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Chapter 12

COMPLIANCE

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.1 INTRODUCTION

This chapter sets forth basic policies and procedures for the handling of compliance matters. This chapter covers:

(1) Compliance with cease and desist orders, including compliance reports, investigations, and civil penalty actions under the Federal Trade Commission Act (FTCA) § 5(l) and § 11 of the Clayton Act;

(2) Compliance with trade regulation rules (TRRs), investigations, and civil penalty actions under FTCA § 5(m)(1)(A) (see OM Ch. 3 for 7-digit investigation procedures to be followed in TRR enforcement investigations and OM Ch. 2 for investigational strategy and criteria);

(3) Requests for advisory opinions regarding order provisions; and

(4) Procedures to amend, modify, or set aside orders.

For additional information on compliance-related matters, see:

(1) Civil penalty actions in enforcement of orders against nonrespondents under FTCA § 5(m)(1)(B) (OM Ch. 11);

(2) Consumer redress actions for violation of TRRs under FTCA § 19(a)(1) and (b) (OM Ch. 11);

(3) Injunctions (OM Chs. 11 and 13);

(4) Judicial appearances and procedures (OM Ch. 13); and

(5) Investigations (OM Ch. 3).

In many respects, the manner in which compliance

is handled for cease and desist orders is similar to that for TRRs. Therefore, compliance with both cease and desist orders and TRRs is discussed in this chapter. Where policies and procedures for cease and desist orders differ from those for TRRs, the differences are explained. Sections .2, .3, .6, .7, and .8 of this chapter are applicable only to orders, while sections .4 and .5 are generally applicable to both orders and TRRs.

References to “compliance investigations” in this chapter encompass investigations that may lead to an enforcement action under FTCA § 5(l) for enforcement of orders against respondents or under FTCA § 5(m)(1)(A) or § 19(a)(1) for enforcement of TRRs.

In handling investigations relating to Bureau of Consumer Protection (BCP) compliance-related matters that involve the enforcement of TRRs or the enforcement of orders against nonrespondents, staff should follow the procedures set forth in OM Ch. 3 for the opening, processing, and disposition of 7-digit investigations, except where these procedures have been specifically modified in OM Chs. 11 or 12.

Investigations in BCP that relate to the enforcement of orders against respondents under FTCA § 5(l) are handled under their docket or consent number in accordance with the procedures set forth in this chapter. It is not necessary to open a new 7-digit investigation to seek a resolution from the Commission authorizing compulsory process, unless the investigation will encompass *de novo* practices not covered by the order.

In the Bureau of Competition (BC), a new 7-digit number is obtained whenever the staff opens a compliance investigation.

.2 COMPLIANCE

.2.1 IN GENERAL

This section deals with Commission policies and procedures following the issuance of cease and desist orders. After every such order is issued, the Secretary serves a copy of the order on the respondent. This is done by certified mail, return receipt requested, in most instances. Copies of the complaint and order, on which is stamped the date of mailing to respondent, are then sent to the appropriate division (either BC Compliance or BCP Enforcement).

Usually, cease and desist orders provide that a compliance report (see paragraph .2.2.3) must be filed within 60 days after service of the order. Some orders may provide for the filing of more than one report.

After receiving its copy of the complaint and order issued by the Commission, the Compliance Division or the Enforcement Division will assign a staff member to review the manner of compliance. Staff will then write a letter to the respondent outlining the information and documentation that should be submitted as a report of compliance demonstrating compliance with the provisions of the order. (See paragraph .2.5.1.)

After receipt of a compliance report, staff reviews it and, if appropriate, corresponds with the respondent and/or his/her attorney to obtain changes or additional materials. Staff then forwards the compliance report along with a memorandum recommending either no further action or the opening of a compliance investigation to the Assistant Director for Compliance (BC) or the Associate Director for Enforcement (BCP), together, in most cases, with a draft letter to inform the respondent of the staff's conclusions regarding the report (e.g., that it does not warrant any enforcement action). (See section .2.10.)

If staff determines not to recommend any enforcement action with respect to a compliance report, generally no further action is taken on the matter unless a decision is made to open an investigation. If after conducting a compliance investigation the staff concludes that the order has been violated, it may recommend referral of the matter to the Department of Justice for a civil penalty action. (See section .5.1.)

.2.1.1 Finality and Enforcement of Orders

Commission cease and desist orders fall into two categories: consent orders and litigated orders. A consent order becomes final the day on which the order is served upon the respondent. A litigated order generally becomes final 60 days after service of the order upon the respondent and the compliance report is due as provided in Rule 2.41, unless the Commission or an appropriate court stays the order pursuant to FTCA § 5(g). If a respondent files a petition for review of an order provision requiring it to divest assets, the provision becomes final at the end of the appeals process as provided in FTCA § 5(g)(4). Motions to the Commission for reconsideration of an order and petitions to reopen the proceeding to modify an order do not affect the finality or enforcement of the order. Similarly, petitions for review to the U.S. courts of appeals filed more than 60 days after service of litigated orders or any time after service of consent orders do not affect the finality or enforceability of those orders. Also, any motion for declaratory judgment filed by a respondent at any time in a U.S. district court does not affect the finality or enforceability of an order.

.2.2 REPORTS OF COMPLIANCE

A report of compliance is usually submitted in a narrative form by a respondent setting forth in detail how it modified its business practices, including its advertisements, sales pitches, structure, records, etc., to bring them into compliance with all the provisions of the Commission's order. The narrative is usually accompanied by evidence of the changes. Examples of such evidence would be copies of sales contracts with disclosures required by the order, copies of advertisements, and copies of business records such as written instructions to employees.

Compliance reports should follow the order, paragraph by paragraph, explaining exactly how each order provision or prohibition has been met. When exhibits are submitted as supporting evidence, each item should be individually numbered and identified. The text of the report should refer to each exhibit with an explanation of precisely how it is evidence of compliance. Both the text of the compliance report and its attached exhibits must be submitted in duplicate. One set will generally be placed on the public record

(documents claimed to be confidential are not placed on the public record until and unless the confidentiality request is denied and the submitter is provided 10 days notice of the denial). When additional exhibits are submitted at a later date, they should also be in duplicate and follow the numerical sequence of the original submission.

