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.1 SCOPE

This chapter describes policies and procedures governing judicial review of Commission orders, enforcement of compulsory process, and representation of the Commission in other actions in federal and state courts. It discusses the assignment of Commission responsibilities relating to recovery in court of civil penalties and consumer redress arising out of violations of Commission rules and orders or from other unfair or deceptive acts and practices (see OM Chs. 11, "Judicial Enforcement," and 12, "Compliance"). It also establishes guidelines dealing with requests that the Commission appear as amicus curiae in federal or state courts and in proceedings before other agencies.

.2 REPRESENTATION

General authority to represent the United States in civil or criminal litigation by or against the government and any of its agencies and to supervise such litigation is assigned by law to the Attorney General (28 U.S.C. 501 et seq.). The Attorney General is assisted by, and further references herein to his office include, a Deputy Attorney General, the Solicitor General, nine Assistant Attorneys General, a United States Attorney in each judicial district, and other special attorneys whom the Attorney General shall appoint.

Despite these broad general provisions for legal representation by the Attorney General, the Federal Trade Commission in recent years has been granted substantial special statutory authority to represent itself in civil actions through its own attorneys designated for that purpose. The present rights of representation may be summarized as follows:

- a) Under amended FTCA § 16(a)(2), the Commission has exclusive authority to represent itself and to supervise litigation in any civil action under the FTCA to (i) obtain an injunction under § 13, including an injunction under that section to prevent violation of any other law enforced by the Commission; (ii) obtain consumer redress under § 19; (iii) obtain judicial review of a rule prescribed by the Commission, or a cease and desist order issued under § 5; (iv) obtain enforcement under § 9 of subpoenas and orders to file special reports; or (v) obtain enforcement under § 20 of a civil investigative demand (CID). This right of representation by the Commission's own attorneys extends to all special statutes under which the Commission derives the power to declare acts or practices in violation of FTCA § 5 (e.g., Fair Credit Reporting Act, Fur Products Labeling Act, etc.).

This section requires that the Commission give notification of each such proceeding to the Attorney General. It does not preclude the Attorney General from intervening in such civil action or in an appeal from such action as otherwise provided by law.

- b) Under amended FTCA § 16(a)(1), the Commission may commence, defend, intervene in, and supervise the litigation of any other civil action and appeal involving the FTCA if (i) the Commission first notifies and consults with the Attorney General and (ii) the Attorney General fails within 45 days after receipt of notification to undertake such representation. This section applies, for example, to civil penalty actions under FTCA § 5(1) or 5(m). Section 16(a)(4) provides that this 45-day period shall automatically be reduced to one-half the time allowed for taking any procedural action that is required to prevent the right of the Commission to commence, defend, or intervene in such action or to take such appeal from being extinguished.
- c) Under amended FTCA § 16(a)(3), the Commission may be represented before the Supreme Court by

its own attorneys rather than by the Solicitor General in certain circumstances. First, the Commission must file a written request to the Attorney General within 10 days beginning on the day on which a final judgment is entered in a civil action in which the Commission has represented itself under the provisions of items (a) or (b) above. Second, the Attorney General must either (i) concur with the request or (ii) refuse or fail to appeal or file a petition for writ of certiorari within a 60-day period beginning on the day of the judgement or order. Section 16(a)(4) provides that this 60-day period shall be reduced automatically to one-half of the time allowed by any procedural requirement of any court in order to prevent the right of the Commission to appeal or to file a petition for writ of certiorari from being extinguished.

- d) The Attorney General has lawful authority to represent the Commission in all criminal actions and in all civil actions by or against the Commission arising under statutes other than the FTCA. As a practical matter, however, Commission attorneys handle a major portion of this litigation. While the Attorney General may exercise this right to representation in certain instances, it is customary in many areas (e.g., petitions of respondents for review of Commission orders pursuant to the Clayton Act), with no objection from the Department of Justice, for Commission attorneys to prepare the pleadings or briefs, handle court appearances and present oral arguments. The appropriate United States Attorney may appear on the pleadings or brief as co-counsel when local counsel is required by a rule of court. Coordinating arrangements between the Attorney General and the Commission are effected by the staff attorneys in the Office of the General Counsel or whichever bureau or regional office has been designated to handle the litigation on behalf of the Commission. Arrangements may be made directly between the General Counsel, bureau or regional office staff and an United States Attorney when Commission staff are supervising the litigation.
- e) Intervention in administrative proceedings before other government agencies and filing of amicus briefs in the courts in actions in which the Commission is not a party to the proceeding are not governed by existing rules or law. In these matters, the Commission may be represented by its own attorneys designated for this purpose under the Commission's ancillary powers to discharge its statutory responsibilities in an effective manner.

