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FTC RULEMAKING THROUGH NEGOTIATION

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The Federal Trade Commission, along with other administrative agencies, has been especially affected by the current emphasis on deregulation. Some proponents of the free market system view the Commission as an unnecessary and costly impediment to market functioning. In this article, Professor Koch and Ms. Martin review past FTC regulatory efforts in light of the FTC's mandate: to maintain an efficient, competitive free market. Although the FTC has deviated from its market maintenance goal, this deviation should not serve as a basis for constricting Commission rulemaking activity. Rather, the authors demonstrate that past Commission practices illustrate the need for an informal rulemaking procedure that is sensitive to the needs of both consumers and industry.

Throughout the political spectrum, the nation's policymakers are espousing a newfound devotion to deregulation. Numerous policy arguments have been advanced to support a decrease in government involvement in social and economic activities, but the driving force behind deregulation has been the growing political power of business interests. This power derives less from the traditional authority accruing to wealth than from a revitalized doctrine that commerce best serves the greater interests of society. Emerging in the decade of the Seventies was a reaffirmation of Coolidge's observation: "The business of America is business."

A corollary of this doctrine is the acceptance of the existence of social and economic winners and losers. Because our democratic, capitalistic system requires rewards and losses, its adherents distrust any institution that insulates a major part of society from the risk of loss. One regulatory institution perceived as interfering with these natural processes is the Federal Trade Commission. Contrary to this perception, the motivation behind the creation of the FTC was a desire to protect economic processes from various anticompetitive practices; only later was the FTC permitted to police anticonsumer practices.[1]

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1. The legislative history is extensive: Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914); *as amended by* ch. 49, § 1107, 52 Stat. 111 (1938); *as amended by* ch. 601, sec. 1107, § 5(a), 52 Stat. 1026, 1028 (1938); *as amended by* ch. 61, sec. 4, §§ 5, 15, 64 Stat. 20, 21-22 (1950); *as amended by* ch. 745, 66 Stat. 631 (1952); *as amended by* Pub. L. No. 85-726, sec. 414, §1, 72 Stat. 731, 770 (1958); *as amended by* Pub. L. No. 85-791, sec. 3-4, §§ 5(b), 5(c), 11, 72 Stat. 941, 942-43 (1958); *as amended by* Pub. L. No. 86-507, sec. 13, § 5(f), 74 Stat. 200 (1960); *as amended by* Pub. L. No. 93-153, sec. 408, §§ 5(l), 6, 13, 16, 87 Stat. 576, 591-92 (1973); *as amended by* Pub. L. No.

The regulatory mandate of the FTC does not require that it replace market resource allocation decisionmaking with government decisionmaking. Rather, the FTC's function is to maintain market machinery so that the market, not the government, allocates resources in the best interests of the entire population.

The FTC performs this function in two ways. First, it must assure continued competition in the marketplace, because only a competitive market allows proper economic functioning.[2] Second, it must strive to encourage confidence in the marketplace among the ultimate economic decisionmakers, consumers.[3] The FTC's consumer protection function is as much a market maintenance activity as is its antitrust function. Regulation for the protection of the consumer is intended neither to substitute government decisions for the marketplace choices nor to insulate consumers in the marketplace from the risk of loss. In performing its market maintenance function the FTC does, of course, lower the risk to consumers in dealing in the marketplace. The risk reduction, however, is aimed at eliminating fears that would deter consumers from entering the marketplace, rather than affecting consumer behavior thereafter.

If the FTC is performing its function properly, honest commercial interests should be as supportative of the FTC's activities as are consumer interests. The FTC should assist in creating a market enviroment in which consumers and honest commercial entities can trade efficiently to their mutual benefit. There is strong evidence, however, that neither commercial interests nor consumers interests are content with the way the FTC currently regulates the marketplace. To a large extent, such dissatisfaction is intrinsic to the FTC's performance of its policing function; no one particularly likes the police even though in the abstract we recognize that they exist for our benefit. Dissatisfaction also emanates from the ambiguous mandate given the FTC by Congress.[4] Moreover, the FTC carries a subtle public image burden: consumer interests want the FTC to protect not only the marketplace but also the losers; business interests see only the short-range costs of market maintenance regulation instead of the long-range benefits of market maintenance regulation.

The vigor of recent criticism surpasses predictable objections and suggests that an actual breakdown in performance has occurred. Dissatisfaction with the FTC, especially within the business community, has reached a level that raises concern as to whether the agency is properly performing its func-

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93-637, 88 Stat. 2183 (1975); *as amended by* Pub. L. No. 94-145, sec. 3, § 5(a), 89 Stat. 801 (1975); *as amended by* Pub. L. No. 96-37, 93 Stat. 95 (1979); *as amended by* Pub. L. No. 96-252, 94 Stat. 374 (1980) (codified as amended at 15 U.S.C. §§ 41-57 (1976 & Supp. IV 1980)).

2. H.R. REP. No. 533, Part 2, 63d Cong., 2d Sess. 1 (1914).

3. The FTC authority over consumer protection was affirmed by the Wheeler-Lea amendment to the Federal Trade Commission Act in 1938. It declared unlawful "unfair or deceptive acts or practices." Act of March 21, 1938, ch. 49, 52 Stat. 111. *See supra* note 1.

4. J. FREEDMAN, CRISIS AND LEGITIMACY 100-03 (1978). Freedman cites several factors that combine to produce an ambiguous mandate: "the FTC deals with an unmanageably broad spectrum of economic activity, usually has not had strong support from either the industries it regulates or the Congress, has been hampered by inadequate enforcement authority and insufficient funding, and has been less successful . . . [than other agencies] in attracting well qualified personnel." *Id.* at 103.

tion. The FTC's mandate requires sensitivity to the objectives of commercial interests because attention to these objectives reveals the proper scope of government efforts to enhance market functioning. The heated criticism the agency has suffered from business interests highlights the failure of the agency to implement its market maintenance function properly. The past FTC administration ignored these criticisms; the present FTC administration apparently is committed to the elimination of the FTC's role in the economy.[5] These approaches are neither productive nor realistic. Whatever the wisdom of deregulation in other areas, stifling the FTC is not deregulation in its true sense. Rather, it represents an attack on governmental efforts that seek to assure an efficient market system. The issue is not a market economy versus a regulated economy, but whether the FTC is properly performing its market policing function.[6] The way to answer the agency's critics is to assure that the FTC successfully furthers its market maintenance functions.

The FTC's original mandate was to enhance the operation of the marketplace by policing unfair methods of competition.[7] Mr. Brandeis, then advisor to President Wilson, insisted on creating an agency to eliminate unfair methods of competition rather than relying on machinery dependent upon judicial enforcement for its effect.[8] He successfully argued against Wilson's own idea of delineating a laundry list of prohibited unfair methods of competition—some of which survived as set forth in the Clayton Act[9]—by convincing Wilson and Congress that business interests would find ways around even the most complete list of anticompetitive practices.[10] Thus, it is fundamental to

5. For example, legislative cutbacks of the FTC are now under way in Congress. In May 1982, the Senate Commerce Committee voted to exempt professional associations from FTC antitrust scrutiny, to prohibit FTC challenges to commercial advertising under the unfairness doctrine, and warned the FTC to avoid regulation of agricultural cooperatives. The Senate Commerce Committee also voted to continue the legislative veto power over FTC rules and to require the FTC to demonstrate that a practice is "prevalent" within an industry before adopting a Trade Regulation Rule. *Senate Commerce Committee Approves Exemptions from FTC Jurisdiction for Professionals, Advertisers*, 42 ANTITRUST & TRADE REG. REP. (BNA) No. 1064, at 1023 (May 13, 1982).

The agency is also threatened with continued staff reductions. On April 16, 1982, the FTC announced that it would close four of its ten regional offices in an effort to reduce agency costs. *FTC Decides to Close Its Four Regional Offices in Los Angeles, Seattle, Denver and Boston*, 42 ANTITRUST & TRADE REG. REP. (BNA) No. 1061, at 807 (April 22, 1982). The four-office shutdown, which was scheduled to occur on July 15, 1982, however, never took place. On May 28, 1982, the four offices were notified that plans to eliminate the offices had been suspended pending further study. *FTC Suspends Its Proposal to Close Four Regional Offices*, 42 ANTITRUST & TRADE REG. REP. (BNA) No. 1067, at 1155 (June 3, 1982).

6. At present, national policy favors a market economy, and hence the basic ideology of the FTC's function is not questioned in this article.

7. Federal Trade Commission Act, ch. 311, 38 Stat. 717 (1914) (current version at 15 U.S.C. §§ 41-57 (1976 & Supp. IV 1980)).

8. 2 A. LINK, WILSON: THE NEW FREEDOM 434-35 (1956).

9. 15 U.S.C. §§ 12-27 (1976 & Supp. IV 1980).

10. Wilson later said: "At first I was inclined to think that various . . . practices had become obviously unfair and detrimental and that it would be best to define them as such in the Clayton law. As I talked with businessmen and students of legislation, however, I came to agree with them that these unfair practices would be [best] reached through the Trade Commission law [i.e., the strong commission bill]." A. W. Shaw, *Memorandum of an Interview with Wilson* (January 4, 1915) (Wilson Papers, Library of Congress), *quoted in* 2 A. LINK, *supra* note 8, at 438.

the very concept of the FTC that it continue to define and seek to remedy unfair practices.

. The failure of the FTC to learn how to perform this function is a problem that has plagued the agency since it began operation in 1916. It has relied heavily upon individual formal adjudications in the apparent hope that respondent businesses would present evidence relating to the market maintenance implications of the FTC's individual decisions. Formal adjudication, however, was and is not a sound procedure for making generalized decisions.[11] Both the agency and private parties fail to focus on the broad application of individual decisions. The agency seeks to resolve the individual controversy at hand, and the respondents focus on their personal plight; only incidental emphasis is placed on the market implications of the FTC action.

Early in the agency's history it became apparent to those involved in agency policymaking that generalized decisions should be implemented through procedures that provide general guidance to business. Over the years the FTC evolved numerous processes for investigating the general facts and underlying policy questions behind regulatory decisions. While each of these processes was found wanting, each had advantages. Nevertheless, the FTC has failed to learn from and to improve on its various experiments; it tends to abandon one generation of regulatory devices for those of the next generation.[12] Perhaps the solution to the dissatisfaction with the FTC's activities lies in the use of its past experiences to deal more effectively with regulatory problems. The agency should learn from its previous experiments to develop tools that will permit the FTC to perform effectively its market maintenance functions.

I. THE FTC EXPERIENCE WITH VARIOUS RULEMAKING DEVICES

The broad policymaking pronouncements of the FTC fit generally under the administrative law concept of "rulemaking." Administrative law theory distinguishes between rules that have the force of law, "legislative rules," and rules with no binding impact, "interpretative rules" and "general statements of policy."[13] For most of its rulemaking history, the FTC has relied on interpre-

11. *See* 1 K.C. DAVIS, ADMINISTRATIVE LAW TREATISE § 7.06 (1st ed. 1958).

12. *See* R. HARVEY, A MANUAL OF THE FEDERAL TRADE COMMISSION LAWS (1916).

13. The distinction between legislative and interpretative rules is one of the most well-established and fundamental in administrative law. Legislative rules are those made pursuant to a delegation of authority to make rules. In contrast, the authority to make interpretative rules emanates from no other authority than the necessary and proper authority inherent in the creation of an agency. Joseph v. United States Civil Serv. Comm'n, 554 F.2d 1140, 1153 n.24 (D.C. Cir. 1977). Because legislative rules are made pursuant to delegated authority and are, therefore, made under legislative mandate, they have the force of legislation. *See* Chrysler Corp. v. Brown, 441 U.S. 281, 295-96 (1979); Jones v. Rath Packing Co., 430 U.S. 519 (1977). This process means that a court cannot substitute its own judgment for legislative rules. Indeed, judicial review of legislative rules is usually limited to arbitrariness, capriciousness, and abuse of discretion. *See, e.g.*, Bowman Transp., Inc. v. Arkansas Best Freight Sys. Co., 419 U.S. 281, 285 (1974); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). Because of their binding effect, legislative rules must be made through public participation. *See* 5 U.S.C. § 553 (1976). Interpretative rules are merely vehicles for announcing an agency's view on a particular area of law or policy; they have no force other than the force of judgment expressed in them, and a court is free to

tative rules. In 1962 the FTC attempted to exercise its legislative rulemaking authority through its "trade regulation rules."[14] Later, in *National Petroleum Refiners Association v. FTC*[15] the District of Columbia Court of Appeals upheld the agency's authority to make legislative rules through the informal procedures of section 553 of the Administrative Procedure Act (APA).[16] After the holding in *National Petroleum Refiners*, business interests intensified lobbying efforts to impose the strictures of formal rulemaking on the FTC. The resulting Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (FTCIA),[17] however, affirmed the legislative rulemaking authority of the FTC. FTCIA required that in making rules the FTC institute only a few trial-like procedures, thus establishing a classic "hybrid" rulemaking process.[18]

The FTC's shift in the late 1960s to legislative rulemaking in lieu of poli-

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substitute its judgment. Koch, *Public Procedures for the Promulgation of Interpretative Rules and General Statements of Policy*, 64 GEO. L.J. 1047 (1976). Futhermore, interpretative rules need not be made through public procedures, although some courts have imposed notice and comment procedures on proposed interpretative rules having substantial impact. *See, e.g.*, Pickus v. United States Bd. of Parole, 507 F.2d 1107 (D.C. Cir. 1974); Lewis-Mota v. Secretary of Labor, 469 F.2d 478, 482 (2d Cir. 1972); Texaco, Inc. v. Federal Power Comm'n, 412 F.2d 740, 744 (3d Cir. 1969). Pending legislation may amend the Administrative Procedure Act (APA) to require public procedures for certain interpretative rules. *See infra* note 62. The "substantial impact" test does not define interpretative rules, and hence affects only their procedure and not their susceptibility to judicial review. *See* K.C. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 5.03-1, at 150-51 (1976).