Respondents are required to report on all their business activities. Corporations must report on relevant activities of their subsidiaries and divisions and also their joint ventures with other firms or independent contractors. Individual respondents must report on the activities of whatever enterprises they may own or control or in which they may participate, even though such enterprises are not specifically named in the order.

A compliance report may be referred to as an *initial*, *interim*, *regular*, *supplemental*, *additional*, or *periodic* compliance report. These modifiers or adjectives, however, do not change the nature of the report or its purpose, scope, and due date.

.2.2.1 Initial Report Under Rule 2.33

The Commission may in its discretion require that a proposed consent order agreement be accompanied by an initial compliance report. The report must be signed by the respondent and explain in detail how the respondent will comply with the order when and if it is entered. Such a report does not become part of the public record unless and until the accompanying consent order agreement is accepted by the Commission. A request for confidentiality may be made at the time the report is submitted with the required showing of justification. (See section .2.11 below). In determining whether to grant such a request, the General Counsel will consider

existing statutory restrictions, the *Rules of Practice*, and the public interest. If a request for confidential treatment raises an important legal or policy issue, the General Counsel may refer the request to the Commission so that it can resolve the issue. For additional information on confidentiality, see OM Ch. 15.

.2.2.2 Interim Report Under Rule 2.41(a)

An interim report may be required by the terms of an order where the order prohibits the use of a false advertisement of food, drugs, devices, or cosmetics that may be injurious to health if they are used as advertised or used under such conditions as are customary or usual, or when it is apparent that the advertisement is disseminated with the intent to defraud or mislead, or when the filing of an interim report is dictated by the facts of the case. Ordinarily, the interim report is to be filed by the respondent within 10 days after service of the order, and it must state how the respondent intends to comply.

.2.2.3 Regular Compliance Reports Under Rule 2.41(a)

A compliance report unless otherwise required by a final Commission order is filed by each respondent named in the order within 60 days from the date of service of the order. When a corporation and individuals are named in the same order, one report may be sufficient if it is signed by each as its report of compliance. The report should detail the manner and form of compliance with the order. Some orders require the filing of periodic compliance reports. Additional information may be requested by the staff to remedy deficient reports.

.2.2.4 Supplemental Reports Under Rule 2.41(a)

Rule 2.41(a) provides that a respondent shall file "such further signed, written reports of compliance" as the Commission may require. Supplemental information may be requested by the staff to determine whether there is compliance with certain or all of the order provisions by a respondent or by a number of respondents. The Commission's overall policy of securing and maintaining compliance with its outstanding orders is implemented by requesting respondents to file supplemental information describing their compliance with orders. Supplemental information may be requested by letter after obtaining approval of the Assistant Director for Compliance or the Associate Director for Enforcement, as appropriate.

The Commission may itself direct a respondent to file a supplemental compliance report. Respondent is notified by letter, subpoena, or an FTCA § 6(b) request that it must file a supplemental report furnishing information and data from the date of the last report or for a specified time period. A date certain (ordinarily 30 days from the date of the letter) is set for the return. If staff wishes to use a subpoena or a § 6(b) request, the matter must be submitted to the Commission for approval.

.2.3 SIGNATURE AND/OR OATH

Rule 2.41(a) provides that the compliance report must be signed by each named respondent. Therefore, the report must be signed (1) by each individual respondent and (2) by an authorized corporate officer on behalf of each corporate respondent.

Rule 2.41(a) also provides that reports of compliance shall be under oath if so requested. The Divisions of Compliance and Enforcement usually request that the respondent submit sworn and notarized reports of compliance. If a respondent objects to filing a sworn and notarized report, the respondent may simply sign and affirm the report.

.2.4 RESPONDENT'S SUBMISSION OF COMPLIANCE REPORTS

Reports of compliance should be submitted on or before the date they are due and should be addressed to the Secretary for filing, pursuant to Rules 2.41, 4.2, and

4.4(b). Respondents are required to submit two copies of all reports of compliance. The original copy of the compliance report must be sent to the Secretary, along with copies of exhibits. The Secretary shall send the respondent a letter acknowledging receipt of the compliance report. In BCP matters, the duplicate copy of the compliance report and exhibits may be sent directly to the responsible staff member. If duplication of any exhibits by the respondent is not feasible (e.g., exhibits are voluminous or bulky), the respondent may be permitted to submit one set of the exhibits directly to the staff member.

It is staff's responsibility to notify the Secretary that the exhibits have, in fact, been received from the respondent. Supplemental information and substituted documents or exhibits for compliance reports should be handled in the same manner. If the staff's review of a compliance report results in the opening of an investigation, documents submitted by the respondent at staff's request are no longer sent to the Secretary. Such documents should be placed in an investigatory file, are not subject to public records provisions, and are entitled to confidential treatment pursuant to § 21(f) of the FTCA.

In BCP matters, respondent is usually advised to submit compliance reports well before their due date so that any omissions or deficiencies discovered by the staff may be called to respondent's attention. Once the time period has expired, the staff may, however, without any further consultation with the respondent, recommend to the Commission that it refer the matter to the Department of Justice for enforcement action. Absent unusual circumstances, the staff should advise the respondent that it plans to recommend that the Commission refer the matter to the Department of Justice for enforcement action.

At any time during the period before a report of compliance becomes due, staff is available for conferences and other consultations with the respondent or its attorneys. Staff does not, however, speak for the Commission, and the respondent should be advised that opinions expressed by staff are its own and not necessarily those of the Commission or of any Commissioner.

It is the respondent's obligation to demonstrate compliance with the order. That obligation arises when an order is served or otherwise becomes final, unless another date is specified by the order, and is not

suspended or deferred pending the submission of a compliance report. The report should disclose compliance when submitted because liability for civil penalties of up to \$11,000 for each violation of a final FTCA order provision (\$5,500 for a Clayton Act violation) may be incurred by the respondent at any time following the day the order becomes final. Beginning on November 21, 1996, inflation adjustments to the amount of civil penalties were and will be made every four years under the Debt Collection Improvement Act of 1996. Pub. L. 104-134, section 3 100(s)(April 26, 1996)(amending the Federal Civil Penalties Inflation Adjustment Act (FCPIAA) of 1990, 28 U.S.C. 2461 note).