.3 GENERAL COUNSEL RESPONSIBILITY

The General Counsel is chief legal adviser to the Commission and has broad authority to represent the Commission in federal and state litigation in which it is involved (Rule 0.11). Representation in the federal courts includes both the federal district courts and appellate courts. Not included in General Counsel responsibility are actions by the Commission to recover civil penalties for violation of orders or rules or to obtain consumer redress filed pursuant to §§ 5(1), 5(m), and 19 of the FTCA and § 11(1) of the Clayton Act. These actions are handled by appropriate bureau or regional office staff (see .8 below; OM Ch. 11, "Judicial Enforcement"; and OM Ch. 12, "Compliance"). When authorized by the Commission, bureau and regional office attorneys may intervene or file comments in administrative proceedings before other government agencies and, subject to review by the General Counsel, file amicus briefs in court proceedings (see .7.4 below). The General Counsel maintains liaison with the Attorney General to facilitate notification or coordination of appearances in those actions in which the Attorney General is empowered to represent the Commission and to supervise the litigation. However, actions for civil penalties for rule or order violations and consumer redress are not included in this method for notification (see .11 below). The Deputy General Counsel and the Assistant General Counsel for Litigation assist the General Counsel in both trial and appellate activities.

.4 NOTIFICATION TO THE GENERAL COUNSEL OF PROPOSED COURT ACTION AGAINST THE FTC

An employee of the Commission who receives service of process or another form of notice involving legal proceedings against the Commission or against the employee in an official and representative capacity should immediately notify the General Counsel by telephone, when available, or the Deputy General Counsel or Assistant General Counsel for Litigation. A copy of the process and a summary of any special information and knowledge concerning the parties, subject matter, and issues involved in such litigation should be forwarded to the General Counsel at the earliest opportunity.

.5 NOTIFICATION TO THE GENERAL COUNSEL OF COURT ACTION BY THE FTC

When a bureau or regional office requires representation by the General Counsel in proposed court action by the Commission, the staff should notify the General Counsel, where available, or the Deputy General Counsel or the Assistant General Counsel for Litigation at the earliest point in the development of the particular matter at which involvement in a court action is seriously contemplated. Such notification should therefore precede the drafting of any court papers. It may be made either personally or in writing.

.5.1 TIME OF NOTIFICATION

The point of time at which a notice of contemplated court action should be sent to the General Counsel will vary with the type of action proposed. Examples when notification should be made are:

- a) With respect to suits to enforce compulsory process, a refusal to comply with such process after exhaustion of all administrative remedies by both sides;
- b) With respect to proposed injunctions under § 13, a decision by the bureau or regional office that it has or will have in the immediate future sufficient evidence to seek issuance of a complaint against the proposed respondent and that an injunction is warranted;
- c) With respect to civil or criminal contempt for violation of an order of any federal court secured by the Commission, substantial probative evidence of violation of the order;
- d) With respect to appearances by the Commission as intervenor, amicus curiae, or other participant, recommendation by the appropriate Evaluation Committee or Bureau Director that the Commission or its staff make such appearance.

.6 PLANNING COURT ACTION

Upon receipt of such notification, the General Counsel or a designee will consult with the person immediately involved and other knowledgeable staff to:

- a) Analyze and evaluate the Commission's legal position;
- b) Prepare appropriate recommendations to the Commission;
- c) Assign staff responsibilities;
- d) Ensure that any necessary legal research and drafting of papers or other preparations are planned and carried out expeditiously;
- e) Resolve questions of form with respect to proposed pleadings, exhibits, and other materials

in accordance with the federal, local, or agency procedures and rules of practice;

- f) Inform the Records Division, Office of the Secretary, within 48 hours of learning what portions of the Commission's records, if any, must be certified to the court.
- f) Coordinate action and eliminate duplication of effort; and
- g) Effect such liaison with the Attorney General and local United States Attorney as may be desired or required under the circumstances.

