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Section

Illustrations

.1 INTRODUCTION

.1.1 SCOPE OF CHAPTER

This chapter describes procedures and criteria regarding judicial actions which may be instituted by the Commission for corrective relief, including:

1. Civil penalties against nonrespondents under FTCA § 5(m)(1)(B)

2. Civil penalties for TRR violations under FTCA § 5(m)(1)(A), and see OM Ch. 12, "Compliance," which also covers this topic;

3. Consumer redress for TRR violations under FTCA § 19(a)(1)

4. Consumer redress as part of the equitable relief authorized for violations of existing orders by named respondents under FTCA § 5(1), and see OM Ch. 12, which also covers this topic;

5. Consumer redress following the issuance of a final adjudicated cease and desist order under FTCA § 19(a)(2); and

6. Temporary and permanent injunctions under FTCA § 13

Although not a judicial action, the Commission's inherent authority to order redress in FTCA § 5 administrative cease and desist orders is also discussed in this chapter. Reference should also be made to OM Ch. 12 which contains additional information on the processing of compliance matters, including cease and desist orders and trade regulation rules.

Excluded from this chapter are the following court-related enforcement actions and activities:

1. Civil penalties and injunctions against named respondents for violations of cease and desist orders under FTCA § 5(1) or Clayton Act § 11(1) as appropriate--see. OM Ch. 12; and

2. Procedures pertaining to the role of the Commission in court proceedings and of the Office of the General Counsel--see OM Ch. 13, "Judicial Appearances and Procedures."

.1.2 CASE PLANNING

An appraisal of alternative forms of relief during the initial stages of an investigation can help staff in formulating investigational strategy and resource commitments. Investigational strategy and procedures may vary depending on the statutory and evidentiary requirements of these enforcement alternatives. For example, the investigation may reveal the existence of practices which may violate a TRR or Commission order, for which a direct action in court for civil penalties or consumer redress may be authorized. During the early stages of an investigation staff should initially determine whether the practices under investigation are, in fact, proscribed by: (1) an existing TRR, (2) a final cease and desist order against the target firm or (3) any decision containing a final cease and desist order against other firms or individuals in which the Commission determined that such practices were deceptive or unfair. To determine whether a particular firm or individual has been involved in any Commission actions which made them subject to a cease and desist order, staff should submit a request for such information, usually by telephone, to the Inquiry and Search Branch, Office of the Secretary. If the target firm or individual is a named respondent in a Commission order covering the practices under

investigation (or a successor to such respondent), staff should consider whether to open a compliance investigation for civil penalties and other appropriate relief under FTCA § 5(1), which is discussed in OM Ch. 12.

If the target firm is not under Commission order, the next step will usually be a determination whether the investigation should primarily focus on those practices for which a civil penalty or consumer redress action can be instituted for violation of a TRR, or, if there is no TRR covering the proposed respondent's practices, whether to seek authority to serve a notice of prior Commission decisions involving these practices on a "nonrespondent" as a predicate for a civil penalty action under FTCA § 5(m)(1)(B).

Evaluation of the nature of the practices and consumer injury involved can enable staff to make timely decisions as to these enforcement alternatives. For example, in determining whether to seek civil penalties, consumer redress or both for rule violations, staff should consider the extent of injury resulting from the violation of law. In situations where there is limited individual injury, civil penalties will usually be the appropriate enforcement alternative (e.g., consumer redress will be more effective for high ticket items than for low ticket items). Similarly, evidentiary burdens in the enabling statutes will also be a determining factor (e.g., although civil penalties and consumer redress are enforcement options for TRR violations, the former requires actual knowledge or knowledge fairly implied that a TRR is being violated, while the latter does not.)

Where the practices being investigated are not covered by a TRR, an appraisal of statutory requirements and consumer injury will enable staff to determine whether the practices are such that civil penalties may potentially be sought under FTCA § 5(m)(1)(B) or whether consumer redress should be sought in connection with an administrative complaint. In the latter situation, the determination will involve an evaluation as to whether the practices will meet the dishonest or fraudulent standard of FTCA § 19(a)(2) and whether censurer redress is a viable option based upon the financial solvency of the target firm or individual, the nature of the injury to consumers or business entities and pertinent statute of limitations restrictions.

The foregoing examples are not all inclusive, but have been included to illustrate the necessity of making a determination of potential enforcement options an integral part of investigative planning and case selection. The remaining sections of this chapter describe the various statutory requirements and the types of evidence which should be sought to obtain relief pursuant to these various enforcement alternatives. Case processing and review procedures for these enforcement alternatives will generally follow the procedures set forth in OM Chs. 2 and 3, subject to special procedures contained in this chapter and in OM Ch. 12.

.2 ENFORCEMENT OF COMMISSION ORDERS

.2.1 CIVIL PENALTIES FROM RESPONDENTS

FTCA § 5(1) and Clayton Act § 11(1) apply to persons, partnerships or corporations who are subject to a final order of the Commission. Respondents or their successors, in appropriate circumstances, who violate a final order of the Commission are subject to civil penalties of not more than $10,000 under FTCA or $5,000 under the Clayton Act for each separate offense in violation of the order. For purposes of this section a continuing violation is deemed to be a separate offense each day such violation is continued. Furthermore, the U.S. district courts are authorized to grant mandatory injunctions and appropriate equitable relief to enforce final orders of the Commission.

For a more detailed explanation of the enforcement of orders against respondents and the procedures for processing these matters, see OM Ch. 12, "Compliance."

.2.2 CIVIL PENALTIES FROM NONRESPONDENTS

.2.2.1 Statutory Requirements

Under § 205 of the 1975 Magnuson-Moss amendments to the FTCA (§ 5(m)(1)(B)), the Commission may seek civil penalties against a nonrespondent who engages in practices which the Commission has held to be unlawful under the FTCA in issuing a cease and desist order where the nonrespondent had actual knowledge of the Commission determination and the unlawfulness of its practices. Thus, individuals or business entities may, pursuant to FTCA § 5(m)(1)(B), be subject to civil penalties for deceptive or unfair practices which have been held to violate the FTCA, even though such "nonrespondents" were not a party nor personally subject to the cease and desist order. In order to obtain a civil penalty against a nonrespondent, the Commission must demonstrate in federal district court that:

1. the particular act or practice was determined to be deceptive or unfair by the Commission in a § 5(b) (FTCA) proceeding;

2. the Commission issued a cease and desist order in that proceeding with respect to the particular act or practice;

3. the cease and desist order has become final; and

4. such person, partnership or corporation had actual knowledge that such act or practice is deceptive or unfair and unlawful under FTCA § 5(a).

Moreover, in a civil penalty proceeding against a nonrespondent, all issues of fact in that action must be tried de novo in the district court (FTCA § 5(m)(2)).

Should the case be settled by the Commission in the form of a civil penalty consent judgment, such settlement must be approved by the district court and be accompanied by a public statement of the reasons for the Commission's acceptance of the settlement (FTCA § 5(m)(3)). The authority to seek civil penalties from nonrespondents does not apply to acts occurring prior to January 4, 1975.

.2.2.2 General Investigatory Policy

This enforcement alternative can be considered only when the challenged practices have already been proscribed as being unfair or deceptive in a prior Commission proceeding. In addition, civil penalties can be sought only for violations which occurred after the proposed nonrespondent has received or otherwise evidenced actual knowledge of the unlawfulness of its practices. Thus these investigations may involve two distinct investigatory stages.

Before staff recommends a civil penalty investigation or action against a target firm, they should first determine, based upon their examination of the target firm and its practices, whether TRR enforcement or consumer redress would be warranted and is a preferable enforcement alternative.

If staff determines to pursue a nonrespondent civil penalty action, staff should examine the existing § 5(m)(1)(B) substantive area synopses (which can be obtained from appropriate program advisors) to determine whether the Commission has previously authorized this enforcement alternative in the area covered by the challenged practices.

Investigations focusing on § 5(m) enforcement may be developed during a 7-digit investigation. The status of the investigation will generally depend on the stage of the proceedings at which authorization to serve notice on a nonrespondent is sought. Staff may also commence a civil penalty investigation by recommending and securing approval for an industrywide investigation of a particular type of practice or business within a limited geographical area. (See .2.2.7 below and OM Chs. 2, 3 and 19.)

.2.2.3 Procedures For Implementing Nonrespondent Civil Penalty Investigation

.2.2.3.1 Initial Procedures

Once it has been determined to pursue a § 5(m)(1)(B) civil penalty action against a target firm, a civil penalty investigation is commenced by serving an approved notice on the target firm or firms.

Staff must seek the approval of the Bureau Director with regard to matters covered by previously approved § 5(m) substantive area synopses. An "approved 5(m) substantive area" is where the Commission has approved the synopsis of prior Commission determinations and has authorized the service of notice letters to companies or individuals who may be engaged in practices in that area.

For matters outside existing substantive area synopses, staff should submit a memorandum to the Commission, via the Bureau Director, to seek approval for the use of this enforcement alternative. The applicable program advisor should be consulted before this is done.

The following § 5(m) approved substantive area synopses are currently available from the appropriate program advisor:

. Advertising and Sale of Cosmetics

. Advertising and Sale of Freezer Meats

. Advertising and Sale of Home Improvement Products

. Advertising and Sale of Tires

. Advertising and Packaging of Toys

. "Bait and Switch" Sales Practices

. Business Opportunities Advertising

. Debt Collection Practices

. Demonstrations

. Door-to-Door Sales of Encyclopedias

. Endorsements and Testimonials

. Labeling and Otherwise Identifying Textile Fiber Products

. Sale of Merchandise Which Is Damaged or Defective or Different From That Ordered.

. Sale of Used and/or Rebuilt Merchandise

. Substantiation of Product Claims

. Truth-in-Lending Act's Right of Rescission in Certain Consumer Credit Transactions

. Truth-in-Lending Requirements in Consumer Credit Advertising

. Automobile Rental Practices

. Credit Balances on Retail Consumer Charge Accounts

. Disclosure of the Filling Contents of Feather and Down Products

. Sales of Merchandise or Services

. Labeling and Otherwise Identifying Wool Products

. Disclosure of the Safety Risks of Products

. Labeling, Invoicing and Advertising of Fur Products

. Energy Savings Claims

. Retail Food Store Advertising and Marketing Practices

. Reasonable Basis for Product Claims

. Advertising of Hair Loss or Baldness Treatments

. Obesity or Weight Control Drug Treatments

. Sales Approval/Unordered Merchandise

. Permissible Purposes for Consumer Reports

.2.2.3.2 Procedures For Bureau Director Approval Where Synopsis Has Been Approved

The Commission has delegated to the Director of the Bureau of Consumer Protection the authority to approve the mailing of notice letters to nonrespondents in substantive areas where there is an approved synopsis and where case selection criteria for that substantive area have been developed by the Bureau and approved by the Commission (except in sweeps of 50 companies or more). There is usually an omnibus resolution for each approved synopsis substantive area, which can be obtained from the appropriate program advisor. Where there is an approved synopsis, staff should submit a request to the Bureau Director to send a notice letter to nonrespondents and to use the existing omnibus resolution.

As a general rule, this memorandum will be routed through the Evaluation Committee if the proposed civil

penalty action is being conducted on an industrywide basis and letters will be sent to numerous individuals or firms. If the notice letters will be sent to only a limited number of nonrespondents (e.g., where the determination to send a notice letter grew out of an investigation of a target firm's practices) the request will be routed through the program advisor and does not require consideration by the Evaluation Committee. See .2.2.7 below for criteria as to when an investigation of the target firm(s) should be sought.

.2.2.3.3 Procedures For Commission Approval Where No Synopsis Has Been Approved

The memorandum seeking Commission authorization to pursue civil penalties should contain the reasons why the target firm(s) is appropriate for the relief sought. Applicable case selection criteria and protocols pertaining to the substantive area program covering the challenged practices should be utilized. (See OM Ch. 2) In addition, staff should discuss whether the practices should be examined on an industrywide basis and/or within a specific geographic area where Commission activity is likely to have a greater deterrent impact. For example, notice letters may be sent to a representative number of firms engaged in similarly challenged practices within a region or metropolitan area.

A synopsis of case decisions should be prepared and submitted to the Commission containing references to Commission opinions and to initial decisions incorporated in final decisions. Unappealed and undocketed initial decisions can be used in a synopsis since, under the APA, 5 U.S.C. § 557, initial decisions become decisions of the agency unless an appeal is received by the agency. Cases should be cited by their docket number and, where available, the FTCA Decisions citation should also be used with an indication of pertinent pages. Generally the synopsis should not contain references to cease and desist order provisions, since the statute requires that the nonrespondent have actual knowledge of a prior Commission determination. While there have been no court cases interpreting FTCA §5(m) (1)(B), the Bureau of Consumer Protection has limited the contents of the synopsis to the text of Commission opinions rather than the order provisions since these provisions are remedial in nature, rather than determinative of violative conduct. The Commission will not use consents where the consent does not contain a Commission determination that the act or practice is unfair or deceptive.

The synopsis should not generally contain references to consent orders, since most consent orders do not contain final determinations that certain practices are unlawful. (See Illustration 1 for an example of an approved synopsis.) The synopsis to be submitted should conclude with the following information:

"Approved:

Resolution: Approved [date] in File 000 0000,
[title of resolution]"

An omnibus resolution granting the use of compulsory process should be prepared and presented to the Commission. In most instances the resolution should seek compulsory process authorization for a particular specific practice, which may further identify a specific industry. The caption of the resolution should first identify the nature of the practices or industry involved (e.g., "Direct Sellers of Reference Books, unnamed" or "Bait and Switch, unnamed firms engaging in"). (See Illustration 2.)

Although omnibus resolutions are generally used in these § 5(m) civil penalty investigations, this does not foreclose the use of special resolutions specifically naming a target firm or individuals.

In addition to the proposed synopsis, staff should submit to the Commission a draft of the notice letter (see

Illustrations 3 and 4). Staff should also submit either the names or the number of firms and individuals who will be sent notice letters.

.2.2.4 Meeting Statutory Requirement For Actual Knowledge

After securing the appropriate Commission or Bureau approval to proceed, staff should utilize the following procedures for meeting the statutory requirement of actual knowledge.

