

TABLE OF CONTENTS

Section

- .1 Introduction
- .2 Some Drafting Suggestions
 - .2.1 Coverage of Similar or Related Practices
 - .2.2 Orders Covering Violation of Different Statutes
 - .2.3 Absolute Prohibitions
 - .2.4 Definitions in Order
 - .2.5 Consumer Disclosures Notices
 - .2.5.1 Wording
 - .2.5.2 Readability
 - .2.5.3 Clear and Conspicuous
 - .2.6 Avoid Inconsistent Language
 - .2.7 Avoid Unnecessary Provisos
 - .2.8 Avoid Escape Clauses
 - .2.9 Avoid Plurals
 - .2.10 Avoid Conjunctives
 - .2.11 Most Favored Respondent Clause
- .3 Format of Orders
 - .3.1 The Preamble
 - .3.2 Jurisdiction
 - .3.2.1 Section 5
 - .3.2.2 Section 12
 - .3.2.3 Cases Involving Section 5 and Section 12
 - .3.3 The Products
 - .3.4 Parties
 - .3.4.1 Third Parties: Successors, Officers, Transferees
 - .3.4.2 Franchisees, Licenses, Distributors
 - .3.4.3 Advertising Agency
 - .3.4.4 Trade Associations and Their Members
- .4 Substantive Order Provisions
 - .4.1 Advertising Substantiation
 - .4.2 Access to and Maintenance of Records
 - .4.3 Time Periods
 - .4.4 Prohibitions on Acquisitions
 - .4.4.1 Pending Divestiture
 - .4.4.2 After Divestiture
 - .4.4.3 Avoid "Purchaser" or "Sale" Language
 - .4.4.4 Time Period of Divestiture
 - .4.4.5 Spin-Offs
- .5 Standard "Further Ordered" Paragraphs
 - .5.1 Compliance Reports
 - .5.2 Notification of Change Of Business Or Employment
 - .5.3 Notification of Change in Corporate Structure
 - .5.4 Distribution of Order
 - .5.5 Concluding Paragraph
- .6 Decision and Order

.7 Retrieval From Lexis

Illustration

- 1 Notice of Contemplated Relief
- 2 Notice of Order
- 3 Readability Chart
- 4 Instructions for Determining Readability
- 5 Suggested Form Language to Ensure that Disclosure Notices Are Clear and Copnspicuous.

.1 INTRODUCTION

This chapter covers the preparation and drafting of a cease and desist order, which may be issued following administrative litigation or consent negotiations. It also outlines some of the problem areas that should be avoided in drafting orders. Illustrations of standard provisions are provided. However, care should be taken to tailor order provisions to named respondents and specific practices. This may require, in certain instances, modification of standard or prior substantive order provisions. For procedures to be followed in obtaining a consent order, see OM Ch. 6.

The importance of drafting a proper and enforceable cease and desist order cannot be overstated, especially since the Commission's ability to achieve its law enforcement missions may depend upon the effectiveness and vitality of its cease and desist orders. The order may be subject to judicial review and often must withstand detailed scrutiny in any subsequent compliance effort. Therefore, the order must set forth specific standards so that the proscribed conduct can be readily demonstrated to secure enforcement.

After drafting an administrative complaint, the staff attorney prepares either a Notice of Contemplated Relief or a Notice Order. See OM Ch. 4. The Notice of Contemplated Relief (See Illustration 1) alerts the respondent to the types of relief considered necessary. It is not an order. It simply describes for the respondent the elements of relief which, if the complaint allegations are proved, would correct the proscribed practices. A Notice Order (See Illustration 2), on the other hand, informs the respondent of the precise relief being sought. In the event respondent defaults or compromises before the administrative proceeding is substantially under way, the notice order may be entered by default or used for settlement purposes. See OM Ch. 10, particularly .9.2 and .9.3 regarding the legal status of Notice Orders.

Since the complaint provides a foundation for the order, the provisions of the order should track the allegations of the complaint. Careful study of orders issued in related cases may supply substantive provisions which may be adapted to the order being drafted. Language and provisions which have been approved by the Commission and those which have been affirmed by the courts provide reliable precedents for the staff. Past decisions and orders relating to specific practices can be retrieved from LEXIS. See OM Chs. 1 and 18.

