms. Kay Lavey
	Mr. R. David Lewis
	Ms. Virginia Williams

Dues paying membership of approximately 700 members.

45-804 O - 79 - 6

ARTISTS EQUITY ASSOCIATION
3726 Albemarle Street, N.W.
Washington, D.C. 20016
(703) 987-8386 (contact)

PRINCIPAL OFFICERS AND EMPLOYEES:

See listing for Board of Directors.

BOARD OF DIRECTORS:

Executive Director:	Ms. Gail Rasmussen
President:	Ms. Gilda Ellis
Secretary-Treasurer:	Mr. Michael C. Gast
Vice-Presidents:	Mr. Richard Mayer (West Coast)
	Mr. Barnard Perlman (East Coast)
	Mr. Dick Strome (Rocky Mountains)
	Mr. M.C. Anderson (North Central)
	Ms. Marlene Matelon (South Central)

Chapter Presidents (20):

Barbara Arens	Dorothy Harroun
Toinette Laurant	Peter Edmunds
Vera Selts	Harlon Lizer
Gwen Mathis	Jim Minden
Frank Meyer	Susan Swinend
Herb Tulk	Pat Warner
Fred Herlest	John Schrup
Phyllis Parun	Eugene Mackaven
William Pelham	Robert Cohen
John DeGroot	Eula Benefiel

Artists Equity is the only national artists organization. It has 3000 members coast-to-coast. Dues paying membership consisting of associate members and active (voting) members.

AUTOMOBILE OWNERS ACTION COUNCIL
1411 K Street, N.W., Suite 800
Washington, D.C. 20005
(202) 638-5550

PRINCIPAL OFFICERS AND EMPLOYEES:

President:	Mr. Archie Richardson
Executive Director:	Mr. William C. Parker
Director of Research and Special Projects:	Mr. D. Paul Sondel
Director of Complaints Processing:	Ms. Catherine Harris

plus 5 investigators and 2 research assistants and administrative personnel.

BOARD OF DIRECTORS:

Chairman of the Board:	Mr. Archie Richardson
General Counsel:	Mr. Stephen D. Keefe
Secretary of the Board:	Ms. Krista Richardson
Board Members:	Baron Lyhme
	John Donnelly
	Rufus King
	Murray Meeker
	Ralph Rohner
	Isaac Hunt

Dues paying membership of approximately 2300 servicing (active) members and approximately 500 supporting members.

CALIFORNIA CITIZEN ACTION GROUP
909 12th Street
Sacramento, California 95814
(916) 446-4931

PRINCIPAL OFFICERS AND EMPLOYEES:

Executive Director:	Mr. Ray Bonner
Project Directors:	Mr. Brad Michaelson
	Ms. Lynn Morris
	Mr. Michael Schulman
	Mr. Roy Alper

BOARD OF DIRECTORS:

Dorothy Jonas
Kimi Klein
Regine Mitchele
Don Rothenberg
Harry Snyder

The current constituency does not include a dues paying membership on a regular basis.

CALIFORNIA PUBLIC INTEREST
RESEARCH GROUP
3000 E Street
San Diego, California 92102
(714) 236-1508

PRINCIPAL OFFICERS AND EMPLOYEES:

Executive Director: Ms. Christine Walker

Staff consists of 10 people.

BOARD OF DIRECTORS:

John Gavares, Chairman
Barbara Christiansen
Steve Young
Julie Mattern
John Sturdevant
Neil Evans

Dues paying membership consisting of approximately 100 members.

CalPIRG also has 10,000 student members at the University of California at San Diego; 4000 at the University of San Diego; and 3500 at the San Diego State University.

CENTER FOR AUTO SAFETY
1223 Dupont Circle Building
Washington, D.C. 20036
(202) 659-1126

PRINCIPAL OFFICERS AND EMPLOYEES:

Executive Director:	Mr. Clarence M. Ditlow III
Mobile Homes Project Director:	Ms. Katherine Meyer
Staff Researcher:	Mr. John Hubbard
Staff Attorney:	Mr. Matthew Finucane

and a total of 14 other employees.

BOARD OF DIRECTORS:

Clarence M. Ditlow III
Ben Kelley
Congressman Rosenthal
James Fitzpatrick, Esq.
Professor Donald E. Schwartz

A membership drive has just begun and so far 350 members have joined the Center.

CENTER FOR OCCUPATIONAL HAZARDS,
INC.
Art Hazards Project
5 Beekman Street
New York, New York 10038
(212) 227-6220

PRINCIPAL OFFICERS AND EMPLOYEES:

Executive Director:	Mr. Michael McCann
Information Center Director:	Ms. Monona Rossol

BOARD OF DIRECTORS:

Alan Hart
Peter Leggieri
Michael McCann
Monona Rossol
John Repaci

The Center has over 200 regular subscriber-members.

CENTER FOR PUBLIC REPRESENTATION
520 University Avenue
Madison, Wisconsin 53703
(608) 251-4008

PRINCIPAL OFFICERS AND EMPLOYEES:

Executive Director:	Ms. Louise Trubek
Co-Director:	Mr. Gerald J. Thain

BOARD OF DIRECTORS:

President:	Mr. Joel Grossman
Vice-President:	Ms. Gilda Shellow
Secretary-Treasurer:	Mr. Joseph Sensenbrenner
Assistant Secretary-Treasurer:	Rev. Willis J. Merriman
Other Members:	
Irven Charney	Percy Julian
Nan Chaney	Dorothy Lageroos
Adrian Cohen	Dr. Esther Pacht
Camille Haney	Mary Ann Perga
Herbert Hill	David Saichek
	June Weisberger

Does not have a dues paying membership but, rather, voluntary contributions from individuals. These memberships are annual and currently number over 400.

CENTER FOR SCIENCE IN THE
PUBLIC INTEREST
1757 S Street, N.W.
Washington, D.C. 20009
(202) 332-4250

PRINCIPAL OFFICERS AND EMPLOYEES:

President:	Mr. James Sullivan
Secretary-Treasurer and Executive Director:	Mr. Michael Jacobson
Principal Employees:	Ms. Patricia Hausman
	Ms. Bonnie Liebman
	Ms. Letilia Brewster

and others.

BOARD OF DIRECTORS:

Mark Ivener, Esq.
Michael Jacobson, Ph.D.
Ken Lasson, Esq.
James Sullivan, Ph.D.
Lucy Waletzky, M.D.

Dues paying membership of approximately 10,000.

COMMITTEE FOR CHILDREN'S
TELEVISION--South
245 So. Carmelina
Los Angeles, California 90049
(213) 476-5181

PRINCIPAL OFFICERS AND EMPLOYEES:

Executive Director: Ms. Sally Williams

STEERING COMMITTEE:

Director: Ms. Alice Aspen March
Members: Dr. Mary Conley
Ms. Maurine Dunoff
Mr. Charles Firestone
Mr. Mark Glazer
Dr. Lynn Gross
Ms. Adelina Ledesma Gutweiler
Dr. Joseph Madonia
Ms. Elaine McAloon
Dr. Thomas Mintz
Ms. Collette North
Ms. Bonnie Oliver
Ms. Eleanor M. Rafn
Ms. Helen Weber

The Committee does not have among its constituency a dues paying membership. It does have fundraisers and grants.

COMMUNITY NUTRITION INSTITUTE
1146 19th Street, N.W.
Washington, D.C. 2-036
(202) 833-1730

PRINCIPAL OFFICERS AND EMPLOYEES:

Acting Managing Director:	Mr. Rob Stein
Administrative Director:	Ms. Dorothy W. Ott
Director, Consumer Division:	Ms. Ellen Haas
Director, Division of Hunger Action:	Mr. Bard Schollenberger
Editor of CNI Weekly Report:	Mr. Stephen Clapp

BOARD OF DIRECTORS:

Patricia Young	Karen Hayes
Florence Rice	Joan Gussow
Charles Prejean	Mabel Gio
Dan McCurry	Vickie Fiteman
Paul Matthias	Thelma Flanagan
William Kennedy	Rev. Gerald Brown

San Juan Barnes

Does not have among its constituency a dues paying membership.

CONNECTICUT CITIZEN RESEARCH GROUP
P.O. Box G
Hartford, Connecticut 06106
(203) 527-7191

PRINCIPAL OFFICERS AND EMPLOYEES:

Director:	Mr. Marc Caplan
Project Director:	Mr. Jack N. Hale

BOARD OF DIRECTORS:

Gilbert Kelman, Chairman
Herbert Bormann
Frank Chapman
Anthony J. DeLorenzo
Diana Cooper
Tom Eaton
Dr. Samuel Hunt
Miles Pennybacker
John Riege, Esq.
Igor Sikorsky, Esq.
Sheila Tobias

The constituency of the Connecticut Citizen Research Group does not include a dues paying membership.

CONSUMER ACTION, INC. (Washington)
1625 Eye Street, N.W., Suite 922
Washington, D.C. 20006
(202) 223-5474

PRINCIPAL OFFICERS AND EMPLOYEES:

Employees: Harris Coulter
Enid Jones
Anita Ohlhausen
Lisa Schlossberg
James Turner

BOARD OF DIRECTORS:

Jeri Smith Fornara
Roy Alper
Cathy Sulzberger
David A. Swankin, Esq.
James S. Turner, Esq.

Consumer Action's constituency does not include a dues paying membership.

CONSUMER ACTION NOW
Council on Environmental
Alternatives
355 Lexington Avenue
16th Floor
New York, New York 10007
(212) 682-8915

PRINCIPAL OFFICERS AND EMPLOYEES:

President:	Ms. Lola Redford
Executive Director:	Ms. Irmgard Hunt
Assistant Director:	Ms. Laura L. O'Neill

BOARD OF TRUSTEES:

Elinor Bissinger	Lucy LeMann
Gerri Debusscher	Barbara Maltby
Christina DeLorean	Carlin Masterson
Carol Eisner	Lola Redford
Jay Emmett	Robert Redford
Jean Fox	Carol Reiner
Lawrence Fraiberg	Cynthia Stein
Arthur D. Krim	Simone Swann
Susannah Lawrence	Patty Watt

TECHNICAL ADVISORS:

Bruce Anderson	Richard Napoli
Sheldon Butt	David Norris
Wilson Clark	Jerry Plunkett
Eugene Eccli	Brent Porter
Hazel Henderson	Travis Price
Michael Holtz	Richard Robins
Dr. Ronal W. Larson	Joan Schary
Jim Mackenzie	William Thomas
Allen MacGowan	Donald Watson

Claire Pollack

Dues paying membership of approximately 20,000.

CONSUMER AFFAIRS COMMITTEE
Greater Washington Chapter
Americans for Democratic Action
1411 K Street, N.W., Suite 850
Washington, D.C. 20005
(202) 244-4080

PRINCIPAL OFFICERS AND EMPLOYEES:

Chairperson: Ms. Ann Brown

BOARD OF DIRECTORS:

There are 30 members on the Board of the Committee. The Committee itself consists of a number of the 2,000 members of the local D.C. chapter of the ADA.

CONSUMER FEDERATION OF AMERICA
1012 14th Street, N.W., Suite 901
Washington, D.C. 20005
(202) 737-3732

PRINCIPAL OFFICERS AND EMPLOYEES:

Executive Director:	Ms. Kathleen O'Reilly
President:	Ms. Ellen Haas
Secretary-Treasurer:	Mr. Kenneth Kovack
Legislative Directors:	Mr. Gerald Hogan
	Mr. Michael Podhodzer

BOARD OF DIRECTORS:

The Federation has 42 members on its Board of Directors. Their names are on file with the Special Assistant for Public Participation, Federal Trade Commission.

Dues paying membership of approximately 230 dues paying member organizations (trade unions, state and local consumer organizations, etc.).

CONSUMERS COOPERATIVE OF BERKELEY
4805 Central Avenue
Richmond, California 94804
(415) 526-0440

PRINCIPAL OFFICERS AND EMPLOYEES:

The Cooperative is owned by 80,000 member-families. Its staff of 10 home economists include Mary Gullberg, Coordinator; Elizabeth Wood; and George Yasukochi.

45-804 O - 79 - 7

CONSUMERS UNION (San Francisco)
1535 Mission Street
San Francisco, California 94103
(415) 431-6747

CONSUMERS UNION (Washington)
1714 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 785-1906

PRINCIPAL OFFICERS AND EMPLOYEES (both offices):

Director (San Francisco):	Mr. Harry Snyder
Director (Washington):	Mr. Mark Silbergeld
Executive Director:	Ms. Rhoda Karpatkin
Staff Attorneys (Washington):	Ms. Ellen Broadman
	Mr. Mark Cymrot
	Ms. Sharon Nelson

BOARD OF DIRECTORS (both offices):

Dr. Gordon Biltens	Robert Harris
Raymond Bonner	Edna Johnson
Clarence Ditlow	Robert Krughoff
Lloyd Daggett	Prof. Stuart Lee
Samuel Epstein	Prof. Robert Morse
Jean Ann Fox	Dr. Joy Nobel
Judith Ford	Judith Whittaker
Betty Furness	Margery Stuart
James Guest	Dr. Patrick Sullivan

Dr. Colston Warne

Has a membership of over 2 million subscriber/members.

CONTINENTAL ASSOCIATION OF FUNERAL
AND MEMORIAL SOCIETIES
1828 L Street, N.W., Suite 1100
Washington, D.C. 20036
(202) 293-4821

PRINCIPAL OFFICERS AND EMPLOYEES:

Executive Director:	Ms. Elizabeth Clemmer
Assistant Executive Director:	Ms. Ericka Landberg

NATIONAL BOARD OF DIRECTORS:

President:	Ms. Rebecca Cohen
First Vice-President:	Ms. Elinor Klein
Second Vice-President:	Mr. Jay Cherry
Secretary:	Mr. Lawrence Berger
Treasurer:	Mr. William F. Gavin
Members:	Ms. Jane Flanagan
	Ms. Harriet Glasner
	Mr. Chester H. Kingsbury
	Ms. Carrie Peebles

Dues paying membership consisting of 160 local memorial societies in 44 states and the District of Columbia that represent 750,000 members.

COUNCIL OF STATE CREDIT INSTITUTES
1239 Second Street
P.O. Box 801
Macon, Georgia 31202
(912) 743-8612

PRINCIPAL OFFICERS AND EMPLOYEES:

Chairman:	Mr. Culver Kidd
Vice-Chairman:	Mr. Earl Bradshaw
Secretary-Treasurer:	Mr. Norman Kinsler
Executive Director:	Mr. Joe W. Andrews, Jr.

BOARD OF DIRECTORS:

Henry T. Wilkinson	Thad Johnson	W.E. Lorance
Roy Clark	Douglas N. Nelson	H.E. Smith, Jr.
D.D. Diamond	Sam O. Sullivan	Ralph Matthews
E.A. Gilbreath	Ken Doehring	T. Jack Davis
Daniel Harvey	Bob Roy	Mel Pulliam
Bobby Adderhold	C.E. Bartkoski	Bill McClelland

Mr. Joe W. Andrews, Jr.
Executive Director

COUNCIL OF VIETNAM VETERANS
329 Eighth Street, N.E.
Washington, D.C. 20002
(202) 547-6000

PRINCIPAL OFFICERS AND EMPLOYEES:

Executive Director:	Mr. Robert Muller
Counsel:	Mr. Stuart Feldman
Director of Washington, D.C. Office:	Mr. Steven Champlin

Other employees include caseworkers.

EXECUTIVE COMMITTEE:

James R. Bombard	Alan Knight
Jim Deal	Tim Kolly
Daniel V. Flanagan, Jr.	Robert Muller
Sherman Green	Marvin J. Peterson
Albert Harris	Ian H. Stirton
John H. Harwood II	Kendrick W. Wentzel
Gordon Kerr	John P. Wheller III
	Joseph C. Zengerle

ADVISORY BOARD:

Cong. David Bonior	Townsend Hoopes
Cong. Silvio Conte	Harry Huge
Kenneth Gibson	Vernon Jordan
David Hackett	Charles Peters

Adm. Elmo Zumwalt

When the Council was formed, the Board of Directors decided to establish a track record before doing direct mailings to try to get a paying membership. Membership drives are now in progress. Presently, several hundred veterans regularly receive information from the Council.

COUNCIL ON CHILDREN, MEDIA AND
MERCHANDISING
1346 Connecticut Avenue
Washington, D.C. 20036
(202) 466-2584

PRINCIPAL OFFICERS AND EMPLOYEES:

President:	Mr. Robert B. Choate
Principle Employees:	Ms. Pamela Engle
	Ms. Patricia Topping
	Ms. Elizabeth Wiggans

BOARD OF DIRECTORS:

Janice Boyd	Stephen Kurzman
Paul Cornely	Michael C. Latham
Geoffrey Cowan	Robert B. Choate
Andrew Freeman	Leo Lutwok
Charles Goodell	Carlotta Miles
Mildred Jeffrey	Abraham Nizel
Norge Jerome	Sondra Raspberry
Dawn Ann Kurth	James Turner

CREMATION ASSOCIATION OF
NORTH AMERICA
Contact: Harvey I. Lapin, Esq.
Lapin, Panichi & Levine
2980 Harris Bank Building
115 South La Salle Street
Chicago, Illinois 60603
(312) 346-8111

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Dues paying membership of approximately 300 members.

ENVIRONMENTAL DEFENSE FUND
1525 18th Street, N.W.
Washington, D.C. 20036
(202) 833-1484

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The Environmental Defense Fund has a dues paying membership of approximately 46,000 members.

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Dues paying membership of approximately 20,000.

GOLDEN STATE MOBILHOME OWNERS
LEAGUE, INC.
400 Pacific Avenue
San Francisco, California 94133
(415) 392-6122

PRINCIPAL OFFICERS AND EMPLOYEES:

President:	Mr. John Santner
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Secretary:	Ms. Pearl Wiedmer
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BOARD OF DIRECTORS:

The League's Board consists of 19 members.

Dues paying membership consists of 94,000 mobile home family memberships in the State of California.

INDIANA HOME ECONOMICS ASSOCIATION
17833 Ponader Drive
South Bend, Indiana 46635

PRINCIPAL OFFICERS AND EMPLOYEES:

Past-President/Counsellor:	Ms. Mary Ruth Snyder
President:	Ms. Edith F. Cullison

Indiana Home Economics Association is affiliated with the American Home Economics Association. It has 1400 dues paying members.

IOWA CONSUMERS LEAGUE
Box 189
Corydon, Iowa 50060
(515) 872-2329

PRINCIPAL OFFICERS AND EMPLOYEES:

Executive Secretary:	Ms. Sheila Sidles

EXECUTIVE COMMITTEE:

President:	Mr. Bob Mumma
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	Mr. Ed Bomberger
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The Iowa Consumers League has a dues paying membership. This membership consists of approximately 400 individuals and groups.

MEDIA ACCESS PROJECT
1609 Connecticut Avenue, N.W.
Washington, D.C. 20009
(202) 232-4300

PRINCIPAL OFFICERS AND EMPLOYEES:

Associate Director: Mr. Randy I. Bellows
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Media Access Project is affiliated with the Center for Law and Social Policy. Members of its Board have jurisdiction over Media Access Project.

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MICHIGAN MOBILE HOMEOWNERS ASSOCIATION
Contact: Andrew S. Muth, Esq.
Egnor, Hamilton & Muth
33 South Huron Street
Ypsilanti, Michigan 48197
(313) 483-1679

PRINCIPAL OFFICERS AND EMPLOYEES:

President:	Mr. Robert Myers
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BOARD OF DIRECTORS:

There is no Board of Directors for the Michigan Mobile Homeowners Association.

Dues paying membership consisting of approximately 2000 paying members.

NATIONAL ASSOCIATION OF HOME
INSULATION CONTRACTORS
4750 Wisconsin Avenue, N.W.
Washington, D.C. 20016
(202) 363-8100

PRINCIPAL OFFICERS AND EMPLOYEES:

Executive Director/President: Mr. Gerald L. McDonald

BOARD OF DIRECTORS:

James Cantrell
Garvin Davis
Chuck Belanger

Dues paying membership of approximately 300 consisting of affiliates (manufacturer or distributor) and regular (contractors).

NATIONAL CONSUMER LAW CENTER
Eleven Beacon Street
Boston, Massachusetts 02108
(617) 523-8010

PRINCIPAL OFFICERS AND EMPLOYEES:

Executive Director: Mr. Robert A. Sable

and others consisting of staff attorneys and support staff.

BOARD OF DIRECTORS:

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NATIONAL CONSUMERS LEAGUE (Congress)
1028 Connecticut Avenue, N.W.
Suite 522
Washington, D.C. 20036
(202) 797-7600

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BOARD OF DIRECTORS:

The Board consists of over 50 members.

Dues paying membership of approximately 1000 members.

NATIONAL COUNCIL OF SENIOR
CITIZENS
1511 K Street, N.W., Suite 540
Washington, D.C. 20005
(202) 783-6850

PRINCIPAL OFFICERS AND EMPLOYEES:

President:	Mr. James Carbray
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Second Vice-President:	Mr. George J. Korpias
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Fourth Vice-President:	Ms. Einar O. Mohn
Executive Director:	Mr. William R. Hutton
Counsel:	Mr. David Marlin (Director, Legal Research and Services for the Elderly)
Deputy Director:	Mr. Hugh Layden

BOARD OF DIRECTORS:

The Board consists of over 60 members, whose names are on file with the Special Assistant for Public Participation at the Federal Trade Commission.

There are 3.5 million older people who are members of the Council, organized in 3872 clubs around the nation.

NATIONAL HEARING AID SOCIETY
20361 Middlebelt
Livonia, Michigan 48152
(313) 478-2610

PRINCIPAL OFFICERS AND EMPLOYEES:

President:	Ms. Marylene Freshley
Executive Vice-President:	Mr. Anthony DiRocco
President-Elect:	Mr. Floyd E. Loupot
Vice-President	Mr. Alan B. Roth
Secretary-Treasurer:	Mr. Donald E. Galloway
Legal Counsel:	Mr. Richard A. Kitch
Director of Governmental Relations:	Mr. Robert W. Lee

BOARD OF GOVERNORS:

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James M. McCrae, S.W.
William L. Syers, Central
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Floyd E. Loupot, Pacific
M.L. Fortner, Governor at Large

Dues paying membership of approximately 2000 direct members. Another 1600 members belong to chartered state affiliates of the Society but do not have individual memberships.

NATIONAL MANUFACTURED HOUSING
FEDERATION
Contact: C.W. Quincy Rodgers, Esq.
Leighton & Conklin
2033 M Street
Washington, D.C. 20036
(202) 785-4800

PRINCIPAL OFFICERS AND EMPLOYEES:

President:	Mr. William R. Keyes (Tx.)
Vice-Presidents:	Mr. Edward Parish (Ca.)
	Mr. James Phipps (Fl.)
Secretary:	Ms. Brett Manwaring (Id.)
Treasurer:	Mr. Wylie Nowman (Il.)
Past-President:	Mr. Paul Stiner (In.)

BOARD OF DIRECTORS:

There is no Board of Directors. The above officers of the Federation comprise an Executive Committee.

Members comprise the state level associations of the Federation. There are 25 state associations and their individual members who are members of the Federation and who pay dues.

NATURAL RESOURCES DEFENSE COUNCIL
917 15th Street, N.W.
Washington, D.C. 20005
(202) 737-5000

PRINCIPAL OFFICERS AND EMPLOYEES:

Executive Director:	Mr. John Adams

EXECUTIVE COMMITTEE:

Chairman:	Mr. Stephen P. Duggan
Vice Chairmen:	Mr. James Marshall
	Mr. Franklin E. Parker
	Mr. Gifford B. Pinchot
	Mr. George M. Woodwell
	Mr. David Sine
Secretary:	Mr. L. Francis Huck

In addition, there are 22 other members of the Board of Directors.

The Council has a dues paying membership of approximately 45,000 members.

NEW YORK PUBLIC INTEREST
RESEARCH GROUP
5 Beekman Street
New York, New York 10038
(212) 349-6460

PRINCIPAL OFFICERS AND EMPLOYEES:

Director: Mr. Donald K. Ross

BOARD OF DIRECTORS:

There are 40 members of the Board of Directors. Their names are on file with the Special Assistant for Public Participation, Federal Trade Commission.

Dues paying membership of approximately 180,000 college students and a citizen lobby of approximately 2600 members.

PRE-ARRANGEMENT INTERMENT
ASSOCIATION OF AMERICA
Contact: Harvey I. Lapin, Esq.
Lapin, Panichi & Levine
2980 Harris Bank Building
115 South La Salle Street
Chicago, Illinois 60603
(312) 346-8111

PRINCIPAL OFFICERS AND EMPLOYEES:

President:	Mr. Charles H. Gaudreau
President-Elect:	Mr. Chester Frederick
First Vice-President:	Mr. Richard O. Herbert
Secretary-Treasurer:	Mr. Darryl J. Roberts
Executive Vice-President:	Mr. Augustus Parker

BOARD OF DIRECTORS:

Pre-Arrangement Interment Association has 18 members on its Board of Directors. Their names are on file with the Special Assistant for Public Participation, Federal Trade Commission.

Dues paying membership of approximately 600 members.

PUBLIC INTEREST ECONOMICS
FOUNDATION
1714 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 872-0313

PRINCIPAL OFFICERS AND EMPLOYEES:

President:	Mr. Allen R. Ferguson
Co-Director (NILE):	Mr. Jerome Zeifman
Director (PIE-West):	Mr. Guy Phillips
Director of Education:	Ms. Cynthia Figge
Director of Clearinghouse:	Ms. Judy Pope
Business Manager:	Mr. Jeffrey Malashock

BOARD OF DIRECTORS:

Gerard M. Brannon	Lester C. Thurow
Charles J. Cicchetti	Allen R. Ferguson
Nancy Gordon	Robert Wolcott
Robert R. Nathan	Carl Pope

Public Interest Economics Foundation's constituency does not include a dues paying membership.

SAFE FOOD INSTITUTE
301 Surrey Street
San Francisco, California 94131
(415) 648-2169

PRINCIPAL OFFICERS AND EMPLOYEES:

Executive Director: Ms. Jennifer Cross

BOARD OF DIRECTORS:

Dr. Helyn Luechauer
Willie Brown, Jr.
Gaylord Willis
Jennifer Cross

Dues paying membership of approximately 200 members.

SAN FRANCISCO CONSUMER ACTION
26 Seventh Street
San Francisco, California 94103
(415) 626-4030

PRINCIPAL OFFICERS AND EMPLOYEES:

Co-Directors: Ms. Mary Fitzpatrick
Mr. Michael Heffer

The staff consists of two full-time employees and volunteers.

BOARD OF DIRECTORS:

Neil Gendel
J.B. Moore
Kay Patchner

Dues paying membership consists of approximately 1500 members.

SIERRA CLUB
330 Pennsylvania Avenue, S.E.
Washington, D.C. 20003
(202) 547-1144

PRINCIPAL OFFICERS AND EMPLOYEES:

Executive Director: Mr. Michael McCloskey

BOARD OF DIRECTORS:

President: Mr. Ted Snyder

and 15 other members.

Dues paying membership of approximately 185,000.

SOCIETY FOR NUTRITION EDUCATION
2140 Shattuck Avenue, Suite 1110
Berkeley, California 49704
(415) 548-1363

PRINCIPAL OFFICERS AND EMPLOYEES:

Executive Director:	Ms. Helen D. Ullrich

BOARD OF DIRECTORS:

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Director-at-Large:	Mr. Gerald F. Combs
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UNION OF CONCERNED SCIENTISTS
Contact: Ellyn R. Weiss, Esq.
William Jordan III, Esq.
Sheldon, Harmon, Roisman & Weiss
1725 I Street, N.W., Suite 506
Washington, D.C. 20006
(202) 833-9070

PRINCIPAL OFFICERS AND EMPLOYEES:

Executive Director: Mr. Daniel Ford

BOARD OF DIRECTORS:

Henry Kendall
Dr. James Fay
Dr. James Mackenzie
Dr. Kurt Gottfried
Daniel Ford

The Union has a dues paying membership of approximately 77,000 sponsor-contributors.

SPECIALTY EQUIPMENT MANUFACTURERS
ASSOCIATION FOUNDATION, INC. (SFI)
P.O. Box 5074
El Monte, California 91734
(202) 462-1155 (Contact)

PRINCIPAL OFFICERS AND EMPLOYEES:

[SFI is affiliated with Specialty Equipment Manufacturers Association (SEMA). Therefore, officers for both are shown.]

Executive Director (SFI):	Mr. Dick Wells
Technical Director (SFI):	Mr. Paul Etheridge
President (SEMA and SFI):	Mr. Leo Kagan
First Vice-President (SEMA):	Mr. Richard Kudner
Second Vice-President (SEMA):	Mr. W.A. Lohmann
Treasurer (SEMA):	Mr. Els Lohn
Secretary (SEMA):	Mr. Bruce McCallum

BOARD OF DIRECTORS:

Chuck Blum (SFI and SEMA)
Tom Shedden (SFI and SEMA)
Leo Kagan (SFI)
Nile Cornelison (SEMA)
Harvey Crane (SEMA)
Victor Edelbrock (SEMA)
Paul Escoe (SEMA)
Don Hampton (SEMA)
Ralph Hansen (SEMA)
Dennis Holding (SEMA)
John Hulls (SEMA)
Don Kirsh (SEMA)
Sheldon Konblett (SEMA)
Richard Kudner (SEMA)
W.A. Lohmann (SEMA)
Els Lohn (SEMA)
Bruce McCallam (SEMA)
Dick Morosso (SEMA)
Ben Sigman (SEMA)
John Simmons, Jr. (SEMA)
Don Smith (SEMA)
Bill Tidwell (SEMA)

SFI has no dues paying membership. SEMA has a dues paying membership of approximately 1600 members. Dues vary according to gross sales.

Attached to these questions is a copy of a copy of a February 28, 1979, letter from the Commission staff to Mr. John Stout of Ontario, Oregon.

Question. Since the complained of practice is a clear violation of 16 CFR Part 23.22(c)(1) (NOTE: the Commission letter incorrectly cites this:)

a. Why can't the Commission respond to meritorious complaints such as Mr. Stout's?

b. What must the average citizen do to get your attention and action?

FEDERAL TRADE COMMISSION,
BUREAU OF CONSUMER PROTECTION,
Washington, D.C., February 28, 1979.

Re corres. No. 21907933.

Mr. JOHN STOUT,
Ontario, Oreg.

DEAR MR. STOUT: Your correspondence to Senator Packwood expressing concern over the use of the term "solid" 14 karat gold by The Historic Providence Mint has been forwarded to the Commission for reply.

Pursuant to Rule 22 of the Commission's Trade Paractice Rules for the Jewelry Industry, it is an unfair trade practice for industry members to use the term "solid gold" to describe gold alloy products or hollow gold products. Therefore, it appears that the use of this term by The Historic Providence Mint in describing its 14 karat gold coins violates the provisions of this Rule. It should be understood however, that the Commission, because of its limited resources, cannot initiate an investigation in every instance where it appears that a business has engaged in an unfair or deceptive trade practice.

Staff will consider your letter along with any others which we may receive to determine what action, if any, is warranted in this matter.

Thank you for bringing this matter to our attention.

Very truly yours,

DOROTHY C. GARDNER,
Research Analyst, Division of Marketing Abuses.

Answer. The Commission receives over 140,000 consumer complain and over 8 thousand congressional referral of constituent complaints each year. With a budget of under $70 million and fewer than 1,700 employees, the Commission simply lacks the resources to pursue each and every complaint it receives. However, the Commission does review closely each complaint it receives; it assesses the likelihood that the complained of behavior violates a statute administered by the agency; it assesses the nature and extent of the injury (at times a complaint may be meritorious in the sense that it alleges a technical violation of a statute, but the extent of injury may be minimal); and it then seeks to focus its resources on those problem areas which are most serious and most susceptible to resolution by Commission action.

Question. For fiscal year 1980 the Division of Marketing Abuses is requesting a decrease in staff and dollars (2 less workyears and $71,000 less).

(a) Why is the Commission cutting back its resources and at the same time citing to the public it cannot investigate complaints because it has "limited resources?"

(b) Does the Division of Marketing Abuses need more investigative staff?

(c) Information made available to the Committee indicates no attorney is currently assigned to work in this area—only a research analyst? Why? When do you plan on hiring an attorney for this program?

Answer. The planned fiscal year 1980 size for the Marketing Abuses program, which includes resources for both the Division of Marketing Abuses and the regional offices, was developed by a zero based budgeting process in which the Commission and its senior managers compare the relative priority of each of the agency;s programs. The proposed budget that is now before Congress reflects the final judgment of the Commission.

With respect to staff activity concerning the jewelry industry, the decrease in the Marketing Abuses program does not reflect any change in resource levels, devoted to the jewelry industry and enforcement of the Jewelry Guides. The resources to be used in this area will continue to be modest. However an attorney has recently been named to manage the program which deals with the Jewelry Guides and an additional attorney has been assigned to work directly on the Guides themselves.

With respect to the specific complaint of Mr. Stout, our reply to him may have overstated the extent to which his concern is meritorious. In effect, his letter contend that it is misleading for the term "solid" to be used for a "14 Karat Gold" product that is solid and without a concealed hollow interior. We have reviewed his

contention and doubt that such a practice violates 16 CFR 23.22(c). The explanatory note to the rule explains that the rule only prohibits the use of the term "solid" for products that contain a concealed hollow center or interior. It does not appear to prohibit the use of the term in situations similar to those alleged by Mr. Stout.