(a) Send, by certified mail, return receipt requested: (1) a letter notifying the target firm(s) of the penalties for engaging in prohibited acts or practices (Illustrations 3 and 4); (2) copy of relevant statutory provision, which is attached to notice letter (Illustration 5); (3) copies of applicable cases (these can be obtained from FTC Decisions or Records Division); (4) a synopsis of the above cases. (See .2.2.3.1 above).

(b) In addition to retaining the return receipt, it is advisable for staff to prepare an affidavit of mailing, or if the materials are personally served an affidavit of service. This affidavit should list all of the enclosures (letter, copy of applicable cases and synopsis of cases) as well as date, time and method of service (Illustration 6). A registered or certified mail receipt merely shows that an envelope has been received but does not evidence its contents.

.2.2.5 Compulsory Process

To see if firms are complying with the synopsis, staff should, after approximately 30-45 days, prepare for a Commissioner's signature a follow-up subpoena or CID (whichever is appropriate). The precise time period for mailing of the subpoena or CID will depend on the nature of the injury and the practices being challenged. In situations where the target firm(s) has indicated a willingness to cooperate, a demand letter may be appropriate. However, even with the use of a demand letter, it is suggested that an affidavit be prepared stating that the affiant has made a complete and thorough search of his or her files and that the information submitted is a full and complete return of the material requested (Illustration 7).

.2.2.6 Staff Evaluation Of Information

Upon receiving the requested information from the target firm(s), staff should evaluate the data and recommend appropriate action for each of the target firms. The following factors should be considered when deciding what action to recommend:

(a) Whether the evidence indicates practices violative of prior Commission determinations;

(b) The extent and seriousness of the violations;

(c) The volume of business of the target firms;

(d) The extent to which the target firm knew that its conduct violated the law and the likelihood that such unlawful conduct will be repeated in the future;

(e) The degree and extent of consumer injury; and

(f) Whether any previous action has been taken against the target firm by the Commission.

.2.2.7 Criteria For Opening An Investigation

A determination to focus an investigation on a possible civil penalty action may be reached at varying stages during the course of an investigation. Generally the decision to open an investigation should be made based upon the criteria and time standards set forth in OM Chs. 3 and 19. Thus the criteria for determining when to initiate a 7-digit investigation may differ from case to case. Because of the need for flexibility and the variable patterns of these investigations, it is advisable to consult the substantive program advisor in determining how to structure the investigation. The following criteria are provided for general guidance.

.2.2.7.1 Criteria Where Approved Synopsis

If an approved synopsis for the specific acts or practices involved in the investigation exists, staff should first ascertain whether there is an omnibus resolution which can be utilized. This will usually be the case. Staff may send a notice letter using the approved synopsis and use the omnibus resolution to subpoena information after obtaining the approval of the Bureau Director.

Where the investigation is being conducted on an industrywide basis, an investigation within the originating office will usually be required and the program advisor should be consulted for guidance. Time should be charged on the Weekly Activity Report to the originating office's 7-digit number, rather than to the omnibus number. After review of the subpoena or voluntary return, staff should forward a request to the Bureau for a separate 7-digit investigation of each specific target firm(s) for whom additional investigation or a civil penalty action appears to be warranted.

.2.2.7.2 Criteria Where No Approved Synopsis

If there is no approved synopsis for the substantive area, staff must forward a memorandum to the Commission, via the Bureau Director, seeking approval of staff's draft synopsis and a resolution authorizing compulsory process. The resolution may be sought either in the form of an omnibus or special resolution, depending on whether the investigation is being conducted on an industrywide basis or involves a target firm (see. OM Ch. 3.3.6.7.4). In such instances, a 7-digit investigation must be requested and approved by the Bureau Director either on an industrywide basis or for the specific target firm(s).

Following the subpoena return, an investigation should be opened for any target firm still under investigation, if not previously opened for that specific firm, as outlined above.

.2.2.8 Staff Recommendation Seeking Civil Penalties Against Nonrespondent

If staff determines that a suit for civil penalties is warranted, a memorandum should be prepared recommending that the Commission institute a civil action (see OM Ch. 12, "Compliance," for a general discussion of the form and content of the memorandum). The memorandum should contain: (a) a discussion of the evidence supporting the civil penalty complaint; (b) the nature and extent of the challenged practices; (c) the extent to which they fall within an established Commission determination of unlawful conduct; and (d) the financial ability of the target firm to pay any civil penalty award. Staff should also draft and submit to the Commission a proposed district court complaint (Illustration 8).

Staff should also prepare a letter for the signature of the Chairman referring the matter to the Attorney General (Illustration 9). As with all civil penalty actions, the Department of Justice is given the opportunity to handle the case, and should the Department consent or not file the action, the matter is returned to the Commission, which may file on its own initiative (for further discussion of statutory requirements, see OM Ch. 13).

Staff should also prepare a proposed news release. Any unusual aspects of the case which are appropriate for inclusion in the news release should be discussed with the Office of Public Information.

.2.2.9 Consent Settlements

After consultation with the appropriate program advisor and the compliance division regarding initiation of a civil penalty action, and prior to submission of this recommendation to the Commission, staff may negotiate a consent judgment with the target firm(s). (For more information, see OM Ch. 12.5.5 - Compliance.)

The consent judgment, in addition to providing for the amount of monetary civil penalties, should contain provisions for a mandatory injunction which would cause any future violations by the defendant target firm to be considered as contempt of court with appropriate sanctions (Illustration 10).

If negotiations are successful, the consent judgment should be submitted to the Commission and a public statement giving reasons for the settlement, which must be approved by the court, should be prepared (Illustration 11).

Staff should also prepare a letter for the Chairman's signature referring the consent judgment to the Attorney General (Illustration 12).

.2.2.10 Closing of Nonrespondent Civil Penalty Investigation

Where examination of the facts indicates that a civil penalty action is not warranted, staff should close the investigation (see OM CH. 3 for a general discussion on procedures for closing investigations). When the investigation is closed, staff should prepare a closing letter for mailing to the target firm(s). Such letter should contain a reference as to the reason for closing the investigation (Illustrations 13 through 15).

Where the closing is based on the fact that a target firm has ceased operations, the closing letter should give notice to responsible corporate official(s) that further conduct by that individual under a different legal entity could result in the Commission initiating a civil penalty action against that official in his or her individual capacity (Illustrations 14 and 15). This letter is placed on the public record. In appropriate cases, staff should consider obtaining an affidavit from such persons(s) stating that person's intention to cease business operations and containing statements establishing actual knowledge (see Illustration 16). This affidavit should be obtained when staff is of the belief that there is a reasonable likelihood that the individual will continue the violative conduct by commencing business in a new form or under a new business name. This possibility is particularly evident in situations where an individual can begin a new business with only a limited amount of capital (e.g., direct selling and business opportunity firms).

.3 CONSUMER REDRESS-CEASE AND DESIST ORDERS

.3.1 CONSUMER REDRESS FROM RESPONDENTS AFTER ADJUDICATIVE TRIAL

.3.1.1 Statutory Authority

Pursuant to FTCA § 19(a)(2), as amended by § 206 of the Magnuson-Moss FTC improvement Act, the Commission is authorized to seek consumer redress in federal district court or any state court of competent

jurisdiction against any person, partnership, or corporation who is subject to a final cease and desist order for having engaged in any deceptive or unfair act or practice. It must be shown in the court action that the challenged act or practice is one which, under the circumstances, a "reasonable man" would have known was dishonest or fraudulent. This is a stricter standard than is required for a § 5 administrative proceeding.

Furthermore, such act or practice must have occurred within 3 years prior to the date the complaint issues (FTCA § 19(d)). The Commission has one year from the date of the final order to initiate a consumer redress proceeding in an appropriate court (FTCA § 19(d)). In addition, § 206(b) of the Magnuson-Moss FTC Improvement Act excludes acts and practices that occurred prior to the enactment of Magnuson-Moss Act on January 4, 1975, unless the complaint and notice order notifies the respondent that consumer redress may be sought. See FTC v. Glenn W. Turner (M.D. Fla. 1978) for the first judicial interpretation of the consumer redress statute.

.3.1.2 Selection of Appropriate Form of Consumer Redress

In selecting the appropriate form of redress, staff, by virtue of the language of FTCA § 19(b), is given wide latitude in suggesting equitable or other relief. This relief can be imposed upon any person, partnership, or corporation. Although § 19(b) enumerates various forms of redress (e.g., rescission, reformation of contracts, refunds of money or property and public notification of violation), staff is not limited to the precise forms of relief set forth. However, imposition of exemplary or punitive damages is expressly excluded from the relief available.

Before seeking any specific form of relief, staff should be familiar with the common law evidentiary principles applicable to the relief being considered. While it can be argued that Congress did not intend the court to be bound by common law doctrines, judges will likely consider such matters when fashioning the appropriate relief. Thus, the suggested relief should be based on the evidentiary requirements generally accepted under common law. Moreover, staff should be acquainted with the defenses to each form of relief. Evidence needed for rebutting such anticipated defense should be secured prior to initiation of the § 19 action.

.3.1.3 Investigative Policy

.3.1.3.1 General

An investigation which may result in an action for redress should focus on gathering and preserving evidence relating to dishonest or fraudulent practices and the financial condition of the proposed respondent. Such information will allow the Commission to evaluate the redress potential of the case. Staff should be careful to isolate those practices occurring within 3 years prior to the expected date of issuance of a § 5 complaint (FTCA § 19(d)) which can predicate redress and earlier practices which can predicate only § 5 relief.

While such evidence is particularly relevant to a subsequent § 19 proceeding, the Commission will consider it when determining whether to issue a § 5 complaint. Additionally when determining the public interest, the Commission may give considerable weight to cases with a substantial likelihood of consumer redress.

.3.1.3.2 Preservation Of Evidence

The bifurcated proceeding in seeking consumer redress is lengthy and fraught with many potential delays which are likely to cause § 19 evidence to disappear and memories of witnesses to fade. Thus, it is important to utilize procedures which will allow for the evidence to be gathered in a form that can be retained for possible use in a § 19 proceeding.

In order to document and preserve such evidence, staff should consider the use of compulsory process. Staff should prepare a resolution authorizing compulsory process setting forth the usual recital of the Commission's investigative authority and include notice that the information gathered may be used to. support a § 19 proceeding (see OM Ch. 3 for information on investigational resolutions; see also Illustration 17).

In developing subpoena specifications and questions of corporate officials, the following areas are relevant to a subsequent § 19 action:

1. Knowledge of corporate officials as to the existence of the challenged practices;

2. The date that the corporate officials became aware of such practices;

3. Whether the corporate officials are aware that such practices are unlawful;

4. The reasons why the challenged practices were used by the company;

5. The date the corporate officials knew such practices were unlawful;

6. The extent and/or nature of individual consumer injury resulting from such unlawful practices;

7. What, if any, action was taken by the corporate officials after being put on notice of the existence of the unlawful practices;

8. Whether such action included any form of relief to aggrieved consumers;

9. The amount of pecuniary benefit accruing to the corporation and/or corporate officials from such unlawful practices;

10. Financial information which leads to a determination of the. corporation's assets and financial stability, e.g., institution of any bankruptcy proceedings;

11. Names, locations and other identifying data of persons affected by the practices; and

12. Existence of any private or state class actions filed.

In cases where individuals are likely to be named as respondents (e.g., officers or principals of the closely held corporation), similar information relating to such individuals should be obtained.

Furthermore, the development of § 19 evidence during the investigation takes on additional importance in terms of any consent settlement negotiations that may occur during the investigation. Obviously, knowledge by proposed respondents that the Commission's staff has documented evidence of consumer harm will be useful in negotiating consumer redress.

.3.1.3.3 Financial Condition

Staff should gather financial information so the Commission can determine whether the proposed respondent is financially solvent to make a § 19 action worthwhile. Since an action for consumer redress arises after a final order (completion of all appeals), solvency of the proposed respondent during the investigation does not

establish that respondent will have adequate funds at the time that a § 19 action would be undertaken. Dissipation of the respondent's assets during the investigative and adjudicative phases may diminish the desirability of seeking § 19 action.

During this investigation staff should gather relevant financial documents filed with the Securities and Exchange Commission (i.e., annual reports, quarterly reports, etc.), financial records showing the proposed respondent's net worth, income tax returns and projected cash flow during the period of the administrative action. Income tax returns should be subpoenaed from the proposed respondent during the investigation. In this regard staff should be cognizant of restrictions imposed by the Tax Reform Act of 1976, 26 U.S.C. 1 et seq.

Furthermore, the investigation should include efforts to determine whether the proposed respondent has improperly syphoned off funds procured from the unlawful conduct to other persons or concerns. Use of 6(b) orders may be particularly appropriate here (see OM Ch. 3).

Also, information from lenders who provide capital to the proposed respondent being investigated should be sought. Staff should note the jurisdictional restrictions imposed on the Commission's regulation of banks under § 5. While the issue of lender liability is still subject to differing court interpretations, a lender liability case probably could be supported upon a showing that the lender had knowledge of the unlawful act or practice and obtained a greater return from its investment than normally arising from a lender-borrower relationship. A theory of constructive trust could be argued where the lender failed to return money to injured consumers after having knowledge that the borrower had used the lender's capital to finance a dishonest or fraudulent act or practice.

.3.1.3.4 Case Selection Criteria-Financial Conditions

Case selection criteria should take into account the respondent's future ability to pay. One factor to be considered is the income derived from business activities other than those being challenged in the investigation since there can be a dwindling of a respondent's assets during the administrative proceeding. Therefore, a proposed respondent with sources or income other than from the challenged practices is more likely to have assets available at the close of the administrative action. A second factor to be considered is the proposed respondent's projected net worth. It is often advisable when drafting and analyzing financial information to use a financial consultant (see OM Ch. 18). The decision to use a consultant and the work that is performed will depend on the complexity or the financial situation.

The financial condition of the proposed respondent is not as critical to the § 19 action when the redress sought is other than of a monetary nature (e.g., contract reformation), but will influence the type of relief sought.