14. General FTC procedures for trade regulation rules are set forth at 16 C.F.R. §§ 1.7-1.20 (1982). A trade regulation rule is a legislative rule promulgated by the FTC under the authority of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act. Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified as amended at 15 U.S.C. §§ 45-58 (1976 & Supp. IV 1980)) (FTCIA). The FTCIA gives the FTC the authority to prescribe "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 57a(a)(1)(B) (Supp. IV 1980). *See infra* notes 49-54, 60-62 and accompanying text.

15. 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

16. Section 553 of the APA provides that legislative rules should be made after notice, opportunity for at least written comment, and statement of reasons for the rules. The District of Columbia Circuit assumed that § 553 would apply if it found that the FTC had legislative rulemaking authority. The APA requires formal or trial-type rulemaking only in situations in which the statute requires a rule "to be made on the record after opportunity for an agency hearing." 5 U.S.C. § 553(c) (1976).

17. Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified as amended at 15 U.S.C. §§ 45-58 (1976 & Supp. IV 1980)).

18. The concept of "hybrid" rulemaking grows out of a series of decisions holding that the notice and comment procedures of § 553 of the APA represent a minimum and additional procedures may be required in the interest of complete fact gathering and fairness. The germ of the concept can be found in Judge Leventhal's opinion in American Airlines, Inc. v. CAB, 359 F.2d 624 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966). The first case actually imposing hybrid rulemaking was Walter Holm & Co. v. Hardin, 449 F.2d 1009 (D.C. Cir. 1971), and the concept reached full bloom in International Harvestor Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973). Empirical study of these decisions found that hybrid rulemaking did not improve the rulemaking process. Williams, *"Hybrid Rulemaking" Under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401 (1975). *See also* Leventhal, *Improving the Administrative Process—Time for a New APA?*, 32 AD. L. REV. 287, 292-93 (1980). The Supreme Court in Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978), ended judicial imposition of hybrid rulemaking. Relying a good deal on the practical arguments against judicial imposition of hybrid rules put forth by Judge J. Skelly Wright in an earlier panel discussion at the National Conference on Federal Regulation, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 CORNELL L. REV. 375 (1974), and a literal reading of the APA, Justice Rehnquist found that § 553 procedures constituted not a minimum but rather the full extent of the procedures Congress intended to provide. 435 U.S. at 545-49.

cymaking through adjudication and interpretative rulemaking was a significant event in the agency's law enforcement history. For the first time, the FTC employed a potent enforcement device that could place the members of an entire industry in jeopardy for committing a practice the FTC considered unfair or deceptive, in less time and with fewer resources than required for individual adjudications.[19] The efficacy of this device, however, created problems. From their inception, the FTC's legislative rulemaking activities have been soundly criticized, especially by business interests. Unfortunately, the current response of the FTC to these criticisms is virtually to eliminate its rulemaking activities.

Commentators have demonstrated that rulemaking is not only an effective regulatory mechanism, but when used in the proper circumstances, an equitable one.[20] If rulemaking is an effective regulatory device, it is unfortunate that the FTC is considering abandoning rulemaking efforts that serve to enhance the FTC's market maintenance performance. The FTC should continue to exercise its rulemaking power; breakdowns in the current regulatory structure should not be used as a justification for removing its rulemaking authority. Rather than eliminating rulemaking from its regulatory scheme, the FTC must examine the reasons for widespread dissatisfaction with the present rulemaking system and strive to improve its rulemaking techniques.

A. Rulemaking Through General Public Participation

The FTC has used two techniques for promulgating rules through public participation—industry guides and trade regulation rules. As the name suggests, the guides provide guidance for subject industries by indicating those practices the FTC considers unfair or deceptive.[21] Trade regulation rules are rules generally applicable to a segment of the industry; the rules are promulgated through the FTC's legislative rulemaking authority and have the force and effect of law. These two techniques sometimes coexist in the agency's repertoire of regulatory powers. While the FTC has favored one or the other at different times, the agency has never effectively combined these procedures

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19. *See* Elman, *The Need for Certainty and Predictability in the Application of the Merger Law*, 40 N.Y.U.L. REV. 613, 618-24 (1965).

20. *See, e.g.*, STAFF OF SENATE COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., 1ST SESS., STUDY ON FEDERAL REGULATION, VOL. IV, *Delay in the Regulatory Process* 36-37 (Comm. Print 1977); Pedersen, *Formal and Informal Rulemaking*, 85 YALE L.J. 38, 39 (1975) ("The shift to rulemaking has been urged and supported both by commentators and to a surprising extent by the courts."); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

21. Organization, Procedures and Rules of Practice, 16 C.F.R. § 1.5 (1982). The rule states:

> § 1.5 Purpose [of Industry Guides]
>
> Industry guides are administrative interpretations of laws administered by the Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. They provide the basis for voluntary and simultaneous abandonment of unlawful practices by members of industry. Failure to comply with the guides may result in corrective action by the Commission under applicable statutory provisions. Guides may relate to a practice common to many industries or to specific practices of a particular industry.

Id.

to institute a comprehensive regulatory scheme. The FTC started developing rules calling for general public participation in 1955 when it instituted its "Industry Guide" procedure.[22] Although this procedure incorporated participation through the basic notice and comment procedure, it was for the purpose of making rules having the limited effect of interpretative rules.[23] The FTC continued its development of public participation rulemaking in 1962 with the creation of trade regulation rules.[24] Originally, these rules also used basic notice and comment procedures, but several legislative enactments added elements of trial and other procedural restraints to this basic procedure.[25] Experience with both guides and trade regulation rules is instructive in probing the strengths and the weaknesses of FTC rulemaking efforts.

Industry guides were the first FTC rules made through general public participation. The FTC did not intend guides to have the binding effect of law.[26] Rather, industry guides are intended to guide "the public in conducting its affairs in conformity with legal requirements. They provide the basis for voluntary and simultaneous abandonment of unlawful practices by members of an industry."[27] The FTC may promulgate industry guides when guidance regarding the legal requirements applicable to a particular practice or set of practices is in the public interest and would bring about more widespread and equitable observance of the laws under the jurisdiction of the FTC.[28] The FTC seeks to eliminate widespread trade abuses through the use of guides; the guides, however, are not intended to prohibit every deceptive practice within a particular industry or group of industries. Rather, guides are intended to deal with serious and prevalent intra and interindustry abuses.[29]

Industry guides can be divided into two categories: those that apply to a practice within a particular industry and those that apply to a practice or to

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22. Note, *Voluntary Compliance: An Adjunct to the Mandatory Process*, 38 IND. L.J. 377, 394 (1963).

23. Section 553 requires only an opportunity for written comment; the FTC consistently provided this opportunity in its guide proceedings. *Id.* at 395. Indeed, it regularly provided for oral presentation in the heyday of its use of guides.

24. *See infra* text accompanying notes 49-54.

25. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980); Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975); Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975).

26. *See* Organization, Procedures and Rules of Practice, 16 C.F.R. § 1.6 (1982). The rule states:

> § 1.6 How [Industry Guides are] promulgated.
>
> Industry guides are promulgated by the Commission on its own initiative or pursuant to petition filed with the Secretary or upon informal application therefor, by any interested person or group, when it appears to the Commission that guidance as to the legal requirements applicable to particular practices would be beneficial in the public interest and would serve to bring about more widespread and equitable observance of laws administered by the Commission. In connection with the promulgation of industry guides, the Commission at any time may conduct such investigations, make such studies and hold such conferences or hearings as it may deem appropriate. . . .

Id. (footnote omitted).

27. *Id.* § 1.5.

28. *Id.*

29. Note, *supra* note 22, at 396-97.

practices that are common to several industries.[30] Representative of the first category are the Guides for the Nursery Industry promulgated by the Commission in 1969.[31] The Nursery Guides are specific and detailed, covering diverse topics related to the special characteristics of the industry, such as deception, misrepresentation, trade practices, and standards.[32] A representative example of the second category, the interindustry guides, is the guide against bait advertising.[33] This is a broadly written guide that seeks to prohibit the once widely employed practice known as "bait and switch" advertising.[34] The guides describe generally the improper "bait and switch" technique and specify certain practices that constitute prohibited conduct under the guides.[35]

The guides procedure is set in motion by independent action of the FTC or by the complaint of any interested person.[36] The FTC staff drafts the guides that are promulgated by the Commission.[37] The FTC, through its staff members who prepare the guides, may in its discretion "conduct such investigations, make such studies, and hold such conferences as it may deem appropriate."[38] The FTC staff, however, is not required to use any of these tools in guide preparation.

In the early 1960s the FTC began a continuing conference procedure under the industry guides program designed to educate businessmen and the general public about the agency's industry guides program.[39] By educating those affected by the guides, the FTC seeks to foster cooperation and thus enforcement and compliance.[40] Moreover, on request by a businessman af-

30. *See generally* 16 C.F.R. § 1.6 (1982).

31. Guides for the Nursery Industry, 16 C.F.R. §§ 18.0-.8 (1982).

32. For example, the guides prohibited deception through use of product names, *id.* § 18.2; deception through substitution of nursery products, *id.* § 18.3; and deception through size and grade designation, *id.* § 18.4. The guides also developed standards applicable to plants grown in a wild state. *Id.* § 18.6. Other examples of industry specific guides include guides for the tire labeling and advertising industry, *id.* §§ 228.0-.19; the metallic watch band industry, *id.* §§ 19.0-.4; the hosiery industry, *id.* §§ 22.0-.6; and the household furniture industry, *id.* §§ 250.0-.15.

33. *Id.* §§ 238.0-.4. Other examples of interindustry guides include guides against deceptive pricing, *id.* §§ 233.1-.5; guides against deceptive advertising of guarantees, *id.* §§ 239.0-.7; and guides against deceptive debt collection practices, *id.* §§ 237.0-.6.

34. Bait advertising has been described as:

> an alluring but insincere offer to sell a product or service that the advertiser in truth does not intend or want to sell. The essence of such a scheme is to switch the customer from the advertised product to a product that the advertiser actually wants to sell, usually at a higher price or on a basis more advantageous to the advertiser.

E. KINTNER, A PRIMER ON THE LAW OF DECEPTIVE PRACTICES 176 (2d ed. 1978).

35. 16 C.F.R. §§ 238.0-.4 (1982). Prohibited "bait and switch" practices include a merchant's refusal to take orders for the "bait" merchandise for delivery within a reasonable time, *id.* § 238.3(d); disparagement of the "bait" product or its accoutrements, *id.* § 238.3(b); and refusal to show the "bait" product upon request, *id.* § 238.3(9).

36. *Id.* § 1.6.

37. *Id.*

38. *Id. See also* Comment, *Trade Rules and Trade Conferences: The FTC and Business Attack Deceptive Practice, Unfair Competition, and Antitrust Violations*, 62 YALE L.J. 912, 921-24 (1953).

39. *See* Note, *supra* note 22, at 397.

40. The primary compliance tool in connection with the guides program has been education. This is premised upon the belief that businessmen will regulate their conduct when informed of what the law demands. Mandatory enforcement measures are utilized only

fected by the guides, FTC attorneys will provide informal advice to help an affected businessman determine whether certain specific practices comply with the applicable guides. In an effort to promote further compliance with the guides, the FTC regularly distributes copies of the guides to affected individuals.[41]

The guides procedure has certain advantages over other industry-wide regulation techniques employed by the FTC. The guides technique is the most flexible of the agency's regulatory tools. Since industry cooperation is unnecessary for the promulgation of industry guides, they may serve to regulate a recalcitrant industry group unwilling to engage in self-regulation.[42] Furthermore, because the Rules of Practice[43] require that the FTC employ only summary procedure, guides may be promulgated more quickly than legislative rules.[44]

The industry guides program should be used by the FTC to set informal standards for industry guidance. Although such rules lack the full force and effect of law, the guides constitute a statement by the Commission of its opinion of the law. Industry guides can provide the FTC with a powerful tool to foster industry compliance with agency views.

Guides have fallen into disuse partly because of the development of a more militant consumer protection attitude and a concomitant antibusiness attitude of the FTC. In the Seventies the FTC saw itself as an adversary fighting business interests that had a perceived tendency to violate the law. Thus, the FTC was more interested in imposing its will on recalcitrant commercial interests than in helping businessmen who might wish to obey the law or to understand the scope of the law. This approach may be counterproductive. Because section 5 of the Federal Trade Commission Act (FTCA) is very broad and ambiguous,[45] effective law enforcement could result from adding concreteness to the regulatory language. Industry guides could provide the necessary concreteness that would allow businessmen to attempt, voluntarily, to alter their business conduct.

Nonetheless, there was considerable dissatisfaction with the guide program as previously implemented by the Commission.[46] One of the major criticisms of the program was that the guides lacked sufficient force to compel the bad actors in the industry to comply with the standards set forth in the guides.

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where voluntary measures have failed or where, for reasons of public policy, voluntary measures are considered inadequate. The guides in no way amount to a finding by the Commission and do not necessarily affect any formal or informal matter before it.

Id. (footnotes omitted).

41. *Id.*

42. *Id.* at 399.

43. 16 C.F.R. §§ 0.1-15.491.

44. Note, *supra* note 22, at 399.

45. *FTC's Letter to Senate Subcommittee on Bill to Restrict Agency's Jurisdiction over Professionals and Unfair Acts or Practices*, 42 ANTITRUST & TRADE REG. REP. (BNA) No. 1055, at 568 (Mar. 11, 1982); *see* Wald, *The FTC and Industrywide Law Enforcement*, 30 J.B.A.D.C. 343, 349-50 (1963).

46. *See* E. COX, R. FELLMETH & J. SCHULZ, THE CONSUMER AND THE FEDERAL TRADE COMMISSION (1969).