The level of commitment to enforcement of the Guides reflects a number of factors. First, over the years there has generally been widespread compliance with the "Jewelry Guides," thereby reducing the need for substantial resource commitment. Second, given limited resources, staff activity, the Commission believes, there are other areas of concern such as consumer expenditures in the critical sectors including food, health, housing, energy and transportation, where the consumer injury may be more significant.

Question. Please explain why the Commission cannot merely send a letter notifying a company of a possible violation in order to correct the illegal trade practice.

Answer. The sending of a letter notifying a company of a possible violation of a guide, trade regulation rule, Commission decision or statute may be appropriate in some circumstances. Among others, these include the existence of a minor violation that does not warrant further action, as where a firm has acted in good faith and will make the necessary changes promptly.

QUESTIONS OF SENATOR WARNER AND THE ANSWERS THERETO

FEDERAL TRADE COMMISSION,
Washington, D.C.

Hon. JOHN W. WARNER,
U.S. Senate, Washington, D.C.

DEAR SENATOR WARNER: Enclosed please find answers to questions you transmitted by letter of May 12, 1979, that you submitted pursuant to the hearings held on May 2, 1979, on the Commission's authorization bill, S. 1020.

With regard to your questions that deal with the "FORMICA" matter, I should point out that the Supreme Court recently denied *certiorari,* declining to interfere with the Trademark Trial and Appeal Board's denial of Formica's petition to dismiss on the grounds that the Commission lacked standing to seek cancellation of the "FORMICA" mark, 47 U.S.L.W. 3786 (June 5, 1979).

Should you have any further questions or require any further information, please do not hesitate to contact me.

MICHAEL PERTSCHUK, *Chairman.*

Enclosures.

Question. In your testimony, you indicated the General Counsel had done a study of the public intervenor issue, entitled: "A Study by the General Counsel relating to the operation of the Public Interest Intervenor Funding under Magnuson-Moss." The General Counsel indicated that the Commission had already implemented some of his recommendations. Please furnish the Committee with a copy of this study for the record.

Answer. The memorandum and its attachments are provided.[1] Portions of the material are exempt from disclosure under the Freedom of Information Act because they involve the Commission's deliberative process. We therefore ask that you respect the confidential nature of this information.

Question. Magnuson-Moss provides for the payment of attorney fees in the case of a person "who is unable effectively to participate in such proceeding because such person cannot afford to pay costs of making oral presentations . . ." Yet, many of the groups you fund do not seem to fall within the voiceless majority which the Act seems to contemplate. How do you make a determination as to whether a group can afford to participate? Would you favor applying an asset limitations to organizations receiving funding under Magnuson-Moss? What about limiting those provisions to individuals?

Answer. The criteria of the statute establish the eligibility criteria. The Commission must determine whether participants in Commission rulemaking proceedings have or represent an interest—

(1) which would not otherwise be adequately represented in the proceeding;

(2) representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole; and

(3) are unable to participate effectively in the proceeding without reimbursement.

To insure that applicants approved for reimbursement of their costs meet these statutory requirements, the General Counsel requires the applicant to submit detailed information that describes the applicant's ability to pay for the costs of its presentation, the nature of its contribution to the proceeding and whether that

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[1] The attachments are in the committee files.

interest is necessary for a fair determination of the proceeding taken as a whole or any of its major issues.

Among the financial information concerning the organization that is considered in the determination of its ability to afford effective representation of its interest is information concerning "the size of the economic stake involved as compared with the costs of participation; the resources of the applicant; and the feasibility of obtaining contributions from other parties who share the applicant's interest." [Section 1.17 of the Rules of Practice.]

Limiting funding to groups with less than a certain level of assets would, in our view, thwart the purpose envisioned for this public participation program and work a special hardship on small business groups currently eligible for funding. Senators Magnuson and Kennedy, in commenting on the proposed staff guidelines on this program, supported this view:

"The statute by its very language, is concerned solely with the necessity for representation of a particular interest or interests in a given proceeding. It does not require the Bureau to make judgments as to the value of an applicant's commitment of its own resources to *other* issues or endeavors. All the Bureau is required to do, once it has determined that an applicant represents an interest that would not otherwise be adquately represented and which is necessary for a fair determination of the proceeding, is to judge whether or not the applicant is able—based on its resources then available—to afford the costs of effective participation.

"We do not challenge the Bureau's assertion that although "the statute is phrased in terms of the inability of the applicant, not the inability of the interest, to pay for participation, . . . it is essential to examine the position of the interest underlying the applicant." (p. 30.) Certainly it is appropriate for the Bureau to examine the relationship between the applicant and the interest to determine whether the interest could legitimately be expected to finance the applicant's participation. This does not mean, however, that the Bureau must consider the wisdom or utility of an applicant's involvement in areas unrelated to the subject proceeding as a factor in determining the applicant's eligibility for compensation.

"Indeed, the Bureau itself seems to recognize the futility of trying to engage in such exercises when it notes exceptions to these rules for situations involving large total stakes divided among many separate individuals, or the special problems presented by established groups which may receive substantial funding from independent sources. We therefore agree with the Bureau's statement, on p. 33, that a group can be eligible to receive compensation even though it has devoted substantial resources to other causes. In our view, the statute cannot be interpreted to mean otherwise." [Letter dated October 27, 1976, to Margery Waxman Smith, Acting Director, Bureau of Consumer Protection, pp. 5–6.]

For your convenience, both the current staff guidelines and the full text of the Magnuson-Kennedy letter are provided.

For the reasons above, asset limitations should not be imposed upon individual applicants either.

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
SUBCOMMITTEE ON ADMINISTRATIVE PRACTICE AND PROCEDURE,
Washington, D.C., October 27, 1976.

MS. MARGERY WAXMAN SMITH,
Acting Director, Bureau of Consumer Protection,
Federal Trade Commission, Washington, D.C.

DEAR MS. SMITH: As senators who have long maintained an interest in the activities of the Federal Trade Commission, we welcome this opportunity to comment on the Commission's proposed guidelines for compensation of consumer representatives who participate in rulemaking proceedings. In our respective capacities as Chairman of the Senate Commerce Committee and as Chairman of the Senate Judiciary Subcommittee on Administrative Practice and Procedure, we are especially interested in seeing that the Commission gives full effect to the spirit and intent of those provisions of the FTC Improvement Act which govern citizen participation.

Section 202(h) of that Act constituted an important first step in what has become a major congressional effort to promote fuller participation by representatives of the general public in proceedings before all agencies of the Federal Government. Some agencies, even without specific statutory direction, have initiated or proposed their own compensation programs to aid public participants in their proceedings. Among these are the Consumer Product Safety Commission, the National Science Foundation, and, just recently, the Food and Drug Administration. The Environmental Protection Agency was given authority to make fee awards under the recently

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enacted Toxic Substances Act. Other agencies, including the Nuclear Regulatory Commission, are expected to initiate such programs in the near future. Provision of financial assistance to public participants in federal agency proceedings is, we believe, a practice that should and will be expanded.

Congress, for its part, has begun to respond to suggestions by many citizens and agencies—and in particular the General Accounting Office—to delineate the kinds of criteria agencies ought to employ to determine which citizen representatives should receive compensation and for which kinds of activities. Clearly, then, the experience of the Federal Trade Commission in administering the compensation provisions of the FTC Improvement Act will have great impact on the future course of public participation in agency proceedings.

We have now completed a review of the proposed guidelines. In general, we feel that the Bureau should be commended for the comprehensiveness of its proposal and for its overall efforts to effectuate the expressed will of Congress in its initial attempt to provide for effective representation of citizen interests within a federal agency. We realize that the paucity of legislative history accompanying the adoption of Section 202(h) makes it somewhat different to determine the exact parameters of the compensation program Congress intended the Commission to institute, and we therefore support the Bureau's efforts to adopt a generally broad program consistent with the spirit as well as specific requirements of the Act. We do feel, however, that in some instances the proposed guidelines reflect too narrow an interpretation of the Act; these are noted below.

Several interpretations given to the FTC Improvement Act in the proposed guidelines are particularly faithful to the overall purposes of the statute. We recognize, for example, the generalized need for the Bureau to inquire into the particular abilities of an applicant for compensation in order to determine whether it will in fact be able to provide effective advocacy for the interest it seeks to represent. In addition, we agree that an applicant which is deemed capable of making a significant contribution to a Commission proceeding should receive compensation even though, by itself, its participation may not make representation of the interest completely adequate. The "significant contribution" test enunciated by the Bureau on page 23 of the proposed guidelines is an appropriate one to be utilized in these circumstances, and one that is generally consistent with the approach favored by many members of Congress. (See especially the discussion of S. 2715 in Senate Report 94-863, at p. 19.)

Furthermore, we can appreciate the reasons for the Bureau's stated desire to give preference to applicants who define their interest or point of view with specifically, as opposed to funding groups which merely claim to represent "all consumers." The Bureau correctly recognizes that not all consumer interests are identical, and that in many cases it may be desirable to compensate several consumer groups who may represent somewhat differing, well-defined points of view. This would insure that the Commission, in conformity with the purposes of the Act, is presented with a wide range of viewpoints that will enable it to reach an informed decision.

Care should be taken, however, to insure that this concern for specificity of viewpoint does not become a bias toward groups with narrow constituencies. We believe that the size or diversity of a group's constituency—even in cases where a group claims to represent "all consumers"—does not presumptively diminish its ability to define with specificity its interest in a given proceeding. The guidelines state that broad consumer representation by a single group is preferable to none. While we essentially support this view, we would urge that the breadth of representation an applicant seeks to provide be deemed a minor factor in deciding whether it should receive compensation.

The rationale for providing advance compensation to consumer groups to enable them to participate in a proceeding is another area in which the Bureau has evidenced a commitment to fulfilling the purposes of the FTC Improvement Act. The Bureau correctly notes that the entire thrust of the compensation program is to aid persons who could not otherwise participate in a proceeding. This certainly implies that they would be unable to participate unless they receive advance disbursement of funds to which the Bureau has determined they are entitled. Indeed, it may well be that the great majority of citizens groups will be unable to participate in proceedings without advance payments. For those applicant who are able to sustain their participation pending reimbursement, however, it is our belief that the guidelines should also set forth a specified timetable as to when they can expect to be reimbursed following the conclusion of their proceedings. (See, for example, § 2(f)(2) of S. 2715.)

We also feel the Bureau should be concerned with giving qualified applicants the earliest possible notice of the level of compensation they are to receive. It is

unrealistic to expect public participants to be able to make effective presentations unless given sufficient time in which to prepare. The guidelines should therefore reflect a greater urgency on the part of the Bureau in reaching decisions on applications. They should also establish a minimum amount of "lead time" between notice to the applicant of its approved level of compensation and the commencement of the proceeding itself.

We differ with the Bureau's interpretation of the statute in several respects:

1. *The FTC Improvement Act does not preclude the Commission from providing compensation to approved participants for expenses involved in petitioning the Commission to initiate the rulemaking proceeding in which they participate.*

This is our most serious area of disagreement with the Commission's interpretation of the statute. While providing reimbursement for the expenses incurred in all rulemaking petitions, successful or unsuccessful, could multiply frivilous applications, we do not believe that reimbursing successful petitioners would "create a lottery effect that would encourage hard-pressed organizations to gamble funds in the hope of ultimate compensation." And most emphatically, we do not believe that such a rule would tend to "guarantee seriousness of interest and purpose and discourage speculative requests." The Bureau offers no evidence to support either contention.

In our view, Congress clearly intended that participants could be compensated for costs incurred in petitioning for rulemaking. This interpretation is supported by two portions of Section 202(h)(1). The first relates to the words "* * * costs of participating in a rulemaking proceeding under this section * * *" The term "rulemaking proceeding" is defined by Section 551 (5) and (12) of the Administrative Procedure Act (Title 5, U.S. Code), read together. It means any "agency process for formulating, amending, or repealing a rule." A rulemaking proceeding therefore encompasses the entire process within an agency by which it is determined that rulemaking in a particular area should be commenced. One aspect of this process is the receipt and consideration by an agency of a rulemaking petition submitted by an interested person. Such a petition is an integral part of the agency's rulemaking process, part of the "proceeding," and expenses incurred in its preparation should therefore be compensable.

This interpretation is further buttressed by subsection (h)(1)(A)(ii), which permits compensation for representation of an interest "necessary for a fair determination of the rulemaking proceeding *taken as a whole.*" The phrase we have emphasized indicates that compensation awards we have emphasized indicates that compensation awards should be made where the interest represented contributes to a fair resolution of the issues involved in the entire agency process, including that leading up to the formulation of a rule. This would certainly include the contribution of a participant whose efforts resulted in the Commission's undertaking the proceeding in the first place. In sum, we do not believe that the FTC Improvement Act can or should be read so narrowly as to exclude reimbursement for the costs of successful petition to initiate a rulemaking proceeding.

2. *The FTC Improvement Act does not "raise questions about the Commission's authority to compensate an applicant with substantial resources which are being devoted to other causes." (p. 30)*

The statute, by its very language, is concerned solely with the necessity for representation of a particular interest or interests in a given proceeding. It does not require the Bureau to make judgments as to the value of an applicant's commitment of its own resources to *other* issues or endeavors. All the Bureau is required to do, once it has determined that an applicant represents an interest that would not otherwise be adequately represented and which is necessary for a fair determination of the proceeding, is to judge whether or not the applicant is able—based on its resources then available—to afford the costs of effective participation.

We do not challenge the Bureau's assertion that although "the statute is phrased in terms of the inability of the applicant, not the inability of the interest, to pay for participation, * * * It is essential to examine the position of the interest underlying the application." (p. 30.) Certainly it is appropriate for the Bureau to examine the relationship between the applicant and the interest to determine whether the interest could legitimately be expected to finance the applicant's participation. This does not mean, however, that the Bureau must consider the wisdom or utility of an applicant's involvement in areas unrelated to the subject proceeding as a factor in determining the applicant's eligibility for compensation.

Indeed, the Bureau itself seems to recognize the futility of trying to engage in such exercises when it notes exceptions to these rules for situations involving large total stakes divided among many separate individuals, or the special problems presented by established groups which may receive substantial funding from

independent sources. We therefore agree with the Bureau's statement, on p. 33, that a group can be eligible to receive compensation even though it has devoted substantial resources to other causes. In our view, the statute cannot be interpreted to mean otherwise.

3. *The willingness of an applcant to spend some its own money on a proceeding should not be a consideration in determining whether it is to receive funds under the compensation program.*

While we recognize that an applicant's willingness to expend some of its own funds may indicate that it believes the issue in which it seeks to become involved is significant to the interest it represents, we think this factor bears little relevance to its overall commitment. The limited funds on which most citizen groups operate hardly make their willingness to contribute some of these funds a dispositive indication of their seriousness of purpose. Indeed, this situation was a primary factor in motivating Congress' establishment of an FTC compensation program in the first place. An applicant should not, in effect, be penalized for stating that it would be wholly unable to participate without receiving full compensation from the Commission.

4. *The Bureau should not assume that individual persons cannot meet the statutory criteria for compensation under the Act.*

The administrative Procedure Act, as well as the FTC Improvement Act, clearly contemplate that an individual who is not part of any organized group should be able to participate in agency proceedings. Indeed, the very definition of "person" in Section 551(2) of the APA (not to mention the meaning of the word in common parlance) encompasses individuals. The central factor for the agency to consider, then, is not the numerical strength of the "person," but the nature of and its relationship to the interest sought to be represented. This would include in particular an individual's ability to provide effective representation for the interest.

An individual seeking to participate as a party to a rulemaking proceeding should not presumptively be relegated to the role of "expert" ore "consultant." Compensation is to be provided under the Act to representatives of interests which ought to be heard in the context of a proceeding. Individuals may well be able to fulfill this role—particularly where no organized group is seeking to represent the interest.

Individual participants are not necessarily witnesses. They may be legitimate representatives of interests which need to be considered. As such, Commission programs to defray their travel or incidental expenses may be totally inadequate to their needs. The FTC Improvement Act clearly contemplates that individuals may be able to make significant contributions to agency proceedings, and that they may require substantial financial assistance in order to do so. Absent any specific indication in the Act's legislative history of Congress' intention to exclude their participation, the Bureau should give full consideration to their applications for compensation.

Again, we want to express our thanks to the Bureau for giving us this opportunity to comment on the proposed guidelines. We know that our views will be given full consideration by the Commission in developing final rules to implement the compensation program, and we would be happy to elaborate on any of the points we have raised.

Sincerely,

WARREN G. MANGUSON,
Chairman, Commerce Committee.

EDWARD M. KENNEDY,
Chairman, Subcommittee on Administrative Practice and Procedure.

Question. In the hearing on children advertising, an organization called the Community Nutrition Institute was, I believe, commissioned to prepare a study on the breakfast food preferences of low-income households. It was adduced in testimony concerning that study that "the largest part of the sample consists of elderly people who do not have children and households earning over $12,000 a year." Did the Community Nutrition Institute receive any Magnuson-Moss funding for completion of this study? If so, has any effort been made to recover that funding, now that it is clear that the CNI did not comply with the terms of its mandate?

Answer. The Community Nutrition Institute received public participation funds to participate in the Children's Advertising proceeding on behalf of low-income consumers. Among the evidence C.N.I. submitted for the rulemaking record was a study of the breakfast food preferences of low-income households. The representatives of groups submitting studies in the proceeding were examined at great length during the legislative phase of the rulemaking proceeding by the Presiding Officer. However, the Presiding Officer has not as yet made any determination as to the weight or value that should be accorded the C.N.I. study or any other study. And, of

course, the Commission will not be in a position to judge the value of any study until the rulemaking record is before it for a final determination.

To insure that the quality of prior presentations by publicly funded groups is considered when the Commission receives a subsequent application from a previously funded group, the Commission has established a procedure for obtaining the views of the Presiding Officer responsible for the prior rulemaking proceeding. This is the arrangement that your committee report on our authorization directed us to formalize as part of the public participation application decisionmaking process.[1] Therefore, should it be determined that any funded group in the Children's proceeding or any other proceeding has produced evidence that is inferior or of little utility to the Commission, that information would be made available to the General Counsel prior to acting on any subsequent funding to that group.

Question. It is my understanding that certain public interest groups have recently communicated with the Commission or its staff in reference to the inadequacy of legal fees awards under Magnuson-Moss. Please provide the Committee with a copy of that correspondence, together with any replies the members or staff of the Commission may have made.

Answer. Copies of all such correspondence are provided.

FEDERAL TRADE COMMISSION,
BUREAU OF CONSUMER PROTECTION,
Washington, D.C.

DEAR: The attached chart lists the maximum billable hourly rates for attorneys participating in the Public Participation in Rulemaking Program for any work done after May 28, 1977.

If you are currently using the services of a third party attorney to represent your interest in a rulemaking proceeding for which you are being reimbursed through our public participation program, that attorney may bill you within the ceilings stated on the chart for work done after May 28, 1977. Should you prepare an application for compensation to participate in an additional rulemaking proceeding, and should you wish to hire a third party attorney, you may negotiate for that person's services within the hourly rate maximums set forth in the chart.

If your staff attorneys are to be reimbursed through our public participation program for their work in a rulemaking proceeding, you should compute their cost to your organization according to the instructions in footnote No. 1 of the attached chart for work performed after May 28, 1977. Of course, the budgets which you plan for future rulemaking proceeding applications should also reflect these instructions. Only those hours attributable directly to representing your interest at the rulemaking proceeding are reimbursable.

Should you have any questions about this information, please write or telphone Bonnie Naradzay (202-523-3868), the Special Assistant for Public Participation.

I appreciate your continued interest in assisting the Federal Trade Commission in its decisionmaking.

Sincerely,

MARGERY WAXMAN SMITH,
Acting Director.

Attachment.

PUBLIC PARTICIPATION IN RULEMAKING PROGRAM—MAXIMUM BILLABLE RATES FOR PARTICIPATING [1] ATTORNEYS—BOTH 3D-PARTY AND STAFF

I. Years of related experience [2]	II. GS	III. Salary	IV. Hourly rate [3]
0 up to 2	11-10	$22,177	$21
2 up to 4	12-10	26,571	26
4 up to 6	13-10	31,598	30
6 up to 8	14-10	37,347	36
Over 8	15-10	43,923	42

[1] The staff attorneys (on salaries) must calculate their hourly cost to their organization by dividing their annual salaries by 1672 hours. (Government work hours per year excluding sick leave, vacation time, and holidays are figured at 1672 hrs./yr.) To this figure is added the percentage cost of retirement (Social Security), health and life insurance benefits borne by the organization. Indirect costs are accounted for by adding on 25% of the total hourly rate calculated.

[2] Applicants must submit attorneys' resumes.

[3] The participating attorney may bill separately only for travel (commercial rates and $37/day flat rate per diem), secretarial costs ($6/hour), long distance telephone, transcripts and copying costs. Paralegal and other added professional hourly rates depend on comparison of resumes with comparable Civil Service ratings.

[1] Sen. Rep. 96-184, 96th cong., 1st Sess. 5 (1979)

WASHINGTON, D.C., *November 25, 1977.*

ALBERT H. KRAMER,
Director, Bureau of Consumer Protection,
Federal Trade Commission, Washington, D.C.

DEAR AL: In my letter to you of October 25, 1977 concerning attorney fees in *Magnuson-Moss rulemaking* proceedings, I incorrectly referred to the "Center study." I was referring to a study of the Council for Public Interest Law, which was attached to the letter.

Sincerely,

BRUCE J. TERRIS.

FEDERAL TRADE COMMISSION,
BUREAU OF CONSUMER PROTECTION,
Washington, D.C., November 28, 1977.

BRUCE J. TERRIS, Esq.
Washington, D.C.

DEAR BRUCE: This is in response to your letter of October 25, 1977, in which you discuss the level of attorneys' fees set by the Bureau in reimbursing third-party attorneys who qualify under Rule 1.17 of the Commission's Rules of Practice. With your letter you enclosed a draft of an upcoming study by the Council for Public Interest Law.

The two issues in your letter, attorneys' fees and per diem rates, are being considered separately. As you can see by the attached notification, the policy on per diem has been revised to reflect current government procedures.

The issue of attorneys' fees is a complex one and is under study. I understand from Jacques Feuillan that the Council's study is still in draft form and is in the process of being circulated among its members for comments. When it is complete and the underlying data can be released to us, I would like to have the opportunity to compare its conclusions with the Bureau's present policy for reimbursement under the public rulemaking participation program.

I share your concern that the rates be both equitable and in line with the Bureau's commitment to balanced participation in rulemaking proceedings. I assure you that your letter is receiving our careful attention, and I will keep you advised of our progress in ensuring the maintenance of appropriate rates for attorneys in these important proceedings.

Sincerely,

ALBERT H. KRAMER, *Director.*

WASHINGTON, D.C., *October 25, 1977.*

ALBERT H. KRAMER,
Director, Bureau of Consumer Protection,
Federal Trade Commission, Washington, D.C.

DEAR AL: As you may know, I and a number of other lawyers who have participated in Magnuson-Moss proceedings have been very dissatisfied for a considerable period of time with the level of attorneys fees set by the FTC under the Act. I have no objection to using government salaries as the basic standard. However, I believe that the FTC staff has egregiously miscalculated what the hourly rates should be to provide private attorneys with comparable compensation.

The original rates established by the FTC ranged from $15 per hour for new attorneys to $27 per hour for attorneys with 10 years or more experience. In August 1976, the Commission announced publicly through the issuance of proposed guidelines that it was considering higher rates. After a period of 12 months, in May 1977, the Commission adopted rates of $21 an hour for attorneys of less than 2 years of experience, $26 an hour for attorneys of 2 to 3 years experience, $30 an hour for attorneys of 4 to 5 years of experience, $36 an hour for attorneys of 6 to 7 years of experience and $42 an hour for attorneys of over 8 years of experience.

The new rates are plainly inadequate. First, the Commission's rates are apparently based on the standard 40-hour work week for government employees (the calculation is based on 1,672 hours per year which is said to be "[g]overnment work hours per year excluding sick leave, vacation time, and holidays"). The use of a 40 hour work week for private lawyers is simply incredible for anyone who has any experi-

ence with private practice. A lawyer who billed 40 hours a week would probably have to work between 55 and 60 hours. If the average private lawyer worked a 40-hour week, as the Commission assumes, he would almost certainly bill substantially under 30 hours a week. I strongly urge the Commission to change its rates based on a 30 hour work week. Sick leave, vacation time, and holidays should then be deducted.

Second, the Commission's rates are based on the old government salary schedules. As you know, government employees received extremely large pay increases of over 7 percent in October 1977.

Third, it appears that the FTC staff has substantially underestimated the cost of private practice. Overhead cost, less secretarial time, has been estimated by the Commission as 25 percent. This figure seems far too low. However, outsiders cannot investigate the FTC's complete analysis because it has not been made available. It appears, however, that this figure is based on an analysis of government overhead costs rather than the actual costs of private practice. Governement costs obviously are irrelevant since the purpose of the Commission's rates are to pay private lawyers the same income as they would receive if they were in the government.

The enclosed study demonstrates how low the FTC's rates of compensation are. The FTC allows a lawyer of 8 or more years of experience to receive $42 an hour; the study shows that such a lawyer must make $58 an hour to receive an income comparable to that of a government lawyer. The FTC allows a lawyer of 5 years of experience to receive $30 an hour; the study shows that a lawyer with 5 years experience must make $39 an hour to receive an income comparable to that of a government lawyer.

I recognize that the FTC recompenses grantees for direct secretarial services. However, our experience is that this does not come even close to making up the huge difference in the hourly rates paid lawyers by the FTC and the hourly figures in the Center's study. It would seem far preferable for the FTC to stop paying for secretarial services and to adopt the standard practice of compensation for private lawyers entirely, with the exception of out-of-pocket expenses, on the basis of the hours spent by lawyers. The FTC could then rely on studies like that of the Center in determining a fair hourly rate for lawyers.

I would also like to point out that the Center's computation is extremely conservative. First, it does not take into account the fact that work for the FTC, unlike that for private clients, requires substantial time in preparing applications for which the lawyer receives no compensation even if the application is approved. Second, it does not take into account the fact that government lawyers have the guarantee of the Federal Treasury for their salaries while private lawyers have only the hope that they will have clients to pay them sufficient amounts to pay for their overhead and compensation. A strong case can be made that private lawyers, who take substantial risks, should receive somewhat more income than government lawyers who do not.

In any event, I think the Center's study is an excellent place to start analysis. I would urge you to have your staff get together with the Council and the D.C. Chapter of the Accountants for the Public Interest in order to determine the differences between the study's analysis and that done by the FTC staff. Then, an effort should be made to determine which analysis is more appropriate as to each point of disagreement. I would then hope that, on this basis, the FTC would *immediately* modify the rates of compensation accordingly.

Lastly, I would urge the commission to adopt a procedure whereby the rates of compensation would automatically and immediately be modified whenever government salaries are changed. If the commission is basing rates of compensation on comparison to government salaries, it is obviously unfair to do nothing to adjust rates of compensation for long periods of time after government salaries have been significantly increased.

While it is a comparatively small point, I would also like to mention the per diem rates for travel since it illustrates the manner in which the Commission is proceeding in this area. The FTC now limits outside parties to a flat per diem rate of $37 for hearings away from home. Government employees receive a per diem that starts at $35 and rises to $50 or more for high-rate cities such as New York. It is a fact that virtually all FTC hearings are held in high-rate cities. Therefore, at virtually every hearing site away from home outside parties receive less money for meals and lodging than government employees. It has been suggested to us that the reason a flat per diem rate was chosen for outside parties was to minimize the problems of bookkeeping that federal employees face when, in high-rate cities, such expenditure must be documented. However, outside parties are required by the rules to do that regardless of how little or much they spend.

I would like to meet with you and your staff after you have had an opportunity to consider the enclosed study.

Sincerely,

BRUCE J. TERRIS.

WHEN THE GOVERNMENT PAYS: CALCULATING ATTORNEYS' FEES FOR REPRESENTATION BEFORE GOVERNMENT AGENCIES

(By Judith Bartnoff and Jacques Feuillan)

Certain federal agencies, most notably the Federal Trade Commission, have begun paying attorneys' fees for those who cannot afford to participate in agency proceedings. This has been done where there is reason to believe the participation and independent representation of certain otherwise unrepresented interests is either necessary to the proceeding or will serve an important public purpose. Congress now has before it legislation which would make such experiments government-wide, as part of the President's effort to open up the process of government and make it more responsive to the general public.

Setting the rate or determining how to caluclate the fees which attorneys should be paid under such programs has proved to be a thorny problem. It seems clear that the rate at which the government will not pay cannot practically be left to individual negotiation between lawyer and client or between lawyer an government agency in each separate proceeding. A fair rate, one of general applicability, that will protect the interests of lawyer, client, and taxpayer, has been the subject of considerable discussion. Most proposals under serious consideration reject the idea of having the government pay either at the rates charged by the largest corporate law firms for non-contingency work as well as the idea of imposing a "public interest discount." Instead, they have come to focus on the salaries paid to government lawyers as the benchmark.

The question which has automatically arisen, however, when it is proposed to use government salaries as a standard, is how much the government will have to pay on an hourly basis if the earnings of a private lawyer are to approximate the take home pay and fringe benefits of a government attorney. How should an agency calculate the difference in costs between running a government agency with hundreds or thousands of employees, with no taxes and no "rent" to pay, and the overhead connected with operating a small law firm?

The Council for Public Interest Law and the Washington, D.C. chapter of the Accountants for the Public Interest have undertaken jointly to develop a method for determining a "fair" rate of remuneration for private lawyers based on government salaries. This effort was limited to fees in situations where there is no contingency of the attorneys' not being paid. (Obviously, the method for calculating fees in litigation where the lawyer assumes the risk of receiving little or no reward if a case is lost have to be calculated under an entirely different formula. For an excellent discussion of that subject, the reader is referred to Samuel R. Berger, "Court Awarded Attorneys' Fees: What is 'Reasonable'?", scheduled for publication in the University of Pennsylvania Law Review (Fall, 1977).) Our calculations were based on the experiences and expenses of private practitioners with small to medium-sized firms in the District of Columbia. The same method could be used, however, for devising hourly pay rates that reflect conditions in other cities or other parts of the country, and which would still be "reasonable" in light of prevailing government salaries for lawyers of comparable skill and experience.

The results of our study can be summarized briefly. In order to receive fees and benefits equivalent to the salaries and fringe benefits of justice department attorneys of comparable experience, a small law firm of two partners (each with fifteen years of professional experience) and two associates (each with five years of professional experience) located in the District of Columbia must charge a minimum of $58 per hour for partner time and $39 an hour for the time of associates.

Programs subsidizing legal work before administrative agencies

The federal government is involved in many aspects of the average ciizen's daily life—it determines what pharmaceuticals and foodstuffs may be sold, what labelling and warranties must be provided with consumer goods, what equipment standards must be met by interstate transportation companies, and what levels of pollutants may exist in the air and water. Much of what the government does that impinges directly on the way the average citizen lives his or her life is accomplished through the rules and regulations issued by federal agencies and departments. As seems natural, these bodies most often hear the views of those with a substantial, business-

related economic stake in the outcome of the proceedings before them. By permitting a deduction from taxable business income of legal expenses which are deemed necessary, the government provides a subsidy for the presentation of those views.

In spite of the publicity which has been given to the consumer and environmental movements in recent years, federal administrative agencies only rarely hear from local community groups, from organizations of senior citizens, from consumer organizations, and from minorities that may be quite directly affected by their decisions. The absence of such groups from the federal administrative process has let to widespread concern that administrative regulation lacks the balance and the broad perspective that it is supposed to achieve. At its worst, it has also led to the airing of suspicions in the press and among the public that agencies are, in Brandeis' famous words, prepared to "sacrifice the interests of the public to that of a single-corporation."

To combat both the real problem of underrepresentation of diverse viewpoints in regulatory proceedings and to deal with the problem of public suspicion of government institutions, it has been proposed by President Carter, among others, that the federal government balance its tax-subsidy of those with a business-related stake in an agency outcome with a program of direct financial assistance to needy parties who represent a substantial interest that is not directly business-related.

Such a program has actually been working successfully at the Federal Trade Commission for almost two years under the Magnuson-Moss Warranty and FTC Improvements Act. Under this program, the FTC contracts to pay for attorneys' fees, expert witness costs, and other expenses of persons whose participation in a trade regulation rulemaking proceeding will significantly contribute to the Commission's efforts to reach a balanced result. Funds are made available to pay for costs only to those who can first establish that they would otherwise lack adequate resources to participate effectively.

The program has brought some interesting new voices into the regulatory process. In one case, for example, it allowed the FTC to obtain from the National Council of Senior Citizens a presentation of the personal experiences of old people in purchasing and obtaining repair service on hearing aids.

The Commission, which had not initially asked for the authority to conduct such a program of public subsidies, reported back to Congress that it had proved extremely useful. Its success has encouraged other agencies—notably, the Consumer Product Safety Commission, the National Highway Traffic Safety Administration, and the Federal Energy Administration, to undertake their own, more limited programs of reimbursement. Similar programs are under consideration at other agencies, including the Environmental Protection Agency, the Civil Aeronautics Board, and the Food and Drug Administration. Congress has held hearings on legislation, endorsed by the President and by the American Bar Association's House of Delegates, that would amend the Administrative Procedure Act to authorize a three-year experiment permitting all government agencies to provide reimbursement in a wide variety of regulatory and rulemaking proceedings.