The writing of an order is an art in itself. An order must be clear and concise and yet comprehensive. An order should (a) prohibit the specific practice as to specific products, as alleged in the complaint, (b) extend to germane practices and products, and (c) attempt to reach generally related practices and, if possible, all products or services. See .2.1 below.

.2 SOME DRAFTING SUGGESTIONS

.2.1 COVERAGE OF SIMILAR OR RELATED PRACTICES

It is well established that the Commission is empowered to and should enter order of sufficient breadth to ensure that a respondent will not engage similar or related violations of the law in the future. See Jacob Siegel Co. v. FTC, 327 U.S. 608, 611-13 (1946); FTC v. Ruberoid Co., 343 U.S. 470, 473 (1952); FTC v. National Lead Co., 352 U.S. 419, 428-30 (1957); FTC v. Colgate-Palmolive Co., 380 U.S. 374, 392 (1965). The principal requirements which the courts have enunciated regarding the Commission's authority are that the order bear a reasonable relationship to the unlawful practice found to exist, and that the provisions be sufficiently clear and precise so that they may be easily understood by the party under order. Siegel, supra, at 611-13; Ruberoid, supra, at 473; FTC v. Cement Institute, 333 U.S. 683, 726 (1948).

Within this framework, the Commission has wide discretion in shaping order provisions. The courts have consistently upheld orders which enjoin "like and related" practices in addition to the specific illegal practices alleged in the complaint. FTC v. Mandel Bros., Inc., 359 U.S. 385, 393 (1959); Niresk Industries v. FTC, 278 F.2d 337, 343 (7th Cir.), cert denied, 364 U.S. 883 (1960); Consumers Products of America, Inc. v. FTC, 400 F.2d 930 (3d Cir. 1968), cert. denied, 393 U.S. 1088 (1969).

.2.2 ORDERS COVERING VIOLATIONS OF DIFFERENT STATUTES

When violations involve different statutes, or when different respondents have engaged in some but not all of the unlawful practices, or when separate rather than common violations are involved, orders should be drafted to conform to complaint allegations as to parties, products, and jurisdictional requirements, except for the standard "further ordered" provisions. (See Illustration 2 paragraphs A, B, C, and D.) Provisions of an order that are related to the same jurisdictional grounds (e.g., § 5) and are identical for two or more respondents in terms of product coverage and scope are grouped under a common preamble. Provisions which are related to a different statute (e.g., Truth-in-Lending) and/or different respondents and products are set out in separate paragraphs.

.2.3 ABSOLUTE PROHIBITIONS

The order provisions should be phrased in absolute terms, without any qualifications. A provision should be clear and unambiguous as to what is prohibited. For example, an order provision dealing with a false and deceptive claim should forbid that particular claim so that, if used again, the issue in an enforcement action would be: "Did the respondent make the prohibited representation?" The question of whether or not an order provision is easily enforceable is one of the paramount considerations in drafting orders. Absolute prohibitions not subject to doubtful interpretations usually result in better compliance by respondents because they know exactly what is prohibited.

.2.4 DEFINITIONS IN ORDER

When the wording of an order includes technical or complex terms which may cause confusion or ambiguity, it is advisable to have a set of definitions at the beginning of the order to ensure that all parties are aware of the manner of usage of such terms. Such definitions should be as clear and concise as possible, so that there can be no misunderstanding as to the meaning of any provision of the order. Definitions used in prior orders should be reviewed to provide consistency whenever possible.

.2.5 CONSUMER DISCLOSURE NOTICES

.2.5.1 Wording

Orders requiring affirmative disclosures should specify the exact wording of the disclosures.

.2.5.2 Readability

The procedures to follow regarding disclosure notices in consent orders and in notice orders attached to Part 3 complaints are as follows:

- (a) Disclosure notices in orders should measure as close to 80 (easy) as possible on the test for readability adopted by the Bureau.

Readability scores can be measured by using the chart in Illustration 3. Directions on how to figure the readability score are contained in Illustration 4. It should be noted that the test for readability cannot be applied mechanically - it is only one of the measures of the difficulty of reading and understanding information. Others are available and may be more helpful in certain circumstances.

