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## .1 IN GENERAL

The Commission's substantive rulemaking authority derives from several statutes that establish varying procedural requirements for the promulgation and enforcement of rules. The distinctions between substantive rulemaking and related activities are noted:

- (1) The development and issuance of the Commission's own procedural rules, set out in its Rules of Practice, do not constitute substantive rulemaking. Petitions for changes in the Commission Rules of Practice are referred to the General Counsel for analysis and recommendation to the Commission. Although public comments are occasionally invited, these rules require only publication in the Federal Register to become effective. (See 5 U.S.C. §553(b)(3)(A).)
- (2) The issuance by the Commission of interpretations of the substantive laws it administers -- industry guides, advisory opinions, policy statements, and the like (OM Ch. 8) -- does not constitute substantive rulemaking.
- (3) Substantive rulemaking is nonadjudicatory and nonspecific in that it does not single out individuals or entities as targets, but deals rather with the practices of an entire industry. Therefore, it should be differentiated from those activities of the Commission that seek enforcement against specific respondents, including issuance (OM Ch. 4) and litigation (OM Ch. 10) of administrative complaints, issuance of orders to cease and desist (OM Ch. 5), acceptance of consent agreements (OM Ch. 6), compliance/civil penalty proceedings (OM Chs. 11 and 12) and various other enforcement techniques (OM Ch. 3).

Substantive rulemaking represents an effort to shape the details of substantive law by means of a unitary proceeding, in contrast to reliance upon case-by-case adjudication as the means for achieving this result. In National Petroleum Refiners Association v. FTC, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974), which held that the FTC has substantive rulemaking power in addition to adjudicatory power to carry out its mandate under FTCA §5, the court described some of the advantages of rulemaking over adjudication. Rulemaking can save the agency resources compared with proceeding on a case-by-case basis to terminate industry-wide practices; it can provide businesses greater certainty as to what business practices are not permissible; it allows the agency to solicit and consider a wide range of data and viewpoints from various interested persons to formulate a rule that is sound and fair to those who will be affected by it, and it avoids singling out one respondent for initial imposition of a new and perhaps costly legal obligation.

## .2 STATUTORY AUTHORITY FOR SUBSTANTIVE RULEMAKING

### .2.1 SPECIFIC STATUTORY AUTHORITY IN NARROWLY DEFINED SUBSTANTIVE AREAS

Various statutes dealing with narrow substantive areas expressly grant the Commission authority to promulgate rules implementing provisions of those statutes. They include:

- (1) The Clayton Act (1914), as amended by the Robinson-Patman Act (1936) (only for fixing quantity limits under §2(a))
- (2) Wool Products Labeling Act (1939)
- (3) Fur Products Labeling Act (1951)

- (4) Textile Fiber Products Identification Act (1965)
- (5) Fair Packaging and Labeling Act (1966)
- (6) Petroleum Marketing Practices Act (1978)
- (7) Title I of the Magnuson-Moss Warranty - Federal Trade Commission Improvements Act -- (1975) warranty provisions
- (8) Energy Policy and Conservation Act (1975)

Procedures for promulgating rules under these specific statutory grants are in Subpart C of Part 1 of the Commission Rules of Practice and reflect the various statutory requirements in § 6 of the Textile Fiber Products Identification Act, § 109(a) of the Magnuson-Moss Warranty - FTC Improvements Act, § 336 of the Energy Policy and Conservation Act and § 203(d) of the Petroleum Marketing Practices Act. In addition, the Commission must comply with the National Environmental Policy Act of 1969 (see .3.11.2.1 and .3.11.2.3 below), the Paperwork Reduction Act of 1980 (see .3.24.2.4 below), and the Regulatory Flexibility Act (see .3.11.2.2, .3.11.2.4, .3.24.2.3, and .3.24.2.5 below).

## .2.2 THE MAGNUSON-MOSS WARRANTY - FTC IMPROVEMENTS ACT: TITLE II

In contrast to the narrow substantive rulemaking authority discussed immediately above, §202 of the Magnuson-Moss Warranty - FTC Improvements Act, enacted January 4, 1975, authorizes the Commission to promulgate rules which define with specificity acts or practices in or affecting commerce which are unfair or deceptive. FTCA §18(a)(1)(B). All references to FTCA sections in this chapter refer to the Act as amended by Magnuson-Moss and the 1980 Improvements Act. Rules promulgated under FTCA §18 are referred to as "trade regulation rules" (TRRs). (Rule 1.7.)

This broad grant of substantive rulemaking authority also provides that TRRs may include requirements aimed at preventing the future occurrence of unfair or deceptive acts or practices. The procedures for promulgation are in Subpart B of Part 1 of the Commission's Rules, more specifically by Rules 1.7 through 1.20, which reflect the procedural requirements set out in FTCA §§18 and 22.

Section 205(a) of Magnuson-Moss amended FTCA §5 by adding subsection (m)(1)(A), which authorizes the commencement of a civil penalty suit in a United States District Court against any person, partnership, or corporation that violates a TRR with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and that it is prohibited by a TRR. In addition, §206 of Magnuson-Moss amended the FTCA by adding §19, which authorizes commencement of a civil action in a United States district court, or a state court of competent jurisdiction, against a violator of a TRR to provide redress for consumers or other persons, partnerships, or corporations who are injured by such violation.

## .2.3 FTCA §6(g) AUTHORITY FOR SUBSTANTIVE RULEMAKING

Although it had long been contended that the Commission's organic statute granted broad substantive rulemaking authority in support of the mandate of §5 of that Act, the Commission during its first forty-nine years limited its rulemaking activities either to the procedural area or to the narrow substantive areas specifically authorized by certain of the statutes discussed in .2.1 above. When the Commission began to promulgate substantive rules, it maintained that FTCA §6(g) authorizes rulemaking in support of §5, and

that nothing in the latter section specifically precludes recourse to nonadjudicatory procedures such as substantive rulemaking even though the section's sole procedural reference is to adjudication. This assertion of broad substantive rulemaking authority was directly challenged in connection with the Commission's promulgation of the "Octane" TRR, with the result that the Court of Appeals in National Petroleum Refiners Assoc., *supra*, sustained the Commission by holding that it had authority to promulgate rules with substantive effect.

### .2.3.1 Effect of the Magnuson-Moss Warranty - FTC Improvements Act

Section 202(a) of Magnuson-Moss provides that the Commission's §18 authority is its only authority to promulgate rules respecting unfair or deceptive acts or practices. Section 18 does not, however, affect the Commission's authority to prescribe rules (including interpretive rules) and general statements of policy with respect to unfair methods of competition in or affecting commerce. (See .4 below.)

Moreover, the Magnuson-Moss amendments to the FTCA do not affect the validity of any rule that was promulgated under FTCA §6(g) prior to the date of enactment of those amendments. §202(c)(1) of Magnuson-Moss. In addition, the Magnuson-Moss enforcement procedures, i.e., civil penalty and consumer redress actions (FTCA §5(m)(1)(A) and 19), may be used with respect to violations of rules that were promulgated pursuant to the Commission's §6(g) rulemaking authority prior to the enactment of the Magnuson-Moss amendments.

## .3 PROCEDURES FOR MAGNUSON-MOSS RULEMAKING

### .3.1 WHEN IS PROMULGATION OF AN INDUSTRY-WIDE RULE APPROPRIATE?

When staff becomes aware of allegedly unfair or deceptive acts or practices that appear widespread, it should consider whether rulemaking, as contrasted with adjudication, is appropriate. Some of the relevant factors to be considered include:

- (1) Prevalence of the acts or practices under investigation. When a practice exists on a widespread basis, rulemaking has advantages over case-by-case adjudication as detailed in .1 above. The precise degree of prevalence appropriate for undertaking a TRR will vary according to such factors as seriousness of consumer injury, vulnerability of the affected consumer group, amount of money involved in the given transaction, and severity of the contemplated rule's impact both on the affected industry, in general and especially on those industry members who did not engage in the underlying unfair or deceptive practices.
- (2) Cost of industry-wide investigation and rulemaking proceedings.
- (3) Feasibility of enforcement of the TRR by the Commission.

### .3.2 SUMMARY OF THE RULEMAKING PROCESS

The following is a step-by-step summary of the rulemaking process with citations to the relevant substantive sections of this chapter and the Rules of Practice:

- (1) Rule development begins with an investigation. The investigation may be conceived and initiated by staff, or undertaken in response to a Commission or Congressional directive or in response to a petition from an outside party. (Rule 1.9 and .3.3 below)

- (2) An investigation oriented towards rulemaking will virtually always be industry-wide, and may require Commission as well as Bureau Director approval. (See OM Ch. 3.1.2.4.1.) A memorandum requesting the opening of a seven-digit industry-wide investigation must be prepared and submitted to the Bureau Director for approval. The request for the investigation should be initially routed as specified in OM Ch. 3. If Commission approval of the industry-wide investigation will be required, the memorandum should be addressed to the Commission via the Bureau Director. That memorandum must include a cost summary. (See OM Ch. 18.4.)
- (3) To obtain authority to use compulsory process in an investigation, the staff must request an investigational resolution from the Commission by memorandum addressed to the Commission via the Bureau Director. The request for approval of the resolution may be submitted concurrently with request for approval of the investigation. In this case a single memorandum containing the information required for approval of the investigation plus justification for the use of compulsory process, is used. (See OM Ch. 3.3.6.7.3.)
- (4) When the investigation is substantially completed, the staff may submit an initial staff report to the Commission proposing the initiation of a TRR proceeding. The report must provide sufficient reason for the Commission to conclude that corrective action is warranted and that rulemaking is the enforcement method of choice. (See .3.8 and .3.9 below.)
- (5) If the Commission determines that rulemaking may be appropriate, an advance notice of proposed rulemaking is published in the Federal Register and a "R" number is assigned. Copies are sent to the Senate Committee on Commerce, Science and Transportation and to the House Committee on Energy and Commerce. (See .3.8.2.3 and .3.8.2.4 below.)
- (6) The staff, upon obtaining Commission authorization, should make available for public inspection the information that was gathered in staff's investigation and that is not exempt from disclosure under the FOIA. (See .3.10.3 below.)
- (7) After considering all information and comments received in response to the advance notice, the staff advise the Commission whether to proceed with rulemaking. (See .3.11 below.) If the Commission determines to do so, it publishes an initial notice of proposed rulemaking (See .3.12.1 below) no sooner than 30 days after submitting a copy to the Senate Committee on Commerce, Science and Transportation and to the House Committee on Energy and Commerce. (See .3.11.2.4 below.) At this point the matter is assigned to a Presiding Officer who is responsible for scheduling and holding a public hearing and maintaining the rulemaking record. (See .3.12.2 below.)
- (8) The staff arranges with the Presiding Officer for the organization of the rulemaking record and the placement of all relevant materials not exempt from disclosure under the FOIA on the rulemaking record, i.e., the body of materials the staff has collected in the course of its investigation that will eventually be reviewed by the Commission. The nonrelevant materials will remain available for public inspection. (See .3.12.3.3 below.)
- (9) Comments on the proposed TRR, in the form of written submissions as well as oral presentations at the public hearings, are solicited formally in both the advance and initial notices of proposed rulemaking and are also solicited informally by staff. The purpose of the submissions and hearings is to further develop a body of information on the record to enable the Commission to determine whether issuance of a final TRR, in the form proposed by staff or some other form, is warranted. (See .3.12.4 below.)