.2.5 PROCESSING OF COMPLIANCE REPORTS

In consumer protection matters, the Division of Enforcement is responsible for obtaining and reviewing compliance reports. In competition matters, the Division of Compliance is responsible for obtaining and reviewing all compliance reports.

When an order is issued by the Commission, copies of the complaint, decision, and order showing the date of mailing to the respondent and the date the respondent received the documents are transmitted by the Document Processing Section, Office of the Secretary, to the appropriate division. The pre-order investigational files remain in Records Processing (Room 240 in Headquarters) and may be obtained by the staff if needed.

.2.5.1 Letter to Respondent

In BC and BCP cases, within 10 days after receipt of a copy of the order from the Office of the Secretary, staff should notify each respondent by letter of specific matters to be covered by the report, material to be submitted with it, and the date the report is due. Where several persons have been named individually under the order and they are officers of the respondent corporation, a single letter directed to the corporation and to the attention of each individual respondent is sufficient. Separate letters should be sent to each corporate respondent and to every individual respondent if they are not affiliated with the respondent corporation. No letter is sent until after the order becomes final as provided in FTCA § 5(g).

In BCP cases, other general information, such as instructions regarding confidentiality requests, is contained in an instruction sheet that is enclosed with the letter. BC does not use an instruction sheet.

.2.5.2 Records and Substantiation of Claims

Respondent should be asked to explain how the business records have been set up and how they will be maintained and what steps it has taken to ensure compliance with each of the terms and provisions of the order, including the administrative provisions of the order (e.g., record keeping and reporting).

In BCP matters, staff should usually ask the respondent to submit all of its promotional materials for products or services subject to the order. If a respondent markets an extraordinarily large number of products covered by the order, staff may ask for an appropriate sample. After the staff has completed its review of such promotional materials, the respondent should also be asked to furnish all substantiation material in support of claims subject to the order that staff views as questionable, such as claims very similar to those giving rise to the order. Staff need not ask the respondent to submit substantiation material in support of facially plausible claims subject to the order.

.2.5.3 Surveillance

Respondent should be requested to outline in detail the appropriate surveillance program instituted to monitor actions by its agents and employees, and to provide copies of all internal documents that relate to the establishment and implementation of that program. More specifically, with respect to order provisions prohibiting oral misrepresentations, staff should request that respondent submit copies of instructions to its agents and employees outlining their responsibilities under the order. The respondent should describe its monitoring of the activities of its agents and employees and how it will ensure adherence to the instructions and compliance with the order.

.2.5.4 Corporate Reorganizations

Most orders include a standard provision requiring all respondents to notify the Commission in advance of any proposed change in the corporate respondent, such as

dissolution, assignment or sale of assets or stock, mergers or creations of new subsidiaries, or any other change in the corporate structure that may affect compliance obligations. Whenever the staff learns of such corporate changes it should ask respondents for copies of the relevant documents and should determine whether a successor or assign of a respondent is subject to the order.

**.2.6 CAVEAT RE: ADVICE
ABOUT COMPLIANCE**

A respondent, subject to the order, may consult with the staff as to the sufficiency of any manner of compliance during the period before the compliance report is due. During consultation, staff should confine its comments to the exhibits submitted or the particular course of action proposed by the respondent and state which, in its opinion, would comply with or violate the order. It should be made clear that it is staff opinion and is not binding on the Commission. It may be desirable in order to avoid possible misunderstanding that such comments, if made orally, be restated in a letter to the respondent, and in any event, staff should usually prepare a memorandum to the file setting forth the substance of such discussion.

.2.7 FAILURE TO SUBMIT A REPORT

If a respondent fails to submit a report by the due date, the Division of Compliance or Enforcement conducts an investigation to determine whether or not the respondent is complying with the order. Staff may visit the place of business of a respondent and obtain information and materials that show compliance or noncompliance. If the respondent refuses to cooperate, staff immediately should seek an investigational resolution authorizing the use of compulsory process or issuance of an FTCA § 6(b) resolution from the Commission. To obtain either, staff should submit a memorandum to the Commission via the Bureau Director recommending the use of appropriate process and should include a draft resolution directing a nonpublic investigation. See OM Ch. 3 on compulsory process investigatory procedures and section .1 above for further information.

After completion of the investigation, staff must make an appropriate recommendation to the Commission, via the Bureau Director, recommending whether action should be taken under § 5(I) or § 10 for failure to comply with any aspect of the order, including, but not limited to, any failure to file a report of compliance or the failure to comply with a subpoena issued pursuant to an investigational resolution or an order to file a special report, as appropriate.

.2.8 EXTENSIONS OF TIME FOR FILING COMPLIANCE REPORTS
UNDER RULE 2.41(A)

The Commission has delegated to the Director, Deputy Directors, and Assistant Directors of BC and to the Director, Deputy Directors, and Associate Directors of BCP, and to the Regional Directors, the nondelegable authority, for good cause shown, to extend the time within which reports of compliance must be filed. See § 2.41(c) of the *Rules of Practice*. Such extensions, however, do not relieve respondent from its obligation to be in compliance from the date the order was served or otherwise becomes final.

.2.9 AUTHORITY TO MONITOR COMPLIANCE REPORTS

The Commission has delegated to the Director, the Deputy Directors, and the Assistant Director for Compliance of BC and to the Director, the Deputy Directors, and the Associate Director for Enforcement of BCP the authority to monitor compliance reports. However, any compliance report falling into one or more of the following categories must be forwarded to the Commission via the appropriate Bureau Director with a staff memorandum explaining staff's intended action with respect to the report and the basis for such action:

- (1) The matter has received specific Commission consideration as to compliance, or the Commission or any Commissioner has expressed an interest in the matter.
- (2) The proposed closing is based on the expense of investigation or testing; or.
- (3) There are substantial questions as to public interest, Commission policy, or statutory construction.

See § 2.41(b) of the *Rules of Practice*.

If no Commissioner objects to staff's intended action by making a motion within 30 days after staff's memorandum is forwarded to the Commission, staff should take the intended action. Staff should refrain from taking its intended action while any such motion is pending.