The impact of guides was further diminished by the necessity of introducing evidence in any enforcement action to support the conclusions reached in the guide.[47] Those willing to risk noncompliance were least affected by the guides, hence the program merely disadvantaged the responsible businesses vis-à-vis their unscrupulous competitors.[48] As a consequence, guides failed to protect consumers from the worst members of an industry— those businesses whose sharp practices do the most damage to consumer confidence in efficient market functioning. Thus compelled to find a more potent industry-wide enforcement tool, the FTC established the legislative rulemaking program of trade regulation rules.

In 1962 the Federal Trade Commission began its initial effort at legislative rulemaking by establishing a Rules Division within the Commission to promulgate trade regulation rules.[49] The first trade regulation rule was promulgated in 1964 to regulate cigarette advertising.[50] The statement of basis and purpose of this rulemaking effort indicates that a trade regulation rule is based on facts common to an entire industry and policy of broad applicability.[51] For the purposes of fairness and efficiency, the FTC determined it would make rules to cover an identifiable segment of the economy rather than using piecemeal treatment through individual adjudication.[52]

The effect on the FTC enforcement process of trade regulation rules, as opposed to guides, is to cut off the rights of those who challenge the conclusions expressed in the rule in a subsequent cease and desist order proceeding.[53] A person who has had notice and an opportunity to participate in the original rulemaking proceeding has no subsequent right to challenge the rule; the only right he retains is the right to allege that changed circumstances or other special circumstances justify exemption from a rule in an individual case.[54]

From the time of the FTC's first promulgation of trade regulation rules, the argument has been made that the FTC was not originally delegated legislative rulemaking authority.[55] Moreover, those opposed to the trade regula-

47. E. ROCKEFELLER, DESK BOOK OF FTC PRACTICE AND PROCEDURE 80 (2d ed. 1976).

48. SENATE COMM. ON GOVERNMENTAL AFFAIRS, STUDY OF FEDERAL REGULATION, S. DOC. NO. 72, 95th Cong., 1st Sess. 36 (1977)("In certain kinds of enforcement agencies, though, such as the FTC, rulemaking is unlikely to be effective unless followed by case-by-case enforcement.") [hereinafter cited as S. DOC. NO. 72].

49. E. KINTNER, *supra* note 34, at 64.

50. 29 Fed. Reg. 8324 (1964) (codified at 16 C.F.R. §§ 408.1-.4 (1964)).

51. *Id.*

52. *Id.* at 8366-68. *See also* Wegman, *Cigarettes and Health: A Legal Analysis*, 51 CORNELL L.Q. 678, 749-51 (1966).

53. 16 C.F.R. § 1.22(c) (1982) provides, "Where a rule is relevant to any issue involved in an adjudicative proceeding thereafter instituted, the Commission may rely upon the rule to resolve such issue, provided that the respondent shall have been given a fair hearing on the applicability of the rule to a particular case."

54. 15 U.S.C. § 57a(g) (1976). *See* National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974) ("[s]ome opportunity must be given for a defendant . . . to demonstrate that the special circumstances of his case warrant waiving the rule's applicability"). *See also* Clagett, *Informal Action—Adjudication—Rule Making: Some Recent Developments in Federal Administrative Law*, 1971 DUKE L.J. 51, 81-83.

55. *See, e.g.*, Burras & Teter, *Antitrust: Rulemaking v. Adjudication in the FTC*, 54 GEO. L.J. 1106 (1965); Weston, *Deceptive Advertising and the Federal Trade Commission: Decline of Caveat*

tion rules argued that if the FTC were bestowed with legislative rulemaking power, it had to exercise that rulemaking authority by using formal, trial-type procedures.[56] Nonetheless, the controversy did not reach a court in a justiciable form until nearly a decade later, in response to the promulgation of a rule compelling retail gasoline dealers to post the octane rating on the gasoline pumps.[57]

In *National Petroleum Refiners Association v. FTC*[58] the Court of Appeals for the District of Columbia affirmed the agency's legislative rulemaking authority and its ability to make such rules through the informal notice and comment process set out in section 553 of the APA. The court found that section 6(g) of the FTCA was sufficient delegation of authority to support the implication of legislative rulemaking authority.[59] Congress later enacted the FTCIA,[60] which specifically delegates to the agency the authority to promulgate legislative rules in the field of consumer protection,[61] but requires the

Emptor, 24 FED. B.J. 548, 568-73 (1964); Note, *The FTC's Claim of Substantive Rule-Making Power: A Study in Opposition*, 41 GEO. WASH. L. REV. 330 (1972-73). These authorities misread the legislative debate on the original Federal Trade Commission Act. It is true that much of the debate involves the question whether the FTC would be delegated illegal "legislative" authority. 51 CONG. REC. 14,938 (1914). Although this debate talks of "legislative authority," it involves the nondelegation doctrine and not rulemaking. The question was whether "unfair methods of competition" is a sufficient standard to avoid the delegation of legislative authority. The sponsors of the bill pointed to existing definitions of that term to show that it had sufficient meaning to provide an adequate standard for either adjudication or rulemaking. Indeed, the sponsors cited numerous cases upholding the delegation of rulemaking authority to agencies then in existence. *Id.* at 11,084-86 (remarks of Senator Newland); *id.* at 14,930-33 (remarks of Representative Covington). Even better authority supported FTC rule making powers. *See* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 5.04 (Supp. 1970); Auerback, *The Federal Trade Commission: Internal Organization and Procedure*, 48 MINN. L. REV. 383, 457-59 (1964); Fuchs, *Agency Development of Policy Through Rule-making*, 59 NW. U.L. REV. 781 (1964). *See generally* Baum, *Reorganization, Delay and the Federal Trade Commission*, 15 AD. L. REV. 92 (1963) (discussion of practical advantages of rulemaking over adjudication).

56. The argument ran that even if the FTC had legislative rulemaking authority, the FTCA required it to make its decisions only after a hearing. Thus, it was argued, a rule was "required by statute to be made on the record after opportunity for an agency hearing" and § 553(c) required such rules to be made through the formal processes of §§ 556-57 and not the informal procedures of § 553. The Supreme Court soundly rejected this argument. *See* Federal Power Comm'n v. Texaco, Inc., 377 U.S. 33 (1964); United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

57. Posting of Minimum Octane Numbers of Gasoline Dispensing Pumps, 36 Fed. Reg. 23,871 (1971) (codified at 16 C.F.R. § 422.1), *revoked by* 43 Fed. Reg. 43,022 (1978).

58. 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). The United States District Court for the District of Columbia, in American Nat'l Standards Inst., Inc. v. FTC, No. 79-1275 (D.D.C. Feb. 4, 1982), recently rejected a bid by an industry group to reconsider the decision in *National Petroleum Refiners*. *See* 42 ANTITRUST & TRADE REG. REP. (BNA) No. 1051, at 331 (Feb. 11, 1982). The Court held that if Congress disapproved of the Court's interpretation of the FTC's powers, Congress could alter that power by rescinding the Commission's section 6(g) substantive rulemaking authority. The Court stated, "Congress has not taken the initiative to do so and it is inappropriate for this [c]ourt to do so." *Id.*

59. 482 F.2d at 681.

60. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified as amended at 15 U.S.C. §§ 45-58 (1976 & Supp. IV 1980)).

61. The Act prescribes hybrid procedures only for consumer protection rules and not for antitrust rules. Presumably, antitrust rules may still be promulgated under the authority of § 6(g), 15 U.S.C. § 46(g) (1975), which was upheld in *National Petroleum Refiners*, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 951 (1974), through § 553 procedures. *See* American Nat'l Standards Inst., Inc. v. FTC, No. 79-1275 (D.D.C. Feb. 4, 1982); *see also* 42 ANTITRUST & TRADE REG. REP. (BNA) No. 1051, at 331 (Feb. 11, 1982).

Commission to follow certain procedures in addition to basic informal rulemaking procedures of the APA.[62]

Under the hybrid procedures of the FTCIA, the FTC begins the rulemaking procedure with publication of the initial notice of proposed rulemaking.[63] At approximately the same time a presiding officer is designated by the Commission to oversee the rulemaking process.[64] The presiding officer then accepts proposals from interested persons regarding issues upon which cross-examination may be appropriate.[65] At this time the FTC also accepts written submissions of data, views, and arguments about the proposed rule from persons interested in the proceeding.[66] The next step in the rulemaking process is publication of the final notice of proposed rulemaking.

After publication of the final notice of proposed rulemaking, the presiding officer accepts applications from interested parties requesting a right of cross-examination during the forthcoming oral hearing stage of the proceeding.[67] The presiding officer may grant or deny the request. He may also designate one party to cross-examine on behalf of many parties if, in his view,

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62. Legislation was proposed in this Congress that would add a general requirement of procedures in addition to those currently required by the APA. *See* S. REP. No. 284, 97th Cong., 1st Sess. 94 (1981); S. REP. No. 305, 97th Cong., 1st Sess. 2 (1981).

63. 15 U.S.C. § 57a(b)(Supp. IV 1980) states:

> (b) Procedures applicable
>
> (1) When prescribing a rule under subsection (a)(1)(B) of this section, the Commission shall proceed in accordance with section 553 of title 5, United States Code [5 USCS § 553] (without regard to any reference in such section to sections 556 and 557 of such title [5 USCS §§ 556 and 557]), and shall also (A) publish a notice of proposed rulemaking stating with particularity the text of the rule, including any alternatives, which the Commission proposes to promulgate, and the reason for the proposed rule; (B) allow interested persons to submit written data, views, and arguments, and make all such submissions publicly available; (C) provide an opportunity for an informal hearing in accordance with subsection (c); and (D) promulgate, if appropriate, final rule based on the matter in the rulemaking record (as defined in subsection (e)(1)(B) of this section), together with a statement of basis and purpose.
>
> (2)(A) Prior to the publication of any notice of proposed rulemaking pursuant to paragraph (1)(A), the Commission shall publish an advance notice of proposed rulemaking in the Federal Register. Such advance notice shall—
>
> (i) contain a brief description of the area of inquiry under consideration, the objectives which the Commission seeks to achieve, and possible regulatory alternatives under consideration by the Commission; and
>
> (ii) invite the response of interested parties with respect to such proposed rulemaking, including any suggestions or alternative methods for achieving such objectives.
>
> (B) The Commission shall submit such advance notice of proposed rulemaking to the Committee on Commerce, Science, and Transportation of the Senate and to the Committee on Energy and Commerce of the House of Representatives. The Commission may use such additional mechanisms as the Commission considers useful to obtain suggestions regarding the content of the area of inquiry before the publication of a general notice of proposed rulemaking under paragraph (1)(A).
>
> (C) The Commission shall, 30 days before the publication of a notice of proposed rulemaking pursuant to paragraph (1)(A), submit such notice to the Committee on Commerce, Science, and Transportation of the Senate and to the Committee on Energy and Commerce of the House of Representatives.

64. 16 C.F.R. § 1.13(c) (1982).

65. *Id.* § 1.11(a)(4) (1982).

66. *Id.* § 1.11(a)(5).

67. *Id.* § 1.12(d) (1982).

those parties hold substantially similar views on the rulemaking proceeding.[68] After completion of the oral hearing, the FTC allows interested parties a limited right to make rebuttal submissions.[69]

After the oral hearing, the staff makes recommendations to the Commission in a report on the rulemaking record.[70] After publication of the staff report, the presiding officer recommends a decision based upon his or her findings and conclusions, and taking into account the staff report.[71] Both of these reports are made public, and interested parties have a right to submit as part of the record comments on both the presiding officer's and the FTC staff's report.[72] Finally, the entire rulemaking record is submitted to the Commission. The Commission promulgates a final rule, which is published in the Federal Register. The rule becomes effective on the fourth day after publication.[73]

The FTCIA specifies that a final rule is subject to judicial review within sixty days upon the request of any interested person.[74] The scope of the review of FTCIA rulemaking is more stringent than that normally applied to section 553 rulemaking under the Administrative Procedure Act. When examining an FTCIA rulemaking proceeding, the court applies a substantial evidence, rather than an arbitrary and capricious, standard of review.[75] Moreover, FTC rulings that limit the rights of participants to engage in cross-examination and rebuttal specifically are made reversible error when such a limitation precludes the disclosure of disputed material facts.[76]

In 1980 Congress modified the trade regulation rulemaking process through the enactment of the Federal Trade Commission Improvement Act of

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68. 15 U.S.C. § 57a(c)(4)(A)-(B) (Supp. IV 1980).

69. *Id.* § 57a(c)(2)(B).

70. 16 C.F.R. § 1.13(f) (1982).

71. *Id.* § 1.13(g).

72. *Id.* § 1.13(h).

73. *Id.* § 1.14(c).

74. 15 U.S.C. § 57a(e)(1)(A) (Supp. IV 1980). This provision raises an interesting question. If an interested person fails to seek preenforcement review within the requisite time, has he lost the right to obtain review both prior to enforcement and at the time the rule is applied to him? *See* Gage v. AEC, 479 F.2d 1214 (D.C. Cir. 1973) (failure to join as parties to rulemaking jeopardizes right to seek direct appellate review); North Am. Pharmacal, Inc. v. HEW, 491 F.2d 546, 592 (8th Cir. 1973) (failure to request hearing during time allowed resulted in refusal of review of order). *See generally* Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1752-60 (1975).

75. 15 U.S.C. § 57a(e)(3)(A) (Supp. IV 1980). Normally under the APA the arbitrary and capricious standard applies to rulemaking. 5 U.S.C. § 706(2)(A) (1970). The Magnuson-Moss Act requires substantial evidence review but probably only as to adjudicative, not legislative facts. CONFERENCE REP. No. 93-1408, Joint Explanatory Statement of the Comm. of Conference, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7755, 7766-67 ("In addition, the Court would set aside a rule under section 18 if it found that the findings and conclusions of the Commission with regard to disputed issues of material fact on which the rule is based are not supported by substantial evidence in the rulemaking record taken as a whole. Of course, this test would not apply to findings or determinations of legislative fact."). S. 1080, 97th Cong., 1st Sess. § 5 (1981) adds a new test for rulemaking: "without substantial support in the rulemaking file, viewed as a whole, for the asserted or necessary factual basis, as distinguished from the policy or legal basis, of a rule adopted in a proceeding subject to section 553 of this title."

