



## **Recommendation 79-1**

### **Hybrid Rulemaking Procedures of the Federal Trade Commission**

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(Adopted June 7-8, 1979)

The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, P.L. 93-637, which became effective January 5, 1975, provides authority and procedures for the Federal Trade Commission's promulgation of "trade regulation rules." The statute requires the Commission to engage in "hybrid" rulemaking, a style which adds to the notice-and-comment requirements for "informal rulemaking" under section 553 of the Administrative Procedure Act such requirements 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. Such 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, by Pub. L. 95-558.]

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). The present recommendations, therefore, represent an interim analysis, based on as much information as has been available early enough to report by Congress' deadline of June 1979. The observations and conclusions in this report are based on those proceedings begun prior to April 1976. The Conference has reviewed and considered proceedings instituted after that date but has not systematically evaluated the experience in such proceedings. The Conference will continue this project with the aim of developing a supplemental report and recommendations as soon as a sufficient number of rulemaking proceedings have been completed to provide perspective on the process as a whole.



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While the Commission 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, which, as originally enacted, stated "unfair methods of competition in commerce are hereby declared unlawful." This 1914 law was not construed by the courts to be a consumer protection statute. The Supreme Court, in *Federal Trade Commission v. Raladam Co.*, 283 U.S. 643 (1931), held that the Commission must in each case show some harm to competitors or the competitive system. 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 to the statute a provision that "unfair or deceptive acts or practices in commerce" are also unlawful.

Until the early 1960's the Commission did not attempt to exercise any authority to promulgate legislative rules defining unfair methods of competition or unfair or deceptive acts or practices. It used its authority under Federal Trade Commission Act section 6(g) "to make rules and regulations for the purpose of carrying out the provisions of this Act" only to issue interpretive rules and general statements of policy. Starting in 1963, however, the Commission commenced proceedings aimed at promulgating legislative rules declaring certain specific trade practices unfair or deceptive within the meaning of section 5. Between 1963 and passage of the Magnuson-Moss Act the Commission conducted 35 trade regulation rulemaking proceedings under section 6(g), using the informal notice and comment procedures of the Administrative Procedure Act, 5 U.S.C. § 553.

The Commission's authority to promulgate trade regulation rules was not free from doubt, however, and, in *National Petroleum Refiners Association v. Federal Trade Commission*, 482 F. 2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974) (the Octane case), it was challenged in the context of a rule requiring that octane ratings be posted on gasoline pumps. The United States Court of Appeals for the District of Columbia Circuit upheld the Commission's power to make such legislative rules under section 5.

During the period the FTC's legislative rulemaking authority was in litigation, debate about the existence and desirability of legislative rulemaking authority to implement section 5 of the Federal Trade Commission Act took place in the Congress. The issue was first raised in bills introduced in late 1969 in the 91st Congress. Opponents of expanded authority for the FTC contended that the Commission did not possess, and Congress should not give it, the power to make legislative rules, and that any rulemaking power Congress might nevertheless decide to create should be accompanied by restrictions to guide and control its use. The Commission and



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its supporters contended that the power already existed, though codification might be useful, and that section 553 of the Administrative Procedure Act provided an adequate procedural framework. After the *Octane* decision, the congressional debate moved beyond the issue of whether the FTC ought to have legislative rulemaking authority to the question of what limitations should accompany a delegation or confirmation of such authority. The Magnuson-Moss Act represents the congressional resolution of the different views about FTC rulemaking.

The Act extended the Commission's jurisdiction to matters "affecting commerce" as well as "in commerce," but did not otherwise 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, but has been the subject of debate in several rulemaking proceedings.



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(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 an 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" an 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." It may, for example, impose time limits, conduct cross-examination on behalf of a person, and require group representation of similar interests.

(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 words "concise, general" from the phrase "concise, general statement of their basis and purpose" has substantive importance is, again, a matter of debate.

(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



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Act, a 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 the Magnuson-Moss Act, the Commission's "action" in a trade regulation rulemaking under section 18 must be supported by "substantial evidence in the rulemaking record," which consists of the rule, its statement of basis and purpose, the transcript of the oral hearing, any written submissions, and any other information which the Commission considers relevant. However, the "contents and adequacy" of the Commission's statement of basis and purpose "shall not be subject to judicial review in any respect." The Court is also empowered to set aside the rule if it finds that denial of cross-examination or rebuttal "has precluded disclosure of disputed material facts which was necessary for a fair determination \* \* \* of the \* \* \* proceeding taken as a whole."

