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.1 INTRODUCTION

This chapter describes the basic format of administrative complaints. The complaint contains the allegations of law violations which serve as the basis for the issuance of a cease and desist order obtained through either a consent settlement or adjudication.

The first part of this chapter contains information about procedures for the preparation of complaints whether issued under Part 2 or Part 3 of the Commission Rules. OM Chapter 5 discusses procedures for the drafting of orders; OM Chapter 6 contains procedures and information about consent agreements; OM Chapter 9 contains more specific information about complaints alleging violations of the Truth-in-Lending Act and other special statutes; and OM Chapter 11 discusses situations in which consumer redress or injunctive relief may be sought. OM Chapter 10 discusses administrative litigation. The last part of this chapter discusses the preparation of the memorandum to the Commission recommending issuance of complaint under Part 3. However, many of the elements of this memorandum are also relevant in the preparation of a memorandum recommending acceptance of a consent agreement under Part 2 with certain exceptions as discussed in OM Chapter 6.

.2 GENERAL GUIDELINES

.2.1 INTERRELATIONSHIP OF COMPLAINT ALLEGATIONS AND ORDER PROVISIONS

The complaint defines the challenged acts and practices and sets the necessary predicate for the relief. Because the scope of the order is controlled by the complaint, the documents should be drafted together and must interrelate.

In drafting a complaint it is helpful to ask whether the allegations logically lead to the relief sought. Every violation alleged in the complaint should be remedied by an appropriate provision in the order, either in the form of a direction to cease and desist or, where appropriate, through a direction to take affirmative action to ensure compliance or correction. See OM Ch. 5 for detailed discussion of drafting orders.

.2.2 SUPPORT FOR CHARGES

To issue a complaint, the Commission must have, at a minimum, sufficient information from which it may conclude that it has reason to believe that the proposed respondents are within its jurisdiction and the challenged practices violate a law enforced by it. However, staff is expected to have developed during the investigation substantial evidence to support the allegations of the complaint or have identified such evidence and determined that it will be available through post-complaint discovery. Failure to develop the facts as fully as possible prior to issuance of the complaint may lead to protracted post-complaint discovery and, as a result, prolonged delay in adjudication. (See OM Ch. 10 for a discussion of discovery in litigation.) Special circumstances, such as the need to toll the statute of limitations for redress or the need to obtain a preliminary injunction, may warrant the abbreviation of the investigation and reliance upon post-complaint discovery to obtain evidence necessary to support the allegations of the complaint.

Once complaint has been issued in cases involving consumer redress, postcomplaint discovery cannot be used to obtain evidence that bears exclusively on consumer redress. Although such evidence may be obtained through additional investigation after completion of the administrative proceeding, the resulting delay may hamper the Commission in making a fully informed determination as to pursuing consumer redress under § 19 FTCA.

.2.3 STANDARDS FOR PLEADINGS

Commission Rule 3.11(b)(2) sets out the pleading standards for Commission complaints. It provides that complaints shall contain "a clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law." (Emphasis added)

It is important that the allegations be drafted to meet this "reasonably definite" standard. Otherwise the complaint is susceptible to attack by a motion for more definite statement as provided for by Rule 3.11(c). If respondent can make a "reasonable showing" that it cannot frame a responsive answer to the allegations, complaint counsel may then be compelled to particularize the allegations in such a manner as to unnecessarily limit either the scope of permissible discovery or the proposed proffer of evidence. If this "reasonably definite" standard is met, the pleading is sufficient even if it does not meet the standards for court pleadings. See A. E. Staley Mfg. Co. v. FTC, 135 F.2d 453, 454, (7th Cir. 1943); In the Matter of The Peelers Co., 65 F.T.C. 799, 820 (1964).

A countervailing consideration in drafting complaint allegations is that each allegation should be broad or general enough so as not to unnecessarily limit the contemplated discovery or proffer of proof. It is advisable to review each allegation from the standpoint of whether it meets the "reasonably definite" standard, but is nevertheless drafted in general enough terms to enable complaint counsel to seek any needed discovery on that issue and have received into the record all the evidence concerning that issue which may be proffered. The art of Commission pleading, in the final analysis, lies in achieving an optimum balance between these two countervailing considerations.

.3 SAMPLE PLEADINGS

In drafting complaints, it may be helpful to review recent complaints and orders involving similar charges. However, prior pleadings are never a substitute for careful analysis of the specific factual and legal circumstances in each case. Before adopting prior pleadings, staff should be certain that the facts and law in the case under consideration are clearly analogous. Further, staff is advised to critically analyze the prior pleadings in terms of their sufficiency and clarity and to review the answers filed to ascertain what challenges, if any, were made concerning the allegations. It is advisable to consider the merits of any challenge even when the challenges were not sustained. Frequently it is possible to redraft the provisions in a manner to meet the arguments previously advanced as to the sufficiency of the allegations.

.4 CAPTION AND PREAMBLE

The purpose of the preamble to the complaint is to recite that the Commission has "reason to believe" that each of the respondents named in the caption has violated a particular statute or statutes within the Commission's jurisdiction and that it would be in the public interest for the Commission to issue its complaint. The caption identifies the case and it is important that all the respondents be properly named, including the exact corporate name of each corporate respondent. Corporate officers who are named as individual respondents should be named as a corporate officer and individual. If the respondent trades and does business under another name, it is ordinarily advisable to include such trade name in the caption, e.g., "The XXX Company, Inc., a corporation, trading and doing business as Smith & Co." Failure to identify the respondents accurately in the caption (or elsewhere) will require a motion to amend to correct the error. See Illustrations 1, 2, and 3 for examples of captions and preambles.