.7 CASE PREPARATION GUIDELINES

The principal purposes of the following guidelines are to inform General Counsel, bureau and regional office attorneys of the requirements for case preparation to be followed, and to assure timely, thorough, and proper preparation of Commission court litigation in which the General Counsel is involved. Experience has demonstrated that it is unwise to rely on precise forms and "boilerplate" phrases in the preparation of the necessary papers, and that each case should be carefully tailored to its specific facts. Accordingly, it usually is not desirable to devote the resources required to prepare court papers in advance of the initial notification and consultation with the General Counsel.

The recommended guidelines are flexible and must be applied discriminately.

7.1 GENERAL GUIDELINES

- a) The General Counsel may, on receipt of an "early warning" as discussed above (.4 and .5), designate an individual staff attorney in the office who will be primarily responsible to the General Counsel for the litigation. This attorney will consult with the bureau or regional office staff recommending or requiring the action with respect to preparing the necessary papers for initiating or defending the court action involved. The General Counsel will coordinate arrangements with appropriate individual attorneys for obtaining or making copies of all exhibits and for making other necessary preparations.
- b) Liaison will be established between the General Counsel's Office and the Attorney General for coordination and clearance in appropriate cases.
- c) Recommendations to commence or defend court action other than to recover civil penalties for rule or order violations or obtain consumer redress will be forwarded to the Commission via the General Counsel, who will make an appropriate endorsement upon all such recommendations.
- d) The General may determine which members of the Commission staff will assist in preparing litigation and which attorneys will appear on behalf of the Commission in court actions supervised by the General Counsel. The General Counsel may utilize bureau and regional office staff with the approval of the appropriate Bureau or Regional Director.

.7.2 ENFORCEMENT OF COMPULSORY PROCESS

The materials which should be forwarded with a request for authorization to seek enforcement of compulsory process include:

- a) A copy of the subpoena, CID, 6(b) order, access order, or ALJ order involved;

- b) A copy of the resolution authorizing compulsory process, or complaint, whichever is applicable;
- c) A copy of the motion or petition to quash if any;
- d) A copy of the staff response to the motion or petition to quash, if any;
- e) A copy of the Commission order directing compliance, if any;
- f) Evidence of noncompliance (e.g., a transcript of the hearing at which respondent refused to comply, letter stating intention not to comply, or an affidavit by a knowledgeable staff member setting forth the facts with respect to noncompliance) and notice of default, if any; and
- g) Copies of other pertinent documents (e.g., rulings of the Administrative Law Judge in adjudicative matters, if not otherwise covered; proof of service, if there may be any question about its validity).

.7.3

INJUNCTIONS

The following documents and materials should be available at the time of a recommendation to initiate proceedings with respect to actions for injunction under § 13:

- a) A draft of the proposed administrative complaint;
- b) Evidentiary material demonstrating the facts constituting the violation alleged, indicating the continuing nature of the alleged violation and establishing, if possible, that the proposed respondent will not voluntarily cease the acts or practices challenged;
- c) Evidentiary material indicating the injury to the public which is likely to result if the alleged violation is not enjoined pending resolution of the administrative complaint; and
- d) Evidentiary material tending to show the lack of substantial adverse effect of the recommended injunction of the proposed respondent's business.

FTCA § 13(b) provides that a temporary restraining order or preliminary injunction shall be dissolved by the court if an administrative complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the order. It therefore is necessary, if an administrative complaint cannot be completed prior to submission of a request for court action, that drafting of such complaint be continued expeditiously while preparations for filing the injunction action and court proceedings are being pursued. See OM Ch. 11.5 for additional information about actions for injunctions.