The requirements added by Magnuson-Moss seem to be based on a different model of rulemaking and the role of outside parties 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 rulemaking, require a somewhat different strategy of implementation from the approach agencies frequently use 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 decisionmaking in which the agency simply identifies a problem, outlines possible solutions in general terms, and then seeks 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



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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 basis 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 decisionmakers 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.

The Magnuson-Moss Act became effective on January 4, 1975. In April 1975 the Commission promulgated Rules of Practice concerning the initial notice stage of rulemaking proceedings and in August, after notice and comment, promulgated rules for the remaining stages of a rulemaking proceeding. By April 1976, using these Rules of Practice, the Commission had commenced 16 rulemaking proceedings under the Magnuson-Moss Act. By April 1979 the number had grown to 20. Of these, 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

Rule	Notice of Proposed Rulemaking	Status as of April 15, 1979*
A. Completed Rulemakings		
1. Ophthalmic Goods & Services (Eyeglasses)	Jan. 16, 1976 (41 FR 2399)	Final rule published on June 2, 1978
2. Vocational Schools	May 15, 1975 (40 FR 21048)	Final rule published on Dec. 28, 1978
3. Prescription Drugs	June 4, 1975 (40 FR 24031)	Proposed rule withdrawn on Nov. 24, 1978



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Rule	Notice of Proposed Rulemaking	Status as of April 15, 1979*
<b>B. Proposed Rules Before the Commission for Final Action</b>		
1. Residential Thermal Insulation ("R-Value")	Nov. 18, 1977 (42 FR 59678)	Commission met to consider a final rule on Nov. 29, 1978; Jan. 24, 1979
2. Funeral Practices	Aug. 29, 1975 (40 FR 39901)	Commission met to consider a final rule on Mar. 23, 1979
3. Care Labeling Amendment	Jan. 26, 1976 (41 FR 3747)	Public comments on reports were due Sept. 18, 1978
4. Used Cars	Jan. 6, 1976 (41 FR 1089)	Public comment on reports were due Feb. 13, 1979
5. Hearing Aids	June 24, 1975 (40 FR 26646)	Public comments on reports were due March 29, 1979
6. Holder in Due Course Amendment	Nov. 18, 1975 (40 FR 53530)	Public comments on reports were due Jan. 24, 1979
7. Food Advertising	May 28, 1975 (40 FR 23086)	Public comments on reports were due Feb. 26, 1979
<b>C. Proposed Rules at the Post-Hearing Report-Writing Stage</b>		
1. Protein Supplements	Sept. 5, 1975 (40 FR 41144)	Presiding Officer report released July 31, 1978; BCP report not released
2. Credit Practices	April 11, 1975 (40 FR 16347)	Presiding Officer report released Oct. 13, 1978; BCP report not released
3. Over-the-Counter Drugs	Nov. 11, 1975 (40 FR 52631)	Presiding Officer report released Jan. 4, 1979; BCP report not released
4. Health Spas	Aug. 18, 1975 (40 FR 34615)	Hearings completed on Dec. 16, 1977
5. Mobile Homes	May 29, 1975 (40 FR 23334)	Hearings completed on Jan. 31, 1978
6. Over-the-Counter Antacids	April 6, 1976 (41 FR 14534)	Hearings completed on Feb. 6, 1979



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Rule	Notice of Proposed Rulemaking	Status as of April 15, 1979*
D. Proposed Rules in the Pre-hearing and Hearing Stage		
1. Cellular Plastics	July 23, 1975 (40 FR 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 FR 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 FR 48654)	Scheduled hearings canceled on Jan. 2, 1979, due to limited interest
4. Standards and Certification	Dec. 7, 1978 (43 FR 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 notice, 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.