.5 PARTIES

.5.1 ORDER IN NAMING PARTIES

After the caption and preamble, the next part of the complaint is the identification and description of the parties to the action. There is no set formula for pleading them. Ordinarily, corporate entities are named first in order of their importance (e.g., parents ahead of subsidiaries), after which the individuals are named in similarly descending order. While each could be pleaded in a separately numbered paragraph, it is more usual to do so in a subparagraph, except if they are not related but for the challenged practices. In the latter instance, separate paragraphs might tend to avoid confusion when the answers are filed. Depending upon the number of parties, the corporations and individuals may be pleaded in separately numbered paragraphs.

.5.2 IDENTIFICATION OF PARTIES

The accurate corporate name, the state of incorporation, and the business address (including zip code) of each corporate respondent should be set out, not only for purposes of identification but also for service of process. Where corporate officers or employees are to be held in their individual as well as in their official capacities, it should be clear that they are being named in both capacities, i.e., John Smith, individually and as an officer of said corporation. Corporate officers should be designated by the general term "officer" rather than their specific title, i.e., "president," since their corporate status may change.

When individual proprietors or partnerships are being named, the relevant trade names, if any, should be included in the identification of the respondents, i.e., "John Smith, an individual trading and doing business as Fantasyland Estates," and "John Smith and Sam Brown, individually and co-partners trading and doing business as Smith-Brown Company, a partnership." All general partners should be named as respondents in a proceeding against a partnership. If corporate trade names are involved, a separate paragraph can be included setting forth briefly that corporate respondent also trades and does business under the trade name. See Illustration 4 for an example of the identification of parties.

.5.3 PARENTS AND SUBSIDIARIES

The trend appears to be against having to prove that a subsidiary is a "mere tool" in order to hold the parent liable for its actions. Compare National Lead Co. v. FTC, 227 F.2d 825, 829 (7th Cir. 1955) with P. F. Collier and Son Corp. v. FTC, 427 F.2d 261 (6th Cir.), cert. denied, 400 U.S. 926 (1970), particularly cases and authorities recited in the latter. The paragraph or subparagraph describing the parent should set out: (a) that it dominated or controlled the acts and practices of its subsidiary corporation, (b) that it knew of and approved the subsidiary's acts and practices, or (c) that it benefits from acts and practices of the subsidiary corporation. There is no single, precise formula for determining what facts need be established in order to find domination and control, or knowing acquiescence. Set out below is a checklist of factors which courts have found relevant. These factors are provided for staff's assistance in making a determination as to whether sufficient evidence exists to warrant the parent corporation being named as a party, and subject to corrective action. Staff is not limited by the factors set out in the checklist, nor is it necessary for all of the factors to be present in order to name a parent corporation a party respondent. In analyzing the parent-subsidiary relationship the following factors, inter alia, should be considered:

- (a) The degree of ownership held by the parent in the subsidiary.
- (b) The degree of interchange of personnel between parent and subsidiary.
- (c) The existence of common or overlapping officers and directors.

- (d) The extent to which accounting, managerial, marketing, distributing, and other functions or facilities are shared or interrelated.
- (e) The history of creating and dissolving subsidiaries by the parent.
- (f) Whether advertising or sales promotions were done in the parent's name vis-a-vis the specific name of the subsidiary.
- (g) Whether the subsidiary uses the parent's name and goodwill to attract business.
- (h) Whether the means or instrumentalities of deception or unfairness were initiated, prepared, disseminated, reviewed, or approved by the parent.
- (i) The extent to which the parent directs day-to-day policies and operations of the subsidiary.
- (j) Whether the particular unfair or deceptive acts or practices have been specifically brought to the attention of the parent.

.5.4 CAPACITY AND LIABILITY OF INDIVIDUALS

Whether or not an individual who is an officer, employee, or stockholder of a corporation charged with law violations may properly be subject to a cease and desist order in an individual capacity depends on a number of factors. Among these are whether or not the individual is sole or majority stockholder of the corporate respondent involved; whether or not the individual directed, formulated, and controlled the policies, acts, and practices of the corporate respondent; whether or not the individual played an active role in the alleged violations; whether or not under the facts and circumstances shown there is reason to believe that an order may be evaded unless the individual is named personally; and whether or not there are unusual or unique circumstances present which would render the naming of an individual personally unfair or unjust. Specific proof of the likelihood of future violation is not a requisite for including an individual in an order in his or her individual capacity. See FTC v. Standard Education Society, 302 U.S. 112 (1937); Steelco Stainless Steel, Inc. v. FTC, 187 F.2d 693 (7th Cir. 1951); Standard Distributors, Inc. v. FTC, 211 F.2d 7 (2d Cir. 1954); Benrus Watch Co. v. FTC, 352 F.2d 313 (8th Cir. 1965); Bascom Doyle v. FTC, 356 F.2d 381 (5th Cir. 1966); Sunshine Art Studios, Inc. v. FTC, 481 F.2d 1171 (1st Cir. 1973); Coran Bros. Corp., 72 F.T.C. 1 (1967); Universal Electronics Corporation, 78 F.T.C. 265 (1971); Standard Educators, Inc., 79 F.T.C. 858 (1971); L. G. Balfour, 74 F.T.C. 345, 494 n. 1 (1968).

