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## .1 CONCEPT

Many violations of the laws administered by the Commission can be avoided and voluntary compliance may be improved through increased understanding of the Commission's interpretation of these laws and the Commission's enforcement objectives. The Commission finishes information to the public concerning its interpretation of the law and its enforcement policies through extra-judicial guidance as well as through its enforcement activities. The Commission also provides economic, financial, and marketing data to the public and other government agencies that may lead to better informed decisionmaking. Also see OM Ch. 17, "Public Information and Education."

## .2 GENERAL CRITERIA

The Commission and its staff routinely provide guidance concerning the broad general requirements and application of all federal antitrust and trade regulation laws which the Commission administers. However, in furnishing interpretive statements and evaluation legal issues the Commission generally will avoid giving specific advice respecting business operations or recommending adoption of any particular conduct or method of compliance with the law. These standards should guide the informal expression of views by members of the staff in the course of public statements and responding to general correspondence and telephone calls (OM Chs. 16 and 17).

When the Commission deems it advantageous to provide more formal general advice, it may select from among several alternative means including industry guides, enforcement policy statements, interpretations of special statutes and rules, and detailed staff reports. The Commission also may provide comments and views concerning specific legal issues in formal advisory opinions and in informal staff opinion letters. Legislative authority for the commission to publish reports and provide industry guidance is found in FTCA § 6(f). Provisions of the Administrative Procedure Act (5 U.S.C. 553) concerning notice and the opportunity to participate in rulemaking proceedings are not applicable to the statements of general policy and administrative interpretations which are discussed in this chapter (see, however, .3.6.4, below).

## .3 INDUSTRY GUIDANCE

### .3.1 SCOPE

This section discusses matters that should be considered in determining when an industry guide would be an appropriate form of corrective action and the procedures and standards to be followed in its formulation, implementation and enforcement.

### .3.2 CHARACTERISTICS OF A GUIDE

A guide is an administrative interpretation by the Commission of the laws it administers (See Rule 1.5). It may have application to any matter of fact or law and it may relate to the practices of a particular industry (Guides for the Household Furniture Industry, 16 C.F.R. 250) or to practices common to many unrelated industries (Guides Against Bait Advertising, 16 C.R.R. 238). In the past certain of these statements concerning practices in a particular industry were promulgated and referred to as trade practice rules (see note 1 to Rule 1.6 and 16 C.F.R. 17). Guides and trade practice rules are published in 4 CCH Trade Regulation Reporter and 16 C.F.R. 18 et seq.

Changes in Commission enforcement policy or in the status of the law may be reflected by the amendment or revocation of a guide or a trade practice rule. Guides which appear unenforceable or which are outdated and no longer useful may be rescinded.

Unlike a trade regulation rule (TRR) (see OM Ch. 7, "Rulemaking"), a guide does not have the force or effect of law and is not legally binding on the Commission or on the public in an enforcement action. Therefore, a case brought to enforce a guide, or which embodies the theory of a guide, must plead a violation of the underlying statute on which the guide is based, not a violation of the guide itself. The guide in question may be introduced into the record in the adjudicative proceeding, preferably as a matter of official notice. The purpose of a guide when used as evidence is to establish the Commission's interpretation as to the appropriate standard of conduct and measure of fairness concerning a particular method, act or practice. The ALJ or other trier of fact must determine what weight if any to accord this evidence in determining whether there has been a violation of law and what form of relief is warranted in the interest of the public.

### .3.3 WHEN AN INDUSTRY GUIDE IS APPROPRIATE

The factors discussed in this section may be considered by the staff to assist it in determining when to recommend a guide as opposed to a TRR or case-by-case enforcement. This discussion does not purport to be exhaustive, but lists some important considerations that are relevant to the decision. Obviously these considerations do not bind nor limit the staff in its recommendations or the Commission in its determinations.

A guide might be an appropriate form of corrective action in any of the following circumstances:

- (1) Where there is an indication that a large number of persons are engaged in a similar type of violation. In making a recommendation for corrective action the staff should consider whether the goals and objectives of the Commission might be attained more effectively and equitably against a large number of comparatively minor violations through promulgation of a guide that defines and helps focus attention on the unlawful conduct rather than selective case enforcement or a complex TRR proceeding.
- (2) Where there is reason to expect a high level of compliance. Widespread violations may be a result of a lack of understanding or misinterpretation of the law, or they may arise when competitive considerations cause many individual persons and firms to adopt and be reluctant to abandon a particular practice until other members of the industry have begun to do so. When promulgation of a guide may provide the impetus for members of an industry to voluntarily correct their business practices and thereby eliminate violations, it can be an effective means of achieving compliance. Individual enforcement action might then be brought against those selected members of the industry who refuse or fail to comply voluntarily with a guide.
- (3) Where a legal standard under consideration is difficult to define except in broad terms, and therefore would lack the requisite specificity for an effective rule.

It is, of course, desirable to have a guide clearly identify prescribed practices or appropriate standards of conduct even though by its very nature such a guide probably will not be as specific as a rule. For example, a guide should never be so general as to state a legal conclusion. It is not particularly helpful to the public to advise that a given practice is illegal "when it has the tendency

or capacity to deceive." A guide should contain meaningful factual criteria for determining when a violation exists and for bringing effective enforcement action.

- (4) Where there is not sufficient information about a particular practice or course of conduct upon which to base a substantive rule and the expense of conducting an investigation or proceeding to obtain such information does not appear warranted. The quantum of evidence required for a guide is less than that required for a rule. When a practice is believed to be widespread and its effects are thought to be detrimental to competition and the consumer, the Commission can make a choice between seeking substantial and probative evidence of violations (for rulemaking or case enforcement) and promulgating a guide that may deter it. Promulgation of a guide may also provide the Commission with the means to acquire actual experience under a proposed standard of conduct and thereby supply the basis for more effective rulemaking should it be required.
- (5) Where there are adequate private legal remedies available but there has been a comparatively low level of private enforcement action. The availability of private remedies and the potential effect of a Commission guide as support for private enforcement are appropriate considerations in evaluating law enforcement alternatives. For example, the Guides for Advertising Allowances and other Merchandising Payments and Services (16 C.F.R. 240) provide a number of useful illustrations of the differentiation between lawful and unlawful practices that may be relied upon as a suggestion for private enforcement.