- (10) The Presiding Officer publishes a final notice of proposed rulemaking (See .3.18 below) which includes, among other items, designated issues, unless there are none, and the time and place of the informal public hearing. But see .3.11.2.1.1 below for alternative procedures that obviate the need for a final notice.
- (11) After the conclusion of the public hearings, and the period for the filing of rebuttal submissions, the staff issues a final staff report containing an analysis of the record and recommendations as to whether a TRR should be issued and, if so, the final form it should take. (See .3.21 below.)
- (12) After the staff report has been published, the Presiding Officer issues a recommended decision pursuant to Rule 1.13(g). (See .3.22 below.)
- (13) The final staff report and the Presiding Officer's recommended decision are placed on the rulemaking record and final public comments on both of these reports are invited. (See .3.23.1 below.)
- (14) The staff reviews the comments received and prepares a summary for the Commission. (See .3.23.3 below.)
- (15) Staff then prepares a final recommendation memorandum with appropriate letters and notices. This memorandum is forwarded to the Commission via the Bureau Director together with the Director's recommendations and those of the Bureau of Economics. (See .3.24.1 below.)
- (16) At this point the Commission may decide to schedule oral presentations directly to the Commission by selected rulemaking participants. (See .3.24.1 below.)
- (17) The Commission makes its final determination based on the rulemaking record as a whole. (See .3.24.1 below.) The final rule is subject to judicial review. (See .3.26 below.)
- (18) If the Commission decides to promulgate a TRR, it will direct the staff to prepare a Statement of Basis and Purpose (see .3.24.2.1 below) and a Regulatory Analysis. (See .3.24.2.3 below.)

### .3.3 RESPONSE TO PETITIONS FOR RULEMAKING

A petition requesting that the Commission initiate a rulemaking proceeding as to a particular practice or practices shall be referred by the Office of the Secretary to the Bureau which shall, within 90 days of receipt of the petition, recommend to the Commission that the petition be granted or denied. The Commission has directed that the Bureau in reaching a determination as to its recommendation, shall consider the following criteria, among others. These criteria are similar to those used by staff in deciding whether to initiate and in subsequently developing a staff proposal for a rule. (See .3.1 above and .3.7 below.)

- (1) Whether a determination to issue the rule sought by the petitioner would be within the Commission's jurisdiction.
- (2) Insofar as can be determined before conducting a rulemaking proceeding whether issuance of the rule sought appears likely, to have greater beneficial than detrimental effects, and otherwise be in the public interest. In this regard, the staff should consider and apply, to the extent possible, the Commission's evidentiary standards that it will apply when deciding whether to issue a TRR.



- (3) Whether the rule sought could, if issued, be enforced to the extent necessary to realize its intended benefits, taking into consideration the Commission's resources and other duties and commitments.
- (4) Whether the effort required to conduct the requested rulemaking proceeding would be consistent with the Commission's resources and other duties and commitments.
- (5) Whether the investigation and analytical effort required to answer questions (1) through (4) would be consistent with the Commission's resources and other duties and commitments, and the necessity for an expeditious response to the petition.

#### .3.4 CONTACTS WITH STATE AND LOCAL GOVERNMENTS

When developing a proposal for a TRR, staff should consult with representatives of state and local governments whose laws would be affected by the TRR. The staff should ascertain the potential effect of the proposed TRR on state and local laws and the ways, if any, of resolving or minimizing potential conflicts.

The staff should encourage the active participation of state and local government representatives in all phases of the rulemaking process, and should inform them of the requirements for such participation. (See .3.9, .3.19.3.1, and .3.19.3.2 below.)

#### .3.5 INVESTIGATIONAL STRATEGY

##### .3.5.1 Strategy Memorandum

It is important that the staff consider both legal and economic aspects of a contemplated rule and develop a broad-scale plan for the conduct of the investigation before proposing the investigation to the Commission. Preparation at an early stage of a strategy memorandum for the investigation delineating abuses and proposed remedies, information-gathering and the alternatives to rulemaking, will help staff refine their thinking and facilitate discussion at preliminary review stages. The strategy memorandum may also form the basis for staff's memorandum to the Commission requesting opening of an investigation.

##### .3.5.2 Support Services of Other Commission Offices and Other Agencies

###### .3.5.2.1 Bureau of Economics

The Bureau of Economics should be contacted informally to obtain its initial response to the rulemaking proposal and to have an economist assigned. Rulemaking matters should be referred to the Deputy Director for Consumer Protection and Economic Policy Analysis, Bureau of Economics. As the prevalence and economic impact of the practices addressed and the effectiveness of the rule itself are of major importance in rulemaking, close coordination with the Bureau of Economics in planning and conducting the investigation is desirable. The Bureau's formal concurrence in the initial staff report to the Commission should be requested. (See .3.8.3 below.)

###### .3.5.2.2 Other Commission Offices and Other Agencies

Early liaison with other Commission Offices and other agencies will prevent unnecessary duplication of preliminary resource expenditures. The regional offices may be asked to assist in the investigation, and other federal agencies with responsibilities in the area may also provide assistance and consultation. Regional offices may also have received complaint letters or have developed data through investigations showing prevalence of the acts or practices in question in various geographical areas. Staff can request information on the type and number of consumer complaints received according to subject matter from the Information Center or Information Management Branch. (See OM Ch. 16.2.) Other Commission offices may be able to provide expertise in the design and conduct of consumer surveys. (See OM 18.)

### 3.5.3 Record of Outside Contacts

Unless staff's investigation has been approved only for the purpose of potential rulemaking (i.e., with no possibility of resulting adjudicatory enforcement), staff must keep a record of contacts with "noninvolved" persons outside the Commission concerning the investigation; if a complaint under Part 3 of the Commission's rules is later issued as a result of the investigation, the record of outside contacts will be placed on the record of that case. The record of outside contacts need not be placed on the rulemaking record. (See OM Ch. 16.10.7.)

### 3.5.4 Rulemaking Information Gathering

#### 3.5.4.1 In General

This section deals with potential methods of gathering information for an investigation oriented towards rulemaking. These methods are dealt with generally in OM Ch. 3.3.6; points will be emphasized here that are specifically relevant to rulemaking.

Technically, staff can continue to gather information after promulgation of the initial rulemaking notice. However, it is best to obtain necessary information as soon as possible before the rule is proposed for the following reasons:

- (1) Industry members may be reluctant to discuss prevailing industry practices after rulemaking has been proposed.
- (2) The greater the amount of evidence placed on the rulemaking record at the time of initial notice, and the more complete the initial staff report, the better understanding interested persons will have concerning the issues to be addressed in written submissions and at the public hearings. This in turn will make the rulemaking proceeding a more effective tool for eliciting relevant information and opinions.

The investigation should be an educational and evaluative process soliciting a wide range of information so that the staff will be able to determine whether a TRR is in fact needed and, if so, what form would be most effective and fair. The investigation should emphasize, to the greatest extent possible, gathering information that can be systematically generalized to the entire industry that would be subjected to the rule.

#### 3.5.4.2 Published and Other Existing Sources

Staff should consult economic, business, and trade journals and other sources of published information to familiarize themselves with the general structure and functioning of the industry in question. (See AM Ch. 1.800.)

Also, research data and studies on business practices and consumer problems (including consumer surveys) are often available from academic researchers, consumer groups, other Commission offices (see .3.5.2.3 above), and other federal and state agencies.

#### .3.5.4.3 Requests for Voluntary Provision of Information

Requests for voluntary provision of information by industry members may foster better Commission-industry member relations and be a more efficient utilization of resources than initial resort to compulsory process. If crucial information cannot be expeditiously obtained through voluntary means, staff should request Commission issuance of an investigational resolution (if this has not already been done) and compulsory process.

Until publication of the initial notice of proposed rulemaking, staff requests for opinions and information should clearly state that although rulemaking is under consideration, the Commission may determine to pursue other enforcement methods or take no action at all.

#### .3.5.4.3.1 Interviews and Questionnaires

Informal interviews and questionnaires are effective methods for learning of industry practices and operations; they may be directed at a broad cross-section of industry members and related interest groups who may have different positions and interests with respect to a contemplated rule. Staff should invite specific comments directly from industry members about a contemplated TRR. Responses may alert staff to potential economic effects of a TRR and problems with compliance with proposed remedies not previously anticipated, or may point out possible misconceptions concerning the initial premises and assumptions underlying the proposed rule. (See OM Ch. 3.3.6.6.2 (questionnaires) and OM Ch. 3.3.6.6.4 (interviews).) Interview reports should be prepared according to the procedures outlined in OM Ch. 3.3.6.6.4.2.

Staff can also use voluntary questionnaires to conduct surveys. Staff should consult with individuals possessing expertise for guidance in designing and conducting surveys so that the results will constitute probative and reliable evidence of the existence and prevalence of a pattern of unfair or deceptive acts or practices and the nature and extent of consumer injury.

Most requests for identical information from ten or more persons must be submitted to OMB for clearance under the Paperwork Reduction Act of 1980. (See OM Ch. 3.1.3.6.)

#### .3.5.4.4 Experts, Consultants, and Contractors

##### .3.5.4.4.1 Experts and Consultants

Experts and consultants can explain highly technical or scientific subjects, analyze data, evaluate the effectiveness of a proposed rule or remedy, and provide other specialized skills. They may also serve as witnesses in rulemaking hearings. (See AM 2.500 and 3.200.) Because experts and consultants generally come within the definition of employees of the Commission for FOIA purposes, the deliberative portions of documents transmitted to or from them normally fall under Exception (5) of the FOIA. (See OM Ch. 15.1.2.2.)

##### .3.5.4.4.2 Contractors

Award of a service contract is sometimes an appropriate means to obtain a needed product or service such as the design and carrying out of a survey. (See AM 4.500.)

#### .3.5.4.5 Compulsory Process

In general, see OM Ch. 3 for policy and procedures for use of compulsory process prior to the publication of the initial notice of proposed rulemaking. Following publication of the initial notice the Presiding Officer may recommend to the Commission that compulsory process be authorized. However, the Presiding Officer does not have authority to issue orders for compulsory process. (See .3.20.2.1 below.)

#### .3.5.4.5.1 Civil Investigative Demands (CID's)

Written reports or answers to questions obtained by means of a CID are similar to reports under Section 6(b) of the FTC Act. Consultation with the Bureau of Economics or outside experts can help staff determine what types of documents may be relevant to issues being investigated. (See OM Ch. 3.3.6.7.5)

#### .3.5.4.5.1 Investigational Hearings

Investigational hearings are especially useful to document (for later placement on the rulemaking record) the views and positions of industry members and trade associations, and industry members' statements concerning their use of certain specific acts or practices. (See OM Ch. 3.3.6.7.6.)

#### .3.5.5 Development of a Mailing List

A mailing list of interested persons should be developed. A Mailing List Control Form (Illustration 1 on page 26) should be used to add, change, or delete entries on the list.

#### .3.6 DOCUMENT INDEXING

(See OM Ch. 18.2.)