.3.1.3.5 Dishonest or Fraudulent Standard

Staff should consider how a court might interpret the dishonest or fraudulent standard. Although there have not been any judicial interpretations to date, the following interpretations should be considered. In interpreting the word "dishonest," it could be argued that the "reasonable man" would be aware of the unlawfulness of his conduct which had been previously prohibited by statute, common law or established Commission precedent. Since the term "dishonest" has not had the extensive judicial interpretation that the term "fraudulent" has, the Commission will have greater flexibility in arguing what conduct should be included within the definition of dishonesty.

In applying the reasonable man standard to fraudulent conduct, it could be argued that the statutory language

of § 19 modifies the customary elements of fraud. The reasonable man concept makes it easier to establish both the intent to deceive and actual knowledge of the false representation, than under traditional fraud standards.

Unfortunately, the only legislative history on the meaning of the dishonest or fraudulent standard is a cryptic comment in the Conference Report stating it is unnecessary to show that the reasonable man knew the act or practice was criminal. Initial § 19 actions should involve practices supporting traditional fraud or dishonesty theories since the court will likely be familiar with such actions and be more receptive to the Commission's case.

.3.1.4 Statute of Limitations

It is necessary to gather evidence as expeditiously as possible because of the three-year statutory limitation set forth in § 19(d). Staff must always be mindful that consumer redress is available only for acts and practices occurring within three years prior to the date of the Commission's complaint. Lengthy delays in gathering evidence of the challenged practices or prolonged unsuccessful negotiations of consent orders prior to issuance of a complaint impair the chances of securing consumer redress or limit the number of transactions for which redress may be obtained.

Under certain circumstances, staff may negotiate a waiver of the statute of limitations with the target firm. This is appropriate when staff and respondent are engaged in meaningful settlement negotiations as the three-year period is about to expire as to some or all of the challenged practices, and staff is forced to terminate the negotiations prematurely in order to make a timely complaint recommendation to the Commission. In such cases staff may propose that the target firm agree to waive the three-year period in return for staff's delay of its complaint recommendation.

In some instances, a target firm may not be represented by counsel. When negotiating a waiver agreement with a pro se respondent, staff should advise the respondent that he may wish to consult with an attorney before making the agreement because the waiver will result in the loss of the defense in a subsequent proceeding. A pro se respondent must fully Understand the implications of the waiver and enter into the agreement freely. Staff should not encourage or attempt to influence the respondent to guard against a later attack that the waiver agreement violates public policy or is fundamentally unfair.

It is also important that when waiver agreements are used, they do not contribute to unnecessary delay. The purpose of a statute of limitations is to encourage the government to bring its claims in a timely fashion and to protect individuals from government action when a claim is stale. Therefore, if settlement negotiations break down, the complaint recommendation should follow as soon as possible. Staff should not seek a waiver merely because more time would be helpful in preparing its case.

The standard form letter should be used for the waiver agreement. (See Illustration 20). It includes a clause limiting the waiver to a period of 12-18 months after the original statute of limitations would have passed. This will promote the policy underlying the statute of limitations because it will impose a time limit on the negotiations and encourage staff and respondents to settle the case without unnecessary delay. It will also encourage staff to make a timely complaint recommendation in the event that settlement negotiations break down. A flexible time limit of 12-18 months recognizes that the time needed for negotiations may differ from case to case. Staff can, therefore, choose a time limit which is appropriate up to 18 months. In extraordinary circumstances where staff believes a longer period is necessary, staff should consult with the General Counsel's office.

.3.1.5 Continuing Violations

Staff investigations often reveal practices for which consumer redress would be warranted except for the fact that the specific transactions occurred prior to the statute of limitations period. In many instances these practices unlawfully induced consumers to execute contracts for property or services with collection of payments within the statute of limitations period. In such cases, staff should consider the following two theories of continuing violations.

In the stronger case, the proposed respondent, after entering into a contract with a consumer, states in subsequent material, used to obtain payments on the contract, similar unfair or deceptive claims to those made at the time of execution of the contract. Although 3 years have elapsed since the initial transaction, it is arguable that the proposed respondent's continuing violation brings the pre-existing transaction within the statutory period. The use of unlawful collection procedures could, in itself, predicate a § 19 case without having to rely on a continuing violation theory. Another continuing violation theory is that the collection of monies on contracts procured through dishonest or fraudulent practices, without anything further, can bring such practices within the statute of limitations time period. It is recommended that the continuing violation theories should only be tested in cases having alternative bases for consumer redress.

.3.1.6 Preservation of Assets by Seeking Equitable Relief

Since the potential for dissipation of respondent's assets prior to a § 19 proceeding exists, thought should be given to a method of preserving the assets of the respondent at the time of the administrative proceeding. It is unclear whether a district court would grant the Commission injunctive relief to preserve assets (e.g., appointment of a receiver at the time of the administrative action). Another possible alternative for obtaining this form of equitable relief might be the seeking of a permanent injunction. The drawback with this method is that the entire case would be tried at the district court level without the benefit of any Commission findings of fact and conclusions of law. (See .5 below for a discussion of injunctions).

.3.1.7 Evidence in the Administrative Proceeding

Evidence relating solely to § 19 issues which is not also relevant to § 5 is not discoverable or admissible in the administrative proceeding (see Electronic Computer Programming Institute, Inc., et al, Interlocutory Order dated November 4 1975, 86 F.T.C 1093). It is, however, generally accepted that complaint counsel may present evidence establishing the nature, gravity and duration of an act or practice since these factors are relevant to the, form of the relief the Commission may issue. Thus, § 19 evidence relating to knowledge and factors supporting dishonest or fraudulent conduct way be, arguably, introduced as part of the administrative case. Moreover, when the individuals are likely to be named in a § 19 action, evidence of personal involvement of the individuals in the acts and practices which subsequently will be argued to be dishonest or fraudulent should be shown during the administrative case. The importance of presenting such evidence during the administrative case is heightened by the fact that under § 19(c) findings of the Commission are conclusive in the district or state court action upon completion of appellate review. If there is no appeal and the order becomes final under § 5 (g)(1), then the Commission's findings must be supported by evidence.

Subsequent to the administrative proceeding, staff should update the financial status of any individual or corporation that is subject to a Commission cease and desist order and which may be named as a party in § 19 action. Ordinarily, a formal resolution should be sought and compulsory process used to gather the necessary information. If there is an existing resolution covering the respondent which refers to § 19 consumer redress it may be used where staff requested, at the time the § 5 complaint was sought, that the investigatory file remain open. However, staff should consider the staleness, breadth and legal sufficiency of the existing resolution

before making a decision to use it. Omnibus resolutions should ordinarily not be used.

.3.1.8 Consent Settlements-Preservation of Discretion to Seek Consumer Redress

In many consent settlements, the proposed respondents are willing to agree to prospective orders, but unwilling to provide the Commission with adequate consumer redress. Where there is a question of the financial stability of respondent such settlements may be acceptable without redress if the respondent is willing to allow the Commission to preserve its right to seek consumer redress in a § 19 proceeding in the future. The preferred method to preserve such rights under § 19 is to include a provision to that effect in the consent agreement (Illustration 18). In addition, stipulated findings of fact and conclusions of law should be attached to the agreement.

An alternative method where the respondent is unwilling to stipulate the findings of fact and conclusions of law is to have the respondent agree not to contest the Commission's issuance of findings or conclusions with the understanding that respondent can contest such findings or conclusions in a § 19 action.

.3.1.9 Preamble to Proposed Orders Accompanying Part 3 Complaints

Section 19(b) FTCA states that the consumer redress provisions of Section 19(a)(2) are not applicable to acts and practices which occurred prior to the enactment of the Magnuson-Moss Act on January 4, 1975. Through a "grand-father" clause, the statute provides an exception where the complaint/notice order notified the proposed respondent that consumer redress would be sought. Thus, staff should include this notification in all complaints/notice orders. This may be done even where the acts or practices occurred subsequent to the enactment of the Magnuson-Moss Act.

This notice should take the form of a preamble to the notice order accompanying the complaint. It should advise the respondent that if the facts alleged are found to be true, the Commission may seek restitution, or other appropriate consumer redress under § 19(b) of the FTCA. The recital of the types of consumer redress contemplated should be based on what is necessary to compensate aggrieved consumers (see OM Ch. 4, Illustration 10).

.3.1.10 Proceedings in Court

.3.1.10.1 Court Complaint

When formulating a complaint for § 19 consumer redress in a federal court, staff should review Rules 4, 8, 9(b) 10, 11, and 15 of the Federal Rules of Civil Procedure (FRCP). Staff should give special attention to Rule 9(b) of the FRCP which requires that the circumstances constituting fraud be stated with particularity within the complaint; actual knowledge or other condition of mind, however, may be averred generally. The "condition of mind" exception in Rule 9(b) is particularly helpful in § 19 consumer redress actions since the dishonest or fraudulent standard has been statutorily modified to include activities that a "reasonable man would have known under the circumstances were dishonest or fraudulent" (see .3.1.3.5, above). In state actions, staff should review the applicable state rules governing filing of civil actions. Ordinarily
§ 19 actions will be filed in federal courts.

To quickly review the requirements for making a § 19 consumer redress complaint, staff should consider the following checklist:

1) Inclusion of statutory authority (15 U.S.C. (Supp. V) § 57(b)).

2) Basis for federal district or state court jurisdiction (15 U.S.C. (Supp. V) § 57(b)).

3) Name of the defendant; its place of incorporation and principal place of business; date the administrative complaint was served; indicate that the notice order gave notice to the defendant of a potential consumer redress action, and include the date of the final order of the Commission or when it becomes final by operation of law.

4) State that the injuries sought to be redressed fall within the statute of limitations.

5) Indicate nature of defendant's business.

6) Include the particular facts which constitute fraudulent or dishonest activity; including the fact that consumers suffered injuries.

7) Make prayer(s) for relief.

In the prayer, staff should request the specific relief needed to cure the alleged consumer injury. In addition, staff should seek such other relief as the court may deem appropriate. Furthermore, staff should be careful in drafting the requested relief so that it is clearly equitable in nature. Finally, a request that the defendant be ordered to pay costs should also be included.

Prior to filing a § 19 complaint, staff should seek to ascertain whether the federal district or state court has any local rules which are applicable to the proceeding. A compilation of the local rules for the federal district courts can be found in both the Federal Trade Commission Library and the General Counsel's Office.

.3.1.10.2 Notification to Injured Persons and Entities

In FTCA § 19 actions for consumer redress, it is unnecessary to individually notify each member of the class of injured consumers. The statutory language requires that notice be given in a manner reasonably calculated to inform those injured of the pending action (§ 19(c)(4)) (e.g., publication).

.3.2 INHERENT AUTHORITY TO SEEK ADMINISTRATIVE CONSUMER REDRESS

Pursuant to FTCA § 5, the Commission has a broad power to issue equitable-type relief within a cease and desist order; this power has repeatedly been upheld. See Windsor Distributing Co. v. FTC, 437 F.2d 443 (3d Cir. 1971) and cases cited in Curtis Publishing Co. 78 F.T.C. 1472 (1971). The Ninth Circuit in Heater v. United States 503 F.2d 321 (9th Cir. 1974), held that the FTC had no power to require the return of money unlawfully collected from consumers. However, the Commission has indicated that it disagrees and may reassert its authority within a cease and desist order to provide this and other forms of consumer relief. No other court has ruled on this issue.

Although the Magnuson-Moss Act specifically provided for consumer redress, it also made clear that S 19 relief did not preclude other relief by including in (FTCA § 19(e)) a provision that the grant to the Commission of such authority (§ 19(a)(b)) was "in addition to, and not in lieu of, any other remedy or right of action provided by state or federal law."

The inherent authority of the Commission to seek consumer redress has two advantages over FTCA § 19. First, the more stringent "dishonest or fraudulent standard" is not applicable and second, the three-year statutory limitation does not apply. Thus, by utilizing the Commission's inherent consumer redress power, staff may be

able to obtain redress where it would be unavailable under § 19.

In cases where the Commission seeks consumer redress as part of the administrative proceeding, the complaint should contain allegations which provide a predicate to support the specific form of affirmative relief sought. Also, such relief should be in either a specific order provision or in a notice of contemplated relief.

.3.3 NEGOTIATED ORDERS AND DECREES REQUIRING PUBLIC NOTICE OF REDRESS

Whenever staff negotiates consent cease and desist orders or consent decrees that provide refunds, contract revisions or other redress and call for publication or other dissemination of notices to the public of the availability of such redress, the staff should insist that notices make clear that they are being given pursuant to a settlement of an FTC matter.

.4 JUDICIAL ENFORCEMENT OF TRR VIOLATIONS

.4.1 CIVIL PENALTIES FOR TRR VIOLATIONS

.4.1.1 Statutory Authority

FTCA § 5(m)(1)(A), as amended by § 205 of the Magnuson-Moss--FTC Improvement Act, authorizes the Commission to seek civil penalties in a U.S. district court against any person, partnership or corporation of up to $10,000 per violation of a trade regulation rule, where such violation was "with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule." Civil penalties may be sought only for violation of rules pertaining to unfair or deceptive acts or practices unless otherwise indicated by the Commission, and not for interpretive rules the violation of which is not considered a violation of FTCA § 5. This section limits the authority to seek civil penalties to acts and practices occurring after January 4, 1975. The. Commission cannot file a civil penalty action through its own attorneys until the Department of Justice has consented or been given the opportunity to file such an action and has not done so within 45 days, FTCA § 16(a)(1) (see OM Ch. 13).

.4.1.2 Continuing Violations

In the case of a continuing failure to comply with an applicable TRR, each day of continuance of such failure is to be treated as a separate violation (FTCA § 5(m)(1)(C)). For purposes of determining the amount of civil penalties in such cases, the. statute lists the following criteria for the court to consider: (a) the degree of culpability; (b) history of prior conduct; (c) ability to pay; (d) the effect of the penalty on the defendant's ability to continue to do business; and (e) such other matters as justice may require.

