

EXECUTIVE SUMMARY OF BARRY B. BOYER REPORT. TRADE REGULATION RULEMAKING PROCEDURES OF THE FEDERAL TRADE COMMISSION

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A. BACKGROUND

1. Reasons for This Report

In December 1974 Congress passed the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, a statute giving the FTC broad substantive, legislative power to promulgate trade regulation rules (TRRs) designed to define and prevent unfair or deceptive acts or practices affecting commerce. Magnuson-Moss also imposes procedural requirements on the process by which these rules are promulgated. It requires the Commission to engage in "hybrid" rulemaking by adding to the notice-and-comment requirements for "informal rulemaking" under section 553 of the Administrative Procedure Act such prescriptions as oral hearings (of both the legislative and evidentiary types), more extensive provision for public comment, including rebuttal, and judicial review of the rulemaking record under a "substantial evidence" standard. Hybrid procedures represent a new approach to agency legislative rulemaking, aimed at enhancing the public's participation and testing the facts and assumptions upon which the agency bases its regulatory policy. The effectiveness and efficiency of the concept were of continuing concern to the Congress, and Section 202(d) of the Magnuson-Moss Act provided:

The Federal Trade Commission and the Administrative Conference of the United States shall each conduct a study and evaluation of the rulemaking procedures under section 18 of the Federal Trade Commission Act and each shall submit a report of its study (including any legislative recommendations) to the Congress not later than 18 months after the date of enactment of this Act. [Congress subsequently extended the deadline to not later than June 30, 1979.]

Since the Magnuson-Moss Act was adopted, twenty proceedings have been initiated by the Commission. By April 15, 1979, only three had been completed (one by withdrawal). This study, therefore, represents an interim

analysis, based on the information available early enough to report by Congress's deadline of June 1979. The Conference will continue the project to a supplemental report as soon as a sufficient number of rulemaking proceedings have been completed to provide perspective on the process as a whole.

2. *Genesis of the Magnuson-Moss Act*

While the FTC has significant responsibilities under a number of statutes, its most important activity has always been enforcement of section 5 of the Federal Trade Commission Act of 1914, which, as originally enacted, stated "unfair methods of competition in commerce are hereby declared unlawful." This law was not construed by the courts to be a consumer protection statute, and to make clear its desire that the Commission's protection extend to consumers as well as to competition, Congress, in the Wheeler-Lea Act of 1938, added a provision that "unfair or deceptive acts or practices in commerce" are also unlawful.

The Federal Trade Commission Act, originally and as amended by the Wheeler-Lea Act, contemplated that the Commission would act primarily through individual cease-and-desist adjudications. While section 6(g) gave the Commission authority "to make rules and regulations for the purpose of carrying out the provisions of this Act," until the early 1960's this provision was used only to promulgate policy statements or generic interpretations of the statute known as "Guides." The FTC began issuing these soon after its creation, and the practice has persisted until the present day. However, experience demonstrated that Guides were not wholly satisfactory as an enforcement tool. In legal effect, a Guide is merely a statement of enforcement policy, and a party charged with violating it is free to challenge the FTC's interpretation of the statute in an adjudicatory proceeding. There was little gain in efficiency over case-by-case adjudication.

In the early 1960's, the FTC began experimenting with trade regulation rules (TRR's) issued pursuant to the authority of section 6(g) after the informal notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. §553. A TRR differed from a Guide in its substantive effect upon subsequent adjudications: it was a binding determination that particular practices violated the statute, and, assuming the procedures resulting in the TRR had been proper, the only question in litigation was whether the respondent had actually engaged in the practices.

However, the Commission's statutory authority to issue such rules was ambiguous, and was eventually challenged in court. Ultimately, the United States Court of Appeals for the District of Columbia Circuit upheld the Commission's power to issue TRRs, but during the time the issue was in litigation debate about the existence and wisdom of legislative rulemaking authority to implement section 5 of the Federal Trade Commission Act took place in the Congress.

The legislative history of Magnuson-Moss reflects widespread congressional concern over the scope of the power delegated to the Commission. The FTC was not limited to regulation of a particular industry, but had, before Magnuson-Moss, jurisdiction over all businesses "in commerce," and, after Magnuson-Moss, over all "affecting commerce." Moreover, the statutory standard governing the FTC's consumer protection activity provided few real limits. The statute proscribed "unfair or deceptive acts or practices," terms which the Commission and reviewing courts had interpreted expansively. As a result, the feeling was apparently widespread among the members of the congressional committees considering the Magnuson-Moss Act that some means had to be found to control this broad discretion. The limits which Congress considered and ultimately enacted were predominantly procedural rather than substantive; the broad rulemaking delegation was retained, but the procedures for promulgating rules were elaborated and formalized. At the same time, Congress was concerned that over-judicialization of the rulemaking process could prevent the FTC from using its trade regulation rulemaking powers effectively. The result was a "hybrid rulemaking" procedure that fell somewhere between the Administrative Procedure Act's polar categories of informal notice-and-comment rulemaking and formal rulemaking.

B. PROCEDURES FOR FTC RULEMAKING UNDER MAGNUSON-MOSS

1. *Statutory Requirements*

Except for extending the Commission's jurisdiction to matters "affecting commerce" as well as "in commerce," Magnuson-Moss did not change the substantive reach or definition of section 5. It added a new section 18 to the Federal Trade Commission Act which confirmed the FTC's authority to issue interpretive rules and general statements of policy, and, further, empowered the Commission to prescribe:

rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of such section 5(a) (1)). Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices.

The statute also provided:

The Commission shall have no authority under this Act, other than its authority under this section, to prescribe any rule with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a) (1)). The preceding sentence shall not affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce.

However, Congress imposed a number of procedural limitations on the Commission's trade regulation rulemaking under section 18. The Commission was directed to "proceed in accordance with section 553" of the Administrative Procedure Act, and, in addition, to comply with several special requirements:

(1) Section 553 requires simply that an agency give notice of "either the terms or substance of the proposed rule or a description of the subjects and issues involved." Magnuson-Moss states that the FTC shall "publish a notice of proposed rulemaking stating with particularity the reason for the proposed rule." The substantive effect of this change is unclear, and has been the subject of debate in several rulemaking proceedings.

(2) Section 553 provides that interested persons shall have an opportunity to submit "written data, views, or arguments" unless the agency "for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." Magnuson-Moss requires the FTC to make all submissions "publicly available," and makes no provision for promulgating legislative rules without allowing an opportunity for public comment.

(3) While section 553 requires neither an oral hearing nor any opportunity for cross-examination or rebuttal, Magnuson-Moss requires the Commission to provide an opportunity for an informal hearing at which any interested person "is entitled . . . to present his position orally or by documentary submissions (or both)," and "if the Commission determines that there are disputed issues of material fact it is necessary to resolve" any interested person is entitled "to present such rebuttal submissions and to conduct (or have conducted . . .) such cross-examination of persons as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to such issues." The Commission is also empowered to make rules and rulings for its hearings "as may tend to avoid unnecessary costs or delay." Specifically, it has power to group participants with common interests, and to compel selection of a group representative who will conduct cross-examination on behalf of the individual members or to require that cross-examination be conducted by the FTC official presiding at the hearing on behalf of an interested person.

(4) Section 553 requires an agency to incorporate in any final rules "a concise general statement of their basis and purpose." Magnuson-Moss requires "a statement of basis and purpose" which includes statements as to "the prevalence of the acts or practices treated by the rule," "the manner and context in which such acts or practices are unfair or deceptive," and "the economic effect of the rule, taking into account the effect on small business and consumers." Whether the omission from Magnuson-Moss of the phrase "concise, general" from the phrase "concise, general statement of their basis and purpose" has substantive importance is, again, a matter of debate.

Similarly, the impact of the statutory specification of some of the factors to be considered in promulgating a rule is unclear. This is the only portion of the statute which comes close to imposing a substantive limit on agency discretion. However, the Act explicitly provides that the "contents and adequacy" of the statement of basis and purpose "shall not be subject to judicial review in any respect.

