REPORT IN SUPPORT OF RECOMMENDATION 79-5

EXPENSE-REIMBURSING PUBLIC PARTICIPANTS IN ADMINISTRATIVE RULEMAKING: THE FEDERAL TRADE COMMISSION EXPERIENCE*

Barry B. Boyer

I. INTRODUCTION

With the enactment of section 202(h) of the Magnuson-Moss Act, the Federal Trade Commission received a novel grant of authority to "provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating" in the FTC's trade regulation rulemaking proceedings.[1] The form of the program thus established—direct payment by the agency to those who are attempting to affect its decisions—was relatively unusual. However, the general principle reflected in the Magnuson-Moss Act's compensation provision has become increasingly common and well accepted in recent years. Direct and indirect use of public funds to support private groups' participation in administrative or judicial proceedings can be found in many federal statutes, rulings, plans and regulations, and the Magnuson-Moss compensation provision is in many respects a logical outgrowth of these prior programs.

During the 1960's, constituency groups of consumers, environmentalists, welfare rights advocates and other reformers emerged and began to use litigation or intervention in administrative proceedings as a means of

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* This is the first part of a two-part report submitted to the Administrative Conference. This part contains the first four sections dealing with the FTC's administration of the public participation funding program. Recommendations based on this part of the report were adopted by the Conference in December of 1979 and published in the Federal Register as ACUS Recommendation 79-5 (45 Fed. Reg. 2307, Jan. 11, 1980). The fifth section, assessing the effects of the compensation program, was submitted to the Administrative Conference under the title "Part Two, Compensating Public Participants in Administrative Rulemaking: The Federal Trade Commission Experience" (Draft of April 1980). Recommendations based on that section were adopted by the Conference in June of 1980 and published in the Federal Register as ACUS Recommendation 80-1, Section C (45 Fed. Reg. 46771, July 11, 1980).

1. 88 Stat. 2138, § 202(h) (1) (1975); *see* text accompanying note 33, *infra.*

furthering their goals.[2] A series of precedent-setting legal victories established broad rights for such groups to participate in agency hearings and to obtain judicial review.[3] However, exercising these rights in complex proceedings was usually costly, and the groups often had minimal resources. Thus, public interest advocates began seeking ways to lower the cost of participation, or to recover litigation expenses.[4] The Federal Trade Commission was an early target of these efforts.

In the early 1970's, the FTC was presented with two related questions concerning its authority to compensate private parties for the cost of participating in agency hearings. In 1969, the Commission had ruled that, as a matter of fundamental fairness, it would not prosecute administrative cease-and desist cases against indigent respondents unless it could provide them with counsel.[5] By 1971, claims of indigency in several pending cases

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2. For historical discussions of the emergence of these advocacy groups *see* Rabin, *Lawyers in Social Change: Perspectives on Public Interest Law,* 28 Stan. L. Rev. 207 (1976); Council for Public Interest Law, Balancing the Scales of Justice: Financing Public Interest Law in America 19-70 (1976); F. Marks, K. Leswing and B. Fortinsky, The Lawyer, The Public and Professional Responsibility 7-45 (1972). The non-legal aspects of the "public interest" movement are described in J. Berry, Lobbying for the People (paper ed. 1977).

3. *See generally* Gellhorn, *Public Participation in Administrative Proceedings,* 2 A.C.U.S. 376, 379-86 (1972) [hereafter cited as "Gellhorn"]. Interestingly, part of the justification for creating broad rights of public participation in one of the leading cases, the first *Church of Christ* decision, was the fact that the high costs of participating would prevent a flood of litigation:

> Always a restraining factor is the cost of participation in the administrative process, an economic reality which will operate to limit the number of those who will seek participation; legal and related expenses of administrative proceedings are such that even those with large economic interests find the costs burdensome. Moreover, the listening public seeking intervention in a license renewal proceeding cannot attract lawyers to represent their cause by the prospect of lucrative contingent fees, as can be done, for example, in rate cases.

Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1006 (D.C. Cir. 1966).

4. *See generally* Council for Public Interest Law, Balancing the Scales of Justice: Financing Public Interest Law in America 57-76 (1976) [hereafter cited as "Council for Public Interest Law"].

5. In re American Chinchilla Corp., 76 F.T.C. 1016, 1034-39 (1969). In a unanimous opinion by Commissioner Jones, the FTC reasoned that failure to provide indigent respondents with counsel could constitute a denial of due process of law:

> We have no doubt that in a proper case where an adequate showing of financial inability is made out, a respondent is entitled to counsel. We can think of nothing less conducive to fairness and due process in administrative procedures than to pit the power of the State, armed with all of the panoply of the legal machinery (funds, investigatory resources, staff of skilled attorneys, etc.), against a single individual and then to deny that individual the right to counsel when he denies the allegations and specifically asserts that he cannot afford counsel.

Id. at 1037.

forced the agency to consider the scope of its authority to spend appropriated funds for this purpose.[6] At the same time, a public interest group[6a] that had intervened in an agency adjudication petitioned the Commission to reimburse the group for witness fees and discovery expenses.[7] The Commissioners' uncertainty about the legality and propriety of using agency funds to compensate participants led to an agency request that the Comptroller General issue a formal ruling on the question.[8] In response, the Comptroller issued an opinion holding that the FTC could use its appropriation to meet the travel and subsistence expenses, transcript costs, attorneys' expenses, and witness fees of impecunious respondents and intervenors, if the agency found that the expenditures were necessary to assure full and fair consideration of a pending

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6. In *American Chinchilla,* the Commission had avoided the question by dismissing the complaint with respect to the respondent who claimed indigency. However, the opinion suggested that hearing examiners (ALJ's) encountering this problem in future cases should refer the claimant to a local bar association or legal aid agency. 76 F.T.C. at 1038.

The case which forced the Commission to deal with the question of how to implement a compensation program was In re Universe Chemicals, Inc., 77 F.T.C. 598, 635-36 (1970). The agency responded by developing more detailed procedures for passing upon indigency claims, In re Universe Chemicals, 77 F.T.C. 1651-54 (1970), by arranging for volunteer counsel through the American Bar Association's Section on Antitrust Law, *cf.* In re Universe Chemicals, Inc., 77 F.T.C. 1673-74 (interlocutory order), and by issuing a policy statement institutionalizing these approaches, Statement of Policy, 35 F.R. 18998 (Dec. 15, 1970), CCH Trade Reg. Rep. ¶9621.654. However, there was some concern within the agency that these measures might not be adequate if a substantial number of indigency claims were presented.

6A. By using the term "public interest group," this Report does not intend to take a position in the long, tedious and generally unenlightening debate over whether consumer, environmental, welfare and minority rights, and similar groups actually serve "the public interest." The phrase is simply used here, as it generally seems to be in the legal vernacular, as a shorthand reference for constituency or membership organizations which generally do not have a sufficiently large and individualized economic stake in the outcome of an administrative or judicial proceeding to make financial support of participation by individual members or constituents economically rational. "Collective goods organization" might be a more accurate title, but that phrase has not entered the general usage, so "public interest group" will have to do.

7. Students Opposing Unfair Practices (SOUP) were granted leave to intervene in the deceptive practices case pending against the manufacturer, for the limited purpose of producing evidence and argument on the question of whether corrective advertising and restitutionary remedies, which had not been recommended by staff counsel supporting the complaint, should be imposed. In re Firestone Tire and Rubber Co., 77 F.T.C. 1666 (1970) (opinion and order granting limited intervention); *see also* In re Campbell Soup Co., 77 F.T.C. 664 (1970). SOUP requested that the Commission grant them to leave to proceed *in forma pauperis* and provide them with three kinds of financial assistance: exemption from the rules requiring that multiple copies of documents be filed; reimbursement of expenses incurred in conducting discovery; and payment by the FTC of witness fees. In re Firestone Tire and Rubber Co., 78 F.T.C. 1572 (1971) (interlocutory order).

8. *See* 78 F.T.C. at 1573 (1971).

matter.[9] A series of subsequent rulings by the Comptroller General extended this principle to a number of other agencies.[10]

Despite these favorable rulings on agency power to reimburse participants, little was actually done during the early 1970's to implement any direct compensation programs. The Administrative Conference of the United States rejected a proposed recommendation encouraging agencies to

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9. Opinion of the Comptroller General B-139703 (July 24, 1972), reprinted in *Hearings on S. 2715 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary,* 94th Cong., 2d Sess, 474 (1976) [hereinafter cited as *Hearings on S. 2715*]. The opinion stated in part:

> The appropriations for the Commission are normally available for "necessary expenses." . . . [T]he appropriations are enacted in the form of lump sums with no specific limitations as to use. Thus, the determination of what constitutes "necessary expenses" is left to the reasonable discretion of the Commission.
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> . . . The litigative aspects of proceeding before the Commission must be reviewed in the context of a mandate broader than the provision of a forum for the "judicial" settlement of differences between contesting parties.
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> . . . When Commission proceedings are viewed in this context, it is clear, apart from the basic rights enunciated in the Chinchilla case, that the Commission is authorized to determine the administrative necessity for full preparation of cases before it in connection with the proper execution of its functions. It follows that the use of Commission appropriations to assure such full preparation of cases by impecunious litigants would constitute a proper exercise of administrative discretion regarding the expenditure of appropriated funds.

10. *See generally* Note, *Funding Public Participation in Agency Proceedings,* 27 Am. U.L. Rev. 981, 984-88 (1978). Some of these subsequent rulings refined and elaborated the standards for agency reimbursement. For example, the Comptroller General's opinion on the Nuclear Regulatory Commission covered two types of financial relief to public participants not discussed in the FTC opinion: providing them with access to agency staff members, and creation of an independent public counsel office or a similar entity within the agency. The Comptroller General ruled that both types of expenditures would be improper under existing statues. In discussing access to information made available by the Freedom of Information Act,the agency could not deploy its staff "to provide a participant's technical expertise" because "the staff is to serve NRC's needs and may not be used to prepare or assist, other than incidentally, those taking an adversary position in NRC's proceedings." Opinion of the Comptroller General B-9228 (Feb. 19, 1976), in *Hearings on S. 2715* at 292. In dealing with related proposals to establish an independent "public counsel's office" or "independent intervenor assistance centers" outside the agency, the opinion concludes that the NRC "does not have authority to use its appropriation to finance independent entities not within the jurisdiction and control of the agency." *Id.*

Later opinions have also liberalized the test for determining whether an applicant's participation is necessary:

> [T]he applicant's participation no longer must be essential to dispose of the matter. Participation now is considered necessary if the agency determines that a particular expenditure for participation reasonably can be expected to contribute substantially to a full and fair determination of the issues before the agency.

Note, *supra,* at 987. *Compare* Opinion of the Comptroller General B-192784 (Jan. 10, 1979) Nuclear Regulatory Commission lacks authority to reimburse private attorney for out-of-pocket expenses incurred in agency proceeding to investigate misconduct charges against him).

establish experimental reimbursement programs,[11] and even the FTC refrained from further action in the field.[12] In part, this quiescence may have resulted from the agencies' unwillingness to undertake such a potentially costly and controversial program without a clear mandate and an additional appropriation;[13] also, there was some uncertainty as to whether the courts would agree with the Comptroller General's expansive construction of agency funding power as a result of the prolonged *Greene County* litigation.[14] The public interest groups themselves may not have put a high

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11. Recommendation 71-6, Public Participation in Administrative Hearings, 2 A.C.U.S. 35 (1971); *see also id.* at 39-42 (separate statements of members relating to funding issue).

12. One study of public participation concluded that the FTC "tended toward restrictive application" of its intervention criteria, and as a result admitted few potential compensation-seekers to its adjudications. Committee on Governmental Affairs of the United States Senate, Study on Federal Regulation, Vol. III: Public Participation in Regulatory Agency Proceedings 47 (1977).

13. The Nuclear Regulatory Commission's statement accompanying its decision not to establish a direct funding program, 41 F.R. 50829, 50831 (Nov. 18, 1976), expresses this rationale in part:

> Funding involves the direct transfer of public money to support a private viewpoint; a viewpoint which is not subject to control or oversight by the public's elected representatives and which may or may not reflect the views of many members of the public. . . . From our perspective, we lack not only the statutory authority to provide funding, but we also find, as a policy matter, that a non-elected regulatory commission is not the proper institution to expend public funds in this fashion absent express Congressional authorization.

14. *See* Greene County Planning Board v. FPC, 559 F. 2d 1237 (2d Cir. 1977) (*en banc*), *cert. denied,* 434 U.S. 1086 (1978). When certiorari was finally denied in *Greene County,* the controversy had been pending before the agency and the courts for approximately a decade. Brief for the Federal Energy Regulatory Commission on Petition for a Writ of Certiorari, No. 77-481, at 3-8 (U.S. Sup. Ct., Oct. Term, 1977). The history of the compensation issue is summarized as follows:

> In June 1971 petitioners moved that [the utility which had applied to construct a power line], or the Commission, pay the expenses, including expert witness fees and attorneys' fees incurred by them in the proceeding. . . . In October 1971 the Commission denied petitioners' motions, 46 F.P.C. 1101, and a petition for review followed. Greene County Planning Board v. Federal Power Commission, 455 F. 2d 412 (C.A. 2) ("Greene County I"), certiorari denied, 409 U.S. 849.
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> . . . On the question of expenses and fees . . . the court [in *Greene County I*] declined to order the Commission to reimburse petitioners. The court noted that while the Commission's order denying such payments appeared to be based on the Commission's view "that it had no authority to grant them," the Commission had argued to the court "that it has foreclosed only the present award of fees and has left open the question of whether ultimately to award them when the proceedings have come to an end." . . .
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> Following the court's remand, the Commission . . . conducted a proceeding that included a lengthy hearing in which petitioners participated. . . . With respect to petitioners' renewed motion for reimbursement of their fees and expenses, the Commission reaffirmed its earlier denial.

Id. at 3-5. On appeal of the final decision, the Second Circuit *en banc* affirmed the Commission's denial of funding, stating: "The authority of a Commission to disburse funds must

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priority on convincing the agencies or the Congress to establish direct funding programs. Foundation support for public interest law was relatively plentiful in the early years of the decade, [15] and there still appeared to be a good chance that consumer and environmental groups could persuade the courts to adopt fee-shifting rules that would enable public interest litigants to recover litigation expenses from the regulated industry. Other methods of funding consumer advocacy, such a check off system[16] or the establishment of offices of public counsel within the agencies[17] or creation of

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come from Congress . . . and it is for Congress, not the Comptroller General, to set the conditions under which payments, if any, should be made." 559 F.2d at 1239. The Justice Department subsequently took the position that *Greene County* should be limited to its facts, and that it could not prevent other agencies from funding public participants. *See* Legal Times of Washington, June 26, 1978, at 4; Letter from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, U.S. Dept. of Justice, to Linda Heller Kamm, General Counsel, Department of Transportation, March 1, 1978, at 2:

> Because the holding of the Second Circuit in *Greene County* involved only a construction given to the Federal Power Act . . . we think it clear that no department or agency . . . other than possibly FERC is bound by that holding. Nor do we think that the Second Circuit . . . announced a principle of law broad enough to cover other departments and agencies.

15. *See generally* Council for Public Interest Law at 226-238; Foster, *Playing It Safe on $11 Million a Year,* Juris Doctor, June/July 1973, at 9, 10-12, 15 (describing public interest programs supported by Ford Foundation).

16. *E.g.,* Nader, *Consumerism and Legal Services: The Merging of Movements,* in The Role of Research in the Delivery of Legal Services: Working Papers and Conference Proceedings 97, 101-102 (L. Brickman & R. Lempert, eds., paper ed., May 1976);

> A group of us are trying to institute what could undoubtedly be the single most effective innovation in the history of the consumer movement: the consumer check off. During the next year we will be pressing twenty states . . . to adopt consumer check off laws in the utility area. . . . [S]tate law could then require all regulated utilities to have a check off box on every bill they send which permits their customer to volunteer any level of contribution that they wish in any month. That contribution to the bill, and . . . accumulated voluntary contributions, are transferred . . . to a statewide consumer action group. . . . The council of directors would hire attorneys, economists, accountants, physicists, engineers, health specialists, organizers, writers, and all the other people necessary to represent consumers in all branches of government on any issues relating to utility policy.

Many of the Nader-inspired public interest research groups (PIRG's) are supported by a similar "check off" system involving student fees at colleges and universities.

17. The idea of establishing separate consumer advocacy offices within the agencies traces back at least to the New Deal. *See, e.g.,* Nelson, *Representation of the Consumer Interest in the Federal Government,* 6 Law & Contemp. Prob. 151 (1939). For a discussion of more contemporary versions of this approach, *see generally* Note, *Federal Agency Assistance to Impecunious Intervenors,* 88 Harv. L. Rev. 1815, 1819-1822 (1975); Murphy & Hoffman, *Current Models for Improving Public Representation in the Administrative Process,* 28 Ad. L. Rev. 391, 402-407 (1977): Bloch & Stein, *The Public Counsel Concept in Practice: The Regional Rail Reorganization Act of 1973,* 16 Wm. & Mary L. Rev. 215 (1975); Report of the Comptroller General of the United States, Organizing the Federal Communications Commission for Greater Management and Regulatory Effectiveness 23-24 (July 30, 1979).

an independent consumer advocacy agency,[18] also had widespread support.

By the time that the Magnuson-Moss compensation program came into existence, however, the outlook for funding public interest representation in administrative proceedings had become much less promising. The foundations, having provided "seed money" to establish advocacy groups, were cutting back on general support for public interest representation and limiting their grants to particular program areas.[19] In 1975, the Supreme Court's decision in the *Alyeska* case[20] made it clear that the courts and the agencies lacked power to compensate public participants by "fee-shifting" arrangements that would impose these costs on the regulated industry. Later, the proposal to create a new Consumer Advocacy Agency was defeated in Congress despite Administration support and a vigorous lobbying effort by its proponents.[21] Thus, in the late 1970's direct funding approaches similar to the Magnuson-Moss program became one of the few remaining alternatives for providing significant amounts of funding to support public participation in administrative proceedings.

The direct funding approach gained widespread support within the legal profession, as reflected in the endorsements of the American Bar Association[22] and a Committee of the Association of the Bar of the City of New York.[23] In recent years the agencies themselves—with some prodding

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18. *See* New York Times, April 7, 1977, at Al, col. 2; June 30, 1977, at A10, col. 3; Nov. 2, 1977, at A19, col. 6.