.5.5 RESPONDENTS AS REPRESENTATIVES OF A CLASS

Where appropriate, respondents may be named as representatives of a class, as, for example, where a franchisor and several but not all franchisees should be named in order to reach a scheme in its entirety. For necessary elements in class actions see Advertising Specialty National Association v. FTC, 238 F.2d 108 (1st Cir. 1956). For another example of a class suit see In re Washington Crab Assn., 66 F.T.C. 45 (1964); this latter case is also helpful regarding the liability of cooperative marketing associations (at pp. 105-110).

.5.6 NONPROFIT ASSOCIATIONS OR ORGANIZATIONS

Nonprofit associations and other organizations which are, in fact, operated for the pecuniary benefit of their

members have long been held liable for violations of the FTCA. See Chamber of Commerce of Minneapolis v. FTC, 13 F.2d 673 (8th Cir. 1926). However, staff should consider the decision of the court in Community Blood Bank of Kansas City v. FTC, 405 F.2d 1011 (8th Cir. 1969) before recommending complaint against nonprofit entities.

.5.7 LENDER AS RESPONDENT

Where a major lender subject to the Commission's jurisdiction has not only loaned substantial sums of money to a respondent, but has also maintained a degree of control, approval, or influence over respondent's practices as a part of their loan agreement, it may be appropriate to name the lender as a co-respondent, particularly if consumer redress may be involved. A final order in § 5 FTCA proceedings against all parties is a prerequisite to bringing a § 19 FTCA consumer redress action against those parties. By naming the lender as a co-respondent and obtaining a final order, the staff will be able to include the lender in any consumer redress action. See OM Ch. 11 for detailed guidance on consumer redress matters.

.5.8 ADVERTISING AGENCY AS RESPONDENT

In all matters where an advertising agency has provided copy for respondent, the staff should consider whether the facts warrant naming the advertising agency as a respondent. An advertising agency should be made a party respondent: (a) if it knew or should have known that advertised claims were false and/or unsubstantiated; or (b) if it played a major role in planning the challenged practices rather than merely in arranging the distribution of the false advertisements to the media.

If a publishing or broadcasting company engages in the role of an advertising agency, it should be so regarded. The provisions of § 14(b) FTCA exempting publishing and broadcasting companies from criminal liabilities do not remove them from FTC jurisdiction. Note, however, the requirement for Commission approval of investigations involving publishers or broadcasters. See OM Ch. 3.1.2.4.2.

.5.9 BUSINESS ENGAGED IN

The purpose of this paragraph is to identify and describe each respondent's function (e.g., manufacturer, distributor, wholesaler, direct mailer, etc.), the product or service involved, the class of customers dealt with (e.g., brokers, retailers, consumers, etc.) and that the volume of respondent's business in or affecting commerce is substantial. These facts may be pleaded in a single paragraph, except where there are multiple respondents operating at different levels or in different businesses, in which case each respondent's business should be spelled out in separate paragraphs to avoid confusion when answers are filed.

.6 STATUTORY JURISDICTION

Under § 5 of the FTC Act the Commission has jurisdiction over certain methods of competition and acts and practices which are "in or affecting commerce." Other statutes administered by the Commission have their own jurisdictional definitions. The statutory language must be set out in the "commerce" allegation. For example, in § 2(a) Robinson-Patman Act cases, two statutory commerce requirements must be alleged. First, the respondent must be engaged in commerce. Secondly, the alleged discrimination must occur in the course of such commerce. For guidance, consult sample pleadings involving the particular statute. See OM Ch. 9 for guidance regarding jurisdictional allegations involving special statutes.

.7 DEFINITIONS IN THE COMPLAINT

When a complaint contains terms which have a technical, complex, or legal meaning, or which may otherwise cause confusion or ambiguity, it may be advisable to include definitions which may be set out at the beginning of the complaint. However, if there are only one or two, they might be included in the body of the complaint, adjacent to where the term is first used. In any event, such definitions should be clear and concise, and contain no ambiguities themselves, so that there will be no misunderstanding of the meaning of any portion of the complaint. This precision has a dual significance: first, it ensures that the scope of proof at trial will be as broad as contemplated by staff and secondly, it reduces provisions designed to prohibit the violations charged in the complaint.

8 PLEADING SEPARATE COUNTS

Distinct violations of different statutes should be pleaded in separate counts. Separate counts should also be pleaded when not all respondents have engaged in the same violations. Further, it is often advisable to plead in separate counts those acts or practices which are alleged to be false, misleading, and deceptive and those acts or practices which are alleged to be unfair. If distinct respondents and violations are clearly pleaded in the complaint, the supporting proof will be more clearly delineated and the preparation of proposed findings in litigation will be easier. Clear and unambiguous findings are especially important to provide a basis for any future enforcement actions against nonrespondents under § 5(m)(1)(B) FTCA.

In consumer protection cases based upon special statutes which provide that violations of those statutes are also violations of the FTCA, e.g., the Truth-in-Lending Act, Warranty Act and the Textile Fiber Products Identification Act, the complaint should allege both a violation of that special statute and of § 5 FTCA in a single count. See OM Ch. 9 for further guidance regarding matters involving special statutes.