.3.4

#### WHEN INDUSTRY GUIDES ARE NOT APPROPRIATE

An interpretive statement or definition of the standards of conduct required by the antitrust and trade regulation laws may be inappropriate when the applicable legal principles already are well-defined by statute or by case precedents. Some factual bases that may militate against issuance of a guide are (1) there is indication that the violations are willful or wanton; (2) only a comparatively small portion of an industry continue to engage in such practices; (3) the industry involved consists principally of a few large firms; (4) the competitive or consumer injury is so great that resort to case-by-case enforcement and entry of an order or a TRR proceeding is called for; (5) compliance with the standard of lawful conduct is not likely to be attained without enforcement action against one or more members of the industry or promulgation of a substantive rule having the force and effect of law; or (6) more stringent correction or enforcement is warranted, such as civil penalties under § 5 (m) (1) (see OM ch. 11, "Judicial Enforcement"). Issuance of a guide is not warranted when there is insufficient public interest in the problem to justify the expenditure of resources that would be required to enforce the guide.

.3.5

#### FORM OF GUIDES

The body of the guide should be preceded by a statement of purpose and the factual and legal basis for issuing a guide. The form of a guide will vary according to the specific purpose that is being served. In some instances a simple declarative statement of fact and law may be sufficient to clarify a particular point that is subject to question. In other cases, a guide may consist of a series of opinions or views concerning the factual or legal implications of some course of conduct "when" or "if" certain conditions arise or results occur. Most of the early trade practice rules provide good examples of relatively short but general declarative statements. In contrast, the Guides for Advertising Allowances and Other Merchandising Payments and Services (16 C.F.R. 240) utilize a narrative approach accompanied by examples which help to illustrate the particular matter together with a few definitive, declarative standards where appropriate.

Guides are intended for widespread use and reliance by the general public, both businessmen and consumers. It is particularly important that such guides be written in an easily readable style and readily understandable words that will communicate effectively. Assistance in the selection and use of simple language may be obtained through application of an approved readability test for measuring sentence structure and comprehension (see OM Chs. 5 and 7 for additional discussion about readability tests).

### 3.6 PROCEDURES TO PROMULGATE INDUSTRY GUIDES

#### 3.6.1 How Initiated

Consideration for a proposed guide is initiated as the result of a petition or application by an interested person or group, on the basis of a recommendation made to the Commission by its staff, or at the initiative of the Commission (Rule 1.6). A recommendation concerning the petition should be forwarded to the Commission within 90 days. A guide may be based upon information and views obtained from correspondence, investigatory files and proceedings of the Commission; from interested persons or groups in the industries that will be affected; and from conferences, hearings, and public comment that occur during proceedings to develop a guide.

The Secretary should refer to the appropriate bureau or regional office for comment and recommendation an application or petition for the Commission to promulgate a guide. Upon receipt from the staff of a recommendation for promulgation of a guide, or on its own initiative, the Commission may either immediately publish a proposed guide, direct the staff to conduct an investigation or study to develop a proposed guide and make further recommendations concerning the choice between a guide and alternative corrective action, or make such other disposition of the matter as it may deem appropriate, including closing.

#### 3.6.2 Responsibilities of Bureaus and Regional Offices

The need for and appropriateness of a guide, like a rule, should be considered early in the planning and investigation process. In most instances, however, a final determination to recommend publication of an industry guide will not be made until one or more investigations provide adequate foundation upon which the staff and the Commission may reasonably conclude that a questionable practice is widespread and that some form of corrective action is warranted in the interest of the public.

The staff of the bureau or regional office submitting a recommendation for a guide should do so only after thorough research and review of all related Commission materials has been conducted. The staff should establish an adequate factual basis for every provision embodied in a proposed guide and for selecting this form of corrective action. If possible, representatives of the industry involved may be contacted at an early stage to obtain their reactions to the principle of the proposed guide and to gauge the likelihood of satisfactory voluntary compliance by them with a guide.

If substantial resources will be expended in connection with further investigation, the staff may either continue its consideration under an appropriate existing file or initiate a new project or investigation, as warranted (see OM Chs. 3 and 19). Recommendation by staff that an industrywide investigation be conducted in order to develop a guide should be forwarded to the appropriate Bureau Director for review and comment prior to submission to the Commission for a determination. When investigation with compulsory process is required to provide an adequate basis for formulation of a guide, approval of the Commission is required. See the procedures for obtaining approval for an industrywide investigation and for use of compulsory process in OM Ch. 3, "Investigations."

### .3.6.3 Recommendation to the Commission

When the staff to whom the Secretary has assigned a petition for formulation of a guide or who has recommended initiation of an industry guide are satisfied that there is adequate factual basis and support, they should prepare a draft proposal which states the background and purpose of the guide and sets forth the guide provisions (see .3.5 above). The staff also should prepare a memorandum to the Commission describing or explaining the following:

- (1) The industry and its products;
- (2) The acts and practices involved and the legal requirements with respect thereto;
- (3) The jurisdiction of the Commission;
- (4) The appropriateness of a guide as opposed to a TRR or case-by-case approach, including evaluation of the comparative costs and benefits;
- (5) Any enforcement problems likely to be encountered if industrywide corrective action is undertaken;
- (6) All facts and considerations justifying that corrective action is warranted and that the recommendation to issue the proposed guide is in the public interest; and
- (7) Any staff recommendation regarding the need for, type, and duration of public hearings and opportunity for public comment, including any proposed requests to particular interested persons or groups to furnish comments or views (see OM Ch. 18.4).