.4.1.3 Actual Knowledge or Knowledge Fairly Implied Standard

The Commission does not have the burden of proving "actual knowledge" to bring a successful civil penalty action for a TRR violation. Although staff need not prove "actual knowledge," it should approach the "knowledge fairly implied" standard of proof with caution. Implying knowledge of a rule to a large corporation probably will not be very difficult since constructive notice may be presumed through publication of the rule in the Federal Register. However, a court may be reluctant to apply constructive notice where a small business is involved. In this instance, staff should consider establishing that the rule should have or did come to the attention of the businessman through means other than publication in the Federal Register. In some instances it may be appropriate to provide the business with actual notice of the requirements of a TRR. In other cases, staff may be able to "imply" knowledge by proving that such business is a member of a trade association which

circulated information concerning the rule to its members. In addition, staff should determine whether the target firm participated in the TRR proceeding or a compliance proceeding by contacting the appropriate program advisor and the compliance division.

.4.1.4 Case Selection Criteria

In evaluating the wisdom of a civil penalty action against a particular business, a number of factors may be helpful:

1) The deterrent effect of an action against the violator.

2) The size of the company (including relative size, amount of sales, geographical sales area and net worth). Many TRRs are essentially "small company" rules so this factor may be of limited value.

3) The nature and extent of violations of the TRR (distinguishing a practice from an isolated circumstance.).

4) Whether the company has been previously notified of the existence of the TRR.

5) Whether actions by other government agencies or private parties are pending or contemplated.

6) Estimated Commission resources required.

7) Criteria set forth in FTCA § 5(m)(1)(C) (see.4.1.2 above).

.4.1.5 Consent Judgments

The Commission is authorized to settle any action for civil penalties. This option should be considered by staff especially in light of the cost of proving its case in court and the efficient utilization of Commission resources.

However, any settlement must be accompanied by a public statement of its reasons and be approved by the court (§ 5(m)(3) FTCA). (For general format, see Illustration 11.)

.4.2 CONSUMER REDRESS FOR TRR VIOLATIONS

.4.2.1 Statutory Authority

Pursuant to FTCA § 19(a)(1) added by § 206 of the Magnuson-Moss-FTC Improvement Act, the Commission is authorized to institute a civil action for "consumer redress" against any person, partnership or corporation violating a TRR. The action may be brought, either in U.S. district court or in any state court of competent jurisdiction. Consumer redress may be sought only for violations of rules pertaining to unfair or deceptive acts or practices. Violation of TRRs must have occurred after January 4, 1975.

.4.2.2 Selection of Appropriate Form of Consumer Redress

For a detailed explanation, see .3.1.2 above.

.4.2.3 Case Selection Criteria

In evaluating whether a § 19 action would be appropriate, the following factors may be useful:

1) The amount and nature of consumer injury caused by the TRR violations, both singly and collectively.

2) The probability that private actions or the action of other government bodies will make § 19 action unnecessary.

3) The remedies contemplated. It must be remembered that § 19 only authorizes the Commission to bring an action against the TRR violator. If, for example, contract reformation is deemed to be the appropriate remedy, the remedy may be unavailable if the contracts have been sold or otherwise transferred to an independent third party.

4) The financial ability of the business to provide the contemplated relief.

5) Estimated Commission resources required.

.4.2.4 "Knowledge" Need Not Be Shown

The "actual or "implied" knowledge requirement of FTCA § 5(m)(1)(A) for TRR civil penalty actions is not required for § 19(a)(1) TRR consumer redress actions.

.5 INJUNCTIONS

.5.1 GENERAL

Pursuant to FTCA § 13 the Commission is authorized to seek preliminary injunctive relief in the federal district courts whenever it has reason to believe that: (a) a law enforced by the Commission is being, or is about to be, violated and (b) such action is in the public interest.

Section 13 is divided into two parts. Section 13(a) pertains to any violation of FTCA § 12 (applicable to food, drugs, devices or cosmetics). Section 13(b) pertains to any provision of law enforced by the Commission. Each section, by its specific terms, has its own standard of proof which the Commission must meet in obtaining injunctive relief. Elements of such proof have been placed in question based on two recent different judicial interpretations of § 13.

.5.2 STATUTORY PROVISIONS

.5.2.1 FTCA § 13(a)

Section 13(a) empowers the Commission to bring suit in federal district court seeking injunctive relief whenever it has reason to believe that any person, partnership, or corporation is engaged in the dissemination of false advertisements intended to induce the purchase of foods, drugs, devices or cosmetics in violation of FTCA § 12 and that enjoining such conduct would be in the public interest. Upon proper showing, a temporary injunction or restraining order shall be granted until final disposition of the administrative proceeding.

.5.2.2 FTCA § 13(b)

Section 13(b), a provision of the FTCA added by the Trans-Alaska Pipeline Authorization Act, 87 Stat. 592, greatly expanded the Commission's authority to seek preliminary injunctive relief. It enables the Commission to bring suit in federal district courts seeking a temporary restraining order or a preliminary injunction whenever it has reason to believe that any person, partnership, or corporation is violating, or about to violate, any provision of law enforced by the Commission. Upon a proper showing that such action would be in the public interest based on (1) a weighing of the equities and (2) the Commission's ultimate likelihood of success, a temporary restraining order or a preliminary injunction may be granted. If an administrative complaint is not issued within a 20-day period after issuance of this temporary restraining order or preliminary injunction, the order or injunction shall be dissolved, having no further force or effect.

Section 13(b) further provides authorization for the Commission to seek a permanent injunction in appropriate cases. The statute establishes no standard as to the burden of proof that must be met to obtain a permanent injunction.

The statutory language of § 13(a) requires only the showing of public interest for preliminary injunctive relief to be granted. However, the statutory language of § 13(b) requires that public interest be shown in light of a weighing of equities and the Commission's ultimate likelihood of success. Although this additional language as to a proper showing might lead one to construe § 13(b) as establishing a public interest showing based on the traditional equitable standard for private preliminary injunctive relief, the Conference Report on the Trans-Alaska Pipeline Authorization Act clearly rejects this interpretation. As stated in the Conference Report, the additional language "is not intended in any way to impose a totally new standard of proof different from that which is now required of the Commission." There was no intent to impose traditional equitable standards (e.g., irreparable injury, probability of success and imbalance of equities in favor of proponent), but to define a duty on the federal district court to exercise independent judgment in determining the propriety of issuing injunctive relief. This independent judgment requirement also has support in the statutory language of § 13(b) which substituted the permissive term "may" for the more mandatory term "shall" in § 13 (a).

.5.3 JUDICIAL INTERPRETATIONS

.5.3.1 FTCA § 13(a)

The necessary showing for § 13(a) action has received dual interpretations. One interpretation would make reasonable belief of the Commission the requisite standard. Under this view, the district court would be required to issue an injunction whenever there is a "justifiable basis" for such belief, FTC v. Rhodes Pharmacal Co., 191 F.2d 744, 747-8 (7th Cir. 1951). This "justifiable basis" been interpreted as requiring the Commission to make only a reasonable inquiry or have credible information that a state of facts probably exists as would reasonably lead the Commission to believe that the defendants are engaged in the dissemination of false advertisements in violation of FTCA § 12. The only question to be resolved is the narrow issue of whether there is adequate reason to believe that the alleged violation has taken place. See FTC v. National Commission on Egg Nutrition, 517 F.2d 485, 488-9 (7th Cir. 1975), cert. denied, 426 U.S. 919 (1976).

The other interpretation is that the Commission's reason to believe serves as a prerequisite only to the application for injunctive relief; the court itself must make further inquiries before granting the relief sought. Under this view, the proper showing specified in § 13(a) requires an independent examination by the district court of the merits and a consideration of the equities affecting all the parties. See FTC v. National Health Aids, Inc., 108 F. Supp. 340, 346 (D. Md. 1952); FTC v. Sterling Drug, Inc., 317 F.2d 669 (2d Cir. 1963). These cases were cited by the Conference Committee in defining the showing required under FTCA § 13(b).

.5.3.2 FTCA § 13(b)

A court interpretation of the evidentiary burden required under § 13(a) indicates that notwithstanding the differences in statutory language in §§ 13(a) and 13(b), the burden of proof required in seeking injunctive relief under both sections was essentially the same, and the function of the district court was to exercise independent judgment in determining the sufficiency of the Commission's evidence. See FTC v. Simeon Management Corporation, 532 F.2d, 708, 713 (9th Cir. 1976).

Section 13(b) has been interpreted as requiring the court to determine "whether the Commission has shown prima facie that the public interest requires that a preliminary injunction issue to preserve the status quo" until the Commission can adjudicate the matter and not whether the respondents have violated or are about to violate the law. Food Town Stores, Inc., 539 F.2d 1339, 1342 (4th Cir. 1976); FTC v. Lancaster Colony Corp., Inc., 434 F. Supp. 1088, 1090 (S.D.N.Y. 1977); FTC v. Beatrice Foods Co., No . 78-1673 (D.C. Cir. Sept. 19, 1978) Slip Op. at 25.

However, the courts have differed as to the showing on the merits which the Commission must make in order to meet the public interest standard. The standard which is gaining general acceptance is that announced in Lancaster Colony Corp., supra, 434 F. Supp. at 1090; FTC v. Beatrice Foods Corp., supra. Such a standard, the court in Lancaster noted, was "something less" than the traditional equity standard of probable success on the merits. 434 F. Supp. at 1090. This interpretation is in accordance with the Conference Report which accompanied the enactment of § 13(b) which stated that the traditional equity standard was "not appropriate for the implementation of a Federal statute by an independent regulatory agency where the standards of the public interest measure the propriety and need for injunctive relief." H.R. Rep. No. 624, 93d Cong., 1st Sess. 31 (1973). The staff should note that even under this standard, the Commission has not always prevailed in the injunction proceeding. FTC v. Beatrice Foods, supra.

Prior to Beatrice Foods, the District Court for the District of Columbia indicated that it would require a showing closer to the traditional injunction standard. See FTC v. Tenneco, Inc., 433 F. Supp. 105, 113 (D.D.C. 1977), where the court held that the Commission must demonstrate a "reasonable probability that it will ultimately prevail on the merits." The court of appeals in Beatrice Foods, supra, however, adopted the Lancaster Colony standard rather than the Tenneco criterion.

The second aspect of the public interest standard for injunctions is the weighing of the equities. This criterion has received little attention by courts considering the Commission's petitions for injunctive relief. No court as yet has disagreed with the Fourth Circuit's pronouncement in Food Town that the equities which are to be weighed are the public equities. FTC v. Food Town Stores, Inc., supra, 539 F.2d at 1344, 1345-46. Under the Food Town standard, private injury to the enjoined company is not a proper ground for denying an injunction under § 13(b). Id. at 1346. However, the staff should recognize that, in cases where the Commission's likelihood of success is less clear, the courts may consider the extent of the injury to the defendant.

.5.4 FORMS OF RELIEF

Various forms of preliminary injunctive relief have been granted by the federal district courts and staff is encouraged to consider this form of relief in each case. When seeking such relief, staff should consider that the comprehensiveness of the evidence presented (i.e., public equities and likelihood of success) is likely to weigh heavily on the measure of relief granted. Moreover, in determining whether to grant preliminary injunctive relief courts have considered such factors as whether the challenged practice is presently occurring; the continuous nature of the alleged infraction; whether a less drastic form of relief may be sufficient; the timeliness of the request for relief (e.g., staleness of Commission evidence); the nature of the public interest (e.g., public health and safety); and whether the acts are in or affecting interstate commerce. However, even

if the court is persuaded by staff's argument for relief, the actual formulation of such relief is discretionary and subject to independent determination by the court. Therefore, in requesting relief, staff should be aware that the district courts may fashion the relief to eliminate any interference with the defendant's business which is more than is actually necessary to alleviate the injury.

Courts have granted unique forms of relief where strong evidence is presented that such relief was necessary. See FTC v. Travel King, No. C74-6S (W. D. Wash. Feb. 22, 1974) where the court, in addition to enjoining advertising using the term "Psychic Surgery," required the defendants to inform the Commission of all persons who made arrangements to visit persons claiming to be psychic surgeons so that the Commission could advise such persons of the pending FTC action.

.5.5 CASE SELECTION AND INVESTIGATION

The following guidelines are factors that should be considered in evaluating the suitability of injunctive relief. They are not intended as rigid criteria. It may be that a matter which does not conform to one or more of the guidelines may nevertheless be appropriate for use of the Commission's injunctive authority.

Preliminary injunctive relief is appropriate where the challenged practices are immediately and clearly harmful; novel issues of law and remedy should generally be left for administrative proceedings.

Injunctions should not normally be sought in those cases where (a) it is known that private action will be taken to enjoin the practice in question (e.g., tender offers); (b) the practice in question has already been terminated (however, an injunction may be sought if the practice is later resumed or if a serious threat of resumption exists); (c) issuance of the administrative complaint has generally been sufficient to bring a halt to the challenged practice, e.g., certain varieties of hardcore horizontal and vertical price-fixing, or boycott agreements (however, if the practice is not stopped within a short period of time, e.g., 10 days after issuance of the complaint, an injunction should then be considered); or (d) the law is very unclear and it would be difficult for a court to determine the Commission's likelihood of ultimate success.

Before recommending an action seeking equitable relief, staff should assemble quantifiable estimates of injury supported by relevant data (e.g., market share, falsity of claim, consumer reliance) and should gather other evidence which would lead a federal district court to conclude that a prima facie case has been made.

In gathering information on the challenged practice, staff should make extensive use of compulsory process. Evidence demonstrating the unlawfulness of the practice and its adverse impact on public interest should be established through the use of transcripts of investigational hearings, affidavits of expected testimony from potential witnesses and relevant documents. The evidence should be sufficient to establish a likelihood of success.

Furthermore, it is incumbent upon staff to be sure that this evidence reflects current practices. Staff must be able to demonstrate that either the evidence presented shows that the challenged practices are continuing at the time of the district court proceeding or, if previously stopped, there is evidence showing the practices are likely to be resumed.

Staff should also focus on the interstate commerce question. For example, although the Commission generally is willing to accept the existence of interstate commerce based solely on the publishing of a deceptive advertisement in commerce, a district court unfamiliar with the FTCA may conceivably require additional evidence demonstrating the existence of interstate commerce.

