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Chapter Six

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.1 PURPOSE

The Commission is primarily responsible for protection of the public through prevention and elimination of violations in the first instance. Thus, consent agreements are used by the Commission to secure an effective and legally enforceable order to cease and desist, to divest, or for other corrective action without expending time and resources required to fully prepare and adjudicate a case. The Commission also is responsible for securing effective compliance with its order and determining the impact on the public after an order has been entered.

In a litigated matter there are an evidentiary record, findings of fact, conclusions of law, and a carefully drawn order tailored to the adjudicatory record that may be relied upon to ensure the violator is adequately fenced in (see OM Chs. 5, "Orders"; 10, "Administrative Litigation"; and 12, "Compliance"). The only record that can be relied upon for interpreting and construing a consent order may consist of the agreement, complaint, staff analysis, decision, and order itself (unless options for consumer redress have been preserved by detailed findings and conclusions; see OM Ch. 11, "Judicial Enforcement"). It is therefore incumbent on the Commission and staff to take careful measures to ensure adequate and appropriate provisions for relief and safeguards are provided in each consent agreement that is accepted.

.2 POLICY

When investigation discloses that an order against individuals or firms engaged in a challenged course of conduct is necessary, the Commission's policy is to secure an effective order--by consent if feasible, or by litigation if necessary. A proposed respondent may be invited to enter into a consent agreement with the staff while a matter is still in investigation, and a respondent may be afforded this opportunity while the case is in adjudication (see .3 and .11 below).

A proposed respondent or respondent may submit a unilateral offer for disposition or settlement at any time during investigation and adjudication in accordance with the provisions discussed in this chapter (see .7 and .11 below).

During the course of the investigation, staff must take care to ensure that letters sent outside the agency shall not state or imply that a proposed respondent has engaged in unlawful practices or otherwise violated the law.

.3 CONSENT NEGOTIATIONS PRECEDING COMPLAINT

The Administrative Procedure Act (5 U.S.C. 554(c)) provides that where time, then nature of the proceeding, and the public interest permit, every person with an interest in an adjudicative proceeding shall be granted the opportunity to submit facts, arguments and offers for settlement or adjustment. It is the policy of the Commission to make this opportunity available during or upon completion of the investigation (Rule 2.31(a)) as well as during adjudication (Rule 3.25).

Special circumstances that may require the staff to affirmatively advise a proposed respondent of its right to submit a settlement offer arise where the person being investigated has not been contacted in the course of the investigation and may not be aware of the possibility of a complaint or where the proposed respondent and its attorney lack familiarity with the Commission's Rules of Practice.

The staff should not assume that a proposed respondent has no interest in a consent settlement because the proposed respondent and its attorney have not cooperated in the investigation. Notification of the opportunity

to submit a proposed settlement should be withheld only to assure preservation of evidence in proposed respondent's possession or where some other specific consideration within the statutory provision (time, nature of the proceeding, and public interest) so dictates or where such notification would be inappropriate, e.g., when dealing with counsel experienced with FTC procedure. When the staff determines that it is not advisable or necessary to explore the possibility of consent settlement before submitting a recommendation for complaint, the staff memorandum should set forth fully the considerations that warrant withholding this privilege (see OM Ch. 4.14.6.9 concerning the memorandum recommending complaint).

3.1 CRITERIA GOVERNING STAFF NEGOTIATIONS

Before offering a consent agreement to a proposed respondent or submitting to the Commission at the conclusion of an investigation a settlement offer by proposed respondent, the staff should have developed sufficient facts to determine:

- (1) the nature and gravity of the practices and of any violations that result;
- (2) the appropriate complaint charges and order provisions; and to conclude;
- (3) whether the public would be adequately protected by the proposed relief.

3.2 APPROVAL FOR NEGOTIATIONS

It is advisable for the staff not to engage in intensive consent order negotiations without prior consultation with the Assistant Director, Regional Director, program advisor in BCP, or Assistant to the Director in BC, as appropriate. This consultation is intended to provide guidance concerning the kinds of provisions that have been obtained or are being sought in similar cases or which might be deemed appropriate by such reviewing officials.

Proper planning of consent negotiations will serve to avoid the necessity for renegotiating an agreement. In competition matters, no investigation should be suspended by staff for more than 30 days to conduct negotiations without approval of the Bureau Director. Investigation should be resumed as soon as it appears that a satisfactory settlement cannot be reached. In consumer protection matters, not more than 20 hours or 20 days shall be devoted to negotiations, including preparation time, before full and vigorous investigation is resumed.

4 LIMITATION ON STAFF AUTHORITY

During negotiations the staff must make it clear to the proposed respondent or respondent that no understanding, agreement, representation or interpretation not contained in the agreement or order may be used to vary or contradict the terms of the order. An agreement as of the time it is entered into by the staff is not binding on the Commission and has no validity or effect unless and until it has been approved and accepted by the Commission in accordance with the Commission Rules.

5 NEGOTIATIONS WITH LESS THAN ALL THE PARTIES

Any person may negotiate with the Staff, with or without the knowledge or consent of other interested persons, and may move for withdrawal from adjudication and certification to the Commission on its own motion or jointly with complaint counsel or with any other respondent or intervenor.

.6 NEGOTIATING SAFEGUARDS

To reduce the opportunity for misunderstandings by staff with counsel for proposed respondent or respondent about what has taken place in the course of negotiations, it is usually advisable for staff to prepare a memorandum summarizing negotiating sessions and other significant events. Any agreements reached between staff and private counsel during the negotiations should be confirmed by letter. This includes any understandings about treatment of confidential information (see OM Ch. 15 re: "Confidentiality and Access").

.7 UNILATERAL SETTLEMENT OFFERS

A proposed respondent may have the Commission consider its proposal or counterproposal for disposition and settlement of an investigation when it is submitted in the form of a complete, executed agreement containing a proposed order even though the terms are deemed inadequate or inappropriate by the staff. The settlement offer should be submitted to the Commission by staff memorandum with the staff comments, views, and recommendations (Rule 2.31(a)). Any proposal or counterproposal for settlement by proposed respondent which is not set out in the form of an agreement executed by proposed respondent and that is deemed inadequate or unsatisfactory by the staff should be included with the files together with any written statement of proposed respondent supporting such offer. The Commission is not required to consider and to inform proposed respondent of its determination concerning a unilateral offer of settlement not set forth in the form of an executed agreement. Staff cannot commit anyone at any higher or reviewing level to discuss the merits of any settlement proposal deemed by staff to be unsatisfactory, whether or not executed by proposed respondent.