#### .3.7 DEVELOPMENT AND PREPARATION OF THE PROPOSED TRR

Development of the rule is an ongoing process. Staff should refine their contemplated proposal as the investigation progresses. Factors that should be considered include:

- (a) Only a comprehensive investigation will reveal whether the contemplated TRR correctly addresses the crucial problems, will not have unforeseen or untoward economic effects, and is enforceable.
- (b) Since TRRs may both define unfair or deceptive acts or practices and include requirements prescribed for the purpose of preventing such acts or practices (FTCA §18(a)(1)(B)), staff should consider various types of remedies, including flat prohibitions and affirmative requirements. The following factors are relevant:

- (1) Whether a particular prohibition by itself will be effective, or, if it may be circumvented by related practices, whether multiple prohibitions, affirmative disclosures, or other requirements would be more effective.

(2) The portion of industry members not engaging in the offensive acts or practices, and the burden on them of complying with affirmative requirements.

If affirmative requirements are contemplated there must be set forth in the TRR itself the specific unfair or deceptive acts or practices that the requirements address. Katharine Gibbs Schools, Inc. v. FTC, 612 F.2d 658 (2d Cir. 1979), reh'g denied, 627 F.2d 758 (2d Cir. 1980) (en banc), held that FTCA §18(a)(1)(B) requires that the Commission "define with specificity" in the TRR the unfair and deceptive practices that rule requirements are designed to address. It will not suffice to list these acts or practices in the Statement of Basis and Purpose that accompanies the TRR when it is promulgated.

- (c) A self-enforcing TRR is the most desirable rule in terms of cost to the Commission. For example, if a TRR requires inclusion of certain language in a form contract, private litigation can thereafter be used for enforcement.
- (d) As the rule is being developed, consideration should be given to a future compliance plan that includes:
  - (1) Industry and consumer education.
  - (2) Enlisting the cooperative efforts of other federal, state, and local agencies.
  - (3) Investigation of and, if necessary, enforcement actions against individual industry members who take no substantial action to comply with the rule after its promulgation.
- (e) The advance notice of proposed rulemaking should set forth the text of the rule under consideration and may suggest alternative rule provisions. Comments received in response to this notice should enable the staff to eliminate impractical or unnecessary provisions prior to publication of the initial notice of proposed rulemaking.
- (f) Staff should research analogous state laws for possible rule models.
- (g) Trade regulation rules affecting small businesses and consumer disclosure notices in all trade regulation rules must be easy to read and understand. Contact the Office of Consumer and Business Education for assistance.
- (h) Disclosure requirements in a rule should be adapted to the particular circumstances at hand. Requirements should consider the benefits and costs of alternative methods of conveying the information, and should be adapted to the differences among media if appropriate. Whenever possible, staff should consider

disclosure requirements based on a performance goal rather than a set of detailed specifications for how the disclosure must be made.

### .3.8 THE INITIAL STAFF REPORT AND ACCOMPANYING MATERIALS

#### .3.8.1 The Staff Report

### .3.8.1.1 Preparation and Contents

When the investigation is complete or sufficiently complete to enable staff to decide on the appropriate course of action, staff should prepare a report to the Commission presenting their findings and recommendations, including the text of any proposed TRR. The initial staff report should be limited to no more than 300 pages, double-spaced, including single-spaced footnotes.

The report should provide the Commission with adequate grounds to determine whether a rulemaking proceeding is warranted and contain:

- (1) A summary and analysis of relevant information gathered indicating the existence and prevalence of unfair or deceptive acts or practices and consumer injury.
- (2) An explanation of the objectives of the proposed TRR.
- (3) A description of alternatives to the proposed rule that may substantially achieve the same objectives and an explanation of why those alternatives should not or cannot be adopted. To the extent practicable, alternatives beyond the authority of the Commission to effect should be discussed and the likelihood of their being instituted by others should be evaluated.
- (4) For the proposed rule and for each alternative identified, staff should prepare an analysis of the projected benefits and any adverse economic effects as well as any other effects, and an analysis of the effectiveness of the proposed rule and each alternative in meeting the objectives of the proposed rule. These analyses should identify those likely to receive the benefits and those likely to bear the adverse effects of the proposed rule and each alternative. To the extent practicable, benefits and adverse effects should be quantified in monetary terms and the potential net benefits should be determined.
- (5) A description of any reporting, record creation and retention, or other compliance requirements in the proposed rule.
- (6) A description of and, where feasible, an estimate of the number of small businesses to which the proposed rule will apply, and the type of professional skills that are necessary for compliance with the proposed rule.
- (7) A description of any alternatives to the proposed rule that would minimize any significant economic impact on small businesses, such as different compliance requirements, the use of performance rather than design standards, and exemption from coverage of all or part of the proposed rule.
- (8) An identification, to the extent practicable, of all relevant federal rules or statutes that may duplicate, overlap, or conflict with the proposed rule.
- (9) A discussion of the possible effects of the TRR on state and local laws, and the ways, if any, of resolving or minimizing potential conflicts.
- (10) An analysis of enforcement considerations posed by the TRR.
- (11) A discussion of legal theories on which a proposed TRR is grounded.

- (12) A discussion of the theory of market failure that justifies Commission intervention.
- (13) The proposed initial version, alternative versions, or general substance of the proposed TRR.

#### .3.8.1.2 Bureau Review

The staff report is reviewed by the Bureau Director, and the recommendations contained therein are recommendations of the Bureau.

#### .3.8.2 Materials Accompanying the Staff Report

Staff is responsible for preparing the documents listed below. They will also be reviewed by the Bureau Director and submitted to the Commission.

##### .3.8.2.1 Forwarding Memorandum

The forwarding memorandum should contain an index of the materials and discussion of the staff's plans for future information gathering and any sensitive policy considerations, including the potential impact on the budget of the proposed rule's future enforcement. The memorandum should also include a request that staff's investigation remain open if there is any reason that staff does not wish the investigation to be closed. (See .3.20.2.2 and .3.25 below.)

##### .3.8.2.2 Rulemaking Proceeding Cost Summary

The Cost Summary should contain information on past and future costs associated with the proposed rulemaking proceeding. Staff members of previous rulemaking proceedings, as well as the Automated Systems Division, can provide staff information that will help them estimate probable future costs. (See OM Ch. 18.4.)

##### .3.8.2.3 Advance Notice of Proposed Rulemaking

The advance notice must contain a brief description of the area of inquiry, the objectives of the rule, and possible regulatory alternatives under consideration. (See OM Ch. 18.7.)

When appropriate, the notice should state that the proposed rule or alternative formulations might have a significant economic effect on a substantial number of small businesses.

The notice must also contain instructions for public inspection of materials that are made available by the staff and for obtaining copies of the staff report. (Rule 1.10)

##### .3.8.2.4 Letters to Congress, OMB, and SBA

At the same time the advance notice is forwarded to the Federal Register, staff should prepare cover letters for the Secretary's signature enclosing copies of the advance notice to the Senate Committee on Commerce, Science and Transportation and to the House Committee on Energy and Commerce, as well as to the Office of Management and Budget. If the proposed rule or alternative formulations might have a significant economic effect on a substantial number of small businesses, a letter should also be prepared transmitting a copy of the notice to the Chief Counsel for Advocacy of the Small Business Administration. (See Illustrations 2 - 5 on pages 27, 28, 29, 30.)

### 3.8.3 Bureau of Economics Concurrence

If concurrence cannot be achieved, the Bureau of Economics should submit an accompanying memorandum outlining its objections to the rulemaking proposal and its recommendations for Commission action.

### 3.9 PUBLICATION OF ADVANCE NOTICE

If the Commission determines that it is appropriate to initiate a rulemaking proceeding, it will authorize publication of the advance notice of rulemaking in the Federal Register or it may revise it or send it back to staff for reworking before publication.

The Office of the Secretary is responsible for sending the copies of the notice to the Congressional Committees, OMB, and the Small Business Administration.

### 3.10 FACILITATING PUBLIC COMMENTS

#### 3.10.1 News Release and Briefings

In general, wide media coverage of the Commission's rulemaking activities is desirable. Publication of the advance, initial, and final notices of proposed rulemaking and promulgation of a TRR as well as interim notices (e.g., postponing hearing dates, extensions of time, establishing additional hearing dates, etc.) are appropriate instances for news releases and, in some instances, news briefings. News releases and news briefings are coordinated by the Office of Public Affairs to ensure the accuracy and completeness of media reports, and must receive advance approval from the Commission.

A news briefing book may be developed by the staff containing a summary of the proposed TRR, a summary of the rationale for the TRR, highlights of the major areas or issues, and all anticipated questions and suggested answers. At the news briefing, copies of the initial or final staff report (and, optionally, special fact sheets) should be available for members of the news media.

#### 3.10.2 Providing Additional Notice to Affected Groups

Staff should use their mailing list to assure that industry and consumer groups that would most likely be affected by any rule promulgated by the Commission are made aware of the advance notice and their opportunity to comment. A particular effort should be made to send copies of the notice to special interest publications that reach consumers and small businesses otherwise not likely to learn of the Commission's activities.

Staff should also distribute the notice to state and local government representatives whose laws may be affected by the rule.

#### 3.10.3 DISCLOSURE OF STAFF DOCUMENTS

##### 3.10.3.1 Investigatory Materials



Staff, upon requesting and obtaining Commission authorization, may make all nonexempt material gathered in the course of their investigation available for public inspection. Staff should separate materials deemed relevant to (i.e., generally probative of) the issues posed by the proposed rule from materials that staff deems of no relevance to the rule. If an initial notice of proposed rulemaking is later issued, the relevant materials will be submitted immediately to the Presiding Officer for placement on the rulemaking record (i.e., the file(s) of materials developed in the rulemaking proceeding) that will eventually be reviewed by the Commission in making its determination. (See .3.13.1 and .3.24.1 below.) The nonrelevant materials are kept together separately and are otherwise made available for public inspection. (Rule 1.18.)

If many essentially identical relevant documents have been accumulated, staff may avoid overburdening what may become the rulemaking record by having only a representative selection of these documents, or a description of them, placed with the other relevant documents and having the remainder otherwise made available for public inspection.

Staff may request Commission authorization to make public FOIA-exempt documents within certain limitations. (See FTCA §§6(f) and 21 and OM Ch. 15.)

The staff's indexing system should be refined to correspond to what is made public and identified as relevant. Public access will be facilitated if the materials are made available in indexed form.

#### .3.10.3.2 Initial Staff Report

The Commission, after making such revisions or deletions as it deems appropriate, directs placement of the staff report on the public record. The staff is responsible for insuring that **two** copies of the Staff Report, all documents cited, and the memorandum from the Bureau of Economics are forwarded to the Document Processing Section for placement on the public record.

##### .3.10.3.2.1 Distribution of Copies

Coordination for printing and internal distribution of the staff report is handled by the Information Management Branch. (See AM Ch. 1.300.)

Staff is responsible for distribution to interested persons outside the Commission anticipated to be most instrumental in presenting views for or against rule provisions. For rules which may significantly affect state laws, copies of the report should be sent, at a minimum, to each affected state's Governor, Attorney General, and presiding officials of its legislative assemblies.

#### .3.11 SUPPLEMENTAL STAFF REPORT

##### .3.11.1 Preparation and Contents

At the close of the comment period the staff prepares a report summarizing and evaluating the comments and information received and advising the Commission whether to publish a notice of proposed rulemaking.