9 CHARGES

9.1 GENERAL

The charging paragraphs of the complaint spell out the specific violations that are alleged. The precise manner in which the charges are alleged will depend on the particular statute involved and the factual evidence. Unless it is absolutely certain that the challenged acts and practices have been discontinued, the allegations should be pleaded in both the past and present tense, e.g., respondent has represented and is now representing that or respondent has been and is now engaged in As suggested in .3 above, sample pleadings in similar cases should be reviewed. However, the allegations must always be tailored to the facts of the particular case.

9.2 COMMON DRAFTING ERRORS

One of the most common drafting errors involves the use of terms which result in unnecessarily increasing complaint counsel's burden of proof. Such errors frequently arise out of the use of absolute and unqualified terms such as "always" or "never" instead of "frequently," or "seldom, if ever," respectively. Similarly, matters expressed in the conjunctive rather than the disjunctive, i.e., using "and" instead of "or," may be misconstrued and thus result in unnecessarily increasing complaint counsel's burden of proof. It should be borne in mind that in establishing the existence of a practice or type of practice engaged in by respondents, it is usually not necessary to show that respondents always engaged in the practice or engaged in the practice most of the time. It is usually sufficient to show that respondents engaged in particular conduct in more than a number of isolated instances. Thus, unless there are reasons why staff would want to incur a burden to prove more than is required to establish a violation of the law, staff should be careful to qualify the allegations so as not to incur a greater burden of proof than staff is prepared to meet.

Another common error involves the description of respondent's practices by quoting or paraphrasing specific statements or representations made by respondent. Because the respondents may have employed variations during the relevant periods of time, the complaint should characterize the representations quoted or paraphrased as not necessarily all inclusive, but merely representative. Failure to so characterize such representations is likely to limit the evidence that may be offered in support of the allegation involved. It is advisable to review the complaint allegations before submission with a view towards avoiding these types of errors.

.10 CONCLUSIONS

The concluding paragraphs of the complaint are generally the "boilerplate" conclusions that are based on the allegations in the preceding paragraphs of the complaint. The concluding paragraphs generally state that the acts or practices as alleged constitute a violation or violations of the applicable statute. Each separate count contains a conclusory paragraph tailored to the count.

The complaint also contains boilerplate final conclusions, which immediately precede the final "issuance" paragraph. In addition, as the Commission has encountered some difficulty in adjudicative proceedings because of the necessity of proving that a violation is a continuing one for which some prospective relief (such as corrective advertising) is necessary to alleviate the lingering effects of the unlawful conduct, all complaints should include boilerplate language to the effect that the violations alleged "are continuing and will continue in the absence of the relief herein requested," unless such language is clearly inconsistent with the complaint. See Illustrations 5, 6, 7 and 8 for examples. These final conclusion paragraphs may also be modified, where for example, a § 5 complaint alleges deception or unfair acts or practices, but not unfair methods of competition. See OM Ch. 9 for examples of conclusions in special statutes matters.

.10.1 ISSUANCE OF COMPLAINT

The final paragraphs of complaints and orders indicate the action taken by the Commission and date of such action.

(a) Issuance of Part 3 complaints with notice order or notice of contemplated relief

Where issuance of a Part 3 complaint is recommended, the complaint should contain the following final paragraph:

"WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this day of A.D., 19 issues its complaint against said respondents."

[Note: This paragraph does not contain the Commission seal or signature of the Secretary]

The notice order or notice of contemplated relief in Part 3 complaints should contain the final paragraph to indicate the issuance of the complaint:

"IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed at Washington, D.C. this day of A.D., 19 ."

"By the Commission.

SEAL

[name]

Secretary"

(b) Cease and Desist Orders

The complaint accompanying a cease and desist order, under Part 2 of the Rules, should contain the following final paragraph to indicate its issuance by the Commission.

"WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this day of A.D., 19 , issues its complaint against said respondents.

By the Commission.

SEAL

[name]
Secretary"

The consent agreement is concluded to indicate the date of signing and signature of counsel and proposed respondents as shown in Illustrations 1 and 2 of OM Ch. 6.

The draft Decision and Order to be submitted along with a consent agreement concludes as follows:

"By the Commission.

SEAL

[name]
Secretary"

ISSUED:

.11 NOTICE PORTION OF COMPLAINT

In addition to the "boilerplate" page which informs respondents of the assigned ALJ, the time and place of the initial hearing and of the applicable adjudicatory rules of practice, the Notice portion of the complaint gives notice as to the form of order which may issue if the charges are admitted, proven, or settled, or in the event of a default. There are two forms of such notice discussed immediately below.

.12 NOTICE ORDER AND NOTICE OF CONTEMPLATED RELIEF

The purpose of the notice order is to set out the provisions of a proposed order so as to put respondents on notice regarding the relief which the Commission considers to be appropriate if the allegations of the complaint are proved. (See Illustration 9)

In many cases, such as in price-fixing, trade restraints, and other competition matters, or where mandatory relief such as corrective advertising is intended, it may be difficult at the complaint stage to spell out the exact relief which may be required if the charges are sustained. In those cases, it may be advisable to include a "Notice of Contemplated Relief" in lieu of, or to supplement the notice order. The Notice of Contemplated Relief allows an enumeration of possible forms of relief which might be considered after an evidentiary basis has been established, without spelling out such relief in detail in formal order provisions. (See Illustration 1 of OM Ch. 5). Also see discussion in OM Chs. 5 and 10, regarding notice order and notice of contemplated

relief.