Calculating a fair rate for billing attorneys' time

A question that arose at once with regard to the Federal Trade Commission's program is that of the fair and proper measure of attorneys' fees for public participants. Because the subsidy comes from the government as a third party, the "client" does not pay. But as far as the agency is concerned, the sky clearly cannot be allowed to constitute the limit. Congress and the agencies are both interested in maximizing the usefulness of the funds available. While setting too high a limit on fees would encourage waste, setting too low a limit might, on the other hand, discourage most lawyers from taking a client's case before the agency. Agencies have, therefore, discerned that they need to be realistic in the limits they impose on fees and grant sufficient funds to enable a participant to make an effective presentation while still protecting themselves from being taken advantage of. In doing this, they have had to consider a number of factors that are somewhat unusual:

Because the nature of the arrangement between a participant under one of these programs and an agency is a contractual one for a given amount of service, the "risk" or "contingency" factors that must be considered by courts in assessing fees under statutes which allow fee-shifting are not relevant;

Because the rates charged for agency work by large corporate law firms to commercial clients are substantially higher than either the national or the Washington, D.C., average for legal services, the use of such commercial rates as a benchmark does not necessarily make either economic or practical sense;

Because many lawyers, particularly those working for charitable organizations, traditionally undercharge their "public interest" clients, to reimburse those lawyers only at the rate they would normally charge for services to the particular client

would be to hang the lawyer in the noose of his or her own charity. It might also cause an attorney in such a situation to refer the client to another lawyer who, though unfamiliar with the particular client's affairs, would be able to negotiate with the agency for a "non-discount" rate.

The Federal Trade Commission decided that the easiest way out of the problems caused by such considerations was to use the salaries it paid its own attorneys as the benchmark for its program of subsidy-grants. This position has generally been accepted as a reasonable one. While the salaries paid to government lawyers may not be as high as the fees received by many attorneys with a commercial practice, they do at least approximate the earnings of most lawyers (while exceeding those of most attorneys in "public interest" practice).

Disputes arose, however, when an attempt was made to translate government salaries, fringe benefits, and overhead costs into the realities of private practice. The FTC has attempted to devise an overhead formula based upon that used for government contractors doing research and development work. The resultant fee scales, combining salary, fringes, and overhead, were widely objected to by lawyers in private practice as being far too low to cover both their actual expenses and to also permit them to take home a decent living. Because the Council for Public Interest Law has a mandate to encourage the widest possible representation of unrepresented citizen interests (Cf., Mitchell Rogovin, "Public Interest Law: The Next Horizon," 63 *A.B.A.J.* 334 (March, 1977)), a number of these objections were brought to the Council as well as to the Federal Trade Commission by lawyers.

The Council accordingly decided to see if it could establish how much an attorney's hourly fee actually must be if he or she is going to conduct a modest law practice in Washington, D.C. This law practice would be one that provides the attorneys in the firm take home pay and fringe benefits equivalent to those received by government attorneys with comparable experience. We, together with the Washington chapter of Accountants for the Public Interest (API), developed a model for such a law firm, order to be able to prepare pro forma statements of income and expenses that would allow us to determine a reasonable hourly rate.

Constructing a model law firm

We conducted an informal survey among several Washington, D.C., law firms to obtain information on the costs of maintaining their law practices. The firms ranged in size from eight to fifteen attorneys (both partners and associates); all have been established since 1970. We collected data on size of staffs, experience of the attorneys, approximate annual operating costs, nonlawyer salaries, and fringe benefits, such as medical and life insurance. Using this data, supplemented by standard manuals on law firm management, we and API put together a hypothetical law firm, developed a budget and income statement, and computed the hourly rates that the firm would have to charge in order to pay the lawyers the equivalent of Justice Department salaries.

Our hypothetical law firm consists of two partners; two associates; an office manager/senior secretary; two additional secretaries; a receptionist; student law clerks; and one paralegal. The firm also retains an accountant and a bookkeeper on a part-time basis.

Salaries.—Salaries in the firm are based on the Justice Department's scale. We assumed that both partners have been practicing law for fifteen years and that the two associates have been practicing law for five years. The senior partner's yearly salary is $47,500, which assumes that in terms of experience and responsibility he or she is the equivalent of a Division Section Chief at Justice with a Civil Service grade of GS–16, Step 7. His or her salary is the maximum now allowed by law for career Civil Service employees. The second partner is paid a yearly salary of $39,419, equivalent to a deputy section chief (GS–15, Step 6). In keeping with common practice for a small law firm, the hourly billing rates for the two partners are the same.

Both associates are paid $28,725 annually—the salary of a GS–14, Step 1. Normally, an attorney can achieve this grade level after four and a half years at Justice.

Salaries for the remaining staff are calculated based on the data provided in our survey. They represent current salary levels among law firms of this size in Washington, D.C.

Fringe benefits.—To compute fringe benefits, API used the cost factors used by the federal government. These were published at 41 Fed. Reg. 35581 (August 23, 1976), in "Federal Procurement Policy—Cost Comparisons Under OMB Circular A–76." It is likely that these are a low estimate of the cost of obtaining, in the private sector, fringe benefits equivalent to those provided by the federal government to its employees.

Office space and rent.—The amount of space needed was calculated according to the average space standards for law firms up to ten attorneys, according to the Prentiss-Hall Manual for Managing a Law Office, ¶ 1051. The rate of $8 per square foot is the average rental for space in office buildings in Washington, D.C. (According to several Washington building management companies, commercial rental rates range from $5 to $10 per square foot. The rates for the firms interviewed ranged from $5 to $7.60.)

Library and office equipment.—Cost and depreciation of office furniture was calculated based on the actual cost of medium-priced furniture. Expenses, including depreciation, for the law library were based on figures obtained from West Publishing Company on the purchase price and annual subscription cost of complete sets of basic reference works and law reporters required by a law firm with a federal litigation and administrative practice.

Other operating expenses.—The expenses set out in the income statement—for office supplies, equipment rental, telephone, postage, professional dues, insurance, printing and duplicating, and the like were derived from figures provided by the firms interviewed in the Council's survey, and reviewed by API. These figures are intended to approximate as closely as possible actual operating costs for a law firm of this size.

Hourly rates.—Hourly rates were computed on the basis of 1500 billable hours per lawyer per year. Billable hours for the firms in our survey ranged from 1200 to 2000 hours annually. Both the Prentiss-Hall manual and the Alton-Weil manual, *How to Manage Your Law Office,* estimate annual billable hours to range between 1200 to 1500. (The Federal Trade Commission, in computing its rate scale for reimbursement of attorneys' fees under the Magnuson-Moss program, based its calculations on 1672 hours—the number of official government work hours per year excluding sick leave, vacation time, and holidays, because the concept of billable hours is inapplicable to government lawyering.)

The salary structure in our hypothetical law firm ended up looking like this:

Partner	$47,500
Partner	39,419
Associate attorneys (2)	57,450
Paralegal	13,500
Office manager-secretary	13,000
Secretaries (2)	22,000
Receptionists	9,000
Law clerks (part-time)	5,610
Total	207,479

And the total expense picture for the firm looked like this:

Salaries	$207,479
Fringe benefits	58,162
	265,641
Rent	17,216
Other operating expenses	27,810
Depreciation of office equipment	3,121
Depreciation of library	3,000
Total expenses	316,788

Basing hourly billing rates on an average of 1500 billable hours per year for chargeable employees led us to conclude that the following rates and the following totals would be necessary for the firm to meet expenses and allow the lawyers fair remuneration equivalent to government salaries and fringe benefits:

Partner (2) at $58 per hour	$174,000
Associates (2) at $39 per hour	117,000
Paralegal (1) at $18 per hour	27,000
Total fee income	318,000

This would give the firm an excess of fee income over expenses of $1,212, a not unreasonable amount.

We have made our pro forma statements of income and hourly rates for this hypothetical firm available to those agencies and lawyers who wish to try to devise a reasonable set of standard rates to be followed in determining what constitutes

fair remuneration in public subsidy programs. We have also provided copies to the staffs of the Congressional committees considering legislation in this area. Copies are available to others on request from the Council for Public Interest Law, 1250 Connecticut Ave., N.W., Washington, D.C. 20036, for those who wish to study them in more detail or who believe they will be of professional use. We believe that they represent an important effort in trying to set standards in a new and rapidly developing area of legal employment.

WASHINGTON, D.C., *May 12, 1977.*

MICHAEL PERTSCHUK,
Chairman, Federal Trade Commission, Washington, D.C.

DEAR MR. PERTSCHUK: I have a law firm with nine attorneys in Washington, D.C. which specializes in consumer, environmental, and other "public interest" matters. My firm has represented several consumer groups, including the National Council of Senior Citizens and the Consumer Affairs Committee of the Washington, D.C. Chapter, Americans for Democratic Action, in Federal Trade Commission Trade Regulation Rule proceedings concerning the Advertising of Ophthalmic Goods and Services, the Funeral Industry and the Advertising of Over-the-Counter Drugs pursuant to the provisions of the Magnuson-Moss Warranty-FTC Improvement Act. As designed group representatives, we were responsible for representing the general interests of all consumers in addition to the specific interests of the groups which we represented. Our participation in each of the FTC TRR proceedings extended over several months and accounted for a considerable portion of our firm's attorney time. Moreover, we expect our participation in these proceedings will continue well into the future. For example, we are currently preparing rebuttal comments in the OTC proceeding and final comments in the funeral proceeding and hope to participate in each proceeding until a final rule is promulgated by the Commission. In addition, one of our clients hopes to participate in the TRR proceedig concerning the operation of health spas and will retain us to represent it if the Commission approves funding for its participation.

The participation of our clients in the TRR proceedings has been made possible through the approval of funding by the FTC pursuant to Section 18(h) of the Magnuson-Moss Act and Section 1.17 of the Commission's Rules of Practice. Section 1.17(e)(2) of the Rules of Practice provides that experts and consultants to public participants will be compensated at rates not to exceed those paid to experts and consultants to the Commission and that attorneys' fees above $50 per hour will be considered presumptively unreasonable. The Commission has not promulgated formal regulations establishing attorneys' fees, but has in recent practice awarded $19 to $27 per hour to attorneys retained by the consumer groups funded by it. In comparison, my firm normally charges a rate of $40 per hour for attorneys' time, and, even that level, as you I am sure know, is far below the commercial rate in the District of Columbia.

The level of attorney's fees paid by the FTC is not realistic in today's market. It is claimed that the salary level was established on the basis of producing salaries which would be paid lawyers of comparable experience in the government. However, the salary level was established on the assumption that an attorney working a 40 hour week from 9 to 5:30 with a half an hour for lunch can bill 40 hours. Of course, as any practicing lawyer knows, it would take 60 hours of work a week to bill 40 hours. Moreover, the Commission does not provide any compensation for the substantial time required to write applications to the Commission for funding for each stage of participation in a TRR proceeding. The time to prepare these applications reduces further the billable hours attributable to this work. In addition, the Commission pays only for the time of secretaries and bookkeepers beyond the attorneys' time. It does not provide for the costs of medical insurance, pensions and other benefits as well as the overhead expenses of running a law office. The fact is that even our fees of $40 an hour produce salary levels well below those of government attorneys.

I am not aware of any firm in Washington which charges rates comparable to those approved by the Commission. In addition other federal agencies which compensate interested parties for participation in their proceedings use fee schedules substantially higher than that of the Commission. The Department of Transportation, for example, currently pays attorney fees ranging from $25 to $48 per hour.

As early as April 1, 1976, the Council for Public Interest Law contacted Joan Z. Bernstein, then acting Director of the Bureau of Consumer Protection, to discuss these and other defects in the Commission's program to provide financial support of groups whose interests have traditionally not been represented before the FTC.

Shortly thereafter, representatives of the Council and the FTC met to discuss these issues. In a letter to Ms. Bernstein, dated June 1, 1976, the Council submitted data to support its assertion that FTC attorney rates were unreasonably low. In the early fall of 1976, the Commission staff issued draft compensation guidelines which recognized that its attorney fee schedule was too low and proposed higher rates. On November 30, 1976, the Council submitted detailed comments regarding the Commission's draft guidelines and was promised immediate action. In February, 1977, the Commission staff issued a second version of its draft guidelines which proposed a new fee schedule which would further increase the level of compensation for attorneys' fees. These guidelines proposed the following schedule:

Attorneys:	*Maximum billable hourly rate*
Up to 3 years' experience after law school graduation	$25.00
3 to 6 years' experience after law school graduation	32.00
6 to 10 years' experience after law school graduation	41.00
10 or more years' experience	48.00

Ever since February, 1977, Commissions staff members have repeatedly assured members of my firm that the Commission would shortly adopt, within weeks or even days, the fee schedule proposed in the draft. As of this date, nothing has happened.

In a conversation with Edward Comer of my firm on May 6, 1977, James DeLong, Assistant Director to Special Projects, of the Commission Bureau of Consumer Protection admitted that the new attorney fee schedule is long overdue and should have been implemented months ago. Mr DeLong further indicated that it was delayed because the Commission staff had not yet agreed upon a final fee schedule. Apparently, the Commission is considering two alternative schedules. According to Mr. DeLong, each fee schedule is substantially higher than the one which the Commission currently uses. Mr. DeLong did not explain why, at the least, the Commission has not implemented on an interim basis the lower of the two proposed schedules. This procedure would at least afford participating groups, and their attorneys, some additional compensation while the Commission staff debates the merits of approving a further increase in compensation rates. In another conversation later that day between Mr. Comer and Ms. Bonnie Naradzay, a staff member of the FTC Office of Compensation, Ms. Naradzay indicated that Mr. DeLong and Ms. Majorie Waxman Smith, Director of the Bureau of Consumer Protection, had discussed the problems raised by the delays and had agreed to request that the new attorney fee schedule be applied retropactively to May 1, 1977. This information was confirmed by Mr. DeLong in a telephone conversation with Ms. Judy Bartnoff, a staff attorney of the Council for Public Interest Law on May 10, 1077. In that conversation Mr. DeLong admitted that the delay in promulgating the new schedule was an "outrage," but he could not indicate when a final schedule would be implemented.

In the meantime, the delays caused by the Commission staff have cost my firm a substantial amount of income. As a result of the Commission's funding guidelines, we can receive no more than the amount approved by the Commission for the time we spend participating in Commission TRR proceedings. Since January 1, 1977, members of my firm have spent 531¾ hours preparaing for and participating in the Commission's TRR Proceedings. This work was performed in the belief that the Commission would shortly increase its fee schedules to the levels proposed. My firm cannot afford to continue to participate in TRR proceedings if we do not receive the increased fee schedule. I believe that few other competent attorneys in the nation could afford to participate in TRR proceedings at current schedules either. The lack of attorney participation in TRR proceedings will surely prevent the type of meaningful consumer and citizen participation which the Congress intended to stimulate when it promulgated Section 18(h) of the Magnuson-Moss Act.

Approximately a year has passed since the Commission staff first admitted that its fee schedule was insufficient adequately to compensate attorneys representing participating groups. There is no excuse for the Commissions' failure to redress this serious and admitted inequity. The staff's procrastination is not simply unfair but it is clearly contrary to the statutory mandate of the Magnuson-Moss Act.

I hope you will direct the staff to redress this situation immediately be immediately adopting a new, substantially higher salary schedule. This schedule should provide compensation truly comparable to that of federal attorneys of comparable experience after carefully considering such factors as the lack of payment for the time to prepare applications, the higher overhead of a law office, and the substan-

tial fringe benefits of government attorneys. I would think that the schedule in the guideline of February 1977, should be the minimum adopted.

I believe that it is appropriate to apply whatever new schedule is adopted on a retroactive basis, beginning at least by January 1, 1977. This position is justified by the staff's unreasonable procrastination in this matter and its misleading and deceptive assurance that the new schedule was just about finalized when it was actually far from complete. The staff agreed in principle to the need for an increased fee schedule before June 1, 1976, and should reasonably have completed it long before January 1977. Moreover, the work which my firm and probably other firms did in FTC proceedings after that date was performed in light of the staff's assurances that the Commission would implement the increased fee schedule in the immediate future. I therefore believe that, as a matter of fairness, the new fee schedule should be effective for all work performed after January 1, 1977.

I hope you can immediately remedy these difficulties and insure that in the future the Commission staff vigorously implements the statutory mandate of the Magnuson-Moss Act.

Sincerely,

BRUCE J. TERRIS.

WASHINGTON, D.C., *March 8, 1977.*

MS. BONNIE NARADZAY,
Bureau of Consumer Protection,
Federal Trade Commission, Washington, D.C.

DEAR MS. NARADZAY: I understand that a new higher schedule of compensation for private attorneys participating in Commission rulemaking proceedings has been approved in principle and merely awaits publication to become official policy. I urge your office to proceed expeditiously to publish these new rates. As you are well aware, many attorneys have participated extensively in these hearings to date, on behalf of consumer clients who ought to be part of such proceedings and whom the Magnuson-Moss Act was designed to benefit. For many of these attorneys, like myself, this participation has been at considerable monetary sacrifice because of the existing fee schedule.

The revised schedule of payments has been pending, in one form or another, since August 25, 1976. There appears to be no reason for any further delay in their publication.

I appreciate your continuing interest in hearing from those attorneys who participate in the program.

Very truly yours,

BRUCE J. TERRIS.

Question. Magnuson-Moss provides for a maximum of 25 percent of funding for organizations which would be regulated by the proposed rule. You indicated in your testimony that roughly 10 percent currently goes to such organizations, and that you were seeking to increase that amount. Have there been any qualified representatives of organizations which would be regulated by a proposed rule which have applied for, but have not received funding? If so, please list the organizations, and the amount applied for. What percentage of "regulated persons" which have applied for funding have not received it? What is the comparable percentage for "nonregulated persons?"

Answer. No representatives of organizations which would be regulated by a rule, if adopted as proposed, have been denied funding. There are, however, a few such applications that are pending a determination of whether they meet the statutory criteria for this program.

On the other hand, over 13 percent of all applicants termed "nonregulated persons" have been denied funding because of a determination that their applications did not meet the statutory criteria. An additional 30 percent of applications from "nonregulated" groups have been partially denied.

Question. Magnuson-Moss requires that a person receiving funding not only espouse a position which would otherwise not be espoused, but that he "represent an interest which would not otherwise be adequately represented." Do you feel this provision should be retained? How do you determine whether an individual represents an interest which would not otherwise be adequately represented? Do you take into consideration whether the organization which that individual purports to represent has elected him as its spokesman or has polled its members with respect to their positions? Does the Commission consider the position of the FTC investigatory staff in determining whether the interest would be represented? To your knowledge,

has any of the ten largest funding recipients ever appeared before your agency or any other agency without receiving complete reimbursement? What ramifications has lack of reimbursement had for any such organization's financial viability?

Answer. The statutory provision that an applicant "represent an interest which would not otherwise be adequately represented" should be retained for we do not believe these funds should be provided to groups whose presentation substantially will duplicate the presentation of others. To determine whether or not an individual represents such an interest, the information accompanying the application and the record of the proceeding are examined, additional information is sought where appropriate, and the Presiding Officer is required to make findings concerning the importance and distinctiveness of each applicant's proposed contribution. In addition, others knowledgable about the weight of the proposed evidence, whether or not it is necessary for a fair determination of the proceeding, and whether the interest is not already adequately represented are also consulted. In making this determination the General Counsel also examines the organization's method of operation and whether its interests is already adequately represented by the staff's position.

Consumers Union participated in both the Standards and Certification proceeding without compensation. However, in both cases participation was limited to submission of a statement a few pages in length. It should be noted such limited comments do not necessarily effectively represent a group or individual's interest in a proceeding.

To our knowledge, no other group has participated in a rulemaking proceeding at its own expense and then applied for reimbursement of its costs in another rulemaking proceeding. In some cases participants have incurred costs in a rulemaking proceeding that exceed that amount approved for reimbursement. In those cases groups have either ceased to participate or have sought to receive outside funds or secure donated services to enable the participants to complete their presentations. In other cases participants have applied for reimbursement after participating initially at their own expense because they no longer could afford the cost of participation.

Finally, we do not know whether any of the funding recipients who have participated in our rulemaking proceedings have participated in other agencies' proceedings without requiring reimbursement.

Question. Please list the ten law firms receiving the greatest amount of legal fees under the Magnuson-Moss program.

Answer. The following is a list of the attorneys and firms receiving the largest amount of legal fees under the program:

Deane, Snowdon, Shutler, Garrish & Gherardi.
Harvey M. Freed, Esq.
Hill, Christopher & Phillips.
Lapin & Levine.
Leighton & Conklin.
Peabody, Rivlin, Lambert & Meyers.
Sheldon, Harmon, Roisman & Weiss.
Swankin & Turner.
James A. White, Jr., Esq.

Question. Would you favor a Magnuson-Moss formula which gave funding on an equal basis to proponents and opponents of agency action?

Answer. No. The essential goal of the Commission's public participation program is to provide balanced and comprehensive representation in the proceeding taken as a whole. If this goal is to be achieved, only groups whose representation is essential to the development of a complete and balanced record should be funded. Currently, groups generally opposed to FTC proposals outnumber groups generally favorable to some sort of rule by a margin of more than 3-to-1. The addition of a funding formula would add significantly to that ratio. Balance in the public participation program would be achieved at the expense of a balance in the proceeding as a whole.

Moreover, a formula that would attempt to approve reimbursement applicants on the basis of whether or not they oppose one or more issues of a proposed rule would be difficult, if not impossible, to impose. This is because a great number of applicants endorse certain provisions in a proposed rule and oppose others. For instance, the American Federation of Small Business, a group that was reimbursed for participating in the Standards and Certification rulemaking (see the attached application), opposed one part of the proposed rule but endorsed other parts, especially Sections 457.6 and 457.7, which provide for procedures for the review of existing standards.

In the Food Advertising proceeding, the Iowa Consumers League's Executive Director, whom the Presiding Officer termed an unusually articulate witness with interesting and important things to say about consumer attitudes, was reimbursed for costs associated with her testimony at the Chicago hearings. Again, the Iowa Consumers League came out in favor of some of the proposed rule's issues and against others.

In many other instances as well, reimbursed participants have made important contributions to the record while evaluating rulemaking proposals critically. Furthermore, the implications of attempting to carry out this statutorily mandated public participation program with regard to whether or not applicants approve of certain issues in a rulemaking proceeding are dire. Such a standard could very well result in representatives being denied the possibility of participating because they did not fall into a particular category. Will, for example, a small business that wishes to testify in favor of an issue in a proposed rule be denied the opportunity at the outset because an application opposing that same issue in the proceeding was not submitted?

Using the program in this way does not appear consistent with the goals noted in the Conference Report concerning this section of the statute. It emphasized that the purpose of the program is to provide "to the extent possible that all affected interests be represented in rulemaking proceedings so that rules adopted thereunder best serve the public interest."

Question. Has the FTC ever initiated proceedings as a result of studies or communications by any group or individual which it subsequently funded during the investigation that followed? Would you support an amendment which prohibited the staff of the Commission from communicating off the record with any individual or organization relating to a matter on which the individual or organization received funding under Magnuson-Moss?

Answer. Although public and private interest groups, members of Congress, and others have petitioned the Commission for the initiation of rulemaking proceedings, it would be difficult to trace a rule proposal solely to such a petition. In the case of the Children's Advertising proceeding, although the staff report describes several petitions for action on the matter, a staff investigation into these advertising practices had been underway for a considerable amount of time prior to the filing of any petition.

An amendment requiring the staff to record communications with participants that have been funded would make it difficult for the staff to deal with the numerous routine communications from participants, including small businesses, who seek substantive information on the many issues that arise in any rulemaking proceeding. Moreover, we think it most important that staff involved in the rulemaking not have a role in public participation funding decisions except where the General Counsel requests information about the application of the statutory criteria. As you are aware, the procedure has been in effect at the Commission for some time and, pursuant to your Committee's recent directive,[1] we will be including that instruction in the internal operating manual currently being prepared.

Question. Please list the twenty largest funding recipients under Magnuson-Moss. With respect to these recipients, please state (1) whether the leadership of the organization is democratically elected by the membership, (2) whether the organization favored or opposed action by the Federal Trade Commission in the cases for which they received funding, (3) whether the organization has any officers or directors which sit on the boards of other organizations within the top twenty, and (4) if available, the total assets and budget of the organization. If the asset and budget figures are not available, please specify the Commission's basis for determining that the organization could not afford to participate in the Commission's proceedings without Magnuson-Moss funds.

Answer. Please see the attached list for the twenty largest funding recipients under Magnuson-Moss.

(1) The leadership of these groups appears to be elected either by the board of directors, the membership itself, or both, depending on the organization of the group.

(2) To the extent possible we have identified whether a group generally supported or generally opposed some form of Commission action. However, in many cases it is difficult to say that a group either opposed or favored the proposed rule. Each proposal not only contains a myriad of issues, it often also contains, as did the Standards and Certification proposed rulemaking announcement, upwards of 100 questions, for which public comment is solicited. As discussed in the answer to Question 8, some organizations have supported some issues in proceeding while

[1] See S. Rep. No. 96–184, 96th Cong., 1st Sess. 5 (1979).

opposing others. For instance, the Automobile Owners Action Council and the California Public Interest Research Group, participating in the Used Motor Vehicle Sales and Warranty proceeding, not only advocated simpler disclosure forms than those the staff had suggested, but also proposed an alternate rule.

(3) To the best of our knowledge, only the following directors of organizations also sit on the boards of other groups: Clarence Ditlow, Director of the Center for Auto Safety, was elected by the membership of Consumers Union to be one of its board members; and Harry Snyder, presently a member of the California Citizen Action Group's board, is the director of the Consumers Union's San Francisco office.

(4) Information pertaining to the organizations' finances is also attached.

AMERICAN FEDERATION OF SMALL BUSINESS,
Chicago, Ill., May 7, 1979.

MS. BONNIE NARADZAY,
Special Assistant for Public Education,
Office of the General Counsel,
Federal Trade Commission, Washington, D.C.

DEAR MS. NARADZAY: This letter is to supplement our original application for public funding to testify on the proposed FTC rules regarding product standards and certification. We are writing in accordance with your requests which we understand arose out of a telephone conversation with our attorney, Eldon L. Ham.

The American Federation of Small Business is a not-for-profit organization located in Chicago, Illinois. We are devoted to the education of U.S. small business people on as many matters as we can pertaining to statutes, case law, and government agency rule making affecting their interests and concerns.

The proposed rule pertaining to products standards and certification is of vital importance to small business, as statistics reveal that the 20,000,000 small business people in the U.S. employ 54% of all persons working in the private sector; the proposed rule will have substantial impact upon the availability of new products for the marketplace and, consequently, will affect innovation to the degree of impacting the very economy of our country.

Small business is particularly interested, because innovation is the key to success for any new or existing small business enterprise, and small business can be innovative only where it is economically feasible to do so.

The AFSB is a non-profit organization with severe budget contraints. First, our foremost asset is not cash but, rather, our mailing list of members. When new laws or regulations are perceived by our staff to profoundly impact small business, we institute a direct mailing to members requesting funds for a particular project. Our overhead is low, and cash is very tight. Our Executive Vice-President, the principal managing officer, has taken no salary for 1978 or thus far in 1979. Further, we have no funds budgeted in advance for legal expense, and *no* funds are available for participation at your hearings. Unfortunately, we became aware of your proposed rule only recently, and there is no time to conduct a fund drive with our members. Our only alternative to public funding and reimbursement is to not participate at all.

Please refer to the attached exhibits and budget for further and more detailed information, but in general the funds will be applied to legal fees for research, preparation, testimony, and other matters, in addition secretarial time, staff time, and travel.

The AFSB views the proposed rule as a two-part animal. First, it attempts to require a series of hearings, etc., for prior FTC approval on all trade organization products standards or amendments thereto. Second, the rule would establish a system whereby the public could challenge existing and/or FTC-approved products standards for a variety of reasons, including questions on accuracy or introductions of new and/or "substitutable" products.

Small business must be able to compete to stay alive. This means that businesses such as our members must be given every opportunity to break into the marketplace with new products. However, the proposed rule goes too far, is redundant with the balance of the rule, and would inordinately slow the development of products to the detriment of everyone, including small business.

Our organization has concluded that the rule procedures for prior hearings and approval on product standards will be too cumbersome and restrictive to benefit small business, innovation, competition, or the economy in general. If a given product has 100 component parts, for instance, it is unnecessarily cumbersome and costly to scrutinize each one individually. This, in fact, is the benefit derived from private product standards in the first place, because presumably the approving organization has looked at each and every component part already. FTC hearings

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will never be able to see future technological innovation anyway, so prior approval will accomplish very little for the time and delay involved.

However, we are not naive. We realize that products standards as they now exist can sometimes persist much longer than they should in light of either technological innovation or errors in the original examination of the product. This is why there is an imperative need for the complaint procedures described by the proposed rule, especially by Sections 457.6 and 457.7 It is needless to re-examine every component part for every product standard, but it is imperative that the standard be subject to review as time, innovation, and experience march on.

If product certifications are delayed, small business sellers and users, as well as small underwriting organizations are damaged; but if subsequent challenges are not allowed, everyone is equally damaged.

Respectfully submitted.

——— ———, *Executive Vice-President.*

AFSB statement

Cash on hand	$1,850
Cash on hand not budgeted elswhere	$0
Membership dues (optional)(year)	$35
Approximate total funds collected from dues	$30,000
Number of Members, includes non-paid members	$3,000
Surplus, if any, for last fiscal year: Deficit	$6.18
Salary for officers, 1978, total	$8,300
Use of funds from members:	
Educational funding (percent)	75
Organizational (percent)	25

BUDGET FOR PARTICIPATION IN FTC RULEMAKING HEARINGS

1.0 X Preparation Prior to Hearing.
2.0 X Original Request.
X Advance Payment Request.

3.0 The budget is to reimburse staff members, secretaries, and outside counsel for research, witness preparation, drafting of testimony, and legal advice and deliverance of testimony in Washington, D.C. The necessary steps to produce the testimony include expenses for legal research, drafting, photocopying and other document reproduction, typing, telephone calls, legal counselling, deliverance of testimony, and travel expenses.

	Total Request
3.1 Name and function:	
Eldon Ham, legal counsel; research; drafting (55 hours at $26 per hour)	$1,430.00
Ira Latimer, research and drafting (45 hours)	0
Total	1,430.00
3.2 Travel:	
Round trip air fare for 1 to Washington, D.C	250.00
Per diem for 1; 2 days in Washington, D.C	
Supplies: Typing materials and photocopying	20.00
Taxi fare:	
To and from Chicago airport	24.00
To and from Washington airport	24.00
During Washington stay	36.00
Secretarial (15 hours at $6 per hour)	90.00
Telephone	20.00
Bookkeeping	30.00
Overhead (25 percent of total time for secretarial)	22.50
Total	516.50
Grand total from above [1]	1,946.56

[1] Plus Per Diem.

Note.—Advance payment request: $900.

SHULTZ & HAM,
ATTORNEYS AT LAW,
Chicago, Ill., May 4, 1979.

To American Federation of Small Business.

Attorney's fees: Retainer for attorney's fees to be applied against total fees of $1430.00 regarding time to FTC proposed rule testimony, research, preparation of witnesses, general legal counsel—$500.

Costs advanced: None.

Total balance due—$500.

ELDON L. HAM, ATTORNEY AT LAW, CHICAGO, ILL.

Professional Practice:

1970 Shultz & Ham, Attorneys at Law: Founding partner; firm handles real estate matters, general corporate law, wills and probate, civil litigation.

1976 Palmer, Blackman, and Mancini, P. C.: Associate attorney; practice involving general corporate law, real estate, probate, civil litigation, franchising, profit sharing and pension plans, marital law; clients included a major suburban savings and loan association, one of Chicago's largest independent meat packers, and a national real estate franchisor.

1975 Cook County Legal Assistance Foundation: Senior Law Student practice under Illinois Supreme Court Rule 711; client counseling, civil litigation.

Professional Experience: Experience to date has included the drafting and IRS qualification of numerous profit sharing and money-purchase pension plans; the registration of a real estate sub-franchisor in Illinois and Wisconsin; federal equal credit regulation practice before the Federal Home Loan Bank Board; drafting shareholder agreements and other corporate documents; arbitration practice and civil litigation in the Illinois courts through the Appellate level.

Activities and Professional Affiliations: American Bar Association; Illinois State Bar Association; Chicago Bar Association; Northwest Suburban Bar Association; Co-Chairman, Attorneys for an Unbiased Election Day; Chicago Council on Foreign Relations; and Field Museum.

References: Hinsdale Federal Savings and Loan Association; Laminite Plastics Corporation of Chicago; and Berry Tire Company.

Education:

1976 J.D., Chicago-Kent College of Law.

1973 B.S., Finance; University of Illinois at Champaign-Urbana; Special emphasis on insurance and Investments.

FEDERAL TRADE COMMISSION,
OFFICE OF THE GENERAL COUNSEL,
Washington, D.C.

Twenty largest funding recipients, Federal Trade Commission public participation program

1. Council on Children, Media and Merchandising [1]	$189,278
Consumer Affairs Committee, Greater Washington Chapter, Americans for Democratic Action and National Council of Senior Citizens) [1]	4,825
Total	194,103
2. California Citizen Action Group [1]	182,237
3. National Consumer Law Center [1]	137,832
4. National Council of Senior Citizens [1]	48,804
Consumer Affairs Committee, Greater Washington Chapter, Americans for Democratic Action) [1]	75,322
Consumer Affairs Committee, Greater Washington Chapter, Americans for Democratic Action and Council on Children, Media and Merchandising) [1]	4,825
Total	128,951

5. National Consumers League (Congress) [1]	123,712
6. Consumer Affairs Committee, Greater Washington Chapter, Americans for Democratic Action [1]	106,442
7. San Francisco Consumer Action [1]	96,533
8. Action for Children's Television (with Center for Science in the Public Interest) [1]	86,287
9. Committee for Children's Television (with Consumers Union, San Francisco office) [1]	81,378
10. Center for Public Representation [1]	73,489
11. Center for Auto Safety [1]	72,279
12. Housing Advocates [1]	54,753
13. National Hearing Aid Society [2]	49,146
14. Consumer Action (Washington, D.C. office) [1]	46,844
15. California Public Interest Research Group	38,583
San Francisco Consumer Action [1]	7,770
Total	46,353
16. Community Nutrition Institute [1]	40,666
17. Consumers Union (San Francisco office) (with California Citizen Action Group) [1]	39,539
18. Media Access Project [1]	33,813
19. Coalition: Sierra Club; Friends of the Earth; Environmental Defense Fund; Natural Resources Defense Council [1]	30,241
20. Automobile Owners Action Council [1]	29,735

[1] Generally supported some form of Commission rule.
[2] Generally opposed some form of Commission rule.