##### .3.11.2 Materials Accompanying the Report

###### .3.11.2.1 Draft Initial Notice of Proposed Rulemaking

If staff intends to recommend the initiation of a proceeding a draft of the initial notice must be prepared. Rule 1.11(a) lists the required contents. Staff should consult with the Office of Administrative Law Judges regarding the form and content of the initial notice. (See .3.11.2.1.1 below if alternative procedures are contemplated.) The initial notice should include:

- (1) A statement of the possible effects of the TRR.
- (2) Information regarding public inspection of the materials placed on the rulemaking record or which are otherwise made available at the time of or shortly after publication of the notice.
- (3) A draft environmental impact statement, or a negative assessment for the proposed rule. (See .3.11.2.3 below.)
- (4) If the rule was not included in each of the Commission's regulatory agendas published in the preceding 12 months, the notice must set forth the reasons for such an omission.

#### .3.11.2.1.1 Alternative Procedures

In the more recent rulemaking proceedings the Commission has directed pursuant to Rule 1.20 that procedures other than those established in Part 1, Subpart B of the Commission's Rules be followed in FTCA § 18(a)(1)(B) rulemaking proceedings. The use of such alternative procedures should be considered by the staff in preparing the draft initial notice. Before proposing alternative procedures to the Commission the staff should consult with the Office of Administrative Law Judges and with the Assistant General Counsel for Legal Counsel.

In adopting the alternative procedures followed in previous rulemakings the Commission has directed in the initial notice that disputed issues not be designated by the Presiding Officer, and that cross-examination be permitted by group representatives on any issue relevant to the proceeding subject to the Presiding Officer's discretion and control. (See, for example, Retail Food Store Advertising and Marketing Practices Initial Notice, 50 Fed. Reg. 43224, 43226-27, 1985, and the Funeral Rule notice, 53 Fed. Reg. 19864, 19871-72, 1988.)

Note that in the two mentioned proceedings the issuance of a final notice by the Presiding Officer (Rule 1.12) was unnecessary since the initial notice issued by the Commission contained all of the relevant information.

#### .3.11.2.2 Preliminary Regulatory and Initial Regulatory Flexibility Analyses

FTCA §22(b)(1) and Rule 1.11(b) list the required contents of the preliminary regulatory analysis. The analysis should also contain the information identified in items 3-8 of .3.8.1.1 above and a succinct statement of the legal basis for the proposed rule. However, if neither the rule nor the alternatives that the Commission proposes to promulgate will have a significant economic impact on a substantial number of small businesses, then items 6-8 and the statement of legal basis (i.e., the initial regulatory flexibility analysis) may be omitted. In such a case, staff must prepare a certification for publication in the Federal Register and transmittal to the Small Business Administration stating that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.

For rules that may have a significant economic impact on a substantial number of small businesses, the initial regulatory flexibility analysis must be published or summarized in the Federal Register. Rarely will it

be convenient for the flexibility analysis to be a separate section of the preliminary analysis required by §22 of the FTC Act. Thus, as a practical matter, the entire regulatory analysis will nearly always be published or summarized in the Federal Register notice. If the entire analysis is not published, then the initial notice must explain how the public may obtain copies. (See OM Ch. 18.7.) (See 5 U.S.C. 601, 603, 605, and 13 CFR 121.3-10 (including Schedules A, C, and D) for the requirements of the Regulatory Flexibility Act.)

### 3.11.2.3 Environmental Impact Assessment

An assessment of the potential environmental impact of the rule must be prepared. For an explanation of this requirement and of staff's ensuing duties with respect to preparation of a draft environmental impact statement (or negative assessment explaining why a draft environmental impact statement is not required), see Rule 1.81 et seq.

### 3.11.2.4 Letters to Congress, OMB, and SBA

Staff should prepare cover letters for the Secretary's signature to submit the initial notice and regulatory analysis to the Senate Committee on Commerce, Science and Transportation and the House Committee on Energy and Commerce no less than 30 days before the publication in the Federal Register, pursuant to FTCA §18(b)(2)(C).

A cover letter should be prepared to submit the initial notice and regulatory analysis to the Office of Management and Budget at the same time that those items are sent to the Federal Register, as well as a letter to the Chief Counsel for Advocacy of the Small Business Administration transmitting the same documents and, where appropriate, a certification that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.

### 3.11.2.5 Notification Of Chief Administrative Law Judge

Because maintenance of the rulemaking and public records becomes the responsibility of a Presiding Officer immediately upon publication of a notice of proposed rulemaking, it is important that the staff promptly advise the Office of Administrative Law Judges of its intention to recommend that the Commission publish the rulemaking notice. When the staff forwards its recommendation for rulemaking to the Commission, copies of the recommendation, together with copies of the initial and supplemental staff reports should be furnished to the Office of Administrative Law Judges. Receipt of such material serves to notify the Office of Administrative Law Judges of the pendency of a proceeding and permit timely appointment of a Presiding Officer. This will avoid delay in the establishment of the rulemaking record and insure orderly progress of the proceeding. Prior to publication of the notice of proposed rulemaking, the Office of Administrative Law Judges will advise the staff of the identity of the Presiding Officer to be appointed to the rulemaking proceeding.

## 3.12 INITIATION OF A PROCEEDING

### 3.12.1 Publication of the Initial Notice

If the Commission determines to initiate a rulemaking proceeding, it publishes the initial notice of rulemaking in the Federal Register no sooner than 30 days after notifying Congress of its intent to do so. The Office of the Secretary is responsible for sending notice letters to the Congressional Committees,

OMB, and the Small Business Administration. (See .3.11.2.4 above.) If the Commission is not satisfied with staff's proposed notice, it may revise it or send it back to staff for reworking before publication.

A C.F.R. (Code of Federal Regulations) number will be assigned to the proposed rule to accompany its publication in the Federal Register. If the rule is eventually promulgated, that C.F.R. number will apply to it permanently. If the Commission closes the rulemaking proceeding or determines not to promulgate the proposed rule, the C.F.R. number will be reopened.

### 3.12.2 Appointment of Presiding Officer

When the rulemaking proceeding begins the Chief Administrative Law Judges appoints the Presiding Officer for that particular proceeding. Rule 1.13(c)(1). The Presiding Officer is responsible for the orderly conduct of the rulemaking proceeding. The Presiding Officer's powers, which are described in Rule 1.13(c)(2), are discussed later in this chapter.

The comments, as well as all other public submissions pertaining to the rule, are delivered to the Presiding Officer. (See .3.13.2 below.) Staff should review the public comments in the office of the Presiding Officer weekly, before they are transmitted to the Document Processing Section. However, the staff is prohibited from discussing facts in issue with the Presiding Officer off the record. (See .3.12.5.1 below). The comments will aid staff in determining whether the TRR is both desirable and feasible and will alert staff to issues that warrant further exploration in the public hearings.

### .3.12.3 Facilitating Public Participation

#### .3.12.3.1 News Releases and Briefings

See .3.10.1 above regarding press coverage.

#### .3.12.3.2 Providing Additional Notice to Affected Groups

The guidance provided at .3.10.2 above applies at this time as well.

#### .3.12.3.3 Transmittal of Relevant Staff Documents to Presiding Officer

Staff should reexamine the materials previously placed on the public record at the time the advance notice of proposed rulemaking was published, and comments and other materials received thereafter, and select those deemed relevant and material. These should be promptly submitted to the Presiding Officer for placement on the rulemaking record, i.e., the initial staff report with supporting documents and any other files of materials developed in the rulemaking proceeding that will eventually be reviewed by the Commission in determining whether to promulgate the rule. (See .3.13.1 and .3.24.1 below). The nonrelevant materials are kept in a separate collection and otherwise made available for public inspection.

(Rule 1.18). The Presiding Officer may direct the Document Processing Section to establish a Non-Rulemaking Public Record which may serve as a repository for these and other relevant materials which are not placed on the rulemaking record. Non-Rulemaking Public Record materials should ordinarily be forwarded to the Presiding Officer for transmittal to the Document Processing Section.

It is essential that staff make all documents available for public inspection as soon as practicable after the initial notice is published. Staff has the responsibility for timely delivery of these materials and all subsequent materials to the Presiding Officer for placement on the public record. Failure to make timely submissions for placement on the rulemaking record may result in a delay in the proceedings.

#### .3.12.4 Public Comments

Rule 1.13(a) provides that "the Commission shall accept written submissions of data, views, and arguments on all issues of fact, law, and policy" until a deadline specified in the initial notice. Staff may want to solicit submissions personally from individuals with expertise and from persons who will be affected by the proposed TRR. Staff should encourage submissions from state and local officials whose laws may be affected by the TRR.

##### .3.12.4.1 Notifications of Interest and Proposal of Designated Issues

The notice of proposed rulemaking should establish a deadline for the filing of notifications of interest by interested persons who desire to cross-examine witnesses at the hearing. These should be submitted to the Presiding Officer.

If the two-notice procedure envisioned by the Rules of Practice is to be used, a deadline should also be established for the submission of comments proposing designated issues for the public hearings, i.e., issues to be considered subject to the rights of interested parties under Rule 1.13(d)(5) and (6). Usually these are received until 30 days after the close of the written comment period or such other period as the Commission may establish in the initial notice, or which may be subsequently established by the Presiding Officer. Rule 1.13(b). (See .3.15 below for a further discussion of designated issues.) If issues are to be designated by the Presiding Officer, the deadline for submission of notifications of interest should be extended to allow interested parties to determine their respective positions on the designated issues.

#### .3.12.5 Communications With the Presiding Officer, Commissioners and Their Personal Staffs

##### .3.12.5.1 Communications With the Presiding Officer

Except as required for the disposition of ex parte matters as authorized by law, neither the staff nor outside interested parties may communicate with the Presiding Officer with respect to any fact in issue in the rulemaking, unless the Presiding Officer gives notice and opportunity for all parties to participate.

##### .3.12.5.2 Communications With the Commissioners and Their Personal Staffs

Written communications from outside parties may be addressed to Commissioners at any time. They will be included in the record of the proceeding if they are received during an appropriate comment period, and otherwise included in the public record. Rule 1.18(c)(1)(i). Oral communications from outside parties, except members of Congress, are permitted only until the close of the post-record comment period and only when advance notice is published in the Weekly Calendar and Notice of "Sunshine" Meetings. Transcripts or summaries of all such communications must be made. See Rule 1.18(c)(1)(ii) and (iii) regarding their

placement on the rulemaking record or the public record and for the treatment of communications that violate the Rule.

Staff may communicate with the Commissioners and their personal staffs at any time. However, except for communications required for the dispositions of ex parte matters as authorized by law, staff may not communicate any fact which is relevant to the merits of the proceeding unless it is on the record or promptly is made available to the public and added to the record. This applies to broad, legislative-type facts as well as specific, adjudicative-type facts. It does not include mere advice or an analysis of evidence already in the record. Rule 1.18(c)(2).

### 3.13 MAINTENANCE OF THE RULEMAKING RECORD

#### 3.13.1 Organization

When the Office of the Secretary receives the Advance Notice of Proposed Rulemaking and any other related documents the Document Processing Section is responsible for insuring that the documents are available for public inspection.