(5) Magnuson-Moss also allows, but does not require, the FTC to provide compensation for costs of participation to any person "who has, or represents, an interest . . . which would not otherwise be adequately represented . . ." if representation of the interest "is necessary for a fair determination," and if the person "is unable effectively to participate" because he cannot afford to pay the costs. Section 553 has no comparable provision.

The Magnuson-Moss Act also specifically provides for pre-enforcement judicial review of trade regulation rules, on both the traditional Administrative Procedure Act grounds and on special grounds set forth in section 18, 15 U.S.C. §57a(e). Under the Administrative Procedure Act, an informal rule may be set aside if, as specified by 5 U.S.C. 706(2) (a)-(D), it is found to be "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law." In addition, under Magnuson-Moss a court can set aside a trade regulation rule if it finds that "the Commission's action is not supported by substantial evidence in the rulemaking record . . . taken as a whole." The rulemaking record is defined as consisting of the rule, the statement of basis and purpose, the transcript of the oral hearing, "any written submissions," and "any other information which the Commission considers relevant to such rule"; "evidence" is "any matter in the rulemaking record." The judicial review section of Magnuson-Moss also goes beyond the Administrative Procedure Act's general provision that agency action can be reversed for procedural error by specifying that FTC rulings limiting cross-examination and rebuttal may constitute reversible error when they have "precluded disclosure of disputed material facts which was necessary for a fair determination by the Commission of the rulemaking proceeding taken as a whole."¹

1. In addition to these procedural modifications of notice-and-comment rulemaking, the Magnuson-Moss Act substantially increased the penalties for rule violations. A knowing failure to comply with a trade regulation rule can result in fines of up to \$10,000 per day, and these penalties begin to accrue as soon as the violation takes place. Under the prior practice, penalties did not attach until the Commission had issued a final cease-and-desist order finding that the respondent had violated a TRR, and the respondent then failed to comply with the order. The Act also gave the Commission broad authority to seek restitution and other judicial remedies for consumers who have been injured as a result of violations of a TRR. These enforcement tools give trade regulation rules considerable force, and thereby raise the stakes in Magnuson-Moss rulemaking proceedings.

This summary of the hybrid features of Magnuson-Moss rulemaking suggests that Congress took two related approaches to confining agency rulemaking power. The first was to heighten the element of reasoned decision-making in trade regulation rulemaking. The requirements that a rule be based on a defined record and supported by substantial evidence compel the FTC to marshal facts supporting the issuance of a rule. At the same time the requirement that the agency state its rationale in some detail at both the beginning and the end of public proceedings implies that the FTC will have to deal rationally with the information in the record, and make explicit the logical linkage between data and conclusions. The second major feature of the statute is its apparent assumption that widespread, effective public participation will serve as a check on agency arbitrariness. The Magnuson-Moss Act goes beyond APA informal rulemaking with respect to both the quality of notice given and the scope of the right to be heard.

The requirements added by Magnuson-Moss seem to be based on a model of rule-making and the role of outside parties different from the one implicit in section 553. In the words of the Conference Report, "[M]ore effective, workable and meaningful rules will be promulgated if persons affected . . . have the opportunity . . . by cross-examination and rebuttal evidence or other submissions, to challenge the factual assumptions on which the Commission is proceeding and to show in what respect such assumptions are erroneous." [1974] *U.S. Code Cong & Ad. News* 7765.

The basic statutory objectives of allowing interested persons to challenge the basis of a proposed rule in detail, while limiting cross-examination and other hearing rights in the interest of preserving the efficiency of rule-making, require a somewhat different strategy of implementation from the approach agencies frequently used in notice-and-comment rulemaking under section 553. Rulemaking under that section has often been treated as a loosely-structured process for fact-gathering and public statement of policy preferences—that is, as a form of decision-making in which the agency simply identified a problem, outlined possible solutions in general terms, and then sought public data, views and arguments as a means of educating itself about the subject matter. By contrast, effective implementation of the fact-testing objective of the Magnuson-Moss Act necessitates, instead of this direct "pipeline" of public views to agency decision-makers, a "funnel" approach in which agency practices and procedures are designed to achieve a progressive narrowing of the theories, factual issues, and policy considerations as the rule moves through the various procedural stages toward final decision. This "funnel" approach implies several general attributes of the rulemaking procedures: (a) more systematic, thorough investigation and consideration of rulemaking proposals than would be customary in section 553 rulemaking prior to the publication of a proposed rule; (b) more complete agency disclosure of the factual, legal and policy bases for a

proposed rule than would be customary under section 553 and the general requirements of the Freedom of Information Act; (c) procedures and standards which make it possible for participants and decision-makers to narrow and focus the key matters in dispute sufficiently early in the process to permit reasonable limitations on the use of trial-type hearing procedures. At this time, it is not clear whether, or to what extent, these objectives can be achieved in the context of a broad delegation of rulemaking authority like that granted the FTC by the combination of sections 5 and 18 of the Federal Trade Commission Act. It does seem clear, however, that failure to observe these principles in agency implementation of hybrid rulemaking can impair the efficiency, acceptability, and quality of decisions.

2. *FTC Rules of Practice*

The rulemaking Rules of Practice adopted by the FTC contain several significant additions to the statutory requirements. For the prehearing stage, the principal innovation is a two-notice procedure leading to the designation of the "disputed issues of material fact" to be addressed at the hearing. The first notice, the Initial Notice of Rulemaking, sets forth the proposed rule or a description of the subjects and issues involved, and the requisite statement of the reason for the rule. Most initial notices have also included a list of general issues of fact, law and policy which the Commission deemed relevant to the proceeding, though this is not required by the Rules of Practice. A Presiding Officer for the oral hearing is also named at the time of publication of the Initial Notice. Publication of this first notice also triggers the participation of other interested parties by: (a) Commencing a period for prehearing public comment which lasts until 45 days before the start of the oral hearing (in practice, this period has usually lasted for several months); (b) Inviting interested persons to propose, within 60 days of publication of the notice, disputed issues of material fact to be designated as issues upon which cross-examination may be allowed at the oral hearing.

The Presiding Officer, after evaluating the disputed issue proposals, publishes a final notice of rulemaking which designates the disputed issues. While all other interlocutory appeals must be certified by the Presiding Officer, this designation is appealable directly to the Commission. The Final Notice also sets the time and place of hearings, and includes instructions for witnesses desiring to testify at the hearings. Although the Rules of Practice do not require it, these witness instructions have invariably required prospective witnesses to submit an advance text or summary of their testimony prior to the hearings so that participants could prepare for cross-examination. Since the end of the pre-hearing comment period is keyed to the start of hearings, the scheduling of hearings in the final notice also has the effect of setting the cutoff date for submission of written comments. Another function of the final notice is to advise interested persons that they must file

a notification of their interest with respect to each of the disputed issues if they want to cross-examine at the hearings. These notifications of interest, which must be filed within 20 days of publication of the final notice, are intended to enable the Presiding Officer to identify groups with common interests, and thereby facilitate the selection of the group representatives who will conduct cross-examination at the hearings.

Although not required by the Rules of Practice, several other events occur during the typical prehearing notice stage. After selection of the group representatives, the Presiding Officer holds a prehearing conference to deal with procedural groundrules for the hearings and to try to resolve any scheduling problems. The prehearing conferences are not used for discovery; however, interested persons often have attempted to obtain discovery, primarily of FTC staff materials, through a variety of motions and requests for production of documents during the prehearing stages.

Another procedural right not subject to filing deadlines is the opportunity to submit requests that the Presiding Officer use compulsory process to obtain testimony, documents, or answers to questions. The Rules of Practice make the grant of compulsory process subject to some of the constraints on cross-examination and rebuttal—that is, persons requesting it are subject to the identification-of-interest requirement, and the use of compulsory process is confined to designated issues. The Rules also suggest that compulsory process is a “last resort” procedure; requests must be supported by a showing that the requested material can be obtained in no other way.