76. 15 U.S.C. § 57a(e)(3)(B)(i)-(ii) (1976).

1980.[77] The Act establishes a legislative veto over the FTC's rulemaking activities: Congress has ninety days to review a final trade regulation rule, and unless both the House and the Senate pass veto resolutions, the rule becomes effective ninety days after promulgation.[78] The FTC may submit a revised rule to Congress if both Houses disapprove a final rule.[79]

The 1980 Act also requires the FTC to alter some of the procedures previously used in the trade regulation rulemaking proceeding. Section 8 of the 1980 Act requires the Commission, prior to the commencement of a rulemaking proceeding, to publish an advance notice of proposed rulemaking.[80] The advance notice must describe the proposed rule, the objectives sought to be achieved through enactment of the rule, and any alternatives to the rule under consideration by the agency.[81] Moreover, section 8 requires the Commission to submit a notice of proposed rulemaking to the Senate and House Commerce Committees thirty days prior to publication in the Federal Register.[82]

Section 15 of the 1980 Act requires the FTC to prepare and publish a preliminary regulatory analysis of the proposed rule setting forth the objectives sought to be achieved from the enactment of the rule. In addition, the preliminary regulatory analysis must delineate the perceived benefits, detriments, and effects of the proposed rule on both the public and the industry regulated by the proposed rule. It must also delineate any reasonable alternatives to the proposed rule.[83]

When the Commission promulgates and publishes a final rule, the agency simultaneously must issue a final regulatory analysis.[84] That analysis must include, in addition to the material required in the preliminary regulatory analy-

77. Pub. L. No. 96-252, 94 Stat. 374 (1980) (codified at 15 U.S.C. §§ 57a, 57a-1, 57b-1, 57b-2, 57b-3, 57b-4, 57c (Supp. IV 1980)).

78. Other legislative veto provisions have been found to be unconstitutional. *See, e.g.*, Consumer Energy Council of Am. v. FERC, 673 F.2d 425 (D.C. Cir. 1982) *petition for cert. filed sub nom* United States Senate v. Consumer Energy Council of Am., 51 U.S.L.W. 3099 (U.S. Aug. 17, 1982) (No. 82-177) & United States House of Representatives v. Consumer Energy Council of Am., 51 U.S.L.W. 3120 (U.S. Aug. 24, 1982) (No. 82-209); Immigration and Naturalization Serv. v. Chadha, 634 F.2d 408 (9th Cir. 1980), *cert. granted*, 102 S. Ct. 87 (1981). In Consumer Energy Council of Am. v. FERC a unanimous panel of the District of Columbia Circuit Court held that the one-house veto provision of the Natural Gas Policy Act was unconstitutional. The court found that "the one-house veto violates Article I, Section 7, both by preventing the President from exercising his veto and by permitting legislative action by only one house of Congress." 673 F.2d at 448. In addition, the court held that "the one-house veto contravenes the separation of powers principle implicit in Articles I, II, and III because it authorizes the legislature to share powers properly exercised by the other two branches." *Id.* Incorporating its reasoning in *Consumer Energy Council*, the D.C. Circuit held unconstitutional the two-house veto provision of § 21(a) of the 1980 Improvement Act, Consumer's Union of U.S., Inc. v. FTC, 51 U.S.L.W. 2262 (D.C. Cir. Oct. 22, 1982) (per curiam). Immigration and Naturalization Serv. v. Chadha is now before the United States Supreme Court for decision. Oral arguments were heard in late February 1982. 50 U.S.L.W. 3687 (Mar. 2, 1982).

79. Federal Trade Commission Improvement Act of 1980, § 21, 15 U.S.C. § 57a-1(c) (Supp. IV 1980).

80. *Id.*, § 8, 15 U.S.C. § 57a(b)(1)(A).

81. *Id.*, 15 U.S.C. § 57a(b)(2)(A)(i).

82. *Id.*, 15 U.S.C. § 57a(b)(2)(C).

83. *Id.*, § 15, 15 U.S.C. § 57b-3.

84. *Id.* The Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified at 5 U.S.C. §§ 601-612 (Supp. IV 1980)), amends the APA to require cost/benefit analysis of the effects

sis, an explanation of the reasons the FTC chose the particular final alternative. The final regulatory analysis must also include a summary of the significant issues raised during the rulemaking proceeding along with the agency's responses thereto.[85]

The 1980 enactment sets limits on the dollar amount of compensation that can be paid to individual outside participants in the rulemaking process.[86] Section 10 further requires that the FTC set aside twenty-five percent of its intervenor funds for small business interests that participate in rulemaking proceedings at the FTC.[87] The Act also requires the FTC to develop a small business outreach program to encourage participation by small business interests in the rulemaking process.[88]

In both the original FTCIA and the 1980 Act, Congress gave interested parties greater participatory rights than it granted under the Administrative Procedure Act. Congress sought to restrict broad substantive delegation of authority to the FTC through the provision of procedural safeguards and limitations.[89] Despite these increases in participatory rights and judicial and legislative oversight, there presently exists a strong objection to FTC rulemaking within some governmental circles and the private sector. This criticism relates to both substantive and procedural aspects of recent FTC activities. Many feel that the Commission has overstepped its legislatively granted authority and is engaged in overregulation in areas in which it is without authority to regulate. Procedural criticisms include the general failure to provide adequate participatory opportunities, unmanageable rulemaking records, staff bias problems, insufficient issue designation, and the extensive and inflexible nature of FTC compliance procedures.[90]

The primary vehicle for enhancing participatory rights is cross-examina-

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of rulemaking on small businesses. President Reagan in Exec. Order No. 12,291, 3 C.F.R. 127 (1981), required cost/benefit analysis for all "major rules" no matter where their impact is felt.

85. Federal Trade Commission Improvement Act of 1980, § 15, 15 U.S.C. § 57b-3(b)(2) (Supp. IV 1980).

86. *Id.*, § 10, 15 U.S.C. § 57a(h)(3). Section 10 limits the amount that each participant can receive to $75,000 per rulemaking proceeding and $50,000 per year per person for all rulemaking activities.

87. *Id.*, 15 U.S.C. § 57a(h)(2).

88. *Id.*, 15 U.S.C. § 57a(h)(5).

89. In the 1980 Act Congress not only provided procedural restraints on FTC rulemaking, but it also sought to limit the substantive scope of FTC rulemaking. This Act significantly restricts the authority of the FTC to regulate in the following areas: voluntary standards-making or certification activities, *id.*, § 7 15 U.S.C. § 57a(a)(1)(B); children's advertising practices, *id.*, § 11 15 U.S.C. § 57a(i); and funeral industry practices, *id.*, § 19, 15 U.S.C. § 57a note. This portion of the statute limits the FTC regulatory power over the funeral industry to (a) mandatory price disclosure, (b) banning deceptive and coercive practices; and (c) prohibiting unlawful practices.

90. E. Cox, R. Fellmeth & J. Schulz, "The Nader Report" on the Federal Trade Commission (1969); B. Boyer, M. Bowers, H. Toiv, D. Edelman, B. Cartwright, C. DeVita & J. Bennett, Trade Regulation Rulemaking Procedures of the Federal Trade Commission: A Report to the Administrative Conference of the United States by the Special Project for the Study of Rulemaking Procedures Under the Magnuson-Moss Warranty—Federal Trade Commission Act Parts I, III (May 1979) [hereinafter cited as Boyer Report]. This report was prepared for consideration by the Committee on Rulemaking and Public Information of the Administrative Conference of the United States. It represents only the views of the authors and not necessarily those of the Conference, the Committee, or the Office of the Chairman.

tion. The utility of cross-examination in rulemaking has been debated for many years.[91] Much of this debate has centered around the FTC rulemaking procedures. Proponents contend that cross-examination helps test the accuracy and integrity of information presented;[92] opponents believe cross-examination fails to improve appreciably the information gathering process and only provides a delaying device for those attempting to avoid law enforcement.[93] While the efficacy of cross-examination in administrative proceedings is questioned by neutral observers,[94] its contribution to delay in administrative decision making is equally questionable.[95] In short, neither the costs nor the benefits of cross-examination seem as high as antagonists suggest.

Delay, however, is a significant problem in the promulgation of trade regulation rules. The FTCIA additions to participatory rights seem to be a factor in that delay.[96] The major cause may be no single factor or set of factors but rather the added spirit of adversarial confrontation inherent in hybrid rulemaking. Many members of the FTC rulemaking staff and private participants have proved overcommitted to their particular interests rather than committed to working together towards a mutually satisfactory result. Also important, however, is that after *National Petroleum Refiners* the FTC began considering rulemaking in more important areas of the economy than in those to which it had previously directed its efforts. Persons affected by these rules had both the inclination and resources to fight the FTC. They could, in fact, carry this fight to the Congress.[97] Consequently, the new procedural opportunities and contentious postures of the participants created a significant impediment to FTC legislative rulemaking. A more cooperative procedure could lead to more efficient rulemaking efforts at the Commission and hence greater

91. *See, e.g.*, Procedures for the Adoption of Rules of General Applicability, 1 C.F.R. § 305.72-5 (1982). 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 380-81 (1958); Hamilton, *Procedures for the Adoption of Rules of General Applicability: The Need for Procedural Innovation in Administrative Rulemaking*, 60 CAL. L. REV. 1276 (1972). *See also* 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE 475 (2d ed. 1978) ("The fundamental movement away from rulemaking on the record [trial-type rulemaking] has been strong and persuasive.").

92. *See, e.g.*, Austern, *Food Standards: The Balance Between Certainty and Innovation*, 24 FOOD DRUG COSM. L.J. 440 (1969); Ross, *The Big Administrative Proceeding: A Response to Mr. Westwood*, 51 A.B.A. J. 239 (1965); Zwerdling, *A Plea for Clemency for Cross Examination*, 57 A.B.A. J. 45 (1971). *Cf.* Clagget, *Informal Action—Adjudication—Rulemaking: Some Recent Developments in Federal Administrative Law*, 1971 DUKE L.J. 51; Robinson, *The Making of Administrative Policy, Another Look at Rulemaking and Administrative Procedure Reform*, 118 U. PA. L. REV. 485 (1970).

93. *See, e.g.*, Westwood, *Administrative Proceedings: Techniques of Presiding*, 50 A.B.A. J. 659 (1964).

94. *See, e.g.*, Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1306 n.199 (1975). E. PRETTYMAN, TRIAL BY AGENCY 30-35 (1959) questions the value of cross-examination even in formal agency adjudications.

95. S. DOC. NO. 72, *supra* note 48, at 32-33. *See* Dixon, *Rulemaking and the Myth of Cross Examination*, 34 AD. LAW REV. 389, 422-23 (1982).

96. Trade Regulation Rulemaking Under the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 1 C.F.R. § 305.80-1 (1982).

97. This fact is evidenced by the restraints in substantive authority included in the Federal Trade Commission Improvement Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980) (codified at 15 U.S.C. §§ 57a, 57a-1, 57b-1, 57b-2, 57b-3, 57b-4, 57c (Supp. IV 1980)).

use of rulemaking through negotiation rather than through the use of adversarial techniques.

These added procedural safeguards also affect the compilation of a rulemaking record.[98] The rulemaking record was intended to demonstrate the Commission's reasoning process in a particular rulemaking proceeding and to provide a basis for meaningful judicial review. A process for developing a complete record would improve the final agency decision and provide a mechanism for court supervision of the FTC rulemaking process. Thus, the institution of a hybrid procedure was designed to heighten the process of reasoned decisionmaking; the rulemaking record was envisioned as the cornerstone of a system designed to ensure a reasoned resolution of material factual issues.[99]

In reality, however, the rulemaking record is widely acknowledged to be unmanageably massive and convoluted.[100] As a result, the informal hearings stage of the proceedings becomes a motions practice. Moreover, the sheer bulk and unmanageability of the record makes the task of mastering the record expensive and difficult. For participants who are unable to overcome the time and cost constraints imposed by the record, the record may reduce the efficacy of their participation. As a practical matter, the prehearing record is ignored by participants in the rulemaking process.[101]

Difficulties in using the record contribute to a tendency of the FTC staff and the participants to treat the successive stages of the rulemaking process as independent episodes. Consequently, participants submit data and argument with little reference to the record in earlier phases of the proceeding. This segmentation creates delay, reduces efficiency, and increases the overall cost of the agency's rulemaking procedure.[102] Moreover, an inaccessible rulemaking record may jeopardize a rule on judicial review; the record may be so functionally inadequate that it justifies judicial invalidation of the rule.[103]

The problem of overformalizing rulemaking procedure is aggravated by the inherent impossibility of settling a rule without going through the entire rulemaking process. Unlike adjudication, the diversity of potential participants in rulemaking compels the agency to play out the process to its end. Even if those directly affected by the rule can agree prior to process completion, inchoate interests could later object to any incomplete procedures, thus jeopardizing the rule. Similarly, even if all the directly interested parties waived some procedural element, that element could not safely be eliminated without endangering the rule. More importantly, the agency could not work a compromise through persuasion or tradeoffs, either on substantive issues or in the rulemaking procedure, with confidence that the agreement would stand in the future. In contrast, such conduct is standard practice in adjudication. For

98. Boyer Report, *supra* note 90, Part I, at 7, Part III.
99. *Id.* Part I, at 7.
100. *Id.* Part III.
101. *See id.*
102. *Id.*
103. *Id.*

this reason the inflexible procedural constraints on rulemaking are potentially more dangerous and counterproductive than they might be in adjudication. In adjudication there is a kind of marketplace of procedure in which the parties can bargain about procedures. Persons involved in rulemaking are locked into the mandated procedure without hope of escape. The trade regulation rule process of the FTC is a prime example of this problem.[104]

Staff bias in favor of a proposed rule adds to the adversarial nature of the proceeding and arguably also reduces its effectiveness by inhibiting cooperation between the government, consumers, and industry groups.[105] Many believe that a staff which investigates a problem, drafts a proposed rule, and has invested a substantial amount of time and effort in support of a proposed rule naturally will be hostile to an industry or consumer position that opposes that rule or supports another rule. One of the problems with FTC rulemaking is the perception, and in many cases the reality, of staff closedmindedness at the time other actors in the rulemaking proceeding express their views about a particular rule and its alternatives.[106] Again, a process built on cooperation and negotiated settlement of conflicts would alleviate much of the hostility caused by this perception.

