

## **MODIFICATION AND DISSOLUTION OF ADMINISTRATIVE ORDERS AND INJUNCTIONS\***

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The permanence of most cease and desist orders issued by administrative agencies and of injunctions obtained by them in the federal courts is admittedly not one of the most pressing problems of administrative procedure today. On the other hand, the indefinite duration of these decrees raises problems that are more than minor irritants. Decrees may lose their effectiveness as enforcement devices as they lie dormant over a period of time. As their value for enforcement purposes diminishes, their capacity to inconvenience and hurt respondents often increases. This is particularly likely to occur with cease and desist orders issued by the Federal Trade Commission (FTC) in restraint of trade cases and antitrust decrees obtained in the federal courts by the Antitrust Division of the Department of Justice. Many of these orders and injunctions seek to restore competitive conditions by including provisions enjoining conduct not otherwise prohibited by law. With the passage of time and change in conditions they may lose their effectiveness and even become anti-competitive in effect.

One solution to this problem would be to limit the duration of cease and desist orders and injunctions to a set period of time. This approach is appropriate in a number of areas and, as discussed in the

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\* This article is based on a report prepared by the author as a consultant to the Committee on Compliance and Enforcement Proceedings of the Administrative Conference of the United States. The report was submitted to the Conference in support of the Committee's Recommendation on the Modification and Dissolution of Orders and Injunctions. The Administrative Conference adopted that recommendation as Recommendation 30 of the Conference at its Sixth Plenary Session on December 7, 1971. Its text appears below in note 1. The views expressed in the report and in this article are those of the author and have not been approved by the Committee or the Conference.

The Administrative Conference of the United States is a permanent executive agency established by Act of Congress. 5 U.S.C. §§ 571-76 (1970). It consists of a chairman and between seventy-five and ninety-one voting members. The membership of the Conference includes federal agency heads and leading practitioners and scholars of administrative law. The principal responsibility of the Conference is to "study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs, and make recommendations to administrative agencies, collectively or individually, and to the President, Congress, or the Judicial Conference of the United States, in connection therewith, as it considers appropriate." 5 U.S.C. § 574(1) (1970).

The Committee on Compliance and Enforcement Proceedings solicited the comments of ten agencies on an earlier version of this recommendation and report. Those agencies were the Securities and Exchange Commission, Federal Trade Commission, National Labor Relations Board, Food and Drug Administration, Interstate Commerce Commission, Federal Maritime Commission, Department of Agriculture, Department of Labor, Antitrust Division in the Department of Justice, and Civil Rights Division in the Department of Justice. All ten agencies provided helpful comments and criticism, and the Committee and the author are grateful for their assistance. These responses were considered by the Committee and led to several important changes in the recommendation. The substance of a number of these comments has also been incorporated into this article. In addition to receiving these formal comments, the author also conferred informally with the enforcement staffs at the FTC, NLRB, and Department of Labor.

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body of this article, has been used successfully by several agencies, especially the Antitrust Division in the Department of Justice. While similar innovations should be encouraged where appropriate, permanent decrees remain desirable in many areas. For instance, a decree that enjoins a specific variety of illegal conduct should not normally expire after a given number of years. Such a decree would in effect notify the respondent that after the expiration date he would be free to renew his course of illegal conduct without fear of contempt penalties and force the agency to initiate a new enforcement proceeding. Furthermore, at the time the decree is entered the existence of conditions that might call for its subsequent modification or dissolution may be either unknown or speculative.

A better solution to the problems posed by permanent decrees is therefore to improve procedures for modifying or vacating outdated decrees. Only a minority of agencies have available formal procedures whereby a respondent may request an agency to modify or dissolve a cease and desist order issued by it or to join the respondent in requesting a court to modify or dissolve an injunction or order over which the court retains exclusive jurisdiction. Recommendation 30<sup>1</sup> of the Administrative Conference of the United States proposes that all agencies which issue or obtain a significant number of decrees

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1. The text of the recommendation as approved by the Conference is as follows:

**RECOMMENDATION 30: Modification and Dissolution of Orders and Injunctions**

Cease and desist orders issued by administrative agencies and injunctions obtained by administrative agencies from the federal courts in the enforcement of regulatory statutes have generally been permanent in duration. As a result of this practice, many orders and injunctions now outstanding are decades old. Such outstanding orders and injunctions may serve no useful purpose and often cause inconvenience and hardship to the respondents. A number of agencies have experimented successfully with techniques for limiting the duration of certain types of orders and injunctions to a set period of time, but this approach is not appropriate in many circumstances. To deal with this situation agencies should therefore have available procedures whereby respondents may seek modification or dissolution of outstanding orders and injunctions.

**RECOMMENDATION**

**A. Agency Cease-and-Desist Orders**

Each federal agency that issues a significant number of cease-and-desist orders over which it retains jurisdiction should have a procedure available whereby a respondent may request the agency to modify or vacate a cease-and-desist order that has become final. The factors considered by the agency in ruling upon such a request should include: the period of time the order has been in effect; changed conditions of fact or law during that period; the respondent's compliance with the order; the likelihood of further violations of the order; the hardship which the order imposes on the respondent; the extent of the respondent's compliance with requirements of law that are related to those covered by the order; the interests of other persons or parties affected by the order; the importance of the order to the agency's overall enforcement program; and the public interest in the enforcement of the law.

**B. Court-Enforced Orders**

Each federal agency that obtains a significant number of injunctions in the federal courts or issues a significant number of cease-and-desist orders which are enforced by federal courts that retain by statute exclusive jurisdiction over the orders should have a procedure available whereby a respondent may request the agency to join or concur with it in moving the court to modify or vacate such an injunction or order or, in the case of an order issued by the agency, to remand the proceeding to the agency for that purpose. The factors considered by the agency in acting upon such a request should include those stated in paragraph A.

establish such procedures and attempts to itemize the factors which an agency should consider in determining whether it is desirable that an outstanding decree remain in force in its present form. The party seeking modification or dissolution should, of course, have the burden of initiating the proceeding and of demonstrating that these factors justify modifying or vacating an outstanding decree.