.2.10 HANDLING OF COMPLIANCE REPORTS

.2.10.1 Reports Not Warranting Further Action

If, in staff's opinion, a compliance report does not warrant further action, staff should prepare a memorandum to the file explaining the basis for staff's conclusions. In BCP matters, staff should normally send a letter to the respondent advising it of staff's conclusion that the report does not warrant any further action. In BC matters, staff should *always* send such a letter. If staff has possession of the compliance report at the time it completes its review, it should send the report to Records Processing (Room 240) for placement on the public record. In addition, staff should complete a Matter Update Notice (FTC Form 81) indicating that the Bureau has filed the report, using event code 4113. If staff has sent a "no-action" letter as described above, staff should send a copy of the letter to Records Processing for placement on the public record.

Following review of a report that shows that respondent is in substantial, but not complete compliance, staff may advise the respondent of any deficiencies and request the adoption and submission of appropriate changes promptly. Respondent may respond to such request by a letter setting forth the additional items of information. Usually when exhibits such as promotional literature, advertisements, or contract forms are deemed unacceptable by staff, correction or substitution can be achieved in several ways. The respondent may write a letter stating that the objectionable exhibits will not be utilized or that substitute acceptable replacements are being submitted. The initially unacceptable exhibits remain with the report, and staff should send a letter to the respondent advising it which exhibits staff believes violate the order as well as why they violate the order. If a satisfactory report is thus obtained, staff prepares a memorandum to the file as described in the preceding paragraph.

Every six months, each Bureau will forward a report to the Commission identifying compliance reports that have been reviewed by the respective Bureau and those that are currently under review.

.2.10.2 Reports Warranting Further Action

If, after staff communicates with the respondent, a satisfactory report is not obtained, staff may conclude that the matter warrants further action. If additional facts are needed to determine whether staff should recommend enforcement action, staff should open a compliance investigation. If staff determines that the investigation will require the use of compulsory process, it should determine whether the Commission has issued an omnibus resolution applicable to the case. If no such omnibus resolution exists, staff should prepare a memorandum to the Commission recommending that the Commission issue a resolution authorizing the use of compulsory process and forward it to the appropriate Bureau Director. If staff has sufficient evidence to recommend an enforcement action based on the compliance report, it should prepare a memorandum to the appropriate Bureau Director seeking authority to engage in consent negotiations with the respondent. If staff determines that the matter is such that immediate enforcement action is necessary, it should prepare a memorandum recommending that the Commission refer the matter to the Department of Justice and forward it to the appropriate Bureau Director. See section .5 below, regarding referral to the U.S. Attorney General.

.2.10.3 Disposition of Compliance Report Files

In BCP matters, once the Bureau has filed a compliance report, all correspondence between staff and the respondent (other than the compliance report and any letter from staff to the respondent advising it of staff's conclusion that the report does not warrant further action), staff memoranda and reports of interviews, meetings, or phone calls should be placed in the appropriate file. See OM Ch. 15 for instructions on

segregation of material.

In BC matters, compliance material is filed in accordance with the Memorandum dated August 10, 1978, from the Bureau Director, on the subject of Uniform Filing System, which specifies that compliance reports are placed in a Compliance Report File and other materials relating to compliance matters are filed in the appropriate files as described in the memorandum.

.2.11 PUBLIC ACCESS TO COMPLIANCE REPORTS

Except to the extent that the General Counsel or the Commission (if the General Counsel refers the request to the Commission for a ruling) has granted respondent's request for confidentiality, the public shall have access to compliance reports "when received." The materials are available for public inspection or copying when the Office of the Secretary, the BC Division of Compliance, or the BCP Division of Enforcement receives the report. If there has been a request that all or part of a report should be classified "confidential," public access to all or part of the report will be delayed until the General Counsel or the Commission acts upon the request. Specific procedures must be followed when dealing with requests from the public for access to compliance reports (1) filed prior to August 1, 1963, or (2) filed on or after August 1, 1963, and (3) with respect to the material contained in reports of compliance submitted following issuance of an order requiring divestiture. Compliance reports in divestiture cases are confidential until the last divestiture required by the order has been finally approved by the Commission. See Rule 4.9(b)(7) and section .2.11.3 below.

.2.11.1 Reports Filed Prior to August 1, 1963

When a request is made for inspection or copying of a compliance report filed prior to August 1, 1963, staff drafts, for the signature of the Assistant Director for Compliance or the Associate Director for Enforcement, a letter to the respondent notifying it that a request has been made to examine its report and requesting that it notify the Commission within 20 days as to whether it regards any of the information contained therein as confidential, and if it does, it should identify with particularity each statement or exhibit for which it claims confidentiality, and respondent should justify each claim with reasons. A general or blanket request to classify the report "confidential" will not be honored. If confidentiality is requested for all or any portion of the report, staff should review the request and forward it to the General Counsel with a recommendation either for or against the granting of confidentiality in whole or in part.

.2.11.2 Reports Filed On or After August 1, 1963

Since August 1, 1963, a respondent who contends that its compliance report or portions thereof should be classified "confidential" must affirmatively request such treatment. Staff first determines whether the request adequately identifies the particular information claimed to be confidential and whether the reasons underlying the request are sufficient to enable staff to analyze the request. If the request for confidentiality is insufficient, staff notifies the respondent that the Commission needs further information as to either the particular material for which confidentiality is wanted or the reasons for each claim of confidentiality, or both.

After analyzing the request for confidential treatment and any additional information submitted by respondent, staff should prepare a memorandum to the General Counsel analyzing the request and advising whether the information in question constitutes (1) a trade secret, (2) privileged or confidential commercial or financial information, or (3) information otherwise exempt from disclosure that should be withheld from the public record (e.g., personal information about consumers in credit files). See § 6(f) of the FTCA and § 4.10 of the *Rules of Practice*. The memorandum to the General Counsel should be accompanied by a draft letter for the signature of the General Counsel advising the respondent of the

action taken with respect to the request for confidential treatment.