See .11.1 below for discussion of the procedure in a Part 3 matter for obtaining consideration of a unilateral offer of settlement or agreement that has not been executed by the Bureau Director.

.8 REQUIRED PROVISIONS IN CONSENT AGREEMENTS

Every executed offer of settlement and consent agreement containing an order to cease and desist or for other relief should include all of the provisions required by Rule 2.32. In appropriate circumstances the agreement may contain a statement that it is for settlement purposes only and does not constitute an admission that the law has been violated as alleged in the complaint, or that the facts as alleged in the complaint, other than jurisdictional facts, are true. This provision should not be included where proceedings for consumer redress under FTCA § 19 might be appropriate. See OM Ch. 6, which Illustration 1 reflects a standard form of consent agreement employed during the investigational stage. Illustration 2 is the form of consent agreement that is used after a Part 3 complaint has been issued.

.8.1 SPECIAL PROVISIONS IN CONSENT AGREEMENTS

The general requirements of Rule 2.32 provide for an admission of jurisdictional facts and either an express waiver of findings of fact and conclusions of law, or a stipulation concerning findings of fact and conclusions of law (see Illustration 3). In most instances, the waiver provision should be utilized, dispensing with findings and conclusions. However, certain special circumstances require findings and conclusions. For example, where the Commission's option to proceed in district court for relief under FTCA § 19 should be preserved, the admission of facts would permit the Commission to make the findings and conclusions in its final decision and order that are prerequisites for such action. In such special circumstances, the agreement should provide for admission or stipulation as to proposed findings of fact and conclusions of law (generally tracking the allegations of the complaint).

These special agreements should include a clear statement preserving the Commission's option to seek § 19 relief. Refer to OM Ch. 11, "Judicial Enforcement for additional guidance.

8.2 INITIAL COMPLIANCE REPORT

An initial compliance report may be included as part of the consent agreement process under Rule 2.33. Recourse to this special procedure may be appropriate in cases involving possible health or safety hazards or in other situations when specific, prompt corrective action is needed. Initial compliance reports may also be appropriate where the respondent might otherwise contemplate going out of business, or in circumstances where the nature of the relief might be illusory unless the concrete manner of implementation is demonstrated in an initial compliance report. Such provision might be appropriate for resale price maintenance and Robinson-Patman Act violations susceptible to immediate corrective action by, for example, notices to all dealers setting out revised schedules or terms for prices, quantity discounts, advertising allowances, and the like.

In negotiating the filing of an initial compliance report, the staff should consult with the Assistant Director for Compliance, program advisor, or other person responsible for supervising compliance in the particular program area to ensure that the provision for filing such a report is not objectionable. The agreement and order should provide only that specified procedures will be, or more appropriately already have been, implemented (e.g., a revised price list has been published and distributed to all customers of a defined class; publication of the allegedly deceptive advertisement has been terminated and, perhaps, corrective advertising has been prepared) upon execution of the agreement and that the violation will not be resumed. The staff should not express any opinion in the agreement and order as to whether such action establishes satisfactory compliance with the order, seek to bind the Commission to approve such report, or limit the right and power of the Commission to require further proof of compliance, to seek civil penalties or consumer redress for alleged violations arising out of conduct described in the initial compliance report, and, to obtain judicial enforcement of the order.

The initial compliance report does not become part of the public record unless and until the accompanying agreement is accepted by the Commission. Provisions concerning an initial compliance report do not affect the obligation of respondent to file one or more regular reports after the order becomes final (see OM Ch. 12, "Compliance").

8.3 PROHIBITED PROVISIONS

8.3.1 "Solely for Purposes of this Agreement . . ."

Rule 2.32 provides that in appropriate circumstances the agreement may contain a statement that the signing thereof is for settlement purposes only and does not constitute an admission that the law has been violated as alleged in the complaint. The staff should not agree to inclusion in the agreement of any other restrictions, limitations, or provisions solely for purposes of the settlement that might prevent the Commission or third parties from using the complaint, agreement, or order in any other proceeding. This is particularly important when such a provision might be asserted as a defense in a subsequent proceeding under FTCA § 19 (see OM Ch. 11, "Judicial Enforcement").

8.3.2 Special Provisions Vis-a-Vis Nonconsenting Persons

Staff should resist attempts by consenting persons to secure special provisions affecting the rights of nonconsenting persons or which purport to bind nonsignors. Examples include: any provision that would amount to a protective order precluding subpoena of documents or testimony in that or any other proceeding;

a prohibition against reference or findings as to the consenting person or its conduct in that or any other proceeding; any provision that might infringe upon the legal rights of nonconsenting persons, other individuals or "class actions"; any provision calling for or dependent upon action of nonconsenting persons; or any provision restricting application to successors or assigns.

.8.3.3 Most Favored Respondent Provision

"Most favored respondent" clauses (clauses which provide that a person will be bound by an order only if, and then only to the extent that, other persons are bound by a similar order provision or that a person shall be relieved of compliance with any portion of the order if another person is placed under a different or less restrictive order) should be avoided. Such clauses should not be negotiated in orders without prior approval of the appropriate Bureau Director.

.9 SUBMISSION OF AGREEMENTS FOR REVIEW AND APPROVAL

.9.1 RESTRAINT OF TRADE MATTERS

When negotiations result in agreement between the staff and proposed respondent, a copy of the draft agreement should be submitted to the Director of the Bureau of Competition for review prior to execution.

Attorneys in BC should first submit the agreement in draft form to the appropriate Assistant Director and the Assistant Director for Compliance. In Clayton Act § 7 and industry wide matters, a copy of the proposed agreement must be sent at the same time to the Bureau of Economics. A copy of the agreement also should be forwarded to BE in all other matters. Regional offices should submit the agreement in draft form to the Bureau Director for review by the Assistant Director staff. The latter are responsible for submission of a copy to the Assistant Director for Compliance for comment and delivery of an information copy to the Bureau of Economics when appropriate.