The Rules of Practice relating to the conduct of hearings add little to the terms of the statute; the broad legislative delegation of power to control the hearings and to avoid unnecessary costs and delay is redelegated to the Presiding Officer.

In contrast to the statute, which is largely silent on the topic, the Rules of Practice contain some fairly elaborate procedures for the post-hearing stages of TRR proceedings. After the hearing record closes, the Presiding Officer prepares a report containing “a summary of the record, both written and oral, relating to the issues designated” for hearing. In writing his report, the Presiding Officer is directed to “make initial factual findings and conclusions” with respect to the designated issues, “and such other findings and conclusions as he sees fit.” This report is followed by a similar report prepared by the staff members assigned to the rule. The staff report contains both a comprehensive summary of the record and the staff “recommendations as to the form of the final rule.” Issuance of the staff report triggers a second opportunity for interested persons to submit written comments, referred to as “post-record comments.” This second comment period lasts for 60 days, and post-record comments are supposed to be “confined to information already in the record.” Requests for Commission review of rulings made by the Presiding Officer also may be included in the post-record comments.

The Commission has added an additional opportunity for public participation not required by the statute. The Rules of Practice provide that the Commission may, at its discretion, allow oral presentations to the Commission before final consideration of a rule. Such "oral presentations," which have generally followed the format of a round-table discussion, were routinely allowed in the first wave of Magnuson-Moss rulemakings to reach the Commission. After the oral presentations, the Commission typically holds one or more "Sunshine meetings" to hammer out the details of the final rule, and to approve or modify the final statement of basis and purpose drafted by the staff.

The Rules of Practice contain one final provision of considerable importance. Section 1.20 says that the Commission may dispense with any procedures required by the Rules but not by the statute if it finds that they are "impractical, unnecessary, or contrary to the public interest."

C. PROPOSED TRADE REGULATION RULES

The Magnuson-Moss Act became effective on January 4, 1975. In April the Commission promulgated the Rules of Practice concerning the initial notice stages of TRR proceedings, and in August the rules for the remaining stages. By April 1976 the Commission had commenced 16 rulemaking proceedings under the Magnuson-Moss Act. After this came a hiatus until November 1977, when one additional rule was proposed, then a further gap until April 1978, after which the Commission proposed three more rules. Each of the rules proposed after April 1976 uses the escape clause of 16 C.F.R. §1.20 to make modifications in the procedures. Of these 20 rules, three have been completed—two by publication of final rules and one by withdrawal of the proposal. The rest are still in process. Their status is presented in the following chart:

STATUS OF TRADE REGULATION RULES PROPOSED SINCE PASSAGE OF THE MAGNUSON-MOSS ACT

A. Completed Rulemakings

Rule	Notice of Proposed Rulemaking	Status as of April 15, 1979*
1. Ophthalmic Goods & Services (Eyeglasses)	Jan. 16, 1976 (41 F.R. 2399)	Final rule published on June 2, 1978
2. Vocational Schools	May 15, 1975 (40 F.R. 20148)	Final rule published on Dec. 28, 1978
3. Prescription Drugs	June 4, 1975 (40 F.R. 24031)	Proposed rule withdrawn on Nov. 24, 1978

B. Proposed Rules Before the Commission for Final Action

1. Residential Thermal Insulation ("R-Value")	Nov. 18, 1977 (42 F.R. 59678)	Commission met to consider a final rule on Nov. 29, 1978; Jan. 24, 1979
2. Funeral Practices	Aug. 29, 1975 (40 F.R. 39901)	Commission met to consider a final rule on Mar. 23, 1979

STATUS OF TRADE REGULATION RULES PROPOSED SINCE PASSAGE OF THE MAGNUSON-MOSS ACT

B. Proposed Rules Before the Commission for Final Action

Rule	Notice of Proposed Rulemaking	Status as of April 15, 1979*
3. Care Labeling Amendment	Jan. 26, 1976 (41 F.R. 3747)	Public comments on reports were due Sept. 18, 1978
4. Used Cars	Jan. 6, 1976 (41 F.R. 1089)	Public comments on reports were due Feb. 13, 1979
5. Hearing Aids	June 24, 1975 (40 F.R. 26646)	Public comments on reports were due on March 29, 1979
6. Holder in Due Course Amendment	Nov. 18, 1975 (40 F.R. 53530)	Public comment on reports were due Jan. 24, 1979
7. Food Advertising	May 28, 1975 (40 F.R. 23086)	Public comment on reports were due Feb. 26, 1979

C. Proposed Rules at the Post-Hearing Report-Writing Stage

1. Protein Supplements	Sept. 5, 1975 (40 F.R. 41144)	Presiding Officer report released July 31, 1978; BCP report not released
2. Credit Practices	April 11, 1975 (40 F.R. 16347)	Presiding Officer report released Oct. 13, 1978; BCP report not released.
3. Over-the-Counter Drugs	Nov. 11, 1975 (40 F.R. 52631)	Presiding Officer report released Jan. 4, 1979; BCP report not released
4. Health Spas	Aug. 18, 1975 (40 F.R. 34615)	Hearings completed on Dec. 16, 1977
5. Mobile Homes	May 29, 1975 (40 F.R. 23334)	Hearings completed on Jan. 31, 1978
6. Over-the-Counter Antacids	April 6, 1976 (41 F.R. 14534)	Hearings completed on Feb. 6, 1979

D. Proposed Rules in the Pre-hearing and Hearing Stage

1. Cellular Plastics	July 23, 1975 (40 F.R. 30842)	Revised Notice of Rulemaking and request for comment on need for TRR published Aug. 9, 1978
2. Children's Advertising	April 27, 1978 (43 F.R. 17967)	"Legislative" hearing was concluded in March 1979; possible "disputed issues" hearing to be held later
3. Games of Chance Amendment	Oct. 19, 1978 (43 F.R. 48654)	Scheduled hearings cancelled on Jan. 2, 1979, due to limited interest
4. Standards and Certification	Dec. 7, 1978 (43 F.R. 57269)	Hearing scheduled to begin May 21, 1979

* The usual principal stages of a Magnuson-Moss rulemaking proceeding are: (1) Initial notice of rulemaking; (2) Final notices, designating disputed issues and setting hearing sites and dates; (3) Pre-hearing comment period (from initial notice to 45 days before hearing); (4) Hearing; (5) Post-hearing rebuttal period; (6) Presiding Officer report; (7) Bureau of Consumer Protection (BCP) staff report; (8) Public comments on the Presiding Officer and BCP reports; (9) Final recommendations by Director of BCP; (10) Oral presentations to Commission by interested persons; (11) Commission meetings to consider rule; (12) Publication of final rule and statement of basis and purpose.

D. IMPLEMENTATION OF THE MAGNUSON-MOSS PROCEDURES

1. *Organizational Factors*

The hybrid, partly adversary nature of the Magnuson-Moss rulemaking procedures caused some difficulty in fitting the proceedings into the FTC's organizational structure. The conflicts centered around the roles of the staff attorneys and the Presiding Officers.

Responsibility for enforcing the section 5 prescription of "unfair or deceptive arts or practices" has traditionally lain with the Bureau of Consumer Protection (BCP), one of the Commission's two main operating units. The other major unit, the Bureau of Competition, is responsible for "unfair methods of competition," and has had minimal involvement in formulating substantive rules. In its consumer protection rulemaking, the BCP may obtain support services from the Commission's Bureau of Economics, which is primarily engaged in conducting research and investigations and in providing litigation support. Assistance may also be sought from legal and nonlegal personnel in the FTC's eleven Regional Offices, and on occasion a Regional Office will have primary responsibility for a rule. However, the bulk of the responsibility for investigating and proposing a TRR, for mobilizing witnesses to testify at the hearings, for cross-examining on behalf of the Commission, and for writing the staff report and the final statement of basis and purpose normally falls upon staff attorneys within the Bureau of Consumer Protection at the FTC's Washington headquarters.

