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**.1 THE OPERATING MANUAL****.1.2 HOW TO USE THE OM****.1.1 FUNCTION AND AUTHORITY****.1.2.1 *Organization***

This Operating Manual (OM) provides the Commission's staff with guidance in processing matters within the agency and in carrying out law enforcement assignments. Prepared by the Commission's staff and issued by the Executive Director, the OM is a continuously updated collection of practical operating procedures and supervisory instructions of general application. It also contains (1) information about support services; (2) guides to existing sources of information; and (3) instructions on document processing and access to Commission records.

Individual chapters in the OM cover particular stages in the progress of cases, other Commission activities or functions, or general information of use to the staff. Where possible, discussion of legal procedures and issues is separated from the treatment of forms and administrative requirements. Instructions for entering case related information into the Commission's Computer Systems are in the FTC Information Handbook.

Although the OM includes material that may reflect Commission directives and policy, the OM does not constitute a directive to the staff from the Commission. Rather, the OM is advisory and instructional. It is advisable, however, to follow the procedures outlined in the OM unless circumstances warrant modification. If modification is deemed necessary, staff should generally consult with their supervisors. Memoranda to the Bureaus or the Commission should explain the reasons why procedures in the OM have not been followed.

Each chapter consists of a table of contents containing major section headings and subheadings (numbered for easy reference), the chapter text, and, where appropriate, a set of illustrations. Citations to the OM should begin with the chapter number and contain the appropriate level of identification for the section or subsection cited, as in "Operating Manual Chapter 4.4" or "12.6.2."

The OM must be used in conjunction with the statutes that the Commission is empowered to enforce and that govern its activities, as well as with the Procedures and Rules of Practice promulgated by the Commission. The Commission's Procedures and Rules of Practice are the official rules of the agency and supersede any other inconsistent directives. While this OM provides detailed guidance to the staff, it does not bind the Commission or its staff to procedures or policies that are not otherwise specifically mandated by the Procedures and Rules of Practice. Failure by the staff or the Commission to adhere to procedures outlined by this OM does not constitute a violation of the Rules of Practice nor does it serve as a basis for nullifying any action of the Commission or the staff.

The OM is distributed to all professional and designated support staff in the Commission, and covers most Commission activities. The OM contains approved language, sample paragraphs, and sample formats for many formal Commission documents. Some of these standard language materials are stored in word processing systems to assure currency and easy access.

The forms and illustrations in the OM are not all inclusive. The OM contains representative illustrations which are essential to an understanding of the subject described, frequently used, relatively unchanging, and of short or moderate length. Illustrations are placed at the end of each chapter where they are arranged in the order in which they are referred to in the text.

**.1.2.2 *Standard Language Materials***

Standard language materials should be maintained in a word processing system to provide the professional and clerical staff with the current versions of:

- \* illustrations printed in the OM;
- \* form letters, such as responses to confidentiality requests and requests for clearance;
- \* samples of motions and other documents in litigated matters;
- \* sample subpoena specifications and 6(b) questionnaires;
- \* sample pleadings; and
- \* standard documents and instructions.

Depending on the document type, these materials take the form of standard language paragraphs, whole documents, or formats for the presentation of variable information.

All standard language should be updated in the word processing systems within 2 working days of any change by the Commission. As the Commission may approve several such changes in a month, this updating and storage method should ensure that all documents will be in the currently approved format and language and that procedures are accurate.

### .1.3 UPDATING AND MAINTENANCE

#### .1.3.1 *Authority*

The OM Coordinator in the Office of the Deputy Executive Director for Planning and Information is responsible for preparing and publishing changes to the OM. Authority for approval of changes is vested in the Executive Director. Some changes in standard language materials may be initiated by the responsible organization or individual, such as a program advisor, and issued by the OM Coordinator.

#### .1.3.2 *Procedures For Issuing Changes*

When a change is required by a Commission directive the Coordinator will prepare the change and circulate it to the OM Committee members for information only. After approval by the Executive Director the change is issued.

When a change is initiated by the staff the Coordinator determines wording and placement in the OM, identifies references to and impact on other OM sections, prepares the change, and circulates it

to affected organizations or individuals for comments/revisions.

Upon final approval by all affected organizations, the issuance is approved by the Executive Director and distributed to all OM holders.

### .1.3.3 *OM Maintenance*

#### .1.3.3.1 Changes In Printed Volumes

##### .1.3.3.1.1 Transmittal Sheets

Each change to the OM is issued with a transmittal sheet, signed by the Executive Director, bearing a release number. The release number consists of the Fiscal Year of the release and a number as a sequential identifier. The transmittal sheet contains a summary of the change, filing instructions, the identification of superseded material, and the date of the issuance. Transmittal sheets should be filed behind the transmittal sheet tab in the OM.