19. *See generally* Council for Public Interest Law at 234-35; Terris, *Hard Times Ahead for Public Interest Law,* Juris Doctor, July-Aug. 1974 at 22; Jaffe, *Public Interest Law-Five Years Later,* 62 A.B.A.J. 982 (1976).

20. Alyeska Pipeline Co. v. Wilderness Society, 95 S. Ct. 1612 (1975). The District of Columbia Circuit, which had been reversed by the Supreme Court in the *Alyeska* decision, later concluded that the *Alyeska* rationale governed questions of the agencies' power to order fee-shifting; thus, neither a court nor an agency could require payment of an adverse party's attorneys' fees without explicit congressional authorization. Turner v. FCC, 514 F.2d 1354 (D.C. Cir. 1975). For an example of a statute authorizing such fee shifting, *see* The Public Utility Regulatory Policies Act of 1978, section 122, 92 Stat. 3117, 3129-30 (1978).

21. [Add cite]

22. *See generally* Special Committee on Public Interest Practice of the American Bar Association, Implementing the Lawyer's Public Interest Practice Obligation (1977); *Public Interest Law: Down But Not Out,* 63, A.B.A.J. 161 (1977); American Bar Association Commission on Law and the Economy, Federal Regulation: Roads to Reform 124-126 (Exposure Draft, 1978); Statement of Sara-Ann Determan, member, Special Committee on Public Interest Practice of the American Bar Association, Before the Subcommittee on Administrative Practice and Procedure of the Senate Subcommittee on the Judiciary Concerning Public Participation Funding in Federal Agency Proceedings (July 20, 1979).

23. *See generally* Committee on Federal Legislation, *Attorneys Fees for Public Interest Participation in Federal Agency Proceedings,* 31 Record of the Association of the Bar of the City of New York 675 (1976). This Committee concluded that the basic issue of the desirability of funding such participation was no longer open to dispute:

In the last decade of Congress has held over 25 hearings dealing with the need for

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from the White House[24]—also became more receptive to direct funding. Several departments and agencies established "implied authority" compensation programs based on the Comptroller General's rulings,[25] and one agency, the Agriculture Department, successfully defended its power to support public participation in a court challenge brought by the Chamber of Commerce.[26] At the same time that support for extension of the Magnuson-Moss approach seemed to be growing, however, political resistance to direct funding increased. Bills to establish general direct funding programs were

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greater public participation in the administrative process. The record compiled establishes that greater public participation in agency proceedings will be of great value to a fair determination of the overall public interest. . . .

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. . . A consensus appears to have been reached that the agencies will perform more expertly in the public interest if they receive input from independent sources who have no significant economic stake in the outcome of the proceedings.

Balance among the viewpoints expressed before federal agencies is essential.

Id. at 679-80.

24. In the wake of the defeat of the consumer advocacy agency bill, the Carter Administration took several steps to increase consumer advocacy. One step was "increasing the policy-making power of his in-house consumer advocate, Esther Peterson." The Washington Post, May 1, 1978, at D9, col.1. According to newspaper accounts, this approach was functionally similar in some ways to the consumer advocacy agency:

Peterson will now be able to express her opinion on any issue that would affect consumers before the President's decision memorandum on that issue is prepared . . . She will report on the effect any administrative action would have on consumers. . . .

Id. In addition, the Administration's 1978 Executive Order on Improving Government Regulations directed the agencies to "give the public an early and meaningful opportunity to participate in the development of agency regulations." E.O. 12044, 43 F.R. 12661, 12662 (March 24, 1978). Subsequently, the President issued a memorandum to the heads of Executive departments and agencies urging them to examine the scope of their existing power to compensate public participants, and to consult with the White House staff concerning the existence and use of this authority. Memorandum from the President on Public Participation in Federal Agency Proceedings, 15 Weekly Compil. Pres. Docs. 867 (May 16, 1979). A direct funding provision was also incorporated in the Administration's regulatory reform bill introduced in the Ninety-Sixth Congress *See* Appendix B, *infra.*

25. *See, e.g.,* 43 F.R. 23560 (May 31, 1978) (Consumer Product Safety Commission Interim Policies and Procedures for Temporary Program); 42 F.R. 2864 (Jan. 13, 1977) Department of Transportation National Highway Traffic Safety Administration Final Rule and Advance Notice of Proposed Rulemaking); 43 F.R. 17806 (Apr. 26, 1978) (Final Rule, National Oceanic and Atmospheric Administration, Department of Commerce). *See also* 44 F.R. 17507 (March 22, 1979) (U.S. Dept. of Agriculture Notice of Proposed Rulemaking); 44 F.R. 23044 (Apr. 17, 1979) Food and Drug Administration Proposed Rule); 43 F.R. 30834 (July 18, 1978) (Federal Communications Commission Notice of Inquiry). [Follow up CAB proposal eff. Nov. 28, 1978].

26. Chamber of Commerce v. Dept. of Agriculture, No. 78-1515 (D.D.C., Oct. 10, 1978), 106 Daily Washington Law Reporter 2113 (Nov. 22, 1978).

introduced in the Ninety-Fourth and Ninety-Fifth Congresses,[27] but none of these provisions generated sufficient support for final passage. During the Ninety-Sixth Congress, several of the major regulatory reform bills, including the Administration proposal, contained direct funding provisions.[28] These proposals were sharply attacked by business and industry groups,[29] and during 1979 the FTC's compensation program became a target of congressional and public criticism.[30] Issue was joined on many levels, ranging from disputes over the details of program administration to more fundamental questions of whether it is proper for government to fund private groups which are trying to influence regulatory policy decisions.

The Magnuson-Moss Act compensation program provides an opportunity to explore some of these issues in the context of the FTC's experience

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27. *See* S. 2715, 94th Cong. 1st Sess. (1978); H.R. 13901, 94th Cong., 2d Sess. (1976); S. 270, 95th Cong., 1st Sess. (1977); H.R. 3361, 95th Cong., 1st Sess. (1977); H.R. 8798, 95th Cong., 1st Sess. (1977).

28. The principal features of several of these regulatory reform proposals are summarized in Appendix B.

29. *E.g.*, Hearings on Regulatory Reform Legislation Before the Senate Committee on Governmental Affairs, May 4, 1979 (Prepared Statement of James D. "Mike" McKevitt, Washington Counsel, National Federation of Independent Business at 18-19; Proposed Statement of William L. McKinley on Behalf of the National Association of Manufacturers at 12-14).

30. *See, e.g.* "Senate Panel Grills Pertschuk on Funding of FTC Consumer Groups," Antitrust & Trade Reg. Rptr. (ATRR), March 19, 1979 at A-5; "FTC Public Funding of Private Groups Comes Under Attack in Senate Hearing," ATRR, May 3, 1979, at A-12 to A-13; "Senate Commerce Committee Supports Controls on FTC Public Participation Program," ATRR, May 24, 1979, at A-20 to A-21; "FTC Public Participation Funding Is Focus of Commerce Committee Actions," ATRR, May 10, 1979, at A-18 to A-20.

The debate over the FTC's funding program has also reached the mass circulation press. Syndicated columnist James J. Kilpatrick concluded:

> Ninety percent of the [FTC compensation] money has gone to "public interest" groups whose whole reason for being is to encourage more federal rules and regulations.
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> The FTC has no more business paying tax funds to witnesses than a committee of Congress would have in paying Ralph Nader to testify on a consumer protection bill. The rule ought to be that all witnesses stand equally at the bar, but with the FTC's slush fund, some are more equal than others.

Buffalo Evening News, June 1, 1979, at 20, cols. 6-7. FTC Chairman Pertschuk responded in the editorial pages of The Washington Post:

> [T]he Chamber of Commerce, the toy manufacturers and some congressmen have generously offered to relieve us of the necessity of having to listen to consumer and small business advocates by urging termination of the public participation program. . . .
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> This would leave the opportunity of criticizing our staff's proposals to those business interests that can afford to do so (helped, of course, by their right to deduct the cost of whatever they spend from their taxable income). . . .
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> As an individual commissioner, I know that I have benefited enormously from this clash of advocacy [that the program makes possible].

The Washington Post, June 26, 1979, at A-19, col. 6.

in administering the oldest and largest of the direct funding systems.[31] By early 1979 when data collection for this study was completed, the Commission had acted on compensation applications from more than a hundred groups and individuals, and had obligated approximately $1.8 million dollars.[32] This body of experience seems adequate to support at least tentative conclusions about the functioning of the FTC's compensation program. As is usually the case in field research, more time and additional data-gathering would have been helpful. Ending data collection in January of 1979 forced the omission of all information concerning the Standards and Certification rulemaking, and permitted only very limited investigation of the Children's Advertising proceeding, and these were two very important and controversial trade regulation rules. Moreover, very few proceedings in which compensated groups participated had reached the stage of final FTC action by that time, and so it is more than normally difficult to draw firm conclusions about the ultimate impact of the compensation program on agency decisions. Nevertheless, the patience of researchers, research subjects, and (most importantly) granting agencies had very definite limits, and this four-year project tested if not exceeded those limits. There is also something to be said for publishing research results before they become matters of merely historical interest.

Numerous information sources were used in reviewing the FTC's administration of the Magnuson-Moss Act compensation program. All available FTC files relating to the processing of compensation applications were reviewed, and additional internal agency documents were provided by the FTC. Since some of these internal documents were received pursuant to a confidentiality agreement, it has sometimes been necessary to provide "blind" citations to nonpublic documents. A second principal source of information was interviews with interested persons—FTC officials administering the program, Presiding Officers and staff attorneys assigned to the

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31. One other agency, the Environmental Protection Agency, has statutory direct funding power under the Toxic Substances Control Act similar to the FTC's Magnuson-Moss authority. *See* 15 U.S.C. § 2605(c) (4) (1976); 42 F.R. 60911 (Nov. 30, 1977). However, as of mid-1979, the EPA had received only two compensation applications under this provision. Telephone Interview with William Pedersen, Office of General Counsel, Environmental Protection Agency, May 22, 1979. See also 42 F.R. 1492 (Jan. 7, 1977) (EPA advance notice of proposed rulemaking on a proposal to create a general compensation program). EPA has grant or contract authority to defray some costs of public participation under other statutes it administers, but these programs are sufficiently different in design and execution from the Magnuson-Moss direct funding system that they will not be discussed in this paper. *See, e.g.*, 43 F.R. 34794 (Aug. 7, 1978). *See also* §122(b) of the Public Utility Regulatory Policies Act of 1978, 92 Stat. 3117, 3129-30 (1978).

32. Data tabulated from Appendix A. The total of 109 applications was derived by counting each person or group who applied for compensation in each proceeding as one "applicant," and excluding any supplemental or amended applications they may have filed. As discussed below, the total of 109 applicants includes several groups which applied in more than one proceeding.

rules, and the compensation applicants themselves. Survey research questionnaires administered to witnesses in seven early Magnuson-Moss rulemakings were also used, along with reviews of hearing transcripts and other public record documents.

The schedule for consideration of this report by the Administrative Conference has made it necessary to produce the draft in two stages. This segment deals only with the FTC's administration of the program; the second installment will attempt to assess the effects and impacts of compensated participation.

II. The Statute

Although the text of section 202(h) of the Magnuson-Moss Act describes in general terms the kinds of expenses that the FTC can reimburse and the standards that the agency must apply in passing upon requests for compensation, it leaves unresolved a great many questions of detail and interpretation. In its entirety, the major substantive section of the compensation provision states:

> The Commission may, pursuant to rules prescribed by it, provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating in a rulemaking proceeding under this section to any person (A) who has, or represents, an interest (i) which would not otherwise be adequately represented in such proceedings, 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.[33]

This provision was added to the bill in conference committee, and the relevant portion of Conference Report is largely a paraphrase of the statutory text.[34] However, second-hand reports of the drafters' intent indicate that the "financing proviso emanated from the . . . Conferees' belief that, since the new statue substantially formalized the FTC's rulemaking procedures, compensation for intervenors would better enable them to participate effectively in the newly structured hearings."[35]

While the broad language of the statute, the novel character of the direct funding approach and the minimal legislative history combined to give the FTC great discretion in developing the compensation program,

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33. 15 U.S.C. § 57a (h) (1) (1976).

34. H.R. Rep. 93-1606, *infra* note 36.

35. Boasberg, Hewes, Klores & Kass, Policy Issues Raised by Intervenor Requests for Financial Assistance in NRC Proceedings 38 (NUREG-75/071, July 18, 1975) (summarizing interviews with staff of the Senate Commerce Committee).

these same factors meant that the Commission had little guidance or experience to fall back on when difficult problems arose. As later events demonstrated, several basic questions and dilemmas were implicit in the Act.

(1) Section 202(h) reflects Congress' willingness to underwrite the full range of expenses associated with public participation[35a]—but only to the extent that the applicant is financially unable to pay these expenses and the participation is necessary to a fair decision. Taken together, these standards can open up some potentially complex and delicate areas of inquiry, including assessment of the financial condition and motivation of the applicant, forecasts of what other participants will do at later stages of the proceedings, and determinations of what kinds of participation are necessary or desirable in a complex hybrid rulemaking process. The answers to the latter question could well vary depending upon whether one emphasizes the "grassroots," participatory-democracy aspects of Magnuson-Moss rulemaking, or its technical dimensions which give preeminence to lawyers, economists and other experts.

(2) In defining the categories of participants who are eligible for compensation, the statute heavily emphasizes the applicant's stake in the outcome of the rulemaking and the unfairness of excluding him from the proceeding. The applicant must have, or advocate, an interest that is not adequately represented in the proceeding, but which should be represented as a matter of fairness. The statute does not speak directly to an alternative basis for justifying compensation, which would focus upon the usefulness and relevance of the data or argument that the applicant wished to present. However, the Conference Committee report does reflect some congressional intent that the compensation authority be administered to improve the quality of FTC decisions by making available to the agency a broader spectrum of views and information.[36] The tensions between these two approaches—which might be

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35A. At least, there has been no serious challenge to this proposition in practice. During the early stages of implementing the program there was some concern within the agency that, because the statutory language of the compensation provision seemed to track the Magnuson-Moss Act's provisions dealing with resolution of disputed issues of material fact, the agency might not be able to fund activities which were not specifically directed toward resolution of these issues—for example, submission of prehearing written comments. That interpretation was rejected as overly formalistic, since anything contained in a written comment could be presented orally at a hearing, and the FTC clearly had authority to fund hearing testimony. Confidential FTC Document 36.

David B. H. Martin, Research Director of the Administrative Conference during most of the period covered by this study, has suggested another possible limiting interpretation of the statute: that the agency could fund participants to present testimony, but not to produce new evidence—for example, by conducting surveys or other field research. This interpretation has apparently never been considered by the FTC, and the legislative history provides no indication of congressional intent on this point. As a policy matter, however, it seems likely that newly "created" evidence of this kind, specifically tailored to the issues in the proceeding, will be some of the most useful information for agency decision-makers.

36. H.R. Rept. 93-1606, *reprinted in* ATRR, Dec. 24 1979, at F1, F11 (emphasis added): "In order to provide to the extent possible that all affected interests be represented in rulemaking proceedings *so that rules adopted thereunder best serve the public interest,* the FTC is authorized to provide compensation for reasonable attorneys and expert witness fees and other costs of participating . . . " *See also* note 37, *infra.*

termed the "fairness" justification and the "utility" rationale—became evident in the FTC's early efforts to implement the compensation program.

(3) The statute provides some guidance to the agency as to the funding allocation it should make when requests for compensation funds exceed available resources. The total annual authorization for compensation funds is limited to one million dollars, and no more than 25 percent of this amount may be given to members or representatives of the regulated industry.[37] However, the situation that arose in practice was quite different. Throughout most of the period covered by this study, available funds exceeded qualified applications, and the issue that emerged was whether the compensation awards were concentrated too narrowly within a circle of "repeat player" consumer groups and law firms.[38] Moreover, the ceiling on the proportion of compensation funds allocated to industry groups was largely irrelevant because the volume of applications from business interests was generally negligible in the early years of the compensation program, and never approached the statutory ceiling. As this became apparent, the FTC faced a policy question as to whether they should make special efforts to encourage more businessmen to apply so that the proportion of funds granted to business interests would move closer to 25 percent.

(4) While the statute contains a specific authorization of funding to support public participation, it does not provide an accompanying allocation of funds or support personnel to administer the program. The Act also did not provide any guidance as to how compensation decisions should be made within the agency—what persons or organizational units should have responsibility for granting or denying compensation applications, whether and to what extent the rulemaking staff should be involved in the decision, what procedural rights applicants should have, and the like. These factors, together with the FTC's complete lack of experience in running any comparable grant programs, caused some problems and delays in the early administration of the compensation program. Later, as staffing problems were resolved and experience accumulated, the quality of program administration improved markedly.

III. Criteria of Eligibility

A. Drafting the Rules and Guidelines

One of the more difficult tasks that the FTC faced in implementing the

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37. 15 U.S.C. § 57a(h) (2) - (3) (1976).

38. *See* Part V.B. of the text, *infra.* In some measure, the FTC's failure to anticipate this problem might be attributable to language in the Conference Committee report, *supra* note 36, at F-11, which seemed to direct the agency to start dispensing compensation funds promptly, without being overly cautious in the application of criteria. "Because the utilization of these funds may be critical to the full disclosure of material facts in rulemaking proceeding," the Report notes, "the conferees expect the Commission to assign a high priority to their proper expenditure."

compensation program was translating the broad generalities of the statute into operational standards that could be used in passing upon individual requests for funding. Despite the directive in the statute to make rules governing grants of compensation,[39] the Commission moved rather slowly to define and elaborate the standards that applicants would have to meet in order to be eligible for compensation.

Early in 1975, soon after the Magnuson-Moss Act was signed into law, a working group of FTC staff members from the Bureau of Consumer Protection and General Counsel's Office met to develop plans for implementing the sections of the statute dealing with the trade regulation rulemaking.[40] Proposed rules of practice for TRR proceedings, including the compensation program, developed out of these planning efforts, with most of the actual drafting performed in the General Counsel's Office. Interviews with some of the participants in these early planning efforts[41] suggest that the compensation program received relatively little attention: other procedural issues evidently seemed more important to resolve in order to create a workable rulemaking process, and in any event the compensation section of the statute gave the FTC substantial discretion. In short, the major threats of obstruction by adverse parties, and reversal on judicial review, seemed to lie elsewhere.[42]

The draft rules of practice for trade regulation rulemaking proceedings were published for comment in the Federal Register in early April of 1975.[43] Approximately 30 comments were filed in response to this notice, but only two discussed the compensation program at any length[44] and these had little effect upon the shape of the final compensation rule that was promulgated in August of that year.[45] This final rule dealt with eligibility criteria in a rather cursory fashion. The first subsection of the rule, captioned "purpose

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39. 15 U.S.C. § 57a(h) (1) (1976) provides that "[t]he Commission may, pursuant to rules prescribed by it, provide compensation . . . "

40. Interview with Barry Rubin, Office of General Counsel, FTC, March 17, 1976.

41. *Id.*; Interview with James V. DeLong, Assistant Director, Bureau of Consumer Protection, FTC, March 10, 1976.