- (b) Before a proposed complaint is submitted to the Commission or an affirmative disclosure notice proposed in consent order negotiations, proposed notices should be submitted to a professional writer-consultant hired by the Bureau to work with the staff. In working with the consultant staff should follow the following procedures:
1. Do the best possible job to write disclosure notices that are clear and easy to understand. An 80 on the readability test may be used as a rough guideline.
 2. Contact the consultant and make arrangements to discuss whether the staff draft can be improved. Such arrangements may include correspondence, working by telephone, or working face-to-face. Information on how to contact the correct consultant can be obtained from the Bureau. Consulting time will be funded by the Bureau.
 3. After submitting the draft to the consultant and receiving his or her initial comments and suggested rewordings, carefully evaluate what the consultant has done. If appropriate, work with the consultant on successive drafts. Then, the staff should make their own decision as to the most appropriate wording.
- The consultant's role is advisory only. The responsibility for the final draft submitted to the Bureau for its consideration rests with the staff. However, the consultant may submit alternative drafts to the Evaluation Committee for its consideration.
- (c) Forwarding memoranda covering proposed orders, and Part 3 complaints which contain disclosure notices, should include a section (a) stating that the material has been submitted to the consultant and (b) setting forth the readability score of the notice as it is finally drafted by the staff.

.2.5.3 Clear and Conspicuous

Orders requiring affirmative disclosures should require that they be "clear and conspicuous." orders requiring printed disclosures should require them to be in a prominent position which attracts attention and catches the eye, and should require legible type and type size. See Illustration 5 for recommended order provisions. These provisions should be included in orders that contain disclosure notices, unless particular circumstances make them inappropriate.

.2.6 AVOID INCONSISTENT LANGUAGE

If possible, avoid inconsistency of language between complaints and orders, such as different words employed to connote the same thought. Under Commission practice where the complaint can be used in interpreting the provisions of a consent order, inconsistent language may create areas of uncertainty with respect to enforcement.

.2.7 AVOID UNNECESSARY PROVISOS

A proviso introduces conditions and limits the application of the order or one or more of its paragraphs. Provisos should be avoided in orders if at all possible and be used only where absolutely essential. Provisos should be carefully analyzed to ensure that they do not cloud otherwise clear provisions of an order. Provisos can be avoided, in many instances, through employment of a "Definition paragraph, or by a limited preamble in-which coverage with respect to products, lines of commerce, etc., is carefully and narrowly defined.

.2.8 AVOID ESCAPE CLAUSES

"Unless such is the fact," "unless respondents are able to establish," "provided, however, it shall be a defense," and similar clauses which interject unnecessary and burdensome factual issues are to be avoided except in very limited situations in which protection of the public interest and fairness to respondents are best served by such terminology. See Tractor Training Service v. FTC, 227 F.2d 420 (9th Cir. 1955).

.2.9 AVOID PLURALS

The use of plurals should be avoided in drafting an order, particularly if a singular is more appropriate. This is especially true in price-fixing orders, whether horizontal or vertical in nature. For example, a provision requiring a respondent to cease and desist from agreeing with "customers" with respect to "Prices, terms and conditions" of sale, would require the plaintiff in an enforcement or penalty-proceeding, to prove an arrangement or agreement with more than one customer with respect to more than one price. Therefore, such an order should prevent a respondent from having any agreement with any customer, with respect to any price, term or condition of sale.

.2.10 AVOID CONJUNCTIVES

The use of a conjunctive, such as "and," is less desirable than the use of a disjunctive "or." If "or" is used in a price-fixing order, violations with respect to an agreement with a given customer may be established for a price, or a term or a condition of the sale. These same observations should be kept in mind in framing any type of order. Good drafting will ensure that the language of the order does not impose an unnecessary enforcement burden.

.2.11 MOST FAVORED RESPONDENT CLAUSE

The attorney shall not, without prior approval from the appropriate Bureau Director, negotiate a "Most Favored Respondent" clause, i.e., a clause providing that one respondent will be bound only if, and only to the extent that, another respondent is bound. See OM Ch. 6 for additional information.

.3 FORMAT OF ORDERS

A cease and desist order usually begins with a preamble which identifies the parties to be bound, the products or services to be covered and the jurisdictional basis for the order. The order then contains substantive provisions which prohibit certain acts or practices and may contain affirmative directions concerning other specific conduct. (See Illustration 2.) Following the substantive provisions some general requirements are set forth in the form of standard "Further Ordered" provisions. The end of the order indicates its issuance by the Commission with the date of issuance, the signature of the Secretary and the Commission seal affixed thereto. To facilitate future reference it is advisable to number the various paragraphs of an order. In addition, if the order covers violations of several statutes, it may be preferable to divide the order into parts by using numerals. See OM Ch. 9 for more information on orders issued for violations of special statutes.