Appendix 10

ATTACHMENT 10.—CENTER FOR AUTO SAFETY INCOME AND EXPENSE SUMMARY, JUNE 30, 1978

	Actual	Budget	Variance from budget	Last year
Income:				
Grants—Restricted	68,931	68,931	.....	102,288
Grants—Unrestricted	57,750	57,750	.....	24,012
Contributions—Major	8,000	1,000	7,000	20,000
Contributions—Small	1,486	1,500	−14	906
PLRS—Subscriptions (Renewal)	4,150	4,000	150	2,015
PLRS—Subscriptions (New)	5,815	5,500	315	5,390
PLRS—Subscriptions (IMPACT)	1,508	3,150	−1,642	533
PLRS—Research	21,515	24,000	−2,485	19,739
Royalties—Goodman Book	8,282	6,000	2,282	5,207
Royalties—Viking	962	40	922	55
Interest	2,702	2,400	302	2,644
Consulting—FTC (MH)	10,621	21,721	−11,100	5,096
Consulting—FTC (VS)	.....	.....	.....	5,275
Consulting—NHTSA (VS)	11,220	21,327	−10,107	13,578
Speeches and articles	500	500	.....	250
Sale of publications	3,517	2,000	1,517	2,077
Total income	207,113	219,823	12,710	209,137
Total income				
General/administrative	24,038	27,690	3,652	22,099
Highway safety project	67,538	91,823	23,470	81,808
Product liability research	33,917	33,900	−17	32,170
Vehicle safety project	52,562	51,866	−696	41,181
Vehicle safety consulting	5,980	1,500	−4,480	10,896
Mobile homes project	17,032	19,982	2,950	14,880
Mobile homes consulting	8,749	6,000	−2,749	2,481
Total expenses	209,816	231,946	22,130	205,515
Net surplus	2,703	−12,123	9,420	3,622

SIERRA CLUB STATEMENT OF REVENUES AND EXPENSES AND CHANGES IN FUND BALANCES—YEAR ENDED SEPT. 30, 1976 WITH COMPARATIVE TOTALS FOR 1975

	Unrestricted	Restricted	1976	1975
Revenues:				
Member dues and admission fees	2,119,755	.....	2,119,755	1,928,427
Contributions (note 8)	1,002,431	523,829	1,526,260	1,680,226
Outings and lodge reservations and fees	1,308,071	.....	1,308,071	1,208,150
Sales, principally of publications	966,078	.....	966,078	809,774
Royalties on publications	344,042	.....	344,042	306,390
Advertising, investment and other income	208,412	800	209,212	95,528
Total	5,948,789	524,629	6,473,418	6,028,495
Expenses:				
Program services:				
Studying and influencing public policy	985,263	337,636	1,322,899	1,081,671
Information and education	1,521,156	168,514	1,689,670	1,580,382
Outdoor activities	1,308,940	3,535	1,312,475	1,201,181
Public law	509,729	23,638	533,367	553,159
Subtotal	4,325,088	533,323	4,858,411	4,416,393
Support services:				
General and administrative	825,795	15,654	841,449	660,109
Membership	646,896	4,192	651,088	612,795
Fund raising	197,631	.....	197,631	119,509
Subtotal	1,670,322	19,846	1,690,168	1,392,413
Total	5,995,410	553,169	6,548,579	5,808,806
Excess (deficiency) of revenues over expenses	−46,621	−28,540	−75,161	219,689
Transfer of funds	−1,587	1,587	.....	.....
Fund balances, beginning of year	425,841	66,151	491,992	272,303
Funds balances, end of year	377,633	39,198	416,831	491,992

Note.—See accompanying notes to financial statements.

ENVIRONMENTAL DEFENSE FUND, INC. [1]

[Year ended Dec. 31, 1976]

	Current funds		
	Unrestricted	Restricted	Total
Support and revenue:			
Public support:			
Foundation grants, bequests and other gifts	$370,992	$353,086	$724,078
Large gifts from members	103,470	29,569	133,039
Membership	802,133	77,006	879,139
Total public support	1,276,595	459,661	1,736,256

ENVIRONMENTAL DEFENSE FUND, INC. [1]—Continued

[Year ended Dec. 31, 1976]

	Current funds		
	Unrestricted	Restricted	Total
Revenue:			
Net realized gain on investment transactions	16,759	.....	16,759
Investment income	17,173	.....	17,173
Miscellaneous	18,121	.....	18,121
Total revenue	52,053	.....	52,053
Total support and revenue	1,328,648	459,661	1,788,309
Expenses:			
Program services:			
Legal action	369,659	307,003	676,662
Public information	79,617	12,688	92,305
Total program services	449,276	319,691	768,967
Supporting services:			
Fund raising:			
Large gifts and grants	108,411	24,334	132,745
Membership	336,355	4,984	341,339
Total fund raising	444,766	29,318	474,084
Management and general:	207,365	.....	207,365
Total supporting services	652,131	29,318	681,449
Total expenses	1,101,407	349,009	1,450,416
Excess of support and revenue over expenses	227,241	110,652	.....

[1] The statement of current revenues and expenditures is based on EDF's 1975 audited report, prepared by Peat, Marwick Mitchell & Co. Copies of the complete financial statement are available on request.

EDF suffered deficits during fiscal 1973, 1974 and 1975 totalling $426,316. These deficits drastically depleted EDF's reserves. As a result budget cutbacks, including salary cuts for professional staff, were implemented at the end of fiscal 1975. EDF's trustees requested that a reserve equalling 50 percent of its annual operating expenses be achieved by the end of 1979. This year the excess of support and revenue over expenditures has been applied toward this goal.

Respirable Particles: Impact of Airborne Fine Particulates on Health and the Environment. Prepared by Frederica P. Perera. 230 pp. (Available Fall, 1977).

NRDC has compiled, for the first time, the available data on airborne fine particles, which can be efficiently drawn deep into the lungs and often contain toxic chemical compounds associated with human respiratory disease and cancer. These particulates remain suspended in the atmosphere for long periods of time and are responsible for serious ecological disturbances far from their source. At present, federal standards tend to regulate only the more easily controlled coarse particulates, ignoring the finer particles. We hope that this report will encourage the regulation of this dangerous class of air pollutants.

A complete list of NRDC publications is available from the New York office.

Financial Statement

Consolidated Statement of Income and Expenses
Year Ended December 31, 1976

(Pre-audited figures*)

Income	
Foundations	$1,247,856
Contributions	684,874
Special Events	48,310
Interest	22,931
Other, including revenue from publications	32,826
TOTAL	$2,036,797
Expenses	
Environmental litigation	$1,090,772
Scientific support	164,823
Public education	103,225
Intern program	20,312
Management and general	272,847
Fund Raising	387,612
	$2,039,591
Excess (expenditures)	$ (2,794)

*Audited figures available July 1, 1977

invested enough to replace members who drop out, no more; we've been satisfied to hold our own. And that's perfectly OK when you're just getting started. But FOE is all of eight years old, and holding our own is no longer enough. We must satisfy creditors and go on from there.

The Empyrean Future

What to do? Strange as it sounds, we found a business firm that is willing to get for us the new members we need. The firm reimburses itself out of receipts that its solicitation mailings bring in. If a mailing is highly successful, we get revenues that remain after our business partner has taken its cut; but essentially, we benefit not from initial dues income but from gaining new members whose dues will come directly to us after the initial year.

So, at some sacrifice of current income, we escape the high cost of soliciting new memberships. Although this new arrangement hasn't had time to prove itself yet, we have high hopes. It has worked well for others.

The Present Crisis

We are now running out of money. The reasons are simple.

1. Summer is upon us, and it's always a perilous time for organizations like ours. With many FOE folks on vacation, contributions become scarcer and renewals are often deferred. It's a time of general quietude, but FOE's work must go on.

2. We've economized as best we can, but inflation—including those well deserved pay raises—has us in its grip. Further economies would seriously damage our program.

3. Recruitment of new members by our solicitation firm is getting off to a slower start than we expected, and in the meantime, we haven't been recruiting new members ourselves. So the benefits of increased income from payment of dues by an enlarged membership have been pushed further into the future.

Can you help?

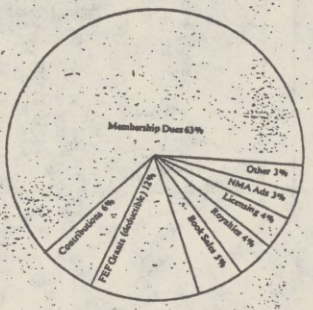
Your help is badly needed. Whatever you can give. We may otherwise be forced to with someone who can't afford to contribute at all.

Here's a coupon. Send it in with a donation, please, if you can, and help keep FOE going at its present level of effectiveness.

Thanks.

FOE Income

July 1976-April 1977: $509,862



FOE Expenses

July 1976-April 1977: $519,002

IV. APPLICANTS REQUIRE COMPENSATION TO PARTICIPATE EFFECTIVELY IN THE PROCEEDING

Friends of the Earth, like most grassroots environmental organizations, is underfinanced. As is the case with all the applicants, FOE, because of the nature of its work, cannot depend for its survival on the largesse of labor unions, political parties, or other similar institutions. Instead, it relies in large part on contributions from its members to finance its day-to-day operations.

FOE recently went through a budget crisis requiring a special appeal to members to meet organizational obligations. That appeal met with a positive response, but FOE continues to operate under strict financial constraints, and does not have the resources to finance participation in this FTC proceeding. FOE's Income from July 1976 through April 1977 was approximately $510,000.[1] However, its expenses for the same period were approximately $520,000 (see attachment for breakdown). Although an updated statement, not yet available, is expected to reflect some improvement in this deficit position, it will not allow surplus funds for financing a new, major activity, such as this FTC rule-making participation.

For the year ending December 31, 1976 (the last year for which figures are currently available) the Natural Resources Defense Council had income of approximately two million dollars and expenses slightly in excess of that amount. A financial statement, along with NRDC's 1976–77 annual report, is attached and includes a breakdown on income and expenses. Expenses and income for the current year are not expected to differ greatly. No funds were allocated in the current year's budget for participation in the FTC rulemaking and it is impossible at this later stage to divert funds already allocated to other program areas. Thus, FTC assistance is needed to finance the joint participation of NRDC in this rulemaking.

As the attached Statement of Current Revenues and Expenditures indicates, the Environemental Defense Fund's annual expenses for the year ending December 31, 1976 were approximately $1.4 million. These were covered by total support and revenues received. However, deficiencies have only been avoided due to severe budget cutbacks, including salary cuts, instituted following deficits suffered during fiscal years 1973, 1974, and 1975. Therefore, expansion of EDF into new cases or proceedings, such as this FTC rulemaking, is limited by a lack of available funds. FTC reimbursement is needed to finance EDF's joint participation since all available funds have already been allocated for specific, established cases within the EDF program areas described previously.

The Sierra Club has annual expenses of approximately 6.5 million dollars. Appoximately 70 percent of these funds are devoted to Club programs including studying and influencing public policy, information and education activities, outdoor activities, and public law activities. The remainder are allocated to Support Services including administrative costs, expenses, costs of servicing memberships, and fund raising activities. Revenues to support these expenses are derived from membership dues and admission fees (approximately 2.1 million), contributions (approximately 1.5 million), outings and lodge reservations and fees (approximately 1.3 million), sales, principally of publications (approximately .9 million), royalties on publications (approximately .3 million) and advertising, investment and other income (approximately .2 million). Despite these broad sources of revenue and the support of a large grassroots membership, the Club suffered a deficiency of revenues over expenses in the year ended September 30, 1976, of approximately $75,000.[2]

It is not feasible for the applicants to attempt a special fund-raising drive to finance their FTC participation. These extraordinary efforts, plus other special budgetary measures, have already been employed in recent crises involving organizational survival, and they cannot be used on a frequent basis without undermining their effectiveness. Furthermore, the expedited nature of the FTC rulemaking precludes initiation and successful execution of such a drive before the necessary financial obligations of FTC participation will have been incurred.

Finally, it should be understood that the FTC's compensation for participation in the rulemaking will not in fact cover all the costs and expenses incurred by the jointly participating groups.

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[1] The attached excerpt from the Friends of the Earth newspaper gives an approximate breakdown of income sources.

[2] The Sierra Club does obtain some additional support for representation by outside legal counsel from the Sierra Club Legal Defense Fund (SCLDF). SCLDF is an entirely separate organization, however, in control of its own budget and priorities. It has several staff attorneys who represent the Club from offices located in Denver and San Francisco. However, these attorneys' dockets, already filled to capacity, do not allow for the assumption of representation of the Club in an ongoing administrative proceeding in Washington, D.C. which will involve substantial attorney time both in preparation, hearings and extensive post-hearing participation.

Summary—Media access project (for year ending Dec. 31, 1978

Assests	$59,256
Liabilities	33,408
Net Assests	25,848
Grants receivable	20,409
Accounts receivable	12,035
Rent	955
Furniture and equipment	1,400
Actual expenditures (inclusive of all restricted grants)	170,173
Exceeded income by	13,810

Summary—California citizen action group

1977 total income	152,327.46
1977 total expenses	153,857.46
1978 total income	87,215.61
1978 total expenses	86,534.50

NOTE.—Present permanent assets: One typewriter.

Further financial information is on file at the Federal Trade Commission.

SUMMARY—NATIONAL CONSUMER LAW CENTER

Officers are elected by the board, representing the legal services membership.

Assets and liabilities (year ending Dec. 31, 1978)

Total assests: $453,000 (Includes cash, law library, office equipment, prepaid expenses, accounts receivable).

Total liabilities: $453,000 (including furniture and equipment). (Includes grant funds for legal services, all of which are restricted grants).

A detailed report on NCLC's annual budget is on file at the Federal Trade Commission.

* * * of existing information and preparation for hearing participation. Without reimbursement for expenses, our participation in the hearing would be severely curtailed and would certainly not adequately represent consumers.

Sec. 1.17(c)(15) *Specific statement of expenses*

See the budget included in part III of this application.

Sec. 1.17(c)(6) *Applicant's status:*

CALPIRG is a private non-profit (501(c)(4)) organization incorporated in California, centered in Southern California with headquarters in San Diego. Founded in 1972, CALPIRG is controlled and funded by the thousands of students enrolled at the University of San Diego, USD Law School, The University of California at San Diego, and San Diego State University. In addition, CALPIRG presently has groups of students engaged in organizing other campuses throughout California.

Our estimated budget for the present fiscal year is approximately $42,000, out of which we support an office with 2 full time paid staff (our Executive Director and Projects Director) (resumes are attached), 3 part time professional consultants (Consumer Assistance Line coordinator, Energy-Environment consultant and Investigational Research Unit coordinator), and 2 paid half-time project coordinators who are students. In addition to our present staff, we also expect to add shortly 4 half-time staff for clerical and secretarial help whose salaries would be paid through Federal RETC funding. Our present staff coordinates research, surveys, projects and advocacy activities involving hundreds of volunteers over the course of a year. Because of our student base, we also have available to us many of the resources of our member schools in terms of research facilities and faculty expertise, as well as the aid of other professionals in the community.

CALPIRG has received a $27,500 grant from the City of San Diego which has been fully committed to the operation of a Consumer Assistance Line, speaker's bureau, distribution of our monthly consumer newsletter to elderly and low-income San Diegans, and to research, publish and distribute the results of projects on:

(1) Food prices;
(2) Nursing homes;
(3) Vocational Schools; and
(4) Open dating on food.

While CALPIRG has not directly participated in prior FTC hearings, it did, in connection with FTC hearings on automobile fuel economy claims, perform a Southern California survey of new car mileage claims made by salesmen, the results of which were combined with those from other Public Interest Research Groups for presentation at the Commission's hearings in Washington, D.C.

APPENDIX B.—*The Housing Advocates, Inc., budget*

I. Staff:	
Professional:	
Executive director	
Chief counsel	
General counsel	
Chief planner	
Total	$30,000
Supportive:	
Secretarial (full- and part-time assistance)	7,245
Work Study students (10)	2,000
Total	9,245
II. Operation:	
Rent	4,800
Telephone	1,900
Utilities	500
Office equipment rental	3,000
Office supplies	750
Postage	1,500
Printing and duplicating services	3,000
Participation in conferences, workshops, and seminars	1,500
Library and research materials	805
Accounting services	1,000
Travel	1,000
Miscellaneous costs	1,000
Total	20,750
Professional Staff	30,000
Supportive Staff	9,245
Difference	20,755
Grand total	60,000

VII. ORGANIZATION CAPACITY

A. Purpose

The Housing Advocates, Inc. is a private, non-profit corporation exempt from income tax under § 501(c)(3) of the Internal Revenue Code of 1954, as amended. The corporation was organized under Ohio law on June 16, 1975 for the purpose of achieving equal housing opportunities in housing and land use practices, and promoting safe, decent, and reasonable cost housing for low and moderate income families.

The Housing Advocates, Inc. provides comprehensive program design, evaluation, research, and legal services of lawyers and planners experienced in housing and community development. The Advocates' staff has experience in legal and program services with national agencies, an areawide planning agency, and community development and local fair housing groups in both the public and private sectors.

B. Goals

To encourage all segments of the housing delivery system to private equal housing opportunities.

To remove constraints to the development of housing for low and moderate income families.

To advocate the use of private and public resources to ensure safe, sanitary, and decent housing for all families, particularly those of low and moderate income.

C. Program

The Housing Advocates, Inc. current program includes the following:

Program planning and evaluation in the areas of:

Fair housing.

Affirmative action.

Low income public housing.

Subsidized housing.

Equal housing opportunities as they relate to land use policies and practices.

Neighborhood disinvestment.

Mobile homes.

Legal services—On a no-charge limited basis, as a public service to the community these services are provided to individuals:

Counseling clients on tenant-landlord, and housing discrimination (sex, race, ethnicity, geographic location) problems.

Assisting clients in the areas of foreclosure, subsidized housing and community resources.

Mobile home counseling and consumer problems.

Research—Reports have been developed for:

Systematic issues in housing discrimination.

Housing need assessment.

Community development housing assistance plans section 8 implementation.

Disinvestment/redlining/FHA-VA practices.

National mortgage lending policies.

Residential segregation/racial migration patterns.

Exclusionary zoning.

Technical assistance—Technical services include:

Assisting local and regional governments or public and private agencies in interpretation of regulations regarding Housing and Community Development Act of 1974, Ohio Tenant/Landlord Law, Fair Housing Act of 1968.

D. Board of trustees

The governing body of The Housing Advocates, Inc. is a board of trustees composed of leaders in the Greater Cleveland Community who are well versed in its housing problems and active in efforts to resolve them. The board is presently composed of the following members:

Lindsey Cowan—Dean, Case Western Reserve University School of Law and former Dean of the University of Georgia School of Law;

Harry Fagan—Executive Director, Commission on Catholic Community Action, member of the faculty of the Urban Studies and Pastoral Institute of Notre Dame University, South Bend, Indiana;

Allen Fonoroff—Professor of Planning at Case Western Reserve University, member of the Cleveland City Planning Commission, and presently engaged in an analysis of the American Law Institute's proposed model land use code;

W. Kiely Cronin—Former President, Cleveland City Club and former Ports Director of the City of Cleveland. Mr. Cronin was a co-founder of the Fair Housing Council and co-chairman of Operation Equality, the fair housing arm of the Urban League of Greater Cleveland;

Lana Cowell—Acting Director, Heights Community Congress, active in housing and community development efforts of the League of Women voters;

Dr. Roberta Steinbacher—Interim Director of the Institute of Urban Studies, Cleveland State University; Trustee, Womenspace;

Dr. Howard Biel—Chairman of Urban and Environmental Studies, Case Western Reserve University;

Rena Blumberg—Director of Community Affairs, WMGC Radio; former Vice President of Cleveland City Club; Trustee, Womenspace.

Action for children's television budget, 1978

INCOME

Grants:	
Committed:	
Ford Foundation	$30,000

The George Gund Foundation	50,000
Rockefeller Family Fund	20,000
Total	100,000
Uncommitted:	
Science workshop and handbook	25,000
Parent education	15,000
Film	30,000
Total	70,000
Contributions:	
New members	10,000
Renewals	60,000
Donors and corporations	35,000
Total	105,000
Miscellaneous income:	
Conference	10,000
Resource materials	10,000
Film distribution and lecture	10,000
Total	30,000
Grand total	305,000

EXPENSES

Salaries	115,000
Payroll taxes	10,000
Secretarial and office	5,000
Rent	6,000
Postage	20,000
Travel	12,000
Telephone	10,000
Educational aids	5,000
Professional fees	22,000
Fundraising and promotion	50,000
Printing	20,000
Film	30,000
Total	305,000

Major grants received by act: 1975, 1976, 1977

Foundation/corporation, purpose and date:	*Amount*
Ford Foundation, general support, January 1975	$25,000
Markle Foundation, general support, January 1975	50,000
Carnegie Corporation of New York, Constituency Building, March 1975	71,500
Ford Foundation, general support, March 1975	40,000
Norman Foundation, education film, May 1975	4,999
Carnegie Corporation of New York, Constituency Building, July 1975	61,500
Joseph P. Kennedy, Jr. Foundation, resource handbook on children with special needs, July 1975	5,000
The Lilly Endowment, resource handbook on children with special needs, September 1975	9,500
Van Ameringen Foundation, resource handbook on children with special needs, November 1975	4,900
National Endowment for the Arts, resource handbook on children's television and the arts, November 1975	20,000
Carnegie Corporation of New York, Constituency Building, December 1975	32,100
ITT, general support, November 1975	1,500
Ford Foundation, general support, January 1976	35,000

Foundation/corporation, purpose and date:	*Amount*
Van Ameringen Foundation, resource handbook on children with special needs, March 1976	12,250
Stride Rite, general support, April 1976	1,000
New York Foundation, bilingual nutrition project, May 1976	12,000
Institute for World Order, parent education project, September 1976	10,000
Mary Reynolds Babcock Foundation, conference on televised role models and early adolescents, December 1976	25,000
Anonymous, parent education, December 1976	45,000
Fiduciary Trust Co., film on issues relating to children and media, January 1977	1,000
Ford Foundation, general support, January 1977	40,000
Ford Foundation, general support, March 1977	50,000
Cummins Engine Foundation, general support, April 1977	1,000
The Green Shoe-Stride Rite Charitable Foundation, general support, April 1977	1,000
Philip L. Graham Fund (The Washington Post), awards program, May 1977	1,000
Gulf Oil Foundation, general support, May 1977	1,000
Mobil Foundation, general support, June 1977	5,000
Ford Foundation, general support, June 1977	30,000
International Business Machines Corp., general support, June 1977	3,000
The Clorox Co., general support, July 1977	1,000
S. C. Johnson & Son, Inc., general support, July 1977	1,000
Scott Paper Co., general support, August 1977	1,000
Levi Strauss Foundation, general support, August 1977	1,000
Scherman Foundation, general support, August 1977	1,000
Spencer Foundation, research workshop on televised role models and early adolescents, August 1977	18,600
The Travelers Insurance Co., general support, September 1977	1,000
Grace Foundation Inc., general support, September 1977	1,000
Anonymous, general support, September 1977	20,000
Robert Sterling Clark Foundation, legal actions, October 1977	20,000
Rockefeller Family Fund, legal actions, October 1977	20,000
Avon Products Foundation, Inc., general support, December 1977	2,000
United Technologies Corp., general support, December 1977	1,000

The Committee does not have the funds necessary to participate in this proceeding. The Greater Washington Chapter of ADA operates on an annual budget of $5,000 to $7,000 derived entirely from membership dues. This money is used mainly to pay a minimal salary to a Chapter Director and for miscellaneous printing and postage. The Consumer Affairs Committee receives $2,000 a year from the local chapter which is used for operating expenses and to pay for the part-time services of one secretary. The Committee receives no funds from the national organization.

As a result, the Committee will require compensation to submit comments in this proceeding in the manner discussed in Section IV above. The Committee estimates that the cost of this work will be as follows:

Attorneys:	
Delmar Karlen, Jr.,—40 hours at $30 per hour[1]	$1,200.00
Bruce J. Terris—10 hours at $42 per hour	420.00
Bookkeeper—2 hours at $10 per hour	20.00
Secretarial—8 hours at $6 per hour	48.00
Miscellaneous expenses, such as long-distance telephone calls to other consumer groups	50.00
Total	1,738.00

[1] This budget uses the Commission's current compensation rates. Nevertheless, the Committee expects that its attorneys will receive the maximum level of compensation authorized by the Commission if current maximum rates are increased.

NATIONAL CONSUMERS LEAGUE STATEMENT OF RECEIPTS AND EXPENSES AND CHANGES IN FUND BALANCE AS OF DEC. 31, 1978

	General fund	Outside grants and contracts	Combined total
Receipts			
Individual dues	$6,335.00		
Individual contributions	2,303.50		
Group contributions	24,845.00		
Fundraising	59,649.00		
Government grants and contracts:			
Assertive consumer		$90,072.00	
Department of Commerce		7,500.00	
HEW–OE		4,950.00	
CPSC		2,422,18	
ASTM contract		30,805.53	
Safety standard (FTC)		1,200.00	
VEIP		3,412.50	
Honorarium	10,338.85		
Publications	2,152.19		
Interest	1,634.11		
Total receipts	107,257.65	140,382.21	$247,639.86
Expenses:			
Salaries	62,186.53	47,526.22	
Unemployment	1,860.92	660.76	
FICA	3,745.34	2,264.85	
Group health	2,027.96	1,096.80	
Consultants	2,440.00	45,003.03	
Local transportation	403.29	637.58	
Out-of-town transportation	281.39	4,159.11	
Food/lodging	316.96	1,121.53	
Telephone	2,315.80	1,702.99	
Printing	4,985.21	5,817.55	
Xeroxing	2,286.14	0.00	
Office supplies	2,785.25	1,488.88	
Rent	6,120.50	1,960.00	
Miscellaneous	469.76	387.56	
Dues/conferences	648.00	0.00	
Safety standard—review panel		175.82	
Maintenance and repairs	155.69	22.50	
Postage	3,014.12	532.79	
Stipends	0.00	4,000.00	
Machine rental	0.00	367.50	
Fundraising	11,385.01	0.00	
Insurance conference	0.00	1,859.12	
Accounting expense	1,200.00	0.00	
Press clipping service	200.00	0.00	
VEIP expenses	0.00	9.40	
Total expenses	108,827.87	120,793.99	229,621.80
Excess expenses over receipts	−1,570.22		
Excess receipts over expenses		19,588.22	
Reimbursed by grants and contracts for NCL staff and facilities	23,784.93	−23,784.93	
NCL receipts	22,214.71	−4,196.71	18,018.00
Fund balance Jan. 1, 1978			31,541.90
Fund balance Dec. 31, 1978			49,559.90

CONSUMERS UNION OF UNITED STATES, INC., BALANCE SHEET, MAY 1976

ASSETS:	
Current assets:	
Cash	$ 187,035
Savings and certificates of deposit	1,548,650
Subscriptions receivable, net	945,436
Inventory of paper and supplies	945,381
Tests in process	1,094,013
Prepaid expenses	254,042
Total current assets	4,974,567
Property and equipment:	
Land	895,340
Buildings and building improvements	2,942,936
Furniture, fixtures, and equipment	2,225,870
	6,064,146
Less, allowance for depreciation	2,339,353
	3,724,793
Other assets (Note 2)	814,803
	$ 9,514,163

LIABILITIES:	
Current liabilities:	
Accounts payable and accrued expenses	$ 850,592
Current portion of unearned subscription revenue, less $3,341,404 deferred promotion expenses	6,403,884
Total current liabilities	7,254,476
Noncurrent portion of unearned subscription revenue, less $1,280,178 deferred promotion expenses	2,453,494
Accrued severance expense	1,509,489
Accrued pension expense	471,300
Commitments and contingencies (Notes 3 and 4)	
DEFICIT:	
Deficit, beginning of year	(1,350,315)
Excess of costs and expenses over income, for the year ended May 31, 1976	(824,281)
Deficit, end of year	(2,174,596)
	$ 9,514,163

See notes to financial statements.

STATEMENT OF OPERATIONS
for the year ended May 31, 1976

Income:	
Revenue from subscriptions, newsstand, and other sales	$16,708,477
Grant from Consumer Product Safety Commission	26,586
Interest on U.S. Government obligations, savings, and certificates of deposit	126,203
Total income	16,861,266
Costs and expenses:	
Reports, Buying Guide, and books:	
Technical and editorial	4,101,675
Paper, printing, and mailing	3,376,463
	7,478,138
Promotion	4,963,647
Servicing of subscriptions	1,921,713
In-house printing and mailing	1,012,023
Consumer curriculum materials, public-information service, and consumer affairs, including grants and contributions of $98,385	420,418
Broadcast/Film	371,072
Consumers Union governance	155,875
Washington and West Coast offices	153,305
Maintenance and depreciation—Mount Vernon buildings and leasehold improvements	400,386
General and administrative	808,970
Total costs and expenses	17,685,547
Excess of costs and expenses over income	($ 824,281)

See notes to financial statements.

NOTES TO FINANCIAL STATEMENTS

1. Consumers Union of United States, Inc. (CU) is a not-for-profit organization, exempt from income taxes under Section 501 (c) (4) of the Internal Revenue Code. The following is a summary of CU's significant accounting policies:

a. *Revenue from Subscriptions to Consumer Reports.* Subscription revenue is included in income on a pro rata basis as each issue is mailed. Unearned subscription revenue represents the portion of the revenue applicable to issues of Consumer Reports due subscribers after the fiscal year-end.

b. *Deferred Promotion Expenses.* Expenses incurred to obtain existing subscriptions are amortized as related subscription revenue is recognized. Accordingly, that portion of such expenses related to subscriptions to be fulfilled after the fiscal year-end has been deferred and deducted from unearned subscription revenue in the accompanying balance sheet.

c. *Inventories.* Investories of paper and supplies are stated at the lower of cost (first-in, first-out) or market.

d. *Tests in Process.* Costs related to test projects, less estimated recoverable value on automobiles, are charged to income when a report is published or a project is abandoned.

e. *Property and Equipment.* Property and equipment is stated at cost and depreciated on the straight-line method over the estimated useful lives (4-40 years) of the related assets. Depreciation expense in 1976 was $308,818.

f. *Accrued Severance Expense.* CU accrues currently the maximum future liability related to severance pay for union personnel in accordance with the provisions of the union agreement. Such benefits vest to the employee principally at normal retirement or CU termination date and are funded in accordance with the minimum provisions of the agreement. Severance expense in 1976 was $176,045.

g. *Pension Plan.* CU contributes to several pension plans covering substantially all employees. CU accrues the cost of the management plans on the basis of accepted actuarial cost methods and funds in accordance with the minimum requirements of the Internal Revenue Service. Total pension expense, including contributions under the union plans, in 1976 was $328,665. The effect of the Employee Retirement Income Security Act of 1974 on future pension expense or funding requirements is not expected to be material.

2. Other assets comprise:

U.S. Government obligations, at cost plus amortized discount and accrued interest (market value, $545,333)	$590,905
Savings and certificates of deposit segregated for severance payments	194,898
Other	29,000
	$814,803

3. In February, 1971, the Bose Corporation sued CU, asking for a retraction of a portion of a CU report on loudspeakers and damages of not less than $500,000. In April, 1976, Amana Refrigeration, Inc., commenced an action against CU claiming product disparagement and damages of $8,000,000 resulting from CU reports on refrigerators and microwave ovens. CU is vigorously contesting these suits and counsel for CU regards such claims as being without merit.

4. CU leases office facilities and computer equipment for which rental expense in 1976 was $249,990. Minimum rental commitments for such leases, expiring through 1981, are as follows: 1977, $252,877; 1978, $245,606; 1979, $165,890; 1980, $153,252; 1981, $121,820. The leases also obligate CU to reimburse the owners of the office facilities for increases in real estate taxes.

The Board of Directors of
Consumers Union of United States, Inc.:

We have examined the balance sheet of Consumers Union of United States, Inc., as of May 31, 1976, and the related statement of operations for the year then ended. Our examination was made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, the aforementioned financial statements present fairly the financial position of Consumers Union of United States, Inc., at May 31, 1976, and the results of its operations for the year then ended, in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

1 North Broadway
White Plains, N.Y.
July 23, 1976.

Coopers & Lybrand

Health Spas (CU)

As a grassroots, statewide organization from California, Committee on Children's Television provides an effective means for representation of the consumer viewpoint. CCT has offices both in San Francisco and Los Angeles, and is governed by a racially diverse group of parents and professionals dedicated to improving children's television. As important, CCT has often spoken to the special adverse effect of television on lower income and minority groups. It has been one of the most active groups engaged in advocacy to improve children's television in the courts, and before various administrative agencies such as the FCC and FTC. It is unlikely that any other California consumer group could provide such a diverse and citizen oriented perspective as could CCT on the issue of children's television regulation.