If confidential treatment is granted for any documents or portions thereof, or if the request for confidential treatment is still pending with the staff or the General Counsel, any compliance report sent to Records Processing must be separated into two folders. One folder, marked "Public Copy," should contain the original copies of all fully nonconfidential documents and photocopies of all partially confidential documents, with the confidential portions deleted. It should also contain a copy of any letter to the respondent advising the respondent of staff's conclusions that the report does not warrant further action. The second folder, marked "Confidential Documents," should contain the original copies of all fully or partially confidential documents, and the first page of each document should have "CONFIDENTIAL" stamped in the center at the bottom. Additionally, all partially confidential documents should contain brackets indicating the confidential information. If the request for confidential treatment is still pending when the file containing confidential documents is transferred to Records Processing, the folder should also be marked "confidentiality request pending."

.2.11.3 Exception for Proposed Divestitures

This section deals with requests for confidential classification of materials in reports of compliance with final orders requiring divestiture, including interim or periodic reports of compliance and applications for approval of divestitures.

The primary purpose of an order requiring divestiture is to restore competition in the marketplace by creating a new viable competitor. It is the Commission's policy to make it easier and more attractive for competitors to enter a market by acquiring the facilities to be divested. Therefore, prospective competitors should not be deterred from entering into negotiations because of the threat of having confidential or sensitive business data made public. The potential new competitor should not be hindered by a public disclosure detrimental to its interest or, conversely, advantageous to existing competitors.

Although not all-inclusive, the following information may be classified as "Confidential" when specifically requested and justified:

- Trade Secrets
- Customer Lists
- Profit and Loss Statements
- Balance Sheets
- Method of Financing Purchase
- Sales Price
- Sales Statistics
- Production Statistics
- Appraised Value of Assets
- Bids

- Negotiating Position
- Contracts

As a general rule, no specified period of confidentiality applies to trade secret information and customer lists.

See OM Ch. 15 for additional information relating to confidentiality and access to records in the possession of the Commission.

.3 PRELIMINARY COMPLIANCE CHECKS IN BUREAU OF CONSUMER PROTECTION MATTERS

A preliminary compliance check is a limited inquiry that ordinarily stems from receipt of information indicating that a respondent may be violating the provisions of an order. Staff usually secures additional facts necessary to decide whether the order has been or is being violated. In appropriate cases, correspondence with the respondent and others to secure corroborative information may be indicated. These checks are often initiated as the result of consumer or competitor complaints, and are conducted either to dispose of minor compliance matters susceptible to prompt correction with a minimum of effort or to determine whether a compliance investigation should be opened. Often they are limited to information obtained from the respondent.

A preliminary check should be undertaken only when it is necessary to obtain more facts. The

expenditure of substantial time or effort on a preliminary check is to be avoided. As a general rule, if a significant amount of actual time will be required to dispose of the question, the matter should be opened as a compliance investigation. The preliminary check is opened by sending appropriate letters to the respondent or the complaining parties. This is usually done when directed by the Commission or when staff seeks to determine whether a respondent may be violating the order. If the inquiry reveals no violations or that it is not in the public interest to proceed further, the matter may be summarily closed by an appropriate memorandum to the office file reviewed by the Associate Director for Enforcement.

A preliminary compliance check is not used in BC matters.

4 COMPLIANCE INVESTIGATIONS

4.1 IN GENERAL

An investigation involving a compliance matter is undertaken to determine whether a respondent or other party is in compliance with a Commission order or a TRR.

These investigations may be initiated at the direction of the Bureau along program guidelines, such as review of industry-wide practices or as part of a review of certain specified types of orders (i.e., advertising substantiation, performance claims). Investigations may also be initiated following receipt of information indicating that an order or TRR has been or is being violated.

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

4.2 COMPLIANCE INVESTIGATIONS RE: ORDERS

A compliance investigation into the manner and form of compliance with a final Commission order under FTCA § 5(l) may encompass a *de novo* investigation, i.e., an investigation into any practice that, although not violating the order under consideration, may violate other laws enforced by the Commission. However, in BCP matters, before a substantial amount of time is committed to investigate practices other than those covered by the order, staff should determine that the practices fall within one of the established programs and should obtain the necessary approvals usually obtained to initiate any other investigation. See OM Chs. 2 and 3.

Once staff initiates a compliance investigation, it should advise the respondent in writing that documents submitted by it during the investigation in lieu of compulsory process will receive confidential treatment pursuant to § 21(f) of the FTCA and § 4.10 of the *Rules of Practice*. In BCP matters, staff should also advise the respondent in writing that its efforts to modify its conduct voluntarily will be considered in deciding whether staff will recommend any action, but will not guarantee that no action will be brought.

4.3 COMPLIANCE INVESTIGATIONS RE: TRADE

REGULATION RULES

Where violations of a TRR are the focus of the investigation, an “omnibus” resolution authorizing the use of compulsory process to investigate violations of the rule may exist. The existence of such a resolution obviates the need for the Commission to approve the use of compulsory process in each investigation of a rule violation. Before proceeding with an investigation for a rule violation, the rule coordinator or program advisor responsible for the rule should be consulted. Use of an omnibus resolution must be cleared with the rule coordinator or program advisor. Where a new resolution authorizing the use of compulsory process is not needed, either because the investigation can be pursued through other means or because an omnibus resolution exists, the staff should follow the Commission and BCP procedures for investigations. See OM Chs. 2 and 3.

4.4 OPENING COMPLIANCE INVESTIGATION RE: ORDERS

The Commission has delegated to the Director, Deputy Directors, and the Assistant Director for Compliance of BC and to the Director, Deputy Directors, and the Associate Director for Enforcement of BCP the authority to open compliance investigations.

In BCP matters, staff conducting the investigation should prepare an appropriate Matter Update Notice (FTC Form 81) indicating that a § 5(l) compliance investigation has been initiated. The docket number of the order is used on that form. A new 7-digit number may be needed if the investigation is later enlarged to cover practices not covered by the order.

In BC matters, a new 7-digit number is obtained whenever a compliance report or a routine compliance review raises compliance issues sufficient to warrant the initiation of an investigation.