42. Internal memoranda indicate that some FTC staff members were considering compensation issues in some detail, but this staff work did not result in the adoption of detailed criteria, perhaps because of the difficulty of gaining consensus within the agency. Confidential FTC Documents 1-4.

43. 40 F.R. 15,238 (April 4, 1975).

44. One of these comments was submitted by former FTC Commissioner Mary Gardiner Jones, who was at that time a Professor of Law at the University of Illinois. The other was prepared by a consortium of public interest groups headed by Paul Gewirtz, an attorney for the Center for Law and Social Policy, who was joined on the submission by Charles Halpern and Neil Levy of the Council for Public Interest Representation. FTC Docket No. 222-3-1 (unpaginated).

45. 40 F.R. 35, 966 (Aug. 13, 1975). There were few changes from the compensation rule originally proposed, and these could fairly be characterized as minor and stylistic.

of compensation," simply tracked the statutory language on interest representation. The "interest" itself was defined as one which (a) necessarily must be represented "for a fair determination of the rulemaking proceeding taken as a whole" and (b) would not otherwise be adequately represented in the proceeding. The applicant who had or represented such an interest was required to demonstrate that effective participation was impossible without compensation.[46] Other sections of the rule, prescribing the information to be included in the application for compensation, gave more detailed content to the financial inability standard. A person or organization seeking compensation was required to describe not only its own resources, but also the resources "of the interest represented by the applicant."[47] This was a step beyond the language of the statute, which required that the person applying have insufficient resources to participate, but said nothing about the financial resources of the interest which the applicant purported to represent. A rule which looked only to the resources of the person applying would create a risk that any interest group, however wealthy, could recruit an indigent to "front" for them and seek compensation. Yet, the approach taken by the Commission had a complementary problem: any trade practice which threatened a large number of consumers would create an "interest" with substantial dollar resources, and might therefore make the consumer interest ineligible for compensation. The solution employed in the rules of practice was to require that the applicant evaluate "the feasibility of contributions to the costs of participation by individual representatives of the interest."[48] Presumably, it would not be feasible to generate contributions from dispersed consumers whose individuals economic stake in a proposed rule was small or speculative.

As the FTC began to receive and act upon applications for compensation, it soon became apparent that the rules of practice had left open numerous questions concerning not only the criteria of eligibility, but also the activities that could be compensated, the amounts that could be paid, and the procedures by which compensation decisions would be made. By June of 1976, a rough draft of supplementary guidelines for applicants was prepared and circulated to interested persons. This draft was revised several times,[49] and final guidelines were published in the Federal Register in June of 1977.[50]

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46. 16 C.F.R. § 1.17(a) (1977). These provisions were repeated in the section of the rules dealing with the information that applicants had to submit in their request for compensation, *id.* at § 1.17 (c) (1) - (3).

47. *Id.* at § 1.17 (c) (4) (iii).

48. *Id.* at § 1.17 (c) (4) (ii).

49. Revised drafts were circulated in August of 1976, February of 1977, and April of 1977.

50. 42 F.R. 30,480 (June 14, 1977). The Commission was evidently somewhat sensitive about publishing guidelines for public participation without first providing a public comment period, since the preamble to the final guidelines states:

> The Bureau of Consumer Protection has solicited the viewpoints of interested parties in preparing these Guidelines. As finally drafted, the Guidelines reflect extensive comments

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Pre-publication drafts of the guidelines were distributed to potential applicants and other interested persons, but it is not clear how many applicants received these drafts, or how useful they were. Thus, during nearly two years of intense rulemaking activity which gave rise to numerous requests for compensation, the only authoritative standards generally available to potential applicants were the vague phrases in the statute and the rules of practice. This lack of clear standards caused problems both inside and outside of the agency. In several instances during the pre-Guidelines phase of the compensation program, applicants sought guidance from the staff attorneys assigned to the rulemaking, and were encouraged to apply for compensation (if not virtually assured that their requests would be granted). When the requests were denied as inconsistent with the evolving criteria or withdrawn after disputes with the agency, the applicants were understandably angry and felt that they had been the victims of a deception or a political decision.[51] In these incidents, the staff attorneys may simply

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comments received from consumer groups, industry, Congressional committees and members of the public.

The Guidelines were adopted by the Bureau of Consumer Protection on May 31, 1977; however, the Bureau will consider amendments to them in response to further comments.

Id. The Guidelines were reportedly not published for comment because they were a Bureau document rather than a rule promulgated by the agency. Interview with Bonnie J. Naradzay, Special Assistant for the Compensation Program, Bureau of Consumer Protection, FTC, Oct. 19, 1976. However, the final Guidelines recite that "[t]he Bureau is issuing these Guidelines in conformance with the authority delegated it by the Commission's rules of practice," 42 F.R. at 30,480, and it is difficult to see why this rationale would not be applicable to publication for comment.

51. A brief review of four incidents in which compensation applicants felt that they had been treated unfairly illustrates the problems of inconsistency that the FTC experienced as a result of its vague standards.

The first two incidents arose early in 1976, and concerned the hearings held in Chicago on the Funeral Practices rule. Michael Hirsh, a television producer who had been involved in a television documentary critical of the funeral industry, applied for compensation to become a consumer group representative (and thus eligible to cross-examine witnesses) for the Chicago hearing. After some time, he learned informally from the Presiding Officer assigned to the rule that the application had been denied because Hirsh was not an attorney and therefore was presumed to be unqualified to conduct cross-examinations. At Hirsh's request, the Presiding Officer put this explanation in writing, and also noted that Hirsh's application had been rejected because he was not affiliated with a consumer group. Interview with Michael Hirsh, May 11, 1976. At this point Hirsh sought help from the American Civil Liberties Union, which wrote a letter on his behalf requesting reconsideration on the grounds that neither the statute nor the rules of practice required compensated consumer representatives to be attorneys, or representatives of an organized consumer group. Letter from David Goldberger, The Roger Baldwin Foundation of ACLU, Inc., to Joan Z. Bernstein, Acting Director, Bureau of Consumer Protection, April 19, 1976. Three weeks later, the FTC's Acting Bureau Director issued a letter ruling formally denying Hirsh's request for compensation, primarily on the ground that his application lacked sufficient information about the substance of his proposed participation, and about the projected expenses for which he wished to be compensated. Nothing was

have been unaware of the developing standards, as a result of the normal difficulties of communicating within any large bureaucratic organization; or they may have been trying to bend the rules in order to supplement the resources available to them for procuring witnesses.[52] Whatever the reasons, more precise standards could have served as a counterbalance to this tendency, and given the applicants better guidance as to how their requests would be judged. Interviews with compensation applicants show a marked change after the 1977 Guidelines went into effect. Many of those who applied before the Guidelines were issued expressed confusion or

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said about the applicant's lack of affiliation with a consumer group. Letter from Joan Z. Bernstein to Michael Hirsh; April 28, 1976. The letter also noted that "[w]hile no other consumer representative has been authorized compensation for participation in the Chicago hearings," four consumer groups had been granted compensation for participation in other phases of the rulemaking proceeding, and "[t]he statute does not require compensation of a consumer representative at every individual hearing for which such a representative applied." *Id.*

At the same time that the Hirsh application was pending, FTC staff attorneys working on the rule were actively soliciting the Consumer Federation of America to apply for compensation as a participant in the Chicago hearings. Interview with Kathleen O'Reilly, Consumer Federation of America, Feb. 16, 1977. Despite initial reluctance to get involved, a CFA representative submitted an application and began preparation for the hearing in reliance on the staff's assurances that the application would be approved. However, a series of delays and problems developed, and CFA withdrew its application shortly before the start of the Chicago hearings. Another consumer group which had earlier been granted compensation for the Washington Funeral Practices hearings was then brought in by the FTC staff as compensated consumer representative for the Chicago hearings.

Not surprisingly, these two rejected applicants were extremely critical of the FTC's administration of the compensation program. Hirsh expressed the belief, based on information obtained from sources within the FTC, that the real reason his application had been denied was because he had refused to follow the suggestions of staff attorneys who had wanted him to present testimony which would support one portion of the rule. Hirsh Interview, *supra.* Similarly, the CFA representative felt that the FTC had raised a series of minor objections to her participation because she had not been sufficiently cooperative in supporting the rule in its entirety. O'Reilly Interview, *supra.*

The other two incidents followed the general pattern of the CFA application, although they involved different rulemaking proceedings. In both instances, FTC staff members from the Chicago Regional Office contacted individuals and urged them to apply for compensation; when they did, their applications were rejected. Interview with Sidney Margolius, March 22, 1977; Interview with John C. Hendrickson, March 17, 1977. One of these applicants criticized the FTC for "arbitrary decision-making" (Margolius Interview, *supra*); the other felt he was the victim of a "hoax" or a "political decision" (Hendrickson Interview, *supra*). The latter applicant was especially upset to learn that part of the reason he was turned down was the decision-makers' doubt that he could complete the work he proposed within the amount of time estimated in his compensation application. In fact he had limited his request for compensation to 80 hours of attorney time, even though he expected to invest additional uncompensated hours, because the FTC staff had told him that this was the most the Commission would fund. Hendrickson Interview, *supra.*

52. Confidential FTC Document 5; *see also* text accompanying notes 80-82, *infra.*

uncertainty about the standards for awarding compensation;[53] by contrast, most of the applicants interviewed during 1979 found the compensation criteria relatively clear and understandable.[54]

The delay in formulating detailed compensation standards probably was attributable more to staffing shortages and workload pressures than to any conscious agency decision to keep the standards flexible. Preparation and circulation of draft guidelines began at about the time a staff person was assigned to spend a major portion of her time administering the compensation program. The difficulty of getting approval of detailed guidelines from the Bureau Director and the Commission may also have been a factor. In any event, with the benefit of hindsight, the FTC might be criticized for not taking some steps to provide better interim guidance—for example, by treating its "action letters" containing the Bureau Director's decision on individual compensation applications as a system of precedents, and collecting them for the use of staff and applicants.[55] The difficulty is that even

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53. Interview with Rebecca Cohen, Continental Association of Funeral and Memorial Societies, Oct. 26, 1976 (criteria lacked specificity); Interview with John Pound, San Francisco Consumer Action, Nov. 10, 1976 (FTC itself not clear on criteria); Interview with Mark Silbergeld, Consumers Union, Feb. 7, 1977 (some aspects of criteria need clarification); Interview with Glen Nishimura and Timothy Holcomb, Arkansas Consumer Research, March 9, 1977 (need better definitions of what is acceptable as the substance of a compensation proposal, and the allowable rate of compensation); Interview with Ken Schorr, ACORN, updated (criteria not clear; no adequate statement of reasons); Letter from Anthony DiRocco, Executive Secretary, National Hearing Aid Society, to Jamie Bennett, Aug. 22, 1977, at 3 (criteria leave too much judgmental power with the FTC; reasons for some aspects of the FTC's decision unclear); Interview with Jack Hale, Connecticut Citizen Research Group, March 18, 1977 (used draft compensation guidelines, but was advised by FTC staff person to ignore guideline formula for computing costs); Interview with David Swankin, Counsel to National Consumers Congress, Feb. 11, 1977 (letter rulings on compensation requests not informative); Interview with William A. Dickert, United Consumers of the Alleghenies, March 9, 1977 (has no idea why his application for compensation was turned down).

54. *E.g.*, Interview with Archie Richardson, Automobile Owners' Action Council, March 19, 1979; Interview with Bruce Terris, March 12, 1979; Interview with Katherine Meyer, Center for Auto Safety, March 20, 1979; Interview with Gerald Thain, Center for Public Representation, April 2, 1979; Interview with Edward Kramer, the Housing Advocates, March 28, 1979. There was one vigorous criticism of the 1977 Guidelines, to the effect that they have numerous flaws and are designed for lawyers rather than laymen. Interview with Robert Choate, Council on Children, Media and Merchandising, March 23, 1979.

55. The "action letters" were personally signed by the Bureau Director during the early days of the compensation program. They were not collected in any central system; rather, one copy would be sent to the applicant, one would be transmitted to the public record of the rulemaking proceeding where the application had been filed, and one would be incorporated in the central compensation files maintained within the Bureau of Consumer Protection, where the action letters were intermingled with other documents relating to the particular compensation application. Collecting a set of "action letters" would have involved a substantial search, even if one had access to the Bureau files, and as described in the text the benefits in terms of additional information would not have justified the costs.

this modest effort probably would have exceeded the resources available during the early days of the compensation program. Through 1976 and 1977, most of the action letters were extremely conclusory documents which gave little or no explanation of the reasoning underlying the Bureau's decision. They did not become more informative until full-time staff became available to prepare detailed drafts for the decision-makers, and the responsible officials encouraged more elaborate explanations. But even if the letters had been more informative and more readily available, it is questionable whether potential users would have had the resources—including time and expertise—to sift through such a collection of documents and distill operative principles from them. As a general matter, it seems unlikely that the FTC staff attorneys working on the rules would have had the time, or that the smaller consumer groups would have had the expertise. The issuance of general rules and lay-language information pamphlets seems a much more effective method of communicating policies and standards in a program of this nature.

In addition to these problems of codifying and disclosing its decision-making criteria, the FTC faced both practical and conceptual questions in formulating detailed standards of eligibility for compensation. Each of the three principal factors enumerated by the statute—the applicant's interest in the proceeding, the adequacy of existing representation, and the applicant's financial inability to participate without compensation—caused some difficulties in implementation.

B. Interest in the Proceeding

The Magnuson-Moss Act's directive that compensation be given to those advocating "interests" which should, as a matter of fairness, be represented in the particular rulemaking forced the FTC to address the question of what interests would be sufficiently affected by its rulemaking proceedings to warrant funding. This proved to be no easy task.

While the concept of "interest" has analogs in the law of standing to seek judicial review[56] and in the rules of governing intervention in judicial proceedings[57] and administrative adjudications,[58] use of an interest-test in

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56. *E.g.*, Sierra Club v. Morton, 405 U.S. 727 (1972); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973).

57. In the federal courts, Fed. R. Civ. P. Rule 24(a) (2) provides that anyone may intervene as of right in a civil action "when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." *See generally* 3B J. Moore, Federal Practice ¶24.08[2]-[6].

58. E.g., Gellhorn at 396:

As Professor Shapiro accurately observed [in *Some Thoughts on Intervention*

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administrative rulemaking raises novel issues. Rulemaking procedures are typically designed to avoid the interest-definition question entirely, at least during the early stages of the proceeding. In the familiar notice-and-comment rulemaking procedure, for example, the agency simply opens its record and welcomes all comers who wish to submit data, views, or arguments. Participants are freed of any threshold requirement to demonstrate that they possess a legally defined right, or a particular stake in the outcome.

More significant than the procedural distinctions between rulemaking and adjudication is a general difference in the kind of decision being made. In the prototypical situation where an individual tries to intervene in a court proceeding—a dispute over a common fund of money, or title to particular property—identifying the interest in question is a relatively simple matter. Substantive legal standards are already in place, and serve to single out those persons or organizations having a colorable claim of entitlement; the subject-matter of the dispute is easily definable and reducible to a common medium of exchange (a dollar value); and the outcome of the proceeding will be clear allocation of the economic goods, authoritatively defining rights and liabilities, "winners" and "losers." In a sense, the proceeding is designed to refine, elaborate and choose among interests that are already rather clearly sketched out by the applicable rules of law. Administrative rulemaking, by contrast, generally addresses the antecedent question: how shall the general standards and values be articulated to create the interests that will later be joined in particular disputes? At minimum, this latter type of proceeding is likely to affect a wider range of persons, groups and institutions, in a greater variety of ways.

The difficulty of defining interests at the outset of TRR proceedings had become fully apparent to the FTC by the time the 1977 compensation Guidelines were published:

> Most of the crucial issues . . . involve determinations of where the consumer interest really lies. Industry representatives may argue that the ultimate costs of a rule to consumers will exceed the benefits from it, or that the rule involves undesirable transfers of money or risk from one group of consumers to another. . . . [R]ulemaking proceedings often hinge on complex questions concerning whether particular practices occur with sufficient frequency to justify government

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Before Courts, Agencies and Arbitrators, 81 Harv. L.Rev. 721 (1968)], "[a]t the heart of almost every intervention case is the nature and extent of the applicant's interest in the proceeding." The intervenor's interest is significant both in determining whether exclusion is unfair to the intervenor . . . and [in determining] whether the intervenor is likely to have a separate and distinct position to present, thereby making a significant contribution to the hearing.

action, the efficacy of proposed remedies, the scope of the practices to be covered, and their economic impact.

Disputes over such issues involve complicated relationships of comon interest and conflict between different segments of industry and different types of consumers. For example, a proposed rule . . . might raise costs and prices as the price of preventing certain deceptive practices. At least three distinct consumer interests may arise in such a case: (1) those who want the protection and believe it worth the increase in price; (2) those who prefer to look out for themselves and buy more cheaply; and (3) those who would be priced out of the market completely by the increase, therefore deriving no benefit from the rule.[59]

Beyond these problematic aspects of sorting out the direct economic stakes in a proposed rule, situations may arise involving claims of indirect or noneconomic interests. Although this was not a significant problem in the FTC's compensation program during the period covered by this study, the interests asserted by some of the uncompensated participants who appeared at the hearings indicate that questions may well arise in the future. For example, the Funeral Rule's proposed ban on embalming corpses without permission of the next-of-kin drew support from representatives of religious groups which oppose embalming as an article of faith.[60] Another provision of the same rule, which would compel funeral homes to advise consumers that purchase of certain products or services is not required by law, was opposed by the U.S. Chamber of Commerce partly as a matter of general public policy, and partly because of concern that the provision would become precedent for a disclosure principle that might be broadly applied to other trades or industries at some undetermined future time.[61]

Faced with these conceptual difficulties, the FTC responded by shifting the burden to the applicants to define their own interests[62] (which they typically described as some variant of "the consumer interest")[63] and by relying heavily on the criterion of adequacy of representation, where some relatively detailed standards emerged. Thus, the definition of "interest"

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59. 42 F.R. 30482 (June 14, 1977).