VII. COMMITTEE ON CHILDREN'S TELEVISION AND CONSUMER UNION'S NEED FOR FINANCIAL ASSISTANCE

The 1977 annual budget for CCT was approximately $45,000. A similar budget is anticipated for 1978, depending on the success of various proposals for foundation funding and of other fundraising activities. All foundation funds are specifically targeted and other monies are needed to meet ongoing program requirements, including staff salaries.

Without the assistance which would be received from the grant of the within proposal, Consumers Union would be unable to participate in this proceeding except in a perfunctory manner. Consumers Union has had an operating deficit of two million dollars which must be retired before additional monetary * * *

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CONSUMERS UNION OF UNITED STATES, INC., BALANCE SHEET, MAY 31, 1977

ASSETS:	
Current assets:	
Cash	$ 231,408
Time deposits	3,073,873
Subscriptions receivable, net	990,013
Inventories, principally paper and supplies	774,822
Tests in process	915,261
Prepaid expenses	429,968
Total current assets	6,415,345
Property and equipment:	
Land	903,804
Buildings and building improvements	2,976,989
Furniture, fixtures, and equipment	2,290,934
	6,171,727
Less, Allowance for depreciation	2,609,012
	3,562,715
Other assets (Note 2)	913,533
	$10,891,593

LIABILITIES:	
Current liabilities:	
Accounts payable and accrued liabilities	$ 979,401
Current portion of unearned subscription revenue, less $3,382,675 deferred promotion	7,903,061
Total current liabilities	8,882,462
Noncurrent portion of unearned subscription revenue, less $1,315,485 deferred promotion	3,059,700
Accrued severance	1,604,298
Accrued pension	62,287
Commitments and contingencies (Notes 3 and 4)	
DEFICIT:	
Deficit, beginning of year	(2,174,596)
Excess of costs and expenses over income for the year ended May 31, 1977	(542,558)
Deficit, end of year	(2,717,154)
	$10,891,593

See notes to financial statements.

STATEMENT OF OPERATIONS

for the year ended May 31, 1977

Income:	
Revenue from subscriptions, newsstand, and other sales	$17,049,679
Interest and other income	296,591
Total income	17,346,270
Costs and expenses:	
Reports, Buying Guide, and books:	
Technical and editorial	4,468,733
Paper, printing, and mailing	3,499,299
	7,968,032
Promotion	4,775,728
Servicing of subscriptions	1,957,179
In-house printing and mailing	1,156,671
Consumer curriculum materials, films, public-information service, and consumer affairs, including grants and contributions of $80,365	457,103
Consumers Union governance	149,750
Washington and West Coast offices	148,731
Maintenance and depreciation—Mount Vernon building and leasehold improvements	431,984
General and administrative	843,650
Total costs and expenses	17,888,828
Excess of costs and expenses over income	($ 542,558)

See notes to financial statements.

NOTES TO FINANCIAL STATEMENTS

1. Consumers Union of United States, Inc. ("CU") is a not-for-profit organization, exempt from income taxes under Section 501 (c) (4) of the Internal Revenue Code. The following is a summary of CU's significant accounting policies:

   a. *Revenue from Subscriptions to Consumer Reports.* Subscription revenue is included in income on a pro rata basis as each issue is mailed. Unearned subscription revenue represents the portion of the revenue applicable to issues of Consumer Reports due subscribers after the fiscal year-end.

   b. *Deferred Promotion Expenses.* Expenses incurred to obtain existing subscriptions are amortized as related subscription revenue is recognized. Accordingly, that portion of such expenses related to subscriptions to be fulfilled after the fiscal year-end has been deferred and deducted from unearned subscription revenue in the accompanying balance sheet.

   c. *Inventories.* Inventories, principally paper and supplies, are stated at the lower of cost (first-in, first-out) or market.

   d. *Tests in Process.* Costs related to test projects, less estimated recoverable value on automobiles, are charged to income when a report is published or a project is abandoned.

   e. *Property and Equipment.* Property and equipment is stated at cost and depreciated on the straight-line method over the estimated useful lives of the related assets. Depreciation expense in 1977 was $309,162.

   f. *Severance Benefits.* CU accrues annually for severance benefits earned by Newspaper Guild of New York (Guild) personnel in the current year based upon the provisions of the agreement with the Guild. Such benefits vest to the employee principally at normal retirement or CU termination date and funds are segregated in accordance with the provisions of the agreement. Severance expense in 1977 was $163,213.

   g. *Pension Plans.* CU contributes to both Guild and Company administered pension plans covering all employees. Total pension expense in 1977 was $368,134 and is funded in accordance with the provisions of the Employee Retirement Income Security Act of 1974.

2. Other assets comprise:

U.S. Government obligations, at cost plus amortized discount and accrued interest (market value, $663,500)	$703,157
Time deposits segregated for severance payments	209,376
Other	1,000
	$913,533

3. CU is a defendant in three legal actions, one which arose in 1971 and two which arose in 1976, relating to test results published in *Consumer Reports*. CU is vigorously contesting these suits and counsel for CU regards such claims as being without merit.

4. CU leases office facilities and computer equipment for which rental expense in 1977 was $245,036. Minimum rental commitments for such leases, expiring through 1981 are as follows: 1978, $243,833; 1979, $167,766; 1980, $157,281; 1981, $146,796. The leases also obligate CU to reimburse the owners of the office facilities for increases in real estate taxes.

The Board of Directors of
Consumers Union of United States, Inc.:

We have examined the balance sheet of Consumers Union of United States, Inc., as of May 31, 1977, and the related statement of operations for the year then ended. Our examination was made in accordance with generally accepted auditing standards and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

In our opinion, the aforementioned financial statements present fairly the financial position of Consumers Union of United States, Inc., at May 31, 1977, and the results of its operations for the year then ended, in conformity with generally accepted accounting principles applied on a basis consistent with that of the preceding year.

1 North Broadway
White Plains, N.Y. 10601
July 22, 1977.

Coopers & Lybrand

EXHIBIT B

Summary—National Council of Senior Citizens for year ending June 30, 1978

Assets	$1,603,472
Liabilities	1,603,472
Budget 1979	1,941,900
Operating expenses:	
Information	250,000
Organization and membership	468,000
Research department	99,700
General and advertising departments	1,121,000
Special projects	3,000

Summary—San Francisco Consumer Action (fiscal year ending Mar. 31, 1977

General budget	$127,589
Assets (cash on hand, checking accounts, accounts receivable)	7,462
Liabilities (accounts payable, notes payable, other liabilities including $16,000 in loans outstanding)	22,909
Revenues	129,322
Contributions	4,855
Restricted grants (government)	58,406
Private foundation restricted grants	21,153
Membership dues	11,134
Book sales	33,774
Expenditures	127,589
Salaries	41,814
Legal fees	6,915
Consulting fees	22,789
Interest	67
Other taxes	1,700
Rent and maintenance	4,899
Travel	6,112
General overhead, printing of newsletter, etc	43,293

IV. APPLICANTS REQUIRE COMPENSATION TO PARTICIPATE EFFECTIVELY IN THE PROCEEDING

ACT is a nonprofit organization funded by memberships and grants from a variety of foundations. ACT has numerous existing interests and obligations. for example, ACT's educational programs include: education of parents on program choices for their children through press releases, mailings and specialized presentations; conferences and workshops with broadcasters, experts in child development and other fields related to children and television; regular publication of a magazine reporting to the public the progress of ACT and of a magazine reporting to the public the progress of ACT and other similar groups in their efforts to improve the quality of children's television; development of extensive resource materials, including books, articles, films and research studies; and maintenance of an extensive in-house library of works relevant to children, child development and the media.

ACT has projected expenses for fiscal year 1978 of approximately $305,000. Approximately 75 percent of these funds are devoted to ACT's educational programs, including producing films, developing educational aids and resource materials, and sponsoring conferences, and commissioning research studies in the area of children and television. The remainder is allocated to various administrative expenses, fund raising activities, and support services. Revenues to support these expenses are derived from membership fees (30 percent), grants from foundations (55 percent) and income from conferences, film distribution and resource materials (15 percent).[1]

Since ACT's projected income for this fiscal year is already committed primarily to funding its educational goals, ACT requires additional funding to allow its participation in these proceedings. Although ACT considers participation at the federal regulatory agency level essential in attaining the goal of improving children's television programming and advertising, ACT cannot jeopardize its established role as an educator of parents, teachers and related groups by shifting funds from educational use to finance its participation in these proceedings. In addition, the terms of most of ACT's grants do not permit ACT to use these funds in this proceeding because the grants were made for other specific purposes.

[1] A copy of ACT's projected 1978 budget is attached as an exhibit to this application.

CSPI is a nonprofit public interest organization which relies on small donations, memberships, and the sale of its books and posters for the largest portion of its income. CSPI has projected expenses for fiscal year 1978 of approximately $265,650. Close to 66 percent of these funds are dovoted to the preparation and printing of its numerous publications and monthly magazine and to staff and consultant salaries. The remainder is allocated to administrative expenses and support services. Revenues to support these expenses are derived from the sale of publications (50 percent), donations (17 percent), magazine subscriptions (12 percent) and other sources (21 percent). According to its projected 1978 budget, CPI anticipates having a $5,000 deficit by the end of the fiscal year.[2]

CSPI is, like ACT, primarily an educational organization whose focus is conducting research on various aspects of health-related food problems. The research is then disseminated to the public, mainly through CSPI's publications. CSPI's staff members frequently make speeches and participate in conferences and meetings which deal with food policy issues.

Since CSPI's projected income is already committed primarily to its publications and research projects, CSPI requires additional funding to allow its participation in these proceedings. Without financial assistance from the FTC, CSPI will be able to have only a perfunctory involvement in this proceeding which it not only helped initiate but views as an important opportunity for improving the eating habits of children.

Finally, it should be understood that the FTC's compensation for participation in the rulemaking will not in fact cover all the costs and expenses incurred by ACT or CSPI. Substantial time has already been expended by staff members of both groups in developing positions on the proposed rule and in contacting possible experts to testify and/or submit comments for the rulemaking. ACT's and CSPI's staff will continue to do substantial uncompensated work throughout the rulemaking proceeding which will represent a substantial contribution beyond the costs of participation for which compensation is sought.

V. NATURE OF APPLICANTS' PARTICIPATION

ACT's and CSPI's participation in this rulemaking proceeding will include conducting a number of research projects in preparation for the legislative hearings, submitting written * * *

* * * * * * *

(ii) *the feasibility of contributions to the costs of participation by individual representatives of the interest;*

(iii) *the resources of the applicant, or of the interest represented by the applicant:*

As a non-profit organization, the Consumer Action group has no "economic stake" in the outcome of the proceedings in the narrow (i.e., profitmaking) sense of the word.

Consumer Action has a bank balance of $5,200.00. It can readily be seen that consumer Action is not a wealthy organization. Our staff consists of one full-time professional with part-time secretarial help. We have no lawyers on our staff; we have no accountants; we have no economists; nor do we have any money in our budget to retain them. Our entire income for 1975 totalled $23,153.58 to pay for specific projects.

As we have said, full participation involves much more than filing a statement or giving oral testimony. If we receive no financial assistance, our participation would be exactly that—the filing of a statement and the presentation of oral testimony. We would do that because the rule is of vital concern to us.

However, effective participation as the lead consumer interest organization would involve the following:

(1) At the very last hearing Consumer Action would

(a) present its oral statement, and

(b) engage counsel to cross-examine all witnesses appearing at the hearings.

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[2] A copy of CSPI's projected 1978 Budget is attached as an exhibit to this application.

(2) Because Consumer Action has working relationships with many national, state and local consumer organizations, we would utilize these assets to:

* * * * * * *

LEOPOLD & LINOWES,
CERTIFIED PUBLIC ACCOUNTANTS,
Washington, D.C., March 20, 1979.

To the Board of Directors, Council on Children, Media and Merchandising, Washington, D.C.:

The accompanying statement of financial position of Council on Children, Media and Merchandising as at December 31, 1978 was not auditied by us. Accordingly, we do not express an opinion on it.

LEOPOLD & LINOWES.

COUNCIL ON CHILDREN, MEDIA AND MERCHANDISING, STATEMENT OF FINANCIAL POSITION AS AT DECEMBER 31, 1978 (UNAUDITED)

Assets—Current fund

Unrestricted:	
Cash	$2,101
Due from restricted fund	10,106
Total	12,207
Restricted:	
Cash	241
Unbilled accounts receivable	27,632
Total	27,873

The accompanying notes are an integral part of this statement.

Liabilities and fund balances—current fund

Unrestricted	
Accounts payable	$1,965
Due to officer	3,924
Accured salary and payroll taxes	4,826
Fund balance	1,492
Total	12,207
Restricted:	
Unapplied advances	16,641
Due to unrestricted fund	10,106
Fund balance	1,126
Total	27,873

NOTES TO FINANCIAL STATEMENT, DECEMBER 31, 1978 (UNAUDITED)

1. Summary of accounting policies

A summary of the major accounting policies followed by the Council is set forth below:

Basis of accouting: The Council follows the accural basis of accounting in preparing its financial statements. In addition, the financial statements are presented in the format recommended by the American Institute of Certified Public Accountants' Industry Audit Guide "Audits of Voluntary Health and Welfare Organizations".

Grants: All grants are considered available for unrestricted use, unless specifically restricted by the grantor.

Accounts receivable: Unbilled accounts receivable represent costs incurred and allowed on contracts but which not yet been billed.

2. Income tax

The Council is exempt from Federal income tax under Section 501(c)(3) of the Internal Revenue Code. During the advance ruling period ending on December 31, 1978, the Council is being treated as a publicly-supported organization under Section 509(a) of the Internal Revenue Code.

The Council has also applied for exemption from District of Columbia income tax.

NATIONAL HEARING AND SOCIETY—UPDATE ON ASSETS AND BUDGET

Assets: NHAS has no property beyond office equipment such as typewriters.

Presently NHAS's annual income is around $260,000 from the payment of annual membership dues of $150. Because the dues has tripled over the past few years, NHAS has lost membership. Of the remaining members, 20 percent pay on an installment basis.

Before applying for reimbursement through the FTC's Public Participation Program, NHAS had spent more than $200,000 to participate in the rulemaking proceeding on the hearing aid industry. It still has more than $60,000 in unpaid legal bills, which it owes its General Counsel, in Michigan, and its Washington counsel.

Budget: NHAS's current budget is now over $300,000; its cash on hand is barely enough to take care of office overhead and salary. Its major activities are educational seminars, since it is the only hearing aid dealers' organization which conveys certification to its members.

PEAT, MARWICK, MITCHELL & CO.,
CERTIFIED PUBLIC ACCOUNTANTS,
Washington, D.C., August 22, 1978.

The Board of Directors, The Community Nutrition Institute, Inc.:

We have examined the balance sheets of The Community Nutrition Institute, Inc. as of December 31, 1977 and 1976 and the related statements of loss and changes in Institute deficit for the years then ended. Our examinations were made in accordance with generally accepted auditing standards, and accordingly included such tests of the accounting records and such other auditing procedures as we considered necessary in the circumstances.

The accompanying financial statements have been prepared in conformity with generally accepted accounting principles that contemplate continuation of the Institute as a going concern: however, the Institute has sustained substantial operating losses during 1977, 1976 and prior years and continuation as a going concern is dependent upon future profitable operations and obtaining additional financing to meet working capital needs if necessary.

As described more fully in note 1 to the financial statements, the Institute does not capitalize the cost of furniture, fixtures and equipment and depreciate such cost over the estimated useful lives, as required by generally accepted accounting principles.

In our opinion, subject to the ability to continue as a going concern and except for the method of accounting for furniture, fixtures and equipment, referred to in the second and first preceding paragraphs, respectively, the aforementioned financial statements present fairly the financial position of The Community Nutrition Institute, Inc. at December 31, 1977 and 1976 and the results of its operations and changes in its deficit for the years then ended, in conformity with generally accepted accounting principles applied on a consistent basis.

PEAT, MARWICK, MITCHELL & CO.,

THE COMMUNITY NUTRITION, INC.—BALANCE SHEETS, DEC. 31, 1977, AND 1976

	1977	1976
Assets:		
Current assets:		
Cash	$18,759	$9,935
Receivables:		
Contracts	55,777	22,392
Newsletter subscriptions	1,627	4,597
Employees		1,455
Other	500	2,020
Total receivables	57,904	30,464
Contract costs in excess of related billings	63,576	7,993
Prepaid insurance	716	519

THE COMMUNITY NUTRITION, INC.—BALANCE SHEETS, DEC. 31, 1977, AND 1976—Continued

	1977	1976
Deposits	2,827	.....
Total assets	143,782	48,911
Liabilities and Institute Deficit:		
Current liabilities:		
Accounts payable and accrued expenses	49,603	45,200
Deferred income—newsletter subscription	45,790	42,585
Billings on contracts in progress in excess of related costs and recognized income	157,067	40,947
Total current liabilities	252,460	128,732
Institute deficit	108,678	79,821
Commitment (note 4)	143,782	48,911

See accompanying notes to financial statements.

THE COMMUNITY NUTRITION INSTITUTE, INC.—STATEMENTS OF LOSS AND CHANGES IN INSTITUTE DEFICIT, YEARS ENDED DEC. 31, 1977 AND 1976

	1977	1976
Revenues:		
Contracts	$290,336	$291,324
Workshops	204,637	104,963
Newsletter subscriptions	94,817	80,874
Contributions and other	7,945	3,103
Total revenues	597,735	480,264
Expenses:		
Direct contract costs	203,139	189,327
Workshops	137,368	96,017
General and administrative expenses	284,914	194,058
Provision for doubtful accounts	892	2,241
Interest expense	279	346
Total expenses	626,592	481,989
Loss	28,857	1,725
Deficit at beginning of year	79,821	78,096
Deficit at end of year	108,678	79,821

See accompanying notes to financial statements.

NOTES TO FINANCIAL STATEMENTS DECEMBER 31, 1977, AND 1976

(1) Summary of significant accounting policies and other information

(a) *Nature of Business.*—The Community Nutrition Institute, Inc. (CNI) is incorporated as a nonprofit organization to conduct training sessions and provide technical assistance in Federal benefits, social services, and nutritional (food assistance) programs. These services are rendered for sponsors (primarily state and local governments) under fixed price contracts.

(b) *Accounting for Contracts.*—Contract revenues are recognized on a percentage of completion basis. The percentage of completion is determined based on the ratio that costs to date bear to total estimated costs. Projected losses are provided for in their entirety upon their determination. The effect of revisions in cost estimates are reflected in the accounting period in which the revisions occur.

(c) *Accounting for Newsletter Subscriptions.*—Subscription revenues are recognized on a pro rata basis over the period of the subscription, generally one year.

(d) *Furniture, Fixtures and Equipment.*—The cost of furniture, fixtures and equipment is charged to expense as acquired. The investment at cost in such assets amounted to approximately $11,500 at December 31, 1977. Purchases of such assets amounted to approximately $4,265 and $760 during the years ended December 31, 1977 and 1976, respectively.

(e) *Pension Plan Costs.*—All pension costs are funded as accrued.

(2) Pension Plan

CNI has a noncontributory, defined contribution pension plan covering substantially all full-time employees. The plan provides for the purchase of an annuity, or a lump sum payment, upon retirement. Contributions are fixed at an amount equal to ten percent of applicable employees' compensation as defined under the plan. Pension expense for the years ended December 31, 1977 and 1976 was $19,142 and $8,941, respectively. Credits of approximately $414 in 1977 and $3,346 in 1976 arising from employee terminations have been applied towards the above expenses.

(3) Related party transactions

During the years ended December 31, 1977 and 1976 CNI borrowed $17,000 and $10,000, respectively, from a bank. These amounts were paid-off prior to year-end. The borrowings were secured by U.S. Treasury notes and a savings account owned by the Executive Director.

(4) Commitment

CNI is obligated under the terms of a lease agreement for new office space which expires in 1982 and provides for annual payments of approximately $34,000, plus certain adjustments for increases in real estate taxes.

Rental expense for the years ended December 31, 1977 and 1976 was $14,500 and $9,068, respectively.

(5) Federal income taxes

CNI is exempt from taxation pursuant to Section 501(c)(3) of the Internal Revenue Code and, accordingly, no Federal income taxes have been provided.

Summary—Automobile Owners Action Council

1977:	
Income	$89,414.00
Expenses	89,988.00
Cash on hand (obligated)	1,514.88
1979:	
Projected expenses (includes salary, rent, telephone, tax, repayment of loans and others	149,286
Projected income (including membership dues, educational programs, government participation reimbursement (National Highway Traffic Safety Administration))	123,400

Further information is on file at the Federal Trade Commission.

Question. The FTC Office of Policy Planning recently issued a report on compulsory licensing and cancellation of trademarks which raised serious doubts about the benefits of divesting market leaders of exclusive use of their famous trademarks. Until such doubts are resolved by thorough and careful analysis and study, is not a proceeding to cancel such a famous trademark premature?

Answer. While the Office of Policy Planning report to which you refer does raise questions concerning licensing of powerful trademarks as an antitrust remedy, the report carefully delineates the differences between the licensing concept and the cancellation of a trademark that has become the common descriptive name of a product. These differences relate, in large part, to the distinction between a highly popular, powerful trademark which commands brand loyalty on the one hand and a trademark which has lost its brand significance and degenerated into a generic or common descriptive name on the other. The report, at page 51, concludes that, in situations where consumers are not widely familiar with any generic name for a product aside from the trademark in question, removal of exclusive trademark rights should be beneficial. This view is consistent with over one hundred years of trademark law. It is firmly established that a word which loses its brand significance and becomes a household word used to describe a whole class of products no longer functions as a trademark and should not belong exclusively to one firm.

It is, of course, impossible to forecast with precision the benefits which might flow from cancellation of a particular mark. There is, however, every reason to believe that cancellation will benefit the public and the marketplace in most instances. When the Commission encounters such an instance, petitioning for cancellation would not appear to be unwise or premature.

Question. When the FTC petitions for cancellation of a trademark registration under the Lanham Trademark Act (before the Trademark Trial and Appeal Board of the Department of Commerce) is the FTC required to prove that the trademark injures competition and consumers?

Answer. No. Under the Lanham Act the FTC has the same burden of proof as any private petitioner, and no showing of injury to competition or consumers is required. Because, however, the Commission operates under a general mandate to act only in the public interest, it has developed criteria for examining whether cancellation would be beneficial. Prior to seeking cancellation the Commission analyzes the structure and market characteristics of the industry in question to determine whether removing restrictions on the use of a generic word would be likely to attract new entrants and stimulate competition. The Commission also looks to whether consumers are paying a higher price for goods carrying the allegedly generic trademark than for competing brands. If such a premium exists and cannot be explained by differences in quality or by a high level of brand recognition and its associated goodwill, the premium is probably unjustified and amounts to consumer injury. The Commission will initiate a cancellation proceeding only if an examination of factors such as these give it reason to believe that cancellation would be in the public interest.

Question. Is it correct that the Trademark Trial and Appeal Board does not have jurisdiction to consider antitrust and consumer protection considerations in determining the validity of a trademark?

Answer. It is true that the Trademark Trial and Appeal Board does not consider antitrust or consumer protection issues in determining the validity of a trademark. This is a result of the trademark law itself. One hundred years of common law, and the Lanham Trademark Act, treat invalid trademarks as harmful on a per se basis.

Question. Under the Lanham Act cancellation procedure, does the respondent have an opportunity to show that cancellation will not improve competition or help consumers?

Answer. No. Because of the presumptions discussed above, such issues simply are not relevant to a cancellation proceeding. It should be noted, though, that a respondent can argue that genericness is not dispositive of the case. A respondent can attempt to show that the trademark does not influence the general public and is rather only a factor among knowledgeable trade buyers. In such a situation, outright cancellation might not be appropriate. For example, in the *Aspirin* case, *Bayer Co., Inc.* v. *United Drug Co.,* 272 F. 505 (S.D.N.Y. 1921), it was established that the word still had trademark significance to pharmacists and physicians but not to the general public. The remedy in the case allowed anyone to use the word "aspirin" in retail sales but preserved the trademark holder's exclusive rights at the wholesale level.

Question. Could not the FTC properly raise claims against a trademark owner of competitive injury and consumer protection by proceeding under Section 5 of the FTC Act?

Answer. Yes. A generic trademark could probably be challenged as violative of Section 5 of the FTC Act, but there is no clear authority for such an action. By contrast, the Lanham Act expressly authorizes the FTC to seek cancellation of generic words. In such a situation, especially considering that the Trademark Trial and Appeal Board, as a tribunal, is familiar with the issues involved in a genericness case, a Lanham Act proceeding appears to be the preferable route.

Question. Which famous trademarks, based upon your investigation, do you consider harmful to competition?

Answer. At present, the Commission has not made any determinations about the competitive impact of any existing trademarks, other than its finding reason to believe the cancellation of FORMICA would be in the public interest.

ADDITIONAL ARTICLES, LETTERS, AND STATEMENTS

ASSOCIATION OF PHYSICAL FITNESS CENTERS,
Washington, D.C., May 1, 1979.

HON. WENDELL H. FORD,
Dirksen Senate Office Building,
Washington, D.C.

Hon. JOHN C. DANFORTH,
Russell Senate Office Building,
Washington, D.C.

DEAR SENATOR FORD AND SENATOR DANFORTH: It is my understanding that your committee will be considering FTC appropriations at a hearing on May 2, 1979. With this in mind, I would like to pass to you the enclosed press release concerning a proposal now before the Federal Trade Commission which would regulate health spas in the United States by allowing consumers the unilateral right to cancel and receive a prorated refund.

The presiding officer's report on these hearings which will be released today cites many significant and profound economic and social dislocations that will result if this rule becomes final in its current form. Yet the presiding officer in his statement of conclusion (page 171) finds that because of the severe nature of the original rule issued by the Federal Trade Commission staff he is severely restricted in his choices leaving him in the position of proposing regulations that he acknowledges will hurt small business.

I respectfully call this to your attention and ask that your committee do whatever is necessary to discover why rules are being set forth which will ultimately and severely injure small business and consumers. Because of the timely nature of your hearings, I felt it imperative to convey this message to you today.

Sincerely,

JIMMY D. JOHNSON, PH. D.,
Executive Director.

Enclosure.

FTC REPORT CITES "SIGNIFICANT ADVERSE IMPACT" OF PROPOSED HEALTH SPA RULEMAKING

WASHINGTON, D.C.—In a still unreleased report, a Federal Trade Commission presiding officer states that America's health spa industry is made up of "a number of excellent businesses" which, according to a professionally conducted study, enjoy "a high level of satisfaction among spa users." In spite of these facts, the FTC is considering regulations that the presiding officer concludes will cause "significant adverse short term impact" among health spa operators, and upon their consumers.

The comments of the presiding officer, Roger Fitzpatrick, contained in his unreleased summary of hearings conclude that "the proposed rule with its unilateral cancellation and pro-rata refund features will have a significant adverse short-term impact upon the health spas operators."

Dr. Jimmy D. Johnson, Executive Director of the Association of Physical Fitness Centers states, "these proposals are being fostered in a climate where their effect is virtually unknown. For example, the FTC concludes that its proposals will adversely affect the health spa industry, but the FTC cannot conclude how badly. Although many consumers will be adversely affected, the FTC cannot pinpoint how many consumers will be injured or by how much. While small businesses in the industry will be injured, the FTC cannot conclude as to how severely or for how long."

"It is absurd," Dr. Johnson said, "that the FTC would conduct an experiment on small businessess, after economists testifying at FTC hearings, predicted dire consequences for consumers of physical fitness services."

Dr. Johnson reported that the presiding officer was candid enough to point out that the original rule proposed by the FTC staff severely restricted his choices,

leaving him in a position of proposing regulations that he acknowledges will hurt small businesses—although the FTC was created to protect small businesses.

According to Fitzpatrick, the FTC record "contains a professionally conducted study which found a high level of satisfaction among spa users." Dr. Johnson stated that this concurs with the conclusions of a Better Business Bureau Survey. That survey stated that of all industries ranked against the number of complaints filed against them, that health spas ranked virtually in the lowest third and that 77% of these complaints were satisfactorily resolved between the consumer and the company.

Further, Dr. Johnson noted that the economic constraints that would be created by the FTC's proposed rule will injure the only avenue now available for middle class Americans to enjoy the benefits of a regular physical fitness program on a year-round basis.

"The FTC is again acting like a kangaroo court," Dr. Johnson said, "going far beyond what Congress intended to be their role. The staff appears to have ignored those points of view that differ from their own—such as the 10,000 letters that the FTC received from satisfied health spa consumers."

"We now find in the conclusion of Roger Fitzpatrick, the presiding officer, that he was unable to fashion a reasonable rule because the proposed rule of the Commission Staff was so absolute in its terms that it gave him no opportunity to consider moderate, sensible approaches to the refund issue," Dr. Johnson explained. "Thus, we see the embarrassment of the whole conception of Trade Regulation Rulemaking at the FTC."

According to Dr. Johnson, "The FTC proposal is another government attempt to add a costly burden of regulation over yet another industry, and the Americans who use its services."

Formed in 1975, the Association of Physical Fitness Centers is a trade association created to inform the public about the economics and ethics of the full-service physical fitness center industry. It is dedicated to preserving and extending the health services provided by the industry, to protecting the interests of the consumer, and to upgrading the operating standards of member companies.

Its present membership of 80 companies own or operate more than 500 physical fitness centers and serve well over 2 million customers.

ASSOCIATION OF PHYSICAL FITNESS CENTERS,
Washington, D.C., May 3, 1979.

Hon. WENDELL H. FORD,
Dirksen Senate Office Building,
Washington, D.C.

Hon. JOHN C. DANFORTH,
Russell Senate Office Building,
Washington, D.C.

DEAR SENATOR FORD AND SENATOR DANFORTH: As a representative of the Association of Physical Fitness Centers, I was an interested spectator at the Consumer Subcommittee Hearing on S1020, Federal Trade Commission Authorization, held on May 2, 1979. The industry we represent, the health spa industry, is currently involved in a proposed trade regulation rule proceeding conducted by the Federal Trade Commission.

In reviewing the prepared statement submitted by the Commission Chairman to the Subcomittee on May 2, it became evident that either an internal communications problem exists at the Commission or that the same spirit of justice and fairness is not shared by all who represent the FTC. On page 12 of his testimony, Chairman Pertschuk states the following:

"We have also sought over the course of the last two years to devote substantially greater resources to analyzing the real world economic impact of our final rules. Throughout the rulemaking proceedings were received extensive submissions on the likely economic impact of these proposals. And, before the Commission makes a final determination on the rule, we study that evidence and make our best judgement as to the economic consequences—including the likely impact on small business and the consumer. But we realize that that is not enough, that we have a responsibility to consumers and affected industries alike to monitor what happen once a rule goes into effect.

"We have also come to recognize that even before a rule is proposed by the Commission, we must drop all we can to determine what that rule's cost might be. And we have set up new internal procedures to ensure that we get the best economic analysis available before the Commission acts to propose a rule".

In view of this statement, you would have to believe that the FTC would make every conscientious effort to bring to light all available information regarding the economic effect or impact of a proposed rule on consumers and the affected industries. During the formal hearings stage of the health spa industry proceedings in late 1977 and early 1978, the FTC produced no economic testimony whatever. It was as if the FTC never considered this aspect.

It was therefore, quite surprising for the APFC to learn in 1978 by accident that Dr. Nathaniel Greenspun produced an internal study for the Bureau of Economics, the draft of which was dated 11-7-77, entitled "Health Spas: An Economic Analysis of Refund Policy Alternatives." When we attempted to obtain copies of this analysis from the FTC after the fact, it required litigation and six months effort under the provisions of the Freedom of Information Act to shake loose a censored version first, and then finally the uncensored report.

Of course, the obvious was true. Dr. Greenspun's report supported the industry's contention that the rule would have a severe impact upon the industry's financial stability and would drive the cost of health spa services to the user up considerably.

As the result of this experience, we have come to look upon the FTC in the same light as we would look upon a prosecuting attorney who was more concerned with a conviction than he was for arriving at the truth of the matter.

We are writing to elicit your help. As a member of the Consumer's Subcommittee, Senate Committee on Commerce, Science and Transportation, we would ask that you act to assure fair treatment to all parties at the hands of the FTC in trade regulations rule proceedings and an above board approach by the regulatory agency in conducting these proceedings. In this regard, perhaps you can determine why the FTC authorities fought the release of Dr. Greenspun's study to interested parties and why it did not appear in the public record?

Copies of both the censored and uncensored reports of Dr. Greenspun's analysis are enclosed.

Thank you.

Sincerely,

JIMMY D. JOHNSON, Ph. D.,
Executive Director.

SMALL BUSINESS LEGISLATIVE COUNCIL,
NATIONAL SMALL BUSINESS ASSOCIATION,
Washington, D.C., May 3, 1979.

Hon. WENDELL H. FORD,
Chairman, Subcommittee on Consumer, Committee on Commerce, Science and Transportation, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is in response to your letter of April 18, 1979 in which you requested views affecting the dollar level for the general operation of the Federal Trade Commission in connection with your proposed legislation on FTC authorization.

It is the view and position of the Small Business Legislative Council, which represents over 4 million small business owners through its 70 member trade and professional associations and their affiliates, that the Federal Trade Commission has not made a fair allocation of the funds and resources made available to it by the Congress to effectuate the national declared public policy respecting small business. Instead, in its allocation of the funds and resources made available to it by Congress, it has starved those programs and matters which, if they had been pursued adequately, would have contributed to an enhancement of the public interest and private competitive enterprise through safeguarding small business enterprises from unfair, discriminatory and anti-competitive acts and practices.