##### .1.3.3.1.2 OM Holder Procedures

Each change to the OM is printed and distributed to all Commission offices to provide each OM holder with a copy. It is the OM holder's responsibility to file a new release and follow the instructions on the transmittal sheet.

When preparing Commission documents or taking any action for which knowledge of the current official policy is of concern, it is advisable to check the OM.

For copies of releases call the Public Reference Section.

#### .1.3.3.2 Changes In OM Materials

The OM Changes Index and the Standard Language Materials provide two sources of information on the release of changes. In general, materials in the OM are expected to change frequently. Staff should always check sample language incorporated into a document is taken from the most OM Release.

## 2 SOURCES OF INFORMATION

### 2.1 STATUTORY AUTHORITY AND DUTIES OF THE FTC

The Commission exercises enforcement and administrative authority or responsibility under numerous Acts, key elements of which are summarized below:

- 1) Federal Trade Commission Act - Under this Act, as amended, the Commission is charged with (a) the prevention of unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce; (b) the conduct of investigations relating to (1) alleged violations of the laws which the Commission is empowered to enforce, (2) the manner in which decrees in antitrust suits brought by the United States have been carried out, and (3) the organization, business, conduct, practices, and management of corporations engaged in commerce (with certain statutory exemptions) and their relation to other enterprises; (c) the making of reports and recommendations to the Congress with respect to legislation; and (d) prescribing (1) interpretative rules and general statements of policy with respect to unfair or deceptive acts or practices; and (2) trade regulation rules defining with specificity acts or practices which are unfair methods of competition or unfair or deceptive acts or practices including requirements for the purpose of preventing such acts or practices. Under the Trans-Alaska Pipeline Amendments to the FTC Act, the Commission may also institute suits in a federal district court for preliminary or permanent injunctions to enjoin violations of the laws it enforces.

Title II of the Magnuson-Moss Warranty Act amended the Federal Trade Commission Act to provide for certain procedures when the Commission prescribes substantive rules for unfair or deceptive acts or practices; to increase the Commission's authority to represent itself in civil court actions and before the Supreme Court under certain conditions; to authorize the Commission to commence a civil action to recover civil penalties for knowing violations of the FTC

Act and for violations of certain TRRs; and to authorize the FTC under certain conditions to file suit for consumer redress of injuries.

- 2) Title I of the Magnuson-Moss Warranty - Federal Trade Commission Improvement Act - This Act authorizes the Federal Trade Commission to develop regulations for written warranties. The Act authorizes the Commission to establish disclosure and designation standards for written warranties; defines the federal content standards for full warranties; prohibits certain disclaimers of implied warranties and establishes consumer remedies for breach of warranty or service contract obligations.
- 3) Amendment to Packers and Stockyards Act - The provisions of this amendment to the FTC Act extend the Commission's jurisdiction to cover the activities of packers not related to livestock, meats, meat products, etc. The Commission is granted additional power and jurisdiction over all transactions in commerce in margarine and oleomargarine and over retail sales of meat and related products.
- 4) Clayton Act - Under Sections 3, 7 and 8 of this Act, the Commission is charged with the duty of preventing and eliminating unlawful exclusive dealing and tying contracts, corporate mergers and acquisitions, and interlocking directorates. Under § 2 of the Clayton Act, as amended by the Robinson-Patman Act, the Commission is charged with the prevention of certain specified practices, i.e., unlawful price and related discriminations.
- 5) Hart-Scott-Rodino Antitrust Improvements Act of 1976 - This Act, in part, amends the Clayton Act to require the filing of premerger notifications with the Federal Trade Commission and the Antitrust Division of the Department of Justice and to establish a waiting period before certain acquisitions or tender offers may be consummated.
- 6) Export Trade Act - The Commission is responsible for receiving and filing the articles of association or incorporation of "associations" organized under the Export Trade Act, and investigating their operations

which may adversely affect competition within the United States.