After consultation with the staff the rulemaking record is organized by the Presiding Officer into categories to provide ready access by the public, interested persons, and the Commission. Categories are assigned for materials already discussed as well as materials generated in the rulemaking proceeding. Each source category or other classification is designed to be mutually exclusive. Therefore a document will ordinarily appear in only one category. Categories in addition to the ones below may be added by the Office of the Secretary at the request of the Presiding Officer in coordination with the Automated Systems Division. The standard categories include:

- AA. Guide to the rulemaking record.
- A. Public notices commencing with the Advance Notice of Proposed Rulemaking, petitions, motions, orders and written rulings of the Presiding Officer and the Commission, and similar documents not specifically assigned to other categories.
- B. Commission staff reports and memoranda, relevant materials gathered in staff investigation, or assembled prior to the initiation of the proceeding, comments received in response to the Advance Notice of Proposed Rulemaking which the Commission staff or other interested persons desire to be included in the rulemaking record.
- C. Staff Materials after Notice of Rulemaking Published.
- D-J Reserved for comments and additional materials submitted by the staff, consumers, industry representatives, state officials, and other interested persons. Titles or designations for these categories would be selected by the Presiding Officer after consultation with the staff and would vary depending upon the nature or identity of the participants in the proceeding. In some proceedings not all of the categories reserved for comments would be used.
- K. Compensation program requests, related memoranda and correspondence.
- L. Transcripts of the public hearing.

- LL. Exhibits received at the public hearing.
  - M. Written rebuttal submissions.
  - N. Final staff report to the Commission and accompanying memoranda.
  - O. Presiding Officer's report containing the findings, conclusions, and recommended decision.
  - P. Comments on final staff report, and any accompanying memoranda, and on the Presiding Officer's report. Requests by interested persons for an opportunity to make an oral presentation to the Commission.
  - Q. Final staff recommendations to the Commission.
  - R. Correspondence about oral presentations to the Commission and the transcript or summary of any such presentations.
  - S. Final Commission action on the proposed rule, the statement of basis and purpose, if any, and other Commission actions or proceedings.
  - T. Court documents including pleadings, orders, and related correspondence.
- Non-Rulemaking Material after promulgation of the Rule.

### .3.13.2 Receipt of Documents and Transmittal to the Rulemaking Record

The Presiding Officer is responsible for the proper maintenance of the rulemaking record from the time of issuance of the Commission's Initial Notice through the end of the post report comment period. Rule 1.13(c)(2). All public submissions to the rulemaking record should be sent to the Presiding Officer for acknowledgment, classification, and assignment of an identification number. Public submissions include public comments on the proposed TRR, motions, petitions, post report public comments pursuant to Rule 1.13(h) on the Presiding Officer's recommended decision and final staff report. The Presiding Officer is also responsible for the placement of certain communications to Commissioners or their personal staffs on either the rulemaking or public record as required by Rule 1.18(c).

In the case of public comments on the proposed TRR, and post report public comments, the Presiding Officer will also send acknowledgment letters upon receipt. (See Illustration 6 on page 31.) The Presiding Officer transmits these submissions to the rulemaking record to the Document Processing Section by means of category transmittal sheets (Illustration 7 on page 32).

Staff and Commission submissions to the rulemaking record must also be made through the Presiding Officer. If at all possible, original documents, as opposed to copies, should be submitted. With respect to their own submissions, staff may prepare the transmittal sheets for the Presiding Officer's signature.

Care should be taken in the preparation of these documents to ensure that only relevant material is transmitted for placement in the record. For example, routing slips and duplicate documents should not be included in the material submitted for the official record.

### 3.13.3 Copying Materials on the Rulemaking Record

Staff should avoid making burdensome requests on the Document Processing Section to copy material, e.g., public comments, for staff's files. The staff and the Presiding Officer should make necessary arrangements to insure that the staff is provided with a copy of written comments, notifications of interest, statements of proposed testimony, hearing exhibits, and other documents and materials received by the Presiding Officer for placement on the public record. (However, staff is prohibited from discussing facts in issue with the Presiding Officer off the record. See .3.12.5.1 above.)

### 3.14 THE COMPENSATION PROGRAM AND STAFF'S ROLE IN IT

The compensation program has been inactive for many years because of a lack of funding. Therefore inquiries regarding its use should be directed to the General Counsel.

### 3.15 DESIGNATION OF ISSUES SUBJECT TO PROCEDURES OF RULE 1.13(d)(5) and (d)(6)

Disputed issues of material fact that the Presiding Officer or Commission determines are necessary to resolve in the rulemaking proceeding must be designated explicitly as such by either the Presiding Officer or the Commission. The Presiding Officer or the Commission may designate issues on their own motions, or may select from proposals made by staff and other interested persons (.3.12.4 above). Proposals may be submitted until 30 days after the close of the written comment period or such other period as the Commission may establish in the initial notice (Rule 1.13(b)), subject to extension or other modification by the Presiding Officer. The designated issues are published in the final notice of proposed rulemaking (unless the Commission has elected to designate them in whole or in part in the notice of proposed rulemaking. (See .3.18 below.)

The effect of designation of an issue is to confer certain rights, set out in FTCA §18(c) and described in full by Rule 1.13(d)(5) and (6), upon interested persons who make notification of their interests with respect to such issue. Such notification must be made no later than 20 days after the publication of the final notice of rulemaking, or at such other date as may be established by the Presiding Officer. (Rule 1.13(d)(3).) The rights conferred on interested persons are:

- (1) to conduct, or have conducted by the Presiding Officer (see Rule 1.13(c)(2)(iv), (d)(4) and (d)(5)), cross-examination at the public hearings with respect to such issue,
- (2) to present rebuttal submissions with respect to such issue, and
- (3) to request the Presiding Officer to recommend that the Commission compel the appearance of necessary witnesses or the production of documents and answers to written questions with respect to such issue.

Each of these procedures is available only to the extent to which it is appropriate and required for full and true disclosure with respect to the designated issue. Rule 1.13(d)(5) and (6). The Presiding Officer may, but is not required to, permit direct examination of witnesses with respect to designated issues. The Presiding Officer or the Commission may in their discretion designate other issues to be subject to the rights of interested persons set out in Rule 1.13(d)(5) and (6).

### 3.16 SELECTION OF PUBLIC HEARING SITES AND DATES



The Presiding Officer has final authority as to the dates and places of the public hearings. However, the Commission may designate the dates and places for the public hearings. These directions may, if necessary, be modified by the Presiding Officer. The Presiding Officer may, and ordinarily will, confer with and solicit recommendations from the staff and other interested persons, but will not consider staff recommendations unless they have first been approved by the Bureau Director; general Bureau policy in this regard is only to approve recommendations for three or fewer sites and for a maximum total duration of five (5) weeks. Although not so required by the Commission Rules, the hearings are usually not scheduled to begin sooner than 90 days after the final notice. The following general factors should be considered by staff in recommending locations:

- (1) Location of witnesses.
- (2) Availability of resources, i.e., both operating expenses and personnel.
- (3) Regional office expertise and/or ability to provide rooms and/or support staff.

### .3.17 INTERIM NOTICES

The Presiding Officer may, on motion from the staff, interested persons, or Presiding Officer, issue orders or public notices which may be necessary for the orderly conduct of the proceeding. These may deal with a variety of matters including changes in dates of the hearings or extensions of previously established deadlines. They may be distributed through use of the staff's mailing list in addition to publication in the Federal Register. (Also, see .3.10.1 above for media coverage guidelines.)

Staff should not issue public notices between initiation of the rulemaking proceeding and publication of the final staff report. If the staff believes that a public notice is necessary, they must request the Presiding Officer to issue it.

### .3.18 PREPARATION AND PUBLICATION OF FINAL NOTICE

If the two notice procedure described in the Commission's Rules is used rather than an alternative procedure the Presiding Officer must prepare and publish in the Federal Register a final notice of proposed rulemaking. This notice cannot be published until the period for submission of proposals for designated issues has expired. (See .3.15 above.) In compliance with Rule 1.12 a final notice must include the following:

- (1) Incorporation by reference of the contents of the initial notice.
- (2) Public hearing dates and places.
- (3) Instructions to witnesses, including requirements for participation in the hearings.
- (4) Designated issues, if any.
- (5) Notification that interested persons who desire to avail themselves of the procedures of Rule 1.13(d)(5) and (d)(6) with respect to any designated issues must identify their interests in those issues.

- (6) Instructions to persons who desire to make oral presentations at the public hearings regarding the advance submission of proposed testimony. (See .3.19.3.2 below.)

### .3.19 PUBLIC HEARINGS

#### .3.19.1 Staff Preparation of Elements of Proof

By the time the final notice issues, staff should have a clear idea of the elements of proof necessary to support the proposed TRR. The Commission has indicated that each rulemaking record should contain "a preponderance of substantial reliable evidence in support of a proposed rule before that rule is promulgated". (See Statement of Basis and Purpose for the Credit Practices Rule, 49 FR 7740, 7742.) In addition, in every rulemaking, on the basis of evidence reasonably available, the Commission requires answers to the extent possible to the following additional questions:

- (1) Are the unfair or deceptive acts or practices that the proposed rule addresses prevalent?
- (2) Does a significant harm exist as a result?
- (3) Will the proposed rule reduce that harm?
- (4) Will the benefits of the rule exceed its costs? (Id.)

Normally, these elements will include all the designated issues and all the issues to be discussed in the Commission's Statement of Basis and Purpose and Regulatory Analysis that must accompany promulgation of a TRR. (See .3.24.2 below.)

Staff should refer to the elements of proof in recruiting witnesses and in planning examination of witnesses at the hearings.

#### .3.19.2 Selection of Group Representatives

From among those persons that have identified an interest in a designated issue, ". . . the [P]residing [O]fficer shall identify groups of persons with the same or similar interests . . . . Such groups may be required to select a single representative for the purpose of examination, including cross-examination. If a group is unable to select a representative then the [P]residing [O]fficer may select a representative of each such group". (See Illustration 9 on page 34). (Rule 1.13((d)(5)(ii).)

A group member who does not agree on the group representative chosen by the group or selected by the Presiding Officer, and who has a particular interest (with respect to a designated issue) not adequately represented by the group representative, shall be allowed to conduct or have conducted examination, including cross-examination, with respect to that issue. (Rule 1.13(d)(5)(iii).)

#### .3.19.3 Witnesses

##### .3.19.3.1 Securing of Witnesses

It is in the interest of informed rulemaking to encourage the participation of expert, consumer, and industry witnesses with a variety of positions on the proposed TRR, i.e., both favorable and unfavorable. It is

possible that written submissions gathered at previous stages may sufficiently explore the arguments both pro and con on a given issue so that extensive oral testimony on such issue is unnecessary. However, the oral testimony of key witnesses on the more important issues should be encouraged by staff so that their views be subjected to cross-examination.

To the extent possible, as hearings go from city to city, staff should attempt to solicit testimony on issues not sufficiently explored previously. Also, the participation of interested state and local government officials should be encouraged by staff.

The following should be considered by staff:

- (1) Direct solicitation of voluntary participation of knowledgeable interested persons.
- (2) Commission hiring of expert witnesses as consultants. (See AM 3.200.)
- (3) Requesting the Commission to subpoena witnesses. (See .3.20.2 below and AM 2.500.)

### .3.19.3.2 Prospective Witnesses' Advance Submission of Proposed Testimony

#### .3.19.3.2.1 In General

Individuals desiring to be witnesses at the public hearings, whether or not recruited by the staff or other interested persons, must comply with instructions in either the initial or final notices with respect to notification of a desire to testify and the submission of prepared statements of proposed testimony.