### .3.6.4 Initial Federal Register Notice

The Administrative Procedure Act requires only that interpretative rules and policy statements be published in their final form in the Federal Register. It does not require the opportunity for public participation in their issuance. However, the Commission ordinarily will publish notice of its proposed promulgation of an industry guide in order to obtain public comment. Recommendation 76-5 adopted by the Administrative Conference of the United States on December 10, 1976, encourages the opportunity for public participation either before or after the issuance of interpretative rules of general applicability and statements of general policy.

A notice proposing promulgation of an industry guide should be prepared by the bureau or regional office reviewing a petition or initiating the recommendation. The notice should contain a short description of the industry and products involved, state the jurisdiction of the Commission (legal basis), explain the need for (factual basis) and purpose of the proposed guide and set out the provisions of the guide in its entirety. The staff may include in the notice a statement in support of the proposed guide which explains the provisions. Further, the staff should include in the notice a request for public comment on such matters as: (1) the economic impact and regulatory impact of the proposed guide; (2) the paperwork requirements that the proposed guide may impose; and (3) possible regulatory alternatives, if any, that would reduce the economic impact of the proposed guide. The staff may also include specific questions or considerations about which it requests comment or views from interested persons. If appropriate, the notice should furnish the dates of any proposed hearings, the place where they will be held, and the deadline for filing any written comments. (See OM Ch. 18.7)

### .3.6.5 Formal Hearings

There is no statutory or other general legal requirement for formal hearings in connection with the Commission adoption of an industry guide. However, hearings may be held at the discretion of the Commission as provided in Rule 1.6 if they would appear to be useful in facilitating the submission of information and comment necessary for proper consideration of the proposed guide.

### .3.6.6 Written Comment

Ordinarily there will be an opportunity for interested persons to file written comments concerning the appropriateness and necessity of the proposed guide. In some instances, the staff may expressly request written comments from interested persons or firms in regard to specific questions or in connection with particular provisions (see .3.6.4 above).

### .3.6.7 Placing Documents on the Public Record

Written comments in response to a proposed guide are placed on the public record by the Public Records Section so they can be viewed by other interested persons. Documents obtained by the staff and relied upon in the formulation of the proposed guide should also be placed on the public record if it appears such action will facilitate developing information and informed comment. However, confidential information, such as identity of applicants, cost data, and customer lists, must be removed from any documents prior to being placed upon the public record (see OM Ch. 15, "Confidentiality and Access").

All hearings concerning a proposed guide are open to the public. A copy of the transcript of such hearings should be made available to the public by the staff for inspection together with any letters of comment or views and other materials placed on the public record.

### .3.6.8 Final Promulgation of Guide by Commission

The staff may find it appropriate to revise sections of the proposed guide after receiving comments or views from the public. Any changes and the facts and considerations in their support should be discussed in a memorandum to the Commission recommending final promulgation of the guide. See OM Ch. 6, Illus. 4, for a suggested format that may be used in comparing the original and revised language. If the staff does not propose changes to the guide, the staff memorandum should summarize to the Commission the substance of any comments which were in opposition to the proposed guide. Once the Commission determines that the industry guide is appropriate and is in the public interest, it will direct publication of the guide in a Federal Register notice that specifies when the guide is to become effective.

## .3.7 COMPLIANCE - INDUSTRY GUIDES

Compliance with the guides aimed at specific industries, as distinguished from those guides directed to a specific practice or practices common to many unrelated industries, may generally be effected in two consecutive procedural phases. When a practice in many industries is involved, these phases may meld so



that general publicity and selective case enforcement proceed simultaneously after a short initial period of publicity.

.3.7.1 Compliance Phase One: Publicity, Education and Voluntary Compliance

This phase of the compliance procedure consists of publicity and education, directed at both the specific industry involved and at interested and affected consumers. Extensive use of the various communications media should be made, resources permitting (see OM 17). Major effort should be given to reaching industry members and concerned consumer groups to ensure their awareness and understanding of the requirements and the objectives of the guide.

During this phase, primary emphasis should be placed on attainment of voluntary cooperation in bringing about compliance with both the letter and the spirit of the guide. Overall responsibility for this phase of the compliance procedure rests with the division, regional office or other enforcement unit that initiated the recommendation that a guide be issued or was charged with responsibility for developing the guide. The Office of Public Information and various regional offices may be asked to assist in this undertaking.

.3.7.2 Compliance Phase Two: Enforcement Proceedings Before the Commission

This phase of the compliance procedure is focused on the institution of enforcement proceedings before the Commission in instances where compliance has not been effected during compliance phase one. As a general rule, the procedure should be initiated as soon as the initial phase has progressed to the point where members of the relevant industry have been adequately informed of the nature, substance, and objectives of the particular guide.

During this phase, enforcement proceedings may be undertaken if complaints from consumers of industry members, industrywide compliance checks, or other monitoring of the industry indicate that compliance with the guide has not been obtained. Enforcement actions may be recommended by the staff in any unit that has resources allocated to a program under which a portion of the guide was formulated and published.

.3.8 REVIEW OF GUIDES

The Commission has adopted a policy of reviewing each of its guides at least once every ten years. This review will be conducted according to a ten-year schedule proposed by staff and approved by the Commission. The Commission may modify or reorder this schedule where appropriate to incorporate new guides, 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 guides to be reviewed during that year. The Bureau of Consumer Protection, in consultation with the Bureau of Competition, the Bureau of Economics, 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 guide scheduled to be reviewed.

The notice should request comment on such matters as: (1) the economic impact of and continuing need for the guide; (2) changes that should be made in the guide to minimize any adverse economic effect; (3) any

possible conflict between the guide and any federal, state, or local laws; and (4) the effect on the guide of technological, economic, or other industry changes, if any, since the guide 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 guide or a further investigation) that staff concludes is warranted.