60. *See* Staff Report on Funeral Practices Rule at 187 n.l.

61. [Add cite—DE]

62. *See* 16 C.F.R. §1.17(c) (1) (1978) (compensation application should contain a "description of the interest the applicant has or represents in the rulemaking proceeding"); 42 F.R. 30482 (June 14, 1977) (Bureau will continue policy of funding "applications to represent consumers as a general class" but "will give preference to applicants who define their interest or point of view with greater specificity").

63. The FTC's 1977 Guidelines for compensation observe: "To date, most applicants have claimed to represent the interests of consumers or large subgroups of consumers." 42 F.R. at 30482 (June 14, 1977).

was only rarely of major significance in the compensation decisions that were made during the period covered by this study. However, there were some debates within the agency over the nature of the interest represented by particular applicants, and some tentative efforts to provide more precise content for the nebulous term "interest."

1. Narrow-focus vs. broad-focus groups

By early 1976, the FTC's Compensation Committee had developed a clear preference for groups which had a narrow or specialized focus, as opposed to those which were general-purpose consumer advocates. The rationale for this preference seemed to be that a group with a particular well-defined interest would have a strong internal incentive to provide high-quality advocacy of its position because its constituents are more likely to monitor its activities.[64] This preference for specialized groups was carried forward into the 1977 compensation guidelines,[65] but with a somewhat different rationale. The Guidelines suggest that specialization is preferred because "the consumer interest" is composed of diverse, conflicting strands which cannot be consistently or effectively advanced by one representative[66] —a kind of "conflict of interest" theory.

One possible reason for the change in rationale is that some consumer groups which had received early drafts of the Guidelines for comment were extremely critical of the theory that a narrow organizational focus assured high quality work. Consumers Union, a broad-focus group which would quite likely be disadvantaged by the preference, argued:

> This presumption . . . is based solely upon the Bureau's *ipse dixit*. We know of no evidence which suggests that members of narrow-focus consumer organizations are more likely, or broad-focus consumer organizations less likely, to make a more thorough case or use available resources better, based upon incentives. In fact, broad-focus organizations may be viewed as such in some cases simply because they specialize in several narrow-focus issues . . . . If a more thorough case has been made or resources better used by a narrow-focus organization, the most likely explanations are 1) more experience and expertise in the substantive area, or 2) better general performance and competence. . . . The

64. Interview with James V. DeLong, Assistant Director, Bureau of Consumer Protection, March 10, 1976; Confidential FTC Document 6.

65. *See* 42 F.R. 30482 (June 14, 1977).

66. *E.g., id.*:

> [G]roups may agree on a consumer protection goal but be opposed on their assessment of the best way to attain it. An example is the conflict between those who want detailed regulation in a particular area and those who favor a free market approach . . . Again, it is difficult for one consumer representative to advocate the alternative approaches effectively.

> Bureau has already provided in the guidelines . . . for consideration of these two criteria . . . .[67]

These points seem cogent: to the extent that preference for narrow-focus groups seeks to assure a particular content or quality of presentation, other criteria can perform this task more directly and efficiently. The narrow-focus preference also may be counterintuitive or difficult for participants to understand. Well after the preference was established, there were instances in which compensation applicants argued for funding,[68] and Presiding Officers designated them as consumer representatives[69] or recommended that they be granted compensation,[70] precisely because they were broad-focus groups who could speak to a wide spectrum of consumer experience.

On the other hand, the preference for narrow-focus groups could have both theoretical and practical value for the FTC in administering the compensation program. If one starts from the assumption that a major purpose of the compensation program is to enrich the rulemaking record by encouraging advocacy of diverse and conflicting veiwpoints, then a standard which encourages the funding of specialized groups with disparate positions makes sense.[71] On a more pragmatic level, the preference could serve to disburse funds more widely among a diversity of consumer groups, rather than allowing the large, multi-purpose national groups to dominate the program. An organization like the Continental Association of Funeral and Memorial Societies, which exists solely for the purpose of facilitating low-cost, prearranged funerals, would be unlikely to apply for funds in any proceeding other than the Funeral Practices rulemaking. Preference for narrow-focus groups might also minimize the controversy which sometimes

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67. Letter from Marck Silbergeld, Attorney, Washington office, Consumers Union, to Bonnie Naradzay, Special Assistant for Compensation, Bureau of Consumer Protection, FTC, Nov. 15, 1976, at 4.

68. *E.g.*, Application of Consumer Federation of America for funding in Thermal Insulation proceeding, Dec. 23, 1977, at 5: "Since CFA's membership includes numerous state and local organizations in every geographic region of the country, we are uniquely suited to advocate on behalf of a widely representative cross-section of the American consuming public."

69. Presiding Officer's Notice of Selection of Consumer Interest Group Representative in Thermal Insulation proceeding, Jan. 19, 1978, at 2:

> The California groups, that is, the California Public Interest Research Group and the California Energy Commission [,] are deemed by me to be too narrow a base to be an appropriate representative of consumer interests generally. Both of the other organizations, [the Consumer Federation of America and the National Consumers League,] on the other hand, represent national constituencies and, given the broad nature of rulemaking in general and this Rule in particular, I deem it advisable to select a Group Representative from an organization with such a broad base.

70. Confidential FTC Document 7.

71. It would not, however, be very helpful in choosing among groups; at the logical extreme, this approach would argue for funding as many groups as possible, so long as they took distinguishable positions with respect to the proposed rule.

arose regarding the legitimacy or authority of compensated consumer groups to act as "representative of the consumer interest"—a role in which the procedures and participants tended to cast them, and which was challenged or resented by some uncompensated interests.[72] With a clear, specific and narrow mandate, the compensated group would more likely be viewed as a legitimate representative of a particular aspect of the consumer interest, rather than as spokesman for all consumers. The FTC's reliance on criteria which would create an incentive for quality representation might also reduce the need for agency officials to make direct assessments of the quality of the work proposed or performed by compensation applicants—a particularly sensitive and difficult task when the applicants are supposed to be independent critics of the agency.

2. Groups vs. Individuals

A related component of the interest test depended upon whether the applicant was an organization (and therefore could be presumed to represent the interests of its members and constituents) or was an unattached individual (and therefore could be presumed to speak only for personal interests). This preference for organizational applicants did not appear in either the Rules of Practice or the 1977 Guidelines, beyond the Guidelines' reference to constituency support as a factor bearing on adequacy of representation.[73] But the distinction between groups and individuals who applied for compensation in their own name during the period covered by this study, only three were given any compensation at all, and two of these received less than $300 each.[74] Most of these individual applications were

72. *E.g.*, Interview with Gary J. Kushner, Staff Counsel, Scientific Affairs, Grocery Manufacturers of America, Inc., Dec. 11, 1976; Interview with Howard Eglit, attorney for National Council of Senior Citizens for Chicago Hearing Aids hearings, July 5, 1976. One of the compensated consumer participants in Food Advertising, appearing on behalf of the Indiana Home Economics Association, also expressed some surprise at being "lumped together" with consumer advocate groups at the hearings, since the group's constituency, home economists, were hardly typical consumers. Interview with Mary Ruth Snyder, Indiana Home Economics Assn., March 18, 1977.

73. *See* text accompanying notes 148-160, *infra.*

74. The following applicants were considered as individuals for this purpose, even though in a few instances there were indications that they were affiliated with organizations that might be thought to have an interest in the proceeding. However, in their applications they did not purport to speak for the organizations.

Proceeding	Applicant(s)	Action
Care Labeling	Seymore Goldwasser	Denied
Food Advertising	Wendy Gardner	Granted
Food Advertising	Mary Ruth Nelson	Granted

filed in the first wave of postamendment TRR proceedings which went into hearing in 1975 or 1976. Later, as the correct interpretation filtered down to the operational levels of the agency,[75] individuals were presumably advised not to seek reimbursement through the compensation program, but rather to apply for funding through the Bureau's allocation of resources for staff witnesses.

While the eligibility of individual applicants to receive compensation funds was not a major practical problem for the FTC, the group preference and the related "constituency ties" factor raise some fundamental questions about the functioning of a direct funding system. Through the group preference, the FTC's Compensation Committee was evidently trying to steer a middle course between two extreme situations which could frustrate the purposes of the program. The first of these might be called "the pure entrepreneurial expert"—the grantsman who viewed the FTC compensation fund as simply another target for his proposal-writing. While no unambiguous examples of this extreme surfaced during the period covered by this study, the application filed in the Food Advertising proceeding by several faculty members at Utah State University is instructive.[76] These researchers proposed to update the data base for their computerized "Index of Nutritional Quality", and to use the index to analyze the nutrient density of traditional foods which would be covered by the proposed rule's nutrition

Proceeding	Applicant(s)	Action
Food Advertising	Kurt Oster, M.D.	Denied
Food Advertising	Sidney Margolius	Denied
Funeral Practices	Michael Hirsh	Denied
Holder in Due Course	Prof. Richard Kay	Denied
Holder in Due Course	Prof. Richard A. Hesse	Denied
Holder in Due Course	David A. Scholl	Withdrawn
Holder in Due Course	Richard Victor	Denied
Prescription Drugs	Craig Sandahl	Denied
Protein Supplements	Chester Sutton	Denied
Vocational Schools	Joel Platt	Granted
Vocational Schools	Len Vincent	Denied
Vocational Schools	John C. Hendrickson	Denied
Vocational Schools	Mary A. Vance	Withdrawn

Further information about these applications can be found in the tabular summaries in Appendix A. This list omits the "San Francisco regional office witnesses" in the Vocational Schools rule because they did not apply for compensation themselves; rather, the FTC's San Francisco regional office sought funds on their behalf. It also omits two individuals' applications on the Children's Advertising proceeding, which were pending when data collection for this study ended in early 1979.

75. *E.g.*, Confidential FTC Document 8.

76. Proposal to Federal Trade Commission from R. Gaurth Hansen, Bonita Wise, and Ann M. Sorenson, Utah State University, June 21, 1976.

advertising provisions. Their application reads much like the narrative portion of a conventional research grant proposal, with no reference to any interest they might represent, or to the need for representation. Although the proposal evidently was of high quality and relevant to the issues in the proceeding,[77] the question was raised as to whether the researchers represented any interest,[78] and they were not funded.[79]

At the other extreme is the compensation applicant who might be a mere "stalking horse" for the staff supporting the rule. Tactically, staff might prefer to channel some of its witnesses into the compensation program in order to make them appear more independent and impartial than they would if they were paid directly by the staff. The staff attorneys might also gain access to a larger pool of resources if they could effectively add compensation funds to the Bureau's rulemaking budget. The funds available for staff to use in hiring contract consultants for rulemaking proceedings were at times quite limited,[80] and the procedures for contracting out research were slow and cumbersome.[81] Thus, there were ample bureaucratic incentives for the staff to try to use the compensation program as an "adjunct contract fund." The officials administering the compensation program were aware of this tendency and sought to resist it, in part through application of the interest tests.[82]

To avoid the risks of either entrepreneur dominance or staff dominance of the compensation program, the requirement that the applicant must be an established, independent organization with a defined mission or interest undoubtedly has some value. However, the organization preference is a less than perfect tool to accomplish this objective. In the first place, the distinction between individuals and organizations may not always be meaningful, since an individual with a cause and a modest amount of resources can establish an organization to advocate his viewpoint. In fact, one of the compensated participants in FTC rulemaking has been described in those terms by a Ford Foundation study. The Council on Children, Media and Merchandising, which received substantial sums to participate in the Food Advertising, OTC Drugs, OTC Antacids, and Children's Advertising proceedings, was characterized as "virtually the alter ego of its founder

77. Confidential FTC Document 9.

78. Confidential FTC Document 10.

79. As Appendix A indicates, no official "action letter" on this application could be found in FTC files. However, Commission records of disbursements under the compensation program make it clear that the Utah State application was not funded.

80. Confidential FTC Document 5.

81. Confidential FTC Document 11.

82. Interview with Bonnie J. Naradzay, Special Assistant for Compensation, FTC, Oct. 19, 1976; Confidential FTC Document 12.

and principal member, Robert Choate," who is quoted as saying: " 'Washington is an organization town. The first question asked of one going to his or her government with other than a purely personal matter is "who are you with?" ' "[83] According to the Council's application in the Food Advertising proceeding, the "organizational base" of CCMM consisted of 13 persons, in addition to Mr. Choate.[84]

Apart from the possibility that an organization may be an "alter ego" of its founder or might even have been created for the purpose of conferring legitimacy and eligibility on an applicant, there is a related issue that arises when a very small organization receives a large grant for extensive participation in a major TRR proceeding. In this situation, the organization will, in all likelihood, have to subcontract most of its participation functions to persons or organizations who might not be eligible themselves for compensation— outside law firms, survey research companies, or individual experts-for-hire. An example would be the Consumer Affairs Committee of the Greater Washington Chapter, Americans for Democratic Action (ADA-CAC), which operated on an annual budget of approximately $2,000 before it became involved in trade regulation rulemaking.[85] During the three-year period from 1976-1979, ADA-CAC received compensation to participate in six different rulemaking proceedings with authorizations totalling approximately $200,000.[86] When an organization's operating budget expands so dramatically, there is some risk that it will become little more than a conduit for the funds, rather than an active participant which shapes and controls its own input into the decision-making process. In ADA's case, the organization eventually applied for, and received, funding for members of the Committee to work with outside counsel in formulating the group's position on a proposed rule.[87]

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83. Thain & Snow, *Non-Law Public Interest Advocacy: Advertising on Children's Television,* in B. Weisbrod, J. Handler & N. Komesar, Public Interest Law: An Economic and Institutional Analysis 473, 477, 498 (paper ed. 1978).

84. Letter from Robert B. Choate to J. Thomas Rosch, Director, Bureau of Consumer Protection, Federal Trade Commission, April 24, 1975, at 2: "The organizational base of the Council is the ad hoc group represented by the names on this letterhead. Communication between Council members and the Chairman takes place with some regularity." The letterhead lists 14 members, including Mr. Choate.

85. Application for Compensation of Consumer Affairs Committee, Greater Washington Chapter, Americans for Democratic Action, in Ophthalmic Goods Proceeding, May 27, 1976, at 3.

86. *See* Table M, *infra.* ADA-CAC also applied unsuccessfully for funding in the Prescription Drugs rulemaking proceeding.

87. This request arose in the joint application of ADA-CAC and the National Council of Senior Citizens for compensation in the OTC Drugs TRR proceeding. Letter from Ann Brown,

(Continued)

To the extent that these situations are regarded as potentially serious problems, a partial answer may be found in another section of the Guidelines which makes constituency ties or membership support a favorable factor in considering a group's compensation request.[88] That is, requiring the organization to demonstrate that it has active, widespread support for its activities could minimize the risk that its participation will be shaped by the FTC staff, or controlled by unrepresentative entrepreneurs. However, the intitial assumption—that the risk of dominance is a serious problem—deserves careful consideration, because it involves a variety of theoretical and practical judgments about the nature of representation in trade regulation rulemaking.

Necessity and Adequacy of Representation

1. Need for representation

The statute requires not only that an applicant for compensation possess or speak for an interest, but also that "representation of [the interest be] necessary for a fair determination of the rulemaking proceeding taken as a whole."[89] Relevant portions of the Rules of Practice simply tracked this statutory language,[90] thereby shifting the burden to the applicants in the first instance to demonstrate why representation of their interest —however they defined it—was necessary. During the early days of the compensation program, applicants sometimes simply ignored this requirement

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(Continued)

Consumer Affairs Committee, Americans for Democratic Action, and David Marlin, National Council of Senior Citizens, to Bonnie Naradzay, Special Assistant for Compensation, Nov. 18, 1977 (requesting supplemental funding for Brown and Marlin to meet with attorneys from the outside law firm representing them in the proceeding "to determine the positions which we will take on the various issues presented in this proceeding," *id.* at 6). The letter continues:

> We will of course seriously consider the advice given by our attorneys . . . but we must make the final decisions. We can only do so if representatives of each group acquaint themselves with the issues and meet with each other, our attorneys and their consultant to discuss them.

Id. at 7. The FTC's subsequent action letter approved this supplemental request, with some conditions:

> If [Ms. Brown] volunteers her time, then her time obviously does not represent a *cost* to the Committee, and it is not reimbursable . . . However, if she would otherwise not participate in this proceeding, and if the $15 per hour accrues to her, then it is reimbursable, because it is a cost to her organization.

Letter to Ann Brown and David Marlin from Richard C. Foster, Deputy Director for Operations, Bureau of Consumer Protection, Feb. 10, 1978, at 2.

88. *See* text accompanying notes 148-160, *infra.*

89. *See* text accompanying note 33, *supra.*

90. 16 C.F.R. § 1.17(c) (2) (1978).

program, applicants sometimes simply ignored this requirement altogether[91] (which evidently did not preclude them from receiving compensation),[92] or provided only a cursory analysis of need.[93] More frequently, applicants resorted to arguing that "the other side" (*i.e.,* industry if the applicants were a consumer group, or vice-versa) was well funded and vigorously represented.[94] At times this approach led to quite abstract "generic balance" arguments, wholly divorced from the array of interests in the particular proceeding, as in the following example:

> It is becoming generally recognized that the consumer interest will not be automatically protected in the process of government and that special steps must be taken to assure adequate representation of that interest.
>
> . . . . .
>
> The adversary process works well only when all sides are effectively and separately represented. This would not be the case if the agency responsible for weighing the evidence and developing a final trade rule in the public interest were also the *sole* advocate of the consumer interest.[95]

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91. *See* Application of New York Public Interest Research Group (NYPIRG) for compensation to participate in Funeral Practices proceeding, Feb. 22, 1976.

92. As the tabular summary in Appendix A indicates, NYPIRG received a substantial grant of compensation to serve as a group representative in the Funeral Practices rulemaking and to present testimony. So far as the documentary record indicates, the question of need for representation was never raised.

93. For example, the relevant portion of the application filed by the Golden State Mobilhome Owners League, Inc. in the Mobile Homes TRR proceeding, Oct. 20, 1976, states in its entirety:

> Mobile home consumers are not represented nationally and therefore, a grant of funds is necessary for the largest and best organized mobile home consumer group to participate in the FTC hearings. On the other hand, mobile home manufacturers and dealers are represented on a national level, and we anticipate that if mobile home consumers are not granted funds to participate in the hearings that [*sic*] only one side of the issue in regard to the FTC mobile home regulation will be presented.