The FTC is also criticized for its failure to articulate the substantive issues and the legal theories behind a proposed trade regulation rule.[107] In most rulemaking proceedings the initial documents, notices, rule provisions, and staff reports are vague; they rarely delineate what the FTC is doing and why. As a result, industry members and consumer groups alike remain in the dark about what question is in issue and on what theories to proceed during the rulemaking process. Furthermore, this vagueness makes it difficult for participants to know what kind of evidence to submit in support or opposition of a proposed trade regulation rule.[108] The free exchange of views through the process of negotiation would greatly increase the sense that the regulatory problems were identified and faced by the agency before a final rule was promulgated.

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104. For example, some rulemaking presiding officers have found that the issue designation approach required by the Act, *id.* Part I, at 8-16, was difficult to implement, so they developed a practice of permitting the parties to cross-examine on any issues in exchange for their promise not to exceed certain time limits. This approach has been criticized. 1 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 6.21 (2d ed. 1978). Davis suggests that the excessive use of cross-examination by the FTC is wasteful and that Congress intended to limit cross-examination to issues of specific fact. Davis further suggests that the excessive use of cross-examination under FTCIA may indicate to Congress that its experiment with limited cross-examination has failed. Davis believes that the end result of this FTC abuse may be a move towards rulemaking procedure that provides no opportunity for cross-examination. *Id. See also* Kestenbaum, *Rulemaking Beyond A.P.A.: Criteria for Trial-Type Procedures and the FTC Improvement Act,* 44 GEO. WASH. L. REV. 679 (1976).

105. *Critique of the Administrative Conference Report on Federal Trade Commission Rulemaking,* 48 ANTITRUST L.J. 1753, 1776-78 (1980) (panel discussion) [hereinafter cited as *Critique*].

106. *Id.*

107. *See* Boyer Report, *supra* note 90, Part I.

108. *See id.* at 40-44. Boyer concludes that if the Commission remains free to frame broad and novel theories to support its rules, to decide issues on a best estimate basis from an inconclusive record, and to rely on a wide variety of evidence to support its conclusions, then the procedural safeguards incorporated in the statute seem illusory. *Id.* at 45.

The major substantive criticism of the FTC trade regulation rule practice is its failure to apply rulemaking to the appropriate industries or practices. For example, the FTC seems to disregard the pervasiveness of an alleged deceptive or unfair business practice.[109] The FTC is perceived as taking the stance that some practices are sufficiently destructive to require preventive regulation regardless of the actual prevalence of the practice within an industry. Although FTC prohibition of widely used deceptive trade practices through rulemaking procedures is generally regarded as appropriate, many critics of the FTC find fault with the agency's imposition of a trade regulation rule when a practice is only employed by a few members of an industry. Obviously, the less pervasive the practice, the more the FTC imposes unnecessary regulatory requirements on those innocent members of an industry.[110] Many argue that rulemaking, especially in the later proceedings, becomes a device "to restrict the lawful activities of law obeyers so as not to discriminate against law breakers."[111] Congress intended that rulemaking be used to attack pervasive practices within an industry; thus the legitimacy of the agency's rulemaking activity is undercut when rulemaking is used to regulate only a few members of the industry. Moreover, many of the remedies imposed on industry by the FTC require extensive, detailed changes in the way an industry does business. Extensive, inflexible compliance specifications are inappropriate when prescribed on an industry-wide basis, particularly when the practices are followed by only a few members of the industry. The prescription of extensive compliance procedures is more realistic and appropriate when imposed in an individual context.[112] This criticism has particular relevance because it is exactly these industries against which negotiated rules will be easiest and most effectively enforced. The majority of the industry already agrees on what the standard of conduct should be; they would be likely to help police the rule after promulgation.[113]

B. Rulemaking through Negotiation

Several factors have contributed to the failure of the FTC legislative rulemaking effort. Many of these factors concern the relationship of the rules to the affected industries. The rules fail to incorporate adequately business

109. *See* Kirkpatrick, *F.T.C. Rulemaking in Historical Perspective,* 48 ANTITRUST L.J. 1561, 1563 (1980); *Critique*, *supra* note 105; Boyer Report, *supra* note 90, Part I, at 37-39.

110. *Id.*

111. Kirkpatrick, *supra* note 109, at 1563. Miles Kirkpatrick, former Chairman of the FTC, suggests that the addition of adjudicatory expertise and procedures to FTC rulemaking would serve partially to solve the rulemaking procedural problems faced by the FTC. Kirkpatrick states:

> The appointment of an ALJ to control the proceedings and to render a report in the nature of an initial decision would help address the procedural problems of issue formulation and refinement, organization, and presentation of evidence, management of the record, and would help to guarantee all participants a complete and neutral weighing of the evidence.

Id. at 1569.

112. *See* Kirkpatrick, *supra* note 109; *Critique*, *supra* note 105, at 1788-94.

113. For a practical guide to trade regulation rule procedure, see S. KANWIT, FEDERAL TRADE COMMISSION §§ 6.02-6.07 (1981).

reality and thereby force business interests to resist the rulemaking and the final rules. The FTC procedures, especially as modified, give industry substantial opportunity to challenge the rule but actually diminish the industry's commitment to the final product. The rulemaking takes longer than necessary because business interests use every tool available to slow down the process. This delay in turn accounts for much of the dissatisfaction among consumer representatives. The absence of business commitment to the final rule also threatens actual, as opposed to formal, compliance with a rule. More industry commitment, therefore, may be a necessary corollary to successful FTC rulemaking. These defects suggest that FTC rulemaking requires a technique which not only assures adequate incorporation of legitimate business realities but also involves industry members in a way that will enhance their commitment to the final rules.[114] The FTC at one time had such a rulemaking procedure—rules resulting from trade practice conferences.

The "trade practice submittal," which later became known as the "trade practice conference,"[115] was the agency's first effort at industry-wide regulation.[116] Prior to the implementation of the trade practice conference program, the FTC brought only individual adjudicatory (cease and desist) proceedings against those who violated the statutes under its jurisdiction. The weakness of individual adjudication to bring about policy changes led the FTC to develop an industry-wide voluntary compliance program designed to attack industry-wide problems through the use of the trade practice submittal procedure.[117]

The first trade practice submittal took place in 1919. The FTC had received numerous complaints about certain common practices in the gold filled, gold plated, and gold shell jewelry industry.[118] As a result, the FTC called an industry-wide conference. Discussion between industry members and the FTC staff resulted in promulgation of simple rules prohibiting several preva-

114. Group behavior research sees one of the goals of participation as the fostering of cooperation. *See, e.g.,* R. DUBIN, THE WORLD OF WORK: INDUSTRIAL SOCIETY AND HUMAN RELATIONS 243-44 (1958).

115. The name of the procedure was changed to trade practice conference in 1926 when the FTC created a separate trade practice conference division.

116. For example, the first conference to be designated with the title "trade practice submittal" was the conference of the book and writing-paper industry in 1919. The Commission promulgated four rules: (1) that papers were not to be labelled "handmade" unless actually made by that process; (2) that papers were not to be labelled with the name of a fabric unless qualifying words were used to show that the name described the finish only, e.g., "Linen Finish" or "Nainsook Finish"; (3) that foreign geographical names were not to be used to designate papers of domestic manufacture without the addition of qualifying phrases such as "Made in U.S.A."; and (4) that the word "parchment" was not to be used without qualifying words to indicate its true character such as "vegetable parchment," or "imitation parchment." Kittelle & Mostow, *A Review of the Trade Practice Conferences of the FTC*, 8 GEO. WASH. L. REV. 427, 429-30 (1940).

117. *See* G. HENDERSON, THE FEDERAL TRADE COMMISSION; A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE (1924); C. MCFARLAND, JUDICIAL CONTROL OF THE FEDERAL TRADE COMMISSION AND INTERSTATE COMMERCE COMMISSION, 1920-1930 (1933); S. WAGNER, THE FEDERAL TRADE COMMISSION (1971); Comment, *supra* note 38, at 916-17.

118. The participants in the gold shell conference agreed that no mark or brand designating gold value or wearing quality should be used, except "[t]he words 'gold shell' preceded by the designation of the alloy of gold used in shell, which shall be preceded by a fraction designating the correct proportion of the weight of the shell to the weight of the entire ring; illustrated by 1/10 14-K gold shell." Kittelle & Mostow, *supra* note 116, at 429 (quoting FTC Release of Nov. 25, 1918).

lent deceptive industry practices.[119]

In 1926 the FTC created a separate Trade Practice Conference Division to deal with the increasing requests for trade practice conferences.[120] In the mid-1930s the National Industry Recovery Act (NIRA) procedures usurped most of the functions of the Trade Practice Conference Division of the FTC. When the Supreme Court declared the NIRA unconstitutional,[121] the FTC again began to regulate actively through use of the trade practice conference device.[122] In 1946 the FTC created a Rules Administration Unit within the Trade Practice Conference Division.[123] The FTC stopped using the trade practice conference procedure in the mid-1960s; the procedure was formally abolished in 1979.[124]

Although the actual trade practice conference procedure was occasionally altered by the FTC, the basic procedure can be simply and accurately described. Written application for initiation of a trade practice conference could be made by industry, consumers, or the Commission. Once received, the written request was studied by attorneys on the staff of the Trade Practice Conference Division who were required to recommend to the Commission whether to grant or deny the conference request.[125]

If the Commission granted the request for the trade practice conference, the application was referred back to the Trade Practice Conference Division, which then began preparations for the conference. Attorneys gathered information about the allegedly deceptive or unfair practices, and practices of the industry in general, from a wide variety of sources within government, industry, and trade associations, and from consumers. After gathering sufficient information, the staff attorneys responsible for conducting the conference drafted a proposed set of industry rules; their task often was accomplished with substantial input from an industry-appointed committee.[126] After the draft rules were completed, all members of the industry and any other interested persons identified by the agency were given notice of the meeting and were invited to attend.[127] At this time the FTC made available to the conference participants the draft rules together with a statement and explanation of the FTC's position on the proposed rule.[128]

At the conference the rules proposed by the FTC were discussed by all

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119. *Id.* at 429-30.

120. 1926 FTC ANN. REP. 47-48.

121. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935).

122. Kittelle & Mostow, *supra* note 116, at 432-33.

123. 1946 FTC ANN. REP. 2, 4.

124. 4 TRADE REG. REP. (CCH) ¶ 41,003 (1979). "In 1979 the FTC ended the device of the 'trade practice rule'. . . . During the 1970's the Commission abolished the industry committee rule, then began rescinding trade practice rule [sic] until the few remaining were converted to the status of 'guides.'" *Id.*

125. 16 C.F.R. § 2.24(b)-(c) (1939). Prior to 1946, as a practical matter, almost all requests for trade practice conferences came from industry groups.

126. Comment, *supra* note 38, at 922-23.

127. *See* 16 C.F.R. § 2.24(e) (1939).

128. Comment, *supra* note 38, at 924.

participants. In light of this discussion, the trade practice conference staff prepared another set of rules that were then submitted to the Commissioners for preliminary approval.[129] If the rules were approved by the Commission, a public hearing would be held in which the FTC, the industry, and the public discussed the proposed rules.[130] If the public hearing revealed no need for substantial change in the proposed rules, the initial rules became final. The final rules were published in the Federal Register and mailed to industry members.[131]

Final trade practice conference rules were divided into two categories: Group I rules and Group II rules.[132] Group II rules codified practices that the industry recommended as demonstrative of ethical business practice; they were not, however, treated by the FTC as a definitive statement of the law.[133] Group I rules were the crucial rules resulting from trade practice conferences and represented the opinion of the FTC as to the requirements of the federal laws that it administered.[134] Group I rules were further subdivided into two sub-categories: "boilerplate" provisions and rules of specific application.[135]

"Boilerplate" rules were broadly written, standardized statements delineating trade practices that were generally believed to be unfair or deceptive. Common "boilerplate" provisions include prohibition against commercial bribery, enticement of the employees of a competitor, obtaining confidential information of a competitor through deceptive means, and disparagement of a competitor's products.[136] Boilerplate rules primarily served to codify then existing statutory and decisional law.

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129. *Id. See* 16 C.F.R. § 2.24(e) (1939).

130. 16 C.F.R. § 2.24(f) (1939).

131. *Id.* § 2.24(g).

132. Kittelle & Mostow, *supra* note 116, at 428-29; McCarty, *Trade Practice Conferences*, 2 CORP. PRAC. REV., June 1930, 19, 22; Comment, *supra* note 38, at 925. The Director of the Trade Practice Conference Division described the rules as follows:

> Resolutions which are intended to define, denounce and eliminate practices which are in and of themselves illegal or if affirmatively approved by the Commission, classed by it as Group I rules; resolutions which are intended to define, denounce and eliminate practices which are not in and of themselves illegal but which nevertheless are regarded by the trade as wasteful, harmful or otherwise bad, if accepted by the Commission as expressions of the trade, are classified as Group II rules. Resolutions which if put into effect would violate the law do not become rules but are rejected by the Commission.

McCarty, *supra*, at 23.