#### 4 ADVISORY OPINIONS

##### 4.1 SCOPE

This part deals with the Commission's discretionary responses to requests from the public for an administrative interpretation on certain types of legal issues or a statement of views with regard to a specific proposed course of conduct or action. It describes the standards and procedures that apply to the formulation and publication of such opinions and views. It includes both formal Commission opinions and staff opinion letters. It distinguishes between what are deemed to be proper staff opinion letters and other general correspondence (see .4.4 below).

##### 4.2 CHARACTERISTICS OF AN ADVISORY OPINION

An advisory opinion is a formal, written statement of views or letter of advice signed by the Secretary at the direction of the Commission in response to a specific request from any individual, group, or firm. It discusses the application of one or more provisions of law to the detailed factual situation set forth as a proposed course of conduct by the requester or analyzes a proposed course of conduct in light of the requirements of a particular trade regulation rule, order to cease and desist, or affirmative order of the Commission. It is issued in accordance with the provisions of either Rules 1.1 through 1.4 or 3.61(d) and (e). While the latter portion of the Rules concerning advice from the Commission in compliance matters does not use the term advisory opinion, it is customary to refer to both compliance advice and other opinions in the same manner (see .4.9.3 and .4.10.2 below).

##### 4.3 EFFECT OF AN ADVISORY OPINION

An advisory opinion is binding upon the Commission with respect to the person or group to whom such opinion is issued with regard to the acts, practices, or conduct described in the request, where all relevant facts were fully, completely and accurately presented to the Commission, until such time as the advice has been rescinded or revoked and notice thereof has been given to the requester. No enforcement action will be initiated by the Commission concerning any conduct undertaken by the requester in good faith reliance upon the advice of the Commission where such conduct is discontinued promptly upon notification of rescission or revocation of the Commission's approval (Rule 1.3(b)).

Under ordinary circumstances, the Commission also will not initiate enforcement action against any person other than the requester for engaging in conduct in good faith reliance upon the advice contained in an advisory opinion published by the Commission. The Commission may, however, reconsider its opinion and notify the requester and other persons of its rescission or revocation of such approval, and may initiate enforcement action against any person who does not discontinue the questioned conduct promptly. When any person engages in activities significantly different from or in addition to those described in an advisory opinion which renders the course of conduct unlawful and clearly outside the scope of the Commission's approval, the Commission may initiate enforcement action without regard to its advisory opinion.

#### 4.4 CHARACTERISTICS OF A STAFF OPINION

A staff opinion letter is a written opinion signed by a member of the staff and given to a person or group in lieu of advice from the Commission. A staff opinion may be rendered in response to a request for an advisory opinion or to any other inquiry that raises a significant legal question when a formal advisory opinion or advice from the Commission is not deemed warranted. The staff opinion differs from an advisory opinion in that it is not submitted to the Commission for review and approval. It should state that it is not binding upon either the Commission or the staff with respect to the requester or any other party. See OM Ch. 17.

The staff opinion letter differs from informal written replies to general correspondence both in the nature of the request being considered and in the form of the response. General correspondence may deal with requests for information concerning the Commission, the nature of the laws it administers, the content of existing rules, guides or policy statements, or other inquiries that raise no specific legal issues. In addition, general correspondence may contain complaints concerning existing practices. In the latter instance, the reply addresses only the critical issues that are posed and seeks to dispose of the matter by referral, incorporation of the correspondence in an existing matter, or explanation as to why corrective action does not appear warranted. Additional information may be requested for enforcement purposes. On the other hand, an inquiry may warrant more formal staff advice when it deals with a question of administrative interpretation affecting proposed action by the requester and raises a significant legal issue that cannot be resolved without careful analysis and an awareness of Commission attitudes and enforcement policies. As an example, a staff opinion letter may be rendered when a Commission response to a request for advisory opinion is not appropriate simply because the requester already has begun to implement the practice or course of conduct involved but all the other criteria for giving an interpretive statement are present. Staff opinions also may be given in connection with the interpretation of trade regulation rules and various special statutes administered by the Commission (see .4.9.5 below and OM Chs. 7 and 9).

A staff opinion letter usually recites every material fact upon which the advice is based, discusses any critical issue of legal interpretation and application, and expresses a view as to whether the staff would recommend corrective action to the Commission if the particular course of conduct were implemented or pursued (see .4.8.2 below).

The Commission or staff obviously cannot provide a general service to the business community merely to review and approve use of particular business forms, documents or procedures. Requests for staff review and approval of proposed bulk advertising copy, forms of contracts, generalized procedures, and the like ordinarily should be denied. Specific questions or issues under the laws administered by the Commission must be presented. In addition, purely hypothetical or academic questions of law ordinarily are inappropriate for Commission or detailed staff opinion.

#### 4.5 WHEN AN ADVISORY OPINION IS-APPROPRIATE

A formal opinion by the Commission may be rendered when the matter involves a substantial or novel question of fact or law and there is no clear Commission or court precedent; when a proposed corporate merger or acquisition is involved; when the subject matter of the request and consequent publication of Commission advice is of general interest; or when the General Counsel and the appropriate bureau are in conflict as to the nature of advice to be given.

#### 4.6 WHEN AN ADVISORY OPINION IS NOT APPROPRIATE

An advisory opinion may not be rendered when the course of conduct covered thereby is already being followed by the requesting party (or competitors, and therefore presents an enforcement question); where the same or substantially the same course of action is under investigation or is or has been the subject of a current proceeding, order, or decree; or where the proposed course of conduct or its effects may be such that an informed decision cannot be made without extensive investigation or other information-gathering and exhaustive legal and economic analysis.