In support of this statement, there is enclosed for your information a copy of an article by Larry Lempert from the publication "Legal Times of Washington," page 8, Monday, April 23, 1979. From that article it is clear that the Commission's investigations and cases designed to relieve small business enterprises from unfair, discriminatory and anti-competitive acts and practices, which used to number in the dozens, have dropped to a handful. A quote from that article makes a statement to the following effect:

"The commission is being 'two-faced,' this attorney said—bringing enough Robinson-Patman cases to keep congressional defenders of small business 'off their backs' but leaving business to deal with a substantial body of restrictive law."

In view of these circumstances, it is suggested that out of all of the millions of dollars Congress is authorizing and appropriating to the FTC each year, more than just a handful of those dollars should be used in furtherance of the declared public

policy and as mandated in the statutory legislation entrusted to the Federal Trade Commission for the protection of small business enterprises from unfair acts and practices, including those that are discriminatory and anti-competitive.

To accomplish what is needed it is suggested that the Congress should, in making these authorizations and appropriations, specify a line item including therein a minimum amount that the FTC would be required to earmark for law-enforcement activities in cases arising under the laws which make unlawful discriminatory conduct unfair to small business enterprises. There are solid compelling reasons for this. The Robinson-Patman Act is an excellent example.

Antitrust law has a single stated goal: preservation of competition. That goal motivated the U.S. Congress to enact the Sherman Antitrust Act in 1890. The Sherman Act, though, could provide penalties only in those instances in which offenses had already taken place. The 63rd Congress strengthened existing antitrust law with passage of the Clayton Act. The basic intent of the Clayton Act was to prevent monopolies from being formed through the use of unfair, anti-competitive trade practices.

The Clayton Act, however, proved to be ineffective against price discrimination, partially be reason of inadequate enforcement and partially due to judicial interpretation. Under the interpretation of the Clayton Act, there was no mechanism to prevent the stifling of competition through the granting of excessively favorable pricing for items purchased by large buyers.

To remedy this, the Congress, in 1936, overwhelmingly approved the Robinson-Patman Act, which has come to be known as the "Magna Carta" of small business. The Robinson-Patman Act forbids price discrimination between purchasers of goods of like quality in interstate commerce, where the effect of such discrimination "may be to substantially lessen competition or tend to create a monopoly in any line of commerce * * *"

A jurisdictional requirement of the Robinson-Patman Act allows action under the Act only where the price discrimination may lessen competiton or tend to create a monopoly. This essential clause clearly points out that the Act, as originally framed, was created to promote competition, and to discourage increased concentration.

The FTC record of enforcement of the Robinson-Patman Act is abysmal. The FTC, the agency with the clear cut statutory responsibility to compel observation of this law, has virtually abandoned it on the basis of an internal decision. No public hearings were held, no notice was given, they simply decided to stop enforcing the Robinson-Patman Act. Instead, the FTC turned their time and attention to the more flamboyant area of consumerism, in a short-sighted attempt to popularize their agency. The action or nonaction of the FTC in ignoring the Robinson-Patman Act is tantamount to a repeal of an Act of Congress. The results have been a flagrant increase in the price differentials, meaning the additional price that small business must pay to support the "inside" discounts made available to the large customers. This was precisely the abuse that led to the enactment of Robinson-Patman in the first place, and is more prevelant today than ever before.

CURBING REGULATORY ABUSE BY CONGRESSIONAL VETO

We also make this additional comment on the general operations of the Commission.

The Committee is undoubtedly aware that considerable support is building in Congress to permit a Congressional veto of FTC abuses. There are solid, compelling reasons for this.

As part of its oversight function, Congress has the duty to determine whether the agencies it has created are issuing rules and regulations contrary to law, inconsistent with legislative intent, and going beyond the statute it is supposed to implement.

When an agency does commit abuse, the damage to small business subject to such rule or regulation may be irrevocable. Therefore a review period of 60 days or longer is essential.

Here are some of the reasons why Congress should exercise veto power over proposed regulations:

In spite of the fact that the Congress of the United States has ordered the FTC to afford opportunity for oral presentations to all parties desiring to testify in Rulemaking proceedings (P.L. 93-636), the Commission continually ignores the law.

In another area, the FTC allows staff reports, assumably stating fact, to be entered into the Rulemaking record, yet refuses to allow those staff members to the cross-examined concerning those statements. This practice is being carried on despite a clear legislative imperative opposing the practice (Cong. Record, December 19, 1974, pp. 41405-41408).

The Magnuson-Moss FTC Improvement Act authorized the FTC to designate those acts or practices which would be henceforth deemed unfair or deceptive on an industry-by-industry basis.

There are now many Rulemaking proceedings being conducted by the FTC in various stages of completion. Uniformly, these Rulemaking proceedings are directed at small business and its customers. The impact of these Rules when enacted will create unfair and unnecessary economic hardships to countless small business enterprises which lack the resources to represent themselves effectively against the institutional attack that tends to undermine their very existence. Congress has warned the Commission concerning this very eventuality, and had built into the text of the law a requirement that the FTC promulgate "a statement as to the economic effect of the rule, taking into account as to the economic effect on small business and consumers." This statement of the competitive impact of the proposed Rule on small scale enterprise should be made when the promulgation of the Rule is initially proposed. Such competitive impact statements should also be subject to administrative fact finding and require a full opportunity for judicial review as an essential pre-condition to the adoption of such a Rule.

The need for overseeing the bureaucracy and its regulatory activities and for action to curb abuses of such activities is widely recognized. President Carter has named a Regulatory Council for the express purpose of reforming regulatory procedures, and eliminating areas of duplication, overlap and inconsistency.

However, more needs to be done. The Regulatory Council is composed of representatives of the Executive branch regulatory agencies and departments, but has no authority, power or relevancy to the regulatory activities of the independent regulatory agencies which are not a part of the Exeuctive branch of the government, and are not subject to oversight, supervision or direction from the President or any of the departments under his control. Consequently, these independent regulatory agencies, as arms of the Congress, have only one overseer: The Congress.

The basis for this conclusion is the U.S. Supreme Court. For example, this is what that Court held in the case of *Humphrey's Executor* v. *U.S.* (295 U.S. 602, 625–628, 1935). The Court unequivocally says the FTC is an arm of Congress. To the same effect, and decided at the same time by a unanimous decision of the Court, Congress cannot Constitutionally delegate to the President quasi-legislative functions. (See *Schechter* v. *U.S.*, 295 U.S. 495.)

Just this week the FTC admits, in its statement on the proposed health spa industry trade regulation, that the changes would hurt small business most. By going ahead with the Rulemaking procedure in spite of this knowledge, the FTC is deliberately restricting competition, instead of promoting competition as it is supposed to.

The FTC presiding officer Roger Fitzpatrick in his report concluded that America's health spa industry is made up of a number of excellent businesses, which enjoy a high level of satisfaction among spa users. In spite of this conclusion, the FTC is pursuing a course which will force the closing of many small health spa facilities because financing will become unavailable. The threat of action by the FTC will make sources of capital very wary of making any investments in the small businesses in this industry. In the meantime, the big companies that already dominate the industry will grow even large. This is not the way that an antitrust enforcement agency is supposed to operate.

The entire concept of antitrust law is designed to promote competition through the presence of an active sector of strong competitors in any given industry. By going after the small firms in the health spa industry, the FTC is perpetuating an abysmal record of abuse of power.

For years now, the FTC's Rule-Making practices have focused on the small firms in the industries they concentrate on, and left untouched the corporate giants which dominate these industries. In fact, the FTC not only has admitted that the proposed spa rule will hurt mostly the small firms and the consumer, but it admits that the industry is dominated by corporate giants that will be largely untouched by the financing problems likely to arise as a result of this proposal.

Even though the figures show high consumer satisfaction with health spa facilities and procedures, the issue in this case is not just health spas. We are concerned that FTC consistently oversteps it bounds, making rules that hurt where they should be making rules to help.

These are only two of the many reasons the Small Business Legislative Council desires to testify at the Committee's oversight hearings in July.

Two resolutions (Attachments A and B) of the Small Business Legislative Council on the subjects covered in this letter are attached.

We request, Mr. Chairman, that this letter be made a part of the record of your hearings on the FTC authorization.

Sincerely,

JOHN LEWIS, *Executive Director.*

Enclosure.

[From the Legal Times of Washington, Apr. 23, 1979]

ROBINSON-PATMAN APPEARS HERE TO STAY

(By Larry Lempert)

"Sometimes praised, sometimes abused, much interpreted, little understood, and capable of producing instant arguments of infinite variety." Former Federal Trade Commission Chairman Earl W. Kintner, in his antitrust primer, so described the Robinson-Patman Act.

Despite occasional rumblings among government enforcers and members of the bar, the act is here to stay, Kintner said last week. And discussions with FTC officials support his view. These officials indicate, too, that the agency's enforcement of the anti-price-discrimination law will be neither as relaxed as the abusers, nor as spirited as the enthusiasts, would like.

The act, unchanged since its enactment in 1936, forbids price discriminations unless they can be cost-justified by the seller or are made in good faith to meet competition. Robinson-Patman detractors, who believe the statute inhibits valid competition, were encouraged recently by the Supreme Court's decision in the *A & P* case (See Legal Times, March 12, p. 9).

Donald Baker of Jones, Day, Reavis & Pogue wrote with satisfaction in the National Law Journal that the combination of *A & P* and *United States Gypsum,* 98 S.Ct. 2364 (1978), "drills a pretty good hole" in the act by promoting market uncertainty among sellers. Baker, as Antitrust Division chief two years ago, led the division out on a limb with a report highly critical of the act.

NO CHANGE FORESEEN

Nonetheless, officials at the FTC, the agency primarily responsible for enforcement, foresee no change in direction. That means that the act, although it is not a priority, definitely remains on the list of responsibilities to be taken seriously by the agency. Alfred Dougherty, Jr., director of the competition bureau, said that *A & P,* by making it more difficult to prove violations under the inducement provisions, section 2(f), might make enforcement more costly. "But we shouldn't be ready to say that we won't enforce Robinson-Patman," Dougherty said.

In *A & P,* the Court exonerated a buyer on the basis of its seller's "meeting competition" defense. This is "one little wrinkle on one kind of violation" and will not put any big dents in the agency's enforcement effort, another antitrust official said.

In a recent speech pledging to continue the FTC's traditional antitrust responsibilities, Chairman Michael Pertschuk tucked Robinson-Patman securely in the middle of his enforcement list (See Legal Times, April 16, pp. 19, 20).

These assurances have to be taken with at least two grains of salt. First grain: Robinson-Patman is dear to the hearts of small business and its defenders in Congress, and the FTC is as Hill-conscious an agency as any in Washington. The act has proven to be resilient, and bad-mouthing it at a time when change is unlikely would serve no useful purpose.

Second grain: over the long haul of a decade, investigations that used to number in the dozens have dropped to a handful. The competition bureau provided these figrues on formal investigations and number of complaints issued per year:

1965—75, 80	1972—9, 1
1966—81, 6	1973—5, 1
1967—159, 8	1974—8, 6
1868—73, 14	1975—3, 1
1969—53, 4	1976—10, 2
1970—36, 5	1977—4, 4
1971—18, 8	1978—0, 5

Robert Reich, director of the Office of Policy Planning, said that investigational time going to vertical restraints, including Robinson-Patman violations, amounted

to 7 percent of the competition bureau's total in 1978. In 1977, the figure was 11 percent; in 1976, 13 percent.

EQUILIBRIUM REACHED

Robinson-Patman enforcement appears, then, to have reached a new equilibrium, at a level far below that of the halcyon days of the '60s. The halcyon levels, indeed, had prompted strong criticism. An influential American Bar Association study on the FTC, published in 1969, recommended that the commission focus its efforts, targeting "instances in which injury to competition is clear, taking into account the consumer interest in vigorous price competition."

According to FTC officials, that is precisely what the agency is doing now—careful case selection is the watchword, they say. "We're looking for major, industry-wide practices that really harm competition," said James Sneed, the assistant bureau director who supervises food cases.

Commissioner Robert Pitofsky is considered by sources both inside and outside the agency to be the least likely to vote for issuance of a Robinson-Patman complaint. However, he does not advocate repeal; rather, he said, he is sensitive to the tension he sees between Robinson-Patman and the Sherman Act.

"There is a need for careful review and analysis of the record to see that real rather than hypothetical injury to competition has occurred," Pitofsky said.

The commission also has its outspoken Robinson-Patman supporter, Commissioner Paul Rand Dixon. The other commissioners say they will go forward with a Robinson-Patman case given the right set of facts, Dixon said. But he complained of a lack of enthusiasm on the part of the staff and said that staff recommendations urging Robinson-Patman enforcement are too few and far between.

The need for selectivity, which has been voiced by Pertschuk as well, does not spring out of theoretical principles alone. Pertschuk has noted that the *A & P* case consumed 35,000 work hours and cost the commission more than a $1 million. Similarly, a competition bureau attorney said, the *Gibson* case No. 9016 awaiting commission consideration has taken 26,751 hours—and that's before logging any court time.

Building the factual foundation for a price discrimination case is an expensive process, this attorney said. He cited, as a good example of careful selection, the *Los Angeles Times-Herald* case now before an administrative law judge (No. 9103). The main issue there—is advertising a "commodity"—is a legal and not a factual one, he said.

Kinter, who is perhaps the bar's most avid Robinson-Patman supporter, said that private enforcement of the act through treble-damage actions should not be overlooked. In fact, he said, the legal frontiers in the field of price discrimination are being plowed by private and not by government enforcement—and privately brought cases are making "some of the best, most useful law."

Another former FTC official, now in private antitrust practice, said that this potential for treble-damage liability creates a difficult counseling problem. Even if the commission officials are skeptical about much of the law developed under Robinson-Patman, the whole body of law remains in effect and businesses still have to comply, he said.

The commission is being "two-faced," this attorney said—bringing enough Robinson-Patmen cases to keep congressional defenders of small business "off their backs" but leaving business to deal with a substantial body of restrictive law.

This restrictive is good or bad, depending which side of the perennial Robinson-Patman debate you're on. The debate seems to have subsided since the fiery Justice Department report issued in January 1977 failed to ignite sparks anywhere else. The issues—whether the Act encourages the stabilizing of prices, whether it restricts new entry, whether it plays a meaningful role in protecting small business, and whether it is too burdensome to establish a Robinson-Patman defense—still excite advocates on both sides, but FTC officials see no prospects for congressional action.

Extensive hearings were held in 1975 before an ad hoc congressional subcommittee and before a White House Domestic Council Review Group. But the alternatives that Justice put forward, a more narrowly drawn predatory practices act and a Robinson-Patman reform bill, garnered little support.

U.S. LEAGUE OF SAVINGS ASSOCIATIONS,
Washington, D.C., May 7, 1979.

Senator WENDELL H. FORD,
Committee on Commerce, Science and Transportation,
Washington, D.C.

DEAR SENATOR FORD: I am responding to your letter of April 18, 1979 to Mr. Glen Troop of our staff regarding hearings on the FTC authorization which were to be held on Wednesday, May 2. The United States League of Savings Associations has for some time been interested in FTC matters. You will recall that last year both Houses passed bills which provided exemptions from Federal Trade Commission jurisdiction for savings and loan associations similar to the exemption currently provided for banks.

Although we did not testify on the FTC authorization, in view of your description of the narrow scope of the hearings, we do wish to record our position favoring an exemption for S&Ls from FTC jurisdiction.

In that connecton we would echo our position before the House Consumer Protection and Finance Subcommittee that an exemption for S&Ls identical to that provided for banks would eliminate costly and duplicative overlaps in jurisdiction between the Federal Home Loan Bank Board and the FTC. We will follow subsequent developments closely and are hopeful that a speedy resolution of our concern in this area can be achieved. In order that our views on this matter be more fully described, we would like to submit (to be included with letter as part of the Subcommittee record) a copy of our statement delivered last March to Congressman Scheuer's Consumer Protection and Finance Subcommittee.

Thank you for permitting us to make our views known.

Very truly yours,

RAYMOND J. GUSTINI,
Assistant Washington Counsel.

Enclosure.

STATEMENT OF JAMES CIRONA ON BEHALF OF THE U.S. LEAGUE OF SAVINGS ASSOCIATIONS

Mr. Chairman, my name is James Cirona. I am President of First Federal Savings and Loan Association of Rochester, New York. I am pleased to be here today to testify on behalf of the United States League of Savings Associations[1] with respect to the question of exempting savings and loan associations from Federal Trade Commission jurisdiction.

At the present time, insofar as we are aware, there is no legislation before this subcommittee like last years' comprehensive H.R. 3816, The Federal Trade Commission Improvements Act of 1977. Nonetheless, the U.S. League appreciates the opportunity to comment upon this important question, and we are hopeful that FTC legislation reported by this subcommittee and the Senate Commerce Committee will contain an exemption from Federal Trade Commission jurisdiction for savings and loan associations.

We view the exemption of savings and loan associations from Federal Trade Commission jurisdiction as noncontroversial since it tracks the bank exemption and was approved (although not enacted) by Congress last year. In my statement I intend to discuss the view of the Federal Home Loan Bank Board, the chief regulatory body of the savings and loan business on the question of an FTC exemption and the powers of the Federal Home Loan Bank Board to control a wide spectrum of practices and activities in the savings and loan business. Finally, I will briefly review Public Law 95-630 approved last year, The Financial Institutions Regulatory and Interest Rate Control Act, because I believe that its enactment meets most of the prior objections of the FTC during markup of H.R. 3816 with respect to the FHLBB's regulatory authority over savings and loan associations.

(A) *Historical background.*—The nation's banks have been exempted from Federal Trade Commission jurisdiction since the genesis of the Federal Trade Commission in 1914. At that time banks were subject to Federal Reserve Board jurisdiction and to

[1] The United States League of Savings Associations (formerly the United States Savings and Loan League) has a membership of 4,400 savings and loan associations representing 99⅔ percent of assets of the $510 billion savings and loan business. League membership includes all types of associations—Federal and state-chartered, insured and uninsured, stock and mutual. The principal officers are: Joseph Benedict, President, Worcester, Mass.; Ed Brooks, Vice President, Richmond, Va.; Lloyd Bowles, Legislative Chairman, Dallas, Tex.; Norman Strunk, Executive Vice Pres., Chicago, Ill.; Arthur Edgeworth, Director-Washington Operations; and Glen Troop, Legislative Director. League headquarters are at 111 E. Wacker Drive, Chicago, Ill. 60601; and the Washington Office is located at 1709 New York Ave., N.W., Washington, D.C.; Telephone (202) 785-9150.

Federal administrative controls. There was no Federal Home Loan Bank system for savings and loan associations nor was there Federal insurance of accounts. The exemption provided for banks in the FTC Act as well as for other specialized businesses such as common carriers and packers reflected long standing Congressional adherence to dividing regulatory responsibilities along industry lines. The Commission's authority under Section (6) of the Act to compile information, to conduct investigations and to require the filing of reports on matters within domestic commerce or affecting foreign trade similarly does not extend to banks thus forming the second part of the two-part banking exemption.

There were good and substantial reasons why the 1914 Federal Trade Commission Act excluded banks. Simply stated, Congress recognized when the Act was passed that certain entities, including banks, were subject to specialized, pre-existing regulation. The intrusion of an additional regulatory agency into a specialized world was not deemed necessary. Savings and loan asociations, however, were never specifically excluded under the 1914 law although the scope of the term "banks" in Sections (5) and (6) (as I will point out later) is still uncertain.

In 1975, the broad banking exemption from Federal Trade Commission jurisdiction was narrowed with respect to FTC rulemaking authority. The Magnuson-Moss Amendments to the FTC Act provided that 60 days after FTC rules were final the Federal Reserve Board was required to promulgate "substantially similar" rules to apply to similar unfair or deceptive practices by banks. A specific exemption for savings and loan associations was not included in the 1975 Magnuson-Moss Amendments although it would have been appropriate at that time to place banks and savings associations on the same footing with respect to the Federal Trade Commission.

(B) *Recent congressional action with respect to S. & L's.*—In 1977 and 1978, Congress saw fit to approve an exemption from FTC jurisdiction for Federally-insured savings and loan associations or Federal Home Loan Bank System member associations. This exemption differs slightly from the bank exemption which applys to all banks, not just those with some Federal nexus. The Senate passed a bill with a narrower S&L exemption, but then also voted to accept the Conference Report with the broader exemption for savings and loan associations passed by the House. For reasons which this Committee knows well, the S&L exemption and the rest of H.R. 3816 did not "stick". However, to my knowledge no Congressional objections were raised in either the House or Senate with respect to the S&L exemption. The amendments following their debate in this subcommittee were perceived as noncontroversial. We recommend, therefore, that the exemption from FTC jurisdiction for savings and loan associations be part of any FTC bill reported by this Subcommittee or a comparable Senate committee. There are several reasons for our recommendation.

(C) *FHLBB powers and authority.*—The first of these is the jurisdiction of the Federal Home Loan Bank Board over virtually every facet of S&L operation. There are no material differences between bank and S&L supervisory authority. Moreover, the supervisory powers of financial institution regulators were buttressed even further just last year. The Chairman of the Federal Home Loan Bank Board, Robert McKinney, has said that the Federal Home Loan Bank Board possess full authority to regulate unfair and deceptive acts or practices occurring in the savings and loan business. He notes in a letter sent last year to Conferees on H.R. 3816 that:

"The Home Owners Loan Act of 1933 gave the Board a comprehensive authority to regulate Federal savings and loan associations including the authority to enforce any law or regulation which would affect the operation of Federal savings and loans. The National Housing Act of 1942 conferred similar broad authority over the operations of Federally-insured savings and loans. Thus the composite regulatory jurisdiction which the Board has exercised over the savings and loan industry leaves no meaningful area for supervision of these institutions by the FTC".

McKinney goes on to say that providing savings associations with the same limited exemption as banks under the FTC Act would:

"* * * eliminate overlapping and potentially conflicting regulatory authority in the savings and loan industry. Since the enactment of the Federal Trade Commission Act in 1914 the savings and loan industry has matured and has become subject to comprehensive Federal regulation. H.R. 3816 would amend the FTC Act and recognize these fundamental changes and confer upon savings and loans the same exemptions presently conferred upon commercial banks".

Attached to Mr. McKinney's letter was an appendix (see Appendix A attached) which describes Federal Home Loan Bank Board regulations. In exercising such jurisdiction the Board has utilized the broad plenary authority contained in Sections 5(a) and 5(d) of the Home Owners Loan Act, 12 U.S.C. Section 1464 (1976) to support

its actions. In addition the FHLBB's dual function, operation of the FSLIC (Federal Savings and Loan Insurance Corporation) gives it jurisdiction over the operations of state chartered savings and loans. For example, Conflict-of-Interest regulations which apply to all Federally-insured S&Ls have enabled the Board to set guidelines concerning the composition of the boards of directors of insured institutions and misleading advertising. The Board has issued similarly broad regulations on discrimination in lending and the amount of give-aways which savings and loan associations may utilize in connection with savings campaigns. Regulations have been issued concerning late charges on mortgage loans, payment of interest on escrow accounts, the use of due-on-sale clauses, loan procurement fees, kickbacks and unearned fees. All of these matters are discussed in more detail in the Appendix.

Another reason supporting the exemption for S&Ls is the specialized lending in which they are involved. Unlike banks, savings and loan associations are not heavily involved in consumer lending or installment loans. Savings and loans do not operate bank-type credit card subsidiaries and make few unsecured installment loans. Thus they are not active participants (as are banks) in the consumer lending fields which are the object of recent FTC proposed rulemaking—short-term, unsecured installment loans. Home mortgage lending is a specialized activity and closely regulated by the Federal Home Loan Bank Board. It should not be subject to dual and potentially disruptive oversight of more than one regulatory authority.

(D) *Effect of Public Law 95-630.*—Last year, the 95th Congress expanded the supervisory authority of the Federal Home Loan Bank Board and the banking agencies. This law, which has been described as the most comprehensive rewrite of Bank-Savings and Loan supervisory laws of the past 25 years, gives financial institution regulators tremendous new authority. In the area of interlocks, it prohibits outright any interlocks between management officials of depository institutions within certain geographic areas and of larger institutions without regard to geographic restriction. With respect to S&L's, the FHLBB is the primary enforcement authority. The Justice Department obtained "referral" authority for any cases not deemed subject to FHLBB jurisdiction. In addition, the Board obtained new authority to remove officers and directors from boards of directors, cease and desist authority against individuals and the right to order the termination of holding company activities.

(E) *The meaning of the word "bank".* Finally, there is an illogical result which will continue if the FTC exemption for banks is not extended to S&Ls. The term "bank" is undefined. It is not entirely clear that it was not intended to apply to all financial institutions. There are, for example, numerous laws and regulations in which the term bank is also deemed to include savings and loan associations. Also, simple reliance on the word "bank" raises interesting questions. Mutual savings banks are thrift institutions like savings and loan associations, but are insured by the Federal Deposit Insurance Corporation. They are presumably exempted from FTC jurisdiction simply because the word "bank" appears in their title. "Bank" left undefined also means that Federal insurance of accounts is not required for the bank exemption. Cooperative banks, thrift institutions operating in New Hampshire and Massachusetts, which meet the savings and loan tax definition, are presumably already exempted as well because the word "bank" appears in their title. It is not clear whether Congress intended to put so fine a point on the differences between financial institutions or whether its intent was broader—to divide regulation along general industry lines. Whatever the intent of the Act, our hope is to clarify it to provide parity for bank and savings and loan associations.

We believe it is time that the burdens of joint FTC-FHLBB regulation be eliminated. The reasons which compelled the bank exemption in 1914 are more compelling today in the case of savings and loan associations. I might also observe that the word "exemption" may not be an accurate description of bank status. Banks today are subject to indirect FTC jurisdiction in that the Federal Reserve Board will be required to write substantially similar trade regulation rules 60 days after final FTC rules are promulgated. The S&L business seeks no more than comparable treatment under the Act for savings and loan associations.

We appreciate the opportunity to present our statement. Our Appendix, in addition to providing a list of the numerous regulatory activities affecting the savings and loan business engaged in by the Federal Home Loan Bank Board also contains a draft of an amendment to the Federal Trade Commission Act which exempts S&Ls following a pattern identical to that for banks.

Thank You.

Appendix A—Significant FHLBB Regulations Regarding Unfair Methods of Competition and Unfair or Deceptive Acts or Practices

A. CONFLICTS OF INTEREST

The Board's conflict of interest regulations set forth guidelines concerning the composition of boards of directors of insured institutions. These guidelines:

(1) Discourage officer or director interlocks between FSLIC-insured institutions and all other thrift institutions;

(2) Discourage directors and officers of FSLIC-insured institutions from serving as salaried officers or employees of a commercial bank; and

(3) Suggest limitations on director interlocks between FSLIC-insured institutions and commercial banks.

12 C.F.R. § 563.33 (1977). Failure to comply with these regulatory guidelines would subject an institution to making required disclosure of such relationships to its voting members. 12 C.F.R. § 563.44 (1977).

B. MISLEADING ADVERTISING

Insured institutions are prohibited from using any type of advertising or making any representation which is inaccurate in any particular or which in any way misrepresents its services, contracts, investments or financial condition. 12 C.F.R. § 563.27 (1977).

C. DISCRIMINATION IN LENDING

The Board has proposed regulations to halt redlining and other discriminatory home lending practices by insured institutions. 42 Fed. Reg. 58182–86 (Nov. 8, 1977). The proposed regulations would:

(1) Prohibit denial of a mortgage loan application because of the age of the dwelling or the neighborhood in which it is located;

(2) Require institutions to review their advertising and marketing practices to ascertain that they are serving adequately all segments of their communities;

(3) Require institutions to develop written standards to be used in processing loans; and

(4) Require institutions to consider all relevant factors in making loan decisions without giving undue consideration to arrest records, educational level, lack of previous homeownership or a history of numberous jobs.

D. GIVEAWAYS

Federal associations are restricted from offering giveaways on condition of the recipient's possessing, opening or adding to a savings account, or maintaining a minimum balance in such an account. 12 C.F.R. § 545.5 (1977)

E. PAYMENT OF INTEREST ON ESCROW ACCOUNTS

Federal associations are required to pay interest on any escrow account maintained in connection with a loan on the security of a single-family dwelling occupied by the borrower in States where State-chartered institutions are required to pay interest.

F. LATE CHARGES

Federal associations are prohibited from assessing late charges on any periodic installment payment received within 15 days after the due date of such installment, in an amount exceeding 5 percent of the aggregate amount of the periodic installment, where the late charges had not been disclosed, or more than once. 12 C.F.R. § 545.6–11.

G. DUE-ON-SALE CLAUSES

Federal associations are prohibited from exercising their rights under a due-on-sale clause based upon creation of a lien subordinate to that of the association, creation of a purchase money security interest for household appliances, transfer by devise, descent or by operation of law upon the death of a joint tenant, or the granting of any leasehold interest of three years or less not containing an option to purchase. No Federal association may impose a prepayment charge in connection with the exercise of its rights under a due-on-sale clause. 12 C.F.R. § 545.6–11 (1977).

H. LOAN PAYMENTS

The regulation governs the timing and disposition of periodic installment payments on conventional home mortgage loans. Federal associations are prohibited

from charging prepayment penalties to borrowers who prepay up to 20 percent of the original amount of a loan during a 12-month period. 12 C.F.R. § 545.6–12 (1977).

I. FORM OF ACCOUNTS

Forms for all types of savings accounts and certificates offered by insured institutions must be approved by the FSLIC. 12 C.F.R. § 563.1 (1977).

J. TIE-INS

No insured institution may grant a loan on the prior condition that the borrower contract with any specific person or organization for insurance services, building materials, construction services, legal services, brokerage services or property management services. In addition, reimbursement that may be charged a borrower or legal services is limited. 12 C.F.R. § 563.33 (1977).

K. LOAN PROCUREMENT FEES, KICKBACKS AND UNEARNED FEES

No person affiliated with an insured institution may receive a loan procurement fee, kickback or unearned fee. 12 C.F.R. § 563.4 (1977).

S. & L. Exemption From FTC Jurisdiction

(a) Section 5(a)(2) of the Federal Trade Commission Act (15 U.S.C. 4b(a)(2)) is amended by inserting after "banks," the following: "savings and loan institutions described in section 18(f)(3),".

(b)(1) Section 6(a) of the Federal Trade Commission Act (15 U.S.C. 46(a)) is amended by inserting after "banks" the following: ", savings and loan institutions described in section 18(f)(3),".

(2) Section 6(b) of the Federal Trade Commission Act (15 U.S.C. 46(b)) is amended by inserting after "banks," the following: "savings and loan institutions described in section 18(f)(3),".

(3) The proviso at the end of section 6 of the Federal Trade Commission Act (15 U.S.C. 46) is amended—

(A) by inserting after "banks" the following: ", savings and loan institutions described in section 18(f)(3),"; and

(B) by inserting ", in business as a savings and loan institution," after "banking".

(c)(1) Section 18(f)(1) of the Federal Trade Commission Act (15 U.S.C. 57a(f)(1)) is amended—

(A) in the first sentence thereof—

(i) by inserting "or savings and loan institutions described in paragraph (3)" after "banks" each place it appears therein; and

(ii) by inserting "or (3)" after "(2)";

(B) in the second sentence thereof, by inserting after "System" the following: "(with respect to banks) and the Federal Home Loan Bank Board (with respect to savings and loan institutions described in paragraph (3))"; and

(C) in the last sentence thereof—

(i) by inserting "each" before "such Board" the first place it appears therein;

(ii) by striking out "such Board finds that (A)" and inserting in lieu thereof "(A) either such Board finds that";

(iii) by inserting "or savings and loan institutions described in paragraph (3), as the case may be," after "banks" the first place it appears therein;

(iv) by inserting after "or (B)" the following: "the Board of Governors of the Federal Reserve System finds"; and

(v) by striking out "the Board" and inserting in lieu thereof "such Board".

(2) Section 18(f) of the Federal Trade Commission Act (15 U.S.C. 57a(f)) is amended by redesignating paragraphs (3), (4), and (5) thereof as paragraphs (4), (5), and (6), respectively, and by inserting after paragraph (2) thereof the following new paragraph:

"(3) Compliance with regulations prescribed under this subsection shall be enforced under section 5 of the Home Owners' Loan Act of 1933 (12 U.S.C. 1464) with respect to Federal savings and loan associations, section 407 of the National Housing Act (12 U.S.C. 1730) with respect to insured institutions, and sections 6(i) and 17 of the Federal Home Loan Bank Act (12 U.S.C. 1426(i), 1437) with respect to savings and loan institutions which are members of a Federal Home Loan Bank, by a

division of consumer affairs to be established by the Federal Home Loan Bank Board pursuant to the Federal Home Bank Act.".

Statement of Consumer Federation of America

Consumer Federation of America is a federation of 240 national, state and local non-profit organizations that have joined together to espouse the consumer viewpoint. CFA and its member organizations represent over 30 million consumers throughout the United States. Among our members are: 60 state and local consumer organizations; 83 consumer cooperatives; 16 national labor organizations; and 27 national and regional organizations.

It has become dangerously fashionable in certain sectors to indiscriminately attack all government regulation and government agencies rather than judge each agency on its own merits. As consideration of the Federal Trade Authorization draws near, CFA expresses its strong support for the authorizaton levels requested by the Federal Trade Commission; 75 million for fiscal year 1980, 80 million for fiscal year 1981, and 85 million for fiscal year 1982.