Upon approval of the draft and execution of an agreement by staff including the Regional Director or appropriate Assistant Director in BC, copies of the signed consent agreement, supporting memorandum and other necessary material shall be forwarded to the Bureau Director within 30 calendar days. Attorneys in BC should send a copy of the agreement to the Bureau of Economics at the same time. The Assistant Director will provide the Bureau of Economics with a copy of the agreement as soon as copies are received from a regional office. The Office of the Director and staff will complete their review of the matter as follows: (i) by the Assistant Director in regional office matters, within 5 working days; and (ii) by the Bureau Director in all matters, within 5 working days. Bureau action on staff recommendation shall be completed within 35 calendar days.

In Clayton Act § 7 matters and industry-wide matters, the Bureau of Economics should be invited to concur in or submit separate views regarding the consent agreement and supporting memorandum and materials. Ordinarily no more than 10 working days total will be allowed for Bureau of Economics concurrence or comments to reach the Director of the Bureau of Competition.

The Bureau of Economics may submit separate comments on any consent agreement pending review in the Office of the Director of the Bureau of Competition. When the Director of either Bureau provides separate comments or views on a settlement submitted by a regional office, the interested regional office will be notified of the nature of the input and may be given an opportunity to provide its own further comment prior to the matter being submitted to the Commission. See .11.1 below for additional procedures required to withdraw a matter from adjudication.

.9.2 CONSUMER PROTECTION MATTERS

When negotiations result in agreement between the staff and proposed respondent, an attorney in BCP or a regional office may execute a consent agreement after consultation with the program advisor. Ordinarily the matter is forwarded for review via the program advisor and the appropriate Assistant

Director either to the Evaluation Committee or, if the provisions are virtually identical with other recent orders in similar cases, to the Bureau Director. If the program advisor, Assistant Director, or Bureau Director do not agree with the terms of the settlement, they may either return the matter to the staff for corrections and further negotiations or submit separate comments to accompany the staff recommendation. The staff will be allowed an opportunity to furnish additional comments in response to any negative views of the program advisor or Bureau official.

(After an agreement has been signed, it shall be forwarded to the Bureau Director within 30 calendar days. Bureau action on the staff recommendation shall be completed within 35 calendar days.)

.9.3 NOTATION OF APPROVALS

The forms for settlement agreements (Illustrations 1 and 2) include provision for approvals by either the Regional Director or the Assistant Bureau Director and Bureau Director, as appropriate. All other staff approvals, concurrences and separate comments appear on transmittal memoranda rather than on the agreement.

.10 DOCUMENT PREPARATION

When a consent agreement is executed, the staff transmits to the Commission via the bureau and the Secretary all files and the following additional documents:

- a) Transmittal memorandum (OM Ch. 4: see also .10.1 below);
- b) Agreement (Illus. 1 or 2 below);
- c) Complaint (OM Ch. 4). A draft of the proposed complaint in Part 2 matters is attached to the agreement when signed by proposed respondent and the original is held for transmittal to the Commission (.10.2 below);
- d) Decision and Order (Illus. 5 or 6 below);
- e) Analysis to aid public comment (Illus. 7 below);

The illustrations referred to above contain general requirements for use as a guideline. They may be modified as warranted by circumstances of the case.

The Commission requires that all consent documents submitted by the staff be single-spaced. However, the Federal Register requires that all documents submitted to it for publication must be double-spaced. Staff therefore are required to submit both single and double-spaced copies of the agreement containing order and the staff analysis to aid public comment, together with a copy of the complaint in appropriate cases.

Care should be taken in the drafting of these documents to avoid incorrect or legally inexact descriptions. For example, executed consent agreements published for cement by the Commission should not be described as

"provisionally accepted." Such agreements are "accepted subject to final approval." See .13.1 below.

.10.1 TRANSMITTAL MEMORANDUM

The memorandum transmits the files and agreement papers to the Commission via the appropriate bureau. It should be patterned after the standard memorandum recommending complaint (see OM Ch. 4, "Complaints") except that certain information relating to proposed litigation need not be discussed unless it should be considered in making a choice between acceptance of the consent agreement and further proceedings. A statement of anticipated consumer and competitive impact and benefits should be made including, in appropriate situations, a concrete description of the classes and number of consumers who are likely to receive redress under the consent order, a description of the basis for inclusion of sunset provisions, and an evaluation of factors that may affect compliance enforcement. In Part 2 matters, the memorandum should indicate whether the investigation is complete, so that if the Commission determines to reject the proffered settlement it may know whether to issue the complaint forthwith or return the matter for further investigation. In Part 3 matters, the memorandum should discuss any revisions in the complaint and notice order contemplated by the agreement (see Illustration 4 for a suggested format to be used in comparing the original and revised language). In addition, the memorandum should: justify any difference in treatment among various parties in the same action or in different actions who are similarly situated; and provide detailed information on what remedies were considered and why different remedies were discarded.

.10.2 AGREEMENT

Before the original agreement is forwarded to proposed respondent for execution in a Part 2 matter, a duplicate copy of the proposed complaint should be attached and the original retained by the staff. When the executed agreement is returned to staff, the attorney should replace the duplicate of the complaint attached to the agreement with the original complaint.

Staff should furnish proposed respondents and their counsel with an adequate number of copies of the complaint, agreement, and order for their use while considering execution of the agreement. Attorneys may make such additional arrangements as they deem appropriate concerning exchange of copies of a partially executed agreement at intermittent stages in the settlement process (i.e., when signed by the staff attorney; when approved by the Regional or Bureau Director).

The complete original signed agreement must be submitted with the files to the Commission in a Part 2 matter. If changes must be made in the agreement and order after it already has been executed by some or all of the parties whose signatures are required and complete reexecution is not convenient, it is advisable to prepare corrected pages and insert them in the original agreement and order. Changes or corrections reflected only by letter agreements may become misplaced or may fail to receive full consideration and thus may be omitted from the agreement and order when accepted by the Commission, published in the Federal Register, and placed on the public record for comment. An appropriate number of copies of the agreement and order bearing all the required signatures (conformed copies) including initialled pages bearing changes is prepared by the bureau for submission to the Commission.

A copy of the executed agreement containing order in a Part 3 proceeding is attached to or submitted with the motion to withdraw the matter from adjudication (see .11.1 below). The staff should furnish the original agreement containing order, and the appropriate number of copies, to the Commission when it submits comments and views on the agreement.

The agreement and order do not become part of the public record in the proceeding unless and until accepted

by the Commission.