4.5 LIAISON WITH DEPARTMENT OF JUSTICE IN COMPETITION MATTERS

Before a compliance investigation is initiated in BC, the Liaison Officer should be requested to check with the Department of Justice to determine if the Department has any objection to the Federal Trade Commission’s

proceeding in the matter. Clearance with the Department of Justice will be handled by BC. If a regional office desires to initiate a compliance investigation of a competition order, it should direct its request to the Assistant Director for Compliance, BC. If the Bureau concurs in the request, it will arrange the necessary clearance and further advise the regional office.

.4.6 AFFIDAVITS IN COMPLIANCE INVESTIGATIONS

The Divisions of Compliance and Enforcement place great reliance on various compulsory process techniques and pre-trial discovery and less reliance on affidavits to obtain the requisite evidence to support charges of violations.

However, affidavits may be desirable in those instances where, in the absence of sworn testimony or documentary evidence, the proof of a salient point may turn on oral testimony. Most frequently such affiants will be individuals to whom representations violative of the order have been made by respondent or its agent. Although staff may properly prepare the affidavit, care should be taken that it reflects the witness' own statements, and the witness should be asked to write in and initial any changes considered necessary. Affidavits are not required from prospective witnesses whose probable testimony will be limited solely to the identification of documents for introduction into evidence. Affidavits also are not ordinarily required of the following:

- (1) Commission's Attorney-Investigator.
- (2) Officials of publishing companies – newspapers, magazines, etc.
- (3) Respondent or its current employees.

The foregoing is intended merely as a guide. In any instance where a material witness initially appears uncertain as to important facts, and the interview resolves this indecision, it may be wise to secure an affidavit if the passage of time between interview and trial may cause uncertainty or a substantial loss of memory.

.4.7 CLOSING COMPLIANCE INVESTIGATIONS

An investigation of possible violations of a TRR is closed in the same manner as any other investigation. (See OM Ch. 3.) A closing letter is sent to every potential respondent who has been subpoenaed.

An order compliance investigation is closed if the investigation fails to uncover evidence of violations or if staff determines that the matter does not warrant enforcement action for some other reason (e.g., the respondent's insolvency). Staff prepares a memorandum to the file setting forth the reasons for closing the investigation and an appropriate Matter Update Notice indicating that the investigation has been closed. If staff used compulsory process in the investigation based on a case-specific resolution, staff must prepare a closing memorandum to the Commission and forward it to the appropriate Bureau Director. (See section .4.7.1 below.) With the memorandum, when deemed appropriate, staff may submit a proposed letter advising the respondent that further action is not contemplated and that the compliance investigation has been closed. Closing letters will be routinely sent in circumstances when the respondent has been previously notified that a compliance inquiry has been initiated. Closing letters should be individually drafted to reflect the circumstances of the particular case.

.4.7.1 Authority to Close a Compliance Investigation Relating to a Commission Order

The Commission has delegated to the Director, the Deputy Directors, and the Assistant Director for Compliance of BC and to the Director, the Deputy Directors, and the Associate Director for Enforcement of BCP the authority to close compliance investigations. However, with respect to any compliance investigation falling into one or more of the following categories, staff must forward to the Commission via the Bureau Director a staff memorandum explaining staff's intended action with respect to the investigation:

- (1) The matter has received specific Commission consideration as to compliance, or the Commission or any Commissioner has expressed an interest in the matter.
- (2) The proposed closing is based on the expense of investigation or testing.
- (3) There are substantial questions as to public interest, Commission policy, or statutory construction.
- (4) The staff used compulsory process in the investigation based on a case-specific resolution.

See § 2.41(b) of the *Rules of Practice*. If the compliance investigation is based on a compliance report, the staff must submit along with its memorandum only those portions of the report that are applicable to the investigation.

If no Commissioner objects to staff's intended action by making a motion within 30 days after staff's

.5 ENFORCEMENT

.5.1 CIVIL ACTION TO RECOVER PENALTIES

The purpose of filing civil penalty actions in the U.S. district courts is to (1) secure compliance with TRRs or outstanding orders and (2) obtain monetary penalties and such other relief as is warranted by the facts for each and every violation of a TRR or final Commission order. As of 1997, penalties of not more than \$11,000 (\$5,500 for Clayton Act) for each day of violation or for each separate violation may be ordered by the court. (See section .2.4 regarding future inflation adjustments to the amount of the maximum civil penalty.)

Where a cease and desist order is violated, the judicial remedies are civil penalties, a mandatory injunction, and "such other and further equitable relief" as the court deems appropriate in the enforcement of the order (FTCA § 5(l)). Such other and further equitable relief may include disclosure requirements or consumer refunds. It is the policy of BCP that an injunction be sought in § 5(l) matters, except in unusual situations.

Where a violation of a TRR is involved, the Commission may pursue, in addition to civil penalties (FTCA § 5(m)(1)(A)), an injunction under FTCA § 13(b) and consumer redress (FTCA § 19(a)(1) and (b)).

In each instance where it is determined that a civil penalty action is warranted for violations of an order or TRR, the attorney will prepare a memorandum explaining to the Commission all relevant aspects of the case, together with a draft of the proposed complaint and document coding form. The attorney will also submit, along with the memorandum, a letter addressed to the Attorney General for the Chairman's signature referring the matter to the Department of Justice.

If the Commission authorizes the suit, the BC Compliance Division or the BCP Enforcement Division delivers the Chairman's letter, accompanied by a complaint and other materials, as appropriate, to the Attorney General at the Department of Justice. The

memorandum is forwarded to the Commission, staff should take its intended action. Staff should refrain from taking its intended action while any such motion is pending.

FTCA authorizes the Commission to bring an enforcement action, but requires it to give the Department of Justice 45 days advance notice, in case the Department decides to bring the case in the name of the United States. In competition matters, the Department of Justice has agreed informally that it will generally allow the Commission to bring the action in its own name. If the Department institutes a suit, the Bureau may endeavor to arrange to have the Commission attorney try the case in its entirety or, in the alternative, cooperate with and render such assistance to the U.S. or Department of Justice Attorney as may be requested. Such assistance may include preparing the case; drawing up motion papers, pleadings, or briefs; securing depositions; and trying the case. If the Department rejects the suit or fails to file the complaint within 45 days and returns the papers to the Commission, the material will be returned to the responsible Commission attorney for whatever action the Commission directs or has directed. Staff should generally notify the proposed defendant that the Commission has authorized filing of the complaint. Once the action has been filed, the staff should open an "X" number.