In addition, a consumer protection case is more likely to result in injunctive relief if there is a showing of danger to the public health and safety, and staff should bear in mind the desirability of showing severe public injury when seeking injunctive relief in a nonpublic health and safety case.

Finally, in selecting cases appropriate for preliminary injunctive relief, staff should consider: (1) that the Commission approves the use of injunctive relief under § 13 of the FTCA in appropriate cases and (2) that it is important to develop precedents which will support future efforts at obtaining such relief. As a result, Commission cases should be carefully reviewed with special emphasis on the likelihood of the relief being granted by the federal district courts.

.5.6 REVIEW PROCEDURES

Under § 13 of the FTCA, the Commission is authorized to seek injunctive relief through its own attorneys without requesting assistance from the Department of Justice.

In coordinating Commission activities, staff should review OM Ch. 13.7.3 and follow the procedures outlined below.

For coordinating purposes:

(a) Early communication is encouraged. In BCP matters staff should consult with the program advisor and Deputy Director for Policy and Evaluation. In BC matters staff should consult with the Bureau Director's office.

(b) If the staff concludes that a preliminary or permanent injunction would be appropriate, coordination with the General Counsel's Office should begin immediately to assure that a minimum of delay occurs if the Commission authorizes staff to seek an injunction. In order to initiate such General Counsel participation, notify the Assistant General Counsel for Litigation, or the Deputy Assistant General Counsel for Litigation. Bureau of Competition and regional office staff working on competition matters should work through the Deputy Director, BC, in arranging contact with the General Counsel's Office.

(c) A recommendation that an injunction be sought should be accompanied by a recommendation that a complaint issue (including a draft administrative complaint, proposed order, and where applicable, notice of contemplated relief). This is necessary to minimize the possibility that injunctions will be dissolved upon the failure of the Commission to issue a complaint within 20 days. In appropriate cases (e.g., those involving clear legal violations and severe public injury), staff may submit a recommendation for injunctive relief without submission of a final draft administrative complaint and proposed notice order. However, in such cases staff should have at least an outline of the complaint and notice order prepared for review at the time of seeking injunctive relief. This will help ensure that the complaint completes the bureau review process and can be issued by the Commission before the injunctive relief is dissolved. In addition, where the administrative complaint will issue after the injunction is filed, the staff should prepare a resolution to be issued by the Commission authorizing an injunction action and setting forth the statutory requirements of 13 (see Illustration 19).

In cases where there is a substantial possibility that an injunction may be warranted after the administrative complaint has issued, staff should recommend that the Commission also make the required finding in conjunction with its issuance of complaint that enjoining the conduct would be in the public interest and authorize the staff to seek an injunction if the practice does not cease within a given time period. This

procedure is very important because of the limitations Rule 4.7 imposes on ex parte communications between the Commission and complaint counsel after the complaint is issued.

Finally, once the investigation is completed, staff should expedite the reviewing process because of the urgency of the action requested. To do this, staff should articulate in a cover memorandum the urgency of corrective action including sane estimate, based on an evaluation of the evidence, as to how long the unlawful activity is likely to continue in its present form.

.5.7 Permanent Injunctions

Section 13(b) authorizes the Commission to seek and the district court to grant permanent, as well as preliminary, injunctive relief "in proper cases" and "after proper proof." Neither the statute nor legislative history provide significant guidance as to which cases or proof would be "proper," other than an indication in the Conference Report that traditional fraud cases would be appropriate subjects for such relief. There are no judicial precedents regarding permanent injunctions under S 13 (b).

Staff generally should utilize the consent agreement procedures rather than seeking stipulated permanent injunctions. Where time constraints justify the use of a stipulated permanent injunction, a public statement explaining the reasons for the injunction should be made.

.5.8 CIVIL PENALTY COLLECTION PROCESS

This section describes internal staff procedures for the timely reporting and collection of civil penalty judgments obtained under § 5 of the FTC Act, 15 U.S.C. § 45; § 333 of the Energy Policy and Conservation Act (EPCA), 42 U.S.C. § 6303, & Part 1, Subpart K, of the FTC Rules of Practice (administrative civil penalty assessment proceedings to enforce the Appliance Labeling Rule); § 203(3) of the Petroleum Marketing Practices Act (PMPA), 15 U.S.C. § 2823(e) (actions to enforce the Octane Rule); § 7A of the Clayton Act, 15 U.S.C. § 18a; the Fair Debt Collection Practices Act, 15 U.S.C. § 1692l(a); the Equal Credit Opportunity Act, 15 U.S.C. § 1691c(c); and other FTC civil penalty programs. For purposes of these procedures, civil penalty "judgment" means a civil penalty that has been reduced to court judgment, whether such judgment is the result of a default, a consent decree, litigation, or otherwise. "Defendant" refers generally to the entities or individuals against whom the judgment may be collected. "Bureau" staff includes the staff of the Bureau of Consumer Protection, the Bureau of Competition, and the Regional Offices.

.5.8.1 Records Management, Recordkeeping, and Reporting Responsibilities

Bureau staff handling the case shall be responsible for obtaining a true copy of the civil penalty judgment as soon as possible after entry. This applies to all civil penalty judgments obtained by the Commission itself or by the Department of Justice (DOJ) on the Commission's behalf. Once the staff receives a copy of the judgment, the staff shall immediately forward a copy to the Records Processing Section of the Records Branch for placement in the official agency file on the matter, to the appropriate Information Centers in each Bureau, to the Office of Public Affairs, and to the Division of Budget & Finance (B&F) for entry into the civil penalties receivable system (CPRS) maintained by that office for tracking, accounting, and reporting purposes. With regard to civil penalties obtained for EPCA appliance labeling rule violations, the Bureau staff shall provide B&F and the Records Branch with copies of the Commission's administrative assessment order or consent agreement at the time it is entered, and shall subsequently provide copies of any subsequent court order, decree, or other judgment enforcing the civil penalties. See Commission Rules 1.94, 1.95(b).

When providing B&F with copies of the judgment (or assessment order, consent agreement or judgment in EPCA civil penalty matters), the Bureau staff shall also inform B&F of the responsible Bureau organization(s), Bureau staff contact(s) and, where applicable, the Department of Justice (DOJ) contact(s). Bureau staff shall keep B&F informed by internal memorandum of the date and nature of staff actions or similar information not otherwise reported or available to B&F relating to the staff's collection of the matter. Such information would include, e.g., mailing of dunning notices (§ .5.8.2.1, infra), enforced collection actions (§ .5.8.2.2, infra), recommendations to compromise, suspend, or terminate collection administratively (§ .5.8.2.3, infra), referral to DOJ (§ .5.8.2.4, infra), new Bureau or DOJ contact organizations or persons, etc. The Bureau staff should also keep B&F apprised of the status of collection efforts in cases that DOJ retains for collection.

B&F will periodically generate status reports on each open civil penalty matter in the CPRS database. Bureau staff shall review the accuracy of the reported data, highlight and explain any discrepancies that may appear, and provide any necessary updates or corrections. The timeliness and accuracy of such reports is important to the Commission in fulfilling its reporting obligations to the Office of Management and Budget (OMB), Treasury, and Congress. See, e.g., 28 U.S.C. § 2461 note (civil penalty reporting requirements under the Federal Civil Penalties Inflation Adjustment Act of 1990); 31 U.S.C. § 3719 (reports on agency debt collection activities to OMB and Treasury).

.5.8.2 Administrative Collection Responsibilities

The following procedures (§§ .5.8.2-.5.8.2.4) apply to civil penalty judgments for which the Commission retains collection responsibility. This does not include judgments obtained by DOJ on the Commission's behalf, unless DOJ has returned the judgment to the Commission for collection purposes.

In many cases, prior arrangements for resolution of payment issues (e.g., escrows, mitigation or compromise of the civil penalty amount, extended installment payment plans, etc.) will have been made with the defendant and expressly incorporated into the judgment to maximize the likelihood of full payment. In cases where the risk of nonpayment may be significant, the staff should also consider whether to perfect the judgment as a lien against the defendant's property or assets. See, e.g., 28 U.S.C. § 3201 (postjudgment liens on the United States' behalf).

Civil penalty judgments should provide by their terms for automatic wire-transfer or other direct payment method to the Treasury. In cases where the Bureau staff has not made such arrangements, and receives payment(s) directly, Bureau staff shall immediately hand-deliver each payment check to B&F for deposit not later than the next working day after receipt. (In the case of regional offices, such delivery may be accomplished by express mail next-day delivery.) Bureau staff shall maintain a log (or similar written record) in the relevant case or matter file sufficient to document the check's chain of custody from receipt until delivery to B&F. This record shall include, at minimum, the date on which the check is received in the office, the check number and amount, the names of all persons within the office who at any time have physical custody of the check, the date that the check is delivered (or mailed) to B&F, and the name of the staff person in B&F who receives the check (or to whom the check is mailed). Each person shall initial the log next to his or her name; staff may accept a signed and dated acknowledgment from the B&F staff person who receives the check, in lieu of that person's initials in the Bureau staff's log.

.5.8.2.1 Demand for Delinquent Payment

Where it is not inconsistent with the payment procedures or conditions established in the judgment itself, if a defendant fails to make a required payment on the judgment within five (5) calendar days after the due

date, the Bureau staff should mail a dunning notice not later than twenty (20) calendar days following the due date. The notice should demand that the defendant remit payment of all amounts due as of the date of the notice, including any interest, late charges, or costs that may also be due, within ten (10) calendar days of the date of the notice, unless the judgment provides that other payment terms or conditions shall apply. Each notice should attach a copy of the relevant portion of the judgment. Notices should be mailed on the same day that they are dated, and should be sent by certified return-receipt mail; copies of notices and receipts shall be maintained in the relevant case or matter file. The notice should inform the defendant that such notice is without prejudice to the government's right, without further notice and at any time, to pursue enforced collection action in court if the defendant fails to make any payments previously or currently due or fails at any time to make future payments as scheduled. A cycle of up to three notices should be sent, although the staff may discontinue notice whenever it appears, after the first notice, that further notice would likely be futile. (Where the judgment provides for installment payments, repeated or overlapping cycles of notices may be appropriate, provided that no single installment payment remains past due for more than three notices.) If the defendant's response is unsatisfactory (e.g., the staff receives no response; payment remains delinquent, in whole or part, after a third notice has been sent; collection costs are exceeding payments collected; etc.), the staff should consider whether to initiate enforced collection proceedings (§ .5.8.2.2, infra), whether administrative compromise, suspension, or termination of collection efforts would be appropriate
(§ .5.8.2.3, infra), or whether the judgment should be referred to DOJ for further collection action
(§ .5.8.2.4, infra).

.5.8.2.2 Enforced Collection Proceedings

In determining whether enforced (i.e., judicial) collection proceedings (e.g., contempt action) would be appropriate in cases where the Commission retains the litigating authority to bring such proceedings, the staff should take into account, among other things, the potential cost of such a proceeding, the amount past due, the total outstanding balance, and the likelihood of recovery. For example, the defendant may have died or filed for bankruptcy, diminishing the prospects for full recovery. The staff should consider whether the Commission's claim has any priority or is subordinate to other claims in bankruptcy and probate cases. See, e.g., 31 U.S.C. § 3713. Where potential litigation costs are likely to outweigh recovery, other action may be more appropriate. See infra § .5.8.2.3 (compromise, suspension, and termination). The staff should also consider whether the matter involves any special litigation or policy issues (jurisdiction, bankruptcy, statute of limitations, vindication of important enforcement objectives, etc.). The staff should also consider what judicial postjudgment remedies, if any, are likely to be available to judgment creditors generally, and to the government in particular, under federal law, see, e.g., 28 U.S.C. § 3001 et seq. (Federal Debt Collection Procedures Act of 1990), or state law. The staff should discuss these and any other relevant considerations in any memorandum seeking the Commission's authorization to institute a collection proceeding, where such authorization is necessary and has not already been obtained.

.5.8.2.3 Compromise, Suspension or Termination of Collection Efforts

If enforced collection is not indicated, the Bureau staff may recommend that agency collection of outstanding amounts be administratively compromised, suspended, or terminated (i.e., written off). See Federal Claims Collection Act (FCCA) of 1966, as amended, 31 U.S.C. § 3711(a)(2) (authorizing agency head to "compromise" collection action on certain claims owed to the United States), (3) (authorizing agency head to "suspend or end" collection of such claims where "it appears that no person liable on the claim has the present or prospective ability to pay a significant amount of the claim or the cost of collecting the claim is likely to be more than the amount received"). For further guidance on the procedures, requirements, and standards for determining whether administrative compromise, suspension, or

termination of collection efforts is appropriate, see DOJ & General Accounting Office, Federal Claims Collection Standards (FCCS), 4 C.F.R. Parts 101-105, at Parts 103 (compromise), 104 (suspension and termination). In general, under the FCCA, an agency may not compromise, suspend, or terminate collection on a claim if the outstanding balance exceeds $100,000 (exclusive of interest) or if litigation authority is retained by another agency (e.g., in fraud or antitrust matters subject to further criminal prosecution or in any other fraud or antitrust matter where DOJ retains authority in the matter for litigation or final disposition). See 31 U.S.C. §§ 3711(a)(2), (a)(3), (c)(1) (FCCA); FCCS § 101.3. Where any of the above limitations apply, referral of the judgment to DOJ may be appropriate. See infra § .5.8.2.4.

If compromise appears to be warranted, the staff should forward a memorandum to the Commission seeking authorization to enter into such an arrangement (and to seek leave of the court, if necessary, to terminate the underlying judgment). The memorandum should summarize and discuss the amount and terms of the outstanding judgment and the proposed compromise, the history of collection experience and of negotiations with the defendant over payment, the defendant's financial condition (assets, employment, bankruptcy, other judgments, etc.), and any other relevant considerations. The memorandum should explain why the acceptance of the proposed compromise in lieu of full payment of the outstanding amount would be in the government's best interest.