This applicant was also granted compensation; *see* Appendix A.

94. *E.g.,* Application for Compensation of Americans for Democratic Action and National Council of Senior Citizens in Funeral Practices proceeding, Feb. 23, 1976, at 5 ("Based on past experience, the Commission's informal hearing will be well attended by representatives of the funeral industry . . . It is obviously essential that consumers of funeral items and services also be adequately represented.") Application of Association of Physical Fitness Centers in the Health Spas proceeding, May 31, 1977, at 5; Application of National Hearing Aid Society in Hearing Aids proceeding, April 12, 1976, at 2-3; Application of Center for Auto Safety in Mobile Homes proceeding, Oct. 24, 1975, at 6 ("Backed by billions of dollars in sales, the mobile home industry will easily find articulate spokespersons to represent its interests. In fact, even before the TRR was published in proposed form, the Mobile Home Manufacturers Association (MHMA) petitioned the Commission to abandon the proceeding, and the industry has already deluged the TRR docket with comments highly critical of the proposed rule.").

95. Application of Automobile Owners Action Council in Used Cars proceeding, (undated; date-stamped May 18, 1976, by Federal Trade Commission), at 11.

Other applicants emphasized the aggregate dollar stake of the interests they represented,[96] or the relevance of the information they sought to present,[97] or their expertise.[98] Only a very few attempted to make showing of need for representation based on the state of the record in the particular proceeding,[99] or the contents of compensation requests filed by other applicants[100]—which is perhaps not surprising, given the difficulty of obtaining access to these materials.[101]

In sum, during the period covered by this study, the need-for-representation standard was given a wide variety of interpretations by the compensation applicants by the FTC. At least, there is no clear evidence that any final decisions on compensation applications turned on the inadequacy of the applicant's showing of need for representation. The 1977 Guidelines continue to hedge on this point, noting that "it is difficult to define precisely when representation of an interest is 'necessary for a fair determination of the rulemaking proceedings taken as a whole.' "[102] However, the Guidelines do establish some boundaries by sketching out two situations in which the FTC believes that the test can be easily applied: "This requirement is met if the proposed rule would significantly affect the [applicant's] interest," but it "is not met when an applicant wishes a proceeding broadened to take care of its particular concerns."[103] Both of these situations deserve brief comment.

In the abstract, it is difficult to quibble with the proposition that an interest needs to be represented when a proposed government action will

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96. *E.g.*, Applications of National Consumer Law Center in Holder in Due Course proceeding (March 9, 1976, at 2-3) and Credit Practices proceeding (Feb. 26, 1976, at 2-3).

97. *E.g.*, Application of National Consumers Congress in Food Advertising Proceeding, May 11, 1976, at 2; Application of Consumers Union in Funeral Practices proceeding, Oct. 28, 1975, at 3; Applications of Association of Physical Fitness Centers in Health Spas proceeding, May 31, 1977, at 4.

98. *E.g.*, Application of National Consumer Law Center in Credit Practices proceeding, Feb. 26, 1976, at 3; Application of Consumers Union on Funeral Practices proceeding, Oct. 28, 1975, at 3.

99. Application of California Citizen Action Group in Health Spas proceeding, Oct. 25, 1976, at 5-6:

> The Commission record as of October, 1976, already includes over 100 industry comments.
>
> To balance this heavy industry input, Citizen Action proposes to act as the representative of the consumer interest. Thus far, the Commission's record has very few organized consumer group comments, and of those that do exist few present an in-depth, substantive analysis of the proposed rule, and few speak from the unique perspective of Citizen Action.

100. *See* Amended Application of Americans for Democratic Action, Health Spas proceeding, April 13, 1977, at 5-6.

101. *See generally* the section of the Administrative Conference Report on Trade Regulation Rulemaking Procedures, Part I, relating to the rulemaking record in TRR proceedings.

102. 42 F.R. 30482 (June 14, 1977).

103. *Id.*

affect that interest in some concrete, substantial way. However, the problem here, as in the standing doctrine, is what kind of threshold determination can be made without getting deeply into the merits of the controversy. Under the Magnuson-Moss Act, one of the ultimate issues to be addressed in a TRR proceeding is the economic impact of the proposed rule, with special reference to the interests of small businessmen and consumers.[104] At the outset of a proceeding, there may be multiple versions of a proposed rule or multiple rule provisions under consideration, widely divergent beliefs as to their possible economic effects on industry or consumers, and very little relevant data available on the rulemaking record.[105] As a result, prehearing determinations of economic effect in a broad policy rulemaking proceeding must often be limited to rough estimates of economic effect, or to consideration of whether the applicant's claims of impact are plausible on their face. That is, the "significant effect" test does not seem to be a very useful tool for screening out ineligibles, or choosing among qualified funding applicants. The situation might be different if proposed rules were narrow in scope, legal theories were precisely defined, proof standards were clear, and prior stages of the process had produced a manageable set of key disputed issues. However, that would be a very different kind of proceeding from the TRR hearing observed during this study.

The second "need" situation, in which the Guidelines state that applications will be rejected if "the particular interest [of the applicant] is not significantly affected by the proceeding as bounded by the Commission,"[106] also seems likely to cause problems in application. This provision may have resulted from concern over the manageability of TRR proceedings under the Magnuson-Moss Act, which frequently generated enormous, unwieldy records and required serveral years to complete. With the proceedings already so large and slow, it is not surprising that the agency would be unsympathetic to any proposals to broaden the scope of a TRR.[107]

One difficulty that arises from the scope-of-proceeding test, however, is the fact that applicants' criticisms of a proposed rule will often tend to inject "new" issues that might not otherwise be in contention. After all, one basic purpose of a compensation program is to generate fresh perspectives on consumer problems. And, as discussed below, some of the criteria applied by the FTC in making compensation decisions placed a premium on new information or diverse viewpoints. Thus, applying the scope-of-proceeding tests is likely to involve some elusive distinctions. For example,

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104. 15 U.S.C. § 57a(d) (1) (1976).

105. Confidential FTC Document 13.

106. 42 F.R. 30482 (June 14, 1977).

107. Another consideration that might make the FTC reluctant to fund groups advocating radical expansions in a proposed rule is the possibility that even if the group was successful in convincing the Commission to enlarge the scope of the TRR, industry groups may be able to convince a court to invalidate the rule on judicial review for inadequate notice.

it is not clear which, if any, of the following positions that might be taken by a compensation applicant would involve an interest "not significantly affected by the proceeding as bounded by the Commission":

(a) A consumer group asserts that the rule is drafted will not protect (therefore will not affect?) the consumer interest because the remedies provided will be totally ineffective in halting abuses.

(b) A trade association representing an industry covered by a proposed rule argues that the rule should be expanded to include some competitors (*e.g.*, the nonprofit competitors of proprietary vocational schools) because otherwise these competitors will have an unfair economic advantage, leading to market distortions.

(c) A consumer group contends that the proposed rule, which covers deceptive practices A, B, and C, should be broadened to include deceptive practices D and E, because they are functionally similar to the covered practices or are frequently used by the same sellers.

(d) A narrow-focus consumer group charges that the proposed rule is deficient because it is designed to help the average consumer, and fails to provide adequate relief ro the group's constituency of peculiarly vulnerable consumers (*e.g.*, the elderly, or children, or Spanish-speaking persons).

It seems likely that the scope-of-proceeding requirement was designed primarily to deal with the latter sort of situation, since three applications raised this problem of scope in the pre-guidelines period. Two were filed by the Council on Children, Media and Merchandising, which sought special protections for children in the Food Advertising and OTC Drugs proceedings; the third was submitted by the Spanish Speaking/Surnamed Political Association, which sought bilingual disclosure requirements in the Food Advertising rule. The Hispanic group's application was rejected on the ground that the problem of Spanish-speaking consumers "appears to apply to several rules, [and] is not a substantive, disputed issue as the food advertising proposed rule is now construed."[108] The Council on Children, Media and Merchandising, on the other hand, received funding for both of its applications, despite an initial denial in the OTC Drug proceeding based upon the irrelevance of the children's advertising issues to the proposed rule.[109] Later, the FTC commenced a separate rulemaking proceeding to

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108. Action letter on Application of Spanish Speaking/Surnamed Political Assn., Food Advertising Proceeding, July 19, 1976, at 1.

109. Action letter on Application of Council on Children, Media and Merchandising,OTC Drug Proceeding, March 1. 1976, at 1-2:

> Your application does not indicate in what way, if any, the interests of children bear on the question of whether claims prohibited by the FDA in labeling should be prohibited in advertising, except for the statement that "[t]he review of OTC drug labels both for wording and for efficacy of the contents of the package must be accompanied by a similar overhaul of how the products are advertised before large audiences, particularly on

deal with some general problems of advertising directed at children.[110] It is not clear how these results can be reconciled, or which of these seemingly conflicting approaches would be the correct interpretation under the Guidelines. However, the fact that CCMM received a compensation award to represent the special interests of children and illiterates in the Antacids rulemaking,[111] after the Guidelines went into effect, suggest that the FTC was not interpreting the "scope-of-proceeding" requirement very strictly.

2. Adequacy of Representation

Some of the most detailed standards contained in the 1977 compensation Guidelines are those explicating the statutory requirement that the applicant have, or represent, an interest "which would not otherwise be adequately represented in the proceeding."[112] In general, the factors bearing on adequacy of representation can be divided into two subgroups: those that relate to the activities which the applicant proposes to undertake, and those that involve various characteristics of attributes of the applicant. As will be seen, these two groups of standards are based upon somewhat different assumptions about the nature of interest-representation in a rulemaking proceeding.

(a) *Activity tests.*—Although the statute does not explicitly require the FTC to examine the activities which a compensation applicant proposes to undertake, this inquiry was a central feature in administration of the compensation program from the outset. The agency's reasons for emphasizing this factor are reflected in the 1977 Guidelines:

> The Bureau cannot determine that an applicant's participation is

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> television." In other words, it appears from your application that the issues you propose to raise cannot reasonably be regarded as within the scope of the issues in the rulemaking proceeding.

CCMM re-applied in a page-and-a-half letter that provided little additional explanation of its position. After reciting that the CCMM personnel involved in the proceeding felt "there is a great need to examine" the rule's theory that FDA labeling requirements can be simply extended to advertisements, the letter states:

> After discussions with your personnel I am concerned that the FTC's desire to keep these hearings to a "sharp, limited focus" disregards a number of issues about drug advertising that must be raised here and now. They may be raised again in the individual [FDA] monograph hearings relative to warnings, but they must also be raised in regard to the affirmative claims which are the subject of the immediate proceeding.

Letter from Robert B. Choate, Chairman, Council on Children, Media and Merchandising, to Margery Waxman Smith, Acting Director, BCP, Dec. 23, 1976, at 2. The application was then approved. Action letter of Jan. 21, 1977. *Cf.* Confidential FTC Documents 14-16.

110. 43 F.R. 17967 (Apr. 27, 1978).

111. Application of Council on Children, Media and Merchandising for Compensation in OTC Antacids Proceeding, Sept. 21, 1977; Action Letter on Application of CCMM for Compensation in OTC Antacids Proceeding, Sept. 30, 1977.

112. 15 U.S.C. § 57a(h) (1) (A) (i) (1976).

> needed for adequate representation of the interest unless the applicant's proposed activities are compared with the efforts of the staff and other participants. . . . The adequacy clause of the statute requires that replication of material already on the record or scheduled to be put on the record does not meet the standard.[113]

This interpretation of the statute has common-sense appeal—Congress could hardly have intended that public funds be expended for the purpose of producing merely cumulative or redundant information—but it raises a series of subsidiary questions.

The first point to be noticed is that a "new information" standard does not apply equally to all compensable activities. Applicants sought, and were granted, compensation for participating in each of the major public stages of a TRR proceeding: submitting prehearing written comments, presenting testimony at the hearings, serving as a designated group representative with the right to examine and cross-examine witnesses, preparing rebuttal submissions, filing post-record comments on the Presiding Officer's and staff's final reports, and making oral presentations to the full Commission. Only three of these possible activities—prehearing comments, hearing testimony, and rebuttal submissions—are designed primarily to generate "data" as opposed to "views or argument." Even for these predominantly data-generating activities, the new information standard sometimes proved difficult to apply.

One difficulty was in determining whether mode of presentation made any difference. More specifically, if the prehearing comment record contained information of a certain kind, would this mean that compensation should be denied to an applicant who wants to present the same kind of data at the hearing? In at least some cases that arose during the period covered by this study, the answer seemed to be "yes." For example, the Center for Auto Safety and the Americans for Democratic Action filed a joint application in the Used Cars proceeding in which they proposed, among other things, to search the Center's files of some 50,000 complaints from car owners, and to prepare a report analyzing the complaints relating to used automobiles.[114] The applicants were denied funding for this portion of their proposal on the ground that it was duplicative of material already on the record.[115]

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113. 42 F.R. 30482 (June 14, 1977).

114. Application of Center for Auto Safety and Americans for Democratic Action, Used Cars Proceeding, Nov. 5, 1976, at 9.

115. Action letter on compensation application of Center for Auto Safety, Dec. 21, 1976, at 2:

> As you may be aware from the staff report and subsequent written submissions on this rule, the present record contains a considerable amount of information on consumer complaints. In addition, the record shows that the Automobile Owners' Action Council has been funded to conduct the sort of file search that you have proposed. Therefore, I cannot find that this further information will be a substantial contribution rather than duplicative.

There would be little reason to object to this approach if all parts of the record were treated as being functionally equivalent in decision-making, or if there were precise standards of evidence in trade regulation rulemaking. In practice, however, neither condition existed. With respect to the relative weights of the comment record and hearing testimony, the argument could be made that written comments were entitled to less weight than oral testimony under the substantial evidence test because they had not been subjected to the crucible of cross-examination. In addition, the problems of physical access to the record—simply locating and obtaining relevant material—were often greater in the comment record, which meant that prehearing comments were more likely to get lost or overlooked in the avalanche of documents that inundated many rulemaking records.[116] The absence of clear evidentiary standards also made it difficult to determine when there was enough evidence for a particular point on the record—for example, whether there were enough consumer complaints to establish the prevalence of unfair practices covered by the rule, so that a consumer group seeking funding to generate more consumer complaints could reasonably be turned down.[117]

The second problem with the new information test concerns the ability of the FTC staff attorneys assigned to the rule to influence compensation decisions. Application of the new information standard required knowledge of both the present and the future state of the rulemaking record, since "replication of material already on the record or *scheduled to be put on the record* does not meet the standard.[118] As a practical matter, the staff attorneys have a virtual monopoly on this information. At the stage of the proceeding when compensation decisions are usually made, shortly before the start of hearings, the only other person who might have some detailed understanding of the record is the Presiding Officer. His mastery of the record in the prehearing stage is typically less systematic and detailed than staff's, since he has had neither the time nor the obligation to review all of the prehearing record, and he has not had as much contact with prospective witnesses as the staff attorneys. As a result, the staff's judgment regarding redundancy or novelty of proffered information is difficult to challenge. This fact creates some risk that the staff attorneys can use their "leverage" to compromise the independence of the compensation applicants, or to defeat the applications of disfavored groups.

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116. *See generally* the section of the ACUS Report on Trade Regulation Rulemaking, Part I (June, 1979) relating to the rulemaking record.

117. The passage from the Center for Auto Safety Action Letter quoted in note 115, *supra,* suggests that the earlier AOAC complaint letters were regarded as necessary evidence eligible for funding despite the presence of several thousand complaint letters on the prehearing record (Confidential FTC Document 17), but that an evidentiary line was crossed with the CFAS application. The basis for this determination is not apparent.

118. 42 F.R. 30482 (June 14, 1977) (emphasis added).

These problems were perhaps most clearly illustrated by the handling of the Center for Auto Safety's application in the Mobile Homes proceeding. The FTC initially denied compensation for two proposed activities on redundancy grounds: an economic study was rejected because "the Commission staff proposes to introduce material that is likely adequately to explore the same economic issues," and consumer complaint testimony was refused unless the applicants could provide "additional information that will show that the witnesses will not simply duplicate the testimony of homeowner witnesses to be called by the staff."[119] The applicants responded angrily, questioning the authority of the FTC to dictate the content of a compensated group's presentation, and requesting discovery of the staff's "case" so that they could dispute the claim of duplication:

> [The compensation provision] was not intended to provide Commission staff an opportunity to control the participation of outside counsel and witnesses, or to use those [who are] granted compensation merely to fill in what Commission staff regard as gaps in the rulemaking record. On the contrary, as Congress recognized, adequate representation is possible only when the client and his/her representatives - and not the FTC - determine what submissions are necessary to support the client's position. . . .
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> . . . [S]ince we do not know either what testimony staff mobile homeowner witnesses will present or what material the staff will introduce that is "likely to explore" the economic issues we have raised, we cannot now demonstrate that our witnesses and economic study will [provide new information] . . . . Indeed, given this information vacuum, we do not see how *anyone* would make the showing you require. We therefore request that the Commission specify (1) the testimony staff homeowner witnesses will present and (2) the economic material the staff will present.[120]

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119. Action letter on application of Center for Auto Safety, Jan. 19, 1976, at 2.

120. Letter from Clarence M. Ditlow, III and Michael M. Landa, Center for Auto Safety, to Joan Z. Bernstein, Acting Director, Bureau of Consumer Protection, Federal Trade Commission, Feb. 26, 1976, at 2. The level of detail (and the burden to FTC staff) that would be encompassed in this discovery request is suggested by the Center's specifications on the economic issue, on which the following information was sought:

(1) How consumer effects are to be defined and measured;
(2) Whether the question of impact of the rule on concentration of market power will be addressed, [and] if so how it will be handled;
(3) How the costs and benefits of the rule will be defined and measured;
(4) What other specific economic issues the staff will raise, the nature of the economic models to be used in all cases in structuring the analysis, the data to be employed.

Id. at 2-3. To the extent these specifications would require the FTC to take a position on unresolved questions of evidentiary standards or burden of proof, there was an additional incentive to avoid a confrontation.