After a civil penalty action has been filed, the judgment entered, and satisfaction obtained on the judgment, the responsible staff member should prepare a Matter Update Notice setting forth the appropriate facts (i.e., payment of civil penalty has been received, other equitable relief has been accomplished, etc.) and closing the "X" number. The staff should then transmit the case files to Records Processing (Room 240).

.5.2 VIOLATIONS BY SUCCESSOR OR RELATED CORPORATIONS

In certain limited situations, the Commission may seek enforcement of an order relying upon acts violative of the order performed by a corporation not named in the

order. This usually occurs in cases where the “separation” of the two corporations is more apparent than real.

For example, where “successors and assigns” have taken over the old company named in the order and have engaged in violative practices, a suit may be appropriate. The term “successors” may be read to cover entities resulting from mergers or reorganizations, while the term “assigns” may be read to include purchasers of the assets of a respondent, depending on the circumstances surrounding the transfer and/or on the terms of the sales contract.

.5.3 VIOLATIONS BY NONRESPONDENTS

See OM Ch. 11 for procedures relating to civil penalty actions against nonrespondents who have knowingly engaged in practices the Commission has found unfair or deceptive in issuing a final cease and desist order, even though the order was not issued against them (FTCA § 5(m)(1)(B)).

.5.4 CIVIL ACTION FOR CONSUMER REDRESS

The purpose of filing an action for consumer redress in U.S. district court or state court under FTCA § 19 where a TRR has been violated is to obtain relief for consumers and other persons, partnerships, and corporations injured by the rule violation. Criteria and procedures for consumer redress actions are set forth in OM Chs. 11 and 13.

.5.5 SETTLEMENT – CONSENT JUDGMENTS

The staff may negotiate with the respondent in consumer protection and competition matters to procure an offer of settlement of an action prior to its filing.

Where there are TRR violations, equitable relief such as restitution or injunction can be sought in a complaint captioned as a “consumer redress” action under FTCA § 19. Where both civil penalties and equitable relief are sought for the TRR violations, the complaint should contain two separate claims for relief, one for consumer redress and equitable relief under § 19, and the second for monetary penalties under

§ 5(m)(1)(A).

Settlements of civil penalty actions involving orders may seek remedies in addition to, or in lieu of, monetary penalties (e.g., corrective advertising, refunds or restitution, public service advertising, or further divestitures).

In both TRR and order violation cases, the complaint and consent judgment are submitted with the memorandum recommending Commission acceptance of the settlement. A TRR civil penalty settlement must be accompanied by a public statement of the Commission’s reasons for its acceptance. The press statement is prepared in conjunction with the Office of Public Affairs and is released after the complaint and consent judgment have been filed with the court. Once the action has been filed, the staff should open an “X” number.

In all such matters, it must be made clear to the respondent during negotiations that such staff settlement is not binding on the Commission or the Department of Justice.

After a civil penalty action has been filed, the judgment entered, and satisfaction obtained on the judgment, the responsible staff member should prepare a Matter Update Notice setting forth the appropriate facts (i.e., payment of civil penalty has been received, other equitable relief has been accomplished, etc.) and closing the “X” number. The staff should then transmit the case records to Records Processing (Room 240).

.5.6 CIVIL AND CRIMINAL CONTEMPT FOR VIOLATIONS OF INJUNCTIONS

If a federal district court issues an injunction against future violations of a Commission order or a TRR and if respondent subsequently violates the injunction, the staff may recommend to the Commission that the violations be brought to the attention of the court so that the respondent may be held in contempt of court. Depending on the gravity and frequency of the violations, criminal or civil contempt may be sought. The General Counsel shall be promptly advised of the proposed action. See OM Ch. 13 for guidelines on coordination between offices.

.6 REQUEST FOR ADVISORY OPINIONS RE: ORDER PROVISIONS

When a respondent subject to an order informally inquires whether its current practices are in compliance with or in violation of an order, the staff may give advice (but is under no obligation to do so) with the usual qualifications that the staff opinion is based on the facts as given and is not binding on the Commission. If the informal inquiry raises close questions of compliance with the order or raises a more general policy issue, it should be referred to the Commission with a recommendation. If the advice is given orally, it should be confirmed in a letter to prevent misunderstandings, especially as to the nonbinding aspect of the staff's advice.

Rule 2.41(d) provides that any respondent subject to an order may request advice from the Commission as to whether a proposed course of action, if pursued, will constitute compliance with the order. The Secretary will forward the request to the Division of Compliance or the Division of Enforcement for review and analysis and preparation of an appropriate recommendation to the Commission. On the basis of the facts submitted, as well as other information available to the Commission, the Commission thereafter may inform the respondent whether or not the proposed course of action, if pursued,

would constitute compliance with its order.

A request ordinarily will be considered inappropriate for such advice (1) where the course of action is already being followed by the requesting party, (2) where the same or substantially the same course of action is under investigation or is or has been the subject of a current proceeding, order, or decree initiated or obtained by the Commission or another governmental agency, or (3) where the proposed course of action or its effects may be such that an informed decision thereon cannot be made or could be made only after extensive investigation, clinical study, testing, or collateral inquiry.

The filing of a request for advice under Rule 2.41(d) does not in any circumstances suspend or relieve a respondent from its obligation under the law with respect to its compliance with the order. It must, in any event, be in full compliance on and after the date the order becomes final.

Advice to a respondent under this paragraph will be published by the Commission in the same manner and subject to the same restrictions and considerations as advisory opinions under Rule 1.4. See OM Ch. 8 for more general information on advisory opinions.

.7 REOPENING OF PROCEEDINGS

After a cease and desist order is final, the Commission may reopen the proceeding whenever it decides that changed conditions of fact or law require the order to be modified or that the public interest so requires. If the staff is recommending the modification, it shall submit a memorandum to the Commission with appropriate exhibits and documentation to support its recommendation and a draft order to show cause. The order to show cause should state the precise modifications of the order being proposed and the reasons they are deemed necessary. If within 30 days of service of such order the respondent fails to answer, it may be deemed to have consented to the proposed

changes, and the Commission may enter a modified order.