133. *Id.*

134. Kittelle & Mostow, *supra* note 116, at 428-29; McCarty, *supra* note 132, at 23; Comment, *supra* note 38, at 925-26; Note, *supra* note 22, at 390-91.

135. Modern rules dealing with deceptive practices and unfair competition range from highly generalized to highly particularized specifications of business behavior. A large portion of the trade rules now in force consist of standard provisions cataloging practices which have long been held illegal under the statutes enforced by the Commission. These "boiler plate" provisions, repeated verbatim in code after code, deal largely with such unfair methods of competition as commercial bribery, disparagement of competitors' products, circulation of false and misleading price tests and price tags, use of lottery schemes in retail distribution, and many other common forms of unfair or deceptive practices. The meat of the rules, however, is continued in "custom-made" provisions patterned to control local practices in a particular industry.

Comment, *supra* note 38, at 926-27.

136. *Id.* at 926-27 & nn.103-07.

Specific application rules, on the other hand, were custom-made to deal with practices peculiar to a particular industry. They were designed to be readily applicable to specific business problems of the committee regulated industry.[137] Specific rules were found to be especially valuable when applied to an emerging or rapidly expanding industry. They were also valuable in stemming emerging, but not yet entrenched, unfair trade practices within an industry.[138]

After trade practice conference rules were promulgated, participating industry members were furnished with "acceptance cards" on which they were encouraged to register their assent to an intention to observe the rules established by the FTC.[139] The Rules Administration Division of the Trade Practice Conference Division was charged with the responsibilty of monitoring compliance with enacted trade practice conference rules.[140] The enforcement procedures employed by the Rules Administration Division were flexible and informal.[141] The primary enforcement emphasis was on informal field visits, correspondence, and office conferences.[142] One commentator stated:

> While firms often maintain stoutly that their challenged conduct is not illegal, the Unit is usually able to persuade businessmen to modify their practices in a way which is satisfactory to the FTC. Such changes in behavior can be obtained by presenting far less evidence and factual data than would be required to justify the issuance of a cease and desist order or even a formal complaint. Ease of enforcement, however, often depends on the type of rule involved. Businessmen comply more readily with a specific "custom-made" rule developed especially for the industry than with the generalized "boilerplate" provisions. The latter are open to more disputes over interpretation . . . .[143]

When informal administrative action failed to secure compliance with a trade practice conference rule by an industry member, the case was referred by the Rules Administration Division to the Bureau of Antideceptive Practices for formal action.[144]

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137. *Id.* at 927-28.

138. Note, *supra* note 22, at 392.

139. Comment, *supra* note 38, at 931 & n.124.

140. *Id.* at 932; Note, *supra* note 22, at 393 & n.92. *See also* 1947 FTC ANN. REP. 4, 71.

141. Comment, *supra* note 38, at 933.

142. *Id.*

143. *Id.* at 933-34.

144. *Id.* at 933-34 & n.144. Like industry guides, *see supra* text accompanying notes 26-48, trade practice rules were not intended to have the force of law, and their conclusion had to be supported in the record of any enforcement proceeding. *See, e.g.*, Northern Feather Works, Inc. v. FTC, 234 F.2d 335, 338 (3d Cir. 1956), in which the court said:

> [T]rade practice rules were not taken as legal commands by the hearing examiner, the Commission or ourselves. But we think that a set of rules worked out in conference between a government agency and an industry can be taken as a guide if, to those responsible for enforcement, they are reasonable and fair.

Id. at 338.

This is the current approach taken by the FTC in enforcement proceedings:

> In this an adjudicatory proceeding the Trade Practice Rules and Guides must be given

Commentators differ in their opinions of the effectiveness of the trade practice conference program. To make an objective judgment, many variables must be examined, including the specific rule involved, the industry involved, the type of rule involved, FTC enforcement monitoring procedures, consumer and industry monitoring procedures, and the susceptibility of the particular violation to discovery. The FTC and some commentators conclude, based largely on a survey of industry responses to official FTC questionnaires, that trade practice conference rules had a substantial regulatory effect on industry behavior.[145] One confidential industry survey indicates, however, that when government, industry, or consumer pressure to comply with trade practice conference rules was absent, the trade practice conference rules, especially those promulgated before 1945, were ineffective.

Some of the early trade practice conference rules and submittals are viewed as having been particularly ineffective.[146] Most of these early rules consisted primarily of broadly worded Group II rules and "boilerplate" Group I provisions; they, therefore, had only a minimal educational or regulatory impact on industry behavior. In fact, several of the rules promulgated in the 1920s were in effect promulgated by industry with only minimal FTC involvement. This unique form of industry self-regulation ended in the early 1930s when the United States Justice Department criticized the FTC for aiding and abetting industry violation of the antitrust laws.[147]

Trade practice rules promulgated in later years often were ineffective because they were written vaguely. From 1959 through 1961 the FTC, for example, conducted trade practice conferences and promulgated rules for six different industries.[148] These rules were in many respects identical: all six sets of rules were composed largely of standard prohibitions repeated in each rule and guide. These provisions were vaguely worded, "boilerplate" admonitions to industry not to engage in "bad" acts. The rules did little, however, to assist either members of an industry or consumers in discerning or correctly solving

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> the effect which the Commission prescribes for them, not as "a substitute for evidence," but "as administrative interpretations having no force or effect as substantive law." "They serve to inform the public and the bar of the interpretation which the Commission, unaided by further consumer testimony or other evidence, will place upon advertisements using the words and phrases therein set out."

Surrey Sleep Prods., Inc., 73 FTC 523, 531 (1968) (quoting Gimbel Bros., Inc., 61 FTC 1051, 1073 (1962)). *See also* Wilmington Chem. Corp., 69 FTC 828, 885 n.31 (1966) ("In *Lifetime Cutlery* [56 FTC 1648, 1649 (1959)], Trade Practice Rules were denied probative weight. Government counsel had sought a finding that respondents' [practice] was deceptive simply on the basis of Trade Practice Rules. The Commission upheld the hearing examiner in refusing to so rule and remanded the case for further evidence.") As these cases suggest, however, trade practice rules are not without effect and were used by courts to help define the law. Fashion Originators' Guild of Am. Inc. v. FTC, 312 U.S. 457, 459 (1941).

145. *See* STAFF OF SENATE TEMPORARY NATIONAL ECONOMIC COMM., 76TH CONG., 3D SESS., MONOGRAPH NO. 34, CONTROL OF UNFAIR COMPETITIVE PRACTICES THROUGH TRADE PRACTICE CONFERENCE PROCEDURE OF THE FEDERAL TRADE COMMISSION 1 (Comm. Print 1941); Kittelle & Mostow, *supra* note 116, at 449-50.

146. Nelson, *Trade Practice Conference Rules and the Consumer*, 8 GEO. WASH. L. REV. 452, 467 (1940); *see* Kittelle & Mostow, *supra* note 116, at 434-38.

147. Kittelle & Mostow, *supra* note 116, at 436-37; Comment, *supra* note 38, at 939.

148. Note, *supra* note 22, at 391.

industry violations of the statutes under the FTC's jurisdiction.[149]

Many commentators, while condemning the "boilerplate" rule provisions, recognize the value of a rule specifically fashioned to address the problems and meet the needs of a particular industry. If a trade practice conference rule offers industry and consumers rational, well-defined standards of what constitutes unacceptable and acceptable conduct with regard to a particular practice or set of practices, both the industry and consumers benefit. Effective protection is afforded when prohibitions are phrased in terms directly applicable to the specific practices of the industry in question; specific provisions serve both to crystallize a standard of industry behavior and to simplify the agency's task of administering the rule. One of the major criticisms of the trade practice program was its reliance on voluntary compliance. Indeed, some critics of the voluntary compliance programs have accused the FTC of tacit collusion with business interests.[150] On occasion, however, government/industry cooperation and voluntary compliance did work even when the industry was subject to substantial regulation. The textile rules, which required informational labelling on many different types of textiles, represent an early effort by the FTC to regulate on an industry-wide basis that had a substantial effect on industry trade practices.[151] The textile industries traditionally were reluctant to cooperate with efforts to end deceptive practices within the industry. Industry members finally were convinced to cooperate with regulatory attempts as a result of pressure brought to bear by consumer groups.[152]

Several controversial sets of trade practice conference rules resulted from the textile industry conferences. The Rayon Industry Rules, for example, were vigorously opposed by members of the rayon industry. The FTC rejected a set of rules submitted by the rayon industry; instead, the FTC substituted its own set of proconsumer rules. The Rayon Rules, as the Silk Rules promulgated a year later, required detailed affirmative representation about fiber content.[153] This affirmative disclosure requirement went beyond then existing common law requirements.[154] Evidence indicates that the various textile rules had a

149. *Id.* at 391-92.

150. *See, e.g.*, E. Cox, R. Fellmeth & J. Schulz, *supra* note 90, at 60-64.

151. Kittelle & Mostow, *supra* note 116, at 439-44; *see generally* Kittelle & Campbell, *Power of the Federal Trade Commission to Require Informative Labeling of Textiles*, 20 B.U.L. Rev. 23 (1940).

152. Comment, *supra* note 38, at 940-41 & n.187.

153. The requirement of informative labelling is best illustrated by Rule 1 of the Rayon Rules which states that it is an unfair trade practice not only to label rayon as not being rayon, or as being something other than rayon, but also to offer it for sale "without disclosure of the fact that such material or product is rayon."

Kittelle & Mostow, *supra* note 116, at 439. This provision was also incorporated by reference in the following trade practice conference rules: Popular Price Dress Manufacturing Industry; House Dress and Wash Frock Manufacturing Industry; Infants and Children's Knitted Outwear Industry; and Ribbon Industry. *Id.* at 439 n.67. The labelling requirements of the textile rules were quite detailed. Rule 6 of the Rayon Rules specifies that fabric fiber content shall be listed in order of predominance by weight. Rule 6 further requires revelation of the actual pertcentage of the fiber used in the fabric where any listed fiber represents less than 5% of the fabric by weight. *Id.* at 439.

154. *See id.* at 447-49.

substantial impact on the manner in which the textile industry conducted business.[155]

The textile rules represent an early instance in which consumer groups had a marked influence on the promulgation of industry rules.[156] Moreover, the rules were finally adopted over industry objection. Nevertheless, evidence indicates that the textile industries complied with the rules once promulgated, despite their initial opposition. It appears clear, then, that not all voluntary compliance procedures serve industry interests at the expense of public interest. In this instance, as well as many others, the FTC, the industry, and consumers came together, albeit reluctantly, to make rules with which industry complied.[157]

The other major criticism of the trade practice conference rule procedure focuses on the enforcement attention given to the rules after promulgation. A successful regulation program based on voluntary compliance must be supported by the forthright and persistent application of enforcement tools.[158] Unless enforcement action is applied consistently, trade practice rules can have only a limited effect on business behavior.[159]

Until 1946 the FTC did not have a division formally charged with monitoring and administering the trade practice conference rules. With the addition of the Rules Administration Division in 1946, the FTC established a formal mechanism with staff assigned specifically to administer rules. Commentators generally agree that the addition of the Rules Administration Divi-

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155. Comment, *supra* note 38, at 940-41 & n.187.

156. Although the New York Board of Trade attempted to institute voluntary reform procedures, such efforts were unsuccessful. The textile rules conferences were called primarily because of the pressure brought to bear on the Commission by consumer groups led by the New York City Federation of Women's Clubs. Textile industry groups were pressured into participating in the trade practice conference proceedings by retailers who in turn were pressured into participating in the proceedings by consumers. Kittelle & Mostow, *supra* note 116, at 441.

157. *Id.* at 441-43. Occasionally industry groups and representatives advocated industry self-regulation as an alternative to government regulation. *See, e.g.*, Filene, *Voluntary Control of Unfair Business Practices*, 17 HARV. BUS. REV. 434 (1939); *see generally* Heermance, *Self-Regulation and the Law*, 10 HARV. BUS. REV. 420 (1932). Filene suggested that industry self-regulation could be achieved by industries acting in cooperation with the FTC; the FTC was to serve as the "final federal enforcing agency." Filene, *supra*, at 440. This self-regulation was to be accomplished in a several step process. First, each facet of the industry, manufacturers, wholesalers, and retailers, would meet separately to prepare a detailed list of prevalent unfair business practices in need of control or elimination. Second, all facets would meet together to agree on a master list of undesirable practices; all participants would then assent to abstain from the listed practices. Third, a clearing house would be set up to monitor compliance and take appropriate action against violators, backed by the cooperation between the clearing house and the FTC. Filene, *supra*, at 440. The author states:

> It has often been said that there can be no enforcement of a law or of an agreement unless there is some ultimate penalty in the background. But the constant reporting of code violations to the clearing house; the constant pressure from the clearing house on violations; and the fact that persistent violations are recorded by the clearing house and may be reported to the Federal Trade Commission—these factors should result in a moral pressure on the "chiseling minority" to mend its ways and conform to the agreed-on code of ethics of the industry.

Id. at 441.

158. S. DOC. NO. 72, *supra* note 48, at 36.

159. *Id.* at 41-43.

sion had some effect on industry compliance.[160] The Division, however, has been criticized for not being equal to the task. Severe manpower and funding limitations prevented the unit from being more than marginally effective.[161]

Although failure to enforce the trade practice rules was a major defect in the system, there is no evidence that the Commission is currently enforcing trade regulation rules any more rigorously. There have been few complaints raising violations of trade regulation rules and no hearings. Though the FTCIA permits the FTC to go directly to court to obtain an injunction against violations of its rules, the FTC rarely has done so, and it is doubtful that the next few years will find it exercising this authority.[162] Thus, while improved enforcement would make rulemaking a more potent law enforcement tool, improved enforcement is dependent on the type of rule employed by the FTC. On the other hand, the adversarial nature of the trade regulation rules process creates a lesser likelihood of voluntary compliance; therefore, negotiated rules seem preferable if limited enforcement is likely.