If suspension or termination appears to be warranted, the Bureau staff should forward a memorandum to the relevant Bureau Director discussing the basis for the recommendation, including application of the statutory and administrative standards cited above. If the Bureau Director approves the recommendation, the Bureau Director shall forward a copy of the approved recommendation to the Executive Director so that the collection matter may be suspended or terminated, as the case may be, for administrative accounting purposes. Depending on the specific circumstances, the staff may determine that termination is warranted without a prior suspension of collection activity. The recommendation should briefly summarize the amount and outstanding balance, the payments made thus far, the staff's collection efforts to date, estimated costs of collection or monitoring, and any other information that may be relevant. Recommendations to terminate collection should include, in particular, the most recent financial data regarding the defendant that the staff can obtain (current within the last six months, if possible).

Where collection has been suspended, the Bureau staff is expected to try to obtain information on the defendant reasonably sufficient to assess the defendant's ability to pay, and to update and re-evaluate that information at least once every six months (or every three months if the defendant's financial situation is expected to improve in the near term). As noted above, such potential monitoring costs may be a factor in determining whether the matter should be terminated at the outset rather than merely suspended. The staff should document such monitoring efforts in the matter file. Once a collection matter is suspended, Bureau staff should review it every two years. At each review date, the staff should recommend by memorandum to the Executive Director whether collection should continue to be suspended (for up to another two years, assuming the relevant statute of limitations has not expired) or formally terminated, i.e., administratively written off as uncollectible.

A suspension or termination of collection efforts is an administrative determination that is not intended to confer any procedural or substantive rights upon the defendant, and should not be viewed as extinguishing or otherwise affecting the legal validity or amount of the outstanding judgment. In particular, such suspension or termination does not preclude the staff's resumption of collection efforts if prospects for recovery improve. Thus, a judgment deemed uncollectible may be reopened whenever the staff believes that there is reason to do so. If the staff resumes collection, the staff should notify the Executive Director and B&F to receive the account for administrative accounting purposes. To avoid jeopardizing possible future collection action, the staff should not affirmatively notify defendants of a suspension or termination

of collection activity.

If inquiry is received, the staff should simply inform defendants that they remain liable for all unpaid amounts.

.5.8.2.4 Referral to DOJ

Civil penalty judgments over which DOJ has retained litigation authority, and other judgments that the Commission is not authorized to enforce judicially, or to compromise, suspend, or terminate administratively, may be appropriate for referral to DOJ for further collection, including possible litigation. See generally FCCS Part 105. Bureau staff should consult with the Office of General Counsel as soon as it appears that such a referral may be indicated. That Office will assist in determining the appropriate procedures for making the referral.

Approved Synopsis

SYNOPSIS OF FEDERAL TRADE COMMISSION DECISIONS
CONCERNING BUSINESS OPPORTUNITIES ADVERTISING

The Federal Trade Commission has determined that the following practices used in the advertising or promotion of business opportunities are deceptive or unfair and are unlawful under Section 5(a)(1) of the Federal Trade Commission Act.

1. It is an unfair or deceptive trade practice to make false, misleading or deceptive representations concerning profits or earnings which may be anticipated by a prospective purchaser of a business opportunity.[1]

2. It is an unfair or deceptive trade practice to represent that a substantial number of distributors have made or can make the profits indicated in a representation, when no more than a few distributors have made that high a profit,[2] when the earnings represented far exceed the earnings normally received by the distributors,[3] or when the representation is made without knowledge, or with only limited knowledge, of the actual profits or earnings normally received by distributors.[4] The Commission has determined that the following types of representations have the tendency and capacity to lead members of the public to believe that "a substantial number of distributors have made or can make the profits indicated in a representation," as that phrase is used in this Paragraph:

a. The representation of an earnings figure, not accompanied by specific limiting and explanatory language, has the capacity and tendency to lead members of the public to believe that a substantial number of

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[1]Opinions of Commission in National Dynamics Corp., Docket 8803, 82 F.T.C. 488 (1973), adopting initial decision except as to order provisions, 82 F.T.C. at 568, appeal denied in part and cause remanded in part, 492 F.2d 1333 (2d cir. 1974), opinion of the Commission on remand, March 7, 1975, slip Op., p. 2; Universal Credit Acceptance Corporation, Docket 8821, 82 F.T.C. 570 (1973), set aside in part sub nom., Heater v. F.T.C., 503 F.2d 321 (9th Cir. 1974); Universal Electronics Corporation, Docket 8815, 7 F.T.C. 265 (1971), reconsideration den., 78 F.T.C. 1576 (1971); Windsor Distributing Company, Docket 8773, 77 F.T.C. 204 (1970), aff. and enforced, 437 F.2d 443 (3rd Cir. 1971); Waltham Watch Company, Docket 7997, 60 F.T.C. 1962 (1962) aff., 318 F.2d. 28 (7th Cir. 1963), cert. denied, 375 U.S. 944, rehearing den. 375 U.S. 998; Washington Mushroom Industries, Inc., Docket 6273, 53 F.T.C. 368 (1956); Von Schrader Manufacturing Company, Docket 3924, 33 F.T.C. 58 (1941).

[2]Opinion of Commission in National Dynamics Corp., supra note 1, adopting initial decision, 82 F.T.C. at 513, 82 F.T.C. at 564.

[3]Opinions of Commission in National Dynamics Corp., supra note 1, 82 F.T.C. at 565; Windsor Distributing Co., supra note 1, adopting initial decision, 77 F.T.C. at 214 and 216; Von Schrader Manufacturing Co., supra note 1, 33 F.T.C. at 64-5.

[4]Opinion of Commission in Von Schrader Manufacturing Corp., supra note 1, 33 F.T.C. at 64.

distributors will regularly earn the figure indicated in the representation.[5]

b. The attribution of earnings figures to specific distributors, not accompanied by specific explanatory and cautionary language, has the capacity and tendency to lead members of the public to believe that a substantial number of distributors will regularly earn the amount attributed to the specific distributor(s) identified in the representation.[6]

3. It is an unfair or deceptive trade practice to make false, misleading or deceptive representations to purchasers regarding the business arrangements, operations and benefits of a business opportunity.[7]

4. It is an unfair or deceptive trade practice to solicit money from an individual, with the implicit understanding that money could be made by that individual in return, by means of recruiting distributors, or by means of retail sales, where the market where the representation is made is at the time of the representation, saturated with distributors.[8]

5. It is an unfair and deceptive trade practice to solicit money from an individual, in return for the right to participate in a plan which holds out the opportunity of making money by means of recruiting others, with that right being passed on as an inducement for those others to join, and being passed on by them ad infinitum.[9]

[5]Opinion of Commission in National Dynamics Corp., supra note 1, 82 F.T.C. at 564-5, adopting initial decision, 82 F.T.C. at 512, cf., opinion of Commission on remand, March 7, 1975, slip op., p. 2.

[6]Opinion of Commission in National Dynamics Corp., supra note 1, 82 F.T.C. at 564, adopting initial decision, 82 F.T.C. at 511-12, cf., opinion of Commission on remand, March 7, 1975, slip op., p. 2.

[7]Opinions of Commission in Universal Credit Acceptance Corporation, supra note 1; Universal Electronics Corporation, supra note 1; Windsor Distributing Company, supra note 1; Waltham Watch Company, supra note 1; Washington Mushroom Industries, Inc., supra note 1; Von Schrader Manufacturing Company, supra note 1.

[8]Opinion of Commission in Holiday Magic, Inc., Docket 8834 (October 15, 1974), slip op., p. 13.

[9]Opinions of Commission in Koscot Interplanetary, Inc., Docket 8888 (October 18, 1975), slip op., pp. 4-5; Holiday Magic, Inc., supra note 8, slip op., pp. 12-13; Ger-Ro-Mar, Inc., Docket 8872 (July 23, 1974), slip op., p. 11, modified and enforced, __F.2d__(2nd Cir. 1975).

Omnibus Resolution

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

RESOLUTION DIRECTING USE OF COMPULSORY
PROCESS IN NONPUBLIC INVESTIGATION

File No.

Nature and Scope of Investigation: To determine whether or not [identify nature or practice or specific industry involved] unnamed and others may be engaged in unfair deceptive acts or practices which may be in violation of Section 5 of the Federal Trade Commission Act, including the use of false and misleading practices in [insert type of substantive area practice, e.g., debt collection] activities in various parts of the United States.

The Federal Trade Commission hereby resolves and directs that any and all compulsory processes available to it be used in connection with this investigation.

Authority to Conduct Investigation:

Sections 6, 9, 10 and 20 of Federal Trade Commission Act, 15 U.S.C. 46, 49, 50 and 57b-l, as amended; FTC Procedures and Rules of Practice 16 C.F.R. 1.1 et seq. and supplements thereto.

By direction of the Commission.

[name]
Secretary

Dated:

Notice Letter Where Prior or
Continuing Investigation

Dear

On January 4, 1975, the Federal Trade Commission Act was amended by 15 U.S.C. 45(m)(1)(B) to provide that a person, partnership or corporation is liable for civil penalties of $10,000 per violation for continuing to engage in acts or practices (a) when they have actual knowledge that such practices are unfair or deceptive and are unlawful under Section 5(a)(1) of the Federal Trade Commission Act and (b) when the Commission has determined that such acts and practices are deceptive or unfair in a prior cease and desist proceeding. A copy of the relevant statutory provision is attached.

As you are aware the Federal Trade Commission has conducted an investigation of the business practices of [name of firms]. After due consideration of all facts uncovered by the investigation the Commission has determined that the matter should be pursued through the use of the amendment to the Federal Trade Commission Act described above.

This letter together with the enclosed Federal Trade Commission decisions and synopses of those decisions is the first step in this process. These papers inform you of certain practices which the Commission has found unlawful under Section 5(a)(1) of the Federal Trade Commission Act. In addition, these papers will serve to notify you of the potential liability of [name of firms] and its responsible officers for civil penalties under the above described statutory provisions if the practices, to the extent they exist, are not stopped.

In summary, to avert possible action for civil penalties of $10,000 per violation of the Federal Trade Commission Act; you should immediately ensure that you are not engaged in any of the practices which were held by the enclosed decisions to violate Section 5(a)(1) of the Federal Trade Commission Act.

Please contact [name] of this office [phone number] it you have any questions regarding the applicable law or your possible liabilities.

Sincerely,

[name and title]

Enclosures

Notice Letter Where Not Sent in Course
of Prior or Continuing Investigation

Dear

On January 4, 1975, the Federal Trade Commission Act was amended by 15 U.S.C. 45(m)(1)(B) to provide that a person, partnership or corporation is liable for civil penalties of $10,000 per violation for continuing to engage in acts or practices (a) when they have actual knowledge that practices are unfair or deceptive and are unlawful under Section 5(a)(1) of the Federal Trade Commission Act and (b) when the Commission has determined that such acts and practices are deceptive or unfair in a prior cease and desist proceeding. A copy of the relevant statutory provision is attached.

This letter together with the enclosed Federal Trade Commission decisions and a synopsis of those decisions is to inform you of certain practices (in the appropriate area) which the Commission has found unlawful under Section 5 (a) (1) of the Federal Trade Commission Act and to notify you of the potential liability of a business or person for civil penalties under the above described statutory provision if a business or person is, in fact, engaged in those practices.

In order to avert possible action by the Federal Trade Commission, you should immediately ensure that you are not engaged in any of the practices proscribed by those enclosed decisions.

Please contact [name] of this office [phone number] if you have any questions regarding the applicable law or your possible liabilities.

Sincerely,

[name and title]

Enclosures

Copy of Relevant Statutory Provision to be
Attached to Notice Letters

CIVIL PENALTIES FOR KNOWING VIOLATIONS

Sec. 205. (a) Section 5 of the Federal Trade Commission Act (15 U.S.C 45(a)) is amended by inserting after subsection (1) the following new subsection:

"(m)(1)(A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this Act respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1)) with actual knowledge or knowledge fairly implied on the basis or objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation small be liable for a civil penalty of not more than $10,000 for each violation.

"(B) If the Commission determines in a proceeding under subsection (b) that any act or practice is unfair or deceptive, and issues a final cease and desist order with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice--

"(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

"(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

"(C) In the case of a violation through continuing failure to comply with a rule or with section 5(a)(1), each day of continuance of such failure shall be treated as a separate violation, for purposes of subparagraphs (A) and (B). In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

"(2) If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo.

"(3) The Commission may compromise or settle any action for a civil penalty if such compromise or settlement is accompanied by a public statement of its reasons and is approved by the court."

(b) The amendment made by subsection (a) of this section shall not apply to any violation, act, or practice to the extent that such violation, act, or practice occurred before the date of enactment of this Act.

Sample Affidavit of Mailing of Notice
Letter and Enclosures

AFFIDAVIT OF MAILING

STATE OF)
) ss
COUNTY OF)

[name] , being first duly sworn on oath deposes and says:

1. I am a [title/position] assigned to the [bureau/regional/office] of the Federal Trade Commission.

2. On [date] , I placed in the United States mails at a Packet of materials relating to [substantive area], addressed to: [name and address of firm or individual]

3. Said Packet contained a cover letter and an attached "Synopsis of Federal Trade Commission Decisions Concerning [substantive area title]" copies of which are attached to this affidavit, and incorporated by reference.

4. Said Packet contained the following additional documents:

a. A copy of the Federal Trade Commission Act, as amended to November 16, 1973.

b. A copy of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act. [or copy of relevant statutory provisions - Illustration 5]

c. Complaint, Administrative Law Judge's Initial Decision and Commission's Decision and order in a Federal Trade Commission proceeding designated: [docket number and name of case]

d. Complaint, Commission's Findings, Decision and Order in a Federal Trade Commission proceeding designated: [docket number and name of case]

e. Complaint, Administrative Law Judge's Initial Decision and Commission's Decision and Order in a Federal Trade Commission proceeding designated: [docket number and name of case]

f. Complaint, Administrative Law Judge's Initial Decision and Commission's Decision and Order in a Federal Trade Commission proceeding designated: [docket number and name of case]

g. Administrative Law Judge's Initial Decision and Commission's Decision and order in a Federal Trade Commission proceeding designated: [docket number and name of case]

h. Complaint, Administrative Law Judge's Initial Decision, Commission's Decision and

Order, and Court of Appeals Decision in a Federal Trade Commission proceeding designated: [docket number and name of case]

5. Said Packet was mailed to said addressee(s) by certified mail, return receipt requested, certificate number. The return receipt has been received by affiant. Said mailing certificate and said return receipt are attached to this affidavit, and incorporated by reference.