#### PROBLEMS ASSOCIATED WITH PERMANENT DECREES

##### *Variety of Enforcement Techniques*

Administrative agencies enforce regulatory statutes in a variety of ways. At least three ways are relevant to this report. First, a substantial number of agencies have statutory authority to issue cease and desist orders; once these orders become final, sanctions may be imposed for violations thereof. The FTC, for example, issues cease and desist orders which become effective a prescribed number of days after issuance if the respondent does not seek judicial review, or a prescribed number of days after the order has been affirmed or enforced by a court on appeal if the respondent petitions for judicial review. Such orders are enforceable through actions for civil penalties in the federal district courts.<sup>2</sup> The Interstate Commerce Commission (ICC) also has authority to issue cease and desist orders in motor carrier cases and may suspend or revoke the certificate or permit of a motor carrier that wilfully violates such an order.<sup>3</sup> Violators of ICC orders may also be fined in the district courts if the violation is both wilful and knowing.<sup>4</sup> Second, an agency may have statutory authority to issue cease and desist orders but sanctions may not be imposed for violations thereof until the order has been enforced by a reviewing court. Obedience to the court's decree is then enforced through the contempt power. This cumbersome enforcement procedure, which was more prevalent in the past, is presently found only at the National Labor Relations Board (NLRB), and the Administrative Conference recommended at its second Plenary Session that the present NLRB procedure be replaced by a procedure similar to that employed by the FTC and ICC.<sup>5</sup> Third, a large number of agencies with enforcement responsibilities do not have statutory authority to issue cease and desist orders, or have only limited authority to do so; in order to restrain violations of the law they must go directly to the federal district courts to seek injunctions. Among the agencies in this category are the Food and Drug Administration (FDA), the Antitrust Division in the Department of Justice, and the Fair Labor Standards Administration (FLSA) in the Department of Labor. The ICC and the Securities and Exchange Commission (SEC) also obtain a significant number of court injunctions but in addition enforce their regulatory statutes

2. 15 U.S.C. § 45(l) (1970). See, e.g., *Herbold Laboratory, Inc. v. United States*, 413 F.2d 342 (9th Cir. 1969).

3. *Frozen Foods Express v. United States*, 351 U.S. 40 (1956).

4. 49 U.S.C. § 322(a) (1970).

5. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, Recommendation 10, at 24 (1970).

through the issuance of cease and desist orders (ICC) or stop orders (SEC). A fourth enforcement technique analogous to the three listed above is the authority of many agencies to enforce regulatory provisions against individuals or businesses by censuring them or by suspending or revoking a license, certificate, registration or some other valuable right bestowed or controlled by the agency. The sanction of revocation has a permanent effect similar to that of most cease and desist orders and injunctions. Prominent among the federal agencies with these powers are the Federal Communications Commission (FCC), SEC, Federal Aviation Authority (FAA), and the Coast Guard in the Department of Transportation.

### *Number of Outstanding Decrees*

Accurate statistics are not available on the number and vintage of cease and desist orders and injunctions presently in force. The agencies contacted in the preparation of this report do not have readily available any tabulation of the number of orders or injunctions which they are presently responsible for enforcing. A general idea of the number of decrees outstanding for each agency may be obtained, however, from the total number of cease and desist orders issued by the agency or injunctions obtained by it in past years. The great majority of these orders and injunctions will still be in effect because in the past orders and injunctions have generally been of permanent duration and because instances of modification or dissolution are infrequent under present law and practice. Of course, many of the orders and injunctions that are still technically in force have no present impact because the respondent has died or gone out of business or because the practice enjoined was prevalent in the past but is not likely to recur today.

The FLSA, FTC, NLRB and the Antitrust Division have issued or obtained the largest number of orders or injunctions. The staffs of these agencies were contacted individually in the preparation of this report and supplied the following information in the spring of 1970. Since its inception in 1938, the FLSA has obtained between 30,000 and 35,000 court injunctions, and 25,000 of these date from 1963 or earlier. The FTC issued 8,511 cease and desist orders in restraint of trade and deceptive practices cases through fiscal 1969, and 4,090 of these orders were issued prior to 1951. The NLRB obtained 3,131 court decrees enforcing in whole or in part Board cease and desist orders between July 5, 1935 and the end of fiscal 1969. That total, however, does not include court decrees granted by consent, summarily, or upon default. The General Counsel's staff has no tabulation of the exact number of enforced decrees that fall into these latter categories, but it is very likely equal to or greater than the number of contested decrees. Exact figures are also not available on the number of antitrust decrees obtained by the Antitrust Division. The recent Stigler Report indicates that the number of outstanding decrees is quite large and that many of these decrees are more than twenty-five years old.<sup>6</sup>

6. REPORT OF THE TASK FORCE ON PRODUCTIVITY AND COMPETITION III, D (1969) (Stigler Report to President Nixon).

Other agencies which have obtained significant numbers of court injunctions include the SEC, the ICC and (to a lesser extent) the FDA. The SEC maintains an up-to-date summary on the number of injunctions obtained by it. From 1934 to June 30, 1969, the SEC obtained 1,587 injunctions against 5,022 defendants. In addition, twenty-three injunction actions were pending on June 30, 1969.<sup>7</sup> The ICC's annual reports indicate that it is presently initiating injunction actions at the rate of 100 per year, and has thus probably accumulated over the years quite a few thousand court injunctions. The FDA, on the other hand, relies primarily on seizure actions to enforce the legal prohibitions against misbranded and adulterated commodities and in recent years has sought only twenty-five or thirty injunctions each year.

### *Scope of Orders and Injunctions*

The scope of cease and desist orders and injunctions is relevant to the problem of their duration. Some decrees are very broad in scope and others quite narrow. Injunctions under the Fair Labor Standards Act are almost invariably framed in the broad language of the statute and simply require the employer to obey the wages and hours, overtime and record-keeping provisions of the Act. An employer may be held in contempt for the violation of such an injunction.<sup>8</sup> Occasionally the injunction is limited to particular employees or to a particular department or plant, but more commonly the injunction covers the entire operations of an employer. Likewise, cease and desist orders issued by the NLRB are quite often broad in scope. When there is a likelihood of further violations, the order need not be limited in scope to the particular unfair labor practice committed by the respondent.<sup>9</sup> Thus, an order may in general terms enjoin an employer or union from interfering with the section 7 rights<sup>10</sup> of employees to self-organization or enjoin a union from interfering with the organizational rights of employees of all employers within a given area and not just of the employees of the particular employer where the union's unfair labor practice occurred.<sup>11</sup> Injunctions obtained by the ICC tend to be narrower in scope and to restrain only particular unlawful practices such as an unlawful mode of carriage. In some cases SEC injunctions are also narrow in scope, but the SEC often obtains injunctions that are not limited to particular securities but which enjoin the respondent from violating the registration provisions of the statute with respect to any security.<sup>12</sup> The appropriate scope of FTC orders has engendered a substantial amount of controversy and litigation. Generally the FTC seeks to frame a cease and desist order which is broader in scope than the particular violation committed by the respondent. The order may enjoin analogous violations, violations with

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7. SEC, THIRTY-FIFTH ANN. REP. (1969).

8. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949).

9. *NLRB v. Express Publishing Co.*, 312 U.S. 426, 435-37 (1941).

10. National Labor Relations Act § 7, 29 U.S.C. § 157 (1970).

11. L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 276-87 (1965).

12. *See, e.g., SEC v. Jan-Dal Oil & Gas, Inc.*; 433 F.2d 304 (10th Cir. 1970).

respect to different products or customers, or any and all violations of a statutory provision.<sup>13</sup> FTC cease and desist orders may also restrain conduct not itself unlawful in order to ensure that a violation of the law will not continue or be repeated.<sup>14</sup> Antitrust decrees obtained by the Department of Justice likewise often seek to restore competitive conditions by enjoining conduct not otherwise prohibited by law.