.3.1 THE PREAMBLE

Every order contains a preamble that identifies the parties to be bound by the provisions of the order. They should be identified as they were in the caption and preamble of the complaint. The preamble also recites the particular products and services to be covered by the terms of the ordering paragraphs, and states the jurisdictional basis, e.g., § 5 or 12 of the FTC Act or § 2 of the Clayton Act.

Since the preamble of an order controls the reach and scope of the subparagraphs, the language used should be exact. For example, employment of a phrase such as "with the purpose or effect of injuring competition" inserted in the preamble of a conspiracy order may have the effect of converting an otherwise per se violation into a rule of reason situation and imposing an additional burden when enforcing the order.

.3.2 JURISDICTION

.3.2.1 Section 5

Under § 5 of the Federal Trade Commission Act, the Commission has jurisdiction over certain methods of competition and acts and practices which are "in or affecting commerce, as commerce is defined in the Federal Trade. Accordingly, an order, which is predicated on § 5 jurisdiction, must reach violations "in or affecting commerce, as commerce is defined in the Federal Trade Commission Act," as follows:

IT IS ORDERED that respondent ABC Corporation, a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of X product or any other (type of) product (or other particular practice) in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

- I. Representing.....
2. Failing.....

.3.1.2 Section 12

Under § 12 of the Federal Trade Commission Act, the Commission has jurisdiction over the advertising of food, drugs, devices or cosmetics when the advertisement was disseminated, or caused to be disseminated (a) by the U.S. mails, or by any means in or affecting commerce as "commerce" is defined in the FTC Act; or (b) by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of these products in or affecting commerce as "commerce" is defined in the FTC Act. Accordingly, these jurisdictional grounds must be set out in Commission orders predicated on § 12. The first jurisdictional ground of a § 12 order is set forth immediately after the preamble, and the language of the second jurisdictional ground is set out as the last paragraph following the ordering subparagraphs, as follows:

IT IS ORDERED that respondent XXX Corporation, a corporation, its successors and assigns, and its officers, and respondent's agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device in connection with the offering for sale, sale or distribution of X product, do forthwith cease and desist from:

1. Disseminating, or causing the dissemination of any advertisement, by means of the United

States mails or by any means in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, which

(a) Represents, directly or by implication, that:

(1)...

(2)...

(b).....

2. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of X product in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited in paragraph 1 of this Order.

.3.2.3 Cases Involving Section 5 and Section 12

A Commission order sometimes contains prohibitions on both § 5 and § 12 jurisdictional grounds. In such cases it must be made clear which ordering paragraphs relate to § 5 and which paragraphs relate to § 12.

.3.3 THE PRODUCTS

Each product or service to be covered by the terms of the ordering paragraphs should be identified in the preamble. A class of products (e.g., "any nonprescription drug product" or "any consumer product") can be named in the preamble when the evidence supports such coverage. Products, services, and functions should not be described by vague phrases such as "specialty food items," "kindred products," and "Class A Dealers." These phrases may well be meaningless in an enforcement proceeding unless they are defined.

.3.4 PARTIES

The preamble of an order names the respondents and sets forth the parties to be bound by the order. Examples of standard language follow:

(a) - Corporations Only -

IT IS ORDERED that respondents XXX, Inc., a corporation, ZZZ, Ltd., a corporation, their successors and assigns, and their officers, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device* in connection with (outline practice and jurisdictional ground), do forthwith cease and desist from . . .

*If a franchise is involved, the following should be added after the word device: "or through its franchisees or licensees."

(b) - Corporation and Individual -

IT IS ORDERED that respondents XXX, Inc., a corporation, its successors and assigns, and its

officers, and John Doe, individually (and as an officer, or as a director of said corporation), and respondents' agents, representatives, and employees

.3.4.1 Third Parties: Successors, Officers, Transferees

Orders should be framed to extend to (a) the parties to the action, (b) their officers, agents, and employees and (c) persons in active concert or participation with those who receive actual notice of the order by personal service or otherwise. A successor or transferee of a party may be bound if it is an instrumentality through which the party may evade the order or if there is a sufficient relationship or continuity of interest between the party and the successor. For example, if the officers, employees and/or stockholders of the party and the successors are the same, or if there is a continuing relationship between the party and the successor, the latter may be held by the courts to bound by the order.