Whenever an order to show cause why a proceeding should not be reopened is opposed, but the pleadings do not raise issues of fact to be resolved, the Commission, in its discretion, may decide the matter on the order to show cause and answer thereto, or it may serve upon the parties a notice of hearing, which will be limited to the filing of briefs and may include oral argument before the Commission. When the pleadings raise substantial factual issues, the Commission will direct such hearings as it deems appropriate, including hearings for the receipt of evidence. See Rule 3.72.

.8 REQUESTS TO REOPEN

.8.1 SCOPE

FTCA § 5(b) requires the Commission to reopen any

order issued under FTCA § 5 to consider whether the order, including any affirmative relief provision, should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission that makes a satisfactory showing that changed conditions of law or fact or that the public interest requires such order to be altered, modified, or set aside. The provision further requires that the Commission determine whether to alter, modify, or set aside the order not later than 120 days after the date of filing of such request.

Rule 2.51 conforms to FTCA § 5(b) and authorizes the filing of requests to reopen any Commission decision containing a rule or order that has become effective or an order to cease and desist that has become final. It applies, therefore, to requests to reopen both orders issued under FTCA § 5 and orders issued under other statutory authority, (e.g., Clayton Act § 11(b)), as well as rules issued after adjudicative hearings under the Fair Packaging and Labeling Act. The rule also provides for reopening if the public interest so requires, as well as if conditions of law or fact have changed.

.8.2 PROCESSING OF REQUESTS TO REOPEN

The Document Processing Section will:

- (1) Send a copy of the request to the appropriate Division of Compliance or Enforcement (Form S64);
- (2) Send a copy to the Office of Public Affairs (Form S63); and
- (3) Place a copy on the public record, where it shall remain until 30 days from the date on which the Office of Public Affairs issues a press release on the request, unless the Commission determines that earlier action on the request is necessary.

Bureau Directors are authorized to publish a notice in the *Federal Register* announcing the receipt of a petition. In BCP matters, staff will prepare a *Federal Register* Notice inviting public comments on the petition. In BC matters, such notices are not prepared in response to petitions to reopen (the press release is all the Commission issues).

.8.3 LETTERS OF COMMENT

.8.3.1 Receipt of Comments

Interested persons should address letters of comment or views to the Secretary. The Document Processing Section will make two copies of each letter, one for the public record and one for the appropriate staff. Commission staff handling the matter should retain a copy of any letters addressed directly to the staff and promptly forward to the Document Processing Section the original for filing and one copy for placement on the public record. The original comment will be placed in a permanent "Public Record Comment" file and retained with the original request. At the close of the public comment period, the public record copy will be removed and placed in a "pending" file until a determination is made by the Commission.

.8.3.2 Staff Response to Comments

At the close of the public comment period, if comments have been received, the Document Processing Section will transmit the complete file to staff handling the matter (Notice of Expiration of Comment Period, FTC Form 140). A reply to each comment will be prepared by staff for the signature of the Secretary and will be submitted to the Commission when the staff's recommendations on the request are submitted.

.8.3.3 No Comments Received

At the close of the public comment period, if no comments have been received, Records Processing (Room 240) will transmit the original of the request to the staff handling the matter and will notify the staff that no comments have been received.

.8.4 STAFF RECOMMENDATION

.8.4.1 Staff Memorandum – Contents

Staff will prepare a memorandum to the Commission, for the approval of the appropriate Bureau Director, setting forth comments and recommendations on the request and taking into consideration any public comments or views on the matter. The memorandum should, at the outset, address the question of whether the request contains a satisfactory showing that changed conditions of law or fact or the public interest require the order to be altered, modified, or set aside in accordance

with Rule 2.51(b). This requirement, it should be noted, is not satisfied by a mere allegation of changed facts or circumstances. The Commission may properly decline to reopen a proceeding if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested order.

Several situations can arise with respect to any given request:

(1) The staff may find that the request fails to satisfy the threshold requirement of a satisfactory showing that changed conditions of law or fact require the order to be altered, modified, or set aside. In this event, staff's memorandum should be accompanied by a draft letter for the Secretary's signature denying the request on that ground.

(2) The staff may find that the request satisfies the threshold requirement and that the order should be altered, modified, or set aside as requested. In this event, staff's memorandum should only be accompanied by a draft order reopening the proceeding and modifying the decision and order as requested.

(3) The staff may find that the request meets the threshold requirement, but that the order should be altered or modified in a manner different from that requested. In this event, staff may, time permitting, informally negotiate with the requester about the terms of the order modification. If such negotiations prove successful, staff's memorandum should so advise the Commission and should be accompanied by a draft order reopening the decision and order. However, if negotiations prove unsuccessful, staff's memorandum should so advise the Commission and should be accompanied by a draft order to show cause pursuant to § 3.72 of the Commission's *Rules of Practice* stating the changes proposed to be made to the order and the reasons they are deemed necessary. If additional time is necessary to complete negotiating the terms of the order modification, the Assistant Director for Compliance or

the Associate Director for Enforcement may authorize staff to seek the respondent's consent to an extension of time for the Commission's decision. If the staff determines that a portion of the request should be granted, and a portion denied (such as setting aside a subparagraph but not an entire paragraph), the staff's memorandum should be accompanied by a draft order reopening the decision and order, granting the request in part, and denying it in part.

(4) The staff may find that the request meets the threshold requirement for reopening, but fails to demonstrate that the order should be altered, modified, or set aside. In this event, staff's memorandum should be accompanied by a draft order reopening the proceeding and denying the request to modify or set aside the order.

Staff's memorandum should be routed to the Bureau Director for approval.

.8.4.2 Staff Memorandum – Time Limits for Submission

Since the Commission is required to rule upon a request that complies with FTCA § 5(b) and Rule 2.51 no later than 120 days after the date of its filing, the following schedule must be strictly adhered to:

(1) Where no public comments on a request have been filed, staff's memorandum on the request shall be submitted to the Commission within 30 days after the close of the public comment period.

(2) Where public comments on a request have been filed, staff's memorandum on the request (together with draft responses to letters of comment) shall be submitted to the Commission within 45 days after the close of the public comment period.

Extensions of time will not be granted except in extenuating circumstances.