The consultant's report documents that these statutory goals of more systematic development of rules by the agency and more effective participation by the public were not fully realized in many of the rulemakings initiated by the FTC. In part, this was because investigations which originated before 1975—with the objective of either selecting individual violators for cease-and-desist actions or commencing section 553 proceedings—were used as the basis for Magnuson-Moss rulemaking proceedings. As a result, information was gathered, and rulemakings were begun, without specific consideration of the meaning of "substantial evidence" in the context of FTC rulemaking or of the kinds of information necessary for an adequate analysis of the particular factors Magnuson-Moss requires to be included in the statement of basis and purpose. Moreover, at the outset the Commission's Bureau of Consumer Protection lacked both the non-lawyer personnel and the traditions necessary for large-scale policy-oriented investigations, and the resources of all kinds necessary to commence 16 rulemaking proceedings in the first year. The problems were made more difficult by the fact that no other agency had been called upon to implement hybrid rulemaking under so general a



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mandate as that contained in section 5, and FTC efforts to find relevant models in the hybrid procedures of other agencies were unsuccessful.

Perhaps the most important factor, however, was that the agency's implementation of hybrid rulemaking did not compel the progressive narrowing described above. The Commission did not take the steps necessary to define the relevant theories, facts and issues at an early stage or to lessen the areas of uncertainty as the proceedings continued. As a consequence, its rulemaking did not seem to result in a progressive sharpening of the Commission's own analyses of the problems. Nor did the proceedings force the participation of other interested persons to be focused, meaningful, or constructive. At the same time, of course, the statute and the FTC's Rules of Practice gave these other interested persons many opportunities to participate. This combination of broad procedural rights and lack of guidance as to the effective use of the rights resulted in extensive, repetitive presentations.

The specific problems were:

(1)(i) *The initial basis for public participation.* If interested persons are to submit informed comment and challenge the factual bases of a proposed rule, they must have access to the Commission's rationales and information supporting the proposal. However, these were often not readily available. The FTC's initial notices of rulemaking often contained conclusory or truncated discussions of the tentative legal theories, policy judgments, and factual assumptions underlying the proposals.

(ii) An early and clear articulation of the bases of a proposed rule is particularly necessary in FTC hybrid rulemaking because the broad "unfair or deceptive acts or practices" standard governing the exercise of the Commission's legislative rulemaking power does not in itself give sufficient specific structure to a proceeding. The proposed rules contained a wide variety of subject-matter and remedial provisions, and involved a number of different industries. Many rules were based on novel theories of unfairness or deception rather than on traditional principles. Some rules contained multiple theories of unfairness or deception or covered numerous and varied commercial practices. As a result, considerable confusion existed throughout the proceedings regarding the nature of the Commission's rationales and the elements of the proof necessary to support or refute the Commission's proposals.

(iii) The FTC staff investigative reports recommending that the Commission initiate rulemaking sometimes contained more detailed discussions of the theories and policy choices supporting recommended rules, but these were frequently not made publicly available early



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enough to be used by those preparing written comments or proposals concerning disputed issues of material fact, nor did the staff reports provide clear connections between legal and policy conclusions and the factual information underlying the proceedings. In fact, many staff investigative reports contained little discussion of the evidentiary basis supporting the staff's proposal. There was often heavy reliance on postulated legal and policy considerations, rather than specific facts. Of course, many of the reports prepared in connection with pending rulemaking proceedings were written prior to passage of the Magnuson-Moss Act.

(2)(i) *Effective access to supporting materials.* Several factors tended to cause an expansion in the volume of paper in the rulemaking proceedings. In many of the investigations originally designed to develop cease-and-desist actions against particular respondents rather than industry-wide rules, compulsory process had been used to gather massive documentation concerning the practices of certain companies. In other proceedings, a wide variety of material of marginal significance had been collected as the staff educated itself about a particular industry. The Magnuson-Moss Act requirement that the Commission base trade regulation rules on a rulemaking record, together with the disclosure provisions of the Freedom of Information Act, led the FTC staff to place in the rulemaking record all of this material that might possibly be relevant, whether or not the staff had any plans to rely on it.