The Commission has long been concerned that the environmental consequences of its actions be considered fully. Accordingly, if staff is planning to include in a recommended complaint relief provisions that may have significant environmental effects, the staff should consult with the Office of General Counsel before forwarding the recommendation.

.13 POSSIBILITY OF CONSUMER REDRESS

Where it would be appropriate to seek consumer redress for violations of law occurring prior to January 4, 1975, it is necessary that the pleadings provide notice to respondents of their potential liability under § 19 of the FTCA. Even where the complaint relates to acts and practices occurring after January 4, 1975, it would be sound legal practice to include such notice, even though it is not technically required by § 19. Notice may also be helpful in seeking a preliminary injunction or other equitable relief. See Illustration 10. See OM Ch. 11 for guidance on consumer redress.

.14 MEMORANDUM RECOMMENDING COMPLAINT

.14.1 PURPOSE AND SCOPE

The purpose of the memorandum recommending complaint is to analyze for the Commission the necessary factual basis upon which the Commission may determine that it has reason to believe that a law it enforces is being violated by the parties named in the proposed complaint and that issuance of the complaint would be in the public interest. Ordinarily, the factual basis will consist primarily of facts and data developed during the investigation and included in the file; however, the factual basis may be supplemented by evidence to be obtained in post-complaint discovery.

In cases which are unusually complex or involve novel issues, the staff should consider the use of a trial memorandum or brief citing the evidentiary materials and legal authorities to be relied upon in support of each allegation in the complaint. If such a trial memorandum or brief is prepared, it should accompany the memorandum recommending complaint which may then be of a more summary nature as to the facts and law with appropriate citations to the trial memorandum or brief.

.14.2 CLEARANCE AND APPROVAL

The memorandum should be addressed to the Commission from the responsible staff and should be via the appropriate Bureau Director if a regional office matter. Memoranda from headquarters staff should be routed through the appropriate Assistant Director and the Bureau Director. Memoranda from regional office staff should be approved by the Regional Director. See OM Chs. 2 and 19 for information on necessary forms, criteria, and approval procedures for complaint recommendations. On competition matters, recommendation for complaint will be sent to the Bureau of Economics for concurrence or comment. In those instances in which a regional office matter involving a recommendation for complaint is being resubmitted to the Commission, e.g., certain changes in the complaint or order were directed by the Commission or the staff was directed to submit additional information, the matter should be returned to the Commission, via the appropriate Bureau Director. See OM Ch. 19 for guidance regarding responses to Commission directives. Unless the Bureau Director determines that notice must be avoided, staff will notify the proposed respondents when the memorandum is forwarded to the Commission, consistent with the provisions of Chapter 3 Section .3.6.1.

.14.3 HEADING

The subject portion of the heading should list the file number, the program to which the matter has been assigned, the names of the principal proposed respondents and a synopsis of the recommendation, including the statutes and violations involved, e.g., § 5 FTCA re: price-fixing and coercion of customers; § 2(a) of amended Clayton Act re: price discrimination, and the products and geographic areas involved. If the matter was subject to prior Commission action, this should be summarized in the heading, citing the dates and nature of such action and attaching a copy of the Commission minute directive.

.14.4 SUMMARY

It is generally advisable to include at the outset a concise introductory paragraph which briefly summarizes the case, including the identity of the proposed respondent(s), the factual circumstances which gave rise to the recommendation or complaint, the charges involved, and the anticipated relief. The purpose of this introductory paragraph is to provide a quick overview of the case.

.14.5 POST-COMPLAINT DISCOVERY

In a paragraph following the introductory summary, staff should state whether the case is ready for immediate trial or post-complaint discovery is required to supplement the evidence. If post-complaint discovery is required the paragraph should briefly summarize the extent of the discovery and include an estimate of the time that will be required after issuance of complaint to complete discovery. The precise nature of the post-complaint discovery should be discussed in more detail in connection with the relevant allegations of the complaint.

It is recommended that staff review OM Ch. 10.13.16 on litigation which discusses discovery. Particular attention should be given to Illustration 4 to that chapter which is an example of a typical prehearing order issued by an ALJ. Staff should anticipate the issuance of such an order and begin preparation for prehearing procedures as soon as possible.

.14.6 BODY OF THE MEMORANDUM

The body of the memorandum must be organized in accordance with applicable instructions for the segregation of material required for compliance with the Freedom of Information Act. (See OM Ch. 15 for detailed guidance.) The memorandum should present a factual outline for the evidence underlying the charges in the complaint and constituting reason to believe the law has been violated. In connection with each allegation of the complaint, there should be a discussion of the evidence in the evidentiary files which staff intends to offer in support of the allegation. Such discussion should indicate appropriately the probative value of the evidence, any anticipated problems with regard to the availability of the evidence and, where appropriate, citations to the evidence relied upon. The methods of proof should also be discussed, especially when reliance is placed upon expert witnesses, the Commission's expertise, survey and the like and when summary decision may be appropriate. Staff should also note in connection with each allegation what evidence is yet to be discovered, the expected sources for such discovery, the means to be used to obtain discovery, the reasons to believe that the evidence is available and discoverable, the reasons for delaying discovery until after issuance of the complaint, and the anticipated cost of obtaining the evidence.