Unless specifically authorized in a notice or by the Presiding Officer, the submission of an outline or summary of proposed testimony rather than a prepared statement of testimony will result in a denial of an opportunity to testify. In the past, the submission of outlines or summaries has been the source of many disputes on the grounds that the information provided was insufficient to permit interested parties to determine the need for or to prepare for cross-examination of the prospective witness.

Witnesses should be instructed that their direct testimony at the hearings will be restricted to the contents of their respective prepared statements. (See Illustration 10 on page 35.)

#### .3.19.3.2.2 Time and Place for Filing: Inspection by Interested Persons

Unless otherwise directed in the notice of proposed rulemaking or by an order of the Presiding Officer, statements of proposed testimony should be submitted to the Presiding Officer on or before the specified deadline. These statements will not be made available to the public or the media until the day the witness is scheduled to testify.

The Presiding Officer ordinarily arranges for copies to be sent to the staff, group representatives and other interested persons who have availed themselves of their rights to cross-examination and submission of rebuttal statements. These arrangements may vary from actually furnishing copies to making a set of statements available for copying by the designated representatives. At the public hearings, the Presiding Officer will ordinarily direct that the statements of proposed testimony be placed on the rulemaking record as hearing exhibits.

### .3.19.3.3 Selection and Scheduling of Witnesses

#### 3.19.3.3.1 Selection

The Presiding Officer will not generally deny a person the opportunity to testify at a public hearing. However, the Presiding Officer has the power to limit the number of witnesses at the hearings in the interests of an orderly conduct of the proceeding. The Presiding Officer may set maximum time limits for groups of industry and staff witnesses. Given those time constraints, staff and industry groups may themselves decide to reduce their own witness lists. Alternatively, the Presiding Officer has the power to set reasonable time limits on each witnesses' oral presentation. (Rule 1.13(c)(2)(iv).)

The Presiding Officer may exercise the power to limit the number of witnesses if a large number of individuals seek to present essentially repetitious comments, views, or arguments. If this power is exercised, the Presiding Officer should ensure that the record will contain sufficient testimony to provide a full and complete disclosure of all issues relevant to the rulemaking proceeding.

#### 3.19.3.3.2 Scheduling

The Presiding Officer should attempt to reserve a block of time in each of the hearings for state and local government representatives, preferably on the first day of the hearings. Media coverage of the hearings will also be considered by the Presiding Officer in scheduling witnesses.

#### 3.19.3.4 Prehearing Contact With Witnesses

Prehearing interviews with prospective witnesses both supporting and opposing the rule may help staff to understand their views, and may also indicate subject areas that should be explored further at the hearings through direct or cross-examination.

So that the essence and scope of their views are communicated clearly, the staff may wish to prepare witnesses to deal with the broad-ranging cross-examination that frequently occurs at the hearings. (See .3.20.1 below.) Because the technical rules of evidence are not fully applied in rulemaking, witnesses must be cautioned to recognize defective questions, i.e., questions predicated on assumptions having little or no basis in the record, and questions going beyond the areas of expertise of the witnesses. Witnesses can then point out the assumptions or note their areas of expertise before answering. Advance submission of prepared statements should be encouraged; direct examination can then be limited to clarifying questions.

#### 3.19.4 Arranging Support Services

The Presiding Officer is responsible for confirming hearing dates and notifying participants of any procedural or scheduling changes. The staff is responsible for reserving the hearing room and scheduling stenographic services. Note: Staff can arrange for obtaining a computer-readable diskette copy of the transcript in addition to the regular stenographic transcript. (See OM Ch. 18.) If the hearings are held in a city where the Commission has a regional office, the Regional Director may be able to provide clerical and other support services to the staff and to the Presiding Officer. If not, the staff should arrange for necessary contractor-provided clerical and other support such as setting up the hearing room, and telephones well before the hearing dates. (See AM 4.5.)

#### 3.19.5 Prehearing Conferences

Prehearing conferences can be used by the Presiding Officer to discuss and determine hearing procedures and various collateral matters. The informal conferences may include group representatives and their at-

torneys, other interested persons who have not been able to agree on the group representative chosen and their attorneys, and the staff, including host regional office staff. Rule 1.13(d)(5)(iii). The Presiding Officer should directly notify (usually by mail) the above-mentioned persons of such conferences. Matters which the Presiding Officer may wish to handle in prehearing conferences include the basic arrangements for the conduct of the hearings, exchange of information regarding the nature and extent of the proposed examination and cross-examination, and resolution of procedural issues in dispute.

### .3.20 CONTROL AND CONDUCT OF THE PUBLIC HEARINGS

The responsibility for the orderly conduct of the hearings lies with the Presiding Officer, who is free to exercise discretion in fulfilling this responsibility. Rule 1.13(c)(2).

#### .3.20.1 Cross-Examination and Direct Examination

The designated issues may be used by the Presiding Officer to control the questioning during the hearings and to limit the scope of cross-examination. (See .3.15 above.) However, the practice has evolved of allowing cross-examination on all issues relevant to the proceeding and within the scope of a witnesses' testimony, subject only to relatively strict time allocations. In any case, the Presiding Officer has the power to set reasonable time limits on cross-examination regardless of any limits on its scope. (Rule 1.13(d)(5).) Alternatively, the Presiding Officer may require that cross-examination to which an interested person may be entitled be conducted by the Presiding Officer. Rule 1.13(d)(4).

Based on the rules of evidence technical objections may be asserted. Because of the fact-gathering nature of rulemaking proceedings, however, such objections (e.g., motions to strike, motions to exclude certain proffered evidence, objections to receipt of evidence, etc.) are less likely to be successful than in adversary proceedings. Also, since witnesses at the hearings, even if invited to testify, are not strictly staff or industry witnesses, the right to object to the general manner in which a witness is being treated on cross-examination is significantly limited.

Direct examination, as noted in .3.15 above, may be permitted in the Presiding Officer's discretion. As with cross-examination, the Presiding Officer may limit the scope and the time allocated for direct examination and may alternately require that direct examination be conducted by the Presiding Officer.

If a witness, in response to a question by the staff or by counsel for an interested person, agrees to provide additional information relevant to the testimony the Presiding Officer may direct the staff or counsel to formalize the request by letter addressed to the Presiding Officer. The Presiding Officer will then forward the request to the witness. (See Illustration 8 on page 33).

### .3.20.2 COMPULSORY PROCESS

#### .3.20.2.1 Compulsory Process Recommended by the Presiding Officer

The Presiding Officer is authorized, in response to motions by staff and other interested persons who have identified an interest in a designated issues at the public hearings, to entertain requests to compel the attendance of persons (at the hearings), or the production of documents (from those testifying as well as those not appearing at the hearing), or to obtain responses to written questions. (See .3.20.2.2 below for guidance in the use of existing compulsory process.)

Such compulsory process is available only if necessary to achieve a full and true disclosure with respect to a designated issue. (See Rule 1.13(d)(6) for the other showings that must be made before the Presiding Officer will recommend to the Commission that it issue a civil investigative demand.)

The forms and letters used for compulsory process issued by the Commission in these circumstances are of the same general format as those described in OM Ch. 18, but are modified to indicate that they refer to rulemaking proceedings. Petitions to limit or quash are entertained by the Commission as provided in Rule 2.7(d).

Compulsory process issued in these circumstances is enforced by the General Counsel's Office in the same manner as other compulsory process issued by the Commission. (See OM Ch. 3.)

### .3.20.2 Staff Requests for Compulsory Process Pursuant to Existing Resolutions

If staff have previously obtained an investigational resolution, such authorization (for the issuance by the Commission or any individual Commissioner of the types of compulsory process described in OM Ch. 3) continues after the initiation of the rulemaking proceeding, and may serve as the basis for a staff request to the Commission for compulsory process during the public hearings. Additional requests to the Presiding Officer for compulsory process are not appropriate.

### .3.20.3 Interlocutory Appeals

Rule 1.13(c)(3) provides that, other than for the appeal of the Presiding Officer's designation of disputed issues, application for review of a ruling by the Presiding Officer will not ordinarily be entertained by the Commission prior to its review of the rulemaking record. An exception arises if the Presiding Officer certifies in writing to the Commission either that the ruling involves controlling questions of law or policy for which immediate review may materially advance the proceeding, or that subsequent review will be an inadequate remedy.

### .3.20.4 Written Rebuttal Period

After the conclusion of examination at the public hearings, interested persons who have previously identified an interest in the relevant designated issues under Rule 1.13(d)(3) may submit a written rebuttal to testimony offered at the hearings. If there are no designated issues written rebuttal submissions by interested persons are also usually permitted. All such rebuttal submissions should be confined to materials on the rulemaking record and should not be used to supplement that record. The time for the submission of such rebuttals may be specified in the notice or by direction of the Presiding Officer. The submission must specifically identify the portions of the testimony being rebutted.

### .3.21 THE FINAL STAFF REPORT

Pursuant to Rule 1.13(f), the staff shall prepare a report to the Commission. The final staff report should be limited to no more than 300 pages, double-spaced, including single-spaced footnotes. The report should contain:

- (1) A summary and analysis of the entire rulemaking record, including recommended findings of fact and conclusions on the designated issues.

- (2) Recommendation for final Commission action, including the final proposed form of a rule, if recommended.
- (3) An analysis of the significant alternatives to the proposed TRR including those that might minimize any significant economic impact on small businesses and including, to the extent practicable, alternatives beyond the authority of the Commission to effect.
- (4) A summary and analysis of the public comments made in response to the preliminary regulatory analysis and initial regulatory flexibility analysis.
- (5) For the proposed rule and for each alternative identified, an analysis of the projected benefits and any adverse economic effects and any other effects, and an analysis of the effectiveness of the proposed rule and each alternative in meeting the objectives of the proposed rule. These analyses should identify those likely to receive the benefits and those likely to bear the adverse effects of the proposed rule and each alternative. To the extent practicable, benefits and adverse effects should be quantified in monetary terms, and the potential net benefits should be determined.
- (6) A discussion of any federal rules or statutes that may duplicate, overlap, or conflict with the proposed rule.
- (7) A discussion of the effects the proposed rule would have on state and local laws.
- (8) Additional legal and policy analysis, as needed.
- (9) Discussion of enforcement considerations and problems posed by the proposed rule. The cover of the report should contain a statement that the report has not been reviewed or adopted by the Commission, and that the Commission's final determination will be made upon the rulemaking record as a whole.

Upon completion, the Bureau Director will forward the Final Staff Report to the Presiding Officer for placement on the rulemaking record.

### 3.21.2 Publication

Announcement of the completion of the staff report may be made by press release as soon as an initial supply of copies is available for distribution. However, such a release should contain the following:

"Comments on this staff report are not desired at this time. Following publication of the Presiding Officer's report containing the recommended decision in this proceeding, all interested persons and the public will be given an opportunity to submit written comments on both reports. The commencement of the period for submission of those comments will be announced by news release and in the Federal Register."

However, publication of a news release announcing completion of the staff report (even with the disclaimer) frequently will prompt the premature submission of comments and confusion among those interested in the proceeding. It is therefore preferable to defer such an announcement until publication of the Presiding Officer's Report. At that time a comprehensive news release and Federal Register notice may be published.

### 3.21.3 Comments of Bureau Directors

Ordinarily comments of the Directors of the Bureau of Consumer Protection and the Bureau of Economics on the final staff report will be made when the rulemaking record is submitted to the Commission at the end of the post report comment period. However, a memorandum setting forth the Director's views may be forwarded with the staff report to the Presiding Officer for placement on the rulemaking record if a Director desires those views be the subject of public comment during the post report comment period.