It should be noted that U.S. v. Armour & Co., 402 U.S. 673 (1971) does not affect the Supreme Court's prior holding in Regal Knitwear Co. v. NLRB, 324 U.S. 9 (1945). In the Regal Knitwear case the court observed that recitation of the words "successors and assigns" in an agency order is not determinative of the question of whether in a particular fact situation a successor is covered by the order. In the Armour case, one section of the decree contained the language "successors and assigns" an another section of the decree omitted the phrase. It was this inconsistent usage of the language which seems to have been viewed by the Court as making the intent of the applicable provision of the decree unclear. Thus, while Regal Knitwear is still controlling, it would be desirable in the future orders to employ the phrase "successors and assigns" so that any doubt as to the Commission's intent to reach de facto successors will be removed. Accordingly, all orders prepared by the staff should include "successors and assigns" in the preamble.

The respondent must notify the Commission of corporate changes. Furthermore, if the circumstances (i.e., past history, financial condition, size of respondent, number of markets, or business of respondent) indicate that a merger or transfer is a reasonable likelihood, and that the acquirer, because it would not be acquiring all or substantially all of respondent's relevant assets or because it might not otherwise be a successor under the law, consideration should be given to incorporating in the proposed order a provision that the respondent's business or other assets shall not be transferred without an agreement by the purchaser to be bound by the terms of the order. The following language is illustrative:

Respondent shall require, as a condition precedent to the closing of the sale or other disposition of [all or a substantial part of specific business] or [describe specific assets to be covered by provision], that the acquiring party file with the Commission, prior to the closing of such sale or other disposition, a written agreement to be bound by the provisions of the order.

.3.4.2 Franchisees, Licensees, Distributors

When a respondent has franchisees, licensees or distributors and when the factual situation warrants it, the order should require respondent to obtain from these third parties a written agreement to obey the order, as a condition of their continuing as franchisees, licensees, or distributors, of the respondent. Compliance by third parties may be obtained by requiring, for example, publication of the order in trade journals as notification that failure to abide by the terms of the order may result in cancellation of the franchise or by requiring service of a copy of the order on each franchisee, licensee, or distributor by the respondent.

.3.4.3 Advertising Agency

When the complaint names an advertising agency as a respondent and when the facts show that the advertising agency (a) knew or should have known that the advertised claims were false or unsubstantiated, or (b) played a major role in planning or developing the advertised claims, the order should prohibit the advertising agency from engaging in such activities in the future. Similar orders can also be issued against publishing or broadcasting companies engaged in the role of an advertising agency.

3.4.4 Trade Associations and Their Members

In unusual circumstances--e.g., where use of rulemaking or utilization of Magnuson-Moss § 205 proceedings are inappropriate-- consideration can be given to having the complaint name representative members of trade associations as a basis for class suits. Where inclusion of individual member, as representatives of a class or otherwise, in a complaint is impracticable, only the trade association is named. In either case it may be desirable to include a provision in the order, mandating that the association amend its bylaws to require the members, as a condition to membership, observe the substantive provisions of the order. This will work to legally bind the individual members. Another possibility is to require the association to mail conformed copies of the order to current and future members. Even though this will not legally bind members in all circumstances, it will alert the members to possible violation and may prevent attempts to ignore the provisions of the order.

4 SUBSTANTIVE ORDER PROVISIONS

4.1 ADVERTISING SUBSTANTIATION

Orders involving respondents found to have deceptively or unfairly advertised without having any reasonable foundation for their claims should contain a provision requiring the respondents to possess and rely upon adequate substantiation which provides a reasonable basis for the advertised claims or representations at the time they are first made. The order should be framed broadly enough to prevent the respondents from engaging in similar illegal practices in future advertisements and it should require the keeping of substantive material, which may be inspected by representatives of the Commission for a specific period of time from the date of the last dissemination. The type of substantiating evidence needed must be determined on a case by case basis.