II. Implementing a System Incorporating Rulemaking Through Negotiation

The challenge of FTC regulation is finding procedures that are acceptable to the factions affected by the agency's regulatory decisions. At the same time, any widely used procedure must provide a balanced regulatory structure through which the FTC can effectively fulfill its legislatively assigned task of regulating the practices of American business.

Each procedure previously discussed—trade practice conference rules, industry guides, and trade regulation rules—possesses advantages and disadvantages. The chief criticisms raised regarding the voluntary compliance procedures are their lack of actual regulatory effect, whether as a result of tacit collusion between industry and government, lack of enforcement, or ineffectual regulatory standards. The primary criticisms of the current trade regulation rulemaking procedure revolve around what is often described as overregulation or insensitive regulation imposed upon industry. The task is to devise a scheme that avoids overregulation but that at the same time effectively accomplishes the agency's regulatory goal.

To accomplish these divergent objectives, the FTC should institute a procedure consciously employing each rulemaking process when it can be used most efficiently. The first, and usual, method of regulation would be accomplished through negotiated rulemaking using a modified trade practice conference rulemaking procedure.[163] Yet the agency's other two rulemaking

160. Comment, *supra* note 38, at 941-43; Note, *supra* note 22, at 393.

161. Comment, *supra* note 38, at 942-43.

162. S. Doc. No. 72, *supra* note 48, at 41-43.

163. The Administrative Conference of the United States is considering a proposal that recommends creation of a supplemental negotiation rulemaking procedure designed to avoid some of the pitfalls associated with traditional rulemaking. This recommendation proposes that the Federal Advisory Committee Act, 5 U.S.C. app. §§ 1-14 (1976 & Supp. IV 1976) [hereinafter cited as FACA] and the APA be amended to facilitate the use of negotiation rulemaking procedures. Rec-

procedures should not be ignored. When broader participation seems necessary but industry cooperation seems likely, the Commission may choose to

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ommendation 82-4: Procedures for Negotiating Proposed Regulations (June 18, 1982) [hereinafter cited as Recommendation], based on P. Harter, Negotiating Regulations: A Cure for the Malaise? (Jan. 1982) (Report prepared for consideration of The Committee on Interagency Coordination of the Administrative Conference of the United States). The Recommendation states that "[t]he purpose of this recommendation is to establish a supplemental rulemaking procedure that can be used in appropriate circumstances to permit the direct participation of affected interests in the development of proposed rules." Recommendation, *supra*, at 2. It identifies the major failure of current rulemaking procedures as the adversarial postures it induces in the participants:

> [T]he participants, including the agency, tend to develop adversarial relationships with each other causing them to take extreme positions, to withhold information from one another, and to attack the legitimacy of opposing positions. Because of the adversarial relationships, participants often do not focus on creative solutions to problems, ranking of the issues involved in a rulemaking, or the important details involved in a rule. Extensive factual records are often developed beyond what is necessary. Long periods of delay result and participation in rulemaking proceedings can become needlessly expensive. Moreover, many participants perceive their roles in the rulemaking proceeding more as positioning themselves for the subsequent judicial review than as contributing to a solution on the merits at the administrative level. Finally, many participants remain dissatisfied with the policy judgments made at the outcome of rulemaking proceedings.

Id. at 1.

Fourteen specific suggestions are made describing the procedure that should be instituted to establish a negotiation rulemaking procedure:

1. Agencies should establish a regulatory negotiation group to draft a proposed rule.
2. Congress should enact legislation to facilitate negotiated rulemaking.
3. Congress should authorize agencies to designate a convenor to organize negotiations. The convenor should be a neutral organization, individual or agency appointed by the implementing agency.
4. The convenor should conduct a preliminary inquiry to determine whether a negotiating group should be empanelled. The convenor should look to the following considerations to determine the usefulness of supplemental rulemaking to solve a given problem.
   a. Issues should be mature and ripe for decision.
   b. Resolution of issues involved in rulemaking should not be such as to require the negotiation participants to compromise fundamental tenets.
   c. Only a limited number of interests should be affected by the negotiation, the affected interests should be identified and then representatives should be selected to participate in the rulemaking conference.
   d. There should be several diverse issues involved in the proceeding so as to allow participants to rank their priorities.
   e. No single issue should dominate the negotiation.
   f. Participants should make a good faith commitment to negotiate and draft a rule.
   g. The agency should be willing and designate an appropriate staff member to represent the agency in the negotiation.
5. If the convenor and the agency determine that negotiation rulemaking is appropriate, the convenor should determine what interests are affected, negotiation participants, the scope of the negotiation and the negotiation schedule.
6. If an existing nongovernmental standards-writing organization exists, and enjoys the support of respective interests involved, the existing organization should be designated a regulatory negotiation group for the purposes of this recommendation.
7. The agency should publish notice of proposed negotiation rulemaking in the *Federal Register*.
8. The agency should also designate a senior official to represent the agency in negotiation and identify the official in the *Federal Register*.
9. The agency should provide financial assistance to affected interests who would otherwise be unlikely or unable to participate in negotiation.
10. A mediator should be appointed if such an appointment would facilitate effective negotiations.
11. The goal of the negotiating group should be to arrive at a consensus rule. If a consensus

employ interpretative rulemaking—industry guides. In the event that an industry fails to make a good faith effort to cooperate with consumers and the government, the Commission might need to resort to legislative rulemaking—trade regulation rules—or class adjudications.

The first effort should be negotiated rulemaking. To be effective, the FTC's procedure for making negotiated rules should be modified in several ways.[164] First, the FTC should be required to promulgate detailed, custom-made industry rules in response to an actively conducted trade practice conference. A resort to boiler plate rules would serve only to denigrate the process in the eyes of both industry and the consumer.

Any interested person should be allowed to request an agency trade practice conference. The industry, in particular, may be willing to do so only if few members are participating in unfair practice or if the situation indicates a strong threat of more forceful regulation, legislation, or individual complaints. The FTC staff should study the request for a conference and advise the Commission whether to institute a proceeding. The FTC should make available to all interested persons a record and summary of trade practice conference requests, and any Commission action taken, in order to prevent claims of inappropriate Commission action or inaction. By providing a record of its actions with regard to conference requests, the Commission would meet any criticisms that it failed to respond adequately to requests for trade practice conferences.

Of course, the agency's use of trade practice rules should not be totally reactive. It should include in its studies and investigation of various industries the potential for industry cooperation in solving identified problems. In addition, it should plan law enforcement strategies that incorporate trade practice rules among the options available.

Once the Commission determines that institution of a trade practice conference is necessary, it should notify industry members and publish a notice of the impending proceeding in the *Federal Register*. The Commission should then establish an informal committee to draft a set of proposed rules and to deliniate the major issues to be dealt with at the trade practice conference. This committee should be composed of the interested factions in the rulemak-

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rule cannot be arrived at the group should state specifically the problems encountered that prevented establishment of a consensus rule.

12. The negotiating group should be authorized to hold closed meetings if the group feels that closed meetings would facilitate the rulemaking.

13. The agency should publish the text of the negotiated rule in the *Federal Register*, followed by any proposed agency changes with reasons therefor.

14. The negotiating group should be given an opportunity to review any comments received in response to the notice of proposed rulemaking to determine whether changes in the proposed rule need to be changed. Final responsibility for issuing the rule, however, should remain with the agency.

Id. at 2-5. *See* P. Harter, *supra*.

This recommendation, although addressing the informal rulemaking process as a whole, has equal application to FTC rulemaking.

164. A Senate bill introduced in this Congress would establish a structure for rulemaking through negotiation for all government agencies. *See* S. 1601, 97th Cong., 1st Sess. (1981).

ing process, typically the industry, consumers, and the FTC.[165] By providing for an appointment of a committee composed of various factions with differing views, the Commission could successfully avoid the staff bias problem encountered in the present trade regulation rulemaking procedure. In addition, the committee would serve to deliniate and focus issues prior to the proceeding, so that all participants would have a better idea of the goals to be accomplished and the stakes involved in the upcoming conference. As a result, the proposed rules would likely be more responsive to the needs of all interested parties early in the process.

The FTC should allow the industry that is the focus of the conference to appoint members of the committee whenever feasible. Many industries have trade associations that could serve this function. The Commission must, however, assure that industry representatives represent the views of all facets of the industry. The FTC should therefore reserve the right to select alternate members of the committee and to reject the preselected industry members if it determines that a faction of the industry would otherwise go unrepresented or be overrepresented in the preconference discussions.

The FTC might appoint a similar number of consumer representatives to the preconference committee to assure that all views are aired. The FTC should have wide discretion to appoint consumer representatives that adequately represent the consumer interest in a particular trade practice conference proceeding. These consumer representatives could be appointed from the various general and specialized consumer rights organizations and from the general public.

While consumer representatives may be useful, they should be included only when they will have something to contribute and should not be considered advocates for a point of view. If the result is unbalanced representation in favor of the industry, the rule will be open to challenge. On the other hand, the purpose of the conference is to ensure that the imposition of consumer interest values does not unduly interfere with the operation of the marketplace; therefore, it is the industry's views and information that are crucial.

Once a committee is appointed, it should determine and designate the principal issues to be discussed and resolved at the forthcoming trade practice conference. The FTC staff will be responsible for the background work necessary to prepare for the trade practice conference. By drawing on outside expertise at this point in the process, the FTC would reap the added advantage of diversity of viewpoint at the earliest possible phase in the proceeding.

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165. The Federal Advisory Committee Act, 5 U.S.C. app. §§ 1-14 (1976 & Supp. IV 1980) may apply to such conferences. If so, the FACA would create problems in terms of openness and notice requirements. CONGRESSIONAL RESEARCH SERVICE FOR THE SUBCOMM. OF ENERGY, NUCLEAR PROLIFERATION, AND FEDERAL SERVICES OF THE SENATE COMM. ON GOVERNMENTAL AFFAIRS, 95TH CONG., 2D. SESS., FEDERAL ADVISORY COMMITTEE ACT, SOURCE BOOK: LEGISLATIVE HISTORY, TEXTS, AND OTHER DOCUMENTS (Comm. Print 1978); Markham, *The Federal Advisory Committee Act*, 35 U. PITT. L. REV. 557, 571 (1974). Because some of these requirements would interfere with rulemaking through negotiation, Senate Bill 1601, S. 1601, 97th Cong., 1st Sess. § 8 (1981), would exempt a "regulatory negotiation committee" from the Act.

Once the committee designates issues, it should discuss and draft an initial set of proposed rules addressing the problems that are to be faced at the forthcoming conference. The committee need not agree on a set of proposed rules at this stage. In fact, well-articulated alternatives may serve further to clarify and emphasize the crucial issues to be decided at the conference. For example, if three subgroups of the committee each supports a different or partially different set of rules for dealing with the problems to be discussed at the conference, the three alternatives and supporting rationales should be set out for discussion by the participants at the trade practice conference. The system need not be limited because, generally speaking, the more alternatives the better.

After the proposed rules or alternative set of rules are drafted, the FTC should set a time, date, and place for the conference, notify the interested parties, and publish the proposed rules in the Federal Register.[166] Even though the trade conference procedure utilizes selective participation, public notice should be given. The notice should explain the alternative proposals and why the proposed rule was adopted. This notice should be sent to all participants and published.

When the conference convenes, the FTC staff should function as mediator and leader of the conference participants. The FTC attorneys should seek to explore the various alternative regulations and to encourage open and frank discussion by all present. The agency should function as a neutral facilitator to encourage creative exploration of available solutions to a given problem.

The FTC must designate representatives to participate in the conference. Although this panel should be larger than the issue-designating committee, it must remain selective. Selective representation may exclude some who wish a voice in the process, and the Commission must remember that the goal of this process is to reap the benefits of small group decisionmaking. A small number of participants assures that the proceeding will efficiently consolidate representation of the major interests. It will tend to mold opinion and information into a workable unit and thus assure a compact record. More importantly, the small group will permit real exchange of understanding, elaboration of special interests' difficulties, and development of ideas to bring about real problem solving. Therefore, despite the desire to include all interested participants in the conference panel, rulemaking panels must be small enough to take full advantage of the conference approach.

The character of the actual meeting must be that of a committee trying to solve a common problem. Much of the advantage of the conference approach will be lost if the exchange deteriorates into a mere struggle to protect individ-

166. The FACA generally requires that all advisory committee meetings be open to the public. 5 U.S.C. app. § 10 (1976). Moreover, the records, minutes, drafts, agenda, transcript, and all other documents of each advisory committee must be made available to the public. The FACA requires that timely notice be given through publication in the Federal Register that an advisory committee is to be created. *Id.* § 9(a)(2). This notice requirement is designed to assure that the public and the Congress have an opportunity to challenge establishment of any proposed committee. S. REP. No. 1098, 92d Cong., 2d Sess. 13 (1972).

ual interests. The final aim must be group consciousness, and every representative must understand that he or she is there to help fashion a workable, negotiated regulatory scheme. The process can succeed only if industry, government, and consumers have a realistic view of the relative positions of each other and thus make a cooperative rulemaking effort. The Commission must serve not as a cohort of either industry or consumer interests, but rather as a champion of both. By allowing Commission attorneys to maintain an objective view of a problem and its solution, a more evenly reasoned rule is likely to result from a regulatory proceeding.

In this regard, the desired openness of the conference becomes a problem. In negotiation, there is value in private exchange, argument, and compromise. Rulemaking negotiation also might need the freedom of nonpublic negotiation. On the other hand, industry-wide deals are even less likely to meet with public trust than other closed door government negotiations. The Federal Advisory Committee Act limits nondisclosure of information discussed in meetings between the government and outside persons.[167] Therefore, the pressure to open the meetings is strong but should sometimes be resisted.