#### 4.7 WHEN A STAFF OPINION LET MAY BE GIVEN

The Office of General Counsel may respond with its opinion, to a request for a Commission advisory opinion when the requirements for an advisory opinion are not met (see .4.5 above). The staff in the bureaus and regional offices screening correspondence should look for any requests for advice that are not specifically identified as requests for an advisory opinion but which should be referred to the General Counsel for determination whether to provide a staff opinion letter or even to recommend issuance of an advisory opinion. See .4.10.2 and .4.10.3, below, for information concerning the use of staff opinion letters concerning compliance matters and special statutes.

A staff opinion letter by the General Counsel is formulated in substantially the same manner that the draft of a formal advisory opinion is prepared for the Commission, except that the letter is signed by the staff and an extensive supporting memorandum is not required. While the staff opinion differs in that it is not binding upon the Commission, and should specifically so state, the considerations that warrant substitution of a staff opinion usually are such that a Commission opinion either is not appropriate or not required for the protection of the requester's legal interests. The staff should resist insistence that the Commission provide an advisory opinion solely for the peace of mind of the requester where there is no substantial factual or legal issue presented. When a requester raises an objection to being given a nonbinding staff opinion as denial of a right to have the Commission consider the request under its rules, the staff should point out those factors (lack of a substantial issue, absence of general interest, etc.) which under the Commission's guidelines would be likely to cause the Commission to exercise its discretion to decline to render advice (see .4.5 above).

#### 4.8 DRAFTING AN OPINION

##### 4.8.1 Form of an Advisory Opinion

The advisory opinion process of the Federal Trade Commission differs from the "Business Review Procedure" in the Antitrust Division of the Department of Justice (28 C.F.R. 50.6), which is addressed solely to the issue of whether the Department intends on the day of the letter to initiate proceedings if the course of conduct is pursued. In contrast, the Commission advisory opinion undertakes to discuss in a meaningful way the interpretation of specific legal principles and their application to the fact situation presented, or points out why the Commission is unable to render a decision (e.g., insufficient information concerning the probable competitive effect or impact of such course of conduct). The opinion may state which features of the conduct are likely to result in a violation of law, and it may recommend specific changes which, if adopted, will eliminate the likelihood of a law violation. The opinion may state, or clearly imply, whether the Commission will or will not undertake enforcement action if the course of conduct is pursued in the manner outlined in the advisory opinion. Instead of drawing a legal conclusion, the opinion may provide a statement or explanation about why the Commission does not intend to bring any legal action (as a matter of enforcement policy, i.e., the practice described may involve a technical law violation but the Commission does not feel that enforcement action would be warranted in the interest of

the public; see, for example, Opinion No. 297, 16 C.F.R. 15.297). The opinion or advice is signed by the Secretary "By direction of the Commission."

#### 4.8.2 Form of a Staff Opinion Letter

A staff opinion letter provides a similar administrative interpretation of law or its application to a particular set of facts, and may suggest whether the staff would recommend enforcement action if the course of conduct is pursued. A staff opinion ordinarily should not express any personal views concerning Commission case evaluation and selection priorities or enforcement policy. A staff opinion prepared in the Office of General Counsel is signed by the staff attorney responsible for its preparation. For more detailed information about preparation, approval, and signature of staff opinion letters, see .4.10 below.

### 4.9 PROCEDURES TO FORMULATE ADVISORY OPINIONS

#### 4.9.1 How Initiated

A request for advisory opinion should be in the form of a written request addressed to the Secretary (Rules 1.1 and 3.61(d)), although every written request for advice that fairly may be interpreted as an application for advisory opinion should be routed for appropriate consideration. The Secretary or any other office of the Commission which receives such a request should refer it to the Assistant General Counsel for Legal Counsel or to the appropriate division or regional office (see the provisions concerning compliance advice, special statutes and TRRs below). Staff of the Commission in each organizational unit are responsible for selecting correspondence that may warrant an advisory opinion. They should then consult with the Assistant General Counsel, Assistant Director for Compliance or other responsible party to determine whether such correspondence should be referred for further consideration of an advisory opinion.

#### 4.9.2 Responsibilities of the General Counsel and the Staff

Most requests for advisory opinion will be referred to the Assistant General Counsel for Legal Counsel for initial evaluation. The staff attorney to whom the request is assigned may consult with the appropriate bureau to discuss the nature of the advice to be given, or begin immediately to prepare a reply and recommendation. Every recommendation to the Commission for issuance of an advisory opinion should be reviewed by the bureaus having substantive responsibility in the areas of the law covered by the advice.

#### 4.9.3 Advice on Compliance with an Order

Commission Rule 3.61(d) makes express provision for a request for advice from the Commission as to whether a proposed course of conduct would be in compliance with an order. This letter of advice is similar in all respects to an advisory opinion and is handled in much the same manner. A formal request for advice of the Commission in a compliance matter should be addressed to the Secretary. It is referred to the appropriate compliance division or regional office for review and for preparation of a response and recommendation. When the course of action is not already being followed by the requesting party, the same or a substantially similar course of action is not under investigation or the subject of a current proceeding, order, or decree, and an informed decision can be made without extensive investigation, clinical study, testing or collateral inquiry, the matter may be appropriate for compliance advice (Rule 3.61(d)).

A recommendation that the Commission give advice and the draft response should be approved by the appropriate supervisors (Regional Director or Assistant Director for Compliance and Bureau Director in consumer protection matters, and Assistant Director for Compliance and Bureau Director in restraint of trade matters) before they are forwarded to the Commission. The Commission may ask the General Counsel for comments upon the proposed advice.

#### 4.9.4 Time for Preparing Advisory Opinions

The Commission has directed that the staff list each pending request for advisory opinion in the Monthly Status Report along with the date of the request and internal deadline for preparation of a response and recommendation. The procedure includes requests for advisory opinion handled by the bureaus in compliance matters as well as requests pending in the General Counsel's office.

