



Recommendation 79-5

Hybrid Rulemaking Procedures of the Federal Trade Commission—Administration of the Program to Reimburse Participants' Expenses

(Adopted December 14, 1979)

The Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, P.L. 93-637, which established procedures for the Federal Trade Commission's promulgation of trade regulation rules, also authorized the Commission to "provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating" in those proceedings. The statute (15 U.S.C. § 57a(h)(1)) provides that the Commission may reimburse the expenses of:

any person (A) who has, or represents, an interest (i) which would not otherwise be adequately represented in such proceeding, and (ii) representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole and (B) who is unable effectively to participate in such proceedings because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceedings.

The present recommendation is addressed to relatively technical questions that have arisen in connection with the Commission's administration of this expense reimbursement program, and not to the issue of whether a reimbursement program is desirable. Since the Commission has completed only three Magnuson-Moss rulemaking proceedings, assessments of the value or the overall impact of this program cannot yet be made. The Conference does anticipate that these larger questions will be addressed in its final report on Magnuson-Moss rulemakings at the Federal Trade Commission.

The Commission, lacking specific statutory guidance and the benefit of other agencies' experience, progressed slowly, through trial and error over a two-year period, in developing its practice for administering its expense reimbursement program. The efforts of the Commission in this regard are more fully described in the report on which this recommendation is based, and merit consideration by other agencies establishing such programs. The Commission's present system of administration appears to implement faithfully and efficiently the reimbursement program established by the statute, and the conclusions embodied in the recommendations set forth below are drawn from an examination of its experience.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Recommendation

1. The Conference recommends that the Federal Trade Commission, in its implementation of the expense reimbursement program established by the Magnuson-Moss Act, continue to observe the following principles, which in large part reflect the Commission's current practice.

(a) Interested members of the public should be given an opportunity to comment on proposed regulations and guidelines for administering any expense reimbursement programs.

(b) The availability of funding should be set forth in the principal agency documents announcing the initiation of a proceeding, such as published notices of proposed rulemaking and press releases. The announcements should advise where further information on the funding program can be obtained. In addition, affirmative steps, such as direct notification of industry organizations, consumer groups, and other voluntary associations likely to be interested, should be taken to inform potentially interested members of the public of the availability of reimbursement funds. Lay-language booklets and brochures explaining the funding program and the procedures for obtaining reimbursement should be prepared and distributed.

(c) Filing dates for reimbursement applications should be established and announced well in advance. Since, however, participatory needs or desires may change by reason of the evolving nature of rulemaking proceedings, applications filed after these dates should be considered to the extent feasible.

(d) Applications for reimbursement should be acted on expeditiously in order to allow applicants adequate time to prepare for participation in the proceeding.

(e) Advance payments to recipients should be available where necessary to allow adequate preparation for participation.

(f) Responsibility for granting or denying applications should not be given to personnel in the office within the agency that has direct responsibility for developing the staff position in the proceeding for which reimbursement is sought. However, these persons and others familiar with the proceeding (including presiding officers) should give their views to the persons with responsibility for reimbursement decisions on such matters as the relevance of the applicant's proposal, the applicant's interest in the proceedings, and the relationship between the



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

applicant's proposal and the views and information expected to be otherwise presented in the proceeding. Wherever feasible, those with responsibility for reimbursement decisions should also be given access to experts, who are independent from any office within the agency that has direct responsibility for developing the staff position in the proceeding, on matters such as survey design and other research activities proposed by an applicant.

(g) When the character of an applicant as a representative organization is important to the decision to authorize reimbursement, the persons with responsibility for reimbursement decisions should consider the nature of the relationship—e.g., whether the applicant receives contributions from members or constituents, whether the applicant has a record of advocating similar positions with apparent member or constituent approval and whether the applicant advises its members or constituents of the position it is taking or has taken in the proceeding. The agency should also require the recipient to advise its members or constituents of its position.

(h) It should be recognized that a legislative standard which limits reimbursement to applicants who cannot afford to pay the cost of participation involves consideration of the applicant's priorities and other spending decisions, its prospects for other funding, and similar questions.

(i) Applicants should be advised in writing of the reasons for grant or denial of their applications. All advisory letters should be indexed and made publicly available.

(j) Programs for auditing the performance of reimbursed entities, including both an examination of their use of funds received and an assessment of the quality of their work product should be established. Sufficient resources should be allocated to ensure that audits are completed on a timely basis, so that supplemental or subsequent funding decisions can be informed by the results of the audits.

(k) An expense reimbursement program can serve several broad purposes—such as broadening the sources of the information presented (or developed by cross-examination) in a proceeding, improving the quality of the information in the record of a proceeding, and providing for participatory democracy by encouraging the expression of public views. The Magnuson-Moss Act does not specify which of those objectives are to predominate in a reimbursement decision. The degree of emphasis placed on one or another of these purposes can lead to different decisional criteria. The agency should specify those purposes that it



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

recognizes and the factors that it will consider in determining whether a reimbursement application might further those purposes.

2. The Conference recommends the principles set forth in Paragraph 1 for the consideration of agencies establishing expense reimbursement programs for rulemaking proceedings, and, as applicable, for the consideration of the Congress, if it were to formulate a statutory program for reimbursing the expenses of participants in rulemaking proceedings.

3. A congressionally-established expense reimbursement program, if one were to be created, should expressly provide for the funds and staff positions necessary to implement the program, including provisions for administration, outreach activities, and financial and quality-control audits.

4. If the Congress were to establish an expense reimbursement program, it should specifically authorize the agency to make advance payments to funded participants if the agency does not clearly have that authority.

Citations:

45 FR 2309 (January 11, 1980)

___ FR _____ (2012)

1979 ACUS 29