.7.4

AMICUS BRIEFS

The following materials should be prepared and forwarded to the Commission together with requests for the Commission to file amicus briefs in federal or state courts (with the concurrence or separate comments of the General Counsel) and to appear as intervenors or other participants in matters before other government agencies:

- a) A copy of the complaint and answer, petition, notice of proposed rulemaking, or other pleadings needed to frame the issues the proceeding;
- b) The precise legal question or questions concerning which the Commission is requested to make an appearance;
- c) An outline of the points which the Commission should seek to present or support;
- d) Explanation of the reason why such position will not be presented adequately by the parties or other interested persons and why Commission support for such position is appropriate (a list of questions to be used in determining when the staff should recommend filing amicus briefs in state courts in occupational licensure matters, which has general application to a determination whether to appear in other types of matters, will be found in the word processing system);
- e) Explanation why it is desirable to participate at the present stage of the proceeding (e.g., initial hearing vs. judicial review);
- f) A copy of all briefs, pleadings, and other documents that already have been prepared and which it is proposed to file on behalf of the Commission. Ordinarily, such papers will not be prepared until after Commission has given preliminary authorization to make an appearance. An amicus brief or other pleading in a formal court proceeding should be prepared in the name of the Commission for signature by the General Counsel or appropriate Bureau or Regional Director and staff. Any other form of statement or papers to be filed in the name of the Commission should be prepared for signature by the Secretary unless otherwise directed by the Commission; and
- g) Description of the effect which the outcome of the matter may have upon Commission enforcement policies, goals, and objectives.

.7.5 RESPONSE TO PROCESS

A Commission employee, upon receipt of service of process issued by a third party involving the performance of official responsibilities, should immediately provide a summary of all available information to the General Counsel. As soon thereafter as possible, the employee should furnish:

- a) A copy of the process received;
- b) A description containing any of employee's knowledge concerning the nature of the proceeding in which the process issued and the issues presented;
- c) A statement of material facts within the knowledge of the employee which are likely to be elicited in response to the process, identifying those matters that may be entitled to confidential status under applicable law;
- d) A list or index of documents in the files of the employee or the files of the Commission in the staff's custody and control responsive to the specifications or other requirements of the process, when production is anticipated; and

- e) A brief analysis of the potential impact which response to such process may have upon the law enforcement efforts of the Commission.

7.6 CIVIL OR CRIMINAL CONTEMPT

When the staff obtains information of a violation by any person of an injunction or other order entered by a federal court in a matter involving the Federal Trade Commission and it appears that a proceeding for contempt of the court is warranted, the staff should furnish to the General Counsel:

- a) A copy of the court order;
- b) Copies of any affidavits, correspondence, advertisements, and other documents that help to establish the existence of the violation alleged;
- c) A list of witnesses and summary of additional testimony or evidence that may be relied upon to support the charge of violation;
- d) An explanation as to the precise manner in which such action or inaction constitutes a violation of the order;
- e) A schedule showing the relevant facts concerning each separate violation of the order and the number of days of each continuing violation;
- f) A statement or calculation of any consumer loss or competitive injury, and any monetary gains or advantages enjoyed by the violator, as a result of the violation; and
- g) A recommendation concerning the nature and extent of the remedies or relief that should be requested.

.8 RECOVERY OF CIVIL PENALTIES AND CONSUMER REDRESS

.8.1 CIVIL PENALTIES

The Commission is represented in court actions to recover civil penalties for rule or order violations by the Attorney General and/or by the staff of the appropriate bureau or regional office both in proceedings against respondents under Clayton Act § 11(1) or FTCA § 5(1) and in actions under FTCA § 5(m)(1) (see .2 above). For detailed discussion of the criteria and procedures for initiation of a civil penalty action, see OM Chs. 11, "Judicial Enforcement," and 12, "Compliance."

.8.2 CONSUMER REDRESS

The Commission is represented in civil actions to obtain consumer redress under FTCA § 19 by its own attorneys in the Bureau of Consumer Protection or a regional office (see .2 above). Detailed instructions for preparing and conducting consumer redress proceedings are presented in OM Ch. 11, "Judicial Enforcement."