(ii) This expansion of volume had two important consequences. First, it took time for the staff to collect the material and transmit it to the rulemaking record. Much material was made public too late to be used by participants submitting written comments or proposing disputed issues of fact for consideration at the oral hearings. Second, the records generated were too massive and poorly organized to be used effectively. Two rules (Credit Practices and Mobile Homes) have records of over 200,000 pages. In the 14 other proceedings commenced before April 1976, the records accumulated before April 15, 1979, 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.) This growth in volume was not matched by a compensating investment in resources necessary to organize and index the material so as to facilitate public use. The creation of sixteen large rulemaking records in a short period of time overtaxed the FTC's record management capabilities. Problems caused by the volume of material were compounded by a lack of central control over record organization and indexing. Presiding Officers and FTC rulemaking staff attorneys experimented with diverse organizing and indexing schemes, and the resulting lack of standardization further complicated and slowed the processing of documents.



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(iii) The net result was that in many situations it became virtually impossible for a participant to determine with any confidence which material was relevant to or significant for any particular point raised by a proposed rule. This seriously undermined the concept that the basis of a rule should be tested.

(3)(i) *Availability of the pre-hearing comments.* In theory, the prehearing written comments submitted by interested persons could provide a framework for subsequent stages of a proceeding by sharpening the issues, suggesting alternatives to agency assumptions, and delineating the central matters in dispute. In fact, these comments were rarely referred to at the hearings.

(ii) This was due partly to deficiencies in the record management system. The chaotic situation described above often led to substantial delays in placing written comments, as well as other materials, on the record. When the comments were incorporated into the record, shortcomings in the indexing or availability of records made it difficult or impossible to use them in a timely, efficient manner.

(4)(i) *"Discovery."* In part because of the difficulties of identifying the key legal theories or policy assumptions and of locating crucial supporting material in the rulemaking records, and in part because counsel for some interested persons tended to treat the proceedings as the equivalent of multi-party adjudication, interested persons frequently filed a variety of discovery motions and Freedom of Information Act requests in an effort to obtain statements of the theories and information upon which the Commission intended to rely. The Commission has never clarified whether it regards discovery motions as a legitimate device in rulemaking proceedings, nor established any systematic procedure whereby participants can obtain an elaboration or clarification of the staff's legal and policy theories or compel the production of underlying materials. Requests for "bills of particulars," written interrogatories directed at the FTC staff and attempts to discover the staff's case at prehearing conferences have been uniformly rejected. Therefore, the participant's basic rights of access to FTC material have been defined by the Freedom of Information Act. Moreover, the agency complied with FOIA by placing large, undifferentiated masses of material on the rulemaking record, a practice that does little to define the issues in a proceeding or to establish the relative importance of different pieces of information to the rulemaking proposal. At the same time, processing discovery requests and complying with FOIA has involved a significant drain on staff resources.

(ii) Similarly, the Commission has not established any systematic procedure whereby the staff can force an elaboration or clarification of other participants' legal and policy theories, or,



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within the context of the rulemaking proceeding, compel the production of underlying materials. It has, however, confirmed the authority of the staff of the Bureau of Consumer Protection to issue subpoenas independently of the Presiding Officer.

(iii) An additional discovery issue concerns the right of one non-FTC participant to persuade the Presiding Officer to subpoena records of another. As of April 15, 1979, such a subpoena has been issued on only one occasion, but the potential of such third-party subpoenas to create delay and disincentives to participation could be significant.

(5)(i) *Designation of disputed issues.* As the rulemaking scheme established by the Magnuson-Moss Act was implemented by the Commission's rules of practice, "disputed issues of material fact which are necessary to resolve" were identified before any hearing, and indeed even before the close of the initial comment period. As a means of limiting cross-examination at the oral hearings, this device proved unworkable. It required identification of highly specific issues at a time when there had been minimal definition of even the major issues in the proceeding. It required identification of factual disputes even before interested persons had finished submitting their initial data, views and arguments in prehearing comments. Finally, it required Presiding Officers to make complicated, important judgments before they had had time to master the subject matter, and in a context in which the interested parties had an incentive to advocate broad, vague designations that would avoid precluding cross-examination on any issue.

(ii) The result was that the designation of issues on which cross-examination might be allowed did little to focus the proceeding. If the statutory phrase "disputed issue of material fact \* \* \* necessary to resolve" is to serve as a limitation on cross-examination, or as a means of focusing on crucial fact issues, then identification of fact issues must take place after the major issues in the proceeding have been made as clear as possible, and with reference to specific evidence previously entered into the rulemaking record.