- 7) Lanham Trade-Mark Act of 1946 - Under this statute the Commission may make applications for the cancellation of registered trade-marks under certain specified conditions. Under the FTC Improvements Act of 1980, the Commission is without authority to petition for cancellation of a trademark on the ground that it has become a common descriptive name for a substance.
- 8) National Energy Conservation Policy Act - This Act requires the Commission, along with the Justice Department, to participate in and monitor the development and implementation of voluntary agreements and plans of actions by oil companies pursuant to the International Energy Program and to comment upon the competitive consequences of such agreements and plans. Under the Act the Commission is responsible for provisions relating to automobile fuel economy, appliance efficiency and recycled oil.
- 9) Defense Production Act of 1950 -as amended, including the Defense Production Act Amendments of 1975 (Section 708), requires the Commission and the Department of Justice to participate in the development and implementation of domestic voluntary agreements by oil companies, i.e., all voluntary agreements other than those implementing the International Energy Program. It is similar to the Energy Policy and Conservation Act in that it requires the Commission to monitor and survey the formation and implementation of all domestic voluntary agreements. After consultation with the Commission, the Attorney General must report each year to Congress and the President on any anticompetitive consequences flowing from such domestic voluntary agreements.
- 10) Consumer Credit Protection Act -  

This Act is made up of several different acts including the following.

The Truth-in-Lending Act requires all consumer creditors to make detailed written disclosures concerning all charges and related

aspects of a transaction before consummation of a sale or loan, or before the account is opened, and on every periodic statement in the case of open end or revolving creditors. The Act also contains specific requirements for any advertisement containing a credit representation, and includes a three-day right of rescission in any transaction involving a security interest (except first mortgage) in the consumer's residence. The Act also prohibits the issuance of unsolicited credit cards and limits a consumer's liability for unauthorized use to \$50.

The Fair Credit Billing Act requires prompt written acknowledgement and investigation of consumer billing complaints and correction of billing errors by open end creditors. It prohibits such creditors from taking an action that adversely affects the consumer's credit standing until the investigation is made; prohibits creditors from reporting to third parties that disputed amounts are past due until the investigation has been completed; and requires that reports to third parties indicate that the amount is disputed when that is the case. The Fair Credit Billing Act further requires creditors to mail periodic statements at least 14 days before the due date, to post payments to the debtor's account promptly, and to refund overpayments or credit them to the debtor's account. Finally, the Act requires sellers to promptly notify credit card issuers of the return of goods or services purchased on such accounts and limits the application of the holder-in-due-course doctrine in credit card transactions.

The Consumer Leasing Act requires written disclosures for consumer leases in addition to substantive provisions as to the valuation of leased property. This Act applies to leases of more than four months duration and not more than \$25,000.

The Fair Credit Reporting Act requires consumer reporting companies such as credit bureaus to provide information to credit grantors, insurers, employers and others that is fair and equitable to the consumer, with regard to confidentiality, accuracy, and the proper use of such information. Users of such information must inform the consumer when

adverse action (such as denial of credit, insurance or employment) is taken on the basis of such reports, and the user must identify the company that is the source of the report so that its accuracy and completeness can be verified by the consumer.

The Equal Credit Opportunity Act provides that it shall be unlawful for any creditor to discriminate against any applicant on the basis of sex or marital status. The ECOA also prohibits discrimination on the basis of race, color, religion, national origin and age (provided the applicant has the capacity to enter into a binding contract). In addition, the Act prohibits discrimination based upon the fact that all or part of the applicant's income derives from any public assistance program or the fact that the applicant has in good faith exercised any right under the Consumer Credit Protection Act.

The Fair Debt Collection Practices Act prohibits abusive debt collection practices by debt collectors. Specifically prohibited is any conduct which may harass, oppress, or abuse any person in connection with the collection of a debt. The use of false and misleading representations and unfair or unconscionable means in the collection of any debt is similarly prohibited. The Act also requires debt collectors bringing legal actions on a debt to do so in forums convenient to the consumer. The Commission may proceed against violators of the Act in a federal district court in the same manner as if the practice had been a violation of a Commission trade regulation rule. In addition, the Act provides for civil liability for debt collectors who fail to comply with any provision of the Act.

- 11) Fair Packaging and Labeling Act authorizes the Commission to issue regulations governing packaging and labeling of consumer commodities other than food, drugs, therapeutic devices and cosmetics, including regulations governing net contents disclosures, identity of commodity, and name and place of business of manufacturer, packer or distributor. Violations of regulations issued under the Act are treated as violations of Section 5 of the Federal Trade Commission Act.