### *Enforcement of Old Orders and Injunctions*

Substantial uncertainty surrounds the enforceability of cease and desist orders and injunctions that are years or decades old. May an agency seek civil penalties or contempt for the violation of an order or injunction that has remained outstanding for a long period of time? This question is particularly pertinent with respect to decrees that are quite broad or simply repeat the prohibitions of the statute. Enforcement of these decrees on a continuing basis would transform the enforcement pattern from one where violators of the law are "fenced in" by cease and desist orders and injunctions which specify what they must not do in the future, to one where the courts directly impose the sanctions of civil or criminal contempt or of civil penalties for any and all violations of the statute. If Congress had intended the latter enforcement pattern to predominate, it could simply have made violations of the statute a civil or criminal offense. Congress chose not to do this because it believed that the broad language of most regulatory statutes needed further refinement and specification before sanctions should be imposed. That task has generally been delegated to administrative agencies who have the responsibility for interpreting and enforcing the law through issuing cease and desist orders or obtaining injunctions from the courts.<sup>15</sup>

There are a number of prominent examples of old decrees that have been enforced against respondents. In *Wirtz v. Credit Bureau of South Florida*,<sup>16</sup> Judge Dyer held a successor employer in civil contempt of a Fair Labor Standards Act injunction issued twenty-three years previously against a predecessor employer. During the intervening period there had apparently been no violations of the injunction, but the subsequent violations concerned the same class of employees as the initial violations which led to the injunction. The 1920 antitrust decree against the meat packers likewise remains in force. Efforts by the respondents to secure modification have proved unsuccessful,<sup>17</sup> and the Department of Justice continues to enforce the decree. The Department's most recent effort, however, ended unsuccessfully when the Supreme Court construed the decree so as not to proscribe the

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13. Kauper, *Cease and Desist: The History, Effect, and Scope of Clayton Act Orders of the Federal Trade Commission*, 66 MICH. L. REV. 1095, 1147-1210 (1968).

14. *FTC v. Colgate Palmolive Co.*, 380 U.S. 374, 399 (1965) (Harlan, J., dissenting on other grounds) (deceptive practices case); *FTC v. National Lead Co.*, 352 U.S. 419, 430 (1957).

15. *Skidmore v. Swift & Co.*, 323 U.S. 134, 137-40 (1944) (FLSA); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 128-32 (1944).

16. 51 CCH Lab. Cas. ¶ 31,658 (S.D. Fla. 1964).

17. *United States v. Swift & Co.*, 189 F. Supp. 885 (N.D. Ill. 1960), *aff'd per curiam*, 367 U.S. 909 (1961).

respondent's intended conduct.<sup>18</sup> The FTC is also presently enforcing a cease and desist order that dates back to 1944.<sup>19</sup>

Agency efforts to compel compliance with the law normally do not involve the enforcement of decrees of such vintage. Courts have often made the enforcement of old orders difficult. In the lead case of *NLRB v. Reed & Prince Manufacturing Co.*,<sup>20</sup> Judge Magruder did not permit the NLRB to bring contempt charges under an eleven-year-old decree that permanently enjoined the employer from violating the Act in any manner. The alleged contempt was the employer's refusal to bargain with the union. A similar refusal to bargain had led to the initial cease and desist order and its enforcement in the court of appeals. The employer had complied with the decree, and the earlier refusal to bargain was in no way connected with the later one. Judge Magruder held that the decree was still viable and in effect, but that a contempt proceeding was inappropriate on these facts and that the Board should try the subsequent refusal to bargain as an unfair labor practice. The courts of appeals should not be burdened with trying as contempt subsequent violations of a decree which are unrelated to the initial violation. In such cases it is the Board's responsibility to bring a new unfair labor practice proceeding to find the facts and apply the law. The Board's decision would then be subject, of course, to the normal judicial review.

This approach has more recently been adopted by the Fifth Circuit in a case in which it granted enforcement of a broad cease and desist order issued by the NLRB.<sup>21</sup> In *Southwire Co. v. NLRB*, the respondent-employer had violated the rights of its employees to self-organization through interrogations, threats, general interference with rights of its employees to self-organization, and discriminatory discharges. The court enforced an order which permanently enjoined the employer from violating the section 7 rights of employees to self-organization, but made it clear that violations "outside the class with which we are dealing should be left to the normal unfair practice procedures under the Act rather than to the contempt power of the court."<sup>22</sup> Thus, the full extent of a broad decree may not be enforceable at any time through contempt proceedings. These considerations on the respective roles of the agency and the court in the enforcement process do not apply, of course, when enforcement is by injunction (for example, under the Fair Labor Standards Act), because then the district court tries both the initial violation and any subsequent contempt. Courts may, therefore, be less chary about contempt proceedings under broad injunctions because there is no danger that a court will abrogate an administrative function.

Informal inquiries at the NLRB and the FTC indicate that the enforcement staffs of those agencies agree with the general approach of *Reed & Prince* that administrative orders whose terms are permanent

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18. *United States v. Armour & Co.*, 402 U.S. 673 (1971).

19. *National Biscuit Co. v. FTC*, 400 F.2d 270 (5th Cir. 1968).

20. 196 F.2d 755 (1st Cir. 1952).

21. *Southwire Co. v. NLRB*, 383 F.2d 235 (5th Cir. 1967).

22. *Id.* at 238.

remain in effect indefinitely but that contempt or civil penalty proceedings are not appropriate sanctions under certain circumstances. In each instance where a respondent violates an order that has been in force for many years, the staff makes a determination whether a contempt proceeding or an action for civil penalties is appropriate or whether the agency should initiate a new administrative proceeding leading to the issuance of another cease and desist order. Among the factors taken into consideration in deciding whether or not to impose sanctions for the violation of the original order are the lapse of time since the entry of the order, the extent of respondent's compliance with the order in the intervening period, any connection between the initial and the subsequent violation, the wilfulness of the subsequent violation, the clarity of the law surrounding the subsequent violation, and any similarity between the initial and subsequent violations. There does not appear to be, however, any official policy statement describing when the agency will seek contempt or civil penalties and when it will initiate a new administrative proceeding. The FTC staff appears willing to discuss this matter informally with a respondent whose subsequent conduct violates a long-standing cease and desist order.