(6)(i) *Conduct of cross-examination.* Largely because the designation process failed to produce sets of precisely defined issues, the effort to use designation as a device for limiting cross-examination was abandoned in favor of a "freedom-for-time" policy. Group representatives and FTC staff could question witnesses on any points they wished, so long as they stayed within established time limits.

(ii) This "freedom-for-time" policy permits cross-examination to concentrate on policy or opinion rather than factual issues, and, because much of the testimony offered in the hearings



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consisted of repetitious opinion unsupported by specific factual data, such cross-examination has seldom produced useful factual information. It generally has involved a credibility attack on the witness or his testimony.

(7)(i) *Utility of oral hearings.* Oral hearings generally were not used to refine or respond to points made in the prehearing written record; rather, they tended to become an independent stage of the proceedings. This can be attributed to the fact that the prehearing phase did not produce an adequate identification of points at issue, and that Magnuson-Moss leaves debatable the Presiding Officer's authority to exclude the testimony of repetitive witnesses. In addition, the hybrid, partly adversary character of the proceedings, in which group representatives were given some of the rights of parties in trial-type proceedings while Presiding Officers were delegated broad authority to limit or control the group representatives' participation, produced some uncertainties and difficulties for the Presiding Officers in controlling the proceedings, and in some instances contributed to an antagonistic atmosphere at the hearings.

(ii) The Administrative Conference study has necessarily focused on the rulemaking proceedings begun in 1975 and 1976. None was commenced in 1977 until the Thermal Insulation Rule was noticed on November 18, 1977. The Conference does not at this time have extensive information on the Thermal Insulation Rule, the Children's Advertising Rule (noticed April 27, 1978), the Games of Chance Amendment (noticed October 19, 1978), or the Standards and Certification Rule (noticed December 7, 1978). In addition, the consultant's reports now available to the Conference cover the rulemaking proceedings only through the stages of investigation, initial and final notices of rulemaking, prehearing comment and oral hearing. Thus the post-hearing procedures have not been considered, and no recommendations concerning these procedures, or concerning the statutory scheme as a whole, can be advanced at this time.

(iii) One point deserves special emphasis. The Commission's approach to rulemaking has not been static. The Commission itself has recognized many of the problems discussed above, and has been experimenting with a series of measures designed to improve its rulemaking. For example, new procedural approaches are being tried in all four of the most recent rules. Commission awareness of the need for greater input from the Bureau of Economics has resulted in the creation of a new division of that Bureau to work exclusively upon consumer protection matters. Directives have been issued designed to make the initial staff reports more thorough and useful. Steps have been taken to increase the accessibility of rulemaking records



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by improving organization and indexing, and by making documents available on microfilm. Internal efforts to develop better rulemaking processes have resulted in the FTC's 1978 Operating Manual, which is cited at several places in the consultant's report as reflecting conclusions similar to those of the Conference study.

(iv) Thus, the recommendations set forth below are not intended to imply that the Commission has not recognized the problems or taken steps to alleviate them. They represent, rather, the Conference's current views on practices which will promote effective and efficient rulemaking under Magnuson-Moss, including some already utilized or endorsed by the FTC.

(v) The Conference does not recommend any revisions in the statute at the present time, though such recommendations may be forthcoming after completion of the supplemental report.

### **Recommendations**

1. The Commission should include in the initial notice of proposed rulemaking a description of the theories and materials which it then considers relevant to the rulemaking, together with appropriate references to the rulemaking record, including materials both supporting and opposing any proposed rule. The notice should indicate with reasonable specificity both the issues upon which the Commission seeks comment and information, and the kinds of evidence or information that are likely to be valuable to the Commission's resolution of the issues.

2. At the time the notice of proposed rulemaking is published, the Commission, consistent with its present policy, should place in the rulemaking record, and index, the staff investigative report recommending rulemaking (which should contain the staff's analysis of the issues, a summary of the information considered significant by the staff, and the methods of analysis used by the staff) and all relevant information in the possession of the staff. Information exempt under the Freedom of Information Act may be withheld. Similarly, all relevant material developed by the staff after the notice is published should be promptly placed in the rulemaking record, and indexed.

3. To the extent feasible, and as early as practicable in the proceeding, the Commission should provide guidance to participants concerning suggested methods for the marshalling and presentation of information.