The body of the memorandum need not track the allegations of the complaint exactly if some other format would provide a more informative summary, but it should cover all of the major factual allegations of the complaint.

.14.6.1 Parties

All of the proposed respondents should be fully identified, giving a description of their business activities, especially those most closely related to the allegations of the complaint. The relationships between parents and subsidiaries, corporations and individual officer or employee respondents, and co-respondents should be spelled out. Citations to the investigatory files, or other sources of such information, should be made when appropriate.

.14.6.2 Jurisdiction

The basis for the Commission's jurisdiction over both the parties and the challenged practices should be explained. If the complaint is predicated on a novel or untested assertion of jurisdiction over parties or practices, the underlying premises should be discussed.

.14.6.3 Charges

The allegations underlying the basic charges of the complaint should receive particular attention. Each of the basic elements making up the heart of the case should be fully explained. Anticipated post-complaint discovery should be outlined as fully as possible, as noted above. There should also be reference to any charges considered and rejected and the reasons therefor.

.14.6.4 Anticipated Defenses

The memorandum should then present an objective analysis of anticipated defenses which may have already been raised by proposed respondents during the course of the investigation and any that a thoughtful analysis of the facts of the case may reveal. This section should include all facts and legal theories which staff may have to rebut, to the extent they can be anticipated.

.14.6.5 Legal Theory Supporting Charges

The memorandum should include a concise discussion of the legal theory underlying the complaint. Referral to prior Commission cases is often useful. Normally, this discussion should not represent a major portion of the memorandum. However, where new, unusual or complex legal theories are involved they should be fully explained.

.14.6.6 Proposed Remedy

The memorandum should discuss the proposed remedy and the reasons that such remedy is appropriate to the circumstances of the case. If the remedy is based upon standard orders in such cases or upon particular precedent cases, this should be explained. If it departs from precedent cases, this should be fully explained and reasons for the departure given. If the proposed relief is innovative or beyond the usual relief in such cases, a detailed explanation should be given, as well as a discussion of the Commission's authority to order the contemplated relief. If complaint is being recommended in an area where there is a TRR, staff must justify the need to seek relief beyond the provisions of the TRR. Possible interim relief, such as a preliminary injunction, should be discussed. (See .14.6.7 below and OM Ch. 11 for guidance regarding recommendations for preliminary injunction.) If the facts indicate a basis for seeking consumer redress, this issue should also be covered.

.14.6.7 Public Inquiry and Economic Impact; Use of Injunctive Authority

The memorandum should discuss the economic impact of the recommended action, including injury to

consumers caused by the violations, economic benefits to consumers and the marketplace that will result from the relief sought, and the probable total cost in work hours and other resources. (See OM Ch. 19 concerning economic analysis.) The volume of sales and other pertinent information regarding proposed respondent's financial condition should also be included. When economic data is available to demonstrate the impact of the case, it should be given. If hard data is not readily available, a careful study of the evidence, the results in similar cases and/or the basic purposes of the relevant statute may be used to provide estimates of economic impact.

There are, of course, instances where injury may be of a nonquantifiable nature, in whole or in part. Economic losses can also result in disparate effects on individuals, depending on their own financial circumstances and their degree of reliance on the product or services involved. Some cases may focus on law violations that create social perceptions or lack of confidence in the marketplace or in the administration of justice. Competitive effects of illegal practices, which if not corrected, may cause a chain reaction in the marketplace and may also not be quantifiable, yet injurious to the public, should also be discussed. Some forms of public injury may involve fundamental rights of individuals, not susceptible to economic measurement. Unfair or oppressive acts may, for example, cause public injury by infringing upon private rights or privacy; have a particular effect on the disadvantaged or children; or may affect safety and health. Thus, discussion of public injury may involve a myriad of intangible factors and benefits which can appropriately be raised in the memorandum.

An analogous discussion is the deterrent effect of Commission action, either through voluntary action by related business or trade associations to correct certain practices or as a legal predicate for enforcement against non-respondents under § 5(m)(1)(B) FTCA.

The memorandum should also include a section assessing the need for and feasibility of obtaining preliminary injunctive relief in the matter or, if the staff concludes that an injunction is not appropriate, the memorandum should include a statement of the staff's reasons for that conclusion.

The assessment should include an analysis of the facts and law relevant to the staff recommendations. Factors militating in favor of seeking an injunction include, the continuing nature of the challenged practice; the timeliness of the Commission's injunctive action (the evidence is not stale); the strength of the public interest in enjoining the practice (e.g., if public health or safety is involved; if the amount of individual economic injury is significant); and the difficulty of obtaining effective relief in the absence of an injunction (e.g., unscrambling merged companies), although all of these factors need not be present in each case. On the other hand, an injunction would appear less appropriate if the practice has ceased or if historically the issuance of a complaint has produced the cessation of the challenged practice; if private action enjoining the practice is likely; if the case raises novel issues of law or seeks novel relief; or if there is no immediate harm from the practice. The Commission should be given sufficient information to determine if factors such as these are present in order to weigh the merit of proceeding with an injunction suit.