#### *The Effects of Long-standing Orders and Injunctions*

Agencies generally favor orders and injunctions that are permanent in duration. Such orders and injunctions serve as deterrents and encourage compliance with the law regardless of whether they remain fully enforceable by contempt or civil penalties. Respondents subject to these restraints are likely to be more careful about obeying the law and thus ease the enforcement task of agencies which do not have sufficient staff to investigate all potential violators.<sup>23</sup> Agencies also believe that any order or injunction, no matter how old, retains some vitality because a violation may still occur that is sufficiently related to the initial violation which led to the order or injunction to justify a contempt or civil penalty proceeding. The FTC in the complex area of pre-1959 Robinson-Patman Act<sup>24</sup> orders also believes that it would lose important advantages if it could not obtain enforcement of these old orders but had to seek new orders. When the FTC enforces the old order, a respondent cannot raise defenses that were available to him when the order was originally issued and may not be able to deny that his price differentials injure competition.<sup>25</sup>

Respondents are generally unhappy about old orders and injunctions. Specific provisions in these decrees may become outdated and restrict the conduct of the respondent long after the need for the restriction has passed. Broad, vague orders and injunctions may also deter respondents from introducing new and improved business practices because the applicability of the decrees to the new practices is uncertain. Outstanding orders and injunctions may also have unfavorable collateral

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23. See *Goldberg v. Cockrell*, 303 F.2d 811 (5th Cir. 1962) (Wisdom, J.).

24. 15 U.S.C. §§ 13-13(c), 21a (1970).

25. See *FTC v. Jantzen, Inc.*, 386 U.S. 228 (1967); *FTC v. Standard Motor Products*, 371 F.2d 613, 615 (2d Cir. 1967) (Lumbard, J.).



consequences in the credit and business world. A company subject to a decree may experience trouble in obtaining a bank loan, issuing or selling its stock or recruiting employees; an individual subject to decree may also have trouble in obtaining a loan or securing a new job.<sup>26</sup> Finally, long-standing orders and injunctions, especially those that restrain conduct not itself unlawful, may have harmful economic effects on the business of the respondent or on the whole economy. This is particularly true of antitrust decrees that seek to restore competition and cease and desist orders under the Robinson-Patman Act that ban price differentials. Specific provisions in these decrees may rapidly become outdated. "Many decrees under the antitrust laws, including consent decrees, are of long or indefinite duration. The effects of these decrees may change with the passage of time. Such decrees may turn out to be ineffective or anti-competitive."<sup>27</sup>

It must be acknowledged, however, that not enough is known about the long-term effects of orders and injunctions.<sup>28</sup>

#### POSSIBLE LIMITATIONS ON DECREES

##### *Limitation of Orders and Injunctions to a Set Period of Time*

Agencies that were asked to comment on an earlier version of this recommendation generally opposed any suggestion to place time limits on decrees that enjoined only illegal conduct. Among the decrees which fall into this category are injunctions obtained by the SEC and the FLSA and cease and desist orders issued by the NLRB and by the FTC in deceptive practices cases. Such limitations were characterized in this framework as an invitation to the respondent to violate the law again once that period expired. Our relative ignorance on the effects of permanent decrees issued or obtained by these agencies is another factor which favors approaching the problem through the improvement of procedures for modification and dissolution, rather than limiting initially the duration of decrees.

With respect to decrees that sought to restore or maintain conditions by enjoining conduct not otherwise illegal or by requiring affirmative action by the respondent, the agencies involved were more receptive to time limitations. At least two agencies (the FTC and

26. See the allegations to this effect in *Tobin v. Alma Mills*, 192 F.2d 133 (4th Cir. 1951); *SEC v. Thermodynamics, Inc.*, 319 F. Supp. 1380, 1383 (D. Colo. 1970).

27. REPORT OF THE TASK FORCE ON ANTITRUST POLICY 12 (1968) (Neal Report to President Johnson).

28. The Stigler Report recognized this information gap in connection with anti-trust decrees:

Little is known of the extent to which a large number of past decrees are still operative, and if operative, of any real value in protecting competition. We recommend, therefore, some such procedure as this in dealing with outstanding decrees:

1. The past decrees still running should be compiled, and the types and duration of prescribed conduct summarized.

2. The current relevance of the decrees, or at least those running against large industries, should be examined — presumably by the economics section of the Antitrust Division.

3. The older (say 25 years and over) and obsolete younger decrees should be vacated.

REPORT OF THE TASK FORCE ON PRODUCTIVITY AND COMPETITION III, D (1969).

the Antitrust Division) have successfully experimented with such limits. FTC orders in restraint of trade cases often proscribe for a period of ten years any acquisitions by the respondent company that do not have Commission approval. Typical of a significant number of other cases at the FTC is *Luria Brothers & Co.*,<sup>29</sup> in which the order prohibited the respondent steel companies from purchasing for a period of five years more than fifty percent of their annual requirements of iron and steel scrap at any given plant from respondent Luria Brothers.

The Antitrust Division has likewise found it appropriate in many "rule of reason"<sup>30</sup> cases to limit the duration of an injunction to a set period of time. In "rule of reason" cases the respondents' practices are considered to be unlawful on account of their anti-competitive effect in a specific business context. That context may, of course, change with the passage of time. Injunctions limited to a set period of time may even be appropriate in some cases of *per se* violations of the antitrust laws. In *per se* cases the likelihood of the practice resulting in a net anti-competitive effect is so great in the majority of cases as to make unnecessary any inquiry by the court on the competitive effects of the practice in a particular case. For instance, the Antitrust Division maintains that the systematic practice of reciprocity represents a *per se* violation of the antitrust laws. Remedial injunctions in reciprocity cases often involve a subtle regulation of the respondent's bookkeeping and of the relationship between the respondent's purchasing and selling personnel. Because such injunctive provisions intrude into daily business operations, the Division generally limits their term to a period of ten years with the expectation that the ten year period will be sufficient to break up the illegal practice.

The present policies of the Antitrust Division and the FTC go a long way towards implementing the recommendations of the Neal and Stigler Reports. Both of those reports recommended limiting the effect of antitrust decrees, including consent decrees, to a period of ten years. They emphasized that decrees should not involve the long-term regulation of a company or whole industry by the Department of Justice but should operate to restore competition within ten years. A similar proposal (with fifteen or twenty year limits) has been advanced by a former chief of the General Litigation Section of the Antitrust Division.<sup>31</sup> The Neal Report specifically included FTC cease and desist orders in its recommendation and proposed a drastic overhaul of the Robinson-Patman Act. Orders under that Act would be limited to five years, with no provision for renewal. The recommendations of both the Neal and Stigler Reports are, of course, primarily directed to decrees that seek to restore competitive conditions by enjoining otherwise lawful conduct; the considerations

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29. 62 F.T.C. 243 (1963).

30. For a detailed explanation of the antitrust rule of reason and the *per se* concept under the antitrust laws, see Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775 (1965); *Part II*, 75 YALE L.J. 375 (1966).

31. Kramer, *Modification of Consent Decrees: A Proposal to the Antitrust Division*, 56 MICH. L. REV. 1051, 1065 (1958).

which favor limiting such orders to a set period of time are not applicable to most decrees that enjoin only unlawful conduct.