FTC REGULATIONS SAVE CONSUMER MONEY

As the nation's largest consumer membership organization we are persuaded that FTC expenditures to date represent a sound use of taxpayers' dollars, both as a matter of consumer protection and fiscal efficiency; to cite but a few examples;

(1) A recent FTC Consent Order entered into with Levi Strauss, Co., resulted in that company's agreement to cease its practice of basing distribution on whether a buyer agreed to the manufacturer's suggested retail price. It has been estimated that the consent order will save $50 million—an amount which is 80 percent of the entire FTC budget.

(2) The recently announced FTC funeral industry rules are expected to save a minimum of $50 per funeral, which cumulatively represents a hefty $100 million annual savings—160 percent of the FTC budget. In support of the proposed funeral rules, the FTC had received 6500 letters from individual consumers, written comments from more than 70 consumer organizations, more than a dozen state and local government consumer offices, and approximately 150 federal, state and local government officials.

(3) The FTC regulation rule removing restrictions on price advertising for eyeglasses, contact lenses and eye exams and further requiring that physicians provide consumers with prescriptions related to eye care could easily save consumers in excess of $5 million a year based on evidence that in those states where advertising has previously been restricted, prices related to eyeglasses have been at levels 25–40 percent higher than in states where advertising has been permitted.

THE FTC SECURES CASH REFUNDS FOR CONSUMERS

In a different vein, any cost-benefit analysis of FTC activities must logically include an arithmetic recognition that FTC orders result frequently in significant cash refunds to consumers. To cite but a few examples:

(1) Last fall's FTC order involving repossessed automobiles (naming Ford Motor Company and its credit subsidiary) should result in an approximate $1 million a year refund for consumers;

(2) Last summer a mail-order nursery was ordered by the FTC to refund some $200,000 to customers who had engaged in purchases with those nurseries since July 1975.

THE FTC GENERATES FUNDS THROUGH ITS PENALTY POWER

Likewise, the cost-benefit equation would be incomplete if consideration were not given to those civil penalties which result from FTC actions and settlements including the recent Bloomingdale's agreement to pay $50,000 in civil penalties in order to settle an action alleging violations of the Equal Credit Opportunity Act.

PUBLIC POLLS DEMONSTRATE STRONG SUPPORT FOR ISSUES AND PRIORITIES UNDERTAKEN BY FTC

On issue after issue individual consumers and consumer organizations are handicapped in their ability to fight for a marketplace free of fraud, deception, and uncompetitive practices because their economic (and thus political) clout is dwarfed by the industry which is fighting against having its activities regulated at all, regardless of the inequities involved.

Two results of a previously released U.S. News and World Report "Study of American Opinion" are quite instuctive. 81 percent of those polled agreed that large companies have a major influence on the government agencies regulating them (8 percent disagreed). On the question of whether business should be required to publish more information on profits for each product manufactured, 52 percent of those polled agreed (29 percent disagreed). The FTC's "line of business" program would accomplish just that!

In poll after poll, strong public support is demonstrated for those issues and priorities undertaken by the Federal Trade Commission. For example, in March of this year Lou Harris released the results of a comprehensive study showing that not only do Americans express skepticism about television advertising, but that skepticism has increased. A "Better Homes and Gardens" survey released last fall showed that Americans would be willing to pay up to 1–2 cents per food item more in order to have assurances of comprehensive and accurate nutritional labeling. And a 1979 New York Daily News Poll showed that 92 percent of those questioned believed that used car dealers should be required to disclose defects of automobiles they sell.

FTC ACTIVITIES IN 1978

A review of Federal Trade Commission activities in 1978 demonstrates an impressive commitment on its part to taking actions designed to insure the strongest possible free market enterprise, an impressive commitment to reduce unnecessary regulation, the development of maximum protection against fraud, and vigorous pro-competition regulations which, as a practical matter, have a significant anti-inflation potential.

Particularly impressive is the FTC's recognition that in the area of the necessities (food, energy, health and housing) consumers are most in need of strong government protection with minimal financial or paperwork burden to the affected industries.

Food

For example, in the area of food (which absorbs a full ⅕ of every consumer dollar) the FTC has undertaken hearings which could lead to the elimination of false or deceptive advertising for natural/organic, health, cholestrol, etc. attributes of food products. It is also engaged in major litigation undertaken against the cereal maufacturers on the important issue of monopoly control. Likewise, on the timely issue of exclusive territorial franchise agreements, the Federal Trade Commission has not abandoned its serious responsibility to explore the legal and economic implications of those practices.

Housing

In the important area of housing (which absorbs nearly ⅓ of every consumer dollar) the Federal Trade Commission has taken strong and much needed ititiatives in barring anti-competitive price practices in the plywood industry, issuing cease and desist orders barring anti-competitive acquisitions involving asphalt and tar roofing, and fiberglass-reinforced plastic panels, and maintaining a vigorous investigation of the extent of competition in the real estate brokerage market. It has likewise investigated an alleged discriminatory "red lining" practice by home mortgage lenders.

Energy

In the increasingly important area of energy, the Federal Trade Commission has investigated the state of competition in the home insulation market as well as pursuing litigation against eight major oil companies for alleged joint monopoly control over the refining of crude oil as well as the maintenance of artificial price levels in the southeastern and eastern regions of the United States. In the case of Atlantic Richfield and Anaconda it has used its expanded merger powers under the Parens Partriae legislation of 1976. In progress are hearings on a proposed rule that would, if adopted, require energy efficiency labeling on major appliances and residential furnaces. Finally, the publication of the staff report on a rule (which if adopted would require gas stations to post octane levels) has been very well received by consumers.

Public participation

In the area of public participation, the Federal Trade Commission has structured the model for effective and much needed public participation in agency preceedings including a strong and equitable commitment to the involvement of small business concerns as well as senior citizen, consumer and other public interest entities.

In short, Consumer Federation of America is very much persuaded that the consuming public has much to gain from and is highly supportive of the very

programs and priorities which the FTC has initiated. Clearly for each dollar invested in the FTC, many more dollars are returned to consumers in the form of lower prices. Equally important, the leadership being demonstrated at the Federal Trade Commission is an important step in the right direction of restoring badly eroded confidence in government.

Statement of the American National Standards Institute, Inc.

The American National Standards Institute, Inc., ("ANSI") is deeply concerned about the apparent lack of regard which the Federal Trade Commission has exhibited for procedural due process. In its rule-making activities relating to Standards and Certification, the Commission has clearly violated the specific requirements of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, specifically Title 15, U.S.C. § § 57a(c) and (e), by refusing to require the staff of the Federal Trade Commision to be cross-examined concerning factual assertions which the staff has placed in a Staff Report which has been introduced into evidence for the truth of the matters asserted therein.

In addition, with the apparent guidance and direction of the Commission, the Presiding Officer has refused to require witnesses who will testify for the rule to take an oath or affirmation prior to being cross-examined by interested persons.

These and many other procedrual errors are the subject of a Petition No. 1 for procedural rulings joined in by twenty-six (26) interested persons who have expressed their dismay at the pattern of prejudicial rulings and directions which, unless restrained, will deprive them of constitutionally and statutorily granted rights intended by the Congress to be afforded to individuals who would be adversely affected by trade regulation rules promulgated by the Federal Trade Commission.

Of particular significance to the Subcommittee this morning should be the apparent abandon with which the staff of the Federal Trade Commission has been permitted to expend funds and resources over a period of nine years in this quest for a standards and certification rule.

Statement of the Grocery Manufacturers of America, Inc.

The Grocerty Manufacturers of America, Inc. (GMA) appreciates this opportunity to present its views to the Consumer Subcommittee of the Senate Commerce, Science and Transportation Committee on the subject of the Federal Trade Commission authorization. We trust that our comments and suggestions will put into perspective the unbalanced, biased awarding of taxpayers' dollars to substantiate proposed FTC Trade Regulation rules.

INTEREST OF GMA

GMA is the trade association of the leading producers of food and household products which are distributed through virtually all supermarkets and other retail grocery outlets throughout the United States. GMA is a non-profit organization which has served its members and the public since 1910.

Because of the limits placed on our testimony by the Committee, we will not at this time address the overall subject of the persistent, unwarranted, and unnecessary intervention of the Federal Trade Commission into the American free enterprise system. Instead, our comments now will specifically examine the widespread abuse by the FTC in their handling of what is commonly known as "Magnuson-Moss" funding.

I. The Commission has abused its authority to fund participation in rulemaking proceedings

The Magnuson-Moss Act authorizes the Commission to—

"(h)(1)" * * * provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating in a rulemaking proceeding under this section to any person (A) who has, or represents, an interest (i) which would not otherwise be adequately represented in such proceedings, and (ii) representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole, and (B) who is unable effectively to participate in such proceedings because such person cannot afford to pay costs of making oral presentation, conducting cross-examination, and making rebuttal submissions in such proceeding."[1]

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[1] Magnuson-Moss Warranty—Federal Trade Commission Improvements Act, Pub. L. 93-637, Title II, 202(h)(1), 15 U.S.C. 57a(h)(1).

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Since this program has been underway, the FTC has doled out over $1,500,000.00 in taxpayers' dollars. But, it is the manner in which this funding program has been administered by the Commission that raises serious questions about its propriety. The record clearly indicates that virtually all Magnuson-Moss funds to go to proponents of Commission rules.[2] In the current rulemaking proceeding concerning television advertising to children, everly single witness funded by the Commission to participate in the San Francisco and Washington, D.C. hearings advocates a restriction on children's advertising.

Far from promoting a balanced presentation of views on a rulemaking matter, this funding pattern effectively distorts the entire rulemking record and violates the spirit, if not the letter, of the Magnuson-Moss Act. In these inflationary times, with the nation's reasonable concern for excess government spending, this fiscal abuse is particularly disturbing.

The Commission frequently argues that industry groups have sufficient funds to present their views to the Commission on rulemaking matters. If that is the case, why has the Consumers Union, which had a total income of $20 million dollars last year, [3] received substantial grants to participate in the children's advertising proceeding? [4]

Inequities of this type must be addressed and rectified if Commission rulemaking proceedings are to be considered fair. The dilemma of how to allocate Magnuson-Moss funds justly must be resolved. Otherwise, every Commission rulemaking proceeding will be irreparably tainted. If the dilemma cannot be fairly resolved—which appears possible, if not likely—the Commission funding authority should be eliminated.

II. Conclusion: The committee should delete FTC Magnuson-Moss funding authorization

We believe the Committee should critically examine the Commission's funding of intervenors in its rulemaking proceedings. Perhaps much more stringent criteria to safeguard against unjustified and wasteful awards of taxpayers' dollars can be devised.

It is our strong belief, however, that virtually any criteria will still be susceptible to misapplication by staff advocates of Commission rules to bolster their case, to the detriment of the public interest.

Thus, we feel the Committee should eliminate entirely Commission funding authority, either by repealing Section 18(h), or by refusing to reauthorize continued funding of the Magnuson-Moss program.

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[2] See Exhibit A. This information was obtained from the FTC response to a telephone request from the GMA offices.

[3] Consumer Reports, October, 1978 at 601.

[4] See Exhibit A at 2-4.

FEBRUARY 1, 1979

PUBLIC RULEMAKING/COMPENSATION
(Magnuson-Moss)

Disposition -- All Requests

RULE/GROUP	AMOUNT REQUESTED	ACTION TAKEN
Antacid Over-the-Counter Drugs		
Council for Children, Media and Merchandising	$26,644.00	Granted--$26,644.00
California Citizen Action Group	$64,228.00	Granted--$64,228.00
Americans for Democratic Action/National Council of Senior Citizens	$ 5,563.00	Granted--$ 4,115.00
Americans for Democratic Action/National Council of Senior Citizens	$ 2,722.00	Granted--$ 2,722.00
Virginia Citizens Consumers Council	$46,597.00	DENIED
Council for Children, Media and Merchandising	$11,256.74	Granted--$11,356.74
Americans for Democratic Action/National Council of Senior Citizens	$ 245.00	Granted--$ 245.00
Council on Children, Media and Merchandising	$ 2,116.00	REVISED
Americans for Democratic Action/National Council of Senior Citizens	$14,510.00	Granted--$14,510.00
Council on Children, Media and Merchandising	$ 3,063.89	Granted--$ 3,063.89
Council on Children, Media and Merchandising	$ 460.00	WITHDRAWN
TOTAL GRANTED -- Antacids:		$126,884.63

RULE/GROUP	AMOUNT REQUESTED	ACTION TAKEN
Care Labeling (Revised)		
Seymore Goldwasser	Not specified.	DENIED
National Consumers Congress	$56,048.00	Granted--$48,352.67*/
National Consumers League	$ 9,940.00	Granted--$ 9,940.00
TOTAL GRANTED -- Care Labeling		$ 57,948.67
Children's Advertising		
Council on Children, Media and Merchandising	$177,728.00	REVISED
Council on Children, Media and Merchandising	$182,759.00	DENIED
Center for Public Representation	$ 17,700.00	Granted--$16,350.00
Action for Children's Television/Center for Science in the Public Interest (CSPI)	$ 97,901.00	Granted--$13,497.50
Consumers Union/Committee for Children's Television	$142,084.00	Granted--$19,700.00
Safe Food Institute	$ 8,184.00	REVISED
Community Nutrition Institute	$ 17,666.00	Granted--$ 7,298.00
Media Access Project	$ 35,163.00	Granted--$35,163.00
Council on Children, Media and Merchandising	$126,079.00	DENIED
Public Interest Economics Foundation	$ 17,659.19	DENIED
Center for Public Representation	$ 2,674.00	Granted--$ 2,674.00

*/ This budget was later revised to $48,008.67.

RULE/GROUP	AMOUNT REQUESTED	ACTION TAKEN
Children's Advertising (Cont'd)		
Consumers Union/Committee for Children's Television	$ 10,238.00	Granted--$22,238.00
Action for Children's Television/CSPI	$ 35,725.00	Granted--$35,725.00
Safe Food Institute	$ 37,527.00	Granted--$12,265.00
Council on Children, Media and Merchandising	$ 35,230.00	Granted--$35,230.00*/
Media Access Project	$ 1,650.00	Granted--$ 1,650.00
Action for Children's Television/CSPI	$ 5,820.00	Granted--$11,920.00**/
Consumers Union/Committee for Children's Television	$ 51,024.00	DENIED
Community Nutrition Institute	$ 32,768.00	Granted--$ 7,298.00**/
Action for Children's Television/CSPI	$ 38,899.50	REVISED
Council on Children, Media and Merchandising	$ 15,498.00	Granted--$15,498.00
Council on Children, Media and Merchandising	$ 35,218.00	DENIED
Council on Children, Media and Merchandising (resubmission)	$ 35,218.00	Granted--$35,218.00
Action for Children's Television/CSPI	$ 39,424.00	Granted--$12,027.70***/
Consumers Union/Committee for Children's Television	$ 16,348.00	Granted--$16,348.00
Consumers Union/Committee for Children's Television	$ 26,838.00	Granted--$15,630.00

*/ This budget was revised to $35,218.00.
**/ These applications were only partially approved due to a lack of funds for FY 78. They were reconsidered in FY 79.
***/This budget was approved, in part, for legislative hearing participation only. Other portions will be considered as appropriate.

RULE/GROUP	AMOUNT REQUESTED	ACTION TAKEN
Children's Advertising (Cont'd)		
Council on Children, Media and Merchandising	$ 9,830.00	REVISED
Council on Children, Media and Merchandising	$ 2,657.95	DENIED
Community Nutrition Institute	$ 20,383.00	Granted--$ 7,898.00
Council on Children, Media and Merchandising	$ 11,175.00	Granted--$ 7,676.00
Council on Children, Media and Merchandising	$ 3,360.00	PENDING
Community Nutrition Institute	$ 6,162.00	PENDING
Action for Children's TV/ CSPI	$ 14,079.00	Granted--$11,444.00
Wackman, Daniel B.	$ 316.00	PENDING
TOTAL GRANTED -- Children's		$325,690.20
Credit Practices		
National Consumer Law Center	$120,000.00	Granted--$91,020.00
National Consumer Law Center	$ 2,000.00	Granted--$ 2,000.00
National Consumer Law Center	$ 1,332.00	Granted--$ 1,332.00
National Consumer Law Center	$ 4,005.24	Granted--$ 4,005.24
National Consumer Law Center	$ 18,635.00	Granted--$11,035.00
Council of State Credit Institutes	$ 6,802.00	Granted--$ 6,228.00
California Public Interest Research Group	$ 28,796.32	DENIED
National Consumer Law Center	$ 26,804.00	Granted--$22,864.00
TOTAL GRANTED -- Credit Practices		$141,986.24

RULE/GROUP	AMOUNT REQUESTED	ACTION TAKEN
Food Advertising		
Consumers Union	$ 8,793.00	Granted--$ 7,360.00
Spanish Speaking/Surname	$ 2,550.00	DENIED
Political Ass'n/National Health Federation	$ 50,000.00	DENIED
National Consumers Congress (League)	$ 7,334.00	Granted--$ 9,295.00
Council on Children, Media and Merchandising	$ 52,400.00	Granted--$51,267.00
Mary Ruth Nelson	$ 270.00	Granted--$ 270.00
Wendy Gardner	$ 295.00	Granted--$ 295.00
Society for Nutrition Education	$ 21,228.00	Granted--$18,904.00
Consumer Action (Wash.)	$ 46,990.00	Granted--$38,158.00
Iowa Consumers League	$ 173.00	Granted--$ 200.00
Indiana Home Economics Ass'n	$ 39.70	Granted--$ 39.70
Connecticut Citizen Research Group	$ 8,242.60	Granted--$ 6,777.00
Utah State University	$ 28,940.00	DENIED
Consumer Action (Wash.)	$ 20,524.00	Granted--$ 5,940.00
Sidney Margolius	$ 1,043.00	DENIED
Society for Nutrition Education	$ 1,956.00	Granted--$ 1,956.00
Consumer Action (Wash.)	$ 14,915.00	Granted--$ 2,746.00
Kurt A. Oster, M.D.	Not specified	DENIED
Council on Children, Media and Merchandising	$ 9,895.28	Granted--$ 6,709.78
Council on Children, Media and Merchandising	$ 3,158.00	Granted--$ 3,158.00
TOTAL GRANTED -- Food Advertising		$153,075.48

RULE/GROUP	AMOUNT REQUESTED	ACTION TAKEN
Funeral Industry		
Consumers Union	$ 3,830.70	Granted--$ 3,980.00
N.Y. Public Interest Research Group	$ 8,557.00	Granted--$ 8,377.00
Continental Ass'n of Funeral & Memorial Societies	$ 12,080.00	Granted--$12,670.00
Americans for Democratic Action/National Council of Senior Citizens	$ 13,138.00	Granted--$ 8,315.00
Michael Hirsh	Not specified	DENIED
Minnesota Memorial Society	$ 112.00	DENIED
Consumer Federation of America	$ 26,024.00	Granted--$11,328.00*/
California Citizen Action Group	$ 13,441.00	Granted--$12,658.00
Central Area Motivation Program	$ 9,792.00	Granted--$ 7,410.00
Arkansas Consumer Research	$ 7,676.00	Granted--$ 6,653.00
Americans for Democratic Action/National Council of Senior Citizens	$ 528.00	Granted--$ 528.00
N.Y. Public Interest Research Group	$ 3,240.00	Granted--$ 3,363.00
Continental Ass'n of Funeral & Memorial Societies	$ 4,500.00	Granted--$ 4,500.00
Arkansas Consumer Research	$ 375.00	Granted--$ 375.00
Americans for Democratic Action/National Council of Senior Citizens	$ 9,824.17	Granted--$ 9,824.17
California Citizen Action Group	$ 3,017.41	Granted--$ 2,657.41
Continental Ass'n of Funeral & Memorial Societies	$ 1,000.00	Granted--$ 1,000.00

*/ Grant later refused by the Consumer Federation of America .

RULE/GROUP	AMOUNT REQUESTED	ACTION TAKEN
Funeral Industry (Cont'd)		
California Citizen Action Group	$ 360.00	Granted--$ 360.00
Continental Ass'n of Funeral and Memorial Societies	$ 19,040.00	DENIED
Americans for Democratic Action/National Council of Senior Citizens	$ 11,298.81	DENIED
Pre-Arrangement Interment Ass'n	$ 23,540.00	DENIED
Cremation Ass'n of N. America	$ 12,900.00	DENIED
Americans for Democratic Action (for all consumer groups except CalCAG)	$ 28,781.00	Granted--$27,483.00
California Citizen Action Group	$ 8,758.00	Granted--$ 8,210.00
Cremation Ass'n of N. America	$ 8,845.00	DENIED
Pre-Arrangement Interment Ass'n	$ 24,522.50	DENIED
California Citizen Action Group	$ 3,120.00	Granted--$ 3,120.00
Cremation Ass'n of N. America	$ 8,845.00	Granted--$ 3,414.00
Pre-Arrangement Interment Ass'n	$ 14,772.50	Granted--$ 4,059.00
Americans for Democratic Action, et al.	$ 5,968.00	REVISED
N.Y. Pub. Int. Res. Group	$ 443.60	PENDING (Premature)
TOTAL GRANTED -- Funerals		$141,363.38
Health Spas		
Consumers Union	$ 23,890.00	WITHDRAWN
Americans for Democratic Action	$ 37,956.00	WITHDRAWN
Consumers Union/CalCAG	$ 15,420.00	Granted--$ 8,850.00
Consumers Union/CalCAG	$ 3,670.00	Granted--$ 3,850.00

RULE/GROUP	AMOUNT REQUESTED	ACTION TAKEN
Health Spas		
Consumers Union/CalCAG	$ 15,590.00	Granted--$15,812.00
Americans for Democratic Action	$ 27,110.00	Granted--$ 9,488.00
Americans for Democratic Action	$ 22,402.50	Granted--$11,291.00
Americans for Democratic Action	Not specified	Granted--$ 5,248.00
Americans for Democratic Action	$ 450.00	Granted--$ 450.00
Ass'n of Physical Fitness Centers	$ 58,972.00	DENIED
Americans for Democratic Action	$ 167.00	Granted--$ 192.00
Americans for Democratic Action	$ 982.00	Granted--$ 853.00
Americans for Democratic Action	$ 3,323.00	Granted--$ 3,743.00
Americans for Democratic Action	Not specified	Granted--$ 3,000.00
Americans for Democratic Action	$ 109.00	Granted--$ 109.00
Consumers Union/CalCAG	$ 2,245.00	Granted--$ 2,245.00
Americans for Democratic Action	$ 8,143.00	Granted--$ 8,143.00
Consumers Union/CalCAG	$ 7,354.00	Granted--$ 7,354.00
Consumers Union/CalCAG	$ 1,428.00	Granted--$ 1,428.00
Americans for Democratic Action	$ 315.00	Granted--$ 315.00
Americans for Democratic Action	$ 5,028.00	Granted--$ 5,028.00
TOTAL GRANTED -- Health Spas		$ 87,399.00

RULE/GROUP	AMOUNT REQUESTED	ACTION TAKEN
Hearing Aids		
National Council of Senior Citizens	$ 34,926.00	Granted--$36,006.00
Consumer Ass'n of Kentucky	Not specified	DENIED
National Council of Senior Citizens	$ 8,100.00	Granted--$ 8,100.00
National Hearing Aid Society	$ 68,249.00	Granted--$34,346.00*/
California Citizen Action Group	$ 3,665.00	WITHDRAWN
N.Y. League for the Hard of Hearing	$ 5,500.00	DENIED
National Hearing Aid Society	$ 35,363.60	Granted--$33,495.87
National Council of Senior Citizens	$ 2,681.00	Granted--$ 2,628.13
National Hearing Aid Society	$ 15,651.00	Granted--$15,651.00
TOTAL GRANTED -- Hearing Aids		$ 95,881.00
Mobile Homes		
Center for Auto Safety	$ 27,749.00	Granted--$ 9,133.00
Center for Auto Safety	$ 10,460.00	Granted--$ 9,915.00
Center for Auto Safety	$ 7,134.00	Granted--$ 7,134.00
Golden State Mobilhome Owners League	$ 35,000.00	WITHDRAWN
Golden State Mobilhome Owners League	$ 28,675.00	Granted--$28,280.00
Golden State Mobilhome Owners League	$ 1,843.00	Granted--$ 500.00
Michigan Mobile Homeowners League	$ 57,986.00	Granted--$ 2,224.00
Housing Advocates	$ 43,794.50	Granted--$36,723.60
Attorney Gen. of Mass.	$ 547.00	DENIED

*/ The NHAS could not avail itself of these funds because of a solicitation it sent its members shortly before it applied for compensation, netting it slightly above this approved budget.

RULE/GROUP	AMOUNT REQUESTED	ACTION TAKEN
Housing Advocates	$ 238.00	DENIED
Housing Advocates	$ 3,102.60	Granted--$ 3,102.60
Housing Advocates	$ 3,493.00	Granted--$ 3,493.00
Housing Advocates	$ 4,789.26	DENIED
Center for Auto Safety	$ 16,654.00	Granted--$14,819.00
Nat'l Mfd. Housing Federation	$ 10,987.00	Granted--$ 8,627.00
Housing Advocates	$ 9,313.05	Granted--$ 9,313.05
Nat'l Mfd. Housing Federation	$ 2,662.96	Granted--$ 2,662.96
Nat'l Mfd. Housing Federation	$ 8,855.00	Granted--$ 8,855.00
Center for Auto Safety	$ 7,656.00	Granted--$ 7,656.00
Housing Advocates	$ 405.00	Granted--$ 405.00
Housing Advocates	$ 1,100.00	Granted--$ 1,100.00
Housing Advocates	$ 615.60	Granted--$ 615.60
TOTAL GRANTED -- Mobile Homes		$154,558.81

Ophthalmic Goods and Services		
Consumer Action	$ 38,630.00	Granted--$37,766.00
California Citizen Action Group	$ 31,992.00	Granted--$33,372.00
Arkansas Community Organizations for Reform Now (ACORN)	$ 1,962.00	Granted--$ 1,828.00
N.Y. Public Interest Research	$ 12,665.00	Granted--$12,575.00
Americans for Democratic Action	$ 11,332.00	Granted--$ 6,652.00
Consumer Action	$ 216.00	Granted--$ 216.00
Americans for Democratic Action	$ 6,280.00	DENIED

RULE/GROUP	AMOUNT REQUESTED	ACTION TAKEN
Ophthalmic Goods (Cont'd)		
Americans for Democratic Action	$ 9,766.00	Granted--$ 9,766.00
Consumer Action	$ 1,604.00	Granted--$ 1,604.00
ACORN	$ 770.00	DENIED
Americans for Democratic Action	$ 2,885.00	Granted--$ 2,855.00
Consumer Action	$ 3,958.60	Granted--$ 3,958.00
United Consumers of the Alleghenies	$ 253.20	DENIED
California Citizen Action Group	$ 850.00	Granted--$ 850.00
California Citizen Action Group	$ 3,582.00	DENIED
California Citizen Action Group	$ 545.00	Granted--$ 545.00
ACORN	$ 840.00	Granted--$ 840.00
Americans for Democratic Action	$ 1,933.00	Granted--$ 2,372.00
Americans for Democratic Action	$ 1,290.00	Granted--$ 1,290.00
Americans for Democratic Action	$ 6,035.70	Granted--$ 5,365.33
California Citizen Action Group	$ 5,813.00	Granted--$ 3,518.00
Americans for Democratic Action	$ 1,902.00	Granted--$ 1,902.00
TOTAL GRANTED -- Ophthalmic Goods		$127,274.33
Over-the-Counter Drugs		
California Citizen Action Group	$ 32,350.00	Granted--$26,620.00
Americans for Democratic Action	$ 18,765.00	Granted--$ 7,545.00
Americans for Democratic Action	$ 1,411.00	Granted--$ 1,411.00
Americans for Democratic Action	$ 10,280.00	Granted--$ 6,604.00
Council on Children, Media and Merchandising	$ 43,966.00	DENIED

RULE/GROUP	AMOUNT REQUESTED	ACTION TAKEN
Over-the-Counter Drugs (Cont'd)		
Council on Children, Media and Merchandising	$ 19,175.00	Granted--$19,175.00
California Citizen Action Group	$ 6,992.00	Granted--$ 6,492.00
California Citizen Action Group	$ 10,611.00	Granted--$10,571.13
Americans for Democratic Action	$ 7,637.00	Granted--$ 7,637.00
Americans for Democratic Action	$ 534.68	Granted--$ 498.90
Council on Children, Media and Merchandising	Not specified	Granted--$ 1,136.00
Council on Children, Media and Merchandising	Not specified	Granted--$ 4,938.00
Americans for Democratic Action	$ 775.00	Granted--$ 775.00
TOTAL GRANTED -- OTC Drugs		$ 93,403.03
Prescription Drugs		
Consumers Union	$ 994.30	DENIED
Consumer Action	$ 16,100.00	DENIED
Americans for Democratic Action	$ 14,558.00	DENIED
Consumer Newsletter	$ 100.00	DENIED
National Council of Senior	$ 9,227.00	Granted--$ 2,070.00
Craig W. Sandahl	$ 90.23	DENIED
TOTAL GRANTED -- Prescription Drugs		$ 2,070.00
Preservation of Consumers' Claims and Defenses		
David A. Scholl	$ 28.00	WITHDRAWN */

*/ This witness mistakenly applied to the compensation program for witness compensation. He was reimbursed instead with Bureau of Consumer Protection operating funds.

RULE/GROUP	AMOUNT REQUESTED	ACTION TAKEN
Consumers' Claims (Cont'd)		
Richard S. Kay	$ 125.00	WITHDRAWN*/
Richard A. Victor	$ 250.00	WITHDRAWN*/
Richard A. Hesse	$ 150.00	WITHDRAWN*/
National Consumer Law Center	$ 3,193.65	Granted--$ 3,093.25
TOTAL GRANTED -- Consumers' Claims		$ 3,093.25
Protein Supplements		
Consumer Action Now	$ 15,200.00	Granted--$12,710.00
Consumer Action	$ 15,128.00	Granted--$15,507.00
Consumer Cooperative of Berkeley	$ 5,014.00	Granted--$ 3,967.70
Chester W. Sutton, Jr.	$ 300.00	DENIED
Consumer Action Now	$ 1,245.00	Granted--$ 1,785.60
TOTAL GRANTED -- Protein Supplements		$ 33,970.30
Standards and Certification		
Public Interest Economics Foundation	$ 7,710.26	PENDING
Center for Auto Safety	$ 21,380.00	PENDING
National Consumers League	$ 30,743.00	PENDING
Center for Public Representation	$ 18,073.00	PENDING
Hayward, John O.	$ 1,058.00	PENDING
American Council of Independent Laboratories	$ 26,591.00	PENDING
TOTAL GRANTED -- Standards		$----------

*/ These staff witnesses mistakenly applied to the compensation program for witness compensation. They were reimbursed instead with Bureau of Consumer Protection operating funds.

RULE/GROUP	AMOUNT REQUESTED	ACTION TAKEN
Thermal Insulation		
Arizona Consumers Council	$ 11,060.00	Granted--$ 1,036.00
Consumer Federation of America	$ 10,631.00	Granted--$ 2,141.10
Consumer Federation of America	$ 8,834.00	DENIED
Center for Public Representation	$ 4,573.09	Granted--$ 4,573.09
National Consumers League	$ 24,912.00	Granted--$18,512.00
California Citizen Action Group	$ 15,840.00	DENIED
California Public Interest Research Group	$ 11,681.00	DENIED
COALITION: Sierra Club; Friends of the Earth; Environmental Defense Fund; Natural Resources Defense Fund	$ 16,105.00 705.00	Granted--$17,645.00
National Ass'n of Home Insulation Contractors	$ 5,800.00	Granted--$ 5,560.00
COALITION	$ 2,080.00	Granted--$ 2,080.00
National Consumers League	$ 8,112.00	Granted--$ 8,112.00
Insulation Contractors Ass'n	$ 1,000.00	DENIED
COALITION	$ 1,260.00	Granted--$ 1,260.00
National Ass'n of Home Insulation Contractors	$ 6,210.00	Granted--$ 6,210.00
National Consumers League	$ 8,160.00	Granted--$ 8,160.00
COALITION	$ 4,030.00	Granted--$ 3,950.00
National Consumers League	$ 16,780.00	Granted (in part)--$ 1,000.00*/
COALITION	$ 8,860.00	Granted (in part)--$ 1,000.00*/
COALITION	$ 2,256.00	Granted--$ 2,306.00
TOTAL GRANTED -- Insulation		$ 93,488.17

*/ These applications were only partially granted due to a lack of funds for FY 78.