4.2 ACCESS TO AND MAINTENANCE OF RECORDS

When appropriate, orders should provide that the respondent shall maintain specified records for a particular period of time, and that the Commission have access to the records. The provision should specify the particular records or class of records to be maintained, and may provide that the records relating to a particular act or practice be maintained for specified number of years following the cessation of the act or practice.

All fictitious pricing orders should include a provision requiring the respondent to maintain full and adequate records disclosing the facts upon which any price reduction or savings representations are made. For example, respondent may be ordered to cease and desist from representing, directly or by implication, through the use of terms such as "our lowest price ever," "special sale price," "savings" or in any other manner, that any price is reduced from respondent's former price, unless respondent's business records establish and show that such price constitutes a significant reduction from the price at which such merchandise has been sold in substantial quantities or offered for sale in good faith for a reasonably substantial period of time, by the respondent in the recent, regular course of its business.

4.3. TIME PERIODS

The provisions of an order are usually unlimited as to time and can be modified only if the Commission concludes that such modification is required by changed conditions of fact or law and is in the public interest. See Rule 3.72. There are instances where it is appropriate to limit particular provisions of an order to a specified time period. For example, the Commission has required respondents to seek Commission approval for acquisitions and divestitures for a certain number of years, to engage in corrective advertising for a fixed period of time, or to maintain records for a specified period of time. Time periods in orders can also be conditioned on the occurrence of a particular event. For example, a respondent can be required to publish a corrective advertisement until a specified amount of money has been expended. The time period should be tailored to meet the enforcement requirements of the particular order. Guidance may be obtained from past Commission orders that are factually related.

4.4 PROHIBITION ON ACQUISITIONS

4.4.1 Pending Divestiture

The order should contain a provision prohibiting respondent, pending divestiture, from acquiring, directly or indirectly, any interest in any concern engaged in the relevant market. The purpose of this provision is to encourage rapid divestiture since the respondent usually will not be permitted any acquisition, even with Commission approval, until after divestiture.

4.4.2 After Divestiture

All proposed orders in Section 7 cases shall include a ten-year prior approval clause for all future acquisitions by the respondent at least in the same product market and geographic market in which a violation has been alleged or found.

A prior approval clause may contain a deminimis exception.

A prior approval clause that contains a deminimis exception should contain a prior notice requirement, except that prior notice should not be required for a transaction that must be reported pursuant to HSR rules.

4.4.3 Avoid "Purchaser" or "Sale" Language

In divestiture orders, "purchaser" or "sale" language should be avoided, both directly and indirectly. These orders should require "divestiture," within a time certain to an "acquirer" [not purchaser] approved in advance by the Federal Trade Commission. The orders should also express clearly the economic purpose of the divestiture, e.g., "to assure re-establishment of a viable producer and seller of [product]." Without such economic purpose stated clearly the question could be whether a plant could be sold as real estate and still satisfy the order. "Purchaser" or "sale" language in a consent order could conceivably be argued as indicating the order's purpose as requiring a mere attempt to sell rather than an unqualified obligation to divest and as not requiring divestiture if a "sale" at reasonable terms could not be effectuated. While such language should be avoided in the preamble of a divestiture order, it is equally important that "purchaser" and "sale" language not be used in "Further Ordered" paragraphs or provisos.

4.4.4 Time Period of Divestiture

The order should make the time period of divestiture clear. Six months may not be realistic. Three years or more is generally too long.

4.4.5 Spin-offs

If a divestiture order provides for a spin-off, it should be clearly mandated. Do not use "If respondent spins off..."

5 STANDARD "FURTHER ORDERED" PARAGRAPH

5.1 COMPLIANCE REPORTS

All orders must contain a standard compliance report provision, as follows:

IT IS FURTHER ORDERED that the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

5.2 NOTIFICATION OF CHANGE OF OF BUSINESS OR EMPLOYMENT

All orders naming individual respondents should contain one of the two following standard paragraphs. In appropriate circumstances, "her" should be substituted for "him."