The federal courts have had little experience with decrees whose terms are limited to a set period of time. District judges in the South have occasionally limited injunctions under the Fair Labor Standards Act to a predetermined number of years. The Department of Labor generally opposes such action and seeks permanent injunctions. There is some indication that some district judges in the South who are out of sympathy with the Act and with "government by injunction" either refuse to issue an injunction at all or issue an injunction limited in duration to a couple of years even though the government has proved the existence of past violations and the likelihood of their recurrence in the future. The Fifth Circuit has consistently rejected this approach.<sup>32</sup> In recent years, however, the courts have approved consent decrees proposed by the Antitrust Division that bar reciprocal dealings or the acquisition of competitors for ten years only.<sup>33</sup>

#### *Modification or Dissolution of Orders and Injunctions*

The leading case on the modification or dissolution of judicial decrees is *United States v. Swift & Co.*<sup>34</sup> Under the rule in *Swift*, a court has inherent power to modify or dissolve its own injunctions but should exercise that power only upon "a clear showing of grievous wrong evoked by new and unforeseen conditions."<sup>35</sup> This stringent limitation on modification operated to prevent *Swift* and the other meat packers from obtaining in 1960 modification of an antitrust decree first entered in 1920.<sup>36</sup>

*Swift* involved a consent decree as to which it might be argued that the respondent had agreed to the restraint and had received substantial benefits in exchange (including avoidance of a trial and immunity from treble damage suits). Courts have nevertheless applied the *Swift* rule to other situations. It has been applied to injunctions obtained from the courts by administrative agencies,<sup>37</sup> and even to injunctions obtained by one private party against another.<sup>38</sup> Courts have also refused to dissolve injunctions when the party seeking dissolution could show no more than compliance with the injunction over a long period of time.<sup>39</sup>

32. *Goldberg v. Cockrell*, 303 F.2d 811 (5th Cir. 1962) (Wisdom, J.) (district judge abused discretion in limiting injunction to one year; permanent injunction entered).

33. *United States v. National Bank & Trust Co.*, 1970 Trade Cas. ¶ 73,375, at 89,501 (E.D. Pa. 1970) (ban on acquisitions without the permission of the Attorney General); *United States v. United States Steel Corp.*, 1969 Trade Cas. ¶ 72,826, at 87,025 (W.D. Pa. 1969) (reciprocal dealings).

34. 286 U.S. 106 (1932).

35. *Id.* at 119.

36. *United States v. Swift & Co.*, 189 F. Supp. 885, 910-12 (N.D. Ill. 1960), *aff'd per curiam*, 367 U.S. 909 (1961).

37. *Wirtz v. Graham Transfer & Storage Co.*, 322 F.2d 650 (5th Cir. 1963) (Wisdom, J.) (FLSA case); *SEC v. LeBrock*, 245 F. Supp. 799 (S.D.N.Y. 1965).

38. *Humble Oil & Refining Co. v. American Oil Co.*, 405 F.2d 803 (8th Cir. 1969) (Blackmun, J.) (injunction against unfair competition).

39. *Walling v. Harnischfeger Corp.*, 242 F.2d 712 (7th Cir. 1957). "Compliance is just what the law expects." *Id.* at 713.

A few courts have been somewhat more liberal in allowing modification or dissolution. In *Tobin v. Alma Mills*,<sup>40</sup> the court affirmed the district judge's dissolution of a ten-year-old Fair Labor Standards Act injunction. The respondent demonstrated that it had fully complied with the injunction and that the injunction was interfering with the sale of its stock. Such a showing seems somewhat less than the showing of "grievous wrong" required by *Swift*. The Second Circuit in *King-Seeley Thermos Co. v. Aladdin Industries*<sup>41</sup> also took a more liberal view and held that injunctions obtained by private parties in trademark litigation could be modified even in the absence of changed circumstances if a better appreciation of the facts in light of experience indicated that the decree was not accomplishing its purposes. The *Humble Oil* decision was expressly rejected as imposing too severe a restriction on the court's equity power to reconcile competing private rights. Of course, the existence of competing private rights distinguishes *King-Seeley* from cases in which a decree only enjoins conduct that is illegal.

The rigid *Swift* rule should not apply to modification or dissolution by an agency of its own cease and desist orders. Agencies should retain greater flexibility in enforcing the requirements of the law. Statutes often confer on agencies broad power to modify or set aside their orders. The Interstate Commerce Act gives the ICC a "continuing jurisdiction" over its orders, allowing it to modify or even rescind a great variety of them at any time.<sup>42</sup> The FTC also has statutory authority to modify or set aside a cease and desist order that has become final following the respondent's failure to petition for judicial review within the prescribed time whenever "conditions of fact or of law have so changed as to require such action or if the public interest shall so require."<sup>43</sup> The FTC's authority to modify or set aside an order that has been enforced by a reviewing court is not clear from the statute. There is strong authority, however, that the modification or dissolution of an FTC order that has been affirmed or enforced by a court remains an administrative matter within the agency's competence.<sup>44</sup> The FTC's Rules of Practice accordingly provide that the agency may modify or set aside any cease and desist order that has become final, regardless of whether the order became final because the time for seeking judicial review expired or because the order was affirmed or enforced by a court.<sup>45</sup> Other agencies, however, may not be able to modify or set aside orders issued by them which have

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40. 192 F.2d 133 (4th Cir. 1951).

41. 418 F.2d 31 (2d Cir. 1969) (Friendly, J.).

42. Interstate Commerce Act §§ 17(6), (7), 49 U.S.C. §§ 17(6), (7), 321(b) (1970). See *Alamo Express, Inc. v. United States*, 239 F. Supp. 694, 697-98 (W.D. Tex. 1965).

43. 15 U.S.C. §§ 21(b), 45(b) (1970). See *Martin-Marietta Corp. v. FTC*, 376 F.2d 430 (7th Cir.), *cert. denied*, 389 U.S. 923 (1967) (FTC's refusal to modify not reviewable).

44. *American Chain & Cable Co. v. FTC*, 142 F.2d 909 (4th Cir. 1944) (Parker, J.).