To conduct the informal hearings, a corps of Presiding Officers was created within the BCP, subject to the supervision of a Special Assistant for Rulemaking. The Special Assistant, who acted as Chief Presiding Officer, reported directly to the Bureau Director.² In practice the Presiding Officers had considerable autonomy.

The staff attorneys were part of a separate and more complex chain of command. The team of staff attorneys assigned to a rule was headed by a managing attorney, who reported to an Assistant Director or division head. The heads of the Bureau's operating divisions had supervisory responsibility for broad subject matter areas of the BCP's jurisdiction, such as National Advertising, Marketing Practices or Special Projects. They in turn reported to the Bureau Director. A major proposal for Commission action, such as the proposal to initiate a TRR proceeding or a recommendation for a final rule, would move up this review hierarchy from the staff attorneys through the Assistant Director and the Bureau Director before it reached the Commission.

2. In September 1978 the Presiding Officers were transferred to the Office of the General Counsel, as was responsibility for administering the program of grants for public participation.

The Commissioners themselves were involved in the rulemaking process at several stages. First, at the beginning of an investigation the Commission had to approve the use of compulsory process. Few major efforts were undertaken without this tool, so the Commission had an opportunity to review major matters at an early stage. Second, throughout the period covered by this study the FTC was working to improve its management and budget information system, and to engage in more frequent and systematic budget reviews. Rulemaking proceedings were of course covered by these processes. Third, the Commission itself made the decision whether to propose a rule, and approved the initial notice. Fourth, any interested party could appeal the Presiding Officer's designation of issues to the Commission, and this happened in several rules. In addition, some interested parties filed motions of various kinds with the Commission, not the Presiding Officer. Some of those were referred to the Presiding Officer. Others were passed on by the Commission. Fifth, as described above, the Commission instituted a practice of hearing oral presentations before it debated a final rule. Sixth, the Commission itself, of course, approved final rules and statements of basis and purpose.

The Rules of Practice at the outset imposed no restriction on contacts between Commissioners and either other interested parties or the FTC staff in a rulemaking proceeding. Following the D.C. Circuit's opinion in *Home Box Office* the Commission prohibited *ex parte* contacts between Commissioners and their immediate staffs and non-Commission interested parties, but it imposed no restrictions on staff access to the Commissioners during the pendency of the rulemaking. The resulting situations, in which the staff could communicate freely with Commissioners while outsiders could not, was criticized by many rule opponents, who saw the proceedings as highly adversary, and the staff as single-minded advocates of the proposed rule. In March 1979 the Commission revised its Rules to allow *ex parte* contacts by outsiders as long as they are reduced to writing and made a matter of public record.

2. *Issues Involving the Basis and Scope of TRR's*

The great variety of subject-matter and remedial provisions in the rules proposed during the first four years under the Magnuson-Moss Act reflects a considerable diversity in the underlying legal theories. Confusion or uncertainty about the elements of these theories and the evidentiary or procedural consequences they entailed were a frequent source of contention in the proceedings, and it seems clear that underlying ambiguities about the nature of the decisions to be made and the weight to be accorded to different types of evidence were significant factors contributing to the procedural problems observed in this study.

As previously noted, when the Commission issues a trade regulation rule, it must consider "the manner and context in which such acts or practices are unfair or deceptive." This is, there must be some legal theory as to

why the practices in question violate the Federal Trade Commission Act. In its simplest form, the legal theory of a deceptive practices complaint or rule can track a common-law fraud action. Through years of litigating deceptive practices cases within the agency and on judicial review, however, the FTC has expanded the definition of deceptive practices and evolved legal theories which are easier to prove than a common-law fraud theory. The Commission can combat not only affirmative mis-representations, but also deceptive failures to disclose. An advertising claim that is literally truthful may be prohibited if the overall impression it conveys is misleading. Actual deception need not be demonstrated; it is sufficient if the representation has the capacity or tendency to mislead. The FTC also has broad discretion in determining whether a particular claim is material to the purchasing decision. In determining deceptiveness, the Commission is not limited to considering the perceptions of educated or even average consumers; it may take account of more vulnerable groups and act to protect "the ignorant, the unthinking, and the credulous." Lack of knowledge or intent to deceive on the part of the person making the representation is no defense. In short, the FTC has broad discretion to determine what an advertisement means, and whether that meaning is deceptive.

If current agency interpretations of the law are correct, the FTC's authority to define unfair practices is even broader. Relying on the Supreme Court's 1972 decision in the *S&H* case and its own prior precedents, the FTC has begun to spell out several formulations of what constitutes unfairness in consumer transactions. Professor (now FTC Commissioner) Pitofsky has divided these theories, insofar as they relate to advertising, into three categories:

[F]irst, claims published without reasonable prior substantiation; second, claims which tend to overreach or exploit particularly vulnerable groups; and third, instances in which sellers fail to provide consumers with information necessary to make choices among competing products.

Examples of all three types of unfairness theories, plus some additional ones, can be found in the TRR's that were pending during this study. The Hearing Aids rule has an "ad substantiation" provision which prohibits sellers from making any claims about product characteristics unless, "[a]t the time of making any such representation, the seller possesses and relies upon competent and reliable scientific or medical evidence which fully establishes that each [claimed] benefit is significant and will be received by a significant number of buyers" The Credit Practices rule is based on the theory that particular substantive provisions in contracts involve the exploitation or overreaching of consumers. The initial notice in this rule points toward a rather open-ended cost/benefit analysis of the contract provisions or trade practices in question. Nondisclosure of essential information is the principal rationale for the nutrition disclosure requirements of

the Food Advertising rule. According to the analysis in the staff statement supporting the proposed rule, a failure to disclose product information may be unfair when it undermines "the ability of consumers to make basic determinations concerning the product and its value, the specific uses for which it is suited, its specific relation to the consumers' particular preferences or needs, or basic considerations involved in its proper use such as the care appropriate to it."

Because nondisclosures can be deceptive as well as unfair, there is potential for overlap between the two theories. This is illustrated by the two nonprescription drug rules, OTCS Drugs and OTC Antacids, which involved the extension to advertising of FDA labeling requirements relating to claims of safety or efficacy. The initial notice in OTC Drugs sets forth a straightforward deception theory. However, a second rationale, based on an unfairness theory, is also stated. It does not follow the Food Advertising rationale of unfairness by nondisclosure, but articulates an unfairness theory which might be called the contrary-to-public-policy rationale. Under this approach, permitting sellers to make claims in advertising that were properly prohibited in labelling "would nullify important public policies basic to the regulatory scheme [of premarketing clearances by FDA] which Congress has enacted for the protection of the public health."

Thus, the unfairness doctrine, at its present stage of evolution, provides an extremely plastic, open-ended set of theories. As the OTC Drugs rule suggests, this quality can make the unfairness doctrine a convenient "safety net" for rules or rule provisions which are basically grounded in deception: if it turns out that there is inadequate record support for a deception theory, a more general unfairness rationale might be used to salvage the rule. This, in turn, can give the Commission some room to maneuver during the post-hearing stages, and it provides a way for the staff attorneys to avoid being "put to their proof" on a narrowly-defined theory. In short, the use of ambiguous, multiple theories tends to expand the scope of agency discretion. It also expands the range of matters in dispute, and the kinds of proofs that might be marshalled to influence the decision.