.9 COMMISSION REVIEW AND APPROVAL

Participation in each court or other legal proceeding on behalf of the Commission requires express Commission

approval unless such authority has been delegated (as in the case of subpoena enforcement and § 10 civil penalties for noncompliance with process). When initiation of court action or other appearance in any judicial or administrative forum is deemed necessary or advantageous to the Commission, a memorandum setting forth the facts, nature of the proceeding, legal issues, Commission policies, goals and objectives that may be affected, and proposed relief or remedies must be submitted to the Commission for consideration. In matters that are handled by bureau or regional office staff (i.e., to recover penalties for rule or order violation or to obtain consumer redress), the Commission may request advice or comments from the General Counsel. In all other matters, the request or recommendation is submitted to the Commission by or through the General Counsel. When a petition is filed in a federal appeals court seeking review of a Commission order to cease and desist, the General Counsel is authorized to represent the Commission and to supervise the litigation under a general delegation of powers and in the manner prescribed by law.

A Commission employee is prohibited from making an appearance in any legal proceeding in an official capacity as a witness, a party, or an intervenor without the consent of the Commission except for the purpose of obtaining any necessary postponement or extension of time in which to consult with the General Counsel and the Commission.

Any comment by an employee of the Commission to be submitted to a court or other agency concerning a matter pending before the court or agency which gives the appearance it is being submitted in the official capacity of the employee, whether by letter or formal papers, will be regarded as an amicus position, not to be undertaken by staff members without authorization from the Commission.

.10 ADVANCE NOTIFICATION TO THE COMMISSION

The Commission has instructed its staff that a minimum period of 3 days should be allowed for the Commission to adequately review and consider each recommendation for action. This requirement poses no problem in the absence of a strict deadline. There are, however, strict deadlines for taking action or filing papers in most legal proceedings pending in the courts or before other agencies. Accordingly, when Commission approval is necessary, the staff should complete any brief, pleadings, or other legal papers required to be filed in the courts or before other agencies in sufficient time for supervisory approvals and submission to the Commission at least 3 days before the due date for filing. Whenever the time period for preparing any such documents is too short or there are other reasons why the staff cannot comply with this requirement, the staff should fully advise the Commission by memorandum at the earliest practicable date as to the nature of the proceedings and the papers proposed to be filed, including the principal issues to be addressed. The staff should furnish to the Commission drafts of the papers to be filed at the earliest opportunity. This may be accomplished by sending the documents to the Secretary for advance assignment to a Commissioner. Advance copies should be clearly labeled as such.

.11 NOTIFICATION TO THE ATTORNEY GENERAL

When the Commission approves a request or recommendation to initiate, defend, or intervene in an action in the federal courts or to make an appeal in such matters, the Secretary returns the documents and papers to the General Counsel or the bureau or regional office that is designated to handle such action. Such office is responsible to furnish any notification to the Attorney General that is required by law. It is important that notification be made promptly, since the date of notification may begin the running of time within which the Attorney General is authorized to commence, defend, intervene in or take an appeal in such court action. Delay in notification may result in inadequate representation and in prejudice to or loss of rights of the United States, the Commission, or the public. The form of such notification will vary according to the nature of the proposed action and the facts that are required to be certified in order to establish the basis for representation.

In addition to the formal notification to the Attorney General required by law in certain instances, it is advisable for each Commission attorney engaged in court proceedings to communicate with the local United States Attorney in that judicial district and to furnish information about the time, place, and nature of the proceedings being conducted.

.12 SUPERVISION AND COORDINATION

Due to the varied nature of the court proceedings and other appearances in which the Commission staff are likely to become engaged and the strict time limits that may be imposed by law, rule, or order, the Commission has not prescribed procedures for the handling of such matters. The supervising attorney, to whom each matter is assigned is responsible to the Assistant General Counsel for Litigation or to the appropriate Bureau or Regional Director for performance of the staff and for the results of the case or proceeding. When coordination between the General Counsel, a bureau or regional office, or the Attorney General is required, staff attorneys within the Commission and in the Department of Justice work directly with one another and are responsible for obtaining review and approvals from their individual supervisors as required.