45. 16 C.F.R. 3.72 (1971).

been enforced by a reviewing court because the court retains by statute "exclusive jurisdiction" over the order.<sup>46</sup>

The enforcement staffs at the FTC and NLRB report that there have not been any significant efforts by respondents to obtain modification or dissolution of long-standing orders. Perhaps respondents are hesitant to make such requests because they anticipate that their efforts will be unsuccessful or because they fear that petitions for modification or dissolution will alert these agencies to orders that they have otherwise forgotten about. The absence of any publicized procedures at the NLRB may also deter requests at that agency. In addition, modification is a two-way street, and respondents may fear that the agency staff will react to a petition for modification or dissolution by seeking modification to obtain more effective relief against the respondent. The Supreme Court has held that the Government may secure modification of an antitrust decree to obtain the additional remedy of dissolution if the original provisions of the decree have proved ineffective in achieving the goal of workable competition.<sup>47</sup> The Court held that *Swift* was inapplicable to such a request by the Government for modification. The FTC staff is presently seeking at the Commission level to modify a cease and desist order against National Dairy to include more restrictive provisions. The Court of Appeals for the District of Columbia has already upheld the FTC's earlier effort to modify a cease and desist order in a false advertising case so as to enjoin the advertiser from making product claims in addition to those covered by the original order.<sup>48</sup> The court in *Elmo Co. v. FTC* went so far as to hold that the governing standard of the public interest is the same when the agency seeks to reopen a final order as when it decides to issue a new complaint. The FTC, however, does not always modify its orders so readily when requested to do so by a respondent. In *Lakeland Nurseries Sales Corp.*,<sup>49</sup> the FTC refused to set aside an eleven-year-old order even though the corporate respondent had gone out of business and the individual respondents had sold their interests in the nursery business and covenanted not to compete with their successors for five years. The FTC decided it was still in the public interest to continue the order because the individual respondents might at some point change their minds and reenter the nursery business.

### *Rights of Third Persons*

Recent court decisions have greatly expanded the standing of persons affected by governmental action to challenge its validity. Most of this new body of law has centered on standing to obtain judicial review of administrative action,<sup>50</sup> but there has also been

46. See the discussion of exclusive jurisdiction *supra* at p. 314.

47. *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968).

48. *Elmo Co. v. FTC*, 389 F.2d 550 (D.C. Cir. 1967).

49. 3 TRADE REG. REP. ¶ 18,521, at 20,877 (1968); this case is also discussed in 38 ANTITRUST L.J. 486-87 (1968).

50. *Association of Data Processing Serv. Organizations v. Camp*, 397 U.S. 150 (1970). For further discussion of judicial review of administrative action, see 31 MD. L. REV. 134 (1971).

considerable litigation on standing to intervene in or to initiate administrative or judicial proceedings.<sup>51</sup> Under this new body of law the inclusion of time limits in decrees and the modification or dissolution of outstanding decrees is not a matter solely for the agency and the respondent. The respondent's competitors, consumer or environmental groups, state agencies, and individual victims of the respondent's illegal practices may seek to participate in any proceedings to formulate or modify a decree. This recommendation does not treat the problem of the standing of these persons to intervene. Intervention in judicial proceedings is presently governed by Rule 24 of the Federal Rules of Civil Procedure, Rule 15 of the Federal Rules of Appellate Procedure, and by relevant federal statutes.<sup>52</sup> Intervention in administrative proceedings is governed by the common law of standing and by agency rules of practice.<sup>53</sup>

This recommendation is not intended to bring about any changes in this body of law. The standing of interested third persons to intervene in proceedings to formulate or modify a decree does not adversely affect this recommendation. The standing of third persons to intervene does not mean that they may dictate the result or hamstring the proceedings. Their views should be heard but they are not controlling. Furthermore, they may not prevent a settlement between the agency and the respondent on a particular issue or on the entire case; they may simply challenge that settlement on further review.<sup>54</sup> Part A of this recommendation provides, however, that the effect on the interests of third persons of the modification or dissolution of a decree is a relevant factor which the agency should consider in determining whether modification or dissolution is appropriate.

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51. *National Welfare Rights Organization v. Finch*, 429 F.2d 725 (D.C. Cir. 1970).

52. In *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967), the Court held that a customer of one of the companies to be formed by a consent decree of divestiture in an antitrust case was entitled to intervene as of right under the new Rule 24(a) of the Federal Rules of Civil Procedure because of its interest in seeing that the company created by the divestiture was viable and able to supply its requirements. Subsequent decisions have limited *Cascade* to its special facts and explained the result in that case on the basis of the Court's dissatisfaction with the substantive provisions of the decree. *Smuck v. Hobson*, 408 F.2d 175, 179 n.16 (D.C. Cir. 1969). Thus, public bodies have been denied intervention under Rule 24 to challenge a consent decree in a civil antitrust action brought by the United States against the major automobile manufacturers charging a conspiracy to eliminate competition in the development of anti-pollution devices. *United States v. Automobile Mfrs. Ass'n, Inc.*, 307 F. Supp. 617 (C.D. Cal. 1969), *aff'd sub nom. City of New York v. United States*, 397 U.S. 248 (1970).

Rule 15 of the Federal Rules of Appellate Procedure only governs the procedure for intervention in review proceedings in the courts of appeals, and the right of interested persons to intervene depends on the particular statutory scheme of the agency involved. *Local 283, UAW v. Scofield*, 382 U.S. 205 (1965). In *Scofield* the Court held the National Labor Relations Act conferred on the party who was successful in the proceeding before the Board an absolute right to intervene in the enforcement or review proceedings in the court of appeals.

53. *City of San Antonio v. CAB*, 374 F.2d 326, 331-33 (D.C. Cir. 1967) (new route proceeding); *Office of Communication of United Church of Christ v. FCC*, 359 F.2d 994 (D.C. Cir. 1966) (license renewal); *In re Firestone Tire & Rubber Co.*, No. 8818 (F.T.C., June 29, 1970) (student group granted intervention in false advertising case). See generally Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721 (1968).

54. *National Welfare Rights Organization v. Finch*, 429 F.2d 725, 739 (D.C. Cir. 1970).

## SPECIFIC ASPECTS OF THE RECOMMENDATION

Recommendation 30<sup>55</sup> seeks to alleviate the problems raised by cease and desist orders and injunctions that have outlived their usefulness by proposing new procedures and more flexible standards for modification and dissolution. Part A covers cease and desist orders over which the issuing agency retains jurisdiction. Part B, on the other hand, covers injunctions obtained by agencies from the federal courts and agency cease and desist orders that have been enforced in the courts and over which the courts retain exclusive jurisdiction. In situations covered by Part A, the agency has authority to modify or vacate the decree on its own, while in the latter two situations the agency must obtain the cooperation of the court to modify or vacate an outstanding decree. The appropriate means for the agency to secure this cooperation is to join or concur with the respondent in a motion to modify or vacate the decree. The modification or dissolution of a judicial decree is, of course, a judicial function within the control of the court, but a court should surely accord great weight to the agency's view on the appropriate disposition of the matter. The agency is not merely a private litigant invoking the judicial process; it is, in addition, a public body charged by statute with the protection of the public interest.<sup>56</sup> The courts should, therefore, ordinarily show considerable deference to the judgment of the agency when the agency decides that the continuation of the decree in its present form is no longer in the public interest.