.10.3 ORDER

The agreed-to order or proffered order, set out in its entirety and containing the post-order compliance report and notification requirements (see OM Ch. 5, "Orders"), is part of the agreement, whether submitted under Part 2 or Part 3.

.10.4 COMPLAINT

In Part 2 matters, a proposed complaint is attached to and incorporated by reference into the agreement. In Part 3 matters the complaint, already a matter of public record, need only be identified and acknowledged by each respondent as having been served, unless the agreement contemplates revision of the complaint in whole or in part, in which event the revised complaint is incorporated by reference in the agreement and served on respondent with the decision and order. The "notice" portion should not be included in the complaint as incorporated. (See OM Ch. 4, "Complaints.")

.10.5 DECISION AND ORDER

Staff should submit a draft decision and order with each consent settlement agreement (see Illustrations 5 and 6). See OM Ch. 11, "Judicial Enforcement," for special provisions that should be included when the right to consumer redress is being preserved.

.10.6 ANALYSIS TO AID PUBLIC COMMENT

Staff should prepare and forward to the Commission an analysis of the proposed complaint and order written in nontechnical terms that can be easily understood. The purpose of this document is to advise the public concerning the nature of the law violations alleged and the remedies or other basis for disposition and settlement. Any substantive statement must be based upon the agreement documents, although paraphrasing in a few words the substance of a long provision is often appropriate. The focus of this analysis is upon the public impact and anticipated effects, including competitive effects, of the proposed settlement. The format for such an analysis is shown in Illustration 7.

.10.7 INITIAL COMPLIANCE REPORT

The initial compliance report provided in any settlement agreement should be forwarded to the Commission with the settlement papers (see .8.2 above).

.11 SETTLEMENT OF DOCKETED CASES

The Administrative Procedure Act (5 U.S.C. 554(c)(1)) provides that in an adjudicative proceeding any interested party shall have the opportunity to submit offers of settlement when time, the nature of the proceeding, and the public interest permit.

After the Commission has voted to issue a complaint, whether or not it actually has been served by the Secretary and a news release published, the case is in adjudicative status and is subject to the prohibition on ex parte communications to the Commission (see Rule 4.7). A consent agreement or settlement offer may be

considered by the Commission and the Commission may receive advice and comments of the staff concerning the terms of the settlement only after the case is withdrawn from adjudication. Even then caution must be exercised to assure that no improper *ex parte* references to the merits of the litigation are made to the Commission when there is a proposed consent settlement as to less than all the named respondents.

.11.1 MOTION TO WITHDRAW FROM ADJUDICATION

Once a matter is in Part 3 proceedings, the proper procedure for securing Commission consideration of a proposed settlement is by motion to withdraw the matter from adjudication (Rule 3.25). See .9 above for discussion of the requirements for obtaining review and approval of negotiations and a proposed settlement prior to execution of the agreement (i.e., prior to filing a motion to withdraw the matter from adjudication).

The staff must prepare and submit a good first draft of the memorandum to the Commission explaining the background of the case and the nature of the consent order for a consumer protection matter for review prior to execution of the agreement and filing of a motion. For competition matters, no memorandum is required. In both Bureaus, extensive oral communication is expected.

When complaint counsel and the Bureau Director sign the proposed settlement agreement, there should be a joint motion to withdraw the matter from adjudication under Rule 3.25(c) (see Illustration 8). A copy of the executed agreement must accompany the motion. The Secretary will enter an order withdrawing the matter from adjudication. Upon entry of said order as to one or more respondents, all proceedings before the Administrative Law Judge automatically will be stayed with respect to such respondents pending a determination by the Commission on acceptance of the proposed settlement.

Complaint counsel may not enter into a joint motion to withdraw a matter from adjudication unless the Bureau Director approves the consent agreement. Immediately after complaint counsel executes a consent agreement, it shall seek the Bureau Director's approval of the agreement and, if time is short, shall file a motion to stay the proceedings pending Bureau Director review. If the Bureau Director fails to approve the consent agreement, complaint counsel should then withdraw its agreement to the settlement. Respondent may then present a motion that the ALJ consider the agreement under the provisions of Rule 3.25(d).

When a motion is filed under Rule 3.25(d) by one or more respondents, the ALJ shall consider the motion and may certify the matter to the Commission together with a recommendation if it is determined in writing that there appears to be a likelihood of acceptance of the settlement by the Commission. Either the Administrative Law Judge or the Commission may order that further proceedings before the ALJ be stayed as to any or all of the respondents pending consideration of the motion and the order certifying the motion to the Commission. The Commission may, if it is satisfied that there is a likelihood of settlement, order that the matter be withdrawn from adjudication with respect to those respondents who have signed the agreement and motion in order that it may consider the arguments and comments in support of and against the settlement. Entry of an order by the Commission withdrawing the matter from adjudication as to one or more respondents shall stay further proceedings before the ALJ with respect to those respondents pending a determination by the Commission.

.11.2 PROCEEDINGS FOLLOWING WITHDRAWAL FROM ADJUDICATION

Upon entry of an order by the Secretary the staff should promptly submit its comments and report in support of the agreement. When the Commission issues an order withdrawing a matter from adjudication on motion of one or more respondents which is not joined in by both complaint counsel and the Bureau Director (Rule 3.25(d)), a minute is issued directing the staff to submit its comment and views expeditiously.

The content of the documents submitted by the staff will be determined by the charges of the complaint, the notice provisions for relief, terms of the

proposed agreement and order, and any intervening developments or new facts that may be material and relevant to the Commission's consideration and determination. In the event that staff oppose the settlement, they should describe in detail the facts and law that warrant rejection of the settlement offer because it is inappropriate, improper, or inadequate. See .10 above for discussion of the documents that ordinarily should be submitted.

The staff should be careful to ensure that copies of all necessary materials from both the adjudicatory files and the investigatory files are submitted as described in .10 above.

.12 COMMISSION ACTION ON PROFFERED AGREEMENTS

.12.1 BY THE COMMISSION

The Commission may accept an agreement, condition acceptance upon agreement to certain (usually minor) revisions, or return it to the staff with specific or general directions for further negotiations. The Commission may reject the agreement and issue the complaint in Part 2 matters, or issue an order remanding the matter to the Administrative Law Judge in Part 3 matters, or it may take such other action as may be deemed appropriate, including closing. When the Commission accepts an agreement, it is placed on the public record for comment.