- 12) Wool Products Labeling Act prohibits the manufacture for introduction into commerce, or the introduction, sale, transportation or distribution, in commerce, or the importation into the United States of misbranded wool products or products which purport to be wool.
- 13) Textile Fiber Products Identification Act requires content disclosure in labeling, invoicing and advertising of textile fiber products. Under its terms, misbranding as well as false and deceptive invoicing and advertising of textile fiber products is unlawful.
- 14) Fur Products Labeling Act requires the truthful labeling of fur apparel, as well as truthful invoicing and advertising of furs and fur products to show, among other things, the proper name of the animal from which the fur was taken and whether the fur is dyed or used. In addition to administrative enforcement, injunctive and condemnation proceedings are authorized.
- 15) Federal Cigarette Labeling and Advertising Act of 1966, as amended by the Public Health Cigarette Smoking Act of 1969 and the Comprehensive Smoking Education Act of 1984, requires all manufacturers and importers of cigarettes to display on a quarterly rotating basis, one of four health warnings on all cigarette packages and advertisements. The Act requires the Commission to submit annual reports to Congress concerning (1) current practices and methods of cigarette advertising and promotion, and (2) recommendations for legislation.
- 16) Comprehensive Smokeless Tobacco Health Education Act of 1986 requires all manufacturers and importers of smokeless tobacco products to display one of three health warnings on all packages and advertisements, except billboards. The Act also requires the Commission to submit biennial reports to Congress (1) describing current sales, advertising, and marketing practices associated with smokeless tobacco products, and (2) recommending legislation and administrative action.

- 17) The Hobby Protection Act prohibits the manufacture or import of imitation numismatic and political items unless marked in accordance with regulations prescribed by the Federal Trade Commission. Imitation numismatic items must be inscribed with the word "COPY" and imitation political items must carry the calendar year of manufacture.

For staff convenience these and other relevant statutes, along with amendments, are reproduced in the blue-covered looseleaf desk book entitled "Federal Trade Commission Statutes," a copy of which is supplied to each member of the Commission's professional staff.

The Office of the General Counsel is responsible for monitoring legislation and transmitting changes to the Information Management Branch, Information Services Division. The Information Management Branch is responsible for preparing the addenda for insertion in the book of statutes. Staff should not rely on the FTC Statutes as official sources.

## .2.2 STATUTORY SOURCES

The United States Code is the best secondary source of statutory language and history. It is published by and under the editorial control of a joint congressional committee and is designed to contain, in a logical order, all currently effective federal statutes. The codification is in part editorial and unofficial and in part statutory and official. The latter portions consist of a number of titles which have been enacted as positive law in the Codified form, as particular titles of the Code. The preface of the current supplement to the United States Code contains a listing of titles which have been enacted as positive law.

The United States Code Annotated uses the same textual wording as the United States Code. It is valuable as a guide to court decisions and for annotations to the Federal Rules of Civil, Criminal and Appellate Procedure, Reorganization Plans, and other materials collateral to federal statutory law.

The official texts of federal rules are promulgated in the United States Reports when adopted by the Supreme Court, and those of Reorganization Plans are promulgated in the annual volumes of the

Statutes at Large and are reprinted in the Federal Trade Commission Statutes.

## .2.3 CONSTRUCTIONAL MATERIALS

The primary authority for construction of the substantive and procedural statutes, as well as constitutional requirements, applicable to the Commission are the pertinent decisions of the United States Supreme Court, as well as those of United States Courts of Appeals and District Courts, and of the Commission itself.

Official texts of Supreme Court decisions are contained in the United States Reports, which are compiled by the Court's reporter and published by the United States Government Printing Office. Unofficial texts are published in the Supreme Court Reporter and The Lawyers Edition. It is customary to cite the official reports in all instances, and optionally to follow them with citations to the secondary sources.

Opinions of the United States Courts of Appeals and District Courts are available respectively in volumes of the Federal Reporter and the Federal Supplement.

A Commission publication, entitled "Federal Trade Commission Decisions," contains complaints, decisions and orders, initial decisions by Administrative Law Judges, Commission opinions and final orders, interlocutory orders and Digests of Advisory Opinions. Cases in the FTC Decisions are indexed volume by volume. Although there is no cumulative indexing of the FTC Decisions as of this date, the material in these volumes (together with some materials not printed in these volumes) can be retrieved on LEXIS by substantive topical areas. Federal Trade Commission Decisions volumes are compiled and edited by the Commission's staff and published by the United States Government Printing Office. These volumes usually will be published no more than 6 months after events; slip copies of unpublished actions are the primary printed source of the more recently issued orders, opinions, and decisions and are available from the Information Services Division, Public Reference Section, H-130. Abstracts may often be found in the Commerce Clearing House's Trade Regulation Reporter and BNA's Antitrust and Trade Regulation Report.

The Commission's Library maintains collections of documents (bills, hearings, reports, the Congressional Record, and slip laws) which comprise legislative histories and regularly compiles legislative histories of laws pertinent to the Commission's work.

The Commission also issues advisory opinions, industry guides, and trade regulation rules construing the laws it enforces. TRRs and Guides are published in the Federal Register and in Title 16 of the Code of Federal Regulations. Advisory opinions are published in the Federal Register, and in C.F.R.

Treatises, textbooks, desk books, law review articles, etc., that cover the Commission's work from various points of view are available in the Commission's main library.