Ambiguity and confusion can arise not only from the theory itself, but also from the explanation of the theory—or lack of it—contained in the documents initiating rulemaking. The examples given above involve situations where the theoretical underpinnings of a rule were made fairly explicit in the initial notice or other Federal Register documents. This was not always done. The central provision of the Hearing Aids rule, for example, was the section giving the buyer a 30-day right to cancel the transaction and receive a refund. The rationale for the provision contained in the initial notice could have been interpreted as: (1) a variant of the unfairness doctrine involving failure to disclose key product attributes (which, in this case, can only be disclosed through actual use rather than verbal disclosures); (2) an unfairness theory which holds that failure to provide a trial period constitutes

overreaching or exploitation of a peculiarly vulnerable group, the hearing-impaired; (3) a deception theory, if one posits that consumers of hearing aids assume that the product automatically achieves some minimum degree of efficacy, when in fact this is not the case for many consumers; (4) a self-help remedy for practices condemned on other grounds, such as false advertising or use of high-pressure sales tactics. A reader not intimately familiar with FTC law would be hard pressed even to identify these various theories. The staff investigative report is somewhat more informative; it indicates that staff apparently relied upon all of these theories, and some others as well, to support the cancellation provision. However, the staff investigative report was released only under the pressure of Freedom of Information Act requests, and prior to the release most of the detailed discussion of the theoretical basis for the rule was deleted as exempt material.

Even when the Commission's prehearing public documents do purport to state the theoretical basis of particular rule provisions, the discussion may be so vague or incomplete as to leave the reader in a state of uncertainty about the doctrinal basis of the rule provision.

Problems of theory—of defining exactly what has to be proved in a TRR proceeding—also arise in connection with the other two factors that the FTC is required to address, the prevalence of the practices in question and the economic effect of the proposed rule. That is, how pervasive do the acts or practices have to be before there is "enough prevalence" to warrant issuing a rule? And how much adverse economic impact is sufficient to defeat a rule provision? The statute, its legislative history, and agency precedents provide little guidance on this point. With respect to the determination of prevalence, as might be expected, rule supporters and rule opponents have emphasized different contextual factors affecting the "threshold of prevalence."

Staff supporting some of the rules have argued that when there is a very serious risk of consumer harm, a low or minimal showing of prevalence should be adequate. Industry spokesmen, on the other hand, argued that the required showing of prevalence varied according to the nature and severity of the remedy proposed. That is, a "definitional" rule provision which simply defined unfair or deceptive practices could be justified on a lesser showing of prevalence than a "preventive" or "fencing-in" provision which was designed to minimize the likelihood that industry members would commit unfair or deceptive acts. The distinction was based in part upon the perceived differences between an industrywide rule and an individual cease-and-desist adjudication. The proposed distinction was also based on the policy ground that imposition of uniform compliance standards when the practices were not highly prevalent would produce little benefit to consumers but could well raise the cost of doing business and the price of goods or services. Both of these kinds of arguments for a variable prevalence standard have a common-sense appeal, but "operationalizing" them into a rule of decision seems a highly subjective task.

In short, all three of the statutory factors bearing on the ultimate decision can generate open-ended theoretical premises, and the range of potentially relevant argument and proof that can be adduced to support or attack those premises may be vast. As a result, different persons can have widely divergent perceptions of the issues in a rulemaking. In the absence of some mechanism for compelling early, detailed articulation of the theoretical premises of the participants, there may not be a true "joinder of issue" until late in the process, or there may be none at all. Procedurally, the participants' varying conceptions of the theoretical framework governing the decision may give parties differing perceptions of what modes of participation are likely to be effective, and what procedural rights are crucial. In other words, the formulation of strategies and tactics of participation requires an implicit model of the substance of the decision to be made. When different participants have divergent assumptions, the likelihood of procedural conflict should increase.

A second level of possible confusion and misunderstanding concerns the degree of precision and certainty with which the FTC must make its findings. The problem arises because all of the three specific decisional factors involve aggregate or generic phenomena which, in theory at least, can be measured with some degree of scientific rigor. The understanding or behavior of consumers as it relates to claimed unfairness or deception, the prevalence of the acts or practices in question, and the economic effect of the proposed rule are all matters that can be illuminated by systematically gathering data and applying statistical or quantitative analyses. They are also matters that could be resolved by informed guess, qualitative estimation, or policy judgments. The scientific techniques for measuring consumer behavior and perceptions, or for projecting economic effects, are soft and imprecise. Even when quantitative studies are available, they are likely to be cumulative, inconsistent, or inconclusive. More pragmatically, the effort to achieve "scientific" levels of precision or certainty is likely to be prohibitively expensive and slow. The question, left unresolved by the statute and prior case law, is when (if at all) are these matters *required* to be treated in a technically precise fashion?

Even if the FTC is not required to resolve issues to a scientific certainty, there remains a distinguishable question relating to the discretion that the agency has to utilize diverse kinds of evidence. Traditionally, the Commission was able to rely upon a wide variety of proofs in cease-and-desist adjudications—or to make findings of deception without any evidence other than the dictionary definitions of words used in advertising, or its own reading of the challenged representations.

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 may seem

fairly illusory. At least, the participants' ability to affect outcomes by using procedural rights may depend largely on the open-mindedness and good will of the agency. If rule-opponents believe that the agency is not in fact open-minded, they may come to view the procedures not as a realistic opportunity to challenge the rule on the facts, but rather as an opportunity to engage in tactical gamesmanship for the purpose of delaying the inevitable or building a record of reviewable procedural error. In short, procedural safeguards may not be an adequate substitute for substantive standards in controlling agency discretion, and the lack of standards may contribute to procedural difficulties.

3. *Investigational Materials*

The uncertainties surrounding the Commission's legal theories, policy analyses and evidentiary requirements were reflected in the investigations leading to the TRRs and the supporting materials developed in them. For most of the rules pending during the period covered by this study, the most striking pattern is the lack of any pattern whatsoever. There were substantial variations in every significant stage of the investigatory process. Furthermore, most of these investigations had been designed and executed with a view toward building support for cease-and-desist cases or section 553 rulemakings. When the focus was changed to Magnuson-Moss rulemaking, staff naturally tended to continue to think in a 553 frame of reference rather than in terms of the more complex Magnuson-Moss procedures, with their emphasis on testing the factual premises of the proposal.

The Commission itself has never articulated a standard to measure the work product of a rulemaking investigation, other than the terse statement in the 1978 Operating Manual that the "staff [investigative] report must provide sufficient reason for the Commission to believe that corrective action is warranted and that rulemaking is the enforcement method of choice."

Thus, for the most part, the investigational material available to support the first wave of proposed rules consisted of large quantities of almost random information collected for purposes other than that for which it was ultimately used. For purposes of a Magnuson-Moss rulemaking proceeding, collecting masses of data through subpoenas seems both overinclusive and underinclusive. Such data contain much more fine-grained detail about individual firms and transactions than would be needed to assess the general patterns and practices in the industry. At the same time, the data were not gathered in accord with accepted sampling techniques and therefore will not support systematic generalization to the industry as a whole. The experience in the first wave of Magnuson-Moss rulemaking suggests that more careful planning of the investigations can produce a more accurate and efficient proceeding in the later stages. At least, rules like Prescription Drugs or Ophthalmic Goods which started out with a clear theory and an early focus on rulemaking seemed to move more swiftly and smoothly through all

stages of the process. The 1978 Operating Manual contains some suggestions which might, if thoughtfully implemented, help to minimize such problems in the future. One is the notion that staff should "consider at the outset the various enforcement mechanisms that are available"—that is, consider the possibility of developing a general rule before large quantities of information have been gathered.

Apart from its specific requirements and directives, the 1978 Operating Manual seems to be premised on the belief that staff's data-gathering during the investigative stage should be much more thorough than it was in some of the early Magnuson-Moss rulemaking investigations. In effect, the Manual encourages staff to have in hand all of the basic information it needs to support the rule before attempting to move the proceeding forward into the public stages.