*Standards for Modification or Dissolution*

The standards or factors which an agency should consider in determining whether the modification or dissolution of a particular decree or portion thereof is justified include the period of time the decree has been in effect, changed conditions of fact or law during that time, the respondent's compliance with the decree, the likelihood of further violations of the decree, the hardship which the decree imposes on the respondent, the extent of the respondent's compliance with requirements of the law that are related to those covered by the decree, the interests of other persons or parties affected by the decree, the importance of the decree to the agency's overall enforcement program, and the public interest in the effective enforcement of the law. All of these factors should be considered by the agency in determining whether the continuation of the decree in its present form is in the public interest. Such an inquiry, which involves a balancing of competing considerations, permits a flexible response by the agency to the problem of long-standing decrees.

This approach is preferable to the rigid *Swift* formulation which requires the continuation of existing decrees in the absence of "a clear showing of grievous wrong evoked by new and unforeseen conditions."<sup>57</sup> The principal advantage of the more flexible approach

55. For a text of Recommendation 30, see note 1 *supra*.

56. *P. Lorillard Co. v. FTC*, 186 F.2d 52, 55 (4th Cir. 1950).

57. 286 U.S. at 119.

is that it should alleviate the problems associated with permanent decrees that may become obsolete with the passage of time. Agencies will still be able to obtain effective relief at the time of the entry of the decree, but respondents will not need to suffer in perpetuity harm or inconvenience that is unnecessary from an enforcement or public interest point of view. The opportunity to obtain eventual modification or dissolution may also be an incentive for respondents to obey the decree and related provisions of the law.

### *Cease and Desist Orders*

The provisions of Parts A and B on the modification or dissolution of cease and desist orders issued by administrative agencies are consistent with the existing powers enjoyed by agencies and enforcing courts to modify or set aside outstanding orders. The FTC has broad statutory authority to modify or set aside a final order whenever "conditions of fact or of law have so changed as to require such action or if the public interest shall so require."<sup>58</sup> The FTC apparently may even modify or set aside those orders that have been affirmed or enforced by a reviewing court. The authority of the NLRB over its own orders is more limited. Prior to the filing in the court of appeals of the record in a case, the Board has plenary power to modify or set aside its own orders.<sup>59</sup> However, once the record has been filed in the appropriate court of appeals, that court has exclusive jurisdiction over the order.<sup>60</sup> Any order of the NLRB that is enforced in whole or in part by the court thus becomes the court's order and the Board does not retain any authority to modify or set aside such an order.<sup>61</sup> This doctrine of exclusive jurisdiction operates in a number of other areas to prevent an agency from modifying or setting aside its own orders once they have been enforced by a court.<sup>62</sup> In these areas, however, the doctrine has a lesser impact than in the case of NLRB orders because the orders of these agencies become final automatically if no judicial review is sought within a prescribed period by the respondent; therefore, only a small percentage of an agency's orders are ever enforced by a court and subject to the doctrine. The NLRB, on the other hand, must routinely enforce its orders in the courts of appeals because sanctions may be imposed only for violation of a judicial decree enforcing a Board order.

The doctrine of exclusive jurisdiction does not prevent a court from modifying or vacating its own enforcing decree or from remanding the case to the agency to allow the agency to modify or vacate its underlying order.<sup>63</sup> The court retains ultimate control over the

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58. 15 U.S.C. §§ 21(b), 45(b) (1970); see note 43 *supra* and accompanying text.

59. 29 U.S.C. § 160(d) (1970).

60. *Id.* §§ 160(e), (f).

61. *International Mine Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335 (1945).

62. See 7 U.S.C. § 194(h) (1970) (cease-and-desist orders issued by the Department of Agriculture under the Packers and Stockyards Act); 49 U.S.C. § 1486(d) (1970) (CAB and FAA orders).

63. Jaffe & Vining, *Exclusive Jurisdiction and Remand*, in *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 709-20 (L. Jaffe ed. 1965).



order, but it naturally should accord great weight to an agency's request on account of the agency's greater experience with enforcement problems. The agency has overall responsibility for maintaining an effective enforcement program that is both fair and flexible; the court, on the other hand, is only concerned with the integrity of its particular decree. For these reasons courts have recognized that agencies enjoy broad powers following a remand to modify or vacate their previous orders.<sup>64</sup> Part B encourages this fruitful working relationship between an agency and an enforcing court by providing that in cases where the court has exclusive jurisdiction over a cease and desist order initially issued by an agency, the agency should join with the respondent in appropriate cases to move the court to modify or set aside the order or to remand the proceeding to the agency to permit it to do so. The agency should have available a procedure whereby a respondent may request the agency to join with it in such a motion. In deciding whether or not to concur with such a request, the agency should consider the same factors it should consider under Part A when it decides whether or not to modify or vacate a cease and desist order over which it retains jurisdiction.

### *Injunctions*

Part B contains similar provisions on the modification or dissolution of court injunctions. Each agency that obtains a significant number of injunctions in the federal courts should have a procedure available whereby a respondent may request the agency to join or concur with it in moving the court to modify or vacate an outstanding injunction. The agency should consider the same factors in acting upon this type of request as an agency should consider in deciding whether or not to modify or vacate one of its own cease and desist orders. When the agency determines that the injunction should be modified or vacated it should join or concur with the respondent in moving the court to do so. The Antitrust Division reports that when it has agreed with a respondent on the modification of a judgment the courts have usually granted the request for modification.

It is, of course, possible that the courts will disregard the proposed standards and continue to apply the rigid *Swift* rule on the modification or dissolution of judicial decrees. This reaction by the courts would largely frustrate the implementation of Part B. Such an outcome seems quite unlikely because there is no indication that the *Swift* rule applies when the government and the respondent join in a request for modification or dissolution. Furthermore, the Supreme Court has made clear that the *Swift* rule does not apply when the government seeks to modify a decree to obtain additional, more effective relief than provided in the original decree.<sup>65</sup> Is not *Swift* equally inapplicable when the government seeks to modify or vacate a decree on the grounds that all or part of the relief provided by the decree is no longer necessary? The answer seems clearly to be yes.

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64. *Id.* at 713.

65. *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968).

In both situations the courts must recognize that the government agency represents the public interest and has the principal responsibility for determining enforcement policy. Since the respondent is not contesting the modification or dissolution of the injunction, any objection is likely to come from third party intervenors. The fact that the intervenor is usually motivated by his private interests and that the agency is acting on the basis of the broader interest of the public as a whole suggests that in this situation the court should ordinarily show deference to the judgment of the latter in matters relating to settlement or remedy.<sup>66</sup>

### *Modification Procedures*

No specific procedures for modification or dissolution are proposed in Parts A and B because of the wide variety of proceedings covered by them. Each agency affected by them should insure that appropriate procedures are available whereby a respondent may request the agency to modify or vacate a cease and desist order that has become final or to join or concur with it in moving the court to do so in the case of an injunction or order over which the court retains jurisdiction. In ruling upon the respondent's request the agency should consider the factors itemized in Part A. A description of the procedures which are available should be made public and, in the case of agencies that enter cease and desist orders in formal adjudicatory procedures, should normally be included in the agency's rules of practice. These procedures should permit a flexible response by the agency to requests for modification or dissolution. The agency should have the authority to rule on such requests on the basis of the written pleadings and briefs or on the basis of affidavits, documents or whatever other evidence it finds necessary for a proper decision in the case. Formal hearings should be necessary only in those rare cases where critical facts are in dispute. In all cases the agency should communicate its decision and the basis thereof to the party seeking modification or dissolution.