[Affiant's signature]

Subscribed and sworn to before me this ____ day of _____.

Notary Public

[notary public
commission and/
or seal

Affidavit that Complete and Thorough
File Search Made When Demand Letter Used

STATE OF) RE: [substantive area title]
) SS
COUNTY OF) FILE NO.

TO BE EXECUTED BY:

AFFIDAVIT

I,_____, being duly sworn, depose and state that:

1. I am the _____ [president or other official of _____ [name of appropriate organization] organized and existing under and by virtue of the laws of the State of _____, and in whose behalf this affidavit is made;

2. I have read the request for documents made by the staff of the Federal Trade Commission as a part of a letter to the organization specified in Paragraph 1, above and referenced as "[substantive area title] File No. "; and

3. A thorough search has been conducted of all the files of the organization including the files of all bodies, committees or other groups under its control or direction and the officers, directors, employees and agents of each and every of the aforementioned pursuant to that request and each and every document within the possession or control of the organization specified in Paragraph 1, above, which is no more than ten (10) years old and which was requested by the aforementioned letter has been sent to the Bureau of Consumer Protection of the Federal Trade Commission in Washington, D.C.

_____
(Affiant's Signature)

Subscribed and sworn to before me this day of , 19

_____
(Signature of Notary Public)

SEAL

Notary Public in and for the County of , State of
My Commission expires the day of 19.

Proposed District Court
Complaint (§ 5(m)(1)(B))
Civil Penalty Action

IN THE UNITED STATES DISTRICT COURT
FOR THE

UNITED STATES OF AMERICA	)	
Plaintiff,	)	
-v-	)	COMPLAINT
Defendant.	)	

Plaintiff, United States of America, by its attorney, United States Attorney for the District of , for its complaint herein alleges upon information and belief as follows:

(1) This is an action brought to recover penalties from defendant for engaging in acts or practices determined to be unfair or deceptive and unlawful in prior final cease and desist orders issued by the Federal Trade Commission, with defendant's actual knowledge of such prior determinations.

(2) This action is brought by the United States at the direction of the Attorney General of the United States acting upon the Federal Trade Commission's referral of facts regarding defendant's having engaged in acts or practices determined to be unfair or deceptive and unlawful in prior final cease and desist orders issued by the Commission, with defendant's actual knowledge of such prior determinations.

(3) This Court has jurisdiction over this action pursuant to Title 28, United States Code Sections 1131(a), 1337, 1345 and 1355 and Title 15, United States Code Sections 45(m), 56 and 1607(c).

(4) Defendant, , is a corporation organized, existing and doing business under and by virtue of the laws of the with its principal office and place of business located at , within the District of

(5) Venue properly rests in the District of based upon Title 28, United States code Sections 1391(c) and 1395(a).

(6) At all times mentioned herein, defendant has maintained a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended (15 U.S.C. 41 et seq.).

PRIOR COMMISSION DETERMINATIONS

(7) The Commission issued final cease and desist orders in Charnita, Inc., et al., Docket No. 8829 (June 6, 1972); Southern States Distributing Co., et al., Docket No. 8882 (December 26, 1973); Seekonk Freezer Meats, Inc., et al., Docket No. 8880 (March 15, 1973) and Beauty Style Modernizers, Inc., et al., Docket No. 8898 (October 13, 1975), copies of which are attached hereto as Exhibits A through D, respectively, determining that certain acts or practices engaged in by these respondents violated the Truth-in-Lending Act (P.L. 90-321, 15 U.S.C. 1601 et seq.) and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

These cease and desist orders have been in full force and effect from their respective dates to the present time.

(8) Included in these Commission final orders are determinations that:

It is an unfair or deceptive practice to fail to disclose in the advertisement, all credit terms required by Regulation Z (12 C.F.R. 226), the implementing regulation of the Truth-in-Lending Act, when an advertisement for consumer credit contains one or more of the following representations:

- The downpayment which is required, or that no downpayment is required.
- The amount of any installment payment.
- The dollar amount of any finance charge.
- The number of installments or period of repayment.
- That there is no charge for credit.

(9) The Commission issued a final cease and desist order in Reliable Mortgage Corp., et al., Docket No. 8956 (January 8, 1975), a copy of which is attached hereto as Exhibit E, determining that certain acts or practices engaged in by these respondents violated the Truth-in-Lending Act (P.L. 90-321, 15 U.S.C. 1601 et seq. and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

This cease and desist order has been in full force and effect from January 8, 1975 to the present time.

(10) Included in this Commission final order is a determination that:

It is an unfair or deceptive practice to advertise any rate of finance charge for consumer credit other than by stating it as the "annual percentage rate," using that terminology, except that where interest is a component of the total finance charge the interest rate may be stated as a simple annual rate in conjunction with, but not more conspicuously than, the annual percentage rate.

VIOLATIONS CHARGED

(11) From on or about to on or about , in connection with the advertising of consumer credit, defendant engaged in those credit advertising practices set forth in paragraphs 8 and 10 hereof which had been previously determined to be unfair or deceptive and unlawful by the Federal Trade Commission in prior final orders, with defendant's actual knowledge of such prior determinations.

(12) By reason of defendant's having engaged in those credit advertising practices determined to be unfair or deceptive and unlawful in prior Federal Trade Commission final orders, as set forth in paragraphs 8 and 10 hereof, with defendant's actual knowledge of such prior determinations, plaintiff, United States of America, hereby brings this action to recover penalties from defendant.

WHEREFORE, plaintiff requests this Court:

(1) To adjudge defendant as having engaged in credit advertising practices which the Federal Trade Commission had previously determined to be unfair or deceptive and unlawful in prior Commission final orders, with defendant's actual knowledge of such prior determinations, from_____, 19_ to ___19_, and to impose penalties against the defendant as provided by law 15 U.S.C. 45(m)(1)(B)):

(2) To enjoin defendant from engaging in such practices.

(3) To order defendant to pay the cost of this action; and

(4) To award to plaintiff such other relief as the Court may deem appropriate in the enforcement of prior Federal Trade Commission determinations.

Dated:

United States Attorney
for the District of

Attorney for Plaintiff
United States of America

By: _____

Letter to Attorney General of
Commission's Intention to
Commence Civil Penalty Suit
Under § 5(m)(1)(B)

Honorable [name]
Attorney General of the United States
Department of Justice
Washington, D.C. 20530

Re:

Dear Attorney General:

Pursuant to the provisions of Section 16(a)(1) of the Federal Trade Commission Act, the Commission hereby gives written notification of its intention to commence a civil penalty suit under Section 5(m)(1)(B) of the Act against [ ] for engaging in acts or practices determined to be unfair or deceptive and unlawful in prior final cease and desist orders issued by the Federal Trade Commission, with actual knowledge of such prior determinations.

[XYZ Corporation] is a [state] corporation with its principal office and place of business located at [address]. [ZZZ] Corporation is a [state] corporation and a wholly-owned subsidiary of [XYZ Corporation] with its principal office and place of business located at (address].

[XYZ Corporation] develops, builds and sells residential real estate in the state of [ ] and [ ], and, through its subsidiary, [ZZZ], offers to extend and extends credit in connection with the sale of said residential real estate. [XYZ] and [ZZZ], in order to aid and promote the extension of credit in connection with the sale of residential real estate, place credit advertisements in newspapers of general circulation in the states in which they do business.

On or about [date], [ZZZ], and [XYZ] were provided with actual knowledge that certain credit advertising practices had been previously determined to be unfair or deceptive and unlawful. On said date, the Commission sent [XYZ], by certified mail, return receipt requested, a copy of the following final cease and desist orders issued by the Commission:

In the Matter of Charnita, Inc., et al.
Docket No. 8829 (June 6, 1972);

Southern States Distributing Co., et al.
Docket No. 8882 (December 26, 1973);

Seekonk Freezer Meats, Inc., et al.
Docket No. 8880 (March 16, 1973);

Beauty Style Modernizers, Inc., et al.
Docket No. 8898 (October 6, 1975); and

Reliable Mortgage Corp., et al.
Docket No. 8956 (January 8, 1976).

The complaint in this action is premised upon violations of the determination made by the Commission in the above-stated cases. [XYZ] and [ZZZ] engaged in each of the unlawful practices in credit advertisements disseminated during the period commencing , 19 and terminating sometime thereafter. These unlawful practices were discovered by the Commission during a review of [XYZ] and [ZZZ's] advertisements, including advertisements submitted to the Commission by [ZZZ] in response to a subpoena duces tecum.

In detailed support of the Commission's claim for penalty, we transmit herewith copies of evidentiary documents. We are retaining original evidentiary documents which, together with additional materials, are available for trial purposes.

If you institute suit, we shall be glad to make available an attorney to assist in the preparation and trial of the case. Please furnish us with copies of all pleadings and moving papers so that we may be informed of developments as they occur.

If it is your decision not to file the suit, please be advised that the Commission, in accordance with Section 16(a)(1) of the Federal Trade Commission Act, intends to institute the action in its own name and by its own attorneys. In this event, please return the enclosures.

By direction of the Commission.

[Name]
Chairman

Enclosures

Consent Judgment
(§ 5(m)(1)(B) Civil
Penalty Action)

IN THE UNITED STATES DISTRICT COURT
FOR THE

UNITED STATES OF AMERICA	)	
Plaintiff,	)	
	)	CONSENT JUDGMENT
-v-	)	
Defendant.	)	

This action having been commenced by the filing of the complaint herein; and service of the complaint having been acknowledged by the defendant; and the parties having been represented by the attorneys whose names appear hereafter; and the parties having agreed to the settlement of this action upon the following terms and conditions:

(1) Without admitting liability for the offenses charged in the complaint, defendant agrees to pay the plaintiff, pursuant to Section 5(m)(1)(B) of the Federal Trade Commission Act (15 U.S.C. 45 (m)(1)(B)), a civil penalty in the amount of $, due and payable within 15 days from the date of the entry of this judgment and such payment to be made by certified check payable to the Treasurer of the United States and delivered to the Chief of the Claims Unit, office of the United States Attorney for the District of ;

(2) In the event of default in payment which default continues for 10 days beyond the due date of the payment, interest at the rate of nine percent per annum shall accrue thereon from the date of default to the date of payment;

(3) Defendant, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any advertisement to aid, promote, or assist, directly or indirectly, the extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. 226) of the Truth-in-Lending Act (P. L. 90-321, 15 U.S.C. 1601 et seq.) is hereby enjoined from:

(a) Representing, directly or by implication, in any advertisement, as "advertisement" is defined in Regulation Z, the amount of the downpayment required or that no downpayment is required, the amount of any installment payment, the dollar amount of any finance charge, the number of installments or the period of repayment, or that there is no charge for credit, unless all of the following items are stated in

terminology prescribed under Section 226.8 of Regulation Z:

(i) the cash price;

(ii) the amount of the downpayment required or that no downpayment is required, as applicable;

(iii) the number, amount, and due dates or period of repayments scheduled to repay the indebtedness if the credit is extended;

(iv) the amount of the finance charge expressed as an annual percentage rate; and

(v) the deferred payment price;

(b) Stating the rate of a finance charge unless said rate is expressed as an annual percentage rate, using the term "annual percentage rate," as "finance charge" and "annual percentage rate" are defined in Section 226.2 of Regulation Z, as prescribed by Section 226.10(d)(1) of Regulation Z; and

(c) Stating or utilizing any component of the annual percentage rate, such as the rate of interest, when such component is stated or utilized more conspicuously than the annual percentage rate; and

It further appearing that this Court has jurisdiction of this action by virtue of Section 5(m) (1)(B) of the Federal Trade Commission Act (15 U.S.C. 45(m) (1) (B));

IT IS HEREBY ORDERED,ADJUDGED, AND DECREED that judgment be entered in favor of the plaintiff, United States of America, and against the defendant, [ ]., in the sum of $ payable pursuant to the terms and conditions recited above together with costs of suit, and that the defendant is hereby enjoined from engaging in the acts or practices recited above.

Dated:

United States District Judge

The parties by their respective counsel, hereby consent to the terms and conditions of the judgment as set forth above and consent to the entry thereof.

United States Attorney
for the District of

Attorney for Plaintiff
United States of America

By:

Attorneys for defendant

By:_____

A member of the Firm

FEDERAL TRADE COMMISSION

By: _____

Attorney

_____

Attorney

_____

[Regional Director or
Assistant Director]

[insert defendant's name]

By: _____

STATE OF)
)
COUNTY OF) ss:
)
)

On the day of ,
before me came

to me known, who, being by me sworn, did depose and say that he/she resides at
that he/she is the
[title] of (defendant firm] the defendant herein, and which executed the foregoing instrument, and who is duly authorized to sign and has so signed said instrument on behalf of defendant, [firm name].

NOTARY PUBLIC

Judgment entered this day of , 19 .

CLERK

Reasons for Settlement by
Entry of Consent Judgment
(§ 5(m)(1)(B) Civil Penalty Action

REASONS FOR SETTLEMENT

This statement accompanies the Consent Judgment executed by defendant in settlement of an action brought to recover penalties from defendant for engaging in acts or practices determined to be unfair or deceptive and unlawful in prior final cease and desist orders issued by the Federal Trade Commission, with defendant's actual knowledge of such prior determinations.

Pursuant to Section 5(m)(3) of the Federal Trade Commission Act, as amended (15 U.S.C. 45(m)(3)), the Commission hereby sets forth its reasons for settlement by entry of a Consent Judgment and injunction:

On the basis of the allegations contained in the attached Complaint, the Commission believes that the payment of $ civil penalties by constitutes an appropriate amount upon which to base a settlement. The amount should assure compliance with the law by the defendant and others who may be in violation. The injunction that is included in the Consent Judgment also constitutes an effective means of assurance of future compliance with the law by defendant. Additionally, with the entry of such a Consent Judgment, the time and expense of litigation will be avoided.