#### 4.9.5 Advisory Opinions Concerning Special Statutes and Rules

The Commission does not ordinarily render advisory opinions concerning the technical interpretation of special statutes and TRRs. Such questions usually are handled by staff opinion letter, staff interpretative statements, or staff guidelines (see .6.2 below and OM Chs. 7 and 9). However, the Commission Rules concerning advisory opinions do not preclude a request for an advisory opinion, and the staff may recommend that specific advice from the Commission be given.

### 4.10 PROCEDURES TO PREPARE A STAFF OPINION

#### 4.10.1 General Counsel

The Rules of the Commission make no specific provision for the handling of requests for an advisory opinion when it does not appear that advice from the Commission is warranted. Since 1962, shortly after the advisory opinion procedure was adopted, the office of the Commission responsible for the preparation of advisory opinions has furnished staff opinion letters in response to requests for advisory opinion or other requests for advice involving a general interpretation of the statutes administered by the Commission when a formal advisory opinion did not appear warranted.

Every staff opinion letter prepared by the General Counsel is submitted to the appropriate bureau for review and comment. When there is serious disagreement between the General Counsel and the Bureau Director as to the advice that should be given, the opinion must be submitted to the Commission, to include opposing recommendations and the recommendations of the General Counsel (see .4.5 above). In the absence of such disagreement, the determination by the Assistant General Counsel for Legal Counsel to furnish a staff opinion letter or decline to provide any advice ordinarily is final.

#### 4.10.2 Compliance Matters

The Assistant Director for Compliance in the Bureau of Consumer Protection issues staff opinion letters in response to requests for advice concerning compliance matters when it does not appear that formal advice from the Commission is warranted. The reply concerning whether a particular practice or course of conduct would be in compliance with an order is prepared by a member of the staff in the Compliance Division or appropriate regional office and is signed by the Assistant Director for Compliance. The letter should state that the views of the staff in compliance matters are not binding on the Commission.

Although a regional office handling a compliance matter may be requested to furnish advice concerning compliance with an order, Regional Directors are not authorized to sign opinion letters. A recommendation for issuance of a staff opinion should be submitted to the Assistant Director for Compliance for approval and signing of the advisory letter.

The Compliance Division in the Bureau of Competition does not provide staff opinion letters.

#### 4.10.3 Special Statutes

The Commission staff also may issue opinion letters containing interpretations under the special statutes administered by the Commission. These staff interpretations may be pursuant to the general power and authority of the Commission (e.g., FTCA S 6) or under express authority granted by the Commission (Rule 1.72, dealing with staff advice under the Fair Credit Reporting Act). The interpretive letters are signed by the members of the staff who are responsible for their preparation or by the Assistant Director for Credit Practices. The opinions or views expressed are not binding on the Commission, and the letter should so state. See OM Ch. 9 for further discussion.

#### 4.11 PUBLIC RECORDS AND FILES

##### 4.11.1 Public Records of Advisory Opinions

Materials concerning a request for advisory opinion that are necessary for an adequate understanding of the application and significance of the opinion, including the request and the response, are placed on the public record. Information which is subject to statutory restriction or which may be excluded under the Commission Rules or in the public interest should be omitted (see OM Ch. 15). The names of the requester and any other parties are included in the public record.

In proposed mergers, the request and supporting materials are placed on the public record as soon as circumstances permit. In all other cases information is placed on the public record when the requester has received the Commission's advice. Copies of the Commission's complete advisory opinions are available to the staff and the public form in the Public Reference Branch, Room 130, Federal Trade Commission. Digests of Opinions Nos. 1 through 313, issued between 1964 and 1968, have been published in paperback and hard cover in Advisory Opinion Digests. A synopsis of each advisory opinion is published in the Federal Register and may be found in 16 C.F.R. Part 15, where the opinions appear in numbered sequence, e.g., Opinion No. 401 is found at 16 C.F.R. 15.401.

##### 4.11.2 Files of Opinion Letters

Staff opinion letters dealing with general legal questions, including both those that were issued by the staff under earlier Commission organization and those issued by the staff of the General Counsel under current procedures, are available in the Public Reference Branch, Room 130, Federal Trade Commission. The General Counsel has prepared card indexes arranged alphabetically and by legal subject matter for all such staff opinion letters issued since 1962. These indexes are available to the staff and the general public in Room 130, together with a "Users' Manual" that explains how to use the index.

Copies of interpretative staff opinion letters dealing with the Magnuson-Moss Warranty Act are available in the office of the Assistant Director for Product Reliability and Standards in the Bureau of Consumer Protection. The correspondence is arranged by the section of law to which the interpretation applies. All identifying information concerning the requesters has been deleted.

There have been no interpretative statements by the staff under the Fair Credit Reporting Act as provided by Rule 1.72. However, the Commission issued formal interpretations under this Act (16 C.F.R. 600) pursuant to the authority of Rule 1.73.

Interpretative statements under the Truth-in-Lending Act are rendered primarily by the Federal Reserve Board. These interpretations are published in the Federal Register, and a compilation of all such interpretations is being published on an annual basis by a private law firm. A copy of this compilation of interpretations is available in the office of the Assistant Director for Credit Practices.

## .5 ENFORCEMENT POLICY STATEMENTS

### .5.1 Scope

This section discusses the purpose, nature, form, content, and uses of statements concerning enforcement policy published by the Commission. It describes the circumstances and processes under which such policy statements are developed.

### .5.2 CHARACTERISTICS OF AN ENFORCEMENT POLICY

An enforcement policy is any clearly defined statement by the Commission concerning its future enforcement plans, goals, and objectives with respect to a particular industry or practice. The statement usually describes either the circumstances in which the Commission intends to take corrective action or the means by which it will be pursued rather than whether or when it may have a legal right to do so. It may also provide an interpretative statement of a law or substantive rule. The policy is of general application to the members of a particular industry or of many unrelated industries.