However, an early focus on rulemaking is no guarantee that the investigation will be well designed and executed, especially when the investigators are attorneys who have not been trained in quantitative research methodologies. To fill this potential gap, the Operating Manual directs staff members to consult with the Bureau of Economics and to have an economist assigned when they "begin to consider rulemaking" as the preferred procedure for dealing with a pattern of unfair or deceptive practices." Even if this system works well, however, it can provide only a part of the expertise that might be needed in a particular investigation. The rules pending during this study involved a variety of technical issues in fields, such as health and nutrition, the physics of combustion and insulation, and diverse areas of consumer behavior and understanding. The FTC does not have this kind of expertise "in-house," and the process of retaining technical consultants to provide it is slow and complex. These procedural obstacles could deter staff from seeking consulting help, and might explain why the use of consultants was fairly rare in the rulemaking investigations studied.

4. Problems in Building the Rulemaking Record

The building of a rulemaking record begins at the earliest stages in the formation of a TRR, at the point when staff begins gathering information with a view toward developing a general rule. During the prehearing phase from the publication of initial notice to the start of hearings, two large and potentially important bodies of documents are placed on the public record: staff investigative materials, and prehearing public comments. Because Magnuson-Moss heightens the requirements for reasoned decision-making in trade regulation rulemaking and emphasizes the need for record support of the resolution of important factual issues, from the outset of the proceeding the record should be designed to be useful to decision-makers within the agency and to the court on judicial review. The prehearing record also provides a mechanism through which interested persons can exchange data, views and arguments, and thereby know the issues to be considered in

the hearing and posthearing stages of the rulemaking. If the prehearing record does not serve this function the hearings are likely to be diffuse and unfocused, and the likelihood that presentations will be redundant or irrelevant will increase.

Measured by these standards, the FTC's rulemaking records had some serious problems, especially in the first wave of rules issued under the Magnuson-Moss Act. For various reasons, including FOIA, the agency tended to put all its material, which was often voluminous, on the record. There were frequent difficulties in getting material onto the public record in an orderly fashion, and once material was incorporated into the record, it was difficult to find or to use.

Two rules (Credit Practices and Mobile Homes) have to date accumulated records of over 200,000 pages. In the 14 other proceedings commenced before April 1976, the records accumulated so far range from a high of 110,695 pages to a low of 8,377 pages, and average 40,551 pages. (Only three of these proceedings are yet complete, of course.) Processing such a large volume of paper placed severe strains on everyone concerned. The pre-Magnuson-Moss system for compiling, controlling, organizing, and indexing TRR records was plainly inadequate to the demands put upon it. This problem had not been anticipated and, once it became apparent, the agency was slow to respond. The pressure was compounded by the fact that 16 TRR proceedings were moving into the public phase of the process simultaneously between April 1975 and April 1976, and there was also pressure from the top levels of the agency and from Congress to move these TRR's along rapidly.

The size and practical inaccessibility of much record material probably contributed to the tactical maneuvering to shift the burden of proof that was observed in prehearing "motions practice" and in the group representatives' actions at some of the hearings. The task of mastering the record became expensive and difficult. For participants who were unable to overcome these burdens of time and cost, the result was less effective participation. Record materials played a minimal role in witness' preparation for hearings, and difficulties in using the record may have contributed to a tendency for each successive stage of the rulemaking process to become a separate and independent episode, with different participants submitting data or arguments that had little reference to what had been placed on the record in the earlier stages.

The second major component of the prehearing rulemaking record, the public comments, involved some of the same problems of organizing the record and making it accessible that the staff investigative materials present. However, the comments also raise more fundamental issues in the context of the hybrid Magnuson-Moss procedures. The statute specifically directs the FTC to "allow interested persons to submit written data, views and arguments, and make all such submissions publicly available"; however, it

does not provide much guidance as to how these public comments are to be used in subsequent decisions on a rule. Different assumptions about the purpose of the comment record can lead to rather different conclusions about the processes that should be used to collect and analyze public comments.

The public comments contained in the TRR records reviewed during this study, as in any administrative rulemaking that attracts widespread public attention and participation, were an extremely diverse lot. One important dimension of this diversity was the extent to which the commenters tended to view the rulemaking as a political process, or as a system designed to produce a reasoned decision.

Some commenters seemed to view the TRR proceeding as a process leading toward a technical decision, and tended to address the issues "on the merits." Others seemed to regard it as a referendum on the proposed rule and participated with comments which did little except indicate their support or proposition. Still others viewed it as a political arena in which it was necessary or appropriate to use political pressure, such as congressional intervention, or to mobilize large numbers of statements of support or opposition by persons with similar interests. Finally, many either appeared not to understand the process at all or were trying to accomplish some objective other than influencing the shape of the rule.

It is not clear, under either Magnuson-Moss or FTC practice, which of these types of participation are useful or appropriate. The statute's emphasis on reasoned decisionmaking and opportunities to challenge the factual basis for the rule seems to focus the attention of the agency almost exclusively on the question whether a proposed rule is logically and factually supportable rather than on its acceptability to affected constituencies. As the rulemaking process becomes increasingly technocratic rather than democratic the preferences and value judgments of constituency groups become increasingly irrelevant.

Because so few rules have reached completion it is difficult to tell the impact of the prehearing comments on the proceedings as a whole. Clearly, however, they have not fulfilled one function that, *a priori*, one might have expected them to fulfill. They have not served as vehicles for narrowing the proceeding, focusing the issue, or setting the stage for a sharp oral hearing.

5. Designation of Disputed Issues

The Congress sought a procedural middle ground in which the Commission would allow some cross-examination, but could confine it to important, controversial fact issues. The principal method of providing this control was through the concept of "disputed issues of material fact" "necessary to resolve," the only type of issues on which cross-examination had to be considered. This aspect of the statute was a clear failure. The designation of issues did not, in practice, serve to confine or focus cross-examination during the initial wave of rulemaking hearings conducted under the

statute, and the Commission ultimately gave up the effort to use designated issues as a means of controlling the hearings.

With the benefit of hindsight, it is possible to identify FTC policies and decisions that contributed to the irrelevance of disputed issues to the conduct of the hearings. But there also seem to be some serious conceptual difficulties in the disputed issues approach, arising primarily from the differences between trade regulation rulemaking and the other settings where a "disputed issue of material fact" standard has been used with more success.

Although the legislative history of the disputed issues language does not provide a detailed discussion of the procedural model that the statutory draftsmen were using, at least three bodies of doctrine seem relevant: (1) summary judgment in a judicial proceeding; (2) Professor Kenneth Culp Davis' distinction between specific facts which are appropriate for trial-type hearing, and general facts which are not; (3) the so-called "hybrid rulemaking" decisions in which reviewing courts required agencies to use limited trial-type procedures during informal rulemaking proceedings. In practice, none of those bodies of doctrine provided adequate guidance. Nor was the agency itself able to formulate adequate guidance for the designation of issues.

It is important to note that the FTC in general and its Presiding Officers in particular faced some strong incentives against limiting hearing rights. Threat of reversal on judicial review was a continuing concern, and without any clear doctrinal guideposts to indicate when cross-examination was necessary, the only insurance against reversal was to be liberal. Moreover, within individual proceedings it often appeared that virtually all of the major participants favored freewheeling, unfettered cross-examination. Their experience and ideology generally seemed to be litigation-oriented, and their approach to the TRR proceedings frequently mirrored this background. Not only industry representatives opposing a rule but also compensated consumer group spokesmen and, in varying degrees, FTC staff attorneys all seemed willing or eager to take advantage of whatever opportunities to cross-examine were available. At the same time, many of the Presiding Officers had had extensive experience in pre-amendment rulemaking, and some of them seemed to exhibit a marked distaste for the procedural bickering and diversion from substantive matters that inevitably accompanied attempts to limit examination of witnesses. The net effect of these differing perspectives was an expansive interpretation of the right to cross-examine, and this tendency was not counterbalanced by any pressure from the upper echelons of the FTC or from external constituencies to apply the statutory standards strictly. The Rules of Practice did not significantly elaborate the statutory standards for proposing and designating disputed issues of material fact, so this task was left in the first instance for the participants in individual proceedings. As might be expected, proposals for disputed issues came primarily from rule opponents, mostly representatives of the industry that would be regulated by the proposed rule.