.12.2 WITHDRAWAL BY PROPOSED RESPONDENT

The forms of settlement agreement approved for use by the Commission staff and the Rules of the Commission make no provision for unilateral withdrawal by proposed respondent and respondent from an executed settlement agreement either prior or subsequent to acceptance by the Commission. An order accepted by the Commission pursuant to such agreement may be altered, modified, or set aside only in accordance with the terms of the agreement and in the manner provided by statute for other orders. However, upon receipt by the Commission of a request to withdraw an agreement prior to issuance of the order, the Commission may determine to reject the agreement and return the matter to staff or remand it to adjudication (see, e.g., Heublein, Inc., D. 8904), or direct such other action as it may deem appropriate (see .12.1 above).

.13 ACCEPTANCE OF AGREEMENT

.13.1 ACCEPTANCE SUBJECT TO FINAL APPROVAL

When the Commission accepts an agreement, it issues a minute directing a news release giving the date the matter was placed on the public record and the date the 60-day period for reception of views and comments will expire. The minute also notes that copies of the agreement, order and analysis are transmitted to the Rules and Publications Branch for the Federal Register.

Before the matter is placed on the public record, the Secretary notifies the respondents by telephone and by letter that: (1) the Commission has accepted the executed consent agreement; (2) there will be a news release; and (3) the agreement and order, along with the proposed complaint (under Rule 2.34), staff analysis, news release, any initial report of compliance submitted pursuant to Rule 2.33 will be placed on the public record (see Illustrations 9A and B).

The Secretary will also notify any applicants of record when the matter is placed on the public record for

comment, and furnish them copies of the proposed complaint (if the agreement is accepted under Rule 2.34), agreement and order, staff analysis, and news release.

The Office of Public Information is primarily responsible for preparation of a public announcement. OPI ordinarily will contact the staff attorney to review its draft news release.

.13.2 PUBLIC RECORD

The Commission directs the Secretary to place all documents referred to in .13.1 on the public record for the comment period.

.13.3 LETTERS OF COMMENT

.13.3.1. Receipt of Comments

Interested persons should address letters of comment or views respecting matters on the public record to the Secretary. They will be referred to the Non-Public Records Section (if a Part 2 matter) or the Public Records Section (if a Part 3 matter) in the Records Division which are jointly responsible for placing such comments on the public record. The Non-Public or Public Records Section will make a copy of all letters for the public record and for the appropriate staff. Commission staff handling the matter should retain a copy of any letters addressed directly to the staff, and promptly forward to the Records Division the original for filing and one copy for placement on the public record, respectively. The original is placed in a permanent "Public Record Comment" file and retained with the official files. The convenience copy on the public record is removed at the end of the 60-day period, and placed in a "pending" file until a determination is made by the Commission.

.13.3.2 Time Limits

An agreement coming off the public record must be forwarded to the Commission:

- a. by the Secretary no later than 5 days after the 60-day comment period has expired when there has been no public comment;
- b. by the staff no later than 30 days after the 60-day comment period has expired when there has been public comment.

The preparation of replies to letters of comment or views and submission of a final recommendation should be accomplished as quickly as possible. The staff shall provide the Commission with an explanation for any delay of more than 100 days from the signing of an agreement to its transmittal to the Commission or of more than 60 days from the close of the public comment period to the submission of the agreement to the Commission for final action.

(Special attention should be given to the prompt disposition of consent agreements providing for consumer redress or involving matters of health and safety.)

.13.3.3 Staff response to Comments

At the end of the public comment period, if comments have been received, the Records Division transmits the complete file to staff handling the matter (see Illustration 10). A reply to each letter of comment or view is prepared by staff for the signature of the Secretary, and is included with the comments when the agreement

is resubmitted to the Commission with a staff recommendation.

.13.3.4 No Comments Received

If comments have not been received, the staff is so notified by a copy of the memorandum for the minutes Branch advising that the complete file is being transmitted for nonagenda circulation to the Commission (see Illustration 11).

.14 FINAL STAFF RECOMMENDATION: SUPPORTING DOCUMENTS

Staff should submit a memorandum to the Commission (1) advising whether the comments or views disclose facts or considerations indicating that the agreement is inappropriate or inadequate and (2) containing recommendations as to appropriate action. If the recommendation is that the Commission issue the order, a revised draft of the decision and order must be submitted by the attorney noting, that comments were received and considered (see Illustration 12 and .10.5 above). When the order has been modified by supplemental agreement with proposed respondent as a result of public comments (or for some other reason), a comparison of the original and revised language should be furnished to the Commission (see Illustration 4).

.15 FINAL COMMISSION ACTION ON THE AGREEMENT

.15.1 ISSUANCE OF ORDER

If the Commission does not withdraw its acceptance of the agreement, it issues another minute directing issuance of the complaint (except in Part 3 matters where the complaint is not being amended) and approving the decision and order disposing of the matter. Replies to the commenters of record are signed by the Secretary by direction of the Commission and transmitted to the Records Division to be mailed when the decision and order are issued. A news announcement is released by the Office of Public Information after the complaint and the decision and order have been issued. See OM Ch. 17 for further information about news releases.

.15.2 WITHDRAWAL OF ACCEPTANCE

If, after reviewing the comments, the Commission determines to withdraw its acceptance of the agreement, the Commission may return the files to the bureau or regional office for further negotiation seeking an agreement conforming with the Commission's direction or take other action as provided in .12.1 above. The Commission may direct such telephonic and written notification to the parties, commenters, and the public as it deems appropriate. A notice given by telephone should be confirmed by a written acknowledgement. This written notice should be prepared in the bureau or regional office handling the matter for signature by the Secretary (see, e.g., Illustration 13).

When the Commission returns the matter to staff without instruction, the negotiation and review procedures outlined in this chapter may be resumed. If the staff is unable to negotiate a satisfactory modified agreement, the bureau or regional office should consider recommending issuance of the complaint in a Part 2 matter or remand of the case to adjudication in a Part 3 matter, or any other appropriate action.

.15.3 OF A MODIFIED SETTLEMENT AGREEMENT

An agreement may be modified by supplemental letter agreement signed by the person or its counsel when the changes are minor or by reexecution of the agreement when the changes are substantial.

When the Commission accepts a modified agreement and order, it is not required to republish the settlement and make opportunity available for public comment. However, the Commission may do so in its discretion if the changes are substantial and further comment is considered desirable or necessary. The staff should draft and submit to the Commission a revised decision and order which states in an appropriate manner in the decision in what way the order has been modified. (See Illustration 12.)