Copies of briefs and other documents in Commission cases, both before the Commission and in the courts, are filed in the case docket files in the Office of the General Counsel. Copies may also be available in the Records (Room H-240). Many Supreme Court briefs are available in the FTC Library.

#### .2.4 FTC ORGANIZATION, PROCEDURES AND RULES OF PRACTICE

Section 552(a)(1) of Title 5 of the United States Code requires each agency to state and currently publish in the Federal Register information concerning its organization and procedures affecting the public. The Commission complies with those requirements by publishing in the Federal Register a Statement of Organization, its Procedures and Rules of Practice, and amendments to them. The Statement of Organization, Procedures and Rules of Practice are also published as Subchapter A of Chapter I of Title 16 of the Code of Federal Regulations. References to the FTC Procedures and Rules of Practice in the OM have been cited as "Rule \_."

#### .2.5 CODE OF FEDERAL REGULATIONS AND FEDERAL REGISTER

Additional information about Commission procedures and rules, trade regulation rules, guides and other regulations of the Commission may be found in Volume 16 of the Code of Federal

Regulations (CFR). The Code of Federal Regulations is published once a year. However, the Federal Register, which is available in Library, contains current amendments to the Code of Federal Regulations on a daily basis. The Federal Register also publishes consent agreements with the accompanying staff analysis (in the Proposed Rules section of the Federal Register) and notification of the final entry of a consent order to cease and desist (in the Rules and Regulations section). The Federal Register also publishes Final Orders and Opinions in adjudicative matters, along with dissenting opinions at the agency's request. Although these prohibited trade practices and/or corrective actions are codified in 16 CFR Part 13, the texts are not printed in CFR and may be obtained by using the Annual Indexes to the Federal Register. In addition, the Federal Register publishes proposals, notices and final rules of the agency, including, for example, trade regulation rules, and rules and notices supplementing the Privacy and Sunshine Acts. The Federal Register can be used to secure current information on rules promulgated by the Federal Reserve Board which affect special statutes such as the Truth-in-Lending Act and the Equal Credit Opportunity Act. (For additional information about Federal Register format and procedures, see OM Ch. 19.)

#### .2.6 INTERNAL INFORMATION

The Operating Manual is just one of several sources that are available to assist staff in carrying out their assignments. The Administrative Manual provides guidance on information management, budget and finance, personnel, and procurement and general services. The Correspondence Manual contains format standards for all outgoing letters and inter-office and inter-agency correspondence.

#### .2.7 INTERNAL STAFF OPERATIONS

From time to time the Commission's staff receives instructions and information from the Commission, the Chairman as administrative head of the Commission's staff, the Executive Director, and from their Bureau Directors and supervisors. These instructions can be given in several forms, and can be of either particular or general application. The more important and more general are disseminated by Staff Bulletins, Notices to the Staff, Commission Memos, and in the Operating



Manual.

industry as a basis for conducting an investigation.

### .3 OVERVIEW OF COMMISSION CASE PROCESS

Some matters that come to the Commission's attention may require liaison with the Department of Justice, the Food and Drug Administration, the Postal Service, or other government agencies. (See OM Ch. 3) Some complaints do not require action or may be incorporated into other investigation files or cases. Some may result in the opening of an investigation.

#### .3.1 INTRODUCTION

The following narrative describes the FTC case process. Since many variables can affect the progress of an investigation, some of the steps that have been identified may not be appropriate in all situations and, in certain instances, various forms of corrective action may be combined within a single investigation. This overview section focuses primarily on law enforcement activities rather than research, reports and legislative responsibilities of the Commission. Detailed instructions as to the procedures and policies leading to alternative law enforcement mechanisms are set forth in the topical chapters of the OM that follow.

#### .3.4 INVESTIGATIONS

The Commission has statutory authority to conduct inquiries necessary to the performance of its duties. Law enforcement activities may take any lawful form, from information gathering and reports to the prosecution of cases in either quasi-judicial administrative adjudicative proceedings or the institution of civil actions in district court charging specific respondents with violations of laws the Commission is responsible for enforcing.

#### .3.2 CASE SELECTION CRITERIA

Law enforcement activities are governed by the mandates of pertinent statutes and the Commission's Procedures and Rules of Practice. Additional instructions on policies and procedures are contained in this OM. Program budgets, protocol and case selection criteria, where adopted, also influence enforcement activities. Consideration and monitoring of the resource commitments required for the investigation and litigation of a matter are another integral part of case selection. In addition, substantive review by the Commission, operating bureaus, program advisors and individual supervisors provide guidance, direction and quality control of case work products.