- (1) IT IS FURTHER ORDERED that each individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of 10 years from the date of service of this order, each respondent shall promptly notify the Commission of each affiliation with a new business or employment. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.
- (2) IT IS FURTHER ORDERED that each individual respondent named herein promptly notify the Commission of the discontinuance of the present business or employment and of his affiliation with a new business or employment. In addition, for a period of 10 years from the date of service of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment whose activities include (description of the practice), or of his affiliation with a new business or employment in his own duties and responsibilities involve (description of the practice). Such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

5.3 NOTIFICATION OF CHANGE IN CORPORATE STRUCTURE

All orders involving corporate respondents must include the following provision:

IT IS FURTHER ORDERED that respondent(s) notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

.54 DISTRIBUTION OF ORDER

The preamble of the order prohibits the respondent and the respondent's officer, agents, representatives, and employee from violating the terms of the order. Accordingly, the order should require that the respondent distribute copies of the final order to these groups and individuals. This distribution will place the recipients "on notice" of the provisions of the order. In addition, it will ensure that the order gets down to the operating divisions where the day-to-day decisions are made and where compliance with the order must take place on a routine basis. An example of such a provision is:

IT IS FURTHER ORDERED that the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

A provision requiring monitoring of employees' activities may be warranted, when the respondent's practices and type of business indicate such a need, e.g., misrepresentations by door-to-door salespersons.

.55 CONCLUDING PARAGRAPH

All notice orders and notice of contemplated relief must contain a final paragraph indicating signature by the Secretary pursuant to Commission direction. (See Illustrations 1 and 2 of this chapter and see OM Ch. 4.10.1 for a discussion of appropriate language for final paragraphs in Part 3 complaints and in consent agreements.)

.6 DECISION AND ORDER

Before preparing Decisions and Orders, staff should consult OM CH 10 and OM Ch. 6.10.5 and Illustrations 5 and 6 therein for procedures and format for drafting Decisions and Orders in consent matters.

.7 RETRIEVAL FROM LEXIS

The staff may obtain sample order provisions by utilizing the LEXIS system. The following is a partial list of retrievable matters which will be enlarged in future reprints.

Land Sales
Placing False Advertising in the Hands of Dealers
Discontinue Dealing Provision
Disclosure of Salesman's Call
Encyclopedia Door-to-Door Sales
Fictitious Pricing
Meat Sales in Bulk or "on the hoof"
Bait Advertising
Earnings or Profits Claims
Multi-products Advertisements

Resale Price Maintenance
Divestitures
Price Discriminations

Sample Of Notice of Contemplated Relief

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceeding in this matter that the respondents, XXX, Inc., and ZZZ Company, are in violation of Section 7 of the Clayton Act, as amended, and/or Section 5 of the Federal Trade Commission Act, as amended, as alleged in the complaint, the Commission may order such relief as is supported by the record and is necessary and appropriate including, but not limited to:

1. Divestiture of XXX so as to form an independent, viable entity.
2. Cancellation of any and all acquisition agreements or understandings between and ZZZ or any of their respective subsidiaries.
3. Imposition of a ten (10) year ban on acquisitions by XXX of any firm manufacturing [products] without prior approval of the Federal Trade Commission; and a ten (10) year ban on acquisitions by ZZZ of any firm manufacturing (products] without prior approval of the FTC.
4. Any other provisions appropriate to correct or remedy the anticompetitive practices engaged in by respondents.
5. Requirements that periodic compliance reports be filed with the Commission by respondents.

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.

[name]
Secretary

S E A L

Sample Form of Notice Order
(For complete Notice see OM Ch. 4)

NOTICE

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 ABC, Inc., a corporation, and John Doe, individually and as an officer of said corporation, might be inadequate to fully protect the consuming public, or to protect competitive conditions within the [specify industry], the Commission may order such other relief as, it finds necessary or appropriate.

ORDER

I

A. IT IS ORDERED that respondents, XXX, Inc., a corporation, its successors and assigns, and its officers, and John Doe, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the purchasing, advertising, offering for sale, sale and distribution of [specify product] or other merchandise in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Misrepresenting orally, visually, in writing or in any other manner, directly or by implication:
2. Failing to disclose clearly and conspicuously,. . . .
3. Failing to act in accordance with the following procedures

II

IT IS FURTHER ORDERED that respondent XXX, Inc., a corporation, its successors and assigns, and its officers, and John Doe, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or any other device, in connection with any extension of consumer credit, or any advertisement to aid, promote, or assist directly or indirectly any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. 226) of the Truth-in-Lending Act (P.L. 90-321, 15 U.S.C. 1601 et seq.) do forthwith cease and desist from:

1. Failing to make the required disclosures

III

- A. IT IS FURTHER ORDERED that respondents distribute a copy of this order to all operating

divisions of said corporation, and to present or future personnel, agents or representatives having sales, advertising, or policy responsibilities with respect to the subject matter of this order and that respondents secure from each such person a signed statement acknowledging receipt of said order.