Form for Consent Order Agreements Prior to Completion of Investigation (Part 2 of the Rules)

UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION

In the Matter of XXX CORPORATION, a corporation, and JOHN DOE and RICHARD ROE, individually and as officers of said corporation.) FILE NO. 000 0000) AGREEMENT CONTAINING) CONSENT ORDER TO) CEASE AND DESIST)

The Federal Trade Commission having initiated an investigation of certain acts and practices of XXX Corporation, a corporation, and John Doe and Richard Roe, individually and as officers of said corporation, and it now appearing that XXX Corporation, a corporation, and John Doe and Richard Roe, individually and as officers of said corporation, hereinafter sometimes referred to as proposed respondents, are willing to enter into an agreement containing an order to cease and desist from the use of the acts and practices being investigated,

IT IS HEREBY AGREED by and between XXX Corporation, by its duly authorized officer, and John Doe and Richard Roe, individually and as officers of said corporation, and their attorney, and counsel for the Federal Trade Commission that:

1. Proposed respondent XXX Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of _____, with its office and principal place of business located at _____, in the City of _____, State of _____.

Proposed respondents John Doe and Richard Roe are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation and their address is the same as that of said corporation.

2. Proposed respondents admit all the jurisdictional facts set forth in the draft of complaint here attached.

- 3. Proposed respondents waive: (a) Any further procedural steps; (b) *The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law; and (c) All rights to seek judicial review or otherwise to challenge or contest the validity of the order

entered pursuant to this agreement.

4. This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission it, together with the draft of complaint contemplated thereby, will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify the proposed respondents, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.

5. *This agreement is for settlement purposes only and does not constitute an admission by proposed respondents that the law has been violated as alleged in the draft of complaint here attached, in that the facts as alleged in the draft complaint, other than jurisdictional facts, are true.

*These provisions may not be appropriate when the Commission wishes to preserve its right to obtain consumer redress. See OM Ch. 11, "Judicial Enforcement," especially Illustration 18.

6. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of § 2.34 of the Commission's Rules, the Commission may, without further notice to proposed respondents, (1) issue its complaint corresponding in form and substance with the draft of complaint here attached and its decision containing the following order to cease and desist in disposition of the proceeding and (2) make information public in respect thereto. When so entered, the order to cease and desist shall have the same force and effect and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery by the U.S. Postal Service of the complaint and decision containing the agreed-to order to proposed respondents' address as stated in this agreement shall constitute service. Proposed respondents waive any right they may have to any other manner of service. The complaint may be used in construing the terms of the order, and no agreement, understanding, representation, or interpretation not contained in the order or the agreement may be used to vary or contradict the terms of the order.

7. Proposed respondents have read the proposed complaint and order contemplated hereby. They understand that once the order has been issued, they will be required to file one or more compliance reports showing that they have fully complied with the order. Proposed respondents further understand that they may be liable for civil penalties in the amount provided by law for each violation of the order after it becomes final.

ORDER

IT IS ORDERED that respondents . . .

[Insert order; see OM Ch. 5 for procedures and illustrations of standard order provisions.]

Signed this ___ day of ____, 19__.

XXX CORPORATION, a corporation

By _____,
(Name) (Title)

[All consent agreements _____
involving a corporation (Street)
must be signed by either
the president or chief _____
executive officer] (City and State)

and as an officer of

John Doe, individually
said corporation

Richard Roe, individually
and as an officer of
said corporation

Attorney for Proposed
Respondents

Counsel for the Federal
Trade Commission

*APPROVED

Assistant Director (or Regional Director - as appropriate) Bureau of _____

Director
Bureau of _____

*If by a Regional Office, only the Regional Director's approval should appear on the agreement. The forwarding memorandum should be approved as set out immediately below:

Regional Director

CONCUR: _____

Director, Bureau of
Competition (or Consumer Protection)

Director, Bureau of
Economics [if Clayton § 7 or industrywide matter]

Form for Consent Order Agreements in Cases Under Part 3 of the Rules

UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION

_____)
In the Matter of)
)
XXX CORPORATION,) DOCKET NO.
a corporation, and) AGREEMENT CONTAINING
JOHN DOE and) CONSENT ORDER TO
RICHARD ROE,) CEASE AND DESIST
individually and as officers)
of said corporation.)
_____)

The agreement herein, by and between XXX Corporation, a corporation, by its duly authorized officer, and John Doe and Richard Roe, individually and as officers of said corporation, hereafter sometimes referred to as respondents, and their attorney, and counsel for the Federal Trade Commission, is entered into in accordance with the Commission's Rule governing consent order procedures. In accordance therewith the parties hereby agree that:

1. Respondent XXX Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of _____, with its office and principal place of business located at _____, in the City of _____, State of _____.

Respondents John Doe and Richard Roe are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation, and their address is the same as that of said corporation.

2. Respondents have been served with a copy of the complaint issued by the Federal Trade Commission charging them with violation of [identify statute and section], and have filed answers to said complaint denying said charges.

3. Respondents admit all the jurisdictional facts set forth in the Commission's complaint in this proceeding.

- 4. Respondents waive:
(a) Any further procedural steps;
(b) *The requirement that the Commission's decision contain a statement of findings of fact and conclusions of the law;

- (c) All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement; and
- (d) any claim under the Equal Access to Justice Act.

5. This agreement shall not become a part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission it will be placed on the public record for a period of sixty (60) days and information in respect thereto publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify the respondents, in which event it will take such action as it may consider appropriate, or issue and serve its decision, in disposition of the proceeding.

6. *This agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in the draft of complaint are attached, or that the facts as alleged in the draft complaint, other than jurisdictional facts, are true.

*These provisions may not be appropriate when the Commission wishes to preserve its right to obtain consumer redress. See OM Ch. 11, "Judicial Enforcement," especially Illustration 18.

7. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of Section 3.25(f) of the Commission's Rules, the Commission may without further notice to respondents, (1) **issue its decision containing the following order to cease and desist in disposition of the proceeding, and (2) make information public in respect thereto. When so entered, the order to cease and desist shall have the same force and effect and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders. The order shall become final upon service. Delivery by the U.S. Postal Service of the [amended complaint and] decision containing the agreed-to order to respondents' address as stated in this agreement shall constitute service. Respondents waive any right they might have to any other manner of service. The complaint may be used in construing the terms of the order, and no agreement, understanding, representation, or interpretation not contained in the order or in the agreement may be used to vary or to contradict the terms of the order.