### 3.22 PRESIDING OFFICER'S RECOMMENDED DECISION

After the publication of the staff report, the Presiding Officer makes a recommended decision. It must include a statement of findings (with specific page references to principal supporting items of evidence in the record) and conclusions as to all relevant and material evidence and specify the form of a final rule, if any, that should be promulgated. Rule 1.13(g). In addition, the recommended decision should contain a summary of the procedural progress of the hearings including references to motions, extensions of time, certifications and related matters, and it may include observations or recommendations on procedural or other matters.

The recommended decision should state that it has not been reviewed or adopted by the Bureau or by the Commission. It should explain that the Commission's final determination will be made upon the rulemaking record as a whole.

### 3.23 SOLICITATION AND HANDLING OF POST REPORT COMMENTS

#### 3.23.1 Announcement of Comment Period

At the time the Presiding Officer's recommended decision is placed in the rulemaking record, the Presiding Officer will publish a Federal Register notice announcing the availability of the recommended decision. This notice will also state that the staff report and the Presiding Officer's recommended decision shall be the subject of public comment for a period of seventy-five (75) days or more, as determined by the Presiding Officer. The notice will include a direction that comments be confined to information already in the record and will inform the public that comments may include a request for review by the Commission of any rulings or other determinations made by the Presiding Officer. The notice must also advise rulemaking participants of their right to request an opportunity for an oral presentation to the Commission pursuant to Rule 1.13(i). A press release announcing the foregoing will be published at about the same time as the Federal Register notice.

#### 3.23.2 Receipt and Handling of Post Report Comments

All post report comments will be directed to the Presiding Officer who will promptly place them on the rulemaking record and provide a copy of each to staff.

#### 3.23.3 Summary of Comments and Staff Indices

Staff at this point, if they have not done so earlier, may request Commission authorization to make available for public inspection staff-prepared indices of the rulemaking record. (See .3.6 above.) Staff reviews the comments received, which have become part of the rulemaking record, and provides the



Commission with a summary of them. This summary may be placed on the rulemaking record when completed, upon the Bureau Director's authorization.

### .3.24 FINAL DETERMINATION

#### .3.24.1 Commission Review of the Rulemaking Record

After the closing of the public comment period and preparation of the summary of comments, staff prepares a final recommendations memorandum. This memorandum is forwarded to the Commission via the Bureau, together with the Bureau Director's recommendations and the recommendations of the Bureau of Economics. If the staff intends to make recommendations to the Commission about oral argument participants, a second memorandum to the Commission must be drafted. This memorandum should be forwarded to the Commission together with the appropriate notices and letters.

After the oral presentation, the Commission will review the record and determine whether to promulgate the TRR recommended by the staff, promulgate a modified version of the TRR, or decline to promulgate a TRR. If the Commission does not decline to issue the TRR, it will direct the staff to prepare the Statement of Basis and Purpose and the Regulatory Analysis. The Commission then makes its final decision to promulgate the rule.

#### .3.24.2 Promulgation of a TRR

If the Commission decides to promulgate a rule, it must publish the text and a Statement of Basis and Purpose in the Federal Register. It should also identify the date of promulgation for purposes of Judicial review. (See .3.27 below.) Staff must also prepare a final regulatory analysis and a final regulatory flexibility analysis, except as explained in .3.24.2.3 below. The analyses must be published in the Federal Register, or the notice must explain how the public may obtain copies. If the rule was not listed in each of the Commission's regulatory agendas published in the last 12 months, the notice must contain an explanation of the reasons why it was omitted. (See FTCA §22(d)(4).)

##### .3.24.2.1 Statement of Basis and Purpose

The Statement of Basis and Purpose should summarize the evidentiary and legal basis for the rule, including the items identified in Rule 1.14(a)(1). It should identify the major relevant submissions of interested parties, the major positions advocated by participants, and the alternatives considered by the Commission. It should not exceed 100 double-spaced pages, including footnotes, which may be single-spaced.

##### .3.24.2.2 Interpretive Statements and Compliance Guidelines

It may be advisable for staff to include a section in the Statement of Basis and Purpose, or in a separate document to be promulgated along with the TRR, containing explanations of the meaning or applications of rule provisions, and/or guidelines for compliance with the rule. Publication of these interpretations or guidelines simultaneously with publication of the TRR, as opposed to their later publication as the staff interpretive statements or guidelines, will ensure that they receive the same dissemination as the TRR; it will also ensure that industry members learn of all their obligations under the TRR as soon as the TRR becomes effective. Also, consideration of the need for interpretations and guidelines prior to publication of the TRR will help staff to evaluate the clarity and comprehensiveness of the TRR itself.

##### .3.24.2.3 Final Regulatory Analysis and Final Regulatory Flexibility Analysis

The final regulatory analysis should contain a detailed analysis of the costs and benefits of the rule and any alternatives that were considered by the Commission. To the extent practicable, costs and benefits should be quantified in monetary terms and the potential net benefits should be determined. Rule 1.14(a)(2).

If the rule may have a significant economic impact on a substantial number of small businesses, then a final regulatory flexibility analysis must also be prepared containing:

- (1) A succinct statement of the need for, and the objectives of, the rule.
- (2) A summary of the issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment by the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments.
- (3) A description of each of the significant alternatives to the rule that are consistent with the stated objectives of applicable statutes and designed to minimize any significant economic impact of the rule on small entities and that were considered by the agency, and a statement of the reasons why each such alternative was rejected.

(See the Regulatory Flexibility Act, 5 U.S.C. 604 and 13 C.F.R. 121.3-10 (including Schedules A, C, and D).) Generally, the information required by this Act will be integrated into the regulatory analysis required by Section 22 of the FTC Act and Rule 1.14(a)(2); it need not be contained in a discrete section. (See 5 U.S.C. 605.)

The Commission need not prepare a final regulatory flexibility analysis if it certifies that the rule will not have a significant economic impact on a substantial number of small entities. The certification must be published in the Federal Register and provided to the Small Business Administration.

#### .3.24.2.4 Paperwork Clearance

If the proposed rule contains a requirement for the collection of information (i.e., a reporting or recordkeeping requirement), it must be submitted to the Office of Management and Budget under 44 U.S.C. Section 3504(h). The notice of proposed rulemaking must contain a statement that the information collection requirements in the rule have been submitted to OMB and should advise that comments on paperwork issues may be directed to OMB (as well as the FTC). The notice should be submitted to OMB along with a completed clearance package (See OM Ch. 3.1.3.6.) When the final rule is published, the Statement of Basis and Purpose should explain how the provisions subject to OMB review conform to OMB's comments, including an explanation of any modifications made in the rule or an explanation of why OMB's comments were rejected. The final rule must then be re-submitted to OMB for assignment of a control number. After receipt of a control number, the staff should prepare a Federal Register notice announcing that number.

Staff should contact the Assistant General Counsel for Legal Counsel for more information if a pending rulemaking contains an information collection requirement.

#### .3.24.2.5 Letters to OMB and SBA

Staff should prepare a cover letter submitting the Statement of Basis and Purpose and regulatory analysis to the Office of Management and Budget at the time those items are sent to the Federal Register (whether or not the rule contains a collection of information requirement). A letter to the Chief Counsel for Advocacy of the Small Business Administration should also be prepared transmitting the same documents and, where

appropriate, a certification that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.

### .3.25 CLOSING A RULEMAKING PROCEEDING; DISPOSITION OF INVESTIGATION

A rulemaking proceeding may be closed at any time before promulgation of a TRR at the discretion of the Commission. A proceeding will automatically be closed by the Office of the Secretary upon promulgation of the TRR by the Commission. If a TRR is promulgated, the R-number is closed, and the rule is thereafter identified only by the published C.F.R. number. (See .3.9 above.) The TRR then goes into a compliance stage.

Staff's investigation will remain open until the Commission determines, ordinarily at staff's request, to close it. Staff may wish to keep their industry-wide investigation open if they desire to pursue further investigation of specific industry members for possible adjudicatory enforcement actions.

### .3.26 [Reserved]

### .3.27 JUDICIAL REVIEW

A rule is subject to judicial review pursuant to 18(e) of the FTCA, based upon evidence in the rulemaking record. Within 60 days after a rule has been promulgated, any interested person, including a consumer or consumer organization, may file a petition for judicial review in the United States Court of Appeals for the District of Columbia Circuit or for the Circuit in which such person resides or has a principal place of business. (See FTCA §18(e)(1)(A).) For purposes of measuring the commencement and duration of such 60-day period, the rule is deemed promulgated under Rule 1.14(c) at 3:00 P.M. Eastern Standard Time on the fourth day after the date on which the rule is published in the Federal Register, unless such day is a Saturday, Sunday or national holiday in which event the rule is deemed promulgated at 3:00 P.M. Eastern Standard Time on the following business day. The Federal Register notice announcing the promulgation of the rule must include an explanation that the rule be deemed promulgated at such time because all interested persons may not be aware of the provisions of §1.14(c).

The grounds for holding unlawful, and setting aside a TRR are specified in FTCA §18(e)(3).

### .3.28 COMPLIANCE

#### .3.28.1 In General

After promulgation of the rule, compliance plans should be finalized and implemented. (See 3.7.(d) above.)

#### .3.28.2 Enforcement of TRR's

For an enforcement action against individual respondents, the Commission through the Department of Justice, may begin a civil penalty action directly in a United States District Court against any person, partnership, or corporation which violates a TRR with actual knowledge or knowledge fairly implied on the basis of objective circumstances that the relevant act or practice is unfair or deceptive and that it is prohibited by a TRR. (See FTCA §5(m)(1)(A).) In addition, the Commission may bring an action in a United States District Court or a state court of competent jurisdiction against any violator of a TRR, to redress injury caused by the violation to consumers or other persons, partnerships, or corporations. (See FTCA §19(a)(1).) (See OM Chs. 11

and 12.) Note that interpretive statements or guidelines issued by the Commission (.3.24.3 above) are not enforceable by these remedies.

#### 4 PROCEDURES FOR RULEMAKING REGARDING UNFAIR METHODS OF COMPETITION

As discussed in .2.3 above, the Commission has statutory authority under FTCA §6(g) to promulgate rules respecting unfair methods of competition. Title II of the Magnuson-Moss - FTC Improvements Act prescribes procedures applying expressly to the development of rules regarding unfair or deceptive acts or practices but does not apply those procedures to rulemaking dealing only with unfair methods of competition. (See FTCA §18(b).) Therefore, the procedural basis for rulemaking in the latter area is the general rulemaking provisions of the Administrative Procedure Act. (See 5 U.S.C. §553.)

Considerations noted in the previous (Magnuson-Moss) section concerning investigational strategy, the need for an efficient indexing system, and development of the rule are generally applicable to the development of competition rules as well.

Section 553 calls for simple notice and comment rulemaking. Whether to provide an opportunity for oral presentation of data, views, and arguments remains discretionary with the agency.

Where oral hearings are contemplated under §1.26(c) of the Rules of Practice, the Office of Administrative Law Judges should be notified by the staff of the initiation of a rulemaking proceeding and request that a Presiding Officer be appointed for the proceeding. (See .3.11.2.5 and .3.12.2 above.)