Ordinarily the conference should be open to observation by the general public. Experience shows that very few observers from outside the affected industry will attend. The advantages of selective participation will not be diminished by the open meeting because those advantages stem from creating an exchange of views among a workably sized group. That this exchange is conducted in public ordinarily will not matter. When, however, the conferees find the need for closed door meetings, the process might provide for it. The Federal Advisory Committee Act might be avoided by arguing that business negotiation by its nature involves confidential business information. Since the results of the negotiation will be available for public scrutiny there should be little danger in the closed door process. As an added precaution, however, the closed meeting should be taped so that a court may hear the tapes of the entire negotiation session if asked to review allegations of collusion. In this manner, the process can take advantage of the recognized advantages of closed door negotiation without raising the specter of government/industry collusion that plagued the prior use of trade practice conferences.

Occasionally, more than one conference may be needed to define adequately issues and attempt to resolve differences or reach compromise between the participants in the conference. The most valuable function of the trade practice conference procedure is the exchange of information, views, and ideas by the participants. This exchange may reflect practical problems or disclose a more complicated situation than was originally surmised. The first conference may recommend no more than a second conference to consider a more sophis-

167. FACA, 5 U.S.C. app. § 10(d) (1976). Any group that meets in an advisory capacity with government officials may fall under the FACA. *See* Center for Auto Safety v. Cox, 580 F.2d 689, 693-94 (D.C. Cir. 1978). *But see* Nader v. Baroody, 396 F. Supp. 1231 (D.D.C. 1975); Consumers Union of U.S., Inc. v. HEW, 409 F. Supp. 473 (D.D.C. 1976), *aff'd*, 551 F.2d 466 (D.C. Cir. 1977). The FACA excludes advice and information sought by federal officials "for the purpose of carrying out an operational duty." Markham, *supra* note 165, at 577.

ticated proposal, or it may resolve only a few of the issues presented to it and leave other problems for the future. It may recommend the adoption of an interim or an experimental set of rules, the results of which will be continually studied and made the subject of a future conference. The conference may recommend that the problem be made the subject of public rulemaking through industry guides or trade regulation rules, or remedied by class adjudication.

After discussion, the participants should try to formulate a common position on the issues presented. Unanimity, however, is unnecessary. Some consolidation and consensus should be produced, but it is not necessary that the committee present only one view. The Commission, however, must take ultimate responsibility for the final rule. It must, therefore, adopt a set of rules that meets the needs and addresses the views of all conference participants.

After the conference, notice of the rule submitted by the conferees to the FTC for approval should again be published. Any report or memorandum in support of the proposed rule should be made available to the public. The notice should describe the method for obtaining such supporting documents.

The nature and force of the rule should be an important part of the decision. The conference should decide how much force it wants to give a negotiated rule. The force might vary from a rule that the Commission hopes will find industry acceptance to one that the Commission advises will be vigorously enforced with individual complaints. The concreteness of the regulatory prescription might also vary greatly. The conference may recommend experimentation or it may be content merely to provide answers to a few established scenarios. Flexibility in the nature of the rule will be an important element in negotiated rulemaking.

The ABA Antitrust Committee distinction between "definitional" rules and "preventive" rules is useful in this context.[168] "Definitional" rules merely define bad practices; the industry is instructed how to behave. "Preventive" rules establish a compliance apparatus with which to prevent law violation. The whole industry is required to comply with somewhat burdensome procedures even though only a few members are using illegal practices or would fail to comply with the agency's wishes once they were articulated clearly. Preventive rules create a significant burden on both the innocent and guilty, and their overuse has led to much of the criticism of FTC regulation. The trade practice conference should avoid preventive rules except in the rare case. By its nature, the conference procedure should result in definitional rules with which the vast majority of the industry will comply without stringent compliance procedures. When preventive rules are necessary, they generally should be undertaken in trade regulation rule proceedings, because they would be supported by a record built on public procedure and should be strictly enforceable.

Moreover, legislation covering FTC rulemaking procedure dictates that

168. *Report of the Section of Antitrust Law, American Bar Association Concerning the Federal Trade Commission Structures, Powers and Procedures*, ANTITRUST & TRADE REG. REP. (BNA), Special Supp. 5-6 (Feb. 14, 1980).

trade practice conference rules must be interpretative. The trade practice rules traditionally have been interpretative.[169] In addition, both the FTCIA and the 1980 Improvement Act mandate procedures for legislative rules and thus foreclose rulemaking by negotiation for such rules.[170] It could be argued that these procedures can be waived, but because they accrue to the benefit of the general public it would be difficult to make the waiver valid against all interested persons with a right to participate. Regardless, the classification of trade practice rules as interpretative or legislative may be immaterial in the FTC's own enforcement action, for the law is fairly clear that an agency is bound by its interpretative rules.[171] The procedural difference may be that the administrative law judge in a subsequent enforcement hearing will have to go through the process of taking official notice of a trade practice rule.[172] These considerations are not too important because the process anticipates large scale cooperation; enforcement factors would relate only to a small number of recalcitrant industry members.

The Commission must zealously monitor industry compliance with an enacted trade practice conference rule. Successful use of this procedure requires that the agency promptly enforce the rules against nonconforming firms. The Commission must be willing to establish the machinery necessary to maintain contact with industry in the post-rule period. In addition, the agency must establish a firm policy of pursuing violators and correcting violations. The government must be willing to invest sufficient resources and manpower in the enforcement arm of the trade practice conference process to ensure the forceful presence of Commission regulatory authority. One of the strongest criticisms of the old trade practice conference procedure regarded its ineffectiveness because of the lack of agency enforcement; this defect must be avoided if reinstituting the procedure is to be successful.

This is not to say that every violation should be a matter for prosecution. The FTC should operate on the assumption that a timely warning is more valuable and less expensive than a tardy prosecution. The FTC should work actively with industry to ensure compliance. Formal prosecution should be viewed as a last resort used against recalcitrant industry. The more flexible, informal means of enforcement should be used to encourage industry compli-

169. *See* Northern Feather Works, Inc. v. FTC, 234 F.2d 335 (3d Cir. 1956); Surrey Sleep Prods., Inc., 73 FTC 523 (1968).

170. Senate Bill 1080, S. 1080, 97th Cong., 1st Sess. § 3 (1981), would require procedures for an interpretative rule that "has general applicability and substantially alters or creates rights or obligations of persons outside the agency."

171. Failure of an agency to follow its own interpretive rules should be *prima facie* evidence of arbitrary and capricious administrative action. *See* Tax Analysts & Advocates v. IRS, 362 F. Supp. 1298, 1303 n.23 (D.D.C. 1973), *modified on other grounds*, 505 F.2d 350 (D.C. Cir. 1974). The Senate Judiciary Committee Report on S. 1080 supported a provision including important interpretative rules under its public procedure by business testimony that "[i]n practice, this 'guidance' was just as binding as a substantive rule." S. REP. No. 284, 97th Cong., 1st Sess. 111 (1981) (citing *Regulator Reform Act—S. 1080: Hearings on S. 1080 Before the Subcomm. on Regulatory Reform of the Senate Comm. of the Judiciary*, 97th Cong., 1st Sess. 629 (1981)).

172. *See* Harry E. Strauss, 63 FTC 1912, 1930 (1963). *But see* Surrey Sleep Prods., Inc., 73 FTC 523, 531 (1968).

ance as long as the informal compliance processes do not become specious, as they have in the past.

If negotiation does not work, the FTC should consider one of the other two forms of rulemaking. Negotiated rules must be a complement to the two forms of rulemaking through public participation. The three types of rules should be viewed as parts in an arsenal of law giving and law enforcement techniques. In some cases general public participation or open forum will be the best way to proceed. It may be that some rules should have the force of a legislative rule. In other industries, problems are serious and concrete enough to warrant solution through class adjudication.

Industry guide procedures should be used as an adjunct procedure to the trade practice conference rules. When, for example, a particular practice pervades several industries, it might be impractical and unwieldy to attempt a trade practice conference. The industry guide procedure could be used to promulgate standards in such a situation; the FTC could still choose to make intrepretative rules through abbreviated procedure but could additionally encourage public participation in the process.

Generally, the guides present a more feasible, practical approach to interindustry regulatory efforts and enforcement than that available through the traditional trade practice conference procedure. The trade practice conference procedure is designed to regulate a single industry. Prior to the institution of the guides program in 1955, the FTC sought to regulate on an interindustry basis by including standard boilerplate prohibitions and rules in each set of trade practice conference rules. Guides proved more effective in accomplishing this function. Frequently a practice is prevalent in several industries; issuance of an industry guide has the practical effect of providing a standard rule regulating practice that is applicable to the marketplace as a whole.

Furthermore, the Commission is not required to secure industry cooperation when issuing guides. Thus, industry guides can be formulated to regulate a recalcitrant industry not initially inclined towards cooperation and compliance with FTC regulatory ideas. In other words, the industry guides process not only gives the regulated industry the opportunity to participate in regulatory efforts, but also gives the FTC an offensive weapon against an industry that refuses to cooperate.

Although the guide process may be chosen because of the absence of anticipated industry cooperation, it also carries the judgment that a legislative rule is inappropriate to the situation. This judgment could be based on a finding that interindustry rules could not be sufficiently specific to justify a rule having the force of law. It could be based on the FTC's need to experiment with more broadly worded and less forceful rules. The FTC might choose guides in order to act quickly without the interference of the cumbersome trade regulation rule procedures.

Industry guide procedures should be viewed as a flexible measure with which the FTC can fill in the procedural gaps created when the institution of a trade practice conference or the trade regulation rule procedures would be

inappropriate or difficult to accomplish. Guides should be promulgated as they are now: with a minimum of procedural requirement and a maximum of flexibility. In connection with the promulgation of industry guides, the Commission should use the provisions of section 1.6 of the Rules of Practice, which allows the Commision staff to take advantage of compulsory processes in the investigative, nonadjudicative procedures.[173]

As a last resort, when neither a trade practice conference procedure nor an industry guide procedure is appropriate, the FTC should consider initiation of a trade regulation rulemaking procedure. While trade regulation might not be preferred, it should be retained in the agency's arsenal of regulatory weapons. Before the FTC uses the trade regulation rulemaking procedure, however, it should determine that there exists a need for concrete rules having the force of law. In the event that the agency decides to institute a trade regulation rulemaking proceeding, the industry affected should have a thirty-day grace period in which to make a good faith effort to argue for the institution of a trade practice conference in lieu of a trade regulation rule. This procedure will encourage industry cooperative efforts and place the responsibility for the successful outcome of the trade practice conference on the industry to be regulated.

The FTC should identify through procedural rules situations in which it will make the choice of legislative rulemaking over guides or negotiated rules. Industries with a large number of bad actors, for example, might require the added force of legislative rules. Industries in which negotiated rules or guides have been tried might suggest at least certain instances in which legislative rules should be useful. Interpretative rules, for example, are particularly appropriate when the answers are unclear and experimentation is necessary, but once answers emerge, the more concrete trade regulation rule could finalize the positive results of the experiments.

The FTC should consciously select from among its tools the most cost-effective law enforcement vehicle. Certain recent problem areas, for example, might have been better handled by a more sophisticated use of all the agency's regulatory tools. Instead of starting with a trade regulation rule in children's advertising, for example, the FTC might have started with broadly written interpretative rules developed either through negotiation or public participation. By now, it would have received information about the impact of its regulatory scheme with which to promulgate the legislative rules it proposed in a relative vacuum years ago. It might have identified areas in which it cannot regulate, areas in which industry cooperation is the only hope, areas in which only soft direction from the government can work, and areas in which concrete prescriptions are needed. It might even have identified certain segments of the industry that could not have been dealt with through rulemaking but needed the direct action of class adjudication. Instead, it started too quickly to regulate practices it did not understand; it ended in an unsuccessful rulemaking

173. Organization, Procedures and Rules of Practice, 16 C.F.R. §§ 1.6, 2.7 (1982).

effort. For this type of reckless action the FTC is criticized, and justifiably so, for the FTC has the tools to proceed effectively with wisdom and patience. It must endeavor to use its legislative rulemaking power sparingly, to the best advantage of the marketplace. Nonetheless, a legislative rule is sometimes necessary. If used sparingly, the soundness of the agency's choice will be accepted by business, albeit begrudgingly.

III. CONCLUSION

The function of the FTC is to maintain a workable market economy. It might do this by assuring that competitive market forces are free to work, and by creating consumer confidence so that consumers unhesitatingly participate in the market. The FTC has deviated from market maintenance goals, moving instead toward a moralistic regulation of market performance. Criticism for this misdirection should not be allowed to inhibit the agency's market maintenance function; it should not lead to a call, especially from the free market enthusiasts, for less FTC activity. The true answer to these criticisms is a sound FTC enforcement policy, but the FTC must be ever conscious of its responsibility to keep the free market functioning effectively.

How can we assure that the FTC will take proper account of all the factors which make the market work to the benefit of all elements of society? Trial-type devices are too myopic to foster that goal; they only result in delay and narrowly focused decisions. The solution lies in a rulemaking procedure that concentrates on broad fact gathering and the development of general policy goals.

Why has rulemaking failed at the FTC? A major cause is the FTC's insensitivity to the societal value of business activities. The FTC has failed to incorporate business interests into its decisionmaking processes. Adverse impact on an industry necessarily results in an adverse impact on consumers. All the interests under the care of the FTC have been disserved by its adversarial attitude toward commercial interests.

It is clear that this insensitivity cannot be attributed to lack of input by the target industries. The records in FTC trade regulation rulemaking proceedings are dominated by industry submissions and testimony. It is, therefore, not the absence of opportunity, but the absence of impact on the decisions that created the problem. The answer to this problem is to use an informal process that results in a rule negotiated between the FTC, representatives of consumer interests, and commercial interests. This negotiation will create a more workable rule that has the advantages not only of assuring optimum market performance, but also of retaining industry aquiescence, even if reluctantly acquired. Indeed, for number of years the FTC used exactly such a process. Rulemaking by negotiation should be reinstituted and should dominate FTC process. Other broad regulatory tools—interpretative or legislative rules made through public participation and class adjudication—should be built around this device.