8. Respondents have read the complaint and the order contemplated hereby. They understand that once the order has been issued, they will be required to file one or more compliance reports showing that they have fully complied with the order. Respondents further understand that they may be liable for civil penalties in the amount provided by law for each violation of the order after it becomes final.

ORDER

IT IS ORDERED that respondents . . .

[Insert order; see OM Ch. 5 for procedures and illustrations of standard order provisions.]

Signed this ___ day of _____, 19__.

**When the complaint is revised, the language should be changed to reflect this fact as follows: "(1) issue its amended complaint corresponding in form and substance with the draft of complaint here

attached and its decision containing the following order to cease and desist in disposition of the proceeding, and..."

XXX CORPORATION, a corporation

By _____, _____ (Title)

(Street)

[All consent agreements _____ involving a corporation _____ (City and State) must be signed by either its president or chief executive officer.] _____

John Doe, individually and as an officer of said corporation

Richard Roe, individually and as an officer of said corporation

Attorney for Respondents

Counsel for the Federal Trade Commission

APPROVED:

Assistant Director (or Regional Director - as appropriate)
Bureau of _____

Director
Bureau of _____

Provision for Simultaneous Filing of

Proposed Findings of Fact and
Conclusions of Law

(To be inserted in Illustrations 1 or 2 in lieu of the standard paragraphs, as appropriate:)

2. (Proposed) respondents admit all the proposed findings of fact and conclusions of law submitted by the Commission's staff simultaneously along with this agreement.

3. (Proposed) respondents waive:

(a) Any further procedural steps; and

(b) All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement.

Sample Format for Comparison of Original With Revised
Provisions of an Order

ORIGINAL

IT IS ORDERED that respondents, _____, a corporation, and _____, a corporation, and their successors and assigns, and their officers, and respondents' representatives, employees, salesmen, agents or solicitors, in connection with the advertising, offering for sale, sale or distribution of magazines or any publications [or merchandise] (hereinafter sometimes referred to as products), [or] subscriptions to purchase any such products or services, or in the collection or attempted collection of any delinquent [or other] subscription [contract or other] account, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

REVISED

IT IS ORDERED that respondents, _____, a corporation and _____, a corporation, their successors and assigns, and their officers, and respondents' respective representatives, employees salesmen, agents or solicitors, directly or indirectly through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of magazines or any other publications (hereinafter sometimes referred to as products or services) by subscriptions to purchase any such products or services through a "paid-during-service" plan, or through a "cash sale" plan (as "cash sale" is hereinafter defined), or in the collection or attempted collection of any delinquent paid-during-service or cash sale subscription account obtained through door-to-door, mail or telephone solicitation, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

In order to avoid any misunderstanding as to the application of the phrase "mail or telephone", inserted after "door-to-door" and before "solicitation", (see last underscoring before definition of "commerce" supra), respondents requested and we agreed to the following definition of that phrase which also appears in paragraph 1(a) of the first "further ordered" paragraph:

ORIGINAL

(a) . . . deliver, by certified mail, a copy of this Decision and Order to each of their present and future dealers or franchisees, representatives, licensees, employees, salesmen, agents, solicitors, independent contractors, or other representatives who [sell, promote or distribute] the products or services included in this Order;

REVISED

(a) deliver, by certified mail or by hand, a copy of this Decision and Order to each of their present and future dealers or franchisees, if any, representatives, licensees, employees, salesmen, agents, solicitors, independent contractors, or other authorized representatives who, as described in the main preamble to this Order, are engaged in the promotion, offering for sale, sale or distribution of the products or services included in this Order by means of paid-during-service or cash sale plans employing door-to-door, mail or telephone solicitation of subscription contracts; provided, however, that the provisions of this

paragraph (a) shall not apply to those who are merely engaged in the physical distribution of magazines or other products included in this Order.

The insertion of phrases "or by hand" and "if any" and the word "authorized" have heretofore been explained and accepted by the Commission. The remaining inserts are designed to reach the same "distributors" envisioned in the opening preamble and to reach "cash" as well as PDS sales. The proviso is completely new.

[Note: Differences between the original and revised versions are indicated by brackets [] around deletions from the original and underscoring of insertions in the revision.]

Form of Decision and Order for Use in Settlement
of Matters Under Part 2 of the Rules

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

| | | |
|------------------------------|---|--------------|
| _____ |) | |
| In the Matter of |) | |
| |) | |
| XXX CORPORATION, |) | DOCKET NO. |
| a corporation, and |) | |
| JOHN DOE and |) | DECISION AND |
| RICHARD ROE, |) | ORDER |
| individually and as officers |) | |
| of said corporation |) | |
| |) | |
| _____ |) | |

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the (identify Regional Office or Bureau) proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act [or other statute]; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true* and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, (and having duly considered the comments received) now in further conformity with the procedure prescribed in § 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent XXX Corporation is a corporation organized, existing and doing business under and by

virtue of the laws of the State of _____, with its office and principal place of business located at in the City of _____, State of _____.

Respondents John Doe and Richard Roe are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation, and their principal office and place of business is located at the above stated address.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

IT IS ORDERED that respondents . . .
[Insert full text of order.]

By the Commission.

[Seal]

[name]

Secretary

ISSUED: _____

*This phrase may not be appropriate when the Commission wishes to preserve its right to obtain consumer redress. See OM Ch. 11, "Judicial Enforcement."

Form of Decision and Order for Use in Settlement of Matters Under Part 3 of the Rules

UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: John Doe, Chairman Sally Smith John Fingerwood

In the Matter of XXX CORPORATION, a corporation. DOCKET NO. DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended [or other statute], and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true* and waivers and other provisions as required by the Commission's Rules; and

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with § 3.25(c) of its Rules; and

*This phrase may not be appropriate when the Commission wishes to preserve its right to obtain consumer redress. See OM Ch. 11, "Judicial Enforcement."

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in § 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

- 1. Respondent XXX Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of ____, with its office and principal place of business located at ____, in the City of ____, State of ____.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

IT IS ORDERED that respondent. . . .

[Insert full text of order.]

By the Commission.