For the foregoing reasons, the Commission believes that the settlement by entry of the attached Consent Judgment with [defendant name] is justified and well within the public interest.

Letter to Attorney General
Where Consent Settlement
(§ 5(m)(1)(B))

Honorable [name]
Attorney General of the United States
Department of Justice
Washington, D.C. 20530

Re: [name of defendant]

Dear Attorney General:

Pursuant to the provisions of Section 16(a)(1) of the Federal Trade Commission Act, the Commission hereby gives written notification of its intention to commence a civil penalty suit under Section 5(m)(1)(B) of the Act against [name of defendant] for engaging in acts or practices determined to be unfair or deceptive and unlawful in prior final cease and desist orders issued by the Federal Trade Commission, with actual knowledge of such prior determinations.

[Name of defendant] is a [state] Corporation with offices located at [address]. [Name of defendant] develops, builds, and sells residential real estate in various states of the United States, including the state of [ ]. In order to aid and promote the sale of its homes, [name of defendant] places credit advertisements in newspapers of general circulation in these states.

On or about [date], [name of defendant] was provided with actual knowledge that certain credit advertising practices had been previously determined by the Commission to be unfair or deceptive and unlawful. On said date, the Commission sent [name of defendant] by certified mail, return receipt requested, a copy of the following final cease and desist orders issued by the Commission:

In the Matter of Charnita, Inc., et al.
Docket No. 8829 (June 6, 1972);

Southern States Distributing Co., et al.
Docket No. 8882 (December 26, 1973);

Seekonk Freezer Meats, Inc., et al.
Docket No. 8880 (March 16, 1973);

Beauty Style Modernizers, Inc., et al.
Docket No. 8898 (October 6, 1975); and

Reliable Mortgage Corp., et al.
Docket No. 8956 (January 8, 1976).

The complaint in this action is premised upon violations of the determination made by the Commission in the

above-stated cases. [name of defendant] engaged in each of the unlawful practices in credit advertisements disseminated during the period of , 19 through , 19 . These unlawful practices were discovered by the Commission during a review of [name of defendant] advertisements, including advertisements submitted to the Commission by [name of defendant] in response to a subpoena duces tecum.

In detailed support of the Commission's claim for penalty, we transmit herewith a draft complaint and copies of evidentiary documents. We are retaining the original evidentiary documents and additional materials.

[name of defendant] has submitted, however, an offer to pay a $ civil penalty and be bound to various injunctive provisions. The Commission recommends that the enclosed consent judgment, encompassing [name of defendant] offer, be filed with the complaint, as final disposition of this matter.

If it is your decision not to file the suit, please be advised that the Commission, in accordance with Section 16(a)(1) of the Federal Trade Commission Act, intends to institute the action in its own name and by its own attorneys. In that event, please return the enclosures.

By direction of the Commission.

[name]
Chairman

Enclosures

Closing Letter - Insubstantial
Evidence of Violation and/or
with Assurance to Comply

Attention: [President or other responsible officer]

Re: [substantive area title]
File No.

Dear

The Commission has conducted an investigation of your advertising of
in the operating of an business.

Based upon the information submitted by you and your assurance that you will abide by the Commission's decisions when [describe advertising] in the future, the Commission has determined that no further action is indicated with respect to this matter at this time. In making such a determination, the Commission has specifically considered and relied upon the information supplied by you that you will refrain from [describe practices previously found to be deceptive].

The Commission will not be precluded, however, from instituting appropriate action, including the institution of civil penalty proceedings, should it subsequently appear that such information is inaccurate or incomplete or it is found that you, individually or through the respondent firm or any other firm, have engaged in acts or practices which the Commission has determined to be unfair or deceptive in prior proceedings.

A copy of the synopsis of the Federal Trade Commission's said determinations concerning [substantive area title] is enclosed for your reference.

By direction of the Commission.

[name]
Secretary

Enclosure

Closing Letter Where Target Firm
Has Ceased Operations
(No Affidavit)

Attention:

Re: [substantive area title]
File No.

Dear :

We have received the materials submitted by you in response to a subpoena duces tecum issued in the above-captioned matter.

Based upon the assumption that the information submitted by you is complete and correct, the Commission has determined that no further action is indicated with respect to this matter at this time. In making such a determination, the Commission has specifically considered and relied upon the information supplied by you that the respondent firm has ceased doing business, and that you, individually, are no longer engaged in any manner in [substantive area-type of business].

The Commission will not be precluded, however, from instituting appropriate action, including the institution of civil penalty proceedings, should it subsequently appear that such information is inaccurate or incomplete or it is found that you, individually or through the respondent firm or any other firm, have entered into any other [substantive area-type of business] in which you or any such firm have engaged in acts or practices which the Commission has determined to be unfair or deceptive in prior proceedings.

A copy of the synopsis of the Federal Trade Commission's said determinations concerning [substantive area title] is enclosed for your reference.

By direction of the Commission.

[name]
Secretary

Enclosure

Closing Letter Where Target Firm
Has Ceased Operations
(with Affidavit)

Re: (substantive area title]
File No.

Dear :

We have received your affidavit dated 19 in which you state that you are no longer operating [name of firm], and do not intend to operate any other [substantive area-type of business] in the future, under the above or any other name.

Based upon the assumption that the information contained in your affidavit is complete and correct, the Commission has determined that no further action is indicated with respect to this matter at this time. In making such determination, the Commission has specifically considered and relied on the information supplied by you that the respondent firm has ceased doing business, and that you, individually, are no longer engaged in any manner in [substantive area-type of business).

The Commission will not be precluded, however, from instituting appropriate action, including the institution of civil penalty proceedings, should it subsequently appear that such information is inaccurate or incomplete or it is found that you, individually or through the respondent firm or any other firm, have entered into any other [substantive area-type of business] in which you or any such firm has engaged in acts or practices which the Commission has determined to be unfair or deceptive in prior proceedings.

A copy of the synopsis of the Federal Trade Commission's determinations concerning [substantive area title] is enclosed for your reference.

By direction of the Commission.

[Name]
Secretary

Enclosure

Sample Affidavit of Actual Knowledge
Where Target Firm Has Ceased
Business Operations

AFFIDAVIT OF [NAME OF AFFIANT]

STATE OF)
) ss
COUNTY OF)

[name of affiant], being first duly sworn, on oath, deposes and says:

1. I am a citizen of the United States over the age of 21, and reside at [street], [city], [state] [zip code].

2. I am President [or other corporate or business title] of [name of target firm], located at [street], [city], [state] [zip code].

3. [name of target corporation] is a [state] corporation, incorporated under the laws of the State of ____ in 19_.

4. On or about ____ 19_, I received a packet of materials relating to [substantive area].

5. Said packet contained a cover letter and an attached document entitled, "Synopsis of Federal Trade Commission Decisions Concerning [insert substantive area title]," copies of which are attached to this affidavit.

6. Said packet contained the following additional documents:

   a. Complaint, Administrative Law Judge's Initial Decision, and Commission's Decision and Order in a Federal Trade Commission proceeding designated: [docket number and title of case].

   b. Complaint, Commission's Findings, Decision and Order in a Federal Trade Commission proceeding designated: [docket number and title of case].

   c. Complaint, Administrative Law Judge's Initial Decision, Commission's Decision and Order, and Court of Appeals Decision in a Federal Trade Commission proceeding designated: [docket number and title of case].

7. I have read the documents contained in the aforementioned packet and agree individually and as [title/position] of [name of business], not to engage in any of the acts or practices proscribed by the aforementioned decisions of the Federal Trade Commission in regard to [substantive area].

*8. That within the last twelve (12) calendar months, the total gross sales of [name of target business firm] was under $____.

*9. That [name of target business] is doing no further business [with the exception of . . . . e.g., servicing accounts] and there is no further advertising.

*10. Affiant is no longer operating [name of target business firm and address] or offering any other [describe substantive area business or type of practice covered by synopsis].

*11. Affiant does not intend to [describe substantive area business or type of practice covered by synopsis] in the future, under the above or any other name.

_____
[Name of Affiant]

Dated: , 19

Subscribed and Sworn to before me
this __ day of _____, 19_

_____
Notary Public in and for the
County of _____,
State of _____.

[Commission and/or seal]

*Depending on circumstance inappropriate paragraphs may be modified or deleted.

Resolution Directing Use of
Compulsory Process in Nonpublic Investigations

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

RESOLUTION DIRECTING USE OF COMPULSORY
PROCESS IN NONPUBLIC INVESTIGATION

File No.

Nature and Scope of Investigation:

To determine whether or not XYZ Corporation, and others, may have been, or may now be, engaged in unfair or deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act, as amended, in connection with the advertising, promotion, offering for sale, sale, development or distribution of [ ] in or affecting commerce and to secure information relating to whether Commission action to obtain consumer redress pursuant to Section 19 of the Federal Trade Commission Act, as amended, would be in the public interest.

The Federal Trade Commission hereby resolves and directs that any and all compulsory processes available to it be used in connection with this investigation.

Authority to Conduct Investigation:

Sections 6, 9, 10 and 20 of Federal Trade Commission Act, 15 U.S.C. 46, 49, 50 and 57b-1, as amended; FTC Procedures and Rules of Practice 16 C.F.R. 1.1 et seq. and supplements thereto.

By direction of the Commission.

[Name]
Secretary

Dated:

Consent Settlements-Preservation
of Discretion

. . .

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

3. Proposed respondents waive:

(a) Any further procedural steps;

(b) The requirement that the Commission's decision contain a statement of findings of facts and conclusions of law; provided, however, that respondents, without admitting the findings of fact and conclusions of law contained in Appendix A attached hereto, waive any right to contest in administrative proceedings the findings and conclusions contained in said Appendix should the Commission make said findings and conclusions and include them in its decision; provided further, that in the event the Commission makes such findings and conclusions, then the decision shall also expressly provide that, in any action which may be brought under Section 19(a)(2) of the Federal Trade Commission Act, as amended, the said findings and conclusions shall not be deemed conclusive within the meaning of Section 19(c)(1)(B)(i) of the Federal Trade Commission Act, as amended.

(c) All rights to seek judicial review or otherwise to settle or contest the validity of the order entered pursuant to this agreement;

(d) Any claim that the signing of this agreement and the Commission's decision and order pursuant thereto bar any action under Section 19 of the Federal Trade Commission Act, as amended, or that the Commission's decision containing the findings and conclusions set out in this Agreement constitute an inadequate basis for an action under Section 19 of the Federal Trade Commission Act, as amended; and

(e) any claim under the Equal Access to Justice Act.

. . . . .

8. Notwithstanding item 2, supra, for purposes of this agreement, proposed respondents specifically reserve the right to contest the jurisdictional facts of this matter in any action which may be brought under Section 19(a)(2) of the Federal Trade Commission Act, as amended.

Resolution Directing Institution of
Proceedings for Injunctive Relief

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

RESOLUTION DIRECTING INSTITUTION OF
PROCEEDINGS FOR INJUNCTIVE RELIEF

File No.

The Federal Trade Commission, having considered the evidence complied during its staff's investigation of [ ] regarding the sale of undivided interests of land in [ ] hereby resolves and declares that:

The Federal Trade Commission has reason to believe that [ ] and others have been and are now engaged in, and are about to engage in, unfair or deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. (Supp. V) § 45, including but not limited to: collecting payments pursuant to contracts for the sale of undivided interests in land in [ ]; failing to disclose the legal consequences of ownership of such land by large numbers of tenants in common; failing to disclose that offers to purchase the land would not be transmitted to purchasers; failing to disclose the existence of mortgages which encumbered such land at the time it was sold; and representing, among other things, that such land was a good or profitable investment, that interest would be repurchased or resold or contracts for the purchase of such interests rescinded at any time and that there were likely to be mineral deposits on the land which would benefit purchasers.

The Federal Trade Commission has reason to believe that enjoining: (i) the collection of payments pursuant to contracts for the sale of undivided interests of land in [ ] by [ ], (ii) the cancellation or termination of such contracts, (iii) the failure to pay taxes, mortgage payments or other charges against the land; and (iv) the disposal, assignment or encumbering of the land or the contracts, accounts receivable or other assets pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by a court on review, or until the order of the Commission made thereon has become final, as authorized by Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. (Supp. V) § 53(b), would be in the interest of the public. The General Counsel is authorized and directed to institute proceedings in an appropriate United States district court seeking such relief.

If such a preliminary injunction is granted, the Federal Trade Commission intends to issue within 20 days thereafter a complaint against [ ] alleging the aforesaid violations of Section 5 of the Federal Trade Commission Act.

By direction of the Commission.

[name]
Secretary

Dated:

Letter Requesting Waiver of Statutory
Limitations for Consumer Redress

XYZ Company
1562 McNally Road
Anytown, New York 10234

Re: File No.

Dear []:

As you know, the Commission staff has been engaged in negotiations with your client to resolve this matter without the necessity of instituting a proceeding for consumer redress. While these negotiations are pending, it would ordinarily seem advisable to delay our recommendation to the Commission regarding the institution of such a proceeding. We are reluctant to do so, however, because Section 19(d) of the FTC Act, 15 U.S.C. §57b-(d), requires that a Commission action be brought within three years of the occurrence of the rule violation or unlawful act or practice in question. Because the statutory limitation period in this matter is running, we cannot delay our recommendation for a complaint beyond [date], unless you are willing to agree that the running of the statutory period will be suspended during the period from the date of this letter until [date] [12-18 months later]. We have put a termination date on this period of suspension to ensure that any proceedings in this case will not be unduly delayed. At that time, the statutory period will again begin to run, and any defense which accrues thereafter will be available to you.

If you wish to agree to this [12-18 month] waiver in consideration of the Commission staff delaying its recommendation of a complaint to the Commission, you may sign at the bottom of this letter. This indicates your agreement on behalf of [] to waive the statute of limitations defense as to the Commission's action for consumer redress for violations dating from [].

You understand, therefore, that in the event this matter is not resolved by negotiations and a complaint is issued, your ability to plead the statute of limitations as a defense will be affected by this agreement.

This agreement will expire on [date].

Sincerely yours,

Agreed to: _____