This particular controversy was resolved through informal negotiations between the applicant and the staff,[121] but it does illustrate the dilemmas of applying a new information standard. If the test is to be anything more than a coarse-grained filter for the grossest redundancies, it will be necessary to receive detailed recommendations from the only individuals who are thoroughly knowledgeable, the staff attorneys. Allowing the staff's characterization to pass without effective opportunity for outside challenge could pose a real threat to the independence of the consumer and industry groups who apply for compensation: simply by making a plausible assertion that the information in question was redundant, the staff could defeat a disfavored applicant. On the other hand, implementing a realistic right to contest the staff recommendation would complicate and delay the proceedings,[122] and would also require public disclosure of intra-agency memoranda containing advice or recommendations—something the FTC is not willing to do.[123]

(b) *Group representatives.*—Although the legislative history of the Magnuson-Moss Act suggests that the opportunity to cross-examine at TRR hearings was provided as a means of protecting those who would be regulated by a proposed rule, the first wave of compensation applications under the statue made it clear that consumer groups also wanted to take advantage of this new procedural right. When the issue arose for the first time in the Vocational Schools proceedings, the FTC decided that the language of the statute was broad enough to permit funding of applicants who wanted to serve as a group representative,[124] and authorization for "procedural participation" soon became a regular feature of the compensation program.[125] In fact, the presumption in favor of having consumer

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121. Letter from Joan Z. Bernstein, Acting Director, Bureau of Consumer Protection, to Clarence M. Ditlow, III and Michael M. Landa, April 12, 1976.

122. The major problems would be threefold. First, the challenger would have to be given time and opportunity to master the existing record—no small chore, given the size and disorganization of the records and the fact that only a single copy was kept in Washington. Second, the challengers would have to have some opportunity to discover staff's projections of what was scheduled or likely to be introduced at the hearing, which would divert staff from hearing preparation and probably intensify the discovery problems that arose in other aspects of the TRR proceedings. Finally, such a procedure would require more time and effort on the part of FTC officials who are responsible for making compensation decisions. In addition, if an applicant group was truly lacking in resources it might need compensation in order to mount a meaningful challenge to the denial of compensation.

123. Interview with Michael Sohn, General Counsel, and Barry Rubin, Office of General Counsel, Federal Trade Commission, Jan. 8, 1979.

124. Confidential FTC Documents 18-20; Action letter on Application of San Francisco Consumer Action in Vocational Schools proceeding, Oct. 24, 1975.

125. *See* 1977 Compensation Guidelines, 42 F.R. 30481 (June 14, 1977) (funding available for "participating as a party in the informal hearing, with a right to examine or cross-examine witnesses as allowed by the Presiding Officer").

group representatives present at all hearings became so well established that staff and Presiding Officers occasionally solicited consumer groups to apply for compensation when no one had volunteered to serve as consumer spokesman at the hearing.[126] At least one consumer representative was present at virtually all of the hearings in 13 of the first 14 TRR proceedings conducted under the Magnuson-Moss Act.[127]

Once the principle was established that procedural participation could be compensated, the question arose as to whether there should be a presumption in favor of funding different local groups to represent the consumer interest at each of the regional hearings on a particular rule, or of funding one group to participate in all of the hearings. In the early Magnuson-Moss proceedings, most of the consumer group applicants did not request funding to serve as a group representative at more than one or two regional hearings. Soon, however, it became clear that there were some significant disadvantages in having a different consumer representative at each regional hearing. From the Presiding Officer's prespective, it was preferable to have one group maintain continuity throughout the proceeding: the single representative would be familiar with the procedural ground rules of the hearing, and would be less likely to duplicate points that had been established at earlier hearings sites.[128] Similarly, as consumer group lawyers gained experience in Magnuson-Moss rulemaking, they began to realize that the group representative who entered in the middle or late stages of an ongoing proceeding was laboring under a handicap, and that fragmented consumer representation was ineffective.[129]

In their funding applications, some consumer groups began to seek compensation to represent the consumer interest at all stages of the proceeding, and to argue the case for having at least one spokesman maintain continuity throughout a rulemaking:

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126. Interview with Kathleen O'Reilly, Consumer Federation of America, Feb. 16, 1977; Interview with James Turner, counsel for Consumer Action, Inc. in Food Advertising rule, Aug. 16, 1976.

127. *See* Data Appendix to Part I of the Administrative Conference Report on Trade Regulation Rulemaking (Data Book I), item 22. The exception was the Protein Supplements proceeding, and in that hearing a consumer group representative was present in the audience and submitting written questions for the Presiding Officer to ask during at least part of the hearings. Interview with Margaret Godwyn, San Francisco Consumer Action, Nov. 8, 1976.

128. Interview with William D. Dixon, Special Assistant for Rulemaking, BCP, Feb. 7, 1976.

129. Interview with Lonnie Von Renner, counsel to Americans for Democratic Action in Prescription Drugs, Funeral Practices and Ophthalmic Goods proceedings, Feb. 15, 1977; Interview with John Pound, Kenneth McEldowney & Karen Tomovick, San Francisco Consumer Action, Dec. 12, 1975; Interview with Michael Schulman and John Reed, California Citizen Action Group, July 30, 1976; Interview with David Swankin, counsel for National Consumer Congress in Care Labeling proceeding and Continental Association of Funeral and Memorial Societies in Funeral Practices proceeding, Nov. 23, 1976; Interview with James Turner, counsel for D.C. Consumer Action, Food Advertising proceeding, Dec. 2, 1976.

> [Funding different consumer representatives in different cities] severely interferes with effective cross-examination since material adduced at earlier hearings cannot be used as the basis of questions. It also prevents the use of cross-examination or direct testimony to fill . . . gaps in the record since consumer attorneys cannot know what gaps exist. Similarly, it is impossible for consumer attorneys to prepare effective rebuttal since they do not know what evidence needs to be rebutted . . . .
>
> Perhaps most important, there is no way for consumer attorneys to prepare adequate [post-hearing] written comments [on the Presiding Officer's and staff's reports] without being familiar with the entire record. If consumer attorneys have not participated at all the hearings, they will have to read a voluminous record later. This is wasteful in both time and money . . . .
>
> . . . No industry organization would consider itself adequately represented if it did not have the same counsel participate throughout the proceeding - planning a strategy before the hearings begin; obtaining witnesses to support this position; having counsel cross-examine witnesses at all the hearings; preparing rebuttal to respond to important adverse evidence; and drafting detailed written comments which use the entire record to present forcefully the group's entire case.[130]

Based on hearing observations and other data collected in this study, the foregoing description of the proceedings is fairly accurate. Uncompensated group representatives generally did structure their participation to develop evidence and arguments in support of their "case" throughout the series of hearings, rather than treating each hearing as having a distinct regional focus. It also seemed generally true that effective participation in the later stages of the proceeding required detailed knowledge of what had gone on before. However, consumer group spokesmen interviewed in this study were not unanimous in their support for the single representative notion, and does seem clear that there may be negative aspects of a policy favoring the funding of only one consumer representative.

Some consumer spokesmen take the position that it is preferable to fund diverse local groups in order to support more "grassroots" input into rulemaking.[131] They point out that some of the smaller local and regional

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130. Joint application of Center for Auto Safety and Americans for Democratic Action, Used Cars proceeding, Nov. 5, 1976, at 6.

131. Interview with Margaret Godwyn, San Francisco Consumer Action, Nov. 8, 1976; Interview with Rebecca Cohen, Continental Association of Funeral and Memorial Societies, Oct. 26, 1976. Some FTC officials involved in the compensation program disagree; they feel that the prehearing comment records and hearing testimony are adequate to give the Commission an understanding of "grassroots" sentiment in TRR proceedings, and that what is really needed for effective representation of the consumer interest is adequate technical expertise, including legal skills. Interview with Michael Sohn, General Counsel, and Barry Rubin, Office of General Counsel, Jan. 8, 1979.

groups may not be willing or able to take on the responsibility for acting as a group representative throughout a long and complex proceeding.[132] It does seem likely that a *de facto* policy[133] of funding at least one consumer representative throughout each TRR hearing will lead to a smaller number of funded participants, and more concentration of the representation function in a specialized "Consumer FTC bar." It may also lead to conflict among consumer groups if they begin competing with each other for the right to be the consumer representative.[134] Consumer group officials have suggested that there are intermediate positions. For example, the Commission could maintain the earlier practice of funding different consumer representatives for different stages of the process, but give them enough resources so they could meet periodically to develop a common strategy.[135]

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132. Interview with Margaret Godwyn, San Francisco Consumer Action, Nov. 8, 1976 (consumer groups have limited staffs, may be over-extended if they try to serve as consumer representative at all hearings); Interview with Mark Silbergeld, Consumers Union, Feb. 7, 1977 (not all consumer groups could afford preparation and consultation time to provide a lawyer for all hearings); Interview with John Pound, San Francisco Consumer Action, Sept. 2, 1976 (community groups lack resources to participate on an equal footing with industry and FTC staff, but involvement of community groups in the administrative process is beneficial); Interview with Rebecca Cohen, Continental Association of Funeral and Memorial Societies, Oct. 26, 1976 (not always possible for a group to be available for all hearings).

To some extent, the FTC's recent policy of cutting back on the number of regional hearings will alleviate these problems. Sohn-Rubin Interview, *supra* note 131. However, TRR proceedings will in all likelihood still be lengthy and complicated affairs, and therefore may be more than many groups are willing or able to undertake on more than a limited basis.

133. Sohn-Rubin Interview, *supra* note 131.

134. Some indication of this can be found in the Children's Advertising proceeding. There, one consumer group sent a letter to the FTC's Special Assistant for Public Participation, with copies to the Bureau Director and Commission chairman, urging that compensation funds not be disbursed too widely among consumer groups:

> It is our understanding that a number of groups are being encouraged to apply for reimbursement in this proceeding. Since there is undoubtedly a limited amount of money available, we are concerned that, if the money is divided among a large number of groups, no one group will be able to participate fully throughout the [proceeding].
>
> We simply hope that no prejudgment has been made by the FTC on how to divide the money . . .

Letter from Peggy Charren, Action for Children's Television, to Bonnie Naradzay, Special Assistant for Public Participation, FTC, March 22, 1978. Soon thereafter, a competing consumer group filed a Fredom of Information Act request for this correspondence. Letter from Harry Snyder, Consumers Union, West Coast Office, to Barbara Keehn, Freedom of Information Unit, FTC, April 4, 1978.

135. Interview with Michael Schulman and John Reed, California Citizen Action Group, July 30, 1976. A similar technique would be compensating regional representatives to attend and observe earlier hearings (Supplemental application of Golden State Mobilhome Owners League, Inc. for $1843.00 to have attorney observe Washington, D.C. hearings, in Mobile Homes proceeding, June 7, 1977; FTC action letter of July 13, 1978, grants $500 for purchase of transcript of Washington hearings instead). Depending upon the size of the hearing and the number of participants involved, these approaches could increase the costs of the compensation program markedly. One suggestion to offset these increased costs is to fund consumer representation only in major controversial proceedings. Interview with David Swankin, counsel for National Consumers Congress in Care Labeling proceeding, February 11, 1977.

Alternatively, the "lead" consumer group representative could be encouraged or required to remain in contact with smaller regional or local groups, and to represent their interests at the hearings.[136] These alternatives seem likely to be relatively costly and cumbersome, however, and likely to increase the proportion of the compensation fund spend on lawyers' fees. In this area, the FTC seems to face an inescapable tradeoff between making consumer participation broadly representative, and making it technically competent.[137] By accepting the arguments of the consumer groups for unified representation, the agency has given preeminence to the objective of providing technically effective, expert representation.

The propriety of procedural representation seemed largely settled until the Commission began experimenting with modified procedures in the Children's Advertising proceeding. There, the FTC adopted a two-stage hearing format.[138] The first stage was a purely legislative hearing, with no opportunity for cross-examination; interested persons were allowed to submit proposed questions to the Presiding Officer, but he had discretion as to whether and how the questions would be asked. Following the legislative hearing, interested persons could propose disputed issues to be explored in a second hearing through cross-examination. Despite the absence of an opportunity to cross-examine in the legislative hearings, several groups applied for funding to act as procedural representatives during that phase of the process. Their arguments were basically twofold. First, transcript reading was not adequate substitute for attendance at the hearing.[139] The purpose of the compensation program was "to give [citizen] groups essentially the same kind of effective representation as that of industry and the staff," and "no competent lawyer would suggest that representation has been effective if a party is not even represented at the legislative hearings."[140] Second, denying funds for this purpose would not really save

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136. Interview with James Turner, counsel to D.C. Consumer Action, Food Advertising proceeding, December 2, 1976.

137. For a fuller discussion of the distinction between "grassroots" interest-representation and technical proficiency, *see* text accompanying notes 161-179, *infra.*

138. *See generally* 43 F.R. 17967 (April 27, 1978).

139. Revised application of Action for Children's Television and Center for Science in the Public Interest in Children's Advertising Proceeding, October 25, 1978, at 6:

> [Attendance at the legislative hearing] will allow representatives of ACT and CSPI to hear the answers given by witnesses to their questions and then to ask follow up questions of witnesses through the Presiding Officer. Unless ACT and CSPI can ask such follow-up questions, they will have been denied effective participation in the legislative hearings.
>
> . . . [In order to decide what issues should be proposed for the second hearing,] it is important to hear the questions asked by the Presiding Officer and the answers given to get a sense of the importance of various positions. Second, the demeanor of witnesses is important in order to determine which witnesses should be cross-examined at a later hearing and which should be rebutted . . . .

140. *Id.* at 7.

money and might cost time. Compensated consumer groups would have to become familiar with the whole record at the later stages of the process, and purchasing transcripts and compensating the groups' lawyers to read them could be almost as costly. Moreover, given the length of transcripts, it might not be possible for the compensated groups to complete their review within the 30 days allowed for proposing disputed issues. These arguments prevailed, and the FTC funded several consumer groups for representation at the legislative hearings; however, compensation was limited to one person per group.[141]

Since the "new information" test does not apply easily, if at all, to procedural representation the hearing and post-hearing stages, other criteria must be applied when applications propose this kind of activity. The only portion of the 1977 Guidelines which speaks directly to this issue is the provision which states: "Evidence that the applicant has a point of view, not already represented by the FTC staff attorneys or any other party, that would help illuminate [key] issues can be [a] favorable [factor]."[142] The documentary records of the compensation program provide no real indication of how the "unique point of view" test was applied; presumably it would involve at least a showing that the applicant favors an outcome different from those supported by staff, industry, or other applicants.[143] In practice, decisions on request for funding to engage in procedural representation seemed to depend more heavily on factors relating to the status of the applicant.

(c) *Status tests.*—The 1977 Guidelines contain six factors which relate to the characteristics or status of the applicant. Functionally, these tests can be divided into two classes: those which concern the representativeness of the group which is applying, and those which touch upon the applicant's technical competence. Both types of criteria seem designed to assure quality of participation. That is, they are directed not at determining whether the existing participants adequately represent the applicant's interest, but rather at predicting whether the applicant, if compensated, will make a substantial contribution to providing adequate representation for the interest in question.[144]

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141. *See* Appendix A.

142. 42 F.R. 30482 (June 14, 1977).

143. One law professor applicant in the Holder in Due Course amendment proceeding addressed the point by saying: "I am not aware of any other individual who shares exactly my views on this subject. Therefore, these views could not be adequately otherwise represented." Application of Professor Richard S. Kay, Feb. 26, 1976 Compensation was denied on the ground that the applicant's "participation would be more in the nature of that of an expert witness rather than as a representative of an interest." Action letter of March 30, 1976.

144. The FTC's reasoning is set forth as follows in the Guidelines:

> [T]he statutory requirement that without the particular applicant the interest will not be adequately represented means that the quality of an application is relevant. The Bureau must determine that it is reasonably likely that the applicant can competently represent its interest.
>
> . . . The test is not whether a particular applicant will make representation of an interest fully adequate, but whether the representation will make a substantial contribution to the adequacy of representation.

42 F.R. 30482 (June 14, 1977).

The Guidelines acknowledge three types of competence or experience as favorable factors in the evaluation of a compensation applicant: expertise in the substantive area covered by the proposed rule, experience in trade regulation matters, and general performance and competence in areas other than trade regulation.[145] There was no significant problem or controversy involved in the application of these criteria during the period covered by the study, and no doubt they are reasonable factors to consider in estimating the utility of a group's participation. However, it should be noted that emphasis on demonstrated expertise, particularly in FTC issues, may tend to create a preference for "repeat player" groups which have previously received funding. Such a group would have several advantages over an inexperienced applicant: a successful grant application format that could be copied in later applications, a reputation within the agency for competence, and the precedential effect resulting from a previous determination that the applicant met the status tests. On occasion, both FTC personnel and applicants suggested that a prior grant of compensation meant that any questions regarding the applicant's status or characteristics had already been resolved, and need not be re-examined.[146] This precedential effect could apply not only to applicant competence, but also to interest definition, representativeness, and possibly also to point of view and need for financial assistance. It is not possible to quantify or demonstrate the extent to which prior compensation grants may have affected decisions or pending applications, but it is worth noting that organizations which applied in several proceedings had a very high success rate unless they had turned in a notably weak performance in their first attempt.[147] In light of the vagueness of some

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145. *Id.* The Guidelines further note, with regard to general performance and competence: "An applicant requesting funds to perform survey research should prove its competence in conducting surveys, or in knowing whom to hire for survey work. A request for funds for cross-examination should establish the expertise of the proposed cross-examiner."

146. *E.g.*, Application of California Citizen Action Group in Health Spas proceeding, Oct. 25, 1976, at 8 ("In regard to the question of financial assistance, it should be noted that on three previous occasions, the FTC determined that Citizen Action could not effectively participate without financial assistance . . . "); Confidential FTC Document 21.

147. *See* Appendix I, Frequency of Application and Authorization. That table indicates that the ten groups which applied in three or more proceedings were successful in 35 of 42 applications, an 83 percent success rate. This figure may underestimate the true success rate. Three of the unsuccessful applications came in the Prescription Drugs proceeding, one of the earliest rulemakings under the Magnuson-Moss Act. The denials were based on the "new information" standard, which had not yet been made clear to applicants. Action Letter on application of San Francisco Consumer Action, November 24, 1975; Action Letter on application of Consumer Affairs Commttee, Americans for Democratic Action, November 24, 1975; Action Letter on application of Consumers Union, November 24, 1975. In addition, one other "unsuccessful" application was withdrawn by the applicant before an FTC decision. Finally, the California Public Interest Group applications may represent a situation where an applicant established a negative precedent in its first application. CalPIRG was granted $46,000 to

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of the criteria and the workload pressures on the officials administering the compensation program, this reluctance to reopen issues that had previously been considered is understandable, and probably efficient as well.