### .5.3 PURPOSE OF AN ENFORCEMENT POLICY

The principal function of an enforcement policy is to deter violations of law. The ways in which it may accomplish this objective include:

- (1) Identifying an industry or practice as an area of special antitrust and trade regulation concern;
- (2) Providing information to businessmen or consumers concerning particular practices that the Commission has reason to believe may be unlawful and in connection with which it might therefore initiate corrective action (e.g., Statements of General Policy or Interpretations Under the Fair Credit Reporting Act, 16 C.F.R. 600).
- (3) Establishing evaluation guidelines or standards by which to determine when an investigation and possible enforcement follow-up may be warranted (e.g., the merger guidelines serve as general statements of Commission enforcement policy).
- (4) Clarifying any ambiguity, confusion, or uncertainty about the interpretation of Commission TRRs or about enforcement policy that may have arisen because of developments either within or outside the Commission.
- (5) Increasing publicity concerning matters of policy which appear to have received inadequate attention.



#### .5.4 BASIS FOR AN ENFORCEMENT POLICY

A statement of enforcement policy may be issued pursuant to a statutory obligation; it may be based upon the accumulated expertise of the Commission acquired from numerous investigations and proceedings concerning a particular industry or practice; it may be the product of a specific investigation or study which provides the basis for policy guidelines the Commission deems to be applicable and of interest to a large industry or segment of society; and it may be the outgrowth of an independent Commission determination that pronouncement of an interpretative statement or enforcement policy upon a particular subject will further the public interest. Such statements usually are issued under the general authority of the Commission and such additional specific authority as may be appropriate. Whatever the foundation in fact and in law, a staff recommendation to the Commission to issue an enforcement policy statement should address the necessity for publication of it plans, goals and objectives as grounds for future enforcement action or as a deterrent to violations of law.

#### .5.5 FORM

The form of the statement will vary according to the nature and scope of the enforcement policy presented. In many instances an enforcement policy was first embodied in a news release approved and issued by direction of the Commission (e.g., the statement on Three-Party Promotional Sales Plans issued Sept. 21, 1965).

In other cases a formal statement may be issued and published in the Federal Register with appropriate announcement by news release (e.g., Enforcement Policy on Mergers in the Dairy Industry, 38 Fed. Reg. 1770, July 3, 1973). Also, a statement may be published or promulgated in a form in which it is not specifically identified an enforcement policy (e.g., the news release on cooperative advertising plans issued Sept. 30, 1968, and the Standard Rule on "Push Money," 16 C.F.R. 14.7).

Due to their varied form, the only readily available reference source for all the enforcement policy statements by the Commission is a set of looseleaf binders in the Public Reference Branch, Room 130, Federal Trade Commission. This source is arranged alphabetically by subject matter. It contains many news releases representing statements of enforcement policy as well as the more formal enforcement policy statements and interpretations concerning special statutes, mergers, etc. Some enforcement policy statements are also published in 16 C.F.R. Part 14; the appendix to the Advisory Opinion Digests; and randomly throughout the CCH Trade Regulation Reporter (e.g., the merger guidelines for various industries). An effort is being made to update and codify prior policy statements and to codify all subsequent enforcement policies in C.F.R.

#### .5.6 CONTENTS

An enforcement policy statement should indicate any TRR and statute or statutes that are affected by the policy, explain the circumstances and considerations that led up to the issuance of a policy statement, describe the basis for and purpose of the statement, and present in a clear and unambiguous way a clearly defined policy concerning the Commission's enforcement plans, goals, or objectives.

#### .5.7 PROCEDURES FOR ISSUANCE OF POLICY STATEMENTS

There are no special procedures governing policy statements. The staff may recommend such a statement in the course of its investigative and enforcement effort either in lieu of some alternative form of corrective action or in furtherance and support of an existing program or proceeding (e.g., the policy on naming individual directors in future complaints involving bank-savings and loan interlocks). The recommendation should be

submitted in a supporting memorandum prepared by the staff with the approval or separate comments of the appropriate Bureau Director. The Commission may direct the preparation and publication of an enforcement policy on its own initiative.

When the Commission proposes to issue interpretative rules of general applicability and statements of general policy, it ordinarily publishes a notice in the Federal Register and affords an opportunity for public participation. Such participation generally is limited to written comments and views. If such procedures are not practicable, necessary, or in the public interest, they may be omitted and the rule or policy statement should include a brief statement of reasons for their omission.

## .6 OTHER INTERPRETATIONS AND GUIDELINES

Interpretations and guidelines concerning special statutes and TRRs are sometimes provided by the Commission and its staff in a manner that does not clearly fit into any of the aforementioned methods of guidance. There are no standards articulated for determining in which situation the Commission or the staff will provide interpretations and guidelines.

### .6.1 Commission Interpretations

The Commission has adopted and published in the Federal Register and the Code of Federal Regulations interpretations of special statutes which it administers. While these interpretations are intended to clarify the requirements of the Acts that they describe, they are not substantive rules and do not have binding force and effect on members of the public. Like industry guides, they are advisory in nature and failure to comply with them may result only in a *de novo* proceeding under the applicable statutory provisions. The Commission may publish its interpretations concerning either a statute or TRR on its own initiative or upon recommendation by the staff when questions regarding the meaning of the particular matter and requests for advice are so numerous that the need for general guidance becomes apparent.

### .6.2 STAFF GUIDELINES

Staff guidelines also are used to provide informal interpretations of statutes and TRRs. They do not need to be in response to an individual request for an opinion or advice, but rather may be an acknowledgment that there has been either general uncertainty or a large number of questions concerning the interpretation and enforcement of a statute or rule. These guidelines may be published in the Federal Register to obtain the widest possible publicity for the information of all the interested public. However, they are not officially approved and adopted by the Commission and are not codified in the Code of Federal Regulations. Guidelines are not binding for or against the Commission in an enforcement proceeding. Their use is limited to advice to the public and guidance of the staff in considering and recommending enforcement action by the Commission for violations of the relevant statute or rule.