While the procedural requirements of §18 do not apply as a matter of law to competition rules, staff should also consider whether it would be advisable for the Commission to publish an advance notice of proposed rulemaking (ANPR) to obtain informal comment on a proposed rule before initiating the informal proceeding. This may facilitate the elimination of provisions that are too far-reaching or impractical.

Section 22 of the FTC Act also applies to rules promulgated pursuant to §6; therefore, preliminary and final regulatory analyses must be prepared. (See .3.11.2.2 and .3.24.2.3 above.) Advance notice of competition rules should also be included in the Commission's regulatory agenda. (See .3.11.2.1 and .3.24.2 regarding explanations that must be made if they are not included.)

In addition, the Commission must comply in all rulemakings with the National Environmental Policy Act of 1969 (see .3.11.2.1 and .3.11.2.3 above), the Paperwork Reduction Act of 1980 (see .3.24.2.4 above), and the Regulatory Flexibility Act (see .3.11.2.2, .3.11.2.4, .3.24.2.3, and .3.24.2.5 above). Informational copies of all advance and initial notices of proposed rulemaking and the final notice of promulgation should be sent upon publication to the Office of Management and Budget.

#### 5 REVIEW OF LEGISLATIVE RULES

The Commission has adopted a policy of reviewing each of its legislative rules (i.e. trade regulation rules and rules promulgated under special statutes) at least once every ten years. These reviews will be conducted according to a ten-year schedule proposed by staff and approved by the Commission. This schedule may incorporate reviews required pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 610. The Commission may modify or reorder this schedule where appropriate to incorporate new legislative rules, or to respond to external factors (such as changes in the law) or other considerations (such as resource limitations).

At the beginning of each calendar year, the Commission will publish notice in the Federal Register of the rules to be reviewed during that year. The Bureau of Consumer Protection, in consultation with the Bureau of Competition and the General Counsel, should forward to the Commission a draft of such notice by December 15 of each year. In conjunction with that notice, or in subsequent submissions forwarded to the Commission not later than March 1 of the following year, the relevant bureau should provide a draft Federal register notice soliciting public comment on each rule scheduled to be reviewed.

The notice should request comment on such matters as: (1) the economic impact of and continuing need for the rule; (2) changes that should be made in the rule to minimize any adverse economic effect; (3) conflict between the rule and any other federal, state, or local laws; and (4) the effect on the rule of any technological, economic, or other industry changes since the rule was promulgated. These various notices should be consolidated for publication whenever possible and, if practicable, combined with other Federal Register notices that the Commission publishes. The relevant bureau should review the comments received in response to the solicitation, and submit a memorandum to the Commission summarizing the comments and recommending any further action (such as a proceeding to amend the rule or a further investigation) that staff concludes is warranted.

A Mailing List Control Form

An electronic version of Illustration 1 is not available.

FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

OFFICE OF THE SECRETARY

[DATE]

The Honorable [NAME]  
Chairman  
Committee on Energy and Commerce  
United States House of Representatives  
Washington, D.C. 20515

Dear Chairman [NAME]:

Enclosed is an advance notice of proposed rulemaking regarding the trade regulation rule on [TYPE OF INDUSTRY] PRACTICES 16 C.F.R. Part 453. The purpose of this notice is to seek public comment on whether the rule should be repealed, amended or remain unchanged. This notice is being published and provided to you pursuant to Section 18(b)(2) of the Federal Trade Commission Act, 15 U.S.C. 57a(b)(2), as amended by the Federal Trade Commission Improvements Act of 1980, Pub. L. 96-252.

By direction of the Commission.

[NAME]  
Secretary

Enclosure

FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

OFFICE OF THE SECRETARY

[DATE]

The Honorable [NAME]  
Chairman  
Committee on Commerce, Science and Transportation  
United States Senate  
Washington, D.C. 20510

Dear Chairman [NAME]

Enclosed is an advance notice of proposed rulemaking regarding the trade regulation rule on [TYPE OF INDUSTRY PRACTICES] 16 C.F.R Part 453. The purpose of this notice is to seek public comment on whether the rule should be repealed, amended or remain as is. This notice is being published and provided to you pursuant to Section 18(b)(2) of the Federal Trade Commission Act, 15 U.S.C. 57a(B)(2), as amended by the Federal Trade Commission Improvements Act of 1980, Pub. L. 96-252.

By direction of the Commission.

[NAME]  
Secretary

Enclosure



FEDERAL TRADE COMMISSION  
WASHINGTON, D. C. 20580

OFFICE OF THE SECRETARY

[DATE]

The Honorable [NAME]  
Director  
Office of Management and Budget  
Executive Office Building  
Washington, D.C. 20580

Dear [NAME]

Enclosed for your information is a copy of the Commission's notice of proposed rulemaking regarding [TYPE OF INDUSTRY PRACTICES]. The notice is scheduled for publication in the Federal Register no sooner than 30 days from today. The notice includes the text of the rule that the Commission has proposed and a regulatory analysis of the proposed rule. This notice is being sent to you pursuant to the Commission's letter of June 25, 1981, to the Vice President. In that letter, the Commission promised to advise you of all of its notices of proposed rulemaking in order to assist you in implementing Executive Order 12291.

Sincerely,

[NAME]  
Secretary

Enclosure

FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

OFFICE OF THE SECRETARY

[Date]

[NAME]

Chief Counsel  
Office of Advocacy  
Small Business Administration  
1441 L. Street, N.W. Room 1012  
Washington, D.C. 20416

Dear [Name]

Enclosed is an advance notice of proposed rulemaking regarding the trade regulation rule on [TYPE OF INDUSTRY PRACTICES] practices, 16 C.F.R Part 453. In it the Commission is seeking public comment on whether the rule should be repealed, amended or remain as is. This notice is being published pursuant to Section 18(b)(2) of the Federal Trade Commission Act, 15 U.S.C. 57a(B)(2), as amended by the Federal Trade Commission Improvements Act of 1980, Pub. L. 96-252.

In addition, this notice is being provided to you pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, because the Commission intends to solicit comment on whether the rule, a proposed amended rule, or a repeal of the rule affects small entities. Your comments would be most welcome.

By direction of the Commission.

[NAME]

Secretary

Enclosure

Acknowledgement Letter for Public Comments

Federal Trade Commission  
Washington, D.C. 20580

Administrative Law Judges

January 18, 1990

Mr. Andrew Levitt  
R.F.D. 147  
St. James, New York 11780

Re: Proposed Amendment of the Mail Order Merchandise Trade Regulation Rule - 16 C.F.R.  
Part 435, R011006

Dear Mr. Levitt:

This will acknowledge the comment you sent in response to the Commission's Notice of Proposed Rulemaking concerning the above-captioned proceeding.

Your submission will be placed in the rulemaking record for consideration by the Commission.

Your interest in this matter is appreciated.

Sincerely,

Henry B. Cabell  
Presiding Officer  
202-326-3624

## Category Transmittal Sheet

Federal Trade Commission  
Washington, D.C. 20580

Administrative Law Judges

February 5, 1990

## MEMORANDUM

To : Document Processing Section  
Office of the Secretary  
Attn: John Thielen

From : Henry B. Cabell, Presiding Officer  
Office of Administrative Law Judges

Subject: Proposed Amendment of the Mail Order Merchandise Trade Regulation Rule - 16 C.F.R. 435 Rulemaking R011006.

RECORD SUBMISSION NO. D-1

It is requested that the attached documents be placed in the rulemaking record of the above-captioned proceeding in the category listed below:

- D. Comments of mail order or telephone-order merchants.
- D-1 Written comment of P.J. Leftwich, General Manager, Markson Science, Inc.
  - D-2 Written Comment of Steven L. Page, Associate Counsel, Texas Instruments Incorporated.
  - D-3 Written comment of Rodney M. Birkins, Sr., President, Catalog Division, J.C. Penney Company, Inc.
  - D-4 Written Comment of Barry J. Cutler, Esquire of O'Connor & Hannan, on behalf of certain mail order sellers.

## Staff Request for Additional Information

This Form letter is used to request additional information from witnesses who testified at the hearing and, in response to a request from Commission or outside counsel, tentatively agreed to provide additional information relative to formalize the request by a letter addressed to the presiding officer.

In using the form letter below identify the counsel making the request, and enclose a copy of the letter from that counsel. If substantially the same information is requested by more than one party--send only one letter but reference both requests.

July 18, 1990

Re: Mandatory Review of the Funeral Industry Trade Regulation Rule. Public Record No. 215-66.

Dear Mr.

Reference is made to your testimony at the hearing in Washington, D.C. on the above-captioned matter. Enclosed is a memorandum addressed to me by the Commission attorneys assigned to this proceeding in which they request that you provide the additional information or documentation referred to in your testimony.

Please give this matter your prompt attention. In the event that some or all of the requested material will not be provided or if there will be a substantial delay in submitting it, please inform me.

All of the material should be sent directly to me. I will have it delivered to the requestor. Upon the request of either you or members of the Commission staff, the material will be placed on the rulemaking record of this proceeding.

Sincerely,

Henry B. Cabell  
Presiding Officer  
202-326-3642

Acknowledgement of Supplemental Notification of Interest

Federal Trade Commission  
Washington, D.C. 20580

Administrative Law Judges

February 6, 1990

Robert L. Sherman, Esquire  
Ruskin, Schlissel, Moscou, Evans & Faltischek, P.C.  
170 Old Country Road  
Mineola, New York 11501-4366

Re: Proposed Amendment of the Mail Order Merchandise Trade Regulation Rule,  
R011006.

Dear Mr. Sherman:

This will acknowledge your letter of January 31, 1990, with which you forwarded a Supplemental Notification of Interest as counsel for the Direct Marketing Association, Inc. (DMA).

If other interested persons who have filed notifications of interest share the same or similar interests as DMA a group may be formed. This group will be afforded the opportunity to select a representative to examine witnesses on behalf of the members of the group.

Any such grouping will be announced in a forthcoming order. If a group is not formed a representative of DMA will be permitted to examine witnesses at any hearing.

Sincerely yours,

Henry B. Cabell  
Presiding Officer  
(202) 326-3642

## Letter Inviting Oral Presentation

November 15, 1988

Professor Robert Sommer, Director  
Center for Consumer Research  
148 Everson Hall  
University of California, Davis  
Davis, California 95616

Re: Funeral Industry Practices Trade Regulation Rule; Record No. 215-66.

Dear Professor Sommer:

This will acknowledge your letter of November 10, 1988, in which you expressed an interest in testifying at the hearing on the above-captioned matter in San Francisco. This hearing is scheduled to commence on January 9, 1989, and I know of no plans to cancel it.

There is enclosed for your information a copy of the notice of rulemaking which describes the purpose of the proceeding. You will note that the Commission has not determined if it should continue, or amend, or repeal the rule.

Instructions for prospective witnesses are set forth in Section E of the notice of proposed rulemaking. 53 Fed. Reg. 19871. You will note that you are required to file a word-for-word statement of your testimony with me no later than December 1, 1988. Special instructions for witnesses who intend to present the results of a survey or research study are set forth in paragraph 4 of Section E. If necessary I can give you a brief extension of time to file the required materials.

Following the receipt of the witness statements a schedule will be prepared and you will be notified of the date, place, and approximate time for your appearance.

Your interest in this matter is appreciated.

Sincerely yours,

Henry B. Cabell  
Presiding Officer  
202-326-3642