.14.6.8 Policy Protocols

If the subject matter is covered by an approved policy protocol, the memorandum should supply the answers to as many of the points covered by the protocol as possible. (See OM Ch. 2 for further guidance on approved protocols.)

.14.6.9 Alternatives To Complaint

The memorandum should explain why issuance of complaint is recommended rather than alternative

proceeding such as rulemaking, TRR enforcement, civil penalties under § 5 (m) (1) FTCA, or issuance of guides. If proposed respondents were offered the opportunity to enter into a consent agreement during the investigation but declined, the negotiations should be summarized. If an unsatisfactory agreement was proffered by proposed respondents, staff should reference the agreement (if executed) and explain why it was not deemed satisfactory. (See OM Ch. 6 for further guidance on the handling of such counter offers.) If proposed respondents were not offered an opportunity to enter into an investigational consent agreement pursuant to Rule 2.31, staff should explain the circumstances justifying the withholding of the opportunity.

If there are any existing or expected collateral proceedings such as private litigation, action by a state or local agency, the filing of bankruptcy by proposed respondent, or other relevant matters, such proceeding should be discussed and reasons given why issuance of complaint is nevertheless warranted.

.14.6.10 Foreign Corporations, Nationals or Interests

If the complaint is being recommended against a proposed respondent that is a foreign corporation, or a domestic subsidiary of a foreign corporation, or an individual proposed respondent who is a foreign national, or if the proposed complaint will otherwise affect foreign interests, telephone notice should be given to the Assistant Director for International Antitrust, Bureau of Competition. The International Division will notify the foreign country or the Department of State, as appropriate. (See OM Ch 3.1.3.7.) The memorandum should note that prior notification to the International Division has been made.

.14.6.11 Opportunity for Proposed Respondents to Present Their Views

If the proposed respondents were not offered an opportunity to present their views, in writing, to the Commission, or were not informed that they could request meetings with Commissioners (see Chapter 3 Section .3.6.1), staff should explain in the memorandum the circumstances justifying the withholding of this information.

.14.6.12 Summary Conclusion

The memorandum should close with a brief summation of the factual and legal circumstances of the case, including the anticipated relief and clearly and concisely stating the staff's recommendation. If proposed respondent is represented by counsel, who should be served with a copy of the complaint, staff should give counsel's name and address. The appropriate approvals and concurrences should appear at the end of the memorandum and staff should list at the end of the memorandum following the approval blocks the files that are being forwarded.

.14.6.13 Accompanying Documents

The following documents should accompany the memorandum recommending issuance of complaint:

- a) Proposed complaint and notice order (or notice of contemplated relief) and
- b) Cost Summary (See OM Ch. 19 for form).

See OM Ch. 19 for copies required and routing instructions.

.14.6.14 News Release

When the Commission approves issuance of the complaint, the Office of Public Affairs drafts a news release based upon the proposed complaint and order. When a memorandum recommending such action is forwarded to the Commission, a copy will also be circulated to the Office of Public Affairs for drafting of the news release. If there are any unusual circumstances or staff believes that particular facts should be stressed in the news release, they should bring them to the attention of the Office of Public Affairs for consideration. See OM Ch. 17 for further information about news releases.

Caption and Preamble
(Corporations and Individuals)

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

)	
In the Matter of)	
XXX CORPORATION,)	
a corporation,)	
ZZZ COMPANY, INC.,)	DOCKET NO.
a corporation, an)	
JOHN J. SMITH, individually)	
and as an officer of said)	
corporations.)	
)	

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth-in-Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that XXX Corporation, a corporation, ZZZ Company, Inc., a corporation, and John J. Smith, individually and as an officer of said corporations, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and the implementing regulation promulgated under the Truth-in-Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows.

* * * *

Caption and Preamble
(Partnerships)

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of)	
)	
CAROL DOE, and)	
BEN DOE, individually and as)	
co-partners, trading and doing)	DOCKET NO.
business as)	
CAREFREE COLLECTION SERVICE,)	
a partnership.)	
)	

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Carol Doe and Ben Doe, individually and as co-partners, trading and doing business as Carefree Collection Service, a partnership, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

* * * * *

Caption and Preamble
(Corporations Trading Under Assumed Names)

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

_____	In the Matter of)
)
	XXX CORPORATION,)
	a corporation, and)
	ZZZ CORPORATION, INC.,)
	a corporation, also trading and)
	doing business as)
	SMITH-JONES COMPANY)
_____)

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that XXX Corporation, a corporation, and ZZZ Corporation, Inc., a corporation, also trading and doing business as Smith-Jones Company, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

* * * * *

Identification of Parties,
Business and Commerce

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of)	
)	
XXX CORPORATION,)	
a corporation, and)	
ZZZ COMPANY, INC.,)	DOCKET NO.
a corporation, and)	
JOHN J. SMITH, individually)	
and as an officer of said)	
corporations.)	
)	

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that XXX Corporation, a corporation, ZZZ Company, Inc., a corporation, and John J. Smith, individually and as an officer of said corporations, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH ONE: Respondent XXX Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Respondent ZZZ Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey.

Respondent XXX Corporation dominates and controls the acts and practices of its wholly-owned subsidiary, ZZZ Company, Inc.