RULE/GROUP	AMOUNT REQUESTED	ACTION TAKEN
Used Motor Vehicles		
Automobile Owners Action Council	$ 31,000.00	Granted--$ 7,300.00
Used Motor Vehicle Study Team	$ 63,246.00	DENIED
Center for Public Representation	$ 33,188.00	Granted--$33,416.00
Center for Auto Safety/ Americans for Democratic Action	$ 63,205.00	Granted--$ 4,500.00
California Public Interest Research Group	$ 28,925.00	Granted--$37,988.68
Automobile Owners Action Council	$ 22,790.00	Granted--$16,960.00
California Public Interest Research Group	$ 1,370.00	Granted--$ 1,370.00
Consumer Action	$ 21,434.00	Granted--$10,976.52
Consumer Action	$ 775.00	Granted--$ 775.00
Automobile Owners Action Council	$ 12,574.90	Granted--$ 432.00
California Public Interest Research Group	Not specified	Granted--$ 595.00
Center for Auto Safety	Not specified	Granted--$ 774.59
California Public Interest Research Group	$ 4,828.00	DENIED
California Public Interest Research Group/Consumer Action (Freed as counsel to both)	$ 10,414.00	REVISED
Center for Auto Safety	$ 4,030.00	Granted--$ 4,030.00
Automobile Owners Action Council/California Public Interest Research Group/ Consumer Action	$ 26,091.00	Granted--$13,245.00
TOTAL GRANTED -- Used Motor Vehicles		$132,362.79

RULE/GROUP	AMOUNT REQUESTED	ACTION TAKEN
Vocational Schools		
Len Vincent	$ 135.00	DENIED
Consumer Action	$ 19,176.00	Granted--$20,020.00
Consumer Action	$ 4,995.00	Granted--$ 4,995.00
Witness Compensation	$ 789.47	DENIED
Joel Platt, Esq.	$ 7,017.00	Granted--$ 5,460.00
John C. Hendrickson, Esq.	$ 3,099.00	DENIED
Mary Anne Vance, Esq.	Not specified	WITHDRAWN
National Consumer Law Center	$ 2,474.25	Granted--$ 2,474.25
Consumer Action	$ 3,063.00	Granted--$ 705.00
TOTAL GRANTED -- Vocational Schools		$ 33,654.25

Statement of the National Association of Manufacturers

The National Association of Manufacturers (NAM) accepts your written invitation to express its views on the FTC authorization bill, S. 1020.

The NAM is a voluntary organization of over 12,400 companies and is affiliated with 158,000 businesses through the National Industrial Council. The NAM member companies provide 80 percent of all industrial output in the United States.

H.R. 1020 would provide authorization for the FTC for fiscal years 1980 and 1981. However, our comments will not deal with the authorization, but the operation of the FTC and our recommendation to rectify the operational problems.

The NAM supports the regulatory veto concept which is found in Senator Towers' bill, S. 193 which was introduced on January 23, 1979 and referred to the Commerce Committee. Senator Towers' bill was co-sponsored by a distinguished group of Senators including Senator Nunn (D–GA), Senator Schmitt (D–NM) and Senator Morgan (D–NC).

The NAM views the regulatory or congressional veto concept as one more tool to achieve regulatory reform. The veto concept is only a stop gap measure which will alleviate some of the problems associated with over-regulation. Effective reform can only be achieved when Congress reviews and rewrites the substantive regulatory statutes which allow the present agencies to engage in excessive activities.

A ready example of such FTC activity is the proposed regulation that would directly thrust the Government into the voluntary consensus standards system. The proposal would add a very costly level of expenditure to both the voluntary consensus system for developing standards and to those who use or reference standards. As part of our statement NAM is attaching our statement of March 16, 1979 submitted by the FTC opposing the TRR on Standards and Certification.

The NAM has been a leader in the flight for meaningful regulatory reform having supported such proposals as "sunset" legislation for government expenditures, airline deregulation (now law), reform of the ICC and its methods of overregulating the trucking industry and postal reform legislation allowing business to expeditiously move time-sensitive material.

The NAM favors the regulatory veto concept for the FTC when it states in its official policy: "* * * *Congress should be allowed the opportunity to prevent the adoption of rules or regulations that are inconsistent with congressional intent, or that go beyond the legislation which the rules or regulations are designed to implement.* Provision should be made for periodic review by the Congress of the need, cost benefit ratio, soundness and fairness of both regulatory statutes and all administrative orders issued in connection with their enforcment." (Emphasis added.)

Legislative veto is not a new concept; no less than 295 separate provisions have been adopted in 196 different acts since 1932 providing for some form of veto. However, the actual use of the veto power by the Congress has been extremely limited. In the period 1960–74, the Congress considered concurrent or simple veto resolutions about 33 times; in 1975 the power was exercised on 42 occasions, but in 1976 the veto was employed only 13 times. In fact, between 1970–76, Senate committees possessing veto power used the device in only 3 of more than 12,337 possible

situations. Clearly, the veto authority has been used only in the most extenuating circumstances, and we believe that trend would continue.

On the state level, 34 state legislatures have formal regulation review authority ranging from review of certain agencies' rules to repeal of rules by the legislature or a committee thereof. According to a 1978 report by the National Conference of State Legislatures entitled, "Restoring the Balance—Legislative Review of Administrative Regulations," it is the feeling that:

"Since in most instances, agency authority stems directly from the legislature, legislative review of regulations can be used to help insure agency compliance with both statutory authority and legislative intent."

The FTC's power to prescribe rules regarding unfair or deceptive acts or practices is authorized solely by Section 18 of the FTC Act. In addition, Section 6(g) of said Act authorizes the FTC to promulgate rules applicable to other unlawful trade practices.

The power granted the Commission is extremely broad. Until recently the actions brought by the FTC to enforce Section 5 were on a case by case basis, the decisions were based upon the law and facts developed in each particular case. However, with the enactment of the Magnuson-Moss Act the FTC has proposed more than 15 trade regulation rules (TRR) covering whole segments of the economy, i.e., funeral directors, the hearing aid industry, used car dealers, standards and certification programs, TV advertising, etc.

The Commission has become a mini-legislative body issuing edicts that have the force and effect of law, affecting not only the participants in the rulemaking, but all sectors of the industry that would come under the scope of the TRRs.

The Commission in its recent actions has not restricted its TRR activity to alleged "unfair and deceptive acts or practices," but has proposed rules for standard setting organizations (Federal Register, Vol. 43, pp. 57269–84, December 7, 1978) which the staff report alleges are based upon practices that may be "unfair or deceptive * * * and *unfair methods of competition* * * *." (Emphasis added.) The law in this area is not at all clear as to whether the FTC has the authority to issue substantive rules based upon illegal activity involving "unfair methods of competition." But the Commission is ignoring this fact and continues to issue proposed rules without clear authority.

The NAM favors the legislative veto concept for FTC regulations both because of the regulatory activity by the FTC and the benefits such authority would confer upon the FTC's area of regulatory authority. It would:

1. Provide an additional check in our system of checks and balances regarding regulatory activities, thereby increasing the accountability of unelected officials;
2. Compel FTC officials to examine closely the legislative intent of laws which they must enforce or implement;
3. Give the Congress, through the veto process and the ensuing debate, greater opportunity to make and/or clarify legislative histry;
4. Induce "self-restraint" on the part of the FTC in promulgating new regulations based on the knowledge of possible veto;
5. Compel the Congress to draft new legislation more tightly and carefully, spelling out its intent more clearly;
6. Prevent injury to the regulated rather than rely on court action after the fact of injury.

NAM views the veto provision as a viable step toward regulatory reform. It is only one of many possible solutions and should not be considered the single option to the exclusion of others. NAM expects this limited regulatory reform tool to be used on a restricted basis in only those flagrant cases involving FTC regulations that go against established public policy, that extend the regulatory authority to its extreme limits, or that are inconsistent with congressional intent.

During the past Congress, the House spoke clearly on its desire to place a legislative veto upon the FTC. Twice, by large votes, the House overturned the conference reports of the last FTC authorization which did not contain such a provision even though the full House had earlier called for it by a 272–139 vote.

It is hoped that the subcommittee will give careful consideration to including a legislative veto provision in this year's FTC authorization.

The NAM requests that this statement be included in the record.

Statement of Jeffrey H. Joseph,* Chamber of Commerce of the United States

The Chamber of Commerce of the United States is the world's largest business federation, composed of more than 79,000 business firms, 2,600 chambers of commerce in the U.S. and abroad, and 1,200 trade and professional associations. On behalf of our 83,000 members, we greatly appreciate the opportunity to share our views on the role of the Federal Trade Commission in our society today.

PUBLIC ATTITUDE TOWARD GOVERNMENT

In the past, it has been our impression that authorization hearings have been considered by all parties to be relatively pro forma. Times change, however, and today a new political attitude is sweeping our country. An increasingly cynical and frustrated public is becoming more vocal about the role of government in society. Proposals that one year ago no one could have predicted with great certainty, such as Proposition 13 and constitutional conventions, are becoming familiar concepts for today's politician.

This new public attitude has permeated all levels of our government. As a candidate Jimmy Carter ran against the Washington establishment. The Congress has since become more conservative. Current events continue to escalate the public debate. For example, one month ago, in a little publicized address to the faculty and students of the University of Kansas, Attorney General Griffin Bell offered a grim perspective on the state of our nation today. The Attorney General's premise for the address was, "that if the republic is to remain viable, we must find ways to curb, and then to reduce, this government by bureaucracy. We must return to government by directly accountable public officials—local, state and federal."

Attorney General Bell went on to offer a few "modest" suggestions to turn the tide. Among those he proposed—

A constitutional amendment to provide for a sole, six-year term for the President;

A complete review and reduction of the regulatory and litigating authority of the independent federal agencies;

A reduction in the staffs allocated to the President, the Congress, and even the federal courts; and

A drastic call to Congress to "sharply curtail, if not abolish, the so-called rulemaking power of the independent regulatory commissions."

Attorney General Bell called rulemaking "a total substitute for all forms of government, executive, legislative, and even judicial. Its abuse can stymie and frustrate the government of whole states and the operations of entire industries."

RULEMAKING AND THE FTC

Public attitudes today dictate that Congress take an extremely hard look at the operations and policies of the Federal Trade Commission. Perhaps more so than any other federal agency, the FTC typifies what the average American seems to be concerned about in government. Through its rulemaking powers, the FTC has involved itself in the affairs of industry and commerce stretching from one end of society to another. Hearing aid dealers, funeral parlor operators, used car dealers, cereal and food manufacturers, vocational school operators, mobile home manufacturers, T.V. advertisers, protein supplement manufacturers, health spa operators, and the science of product standards and certification are all subject to action by the Federal Trade Commission. There appears to be no area in our society where the FTC does not seem to have a better idea. This presumed omniscience raises a fundamental question: as it now exists under the FTC Act, is rulemaking prudent and consonant with the principles of government embraced by the constitution?

It is clear to many observers that the Federal Trade Commission's rulemaking process is not working well. The Administrative Conference of the United States published in the Federal REgister of February 21, 1979, a request for public comments on certain proposed recommendations which pertain principally to the preparation and prehearing stages of the trade regulation rulemaking process. The study is being directed by Professor Barry B. Boyer, a law professor at the University of Buffalo, who is serving as a consultant to the Administrative Conference. The Conference is scheduled to report to Congress the results of its study of the Magnuson-Moss Act. The preliminary study raises significant questions and criticisms of the FTC's handling of the preparatory and prehearing phases of the rulemaking process.

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*Director of Government & Regulatory Affairs, Chamber of Commerce of the United States.

Any study of rulemaking by the FTC must commence with a close examination of the powers from which the trade regulation rules emanate. The FTC Act, as amended by the Magnuson-Moss FTC Improvement Act, reads in part as follows: "The Commission may prescribe . . . rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce." There are two clear standards applicable to the FTC rulemaking—"unfair" and "deceptive." Under the clear language of the statute, an illegal practice need not be both.

Since 1938, when the "unfair or deceptive acts or practices" language was added to the FTC Act, the Commission has made great strides in defining and eliminating "deceptive" practices. Its premise has been that the free flow of accurate consumer information is necessary for the efficient operation of markets—a premise with which few would argue. There is no arguing with the proposition, for example, that a misrepresented product characteristic is a deception that should be enjoined.

However, it has not been until recently that the Commission has made significant use of the "unfairness" standard. Evidence of the FTC's judgement as to what is or is not unfair is evident in the current debates which are keeping the highly controversial nature of this agency in the public's eye. From the standpoint of the FTC, "unfairness" has no bounds. It lies in the eyes of the beholders, in this case the staff and the members of the FTC.

Furthermore, the vagueness of unfairness is increased in the context of rulemaking, which itself has ill-defined boundaries. The FTC was originally intended to be a "cease and desist" agency. Under rulemaking, it may apparently order any affirmative or negative action it wishes to eliminate the practice it deems unfair. It is obvious to those who are contesting FTC actions that the agency is the second most powerful "legislative" body in the United States.

While it is clear that the FTC is going out of its way to impose its standard of "unfairness" on the country, the public is becoming increasingly aware that the base concept, "fairness," is not always present in the conduct of the various rulemaking proceedings. As this committee examines the performance of the agency, it must ask why semblances of fairness must continually be compromised. Why, for example, did the staff lawyers in the hearing aid proceeding take the unprecedented step of providing their personal evaluation of the credibility of various participants in the rulemaking proceeding, arriving at a statistically impossible conclusion that almost all of the individuals who testified in opposition to the rule were deemed not to be credible, while those who supported the rule had, by no strange coincidence, most unimpeachable characters? The concept of commenting on the credibility of witnesses is astounding, since the staff lawyers are supposedly serving as advocates, not factfinders.

The concept of fairness also extends to the relationship among FTC staffers who participate in rulemaking. Many industries which face the possibility of living with new, agency-mandated rules of practice feel victimized in a proceeding where a staff member of the Bureau served as the "impartial" hearing officer; and still other bureau colleagues decided which "public interest" groups were reimbursed to play the "objective" role of supporting the proposed rule.

The FTC's "public funding" program itself raises an important question of fairness and equity. While opposing the proliferation in other agencies of the concept of direct reimbursement of participant costs, the National Chamber is well aware that the FTC has the statutory authority pursuant to the Magnuson-Moss Warranty Act to award public participation grants under certain conditions. We also are aware that the FTC makes separate grants to witnesses from its own budget, and has authority to do so. In fact, when the Magnuson-Moss bill went to the President for his signature, we informed him that we supported the bill and were curious to see how the intervenor funding portion would be administered. In our opinion, it has not been administered well.

Hence, we will not address the underlying concept of direct reimbursement for public participation in rulemaking proceedings. We view that issue, at least as it applies to the FTC, as moot. Nor do we object to the Commission's issuance of rules of practice or its issuance of Guidelines to explain those rules of practice. However, we regret the FTC's decision not to adopt the guidelines suggested by the National Chamber in a statement submitted to the FTC on July 25, 1977.

While the National Chamber believes that all interest groups, particularly consumers, should be represented in agency proceedings, the National Chamber continues to oppose the authorization of any federal activity or expenditure that would result in an unfair or unnecessary regulatory effort.

In testimony before a Senate Judiciary Subcommittee in June of 1977, these serious abuses in the funding program used at the FTC were cited:

Funds were disbursed, in many instances, to specific individuals or groups in agreement with the FTC's position.

Funds went to individuals and groups not qualified to receive them under the definition of "participation," as spelled out in the law.

Funds went to organizations which had sufficient funds of their own to pay the costs of their participation in FTC proceedings.

Staff attorneys of the FTC, in effect, played a double and conflicting role; they took part in the hearings and joined in determining what outside groups should be compensated for taking a position in the hearings.

The FTC failed to guard against staff excesses, such as what might be called "ventriloquist advocacy"—in the preparation of written statements delivered by public witnesses.

These abuses suggest there are many difficult questions to be resolved in framing detailed standards for a direct compensation program and in administering the granting of compensation funds. This point has also been confirmed in another report by Barry B. Boyer.

Professor Boyer, in a preliminary review of the FTC's use of payments to public participants, says that the FTC Had "potentially an extremely difficult task" of identifying which interests should be compensated, but "tended to avoid the problem by accepting at face value the broad and conclusory definitions of the consumer interest that the applicants advanced." The FTC took a "liberal approach" on the issue of financial inability, with the agency concluding that "a group was financially unable to participate if its unrestricted funds had been budgeted for other projects."

Mr. Boyer also found that FTC staff attorneys have played a major role in selecting paid participants, both in making formal recommendations and through "informal pre-application contacts with consumer groups and other applicants." Also, Mr. Boyer found that "(l)ike staff, the consumer groups tended to mobilize witnesses who were rule-supporters, and overall there many more pro-rule than anti-rule witnesses at the hearings." He observed that "(c)ompensated consumer groups tended either to support the rule, or take the position * * * (it) did no go far enough."

In view of this evidence and other "abuses" which have occurred, the National Chamber urges Congress to engage in an in-depth analysis of the FTC's federal advocacy funding program to ascertain whether or not its procedure is functioning fairly, impartially, and with proper restraint in the use of public funds.

Because the reimbursement program has been used to give special status, advantages, or exemptions to consumer groups sharing an agency's position, and has led to unnecessary, duplicative testimony and preparation of testimony by staffers to be submitted by ostensibly objective witnesses, Congress should take a serious look at this program.

Lest this be viewed as a classic confrontation between the business community and the consumer movement, consider the following comments made by respected "consumerists." John W. Gardner, founder of (the citizen lobbying organization) Common Cause, has commented that "if the concept of conflict-of-interest means anything, then there is a danger in potential critics of an agency being financed by the very agency they criticize. We could easily create a class of kept critics, and damage the future of an independent public interest movement." Margery Waxman Smith, former Executive Director of the FTC, in tesimony before a Senate Judiciary Subcommittee, noted that she had a number of reservations about the FTC's reimbursement program, including potential conflicts-of-interest.

CONGRESSIONAL VETO

Ours is a government that rests on checks and balances. a backlash to regulatory agency excesses is growing. At the present time, administrative rules and regulations of the FTC have the same force and effect as laws passed by Congress. As long as our unelected bureaucrats continue to pass laws without effective Congressional control, support will continue to grow for the use of congressional veto as an effective tool to improve the regulatory process.

National Chamber support for the congressional veto concept was recently enunciated by our Board of Directors with the realization that there are existing tools available to Congress to control the agencies. These include greater and more effective oversight, stricter standards on the appointment of cabinet members and agency chairmen, and greater reliance on the authorization and appropriation process. However, we have determined that these tools simply are not adequate to address the problem a particular rule or regulation may present. All the above remedies are *ex post facto*—after the damage has been done. The Congressional veto

would prevent the damage and serve as a possible tool of "consumer redress" from egregious FTC rulemaking actions. Therefore, we support the effort to apply this process to the FTC, as found in S. 193.

From a political standpoint, we must recall the noteworthy votes taken on this issue in the last Congress. Although the House passed an amendment providing for congressional veto of FTC regulations by a 2 to 1 vote, 272 to 139, the Senate refused to accept that provision in conference. On two separate occasions, the House voted to reject the FTC conference report because it did not contain a congressional veto of FTC regulations. The first vote was 146 to 255; the second vote was 175 to 214. The two-time rejection of the conference report constituted unprecedented action on the issue and dramatized the feeling of concern that the actions of the FTC have brought to bear on our public.

CONCLUSION

In summary, we hope that the above recommendations will be received in the spirit in which they are intended. They are offered as part of the National Chamber's continuing effort to achieve regulatory reform, and our continued commitment to remove government impediments to growth in the regulatory system—a commitment clearly shared by President Carter, as evidenced by this statement to Congress:

"One of my Administration's major goals is to free the American people from the burden of overregulation. We must look, industry by industry, at what effect regulation has—whether it simply blunts the healthy forces of competition, inflates the prices and discourages businesss innovation. Whenever it seems likely that the free market would better serve the public, we will eliminate government regulation."

We recommend that the Committee consider incorporating the congressional veto concept in the authorization bill.

STATEMENT OF THE NATIONAL FIRE PROTECTION ASSOCIATION, INC.

We understand that at this time the Consumer Subcommittee of the Senate Committee on Commerce, Science and Transportation is holding hearings on the reauthorization of the Federal Trade Commission programs with much broader oversight hearings to follow in July. The National Fire Protection Association, Inc. (NFPA) together with several hundred standards developing organizations and product certifiers is affected by and involved in the Federal Trade Commission Trade Regulation Rule (TRR) proceeding on Standards and Certification. The purpose of this brief statement is to bring to the Subcommittee's attention certain matters of FTC conduct and procedures we are experiencing in the present proceeding, which unless corrected will deny NFPA's basic constitutional and statutory rights, and which may be relevant in the Subcommittee's deliberations establishing an authorized level of funding for the FTC. The NFPA may wish to testify in detail concerning these matters at the July oversight hearings.

Congress gave very carefully framed authority to the FTC when it passed the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, specifying due process procedures greater than those applicable to ordinary informal agency rule-making. In short, Congress required that TRR rulemakings have a secure evidentiary basis founded upon a clear delineation of disputed issues of fact which would be tested by cross-examination and reviewed for substantial evidence. This Congressional intent appears to be frustrated by a singleminded effort to (a) avoid granting statutorily provided rights, (b) expedite the proceeding at the expense of developing fair procedures, and (c) spend enormous resources of personnel and dollars to achieve a result even at the cost of distorting the true facts.

A few examples of experiences we are having in the Standards and Certification matter may be of help in describing the problem.

1. The FTC's Notice of Rulemaking, contrary to the statutory requirements, failed to identify whether there are any disputed issues of material fact, and if there are any, specify them. The FTC unilaterally changed the Congressional mandate of affording interested persons a "right to cross-examine" to a "right to question." This opens the subject to "questioning" to anything that is "relevant" without identifying what the "disputed" issues are in the Commission's view. Under the circumstances, and considering the limited time available for questioning (ten minutes per witness was announced by the Presiding Officer), such a broadly defined "right" constitutes a deprivation of the right to cross-examine. This deprivation is reinforced by a refusal to place witnesses under oath.

2. The FTC Staff Report, containing numerous unsubstantiated allegations of fact and conclusions of fact, has been made part of the Rulemaking Record. This Rulemaking Record constitutes the body of documents, which, according to the Congressional mandate must serve as the repository of all evidence pertinent of the proposed rule. The Presiding Officer has ruled that the FTC Staff may not be subjected to cross-examination concerning the Staff Report. In essence, the staff has created evidence on disputed issues of fact which may not be tested by cross-examination.

3. NFPA has discovered that the FTC staff has not disclosed the identity of certain witnesses nor has it identified all of the evidence accumulated during its nine year investigation. The probable intent of the FTC will be to present these as surprise witnesses at the informal hearing. Such presentations, of course, would not permit adequate preparation for the defense, thus, again denying the right for meaningful cross-examination.

4. NFPA has learned that a new Interim Rule of the FTC on the subject of ex parte communications permits secret, off the record communications between the Staff and the various Commissioners with regard to matters involving any TRR proceeding. This is to be contrasted with the requirement that any communications by members of the public must be on the record and become part ot the evidence in the TRR. In our opinion this rule is manifestly unlawful, and jeopardizes the fair conduct of the proceeding.

5. Finally, and most importantly for this committee's purposes, there appears to be unlimited financial and staff resources available for the purpose of seeking out witnesses from all parts of the country. The staff size has grown almost daily; the resources available appear to be absolutely unlimited and unsupervised. A meaningful question in our view would arise as to precisely what level of resources should be permitted to be deployed on one matter.

We respectfully request that the committee ask the Commission to place on the record responses to the attached questions so that the Congress and the public may be more fully informed of all relevant facts.

The NFPA respectfully requests that the Subcommitee consider these matters, described in detail in the attached Petition No. 1, which was submitted to the Commission on April 25, 1979.

STATEMENT OF CHARLES R. HALPERN, PROFESSOR OF LAW, GEORGETOWN UNIVERSITY LAW CENTER AND DIRECTOR, INSTITUTE FOR PUBLIC REPRESENTATION

I appear before the Subcommittee today to support the Federal Trade Commission budget request of $750,000 for its fiscal year 1980 public participation program, the same amount that was requested and approved by the Congress in fiscal year 1979. My testimony in support of the request is in two parts. First, I place the FTC program in the context of promising efforts over the last decade to provide meaningful public involvement in important federal agency decisions. Second, I wish to discuss the FTC program itself, and the reasons why its past performance justifies continuing support.

My interest in this program comes from several sources. During four years in private practice in a large corporate firm in Washington, I frequently had opportunities to represent corporate interests in administrative proceedings. That experience persuaded me that there is an urgent need for representation of the interests of ordinary citizens in agency proceedings. In 1969, I become the first Director of the Center for Law and Social Policy, a public interest law firm committed to the representation of unrepresented interests. We focused primarily on administrative practice and, with the assistance of foundation support, we frequently brought to agency proceedings the views of consumers and other affected citizens who had never previously been represented. It is my belief that our representation of the consumer and other citizen interests materially aided the agencies in which we participated in reaching soundly based decisions.

While I have never applied for or received funds from the Federal Trade Commission, I have maintained a strong interest in their financing program, viewing it as a model for similar programs in other government agencies. Currently, I am teaching in the administrative law field and directing the Institute for Public Representation, an institute at Georgetown University Law Center dedicated to assuring representation for unrepresented interests. I am also a member of the Administrative Conference of the United States, sitting on the Committee which oversees the study currently in progress of the FTC's administration of the Magnuson-Moss Act.

The need for greater public participation

It has been more than a decade since Chief Justice (then Judge) Burger put to rest as "no longer a valid assumption" the theory that federal agencies can act in the interests of the public without hearing from interested citizens. In the 1966 court decision in *United Church of Christ* v. *Federal Communications Commission*,[1] Chief Justice Burger explored some of the reasons why agencies need "the aid and participation of legitimate [public] representatives fulfilling the role of private attorneys general." He observed that agencies usually lack adequate staff and resources and face inherent conflicts in their dual roles as advocates and arbiters.

A strong public presence in agency proceedings is also suggested, indeed required, said Justice Burger, by our "national tradition" of "public response" as "the most reliable test" of governmental performance.[2]

Chief Justice Burger's call for increased public participation in agency deliberations has been partially fulfilled in the years that followed. In certain areas, private foundations and charitable organizations have funded a variety of public-oriented groups who have engaged in sustained, informed advocacy on behalf of interests in our society long unrepresented before federal agencies and in the courts. The results have been impressive. Both agency officials and judges have stated publicly, in both congressional testimony and a variety of publications, that where the public has fully participated, a balanced record has been developed and informed decisionmaking has been significantly enhanced.[3]

But these important success stories remain the exceptions. On the whole, most important agency decisions continue to be made without public participation or with only a perfunctory public presence. A recent study of the deliberations of eight major federal agencies by the Senate Government Affairs Committee found that there was no organized public participation in more than half of these agencies' regulatory proceedings.[4] Where there was public participation, the study characterized it as a "small fraction" of the total participation, a fraction greatly outstripped in both frequency and finances by regulated interests.[5]

This marked imbalance in the data and views means that federal officials make decisions about important public problems without any clear idea of the wishes of the consumers and other citizens who are affected by regulatory decisions.

The need for agency funding

The reason why important segments of the public have not participated more fully in federal decisionmaking can be summarized in one word: money.

Many regulatory proceedings are complex, and effective participation, often requiring technical experts and lawyers, is prohibitively expensive. Foundations and charitable institutions viewed their support of public advocacy as providing seed money for an experiment. Now that the public participation experiment has shown that it can succeed, foundations are diminishing their support and expecting other sources to take up the slack.

While membership resources are increasingly being tapped for advocacy support, there are definite limits to this source of funding. Many unrepresented groups, such as racial minorities, low and middle income consumers, and small business owners, simply cannot afford to contribute money to such advocacy organizations. Even

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[1] Office of Communications of the United Church of Christ v. Federal Communications Commission, 359 F. 2d 994, 1003 (D.C. Cir. 1966).

[2] *Id.*

[3] See, e.g., the views of Judge Leventhal of the D.C. Circuit expressed in congressional testimony, Public Participation in Federal Agency Proceedings, Hearings on S. 270 Before the Subcommittee on Administrative Practice and Procedure, Committee on the Judiciary, United States Senate, 94th Cong., 2d Sess. 85 (1976) [hereinafter "1976 Hearings"] and in his article, Attorneys' Fees for Public Interest Representation, 62 ABA J. 1134 (1976). United States District Judge Richey expressed similar sentiments in the same Congressional forum. 1976 Hearings supra, at 18. Former EPA Administrator William D. Ruckelshaus cited an example of "a single piece of testimony from a public interest lawyer" that had "more impact" on his thinking "than any other testimony during a lengthy 3-week hearing." Id. at 119. Mr. Ruckelshaus said that "many more [examples] could be cited."

[4] Public Participation in Regulatory Agency Proceedings, Committee on Government Affairs, United States Senate, 95th Cong., 1st Sess., 16 (July 1977) [hereinafter "Senate Study"]. The study examined comprehensively a number of rulemaking and adjudicatory proceedings conducted by eight major regulatory agencies in the past few years.

[5] *Id.*, at 16,22.

those who can afford to make contributions often have a small or not easily identifiable economic stake and therefore have little incentive to contribute.[6] This situation contrasts markedly with large regulated interests, each of which have advocacy funds at their disposal.

The experience of the FTC public participation funding program

Against this background, the FTC program stands as the most significant congressional response to promotion of public participation in agency decision-making. I strongly urge this Subcommittee to continue a financial commitment to the program at the requested level.

1. Positive results to date

The most important reason for continued support for the FTC program is the program's excellent record to date. Important indications of program success have emerged from the extensive congressional scrutiny that has already been afforded the program.

The July, 1977 report of the Senate Government Affairs Committee reviewed the program and stated that it "has allowed for the presentation of diverse viewpoints and information that otherwise would not have been presented."[7] The FTC program has also been extensively reviewed in Senate and House hearings on legislation to establish public participation programs throughout the government.[8] In these hearings, an impressive array of witnesses, both from within and without the Federal Trade Commission, have spoken favorably of program results.

I would like to highlight three particularly significant aspects about the program to date:

First, the FTC has funded very diverse groups of hearing participants. In many proceedings the Commission has funded consumer representatives and representatives of small business interest, to bring to its deliberations various viewpoints to supplement its staff presentation.

Further, a large number of "grassroots" community organizations, such as the Arkansas Consumer Research Group and the Golden State Mobile Homeowners League, have received Magnusion-Moss funds. This has exposed decision-makers to advocates whose backgound and style of approaching issues may differ substantially from those of more nationally-oriented, consumer organizations or small business associations.

Second, it is clear that all interests funded by the program, be they small business or consumer representatives, have engaged in types of participation that they could not have afforded had FTC funding not been available. For example, funding allocated to the National Association of Home Insulation Contractors, and association of local small businesses which install insulation, permitted the National Association to acquire the services of expert witnesses, present testimony and engage in active cross-examination. Another example is the National Hearing Aid Association, made up of small retail sellers of hearing aids. The Association attempted to participate on its own in the first phase of the FTC hearing aid rulemaking, but received a substantial amount of FTC participation funding after it become obvious that it would have to withdraw from the proceeding if left to its own resources. Without FTC funding, these two associations, like many other small business trade associations and citizen organizations with modest budgets and fixed commitments to other activities, would no doubt have been restricted, at most, to submissions of brief written comments. The impact of such written comments is small compared to the impact of live testimony, cross-examination and the presentation of technical data.

Even modest awards of Magnuson-Moss funds fielded significant levels of participation. A few hundred dollars in travel expenses have enabled representatives from grassroots organizations to journey to Washington, D.C. to participate directly in previously inaccessible hearings. Such boosts to participatory democracy are especially signifcant in an era in which the average citizen feels distant from federal officials.

Third, funded participants have shown striking independence. They have taken seriously the requirement that they offer perspectives "not otherwise adequately represented"—by the FTC staff or others. Thus, for example, a funded trade associ-

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[6] For example, a change in utility rate structures may, over a peiod of years, produce a significant benefit to the average consumer or small business owner. Yet the change may make itself known only as a small change in the killowatt/hour rate.

[7] Senate Study, note 4 supra, at ix (Summary of Findings), 98–113.

[8] Public Participation in Federal Agency Proceedings Act of 1977; Hearings on S. 270 Before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 95th Cong., 1st Sess. (1977); Public Participation In Agency Proceedings: Hearings Before the Subcommittee on Administrative Law and Governmental Relations, Committee on the Judiciary, House of Representatives, 95th Cong., 1st Sess. (1977).

ation opposed as overly burdensome the FTC hearing aid regulation. Consumer groups opposed as overzealous provisions in the proposed rules relating to used cars, food advertising, and revised care labeling.

There is good reason to believe this independent-mindedness results both from the tenacity of advocates and from the steps the FTC has taken to insulate selection of participants from FTC staff members who have a stake in the outcome of a proposed rule. Under current FTC practice, the General Counsel makes the funding decisions. While the decision-makers routinely check with the presiding officer or staff to insure that the applicant's participation would not duplicate the staff presentation, no other staff participation in the funding decision is allowed.

2. The continuing administrative conference study

A cutback in funding of the FTC fund program would also be unwise because it would seriously jeopardize an experimental program before the experiment had been fully evaluated in the way Congress intended. The Magnuson-Moss Act established many innovative procedures, including the participation funding program, for FTC rulemaking. The Act assigned to the Administrative Conference of the United States the duty of analyzing these innovations, and the Conference is actively pursuing a comprehensive study which will yield a detailed report to Congress. A great deal of data on the FTC's public participation program has been gathered and is now being evaluated. It will, in the near future, be available to Congress and will provide information relevant to decisions about the future of the program. I must emphasize that a document which has been cited as containing preliminary Conference findings on the program is merely a topical outline intended, in the words of the Chairman of the Admininstrative Conference, "primarily to indicate questions and issues to be investigated and considered more fully in later reports,"[9] It cannot be properly cited as "evidence" or "findings."

As a concluding thought, I must observe that the attack on public participation funding seems curiously out of step with the current political climate. We are all concerned about whether regulators are out of touch with the everyday concerns of individual citizens. Objections are raised that citizens have lost the ability to hold regulator's responsible for their decisions and for the impacts that they have on their daily lives.

No governmental initiative is more responsive to these concerns than public participation funding. At a small cost, it provides a way for individual citizens and their representatives to have direct access to federal decision-makers. The FTC program for public participation funding deserves continuing congressional support.

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[9] Letter from Robert A. Anthony, Chairman, Administrative Conference of the United States, to the Honorable James Scheuer, Chairman, House Subcommittee on Consumer Protection, March 16, 1979.

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