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4. The Commission, to the extent feasible, should promote (but not require) the use of standard methods for the marshalling and presentation of information with respect to issues commonly recurring in trade regulation rulemaking proceedings.

5. In conducting investigations which may lead to trade regulation rulemaking, the Commission should experiment with techniques for eliciting increased information and views from the public, including the use of advance notices of proposed rulemaking with opportunity for public comment and meetings for conferences open to the public on adequate notice. The Commission should assure that its staff solicits the views of affected interest groups during the course of the investigation, including groups that might not otherwise participate.

6. Many issues that arise in the course of formulating rules pursuant to section 18 of the Federal Trade Commission Act require, or can benefit from, the contributions of disciplines other than law. The Commission should continue its efforts to assure appropriate use, at all stages, of experts whose disciplines are relevant to consideration of the proposed rule, including economists, statistical analysts and consumer research specialists.

7. To avoid burdening the rulemaking record, the Commission, consistent with its present policy, should require that the staff maintain, separately from that record, a public file of related documents, collected and generated by it, that the staff, pursuant to procedures established by the Commission, has determined not to be relevant.

8. Proper handling of rulemaking records can greatly assist public participation in proceedings, reduce delay, and enhance the quality of decisions. The Commission should continue and intensify its efforts to improve public and staff access to the rulemaking record through upgrading of record management practices, storage and retrieval technologies, copying and microfilming capability, and record indexing and organization. The Commission should ensure that all materials in the rulemaking record are indexed as they are received, and that adequate facilities are provided for members of the public to inspect, copy, and work with the record.

9. The use of subpoenas should be restricted to the investigation conducted by the Commission staff to develop information relevant to the rulemaking, including information both supporting and opposing the rule. Once a hearing has been noticed, the subpoena power should be used sparingly, and, once a hearing has been commenced, should be used only with the approval of the Presiding Officer upon a showing of need.



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10. In lieu of a discovery practice, the Commission should provide by rule that at a hearing or within a reasonable time thereafter the Presiding Officer, on his own motion or on that of the Commission staff or any other participant, may request the staff or any other participant at that hearing to clarify, elaborate or support any oral or written presentation then or previously made by such participant. The rule should also provide that failure to comply with such a request may result in the drawing of adverse inferences with respect to the presentation, or a reduction in the weight to be given to the presentation.

11. If a person appealing from the Commission's initial denial of a Freedom of Information Act request asserts that the information sought is desired for use in a pending rulemaking proceeding, the agency official handling the appeal should not affirm the denial on the basis of an exemption in that Act without first obtaining the views of the Presiding Officer in the proceeding as to the utility of that information, except where withholding the information is required by law. The Commission should adopt such amendments to its Freedom of Information Act procedures as may be necessary to assure this consultation.

12. As a general practice the Commission, after the close of the first period of submission of written comments, should conduct a legislative-type hearing, following which it should determine whether there appear to be "disputed issues of material fact it is necessary to resolve." If it so determines, such issues should be designated with specificity, and a further hearing in accordance with section 18(c) of the Federal Trade Commission Act should be held for the purpose of resolving them.

13. An oral hearing can serve any or all of at least four somewhat separate functions: (1) fact gathering; (2) fact testing; (3) assessment of the views of different segments of the public; and (4) clarification of positions and exchange of views on policies, values or desirable lines of inquiry. The fact testing function is performed in the section 18(c) hearing referred to in Paragraph 12, above. The legislative hearings should be designed according to which of the other three functions is believed likely to predominate. For example, the clarification of positions and exchange of views on policies, values or desirable lines of inquiry may best be furthered by such informal devices as roundtable or panel discussions.

14. The statutory phrase "disputed issues of material fact it is necessary to resolve" should be understood to mean only those issues (1) which are capable of being resolved as matters of fact, and (2) whose resolution is essential to the evaluation or formulation of a rule.



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15. Cross-examination may not be necessary on a designated disputed issue of material fact. However, if the Commission determines to limit or deny cross-examination on a designated issue, it should state the basis for its decision.

### **Citations:**

44 FR 38817 (July 3, 1979)

\_\_\_ FR \_\_\_\_\_ (2012)

1979 ACUS 3