B. IT IS FURTHER ORDERED that respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

C. IT IS FURTHER ORDERED that the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of 10 years from the date of service of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment.. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

D. IT IS FURTHER ORDERED that the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

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.

[name]
Secretary

S E A L

ISSUED:

Illustration 3 is not available in an electronic format at this time.

Instructions for Determining Readability¹

To estimate the readability of a piece of writing, go through following steps:

Step 1. Count the number of sentences

Count the number of sentences in your piece of writing. In counting sentences go from one period to the next, regardless of internal punctuation, such as colons, semicolons, dashes, and paragraph breaks. Disregard headings and subheadings in your count.

Step 2. Count the number of words

Count the number of words in your piece of writing. Disregard words in headings and subheadings. Count contractions and hyphenated words as one word. Count numbers and letters as words, too, if separated by spaces. For example, count each of the following as one word: 1948, \$19,892, e.g., C.O.D., wouldn't, full-length.

Step 3. Figure the average sentence length

Figure the average sentence length in words for your piece of writing. Divide the number of words in your piece of writing by the number of sentences.

Example 1: number of words	98	
number of sentences		6
average sentence length	$\frac{98}{6} = 16.3 = 16$	6

Example 2: number of words	55	
number of sentences		4
average sentence length	$\frac{55}{4} = 13.7 = 14$	4

Step 4. Count the syllables

Count the syllables. Count syllables the way you pronounce the word; e.g. asked has one syllable, determined three and pronunciation five. Count the number of syllables in symbols and figures according to the way they are normally read aloud, e.g. two for \$ ("dollars") and four for 1916 ("nineteen sixteen"). If in doubt about syllabication rules, use any good

¹ Adapted from The Art of Readable Writing, by Rudolf Flesch (Harper and Row, 1949, 1974). Used with permission.

NOTE: This test is only one of the measures of the difficulty of reading and understanding information. Others are available and may be more helpful in certain circumstances.

SUGGESTED FORM LANGUAGE
TO ENSURE THAT
DISCLOSURE NOTICES ARE
CLEAR AND CONSPICUOUS

cease and desist from:

...

() Failing to disclose clearly and conspicuously the following notice printed in the manner described below:

"IMPORTANT! Read This Before You Sign Anything

"Buyer's Right To Cancel"

"You, the Buyer, may cancel this transaction"

XX
XX
XX

"I have read this notice and understand what it says"

_____ (date) _____ (Signature of Buyer)

_____ (address)

- (a) This notice must appear on the front page of all sales agreements or on a separate sheet of paper given to customers before they sign the sales agreement. The separate sheet may not contain any other writing.
- (b) Before signing any sales agreement, the buyer must be asked to read and sign this notice.
- (c) The text of the notice must be printed in 12-point boldface type and the two headings in 16-point extra boldface type. The capitalization, punctuation and wording of the text and headings must be exactly as shown above.
- (d) The whole notice, from the word "IMPORTANT" to the words 'what it says,' must be printed in Cheltenham, Antique, Bodoni or Helvetica type in black ink on a white background. If the notice is printed on the front page of a sales agreement on which other information is emphasized by the use of colored type, the notice must then be printed in the most conspicuous colored type used.

(e) The whole notice from the word "IMPORTANT" to the space for the customer's signature, must be boxed. The box must be a black rectangle with lines 2 points thick if the notice appears on front page of a sales agreement or 1/8 inch thick if it appears on a separate sheet of paper.

() Saying or hinting in any way, in any agreement, advertisement, labeling, sales talk, or sales material that the notice does not mean exactly what it says.

() Failing to give each customer at the time of sale a fully filled-in and legible copy of the sales agreement. If the notice appears on a separate sheet, that sheet must be attached to the agreement.

() Failing to keep a fully filled-in and legible copy of each sales agreement for three years after signing. If the notice appears on a separate sheet, that sheet must be attached to the agreement.

NOTE: On some orders the words "sales agreements and receipts" or "receipts" will be substituted for "sales agreement".