Some of the more sophisticated proponents of disputed issues were trying to accomplish several tactical objectives through their submissions. First, they were careful to keep their options open (and perhaps expand the scope of the proceeding) by filing "shotgun" proposals which sought to put every conceivable issue in dispute. A second possible tactical objective of disputed issue proposals was continuation of the effort to obtain discovery, to pin down the evidence and theories that the FTC staff were relying on to support the rule. A third, and related, function of the disputed issues proposal was to jockey for advantage by trying to shift the burden to the FTC staff for building an adequate record on a particular proposition.

This jockeying for tactical advantage was a significant element in the issue-designation process. Counsel for the rule opponents may have believed, taking the statute and the rules of practice at face value, that a failure to propose issues could result in waiver or limitation of the opportunity to cross-examine and rebut adverse testimony. No careful lawyer would willingly give up those rights without detailed knowledge of the theories and facts supporting his opponents' positions. Yet, that kind of information often was not available, even for those who were diligent and had ample resources to search it out.

The same tactical considerations that motivated rule opponents to try to use the disputed issue proposals as a device for pinning down the theory of the rule and shifting the burden to the FTC led the rulemaking staffs to resist designation. In particular, staff attorneys seemed alarmed at the prospect that the label "necessary to resolve" would be attached to a large number of issues. At the same time, they had considerable difficulty trying to make sense out of the provisions of the statute and the Rules of Practice relating to issue-designation, and several vain attempts were made to clarify the statutory language in a way that would sharply limit the number of issues designated.

The net result of the Commission's failure to develop any coherent doctrine was that the Presiding Officers, who had initial responsibility for designating issues, were left with little guidance and considerable confusion. They also had a less complete grasp of the factual and theoretical underpinnings of a rule than the staff supporting the rule or the industry rule opponents, since the Presiding Officers were not appointed to conduct the rulemaking until publication of the initial notice—60 days before disputed issue proposals were due to be filed.

Left to their own devices, the Presiding Officers adopted idiosyncratic approaches to issue designation; but the general trend seemed to be toward broader formulation of designated issues. Several of the final notices designated issues which were plainly matters of legislative fact, such as consumer understanding or behavior, or the technical properties of foods or products, or the prevalence of acts or practices. Other designated issues seemed to involve policy or remedial or definitional questions, and a significant proportion of the designated issues were framed in terms of the ultimate questions to

be resolved in the rulemaking. With the designated issues this compressed and open-ended, there was little prospect of using them to control cross-examination or other trial-type procedures.

The demise of the designated issues began in the Vocational Schools proceeding, the first rulemaking to reach hearing after the passage of the Magnuson-Moss Act. The Presiding Officer's attitude toward the statutory limitation of cross-examination to "disputed issues of material fact" which are "necessary to resolve" is reflected in the following statements from his post-hearing report:

We were here dealing with another of those facile legislative phrases drafted, I suspect, by someone who never participated in a public hearing of this type but who sincerely wanted to give the Commission a device to control questioning of witnesses

. . . It is one thing to cope with this concept in the drafting rooms of congressional committees, the chambers of a court or the library of a law school, where there is time and quiet to consider all the nuances. It is quite another thing to tell one when you see it. Once the action starts and the questions and answers move back and forth, I would defy the scholars to read the label on that ball while it is still in play. That is, read it without completely destroying the effectiveness of the questioning being conducted as counsel debates with the Presiding Officer not the witness.

The ultimate policy, dubbed the "freedom for time" tradeoff, allowed the group representatives to pursue any line of questioning they wished, without regard to the designated issues, so long as they kept within the time limits set by the Presiding Officer. This approach was followed, with varying degrees of success, by the Presiding Officers in later proceedings. Cross-examination was even allowed in proceedings where no issues were designated, on the theory that "limited examination of witnesses could serve a useful function in developing a complete record."

As it became increasingly obvious to all that the designation of disputed issues was irrelevant to the conduct of the hearings, the question naturally arose: why bother to designate them at all? And so, toward the end of 1977 the FTC began to experiment with radical modifications of the issue-designation process. One approach, which involved collapsing the initial and final notices into a single notice of rulemaking containing a statement of questions that the Commission would like the participants to address, was first adopted in the Thermal Insulation proceeding and later copied in the Games of Chance Amendment and Standards and Certification rulemakings. The notice in the latter proceeding makes clear that time limits, general notions of relevance, and the scope of the direct testimony are the only limits on cross-examination. Although there is not enough experience with these modified procedures to permit a general comparison to

the earlier Magnuson-Moss hearings, observations of the Thermal Insulation hearings suggest that the absence of designated issues makes no significant difference in the conduct of the proceedings.

A second modification of the issue-designation process was made in the Children's Advertising rulemaking, noticed in April of 1978. Its central feature is a division of the public hearing into two sequential steps. The first stage is purely legislative hearing; no issues are designated and no cross-examination is allowed, except for questions that the Presiding Officer decides to ask as a matter of discretion. Following this legislative stage, interested persons may submit requests to cross-examine witnesses who appeared at the first hearing or to submit oral rebuttal. If these requests are granted, a separate "disputed issues" hearing will be held. Thus, the designation of disputed issues is deferred until after an initial round of informal hearings. As in the case of the Thermal Insulation procedures, it is too early to generalize about the strengths and weaknesses of this approach. However, it does seem to be quite unpopular with industry representatives who are prevented from cross-examining in the first-round hearing.

These two experimental approaches reflect a degree of ambivalence within the FTC regarding the disputed issues standard. The Thermal Insulation approach suggests a belief that it is not worth trying to limit cross-examination to "disputed issues of material fact which are necessary to resolve," while the Children's Advertising rulemaking seems premised on the assumption that the standard could work if the implementing procedures were altered. Both experiments may indicate the FTC's agreement with one of the findings noted above: that it is not possible to designate issues narrowly, or even to identify key issues accurately, until the participants and the Presiding Officer have had a realistic opportunity to master the data and theories relied upon by other participants.

The first-stage legislative hearing of the Children's Advertising proceeding is one method of trying to fill this need. An alternative possibility would be to retain the notion of designating issues at the outset of a single hearing (or series of hearings), while altering the nature and timing of the prehearing procedures so that an adequate information exchange would take place before issues were designated. At minimum, this latter approach would seem to require: (1) more orderly and complete disclosure of staff materials, including a more detailed and explicit articulation of staff's "theory of the rule" and systematic indication of the perceived relevance of staff investigative materials; (2) a comparable requirement that the major participants, the group representatives, articulate their theories and supporting data before issue-designation; and (3) a deferral of issue-designation until the prehearing comment period has closed and the participants (including the staff) have had an opportunity to evaluate and react to the comments.

6. *Discovery and Other Motions Practice*

As the rulemaking proceedings moved through the final notice step toward hearings, the matters in dispute often remained vague and unfocused. Both the staff theories supporting the rule and the designated issues were frequently framed in broad terms. The prehearing rulemaking records contained large masses of unanalyzed and inaccessible information, and in some instances significant portions of this material were still being disclosed after publication of final notice.

In these circumstances, it is not surprising that a lively motions practice developed in several TRR proceedings. The content of these motions was limited only by the ingenuity of counsel, but in general they raised four kinds of issues: (1) requests for extension of the various filing deadlines established for the proceeding; (2) motions relating to disputed issues of material fact; (3) proposals to terminate the rulemaking proceeding, or to change its scope; and (4) attempts to obtain discovery. Among these major types of motions, the discovery requests were the largest and most important category.