The implementation of Parts A and B along these lines will require some affirmative action by most agencies. While all agencies that commented on this recommendation recognized the appropriateness of modifying or vacating outstanding decrees in at least some situations, only a minority of agencies have available publicized procedures as contemplated by Parts A and B. In addition, while the majority of agencies expressed general agreement with the standards for modification or dissolution proposed in Part A, these standards have not been articulated by the agencies so as to give guidance to respondents as to when modification or dissolution is possible. Most agencies leave the matter to be worked out informally on a case by case basis by the attorneys for the respective parties. The FDA, SEC, ICC, and Anti-trust Division all report that, in a limited number of cases, counsel for the agency and for the respondent have agreed that an outstanding decree should be modified or vacated. The courts and agencies involved

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66. Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 746 n.114 (1968).

have generally gone along with these agreements and modified or vacated the decrees accordingly. The Civil Rights Division has gone one step further and inserts in many injunctions in housing and employment cases a provision that the respondent may seek to dissolve the injunction in a given number of years with the understanding that the Division will not oppose such a motion if there have been no violations of the law in the interim period.

While these ad hoc procedures have seemingly worked smoothly in cases in which they have been invoked, it seems desirable for an agency to publicize the availability of procedures for modification or dissolution of outstanding decrees and to articulate the standards to be applied. This action would assure that all respondents are informed about the opportunities for modification or dissolution and enable the agency to apply its policy with respect to modification and dissolution in an even handed manner. Rule 3.72 of the FTC satisfies these criteria and still insures that the agency has sufficient flexibility in ruling upon requests for modification or dissolution.<sup>67</sup>

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67. Rule 3.72 reads as follows:

§ 3.72 **Reopening.**

(a) *Before statutory review.* At any time prior to the expiration of the time allowed for filing a petition for review or prior to the filing of the transcript of the record of a proceeding in a U.S. court of appeals pursuant to a petition for review, the Commission may upon its own initiative and without prior notice to the parties reopen the proceeding and enter a new decision modifying or setting aside the whole or any part of the findings as to the facts, conclusions, rule, order, or opinion issued by the Commission in such proceeding.

(b) *After decision has become final.* (1) Whenever the Commission is of the opinion that changed conditions of fact or law or the public interest may require that a Commission decision containing a rule or order which has become effective, or an order to cease and desist which has become final by reason of court affirmance or expiration of the statutory period for court review without a petition for review having been filed, or a Commission decision containing an order dismissing a proceeding, should be altered, modified, or set aside in whole or in part, the Commission will serve upon each person subject to such decision (in the case of proceedings instituted under § 3.13, such service may be by publication in the FEDERAL REGISTER) an order to show cause, stating the changes it proposes to make in the decision and the reasons they are deemed necessary. Within thirty (30) days after service of such order to show cause, any person served may file an answer thereto. Any person not responding to the order within the time allowed may be deemed to have consented to the proposed changes.

(2) Whenever any person subject to a decision containing a rule or order which has become effective, or an order to cease and desist which has become final, is of the opinion that changed conditions of fact or law require that said rule or order be altered, modified, or set aside, or that the public interest so requires, such person may file with the Commission a petition requesting a reopening of the proceeding for that purpose. The petition shall state the changes desired, the grounds therefor, and shall include, when available, such supporting evidence and argument as will in the absence of a contest provide the basis for a Commission decision on the petition. Within thirty (30) days after service of such a petition, the Director of the appropriate bureau of the Commission shall file an answer.

(3) Whenever an order to show cause or petition to reopen is not opposed, or if opposed but the pleadings do not raise issues of fact to be resolved, the Commission, in its discretion, may decide the matter on the order to show cause or petition and answer thereto, or it may serve upon the parties (in the case of proceedings instituted under § 3.13, such service may be by publication in the FEDERAL REGISTER) a notice of hearing, setting forth the date when the cause will be heard. In such a case, the hearing will be limited to the filing of briefs and may include oral argument when deemed necessary by the Commission. When the pleadings raise substantial factual issues, the Commission will direct such

The FTC rule permits the Commission to modify or set aside a final order only when "changed conditions of fact or law," or "the public interest" require it. In its formal comment on an earlier version of this recommendation, the FTC expressed doubts as to whether all of the factors proposed in Part A meet this requirement and questioned the need for incorporating these factors into the Commission's rules. In particular, the Commission doubted that the fact that an order was old or imposed a hardship on the respondent was necessarily dispositive of the statutory requirement of the public interest. In response to the FTC's concern, the Committee has added to the text of Part A the new factor of the public interest in the enforcement of the law. Furthermore, it is intended that the agency should consider all the relevant factors in passing upon a request for modification or dissolution and that no one factor is intended to be dispositive. It is a matter for agency discretion whether the agency itemizes all these factors in its rules or simply adheres to them in its decisional process under a more broadly stated rule. The agency need only make known in some convenient fashion those standards which it is applying.

The Federal Maritime Commission (FMC) is presently considering the adoption of a rule similar to that of the FTC. Its present rule provides that a party must file a petition for reconsideration with respect to a cease and desist order within thirty days. The FMC recognizes that this procedure is inadequate in the important area of orders based on practices which are labeled unreasonable because what may be unreasonable at one time may not be so at a later date.<sup>68</sup> The new FMC rule will most likely be consistent with these recommendations. The NLRB's member of the Administrative Conference, on the other hand, strongly opposes formalizing existing procedures and favors modifying or vacating outstanding decrees only in rare cases where new or unforeseen circumstances permit modification or dissolution under the rule in *Swift & Co.* He believes that the implementation of this recommendation will lead to a host of frivolous petitions for modification that will waste the time of the Board and of the courts. The majority of the Conference does not share this judgment.

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hearings as it deems appropriate, including hearings for the receipt of evidence by it or by a hearing examiner. Unless otherwise ordered and insofar as practicable, hearings before a hearing examiner to receive evidence shall be conducted in accordance with Subparts B, C, D, and E of Part 3 of this chapter. Upon conclusion of hearings before a hearing examiner, the record and the hearing examiner's recommendations shall be certified to the Commission for final disposition of the matter.

16 C.F.R. § 3.72 (1971).

68. Investigation of Free Time Practices — Port of San Diego, 9 F.M.C. 525 (1966).