The second major cluster of status tests deals with the relationship between the applicant and the interest it purports to represent. Under the Guidelines, the applicant must be a bona fide spokesman for the interest in question,[148] and the applicant's status as a membership organization or the recipient of contributions from its constituency are favorable factors.[149] Similarly, the applicant's willingness to spend some of its own money on the proceeding is considered a positive factor.[150]

This emphasis on constituency ties may serve two rather different objectives. If the group is accountable to its membership or contributors, it may be under pressure to produce results and therefore do quality work. The existence of a defined constituency may also have a legitimizing function: to the extent that major questions in trade regulation rulemaking

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participate in the Used Cars proceeding. Its lead researcher wrote a letter and testimony and describing internal dissension in the group. Letter from David Rogoff to Bonnie Naradzay, March 19, 1977; *cf.* Letter from Miles Frieden, Executive Co-Director, CalPIRG, to James P. Greenan, Presiding Office May 16, 1977. CalPIRG's applications in two later proceedings were denied. One of the officials administering the program had commented during the Used Cars controversy:

> [I]t would be a mistake for anyone to regard this [compensation] program as a general subsidy that will continue regardless of the quality of work. While we have been liberal in allowing groups to show what they can do, there is an institutional memory here and certainly any group applying for compensation a second time had better have excellent explanations for any failures of performance in prior situations.

Letter from James V. DeLong, Assistant Director, BCP, to David Rogoff April 22, 1977, at 4.

148. 42 F.R. at 30482. The Guidelines explain: "An industry trade association that claims to represent consumers would be viewed skeptically, and vice versa, for example." *Id.*

149. *Id. See also* Health Research Group v. Kennedy, 45 Ad. L. 2d 133 (D.D.C. 1979), where the court denied standing to seek judicial review to a Nader-affiliate organization which had no members, just contributors. In reaching this decision, the court reasoned:

> So long as the courts insist on some sort of substantial nexus between the injured party and the organizational plantiff — a nexus normally to be provided by actual membership or its functional equivalent, measured in terms of control — it can reasonably be presumed that, in effect, it *is* the injured party who is himself seeking review. . . .
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> . . . . .
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> . . . [T]here is a material difference of both degree and substance between the control exercised by masses of *contributors* tending to give more or less money to an organization depending on its responsiveness to their interests, or through the expression of opinion in the letters of *supporters,* on the one hand, and the control exercised by *members* of an organization as they regularly elect their governing body on the other.

Id. at 140, 141 [emphasis in original].

150. 42 F.R. at 30482.

involve value preferences as to whether additional protections for the consumer are worth the cost, it may be desirable or necessary to assure that the group actually has some authority to speak on behalf of its constituents.[150A]

These justifications, however, are subject to both practical and theoretical objections. As a factual matter, it is doubtful that the rank-and-file members of consumer organizations (or, for that matter, trade and professional associations and other voluntary groups) actually participate to any significant degree in the initial decision to participate in this kind of proceeding, or in monitoring the quality of representation. The practical obstacles are formidable, both because the issues raised in deciding whether or how to participate in a TRR proceeding are complex, and because the time and resource costs of polling a dispersed membership can be prohibitive. Also, the members are not likely to have access to detailed information about the proceedings and the conduct of the group's representatives, except through the association and its publications. Available evidence, both from this study and from the literature on related areas of public participation,[151] suggests that the level of member involvement is very low. Members will usually have expectations about the basic objectives the organization will pursue and its general level of success in realizing those objectives. Decisions about the positions, strategies and tactics to be adopted in a particular controversy tend to be made by the staff of the organization, or by staff in conjunction with boards of directors or executive committees, or by the lawyers and other technicians who are developing the strategy and tactics of participation. That is, membership influence, to the extent it exists, comes more from the choice between "exit" and "loyalty" than from opportunities for "voice" within the organization,[152] and this sort of evidence can be ambiguous at best.[153]

150A. Documentary records and interviews with FTC officials suggest that, in practice, the "quality control" aspect was the dominant consideration, and the legitimizing aspect received little or no attenion from agency decision-makers.

151. *See, e.g.,* T. Lowi, The Politics of Disorder (paper ed. 1974); J. Berry, Lobbying For The People (paper ed. 1977); C. Pateman, Participation and Democratic Theory (paper ed. 1977); S. Ebbin and R. Kasper, Citizen Groups and the Nuclear Power Controversy: Uses or Scientific and Technical Information (paper ed. 1974).

152. One consumer group spokesman interviewed during this study felt that opinions expressed in constituents' letters were a more reliable form of "feedback" for the organization. Interview with Robert Choate, Council on Children, Media and Merchandising, March 26, 1979. The group in question is a non-membership organization.

153. Members may join, or leave, an organization for a great variety of reasons, some of them totally unrelated to the group's position on particular issues. Even if one assumes that an organization's participation in a given proceeding is sufficiently important to influence membership decisions, the proper interpretation of a rise or fall in membership may be arguable. The compensation application of the National Hearing Aid Society (NHAS), a membership association of hearing aid dealers, illustrates this problem. The Society argued

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Compensated consumer groups contacted during the course of this study indicated that they used a variety of strategies to develop and validate the positions that they were taking on pending TRR's. Some groups held meetings with individual consumers who would be affected by the rule,[154] or discussed the issues with other consumer organizations.[155] Others conducted informal surveys of consumer opinion about particular rule provisions,[156] or kept their positions tentative pending completion of research they were conducting in the proceeding.[157] A number of groups required staff members who were working on TRR's to get approval from a Board of Directors,[158] or would not adopt a position unless consensus could be

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that it should be granted funding to continue its participation in the Hearing Aids rulemaking because it had taxed its membership of small businessmen to the limit, and had fallen short of raising the money it needed to pay its lawyers. As evidence of its financial inability to participate, NHAS pointed out that its dues had nearly tripled over a three-year period, and that several hundred members had refused to pay these increased dues, or a special assessment to support participation. Application of National Hearing Aid Society, May 4, 1976, at 1-2. However, a rival association argued that "the acknowledged drop in NHAS membership . . . may be a product of dealer dissatisfaction with the direction and substance of NHAS advocacy efforts, and not, as NHAS suggests, the result of increased NHAS membership dues." Letter from American Speech and Hearing Association to Presiding Officer, May 21, 1976, at 1.

154. Interview with Edward Kramer, The Housing Advocates, Mobile Homes proceeding, March 28, 1979.

155. Interview with Miles Frieden, CalPIRG, Used Cars proceeding, April 3, 1979.

156. Interview with Irmgard Hunt, Consumer Action Now's Council for Environmental Alternatives, Protein Supplements proceeding, April 3, 1979.

157. Interview with Rebecca Cohen, Continental Association of Funeral and Memorial Societies, Funeral Practices Proceeding, October 26, 1976 (proposed to hire an economist to investigate whether the disclosures mandated by the Funeral Rule would raise prices to the consumer, as industry claimed); Interview with Lonnie Von Renner, counsel to Americans for Democratic Action and National Council of Senior Citizens in Prescription Drugs, Funeral Practices and Ophthalmic Goods proceedings, February 15, 1977 (when there is evidence that consumer interests are not uniform, the group's position should be flexible to accomodate evidence offered at the hearing; taking a firm position can be delayed until the post-hearing comment stage of the proceedings); Interview with Jack Hale, Connecticut Citizen Research Group, Food Advertising Proceeding, March 18, 1977 (formulating a position on the rule caused some problems of identifying and accomodating subgroups of consumers, especially when objective data were not available).

158. Interview with Glen Nishimura and Timothy Holcomb, Arkansas Consumer Research, Funeral Practices proceeding, March 9, 1977; Interview with Rebecca Cohen, Continental Association of Funeral and Memorial Socieiteis, Funeral Practices Proceeding, October 26, 1976 (decision to participate made by Board of Directors on recommendation of staff; board elected by members of local memorial societies); Interview with Gerald Thain, Center for Public Representation, Used Cars, Thermal Insulation and Children's Advertising proceedings, April 5, 1979.

achieved among staff members.[159] In a few groups, the question did not arise because the organization had already taken a position on the issues before becoming involved in the TRR proceeding.[160] To determine what significance, if any, these varying relationships between public interest groups and their constituencies should have in FTC compensation decisions, it is necessary to consider briefly some theoretical aspects of the representative relationship.

3. Adequacy of Representation: Theoretical Considerations

As the foregoing discussion suggests, the FTC's interest representation standards were fairly vague, and some of the tests developed in the Guidelines seemed to pull in opposite directions. In large measure, the difficulty may arise not so much from deficiencies in implementation as from the lack of any clear theory of representation that could give focus and coherence to the compensation program. Despite its familiarity and frequent use in discussions of public participation, the concept of representation—whether of persons or interests—is complex and variable from one context to another. For present purposes, it seems useful to consider two dimensions of the concept of representation in relation to the FTC compensation program: the functional and the formalistic aspects of the representative's status.

Functional considerations, as used here, refer to the relationship between the characteristics and activities of the representative, and the kinds of decisions being made. One commentary on political representation states this relationship in the following terms:

> The more a theorist sees political issues as questions of knowledge, to which it is possible to find correct, objectively valid answers, the more inclined he will be to regard the representative as an expert and to find the opinion of a constituency irrelevant. If political issues are like scientific or even mathematical problems, it is foolish to try to solve them by counting noses in the constituency. On the other hand, the more a theorist takes political issues to be arbitrary and irrational choices, matters of whim or taste, the less it makes sense for a representative to . . . ignor[e] the tastes of those for whom he is supposed to be acting. If political choices are like the choice between, say, two kinds of food, the representative can only please either his own taste or theirs, and the latter seems the only justifiable choice. . . .

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159. Interview with Margaret Godwyn, San Francisco Consumer Action (Protein Supplements Rule), November 8, 1976 (all policy decisions presented to group staff for debate and vote; policy decisions required consensus rather than a majority vote; policy decisions required consensus rather than a majority vote); Interview with Mark Silbergeld, Staff Attorney, Consumers Union, February 7, 1977 (position arrived at collegially, by discussions between staff lawyers and technical experts).

160. Interview with Robert Choate, *supra* note 152.

> . . . Political issues, by and large, are found in the intermediate range . . . . Political questions are not likely to be as arbitrary as a choice between two foods; nor are they likely to be questions of knowledge to which an expert can supply the one correct answer.[161]

Regulatory decisions, including those involved in trade regulation rulemaking, can also be ranked on a continuum that ranges from the normative to the expert, and the location of a particular decision on the continuum implies the kind of representation which is appropriate. That is, when the decision is predominantly technical or scientific, the representative should be an expert in the relevant discipline. If, on the other hand, the decision is intended to produce a bargained outcome or a "pure" policy choice, the representative's influence should depend largely on the constituency he purports to represent.

The conceptual difficulty confronting the Federal Trade Commission, as some agency officials have realized,[162] is that most of the issues raised in trade regulation rulemaking do not fall at either extreme on this continuum. A few proceedings will include relative narrow technical inquiries, such as the question in the Protein Supplements proceeding regarding the processes by which human beings metabolize amino acids.[163] Somewhat more frequently, TRR proceedings will raise what may be considered a pure policy question. An example can be found in the Credit Practices proceeding: if one assumes economic theory is correct when it predicts that abolition of summary creditors' remedies will raise the cost of credit, or reduce the availability of credit for low income consumers, or both, what regulatory policy should be adopted?[164] Between these extremes lie the great majority of issues in trade regulation rulemaking, mixing normative and expert considerations. For

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161. H. Pitkin, The Concept of Representation 211-12 (paper ed. 1972).

162. *E.g.,* Letter from James V. DeLong, Assistant Director, BCP, to David Rogoff, April 22, 1977, at 1-2.

> [I]t must be recognized that the public participation program, like rulemaking proceedings themselves, has two aspects that do not always mesh smoothly. On the one hand it is a technical inquiry into what is going on in a particular industry and what steps may be taken by the Federal Trade Commission to alleviate consumer injury. This aspect requires legal analysis of deception and unfairness, surveys into the prevalence of practices, economic analysis of harm . . . and so on. The other aspect is that a rulemaking proceeding often has a large component of participatory democracy in it. . . . Technical studies, for example, cannot substitute for the direct experience of consumers who have dealt with the used car sales system. . . . Nor can technical studies substitute for asking consumers and consumer groups directly whether they feel a need for it.
>
> In administrating [*sic*] the compensation program we have tried to recognize both these dimensions.

See also Statement of Margery Waxman Smith, Acting Director, Bureau of Consumer Protection, FTC, in Hearings on H.R. 3361 Before the Subcomm. on Admin. Law and Governmental Relations of the Senate Judiciary Comm., 95th Cong., 1st Sess. 517-18 (1977).

163. Report of the Presiding Oficer, Protein Supplements Proceeding 14-30 (June 15,1978).

164. *See* 40 F.R. 16349 (Apr. 11, 1975).

these middle-range questions, the "political" or "technical" character of a particular issue is in large measure a matter of discretion or choice. One could, for example, convert the policy question concerning creditors' remedies described above into the factural issue of whether the projected economic effects and other possible costs or benefits will in fact occur, and then try to resolve these issues through field research on the behavior or attitudes of lenders and borrowers, comparisons of experience in states which had abolished summary remedies with those which had not, and so on. The rulemaking process also takes place within a larger political context. Thus, even if the agency views its decision on a proposed rule as a purely technical matter, it may still have to be concerned about generating enough political support to enable its final product to survive congressional oversight.

In light of the mixed and shifting character of the issues involved in FTC rulemaking, it seems impossible to develop simple, uniform standards which reconcile the conflicting bases of representation outlined above. But in theory, at least, it might be desirable to apply the representation tests so that they give appropriate emphasis to the kinds of presentation the applicant proposes to make. That is, if the applicant seeks to develop technical information such as survey research data or economic modeling, its expertise would become a predominant concern. If, on the other hand, the applicant wishes to address policy or value or preference issues, its ability to speak for an affected constituency would be the key factor. The 1977 compensation Guidelines are generally consistent with this approach, although some clarification and elaboration might be helpful.

Whenever a compensation applicant's proposed participation has a sufficiently large policy or value-preference component to raise questions about the organization's ability to speak on the behalf of a constituency, it becomes necessary to inquire into the formalistic aspects of the representative relationship. That is, the agency should consider whether there is an adequate mechanism to assure that the applicant is a proper, legitimate spokesman for the interest it purports to represent.[165]

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165. *See* Stewart, *The Reformation of American Administrative Law* 88 Harv. L. Rev. 1667, 1806 (1975):

> There are two possible responses to the realization that legislative discretion is exercised by agencies . . . One might somehow attempt to require the legislature to take back the discretion it has delegated; but such a program overlooks the inability of any single elected body to resolve more than a small proportion of the major issues of collective choice in a developed society. On the other hand, agencies could be invested with the legitimizing rituals of election. However, the formal one-person, one-vote principle which sustains the legislature is too brittle to permit its wholesale application to numerous agencies enjoying substantial measures of discretionary power - hence the effort to develop other modes of representation in adminstrative decision by resort to individuals or organizations that purport to speak for broad classes of private interests. But this stratagem simply pushes back the problem of representation to a prior stage; because the interests of broad categories of individuals, such as "consumers," are not self-defining, we cannot say that a given litigant or organization truly speaks for "consumers" unless there is some mechanism that ensures this.

Concern for the formal authority of an organization to represent a constituency is reflected in the occasional criticism that consumer groups are "self-appointed spokesmen" for the consumer interest.[166] It is also evident in the lines of questioning that some industry spokesmen used to challenge the legitimacy of compensated consumer group witnesses during TRR hearings. The following excerpt from the transcript of the Eyeglass Rule hearing is a fairly typical, if lengthy, example of this tactic. In its counsel for the National Association of Optometrists and Opticians, Mr. Markey, is interrogating a witness from San Francisco Consumer Action who had conducted two field surveys of price advertising among sellers of opthalmic goods and services. The import of her direct testimony was that the proposed rule's removal of state bans on price advertising would not, by itself, increase price competition among sellers.

Mr. MARKEY. . . . What consumers do you represent?
Ms. SCHLETTER. You want their names?

. . . . .

Mr. MARKEY. How many consumers do you represent? That was the question.

. . . . .

Ms. SCHLETTER. Thirty-two hundred
Mr. MARKEY. What are they, paid up members?
Ms. SCHLETTER. Yes.
Mr. MARKEY. Thirty-two hundred consumers. What is the population - is this the Bay area, or just San Francisco?
Ms. SCHLETTER. I think this is in the record

. . . . .

Mr. MARKEY. Can anybody be a consumer advocate or are there certain special requirements attendant to being a consumer advocate?
Ms. SCHLETTER. By FTC requirements or what?
Mr. MARKEY. In this area.
Ms. SCHLETTER. I don't know.

. . . . .

Mr. MARKEY. . . . Is [your testimony] the position of the thirty-two hundred people you represent?
In other words, how many people participated in this and came to the conclusion that this is what is good for consusers and this is what is in the public interest?
Ms. SCHLETTER. It was a study team. We didn't have an election on it.
Mr. MARKEY. How many people?
Ms. SCHLETTER. Approximately twenty.
Mr. MARKEY. Did you take a vote?
Ms. SCHLETTER. A vote? Everybody has read it and has acceded to the results and had input and conversations before we debated and argued and came to these conclusions in a very open way.[166a]

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166. *E.g.*, A. McFarland, Public Interest Lobbies: Decision-Making on Energy 67 (paper ed. 197): "Crtics refer to [Ralph] Nader as a 'self-appointed' spokesman for the consumer, but such a description can be misleading. He has a constituency which gives him support, just as other politicians do." *See also Hearings on H.R. 3361 and Related Bills (Public Participation in Agency Proceedings) Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary,* 95th Congress, 1st Sess. 563 (1977),

166a. [add cite]

This line of cross-examination excerpted above is notable both for its implicit assumption that there are, or should be, some formal criteria for authorizing the representative to represent, and for its confusion or uncertainty in suggesting what those criteria ought to be. The questions can be read to imply that San Francisco Consumer Action is both too elite (how many consumers do you represent out of the thousands or millions who live in your area?) and too undifferentiated from the mass (can anybody be a consumer advocate or are there special requirements?). The examination mixes issues concerning the characteristics of the group's membership with questions relating to its internal decision-making procedures (did you take a vote?). In short, the notion of representing consumer interests in Magnuson-Moss rulemaking implies several quite different concepts of authority to represent. To sort out these competing notions of representation, it seems useful to analogize the consumer group situation to more familiar representative relationships.