##### .3.4.1 *Investigatory Powers*

As part of the information gathering component of an investigation, staff may seek information through voluntary means such as requests for voluntary access, submissions and surveys. Staff may also seek Commission authorization for compulsory process in investigations to permit the use of subpoenas, civil investigative demands, special (Section 6(b)) reports, and access orders. Investigational strategy will involve a selection of appropriate voluntary or compulsory devices. (See OM Ch. 3 and Rule 2.7 *et seq.*)

#### .3.3 INITIATION OF AN INVESTIGATION

An investigation of an individual, business entity or industry may be started as a result of public complaints, reports, or studies by staff. Commission investigations may also be initiated by congressional mandate, referral by another government agency, or Commission directive. Procedures for handling, processing, referring, and making use of public complaints are detailed in OM Chapter 16. In addition, the Commission may receive, compile or use reports that it requires of

##### .3.4.2 *Investigations (Initial Phase)*

Investigations are opened when it is necessary to go beyond the original public complaint or inquiry to obtain specific information, the matter appears to involve a violation of Commission-enforced law, and is of sufficient public interest to warrant the resource commitment. The initiation of an investigation will generally be governed by priorities established by the Commission, as reflected in its program budget. (See OM Ch. 2.)

Initial phase investigations should be pursued until sufficient information has been obtained to determine whether further action is warranted. In addition, guidelines have been established to limit

the duration of and resources committed to initial phase of investigations. (See OM Ch. 3.)

### .3.4.3 ***Full Phase Investigations (Beyond Initial Phase)***

A full phase investigation may be pursued when it has been decided, by the Bureau Director, after the initial phase of an investigation, that a more comprehensive investigation is warranted. (See OM Chs. 2 and 3.) Additional information concerning special statutes, such as consumer credit statutes, warranties, and wool, fur and textile matters is detailed in OM Ch. 9. Special considerations pertaining to investigations that may potentially result in the development of a trade regulation rule, or in an action for redress, civil penalties or injunctive relief are discussed in OM Chs. 7 and 11, respectively.

### .3.4.4 ***Disposition of Full Phase Investigations***

Investigations may be closed by the Commission or Bureau Directors without further action, or they may result in a recommendation for corrective action by the Commission. (See OM Ch. 3 for specific procedures) Corrective action may include the acceptance of a consent agreement, issuance of an administrative complaint, institution of an injunction proceeding, proposal for a trade regulation rule or guide, enforcement of a Trade Regulation Rule (TRR) or the institution of a civil penalty action. In addition, an investigation may result in a request that nonrespondents receive notice of prior Commission decisions respecting a particular practice as a predicate for a possible civil penalty action, or that respondents be advised that the Commission may seek consumer redress following issuance of a final order. Investigations may also be closed with a recommendation that other forms of action be taken.

## .3.5 **LAW ENFORCEMENT RECOMMENDATIONS**

### .3.5.1 ***Consent Agreements***

An investigation may result in the execution of a consent agreement pursuant to Part 2 of the Commission Rules. Proposed respondents are generally offered an opportunity to dispose of matters by executing agreements consenting to the concurrent issuance of complaints and

accompanying orders to cease and desist. Information on drafting complaints and orders for use in consent agreements is in OM Chs. 4 and 5, and procedures and documents pertaining to consent agreements are described in OM Ch. 6.

The Commission may reject the agreement, send the matter back for further negotiation, or accept the agreement and place it on the public record for comment. After it has been on the public record, a consent agreement will again be considered and appropriate action taken. Subsequent Commission action can include issuance of a final Decision and Order, returning the matter to the originating office for further investigation or modification of the agreement, issuance of a Part 3 adjudicative complaint, or closing the investigation.

### .3.5.2 ***Administrative Complaints***

When an investigation does not result in an agreement, staff may recommend that the Commission issue an adjudicative complaint, under Part 3 of its Rules, charging the proposed respondents with violating one or more of the laws enforced by the Commission. (See OM Chs. 4 and 5.)

Upon issuance of a complaint, an adjudicative proceeding is instituted (See OM Ch. 10) and the Secretary assigns a formal docket number to the matter. The Commission may also seek injunctive relief in district court prior to issuance of an administrative complaint. (See OM Chs. 11 and 13.)

A Part 3 complaint often contains either a notice order or a notice of contemplated relief describing the type of relief which the Commission might impose if the allegations in the complaint are sustained. A notice order contains specific proposed order provisions, while a notice of contemplated relief merely outlines the type of relief which may be considered appropriate. In some instances, restitution may be sought as part of an administrative complaint. (See OM Chs. 5 and 11.)