All of the above corporate respondents have their principal offices and places of business at 7022 Smith Street, Anytown, New York 12134.

Respondent John J. Smith is an officer of each of the corporate respondents named herein. He formulates, directs and controls the acts and practices of said corporate respondents, including the acts and practices hereinafter set forth. His address is the same as that of said corporations.

The aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PARAGRAPH TWO: Respondents are now, and for some time last past have been, engaged in the purchasing, offering for sale, sale and distribution of (product) and related products to the public at retail.

Count I

Alleging violation of Section 5 of the Federal Trade Commission Act, the allegations of PARAGRAPHS ONE and TWO are incorporated by reference herein as if fully set forth verbatim.

PARAGRAPH THREE: Respondents maintain, and have maintained, a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

* * * *

Conclusions - Part 3 Complaint
(Section 5 FTCA)

PARAGRAPH : In the course and conduct of their business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of merchandise of the same general kind and nature as merchandise sold by respondents.

PARAGRAPH : The use by respondents of the aforesaid false, misleading, and deceptive statements, representations, acts and practices, directly or by implication, has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and into the purchase of substantial quantities of respondents' products and services by reason of said erroneous and mistaken belief.

PARAGRAPH : The acts and practices of respondents,as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this day of A.D., 19 issues its complaint against said respondents.

NOTICE

[See Illustration 9 of this Chapter]

* * * *

ORDER

[See OM Ch. 5]

* * * *

IN WITNESS WHEREOF, the Federal Trade Commission has caused its complaint to be signed by its Secretary and its official seal to be hereto affixed at Washington, D.C. this day of A.D., 19 .

By the Commission.

SEAL

[name]
Secretary

Conclusions - Part 2 Complaint (Section 5 FTCA)

PARAGRAPH : In the course and conduct of their business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of merchandise of the same general kind and nature as merchandise sold by respondents.

PARAGRAPH : The use by respondents of the aforesaid false, misleading, and deceptive statements, representations, acts and practices, directly or by implication, has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and into the purchase of substantial quantities of respondents' products and services by reason of said erroneous and mistaken belief.

PARAGRAPH : The acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this day of , A.D., 19 , issues its complaint against said respondents.

By the Commission.

SEAL

[name]
Secretary

Conclusions - Part 3 Complaint
(Price-Fixing)

PARAGRAPH : By means of the aforesaid acts and practices and more, respondent, in combination, agreement, understanding and conspiracy with certain of its authorized dealers and with the acquiescence of other of its authorized dealers, has established, maintained, and pursued a planned course of action to fix and maintain certain specified uniform prices at which said products will be resold.

PARAGRAPH : The aforesaid acts and practices of respondent have been and are now having the effect of hampering and restraining competition in the resale and distribution of said products, and, thus, are to the prejudice and injury of the public, and constitute unfair methods of competition in or affecting commerce or unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this day of , A.D., 19 , issues its complaint against said respondent.

* * * *

Conclusions - Part 3 Complaint
(Discriminatory Pricing)

PARAGRAPH : The effect of the discriminations in price by respondent in the sale of its snack food products, as set forth hereinabove, has been or may be substantially to lessen competition or tend to create a monopoly in the sale of said products, or to injure, destroy, or prevent competition between retailers that pay higher prices and competing retailers that pay lower prices for respondent's said products.

PARAGRAPH : The discriminations in price, as herein alleged, are in violation of subsection (a) of Section 2 of the Clayton Act, as amended. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this day of , A.D., 19 , issues its complaint against said respondent.

* * * * *

Notice Order

NOTICE

Notice is hereby given to each of the respondents hereinbefore named that the day of , A.D., 19 , at a.m. o'clock is hereby fixed as the time and Federal Trade Commission Offices, The 1101 Building, 414 - 11th Street, N. W., Washington, D. C. 20580 as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under said Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in this complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the thirtieth (30th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material allegations to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint, and together with the complaint will provide a record basis on which the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer you may, however, reserve the right to submit proposed findings and conclusions and the right to appeal the initial decision to the Commission under Section 3.52 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions and order.

The following is the form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint. If, however, the Commission should conclude from record facts developed in any adjudicative proceedings in this matter that the proposed order provisions as to XXX Corporation, a corporation, ZZZ Company, Inc., a corporation, and John J. Smith, individually and as an officer of said corporations, might be inadequate to fully protect the consuming public, or to protect competitive conditions within the _____ industry, the Commission may order such other relief as it finds necessary or appropriate.

ORDER

* * * *

IN WITNESS WHEREOF, the Federal Trade Commission has caused its complaint to be signed by its

Secretary and its official seal to be hereto affixed at Washington, D.C. this day of A.D., 19 .

By the Commission.

SEAL

[name]
Secretary

Consumer Redress Notice

Moreover, the Commission has reason to believe that, if the facts are found as alleged in the complaint, it may be necessary and appropriate for the Commission to seek relief to redress injury to consumers, or other persons, partnerships or corporations, in the form of restitution and refunds for past, present, and future consumers and such other types of relief as are set forth in § 19(b) of the Federal Trade Commission Act. The Commission will determine whether to apply to a court for such relief on the basis of the adjudicative proceedings in this matter and such other factors as are relevant to consider the necessity and appropriateness of such action.

[Note: The above paragraph should follow the last paragraph of the Notice Section in Illustration 9.]

* * * *