## .7 REPORTS

### .7.1 SCOPE

This section discusses the considerations for preparing and publishing reports concerning the information collected and the economic and legal analysis performed by the Commission staff in the course of conducting various studies, investigations, and proceedings.

### .7.2 DEFINITION OF A REPORT

A report is a comprehensive statement by or to the Commission containing economic, financial, and market statistics or other information which may be accompanied by economic or legal analysis of the staff. It may be published under authority of FTCA § 6(f).

### .7.3 PURPOSE AND USES

Reports represent the accumulated experience and knowledge of the Commission and its staff with respect to the structure, conduct, and performance of the market and the economy. Information contained in such reports is intended for the use of the Commission, Congress, other government agencies, or the public as the basis for consideration of enforcement, legislative, regulatory, business, and other policy or market decisions. Some reports present analysis of the structure and performance of a sector of the economy over a period of time (e.g., the years 1962-1971 covered by the Economic Report on the Dairy Industry). Other reports present data only at a particular point in time (e.g., Installment Credit and Retail Sales Practices of District of Columbia Retailers). A series of reports may be published to demonstrate not only current conditions but also market trends (e.g., Quarterly Financial Report on Manufacturing Industries, or the Economic Report on Food Chain Profits--a new series of the Commission).

Reports result from a variety of sources. The Report on the Structure of Food Retailing was prepared under contract with the National Commission on Food Marketing. The FTC Staff Report on the Effects of Decontrol on Competition in the Petroleum Industry was in direct response to Congressional and public interest but without any specific mandate. On the other hand, the Staff Report on the Used Motor Vehicle Industry was required by § 109 of the Magnuson-Moss Warranty - Federal Trade Commission Improvement Act (P.L. 93-637). A Survey of Funeral Prices in the District of Columbia: Staff Findings and Analysis was conducted with the express view of making a report, as well as for planning and evaluating possible law enforcement initiatives. The New York Regional Office Staff Report on Debt Collection Hearings resulted from a series of preliminary public hearings conducted to obtain information and public views concerning the consumer problems involved in that industry.

It is possible to prepare a report at any stage of an investigation or inquiry. A Report on Agricultural Cooperatives contains factual and legal analysis of the Capper-Volstead Act exemption for organization of food cooperatives, and was prepared as part of the program planning activities of the staff. In contrast, Food Chain Selling Practices in the District of Columbia and San Francisco and Discount Food Pricing in Washington, D.C. both resulted from staff investigations. The Commission then determined that it should publish the staff's analyses of these matters for general information.

The Agricultural Cooperatives and Debt Collection reports were published in order to share the benefit of current information-gathering at the Commission with interested consumers and other government organizations, and to indicate specific areas in which future legislative or regulatory action might be needed. Other reports of a largely statistical and economic nature provide information that may be useful to many segments of society, without any suggestion for corrective action. Members of the Bureau of Economics staff are currently doing a series of reports on their economic study and analysis of various discrete industries (e.g., semiconductors). A staff study, nevertheless, may furnish the basis for specific staff recommendations and for the adoption of Commission policy, eg., the Enforcement Policy on Mergers in the Dairy Industry that was published together with the Economic Report on the Dairy Industry.

### .7.4 RECOMMENDATION

Staff recommendations included within a report prepared for publication should be limited to general matters of public concern. Specific recommendations for further study and investigation or for enforcement action by

the Commission and legislative recommendations intended for submission to Congress should be submitted by a separate memorandum addressed to the Commission with the draft of report. This memorandum should cite the findings of the report that support each recommendation and include an evaluation of the recommendation, its costs relative to those for alternative means for corrective action, and the competitive or consumer benefits that may be expected to ensue. These recommendations should be reviewed by and bear the approval or be accompanied by the separate comments of the appropriate Bureau Director or Regional Director.

#### .7.5 PUBLICATION

The Commission makes a determination in each instance whether a staff report is of sufficient public interest or informational value to warrant publication. In addition, the Commission makes a determination as to when a report should be submitted to Congress or another government agency in addition to or in lieu of publication. The Commission may direct that a report be prepared for publication in order to make available information that has been acquired by the Commission and its staff, or that investigation or study be conducted to collect information for a report for publication.

A report published by the Commission containing primarily financial and economic data or responsive to Congressional mandate may be approved as a report of the Commission (e.g., the Annual Reports of the FTC). In most instances, however, the report will contain analysis, conclusion, and views of the staff together with possible suggestions for corrective action by the Commission or other parties. It should be clearly identified as a staff report which is not an expression of Commission views and which is not binding upon the Commission.

The staff should prepare its draft of a report and any recommendation concerning the manner of publication with a view to the restrictions on the Commission with regard to *ex parte* communications and prejudgment (see Rule 4.7). The Commission makes the final determination as to whether each report it authorizes for publication will be identified as a staff report or a Commission report. Arrangements for publication of a report authorized by the Commission are made by the Rules and Publications Branch in the Office of the Secretary.

#### .7.6 CREDITS AND ACKNOWLEDGEMENTS

A report by the staff to the Commission should bear an appropriate title that indicated the source and nature of the information presented. It may be designated a "Staff Report . . ." or, for example, it may be entitled an "Economic Report . . ." with a clear disclosure on the cover and/or title page that it is a "Staff Report to the Federal Trade Commission." The acknowledgements page should identify individual members of the staff who are responsible for and who made substantial contributions to the preparation of such report.

When one or two individuals have contributed substantially all of the required analysis and drafting for a report, they may claim authorship on the title page as well as in the acknowledgements.

The Bureau Director or Regional Director under whose supervision the report was prepared should be acknowledged.