Efficient utilization of Commission resources and the avoidance of waste or duplication of effort require close cooperation and joint effort among the staff. The General Counsel possesses knowledge and experience regarding a wide range of procedural questions, such as the rules of confidentiality and attorney work product, principles of relevancy or burdensomeness in the enforcement of compulsory process, the scope of judicial review, court procedure, and the local rules in various federal courts. The enforcement staff, on the other hand, may have intimate knowledge whether substantial evidence of a law violation may be found in the record or what facts in the record support the claim for extraordinary or specific relief that is being asserted by the Commission. The staff are obligated to coordinate their skills, knowledge and experience to assure competent representation and satisfactory results in all proceedings involving the Commission.

In the event of a difference of opinion between the staffs of the General Counsel and any bureau or regional office on any question of procedure or form that does not involve a decision as to litigation tactics or legal strategy, and the General Counsel and Bureau or Regional Director are unable to resolve such conflict through consultation, the advice or determination of the General Counsel should control.

In any court action in which the General Counsel is authorized to supervise the litigation, the General Counsel or a designee shall determine which attorney will conduct hearings or present arguments. Consultation first with the Bureau or Regional Director may be appropriate. The appropriate Bureau or Regional Director is responsible for staff assignments in all other matters. Additional staff may attend a hearing, argument, or other proceeding as observers when there is no objection by the attorney supervising the case or proceeding.

The final step in coordination of Commission activities involving judicial appearances and procedures is an effective exchange of information and communication among staff through distribution of copies of briefs, statements, and memoranda that have been filed on behalf of the Commission.

Guidelines in Determining to File Amicus
Briefs in State Courts in Occupational
Licensure Matters

Amicus Briefs.

1. The issue presented.
 - a. What is the issue presented?
 - b. Is the issue presented by this case one of general relevance? -- Explain, considering:
 - (1) The prevalence of the questioned practice;
 - (2) The number of consumers affected by the questioned practice;
 - (3) The type of consumer most frequently affected by the questioned practice;
 - (4) The dollar volume of business in the industry or occupation directly involved; and
 - (5) The dollar volume of business in industries or occupations with practices identical or similar to the challenged practice.
2. The fact pattern
 - a. Briefly describe the fact pattern.
 - b. Does the court's decision ultimately depend on its view of the facts or on its view of the law?
3. Identity of the parties to the litigation
 - a. Name the plaintiff and defendant, or their attorney.
 - b. Does either party have any relationship to the Federal Trade Commission?
4. Commission expertise.
 - a. Does the Commission possess special expertise bearing on the controverted issue that will be helpful to the court in rendering its decision?
 - b. What is this expertise, and how does it relate to the issue(s) being litigated?

- c. Will the information contained in the amicus brief be presented to the court if the Commission does not intervene?
 - d. Is the presentation of this information likely to have a significant effect on the court's decision?
 5. Level of adjudication.

Is the matter at the trial or appellate level?
 6. Consumer benefit.
 - a. Direct benefits from the case at hand.
 - (1) What benefits will accrue to consumers if the ruling is favorable to the Commission?
 - (2) How many consumers will be benefited by a favorable ruling?
 - (3) Will these benefits accrue to a particular class of consumers?
 - (4) What are the potential costs to consumers and occupation members of a favorable ruling? (Consider the quality arguments, supra.)
 - (5) Will these costs disproportionately affect any class of consumers or occupation members?
 - b. Indirect benefit.
 - (1) What is the present state of the law in this area?
 - (2) What precedential value, if any, will result from a favorable decision?
 - (3) If there is significant precedential value:
 - (a) What benefits will accrue to consumers?
 - (b) How many consumers will be benefited by a favorable ruling?
 - (c) Will these benefits accrue to a particular class of consumers?
 - (4) What are the countervailing costs, if any?
7. Resource expenditure.
 - a. Is there a body of published material that can be drawn upon to support the Commission's position?

- b. Has the Commission previously completed studies or otherwise gained expertise in this area?
- c. Has the Commission previously submitted a brief on this issue? If so:
 - (1) What was the result?
 - (2) Why should this request be granted in light of the holding in the other case?
- d. How many work hours will be required to complete the brief?