#### .3.5.2.1 **Action in Federal Court for Consumer Redress**

Where circumstances indicate that respondent's alleged violations of the law may justify consumer

redress under the Magnuson-Moss Warranty - FTC Improvement Act (FTCA § 19), the notice order of the complaint usually states that the Commission may seek such relief in court following trial and issuance of a final order. (See OM Chs. 4 and 11.) The Commission may institute an action in a federal district court or state court within one year after the order becomes final seeking redress on behalf of injured consumers or businesses. The court is empowered to fashion an appropriate remedial award to redress injury upon proof by the Commission that the act or practice to which the cease and desist order relates is one that a reasonable person would have known to be dishonest or fraudulent under the circumstances.

### **.3.5.3      *Enforcement of Decisions Against Nonrespondents***

Under the Magnuson-Moss Warranty - FTC Improvement Act, the Commission may seek civil penalties in a United States district court against any person, partnership or corporation that knowingly engages in any act or practice determined by the Commission to be unfair or deceptive. Under current policy, a formal notification is sent to persons or business entities advising them of Commission determinations and of their potential liability for civil penalties if they subsequently engage in such unfair or deceptive acts or practices. Thus, as part of an investigation, staff may request authority to serve an approved notification to an individual or business entity and to investigate the firm's practices following receipt of the notification. In such instances, an investigation may result in a later request for the institution of a civil penalty action against nonrespondents for having engaged in the proscribed practices. (See OM Ch. 11.)

A district court may also order other appropriate relief such as an injunction to compel defendants to comply with the provisions of the cease and desist orders. Prior to the institution of a civil penalty action proposed defendants may enter into a consent judgment with the Commission, which is thereafter recommended to the court for approval and entry as a final judgment and order of the court.

### **.3.5.4      *Promulgation of Trade Regulation Rules***

An investigation may result in the recommendation that the Commission promulgate a trade regulation rule. Rulemaking is a substantive lawmaking proceeding, which defines with specificity unfair or deceptive acts or practices within an industry or group of industries, including requirements to prevent proscribed conduct. The proceedings are conducted in accordance with Part 1 of the Rules of Practice, with broad public participation and comment prior to promulgation. The Commission is authorized to seek direct enforcement of TRRs in court. An investigation which leads to the recommendation for the promulgation of a TRR may be continued simultaneously with the rulemaking proceeding. (See OM Ch. 7.)

### **.3.5.5      *Enforcement Actions For Violations of a Trade Regulation Rule***

A person, partnership or corporation that violates a Trade Regulation Rule (TRR) after its effective date may be subject to corrective action by the Commission. An investigation may focus on whether proposed respondents have engaged in practices in violation of a TRR. Proof of actual knowledge or knowledge fairly implied of the TRR and its violation are required for a civil penalty action, but not for consumer redress. Staff may recommend to the Commission that a civil action be commenced in court to recover a civil penalty or to redress injury to consumers or other persons, partnerships and corporations for violation of a TRR as warranted under the circumstances. (See OM Chs. 11 and 12.)

### **.3.5.6      *Other Forms of Corrective Action***

An investigation may also result in a recommendation for other action by the Commission. For example, staff may recommend that the Commission issue a guide to furnish appropriate interpretations to industry concerning the laws it administers (See OM Ch. 8), prepare a report to the Commission with a recommendation that it be published, prepare a report to the Congress concerning practices germane to the laws the Commission administers or request that legislation be considered by Congress.

## **.3.6      ADMINISTRATIVE ADJUDICATIONS**

### **.3.6.1      *Introduction***

Commission adjudications are commenced upon an affirmative vote of the Commission to issue a complaint. Upon issuance of the complaint, the matter is given a docket number and assigned to an Administrative Law Judge (ALJ) who controls pretrial discovery, rules on motions, presides at trial, and prepares an initial decision. The Commission may allow full or limited intervention by others. (Rule 3.14.) An administrative adjudicative proceeding terminates with the issuance of a Final Order to cease and desist, dismissal of the complaint, or withdrawal of the matter from adjudication for consideration of a consent agreement settlement. (See OM Ch. 10.)

### .3.6.2 *Consent Agreement Settlement*

Respondents and counsel representing the Commission may enter into consent negotiations during the course of the adjudicative proceeding. If agreement is reached, a joint motion can be made to withdraw the matter from adjudication. The Rules of Practice authorize the Secretary to issue an order withdrawing a matter from adjudication when a joint motion is presented. Respondents are permitted to request that a unilateral agreement be certified by the ALJ to the Commission even though the agreement and the motion are opposed by complaint counsel. (See OM Chs. 6 and 10; Rule 3.25) Once a matter is withdrawn from adjudication, the proposed consent must be presented to the Commission by the staff as a Part II matter.