[name]

Secretary

[Seal]

ISSUED:

Analysis of Proposed Consent
Order to Aid Public Comment.

The Federal Trade Commission has accepted an agreement to a proposed consent order from _____

The proposed consent order has been placed on the public record for sixty (60) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

(Description of the allegations of this complaint.)

(Description of the terms of the proposed order and, when appropriate, of the terms of the agreement.)

(Description, when appropriate, of the anticipated effects of the proposed order, such as the competitive impact of the proposed order.)

The purpose of this analysis is to facilitate public comment on the proposed order, and it is not intended to constitute an official interpretation of the agreement and proposed order or to modify in any way their terms.

Form of Joint Motion to Withdraw a Matter from Adjudication for Consideration of a Settlement

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

| | | |
|------------------|---|------------|
| _____ |) | |
| In the Matter of |) | |
| |) | |
| XXX Company, |) | DOCKET NO. |
| a corporation. |) | |
| |) | |
| _____ |) | |

JOINT MOTION TO WITHDRAW FROM ADJUDICATION

To the Honorable _____
Administrative Law Judge

Counsel Supporting the Complaint and Respondent, XXX Company, through its attorney, pursuant to Section 3.25(b) and (c) of the Commission's Rules of Practice, move the Commission to withdraw Docket No. _____ from adjudication for the purpose of considering the attached consent agreement.

Respectfully submitted,

By _____
Counsel Supporting the
Complaint

By _____
Attorney for Respondent

[Date]

Form of Written Acknowledgement by the
Secretary That a Consent Agreement
Has Been Accepted and Placed on
the Public Record
Under Rule 2.34

Re: File No.

Confirming today's telephone call from this Office, you are hereby notified that the Commission, in accordance with § 2.34 of its Rules, has accepted the executed agreement submitted in the above-captioned matter. A news release concerning this matter will be issued on

On this agreement and order, the proposed complaint, a staff analysis of the order, any initial report of compliance submitted pursuant to Rule 2.33, and the news release will be placed on the public record for a period of 60 days during which time the Commission will receive and consider any comments or views concerning the order that may be filed by interested persons.

Following the 60-day period, the Commission may either issue the complaint and decision and order as contemplated by the agreement, or withdraw its acceptance of the agreement and thereafter take such action as it considers appropriate.

Sincerely,

[Name]
Secretary

Form of Written Acknowledgement by the
Secretary That a Consent Agreement
Has Been Accepted and Placed on
the Public Record Under Rule 3.25

Re: Docket No.

Confirming today's telephone call from this office, you are hereby notified that the Commission, in accordance with § 3.25 of its Rules, has accepted the executed agreement submitted in the above-captioned matter. A news release concerning this matter will be issued on

On this agreement and order, a staff analysis of the order, any initial report of compliance submitted pursuant to Rule 2.33, and the news release will be placed on the public record for a period of 60 days during which time the Commission will receive and consider any comments or views concerning the order that may be filed by interested persons.

Following the 60-day period, the Commission may either issue the decision and order as contemplated by the agreement, or withdraw its acceptance of the agreement and thereafter take such action as it considers appropriate.

Sincerely,

[Name]
Secretary

Memorandum Transmitting File to Staff following Receipt
of Public Comment on Proposed Consent Order

Date:

MEMORANDUM FOR COMMISSION COUNSEL

Subject: Notice of Expiration of Time for Comments or views Ended:

File./Docket No.

Title:

The attached agreement, complaint (if Part 2), and staff analysis have been on the public record for 60 days and comments and/or views have been received in the Records Division.

The file is transmitted herewith for submission to the Commission in accordance with guidelines established in Operating Manual Chapter 6.13.3.2, "Time Limits."

[name]
Director, Records Division

cc: Minutes Branch
Bureau Director
Assistant Director

Memorandum Transmitting File to
Minutes Branch After Period for Public Comment
When No Comment Received

Date:

MEMORANDUM FOR MINUTES BRANCH

Subject: Notice of Expiration of Time for Comments or views Ended:

File/Docket No.

Title:

The attached agreement, complaint (if Part 2), and staff analysis have been on the public record for 60 days and no comments have been received in the Records Division.

The file is transmitted for Non-Agenda circulation to the Commission for its final decision with the recommendation that the Commission issue the complaint (if Part 2) and the decision and order.

[name]
Director, Records Division

cc: Commission Counsel
Bureau Director
Assistant Director

Provision in Revised Decision and Order Showing
Receipt and Consideration of Public Comment

When public comment is received concerning a consent agreement placed on the public record, the staff must submit to the Commission with its recommendation for final approval of the proposed agreement and order a revised Decision and Order which reflects the fact that such comment was received and considered. The phrase that must be added to the last preliminary paragraph of the Decision and Order is underscored here for emphasis:

The Commission having considered the matter [and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect,]* and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to § 2.34 [or 3.25] of its Rules, now in further conformity with the procedure prescribed in § 2.34 (or 3.25) of its Rules, the Commission hereby [issues its complaint,]* makes the following jurisdictional findings and enters the following order:

When the provisions of the order have been modified by supplemental agreement with respondents as a result of public comment, there should be a descriptive statement concerning intervening events leading up to entry of a modified order (see, e.g., the Decision and Order in Xerox Corporation, Dkt. 8909 (1975)).

*The language bracketed here appears only in Part 2 Decisions and Orders; it is not required in Part 3 matters in which a complaint already has been issued.

Sample of Written Notification by the Secretary
That the Commission Has Withdrawn Its
Acceptance of a Consent Agreement

Re: XXX Corporation
Docket No.

Dear

Thank you for your recent letter commenting on the Federal Trade Commission's consent order in the [name of company] proceeding. Your letter was placed on the public record pursuant to § 3.25(f)* of the Commission's Rules and was given serious consideration by the Commission.

The Commission has determined [,upon recommendation of the staff,) that the consent order should be rejected and has directed that during the next 30 days the [bureau or office] should meet with [name of company] for the purpose of preparing a revised consent agreement. If a revised consent agreement is submitted and accepted by the Commission, it may be placed on the public record for 60 days for comment. The Commission may order the matter returned to adjudication unless a revised consent agreement acceptable to the Commission is submitted to it.

By direction of the Commission.

[Name]
Secretary

*These items will have to be revised for use in matters under Part 2 of the Rules (i.e., "File No."; "§ 2.34"; and "such disposition of the matter as may be appropriate").