Potentially, at least, the prehearing rulemaking record—consisting primarily of staff investigative materials and public comments—plays a crucial role in giving substance to the participatory rights conferred by the Magnuson-Moss Act. During the prehearing stages interested persons have to prepare three kinds of submissions: prehearing comments, proposals for disputed issues of material fact, and witness testimony to be presented at the hearings. Without reasonable access to the data and theories on which the staff position is based, it can be difficult or impossible to use these participatory opportunities in a well-focused, effective manner. In essence, then, the handling of the prehearing rulemaking record may determine whether interested persons can in fact challenge the factual premises on which the Commission is proceeding, as intended by the drafters of the Magnuson-Moss Act. Moreover, to the extent that important data, views or arguments may find their way into the prehearing record, administrative shortcomings in organizing, indexing or preserving that record may frustrate the statute's goal of assuring reasoned decision-making in trade regulation rulemaking.

On a more pragmatic level, the size and complexity of the records generated in many TRR proceedings mean that seemingly trivial questions of indexing, access and copying can have a major influence on the balance of advantage in a proceeding. If an outside party can pin the staff down to a narrowly defined theory at the outset of a proceeding, force the staff to specify the evidence and argument it is relying on, and shift the cost and burden of indexing the record to the FTC, he has gained a major tactical advantage. Not only has the rule opponent greatly decreased the cost of challenging a rule, he has also probably increased the chances of defeating it, either before the agency or on judicial review. In addition, if the later stages

of the proceeding should reveal that the original staff theory was slightly wrong, or that there are related acts or practices not covered by the proposed rule that should be prohibited, the rule-opponent has good grounds for arguing lack of adequate notice. Conversely, if the FTC staff can delay or prevent rule-opponents from gaining access to significant documents, force them to create their own indexing systems from scratch, and frame the legal theories broadly enough to keep the agency's options open until the posthearing stages, it can maximize the likelihood that a rule will be adopted. Thus, in many respects the key question is not so much whether it is technically possible for an outside party to obtain sufficient information to challenge a proposed rule; rather, the issue is what steps the FTC ought to be expected to take to reduce the burdens of a challenge.

Discovery attempts, besides their possible utility in creating the war-of-attrition morass so common in multi-party litigation, represented attempts by interested parties to: (a) Pin the agency down as to its facts and theories; and (b) Force the agency to analyze and index the supporting materials.

Discovery motions were not a uniform feature in all TRR's; rather, they were heavily concentrated in a few proceedings. Among the seven core rules, all of the 48 total discovery motions were filed in three proceedings. This variance among the proceedings seems to reflect differences in the general level of hostility and contentiousness between staff and rule-opponents, as well as more specific attitudes of the major participants—for example, whether staff willingly disclosed most of its investigative report and file materials, or the extent to which outside counsel were willing to accept the proposition that rulemaking should be less judicialized and adversary than a formal trial-type hearing.

Not surprisingly, in view of the strategic situation described above, all requests for discovery directed at FTC staff were denied.

A second potential discovery issue concerns discovery by one interested party directed at another. The Rules of Practice contemplate such a possibility, though under rigorously limited conditions. So far, in only one proceeding has one group representative been successful in obtaining compulsory process against another, and the experience in this instance indicates that these requests should be granted with extreme reluctance. Wrangling over this subpoena has consumed over a year, and is not yet over.

7. Conduct of the Oral Hearings

As TRRs moved into hearings it became apparent that many significant procedural issues were unresolved. The prehearing stages often had failed to produce consensus or even joinder of issue on the major questions of fact, law and policy; indeed, in some areas, such as discovery and designation of disputed issues, the prehearing period had simply initiated procedural disputes that carried forward into the hearings. The FTC Rules of Practice relating to the conduct of hearings contained a broad delegation of authority

to the Presiding Officers, but little specific guidance. Thus, the task of giving content and direction to the hybrid hearing process envisioned by the statute fell primarily to the Presiding Officers and group representatives who were the major participants in the proceedings.

Resolving the issues was made more difficult by the fact that a Magnuson-Moss hearing, while "adversary" in some respects, differs significantly from a conventional trial-type adversary hearing in four areas:

(a) *Party Initiative and Control.* In the common-law tradition, the adversary system gives affected parties a high degree of control over fact-gathering, and over the presentation of proofs and arguments. The sole record for decision is the one which the adversary parties build themselves. In Magnuson-Moss, large blocks of material are placed on the record without overt sponsorship by the "parties" (group representatives). Witnesses and interested persons submitting comments or rebuttal have direct rights to participate and are not necessarily under the control of the group representatives. At least nominally, the FTC staff and the Presiding Officer have different roles from their counterparts in a true adversary system. The staff is charged not only with the task of presenting facts and arguments to support their position, but also with the broader obligation of building a complete record on all views and issues relevant to the rule.

Similarly, at least some of the Presiding Officers viewed their responsibilities in the hearings as broader than simply acting as the "traffic cop" to enforce procedural fairness among the group representatives. Rather, they sought to build a comprehensive, useful record for the Commission to consider in making its ultimate decision on the rule. But while they had larger responsibilities for record-building than does a judge the Presiding Officer had less clearly delineated procedural authority or "leverage" to control the hearings.

(b) *Fact-gathering vs. fact-testing.* In a fully adversary system of decision-making, the parties usually have completed the task of collecting and organizing factual material before the start of formal proceedings. An informal rulemaking hearing, on the other hand, is designed at least partly as an open fact-gathering process.

The Magnuson-Moss Act seems to assume that the hearing will contain both fact-testing and fact-gathering elements. The FTC's experience in implementing the statute suggests that it can be difficult to reconcile these two objectives within the confines of a single oral hearing.

(c) *Procedural formality of judicialization.* Another characteristic of a classical adversary system is the existence of an elaborate body of procedural and evidentiary rules to govern the conduct of the proceedings. No such body of rules existed for hybrid rulemaking, and neither the statute nor the Rules of Practice nor general legal concepts provided guidance as to how formalized a hybrid proceeding should be. There were frequent procedural disputes in some of the hearings, and numerous attempts by counsel

to move the process further toward the adversary trial model. The Presiding Officers generally tried to resist "judicializing" the procedures.

(d) *Polarization and contentiousness.* An adversary system seeks truth through confrontation. This implies a substantial measure of contentiousness, if not hostility, between the contending adversaries. By contrast, informal rulemaking, as it was conceived at the time of the Administrative Procedure Act, is a decision-making process that relies heavily on consultation to try to find common ground among the affected interests, rather than on confrontation. As the rulemaking procedures become more formal and trial-like, they may tend to polarize the positions taken by the parties, and make a consensual resolution or an acceptable modification of the rule less likely.

As a general proposition, the conduct of the oral hearings represented a working out of the interaction of these uncertainties about the nature of the proceedings with the pre-existing substantive uncertainties about the legal, theoretical, and factual bases of the proposed rules.

The Presiding Officers, working in a context in which the crucial issues and evidence, and, indeed, the very purpose of the oral hearing, were poorly defined, tried to accommodate the various demands placed upon the proceedings by the interested persons and the FTC staff. They tended to emphasize the fact-gathering function over the fact-testing, and minimized procedures that would preclude or circumscribe witness testimony. Most of the time spent on hearings was devoted to questioning and cross-questioning witnesses (as contrasted with delivery of statements), but the amorphous nature of many of the initial witness statements, combined with the unlimited scope of cross-examination inherent in broad issue designations and the freedom-for-time trade-off, tended to downgrade the fact-testing function. Cross-examination often turned into a credibility attack on the witness, quarreling with his right to have an opinion rather than testing specific assertions.

Cross-examination was most useful to the record when used in connection with expert testimony, not because it discredited the witness—such a conclusion was rare—but because it gave experts an opportunity to expand their views and explain them in lay terms. Perhaps the strongest case for cross-examination as a fact-testing device is its utility in exposing methodological shortcomings or problems of interpretation in survey research testimony.

E. CONCLUSION

This phase of the Conference's study has covered the process of rule-making under Magnuson-Moss only through the hearing stage. A supplemental study discussing the post-hearing procedures will be completed at a later time. Proposed recommendations covering these initial stages of rule-making have been forwarded to the Conference for its consideration. No

recommendations on the statute itself have been prepared, though such recommendations may be appropriate at the conclusion of the supplemental study.