### .3.6.3 *Discovery, Trial, and Initial Decision*

The Administrative Law Judge is in charge of the case until an initial decision is filed, or the matter is withdrawn from adjudication. The ALJ has explicit authority to consider and rule upon certain motions and to regulate hearings. (Rule 3.42(c).) Although the ALJ has been vested with authority to rule upon most adjudicatory matters, in some instances specific questions must be certified to the Commission. In addition, the Rules permit some interlocutory appeals to the Commission. (Rules 3.22, 3.23.)

Commission proceedings include both pretrial and trial stages. Prehearing procedures are used for discovery and to resolve issues and other matters not requiring formal hearings. These procedures include, for example, formal conferences,

admissions, depositions and subpoenas returns. An ALJ lacks punitive and coercive authority similar to the criminal and civil contempt powers of a federal court. The ALJ is given authority to impose certain sanctions requiring compliance with discovery and admission orders and affecting the admissibility of evidence or inferences at trial. If the Commission concludes that compliance with a subpoena or an order is essential to a proceeding, it is necessary to invoke the aid of a federal district court and that court's contempt powers. At the conclusion of hearings, counsel may file proposed findings of fact and conclusions of law and orders, accompanied by briefs, and ALJs may entertain oral argument.

When the parties have completed their submissions, the hearing record is closed and the ALJ prepares and files an initial decision.

### .3.6.4 *Final Decision of Commission*

The Commission is responsible for making a final decision in each case. It may do so by means of any of three alternative courses of action. First, any party may appeal to the Commission from the initial decision. (Rule 3.52(a).) Second, the Commission may decide on its own initiative to review a matter by issuing an order placing it on the Commission's docket. (Rule 3.53) Third, in the absence of a perfected appeal by a party or sua sponte review, the ALJ's Initial Decision automatically becomes the decision of the Commission. Commission decisions are promulgated by Final Orders. (Rule 3.51(a)) In cases where the Commission determines that a violation of law has not been proven the Final Order dismisses the proceeding. The Commission may also return a matter to the ALJ for further hearings. In those cases in which it determines that violations have occurred and should be prohibited or corrected, the Final Order contains an order to cease and desist and any ancillary mandates the Commission considers appropriate. Final Orders are accompanied by Opinions explaining the Commission's reasons for imposing them.

### .3.6.5 *Appellate Court Review of Adjudicative Orders*

Anyone subject to a Commission order to cease and desist may file a petition for appellate review

of the Commission's decision in an appropriate United States Court of Appeals. That decision may be further reviewed by the United States Supreme Court. Except for Decisions and Orders arrived at by consent, which become final upon service, the Commission's final orders do not become "final" in the statutory sense of that term until completion of appellate review upholding the orders or until expiration of the period within which such review may have been sought.

### .3.7 REOPENING AND MODIFICATION OF CEASE AND DESIST ORDERS

The Commission has statutory authority to reopen its proceedings after its orders have become "final" and to modify or set aside orders to accommodate changed conditions of fact or law, or whenever it is in the public interest to do so. The Commission is required to reopen an order on request of a person, partnership, or corporation where the requesting party has made a satisfactory showing that changed conditions of law or fact require the order to be altered, modified, or set aside. (See OM Ch. 12.) The Commission's determination must be made within 120 days after the date of filing of the request to reopen.

### .3.8 COMPLIANCE WITH ORDERS

#### .3.8.1 *Monitoring Compliance With Final Orders*

All Commission Final Orders contain provisions requiring those persons subject to the orders to file with the Commission, within specified periods,

reports setting out in detail the manner and form of their compliance. An initial compliance report may also be required in connection with the execution of a consent agreement. Commission staff may also, at any time, require such respondents to file supplemental reports, and may conduct compliance investigations to determine whether Commission orders are being violated. Staff may use voluntary or compulsory measures to conduct a compliance investigation. (See OM Ch. 3.)

Respondents subject to Commission orders to cease and desist or to divest may submit to the Commission requests for advice as to whether proposed courses of action would comply with their orders. (See OM Chs. 8 and 12.)

#### .3.8.2 *Civil Penalty Actions for Violation of Commission Orders*

When a named respondent, subject to a cease and desist order fails to comply with that order, a civil suit may be instituted in a federal district court for monetary civil penalties and for injunctive and other appropriate equitable relief.

After a successful court suit, further violations of a Commission order are violations of the court's injunctive order and may be treated as contempt of court. Both civil penalty actions and actions seeking to have a respondent held in contempt of court may be settled by a consent agreement between the Commission and the respondent. (See OM Chs. 12 and 13.)