In considering these comparable situations, the most significant factor seems to be the extent to which a representative is expected or required to have a formal, specific mandate to act, rather than exercising independent judgment on behalf of a principal or constituency. For example, the common law master-servant relationship is one in which the scope of the employee's authority to bind the employer is formally circumscribed by contractual and legal standards, and the servant's actions usually are totally subordinate to the directives of the employer. Somewhat less constrained and specified is the authority of the lawyer to act on behalf of a client. The relationship is still basically contractual and the represented client still retains controls over important decisions; but the lawyer has more latitude for independent judgment as a result of his technical expertise and his professional obligations. The interplay between client wants and lawyer judgment has been described in the following terms by one seasoned Washington lawyer:

> [A]n inherent part of the lawyer's function in being "for" his clients is helping determine what exactly *is* their interest in a particular set of circumstances. Certainly, when a corporate client comes to a Washington lawyer with a problem, the lawyer is charged with furthering his client's "interest". But often a client knows only in a general sense what the interest is, and seeks the lawyer's skills and knowledge in defining as well as implementing that interest. . . . The definition of this interest is not forged in a vacuum, divorced from considerations of public policy. Here the Washington lawyer in particular has an obligation to present to his client constructive alternatives for harmonizing corporate and public goals. So his job is at least in part that of a mediator seeking a congruence between the public interest and the client's interest.[167]

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167. Califano, *The Washington Lawyer: When to Say No,* in Verdicts on Lawyers 187, 190 (R. Nader and M. Green, eds., 1976). *See also* D. Rosenthal, Lawyer and Client: Who's In Charge 7 (19—):

> There are two ideas about the proper distribution of power in professional consulting

(Continued)

As the focus shifts from representation of individuals or of hierarchical organizations like corporations to the representation of dispersed groups—that is, from personal to political representation—the representative's independence generally tends to increase. Here, three forms of representation can be distinguished: lobbying, electoral representation, and "descriptive representation." According to some commentators, lobbying is functionally similar to the kind of lawyer-client representation described above, with somewhat greater latitude for the representative to translate diverse, inchoate wants of the constituency into a unified position:

> The act of lobbying is, in very general terms, an act of representation. Like the votes of members of Congress, however, the strategic decisions of lobbyists are not simply mirror images of constituent preferences. An interest group is an intermediary between citizens and government; and it is the task of the organization to convert what it perceives to be the desires of its constituents into specific policies and goals. The choice of issues by the organization is the conversion process by which resources and policy objectives are converted into specific acts of interest articulation and representation.[168]

Others have noted that lobbying organizations and similar voluntary associations tend to become staff-dominated or "oligarchical" in form, with little chance for the rank-and-file to influence policy directly.[169] There are several practical reasons why this should be so. Usually, a voluntary association consists of numerous dispersed "principals" who have little direct involvement in the political environment where the lobbyist functions. Moreover, the numerous strategic and tactical decisions which the lobbyist must make cannot easily be specified in advance, or subjected to membership clearance or ratification within acceptable bounds of time and resources. To be effective, the lobbyist must have a considerable measure of discretion on defining and advancing the group position, and, at times, privacy from even limited disclosures of his activities.

The role of the elected representative seems in many ways comparable. The number of issues on which a typical legislator has a true mandate from his constituency is probably small: not many political issues are sufficiently visible, important to constituents, and foreseeable to affect the outcome of

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(Continued)

relationships. The traditional idea is that both parties are best served by the professional's assuming broad control over the solutions to the problems brought by the client. The contradictory view is that both client and consultant gain from a showing of control over many of the decisions arising out of the relationship.

168. J. Berry, Lobbying for the People 5 (paper ed. 1977).

169. *See, e.g.*, sources cited *id.* at 187, nn. 8-10. T. Lowi, The Politics of Disorder 73 (paper ed. 1974).

an election; and even when specific policies are widely desired, there may be little consensus on the best means of achieving or implementing them.[170] Consequently, the elected representative must exercise his judgment, aided by imprecise or ambiguous feedback from the constituency, in representing their interests.

Finally, a different form of political representation, sometimes called "descriptive representation," seeks to avoid the problem of providing the representative with a mandate by structuring the representative body to mirror the composition of the constituency.[171] Just as a scientific sample is supposed to epitomize the population or universe from which it is drawn, the representative body would inherently reflect the preferences, values and knowledge of the larger group, and no directives or consultation would be necessary. Apparently this was the theory that the cross-examiner quoted above was using when he sought to contrast the membership of San Francisco Consumer Action with the population of the San Francisco Bay Area.

Ordering typical representative relationships in this fashion suggests several conclusions about consumer representation in administrative proceedings. If it is generally true that a representative's range of legitimate discretion to act without a specific prior mandate expands as his constituency becomes increasingly large, diverse, and not part of a hierarchical administrative structure, then one can expect that consumer representatives would necessarily exercise a high degree of independent judgment. Even when a consumer protection issue is relatively narrow in scope—for example, sales practices of hearing aid dealers or advertisements used to promote protein supplements—it can have broad impact on geographically dispersed, unorganized individuals. Moreover, consumer protection is, in some respects at least, a "collective good"[172] for which economic theory posits major disincentives to organized action:

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170. *See, e.g.*, Miller & Stokes, *Constituency Influence in Congress*, — Am. Pol. Sci. Rev. 45 (19—).

171. H. Pitkin at 60-61 (emphasis in original):

> True representation [some] writers argue, requires that the legislature be so selected that its composition corresponds accurately to that of the whole nation; only then is it really a representative body. A representative legislature, John Adams argues in the American Revolutionary period, "should be an exact portrait, in miniature, of the people at large, as it should think, feel, reason and act like them." . . .
>
> . . . . .
>
> . . . For these writers, representing is not acting with authority, or acting before being held to account, or any kind of acting at all. Rather, it depends on the representative's characteristics on what he *is* or is *like*, on being something. The representative does not act for others; he "stands for" them, by virtue of a correspondence or connection between them, a resemblance or reflection.

172. *See generally* Mancur Olson, The Logic of Collective Action (paper ed. 1977). For discussions of the theory in the context of public participation in administrative or political decisionmaking, *see* A. McFarland, Public Interest Lobbies: Decision Making on Energy 27-40 (paper ed. 197); Snow and Weisbrod, Consumerism, Consumers and Public Interest Law, in Public Interest Law 395, 401-406 (B. Weisbrod, J. Handler and N. Komesar, eds., paper ed. 1978).

> [T]here are . . . three separate but cumulative factors that keep larger groups from furthering their own interests. First, the larger the group, the smaller the fraction of the total group benefit any person acting in the group interest receives, and the less adequate the reward for any group-oriented action . . . . Second, since the larger the group, the smaller the share of the total benefit going to any individual, or to any (absolutely) small subset of members of the group, the less the likelihood that any small subset of the group, much less any single individual, will gain enough from getting the collective good to bear the burden of providing even a small amount of it; in other words, the larger the group the smaller the likelihood of oligopolistic interaction that might help obtain the good. Third, the larger the number of members in the group the greater the organization costs, and thus the higher the hurdle that must be jumped before any of the collective good at all can be obtained.[173]

In light of these conditions, it seems unrealistic to demand that consumer representatives have a specific prior mandate from their constituency. How, then, can they be held accountable for the positions they advocate?

The review of representative relationships set forth above suggests that common methods for assuring the accountability of the representative share two general characteristics. First, as the constituency becomes large and diverse, the tendency is to hold the representative to account after decisions are made or actions taken, rather than before. The elected representative may not have a detailed set of instructions from his district, but he knows that he can be replaced if his votes or public positions diverge too sharply from constituent preferences. Similarly, the executive of a voluntary association knows that the leadership cannot often take positions that are distasteful to the members without witnessing a decline in the organization's membership, resources and influence. A second characteristic of the representative relationships described above is that accountability tends to become general rather than specific as the interest represented shifts from personal to diffuse. That is, when the constituency group is large and dispersed, the representative is not expected to seek clearance or approval for each decision he makes, but rather is subjected to periodic review on the general quality of his performance.

The conclusion which seems to follow is that a criticism asserting that a consumer group (or, for that matter, a trade association) failed to take a plebiscite of its membership regarding the particular issues involved in a rulemaking proceeding is rather beside the point. On the other hand, unless the material submitted by the group is so purely technical that constituency ties are irrelevant, it seems feasible and appropriate to require some

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173. M. Olson, *supra* note 172, at 48.

assurance that the group is exposing itself to the risk of membership disaffection by publicly advocating the positions it is taking in the administrative proceeding. This would involve a showing that the organization obtains a substantial proportion of its revenues from membership dues or public contributions,[174] and that its constituents have been informed, or will be informed, of the positions which the group is advocating. A group's track record of advocating positions similar to the one taken in the present proceeding would therefore be a relevant factor to consider in determining constituency accountability. When the organization does not have a prior history of involvement in the particular subject matter, it should be possible to require the recipient organization to file post-award reports of its communications with its membership, especially if the FTC continues the practice of using supplemental compensation requests to approve participation at each distinct stage of the rulemaking. The FTC may have been trying to assure this kind of constituency accountability in creating its preference for narrow-focus groups.[175] However, this distinction provides only a rough approximation of the kind of accountability discussed here—really, only one example of it—and the preference could have an unnecessarily adverse effect on broad-spectrum groups if it were enforced consistently. Thus, it seems much preferable to address the issue more directly, and require a demonstration that the applicant has some minimal accountability to its constituency.

There remains the question of whether there is also a role for "descriptive representation" in a compensation program like the FTC's—that is, whether there should also be an inquiry into the composition or characteristics of the applicant relative to the constituency it purports to represent. As previously noted, this is basically a sampling approach in the sense that the objective of the inquiry would be to determine whether the membership of the consumer group was an adequate reflection of the relevant consumer

174. Organizations which provide noncollective goods or services present a special problem under this approach. For example, Consumers Union is financed principally by sales of the magazine Consumer Reports; many trade or professional organizations provide valuable information, advice, and assistance to their members; and some "public interest" organizations sponsor trips, social events, or product discounts. When the noncollective goods are basically incidental to a predominant advocacy purpose (*e.g.,* Sierra Club outings or calendar sales), their provision should not materially affect the accountability of organization spokesmen. The situation is less clear, however, in the Consumers Union situation where the product sale component seems predominant. It could be argued that, since the proceeds of magazine sales are used to finance advocacy efforts. However, since the contribution is "tied" to a sale that seems likely to be the dominant feature in constituent decisions, it may well be that the organization's accountability to its constituency for advocacy positions is fairly attenuated. The Commission might consider requiring applicants to provide information about their dues structure and the nature of noncollective goods or services they provide to members.

175. *See* text accompanying notes 64-72, *supra.*

population.[176] Depending upon how technical one wanted to be in pursuing the sampling notion, the issues could become complex to the point of unmanageability.[177] Whether it is worthwhile for the agency or the Congress to try to frame some standards in this area depends in large measure upon how one views the basic purpose of the compensation program.[178] If one infers from the statue a congressional purpose to underwrite participation costs only for those who can validly claim to speak on behalf of all consumers of eyeglasses or funerals, or all small businessmen in fields like home insulation contracting or hearing aid dispensing, then it would be appropriate to make funding applicants demonstrate that their constituency does not vary materially from the larger groups. On the other hand, if one believes that

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176. The political science literature suggests that consumer group members are not likely to be typical of the general population. Generally, individuals who join organizations engaged in advocacy relating to political or governmental affairs are, like those who vote in general elections, disproportionately upper-middle class in terms of income, education and status. *See generally* S. Verba and N. Nie, Participation in America: Political Democracy and Social Equality (paper ed. 1972); D. Ippolito, T. Walker and K. Kolson, Public Opinion and Responsible Democracy and Social Equality (paper ed. 1972); D. Ippolito, T. Walker and K. Kolson, Public Opinion and Responsible Democracy (1976); L. Milbrath, Political Participation 110-141 (paper ed. 1969). However, in the present context it is not clear whether, or to what extent, this socioeconomic "bias" should be presumed to affect the group members' policy positions. To the extent they have disregarded the economic incentives posited in the theory of collective goods by joining such a group in the first place, it seems necessary to acknowledge that their policy preferences, as reflected through the group, are based on noneconomic or altruistic considerations.

177. For a group like San Francisco Consumer Action that does not recruit members on a national scale, it would presumably be necessary either to establish a relevant "geographic market," or to determine that there were not significant regional differences to bias the sample. Moreover, apart from the rare (probably nonexistent) marketing practice that affects all consumers with absolute uniformity, it would arguably be necessary to create a stratified sample to take account of specially affected subgroups. Sample stratification is potentially a slippery slope, since a critic with a modest amount of ingenuity can quickly proliferate variables on which, it can plausibly be argued, the sample should be stratified. To continue with the example of the Ophthalmic Goods rule, which removed state bans on the price advertising of eyeglasses, the following sample arguments are suggestive of the points which could be raised in a strict sampling approach.

(a) Since visual problems tend to increase with age, the sample has to take account of the age distributions of eyeglass wearers.

(b) The cost of eyeglasses takes a proportionately greater share of the income of the poor than of the well-to-do, and the benefits and burdens of the rule are likely to be felt disproportionately by the low-income consumers. Consequently, the sample should be stratified by income level.

(c) Price advertising through the mass media is considerably more important to consumers who lack the mobility to comparison shop, either because they are physically handicapped, or because they lack transportation, or because they live in rural or other isolated areas. The sample should be structured to take account of these consumer differences.

178. *See generally* Part V, *infra.*

the purpose of the compensation provision is to achieve a better balance of viewpoints rather than an optimum system of proportional representation,[179] then a limited or specialized constituency would not be a disqualifying factor. Participation by spokesmen for each additional, otherwise unrepresented or underrepresented, constituency would be a net gain for the decision-making process. This is not to say that the size and composition of a group's constituency would be irrelevant to the agency's assessment of positions espoused by the group. An expressed preference for a particular rule provision would be entitled to more careful consideration if it came from a group whose members comprised a large and typical segment of affected consumers or businessmen that it would be if the organization's constituency was small and atypical. But this should be a general practice in trade regulation rulemaking rather than a feature unique to the compensation program. That is, the composition of a group's constituency should not normally serve to include or exclude them from participating; rather, it should be a factor for decision-makers to consider in determining how much weight to accord to the group's position.

D. Financial Inability of the Applicant

The most detailed standard for compensation awards contained in the statute concerns the financial need of the applicant. Funds are to be granted only to an eligible person "who is unable effectively to participate in such proceeding because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceedings."[180] The Rules of Practice and the Guidelines elaborate this standard into three general requirements. First, the applicant must provide information describing the economic stake of the interest it wishes to represent, as compared to the cost of participation. The Commission's assumption is that an applicant with a small economic stake (or, presumbly, a noneconomic interest) would have diffculty raising the money to participate.[181] Second, in the complementary situation where the economic stake is large in comparison to the cost of participating, the applicant is expected to bear its own costs. There is, however, an important exception "when a large total stake is divided among many separate people so that each individual has little incentive to participate."[182] Applicants who

179. *E.g.*, Stewart, *supra* note 165, at 1764: " 'Public interest' advocates . . . do not represent—and do not claim to represent—the interests of the community as a whole. Rather they express the position of important, widely-shared (and hence 'public') interests that assertedly have not heretofore received adequate representation in the process of agency decision."

180. *See* text accompanying note 33, *supra*.

181. 16 C.F.R. § 1.17(c) (4) (i) (1978); 42 F.R. 30483 (June 14, 1977).

182. 42 F.R. 30483 (June 14, 1977).

are claiming this "collective goods exception" are required to provide information about the feasibility of raising funds to participate through individual contributions. Finally, the applicant must provide information about its own resources, and the Guidelines reflect the common-sense notion that well-funded organizations will have a more difficult time showing that they will be financially unable to participate without compensation. Again, however, there is an important exception: "A group with substantial resources can be eligible if it is unable to participate because its resources are already committed to other areas, if it has undertaken to cover too many different activities to focus resources on a project as large as an FTC rulemaking, or if other factors would preclude participation."[183]

In light of the prominence given the financial inability standard in the statute, Rules of Practice, and Guidelines, it is perhaps surprising that this factor played a relatively small role in practice. Apparently only two compensation applications were rejected on the ground that the applicant was financially able to participate. The first of these was submitted by an individual witness who was sufficiently candid (or unsophisticated) to inform the FTC that he would testify regardless of whether he was reimbursed.[184] The second was submitted by an industry trade association.[185] In a third situation, an initial compensation award to another trade association was not used because the FTC had required that the award be offset by membership dues and contributions, and the association was successful in raising more than the amount of the grant.[186] Later, the association submitted a supplemental application with updated budget information, and received funding for participation in the post-hearing stages of the proceeding.[187] There seem to be two reasons why the financial inability standard was not invoked more frequently. For one thing, the FTC did not demand, and often did not receive, very detailed financial information from applicants. Second, and more importantly, the Commission interpreted and applied the financial inability standard in such a way as to make detailed examination of applicant finances unnecessary.

As a general matter, applicants in the latter proceedings seemed to provide somewhat more extensive financial information than those who sought

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183. *Id.*

184. Applications of Dr. Kurt Oster in Food Advertising proceeding, Aug. 16, 1976; *see also* Action Letter of Nov. 12, 1976.

185. *See* Action Letter on application of Association of Physical Fitness Centers in Health Spas Proceeding, July 14, 1977.

186. *See* Action letter of July 20, 1976 on application of National Hearing Aid Society in Hearing Aids proceeding, budget attachment, fn *; Letter from Margery Waxman Smith, Acting Director, BCP, to Anthony Di Rocco, Executive Secretary, National Hearing Aid Society, Oct. 29, 1976; Letter from Anthony Di Rocco, Executive Secretary, National Hearing Aid Society, to Margery W. Smith, Acting Director, BCP, March 30, 1977.

187. Supplemental Application of National Hearing Aid Society in Hearing Aids proceeding, Sept. 26, 1977; Action letter of Sept. 30, 1977.

funding in the early Magnuson-Moss TRR's.[188] However, even in 1977 and 1978 it was possible to find applicants who had provided only cursory financial data being granted compensation. The "financial need" section of one application in the Children's Advertising proceeding, for example, states in its entirety:

> Media Access Project is a non-profit 501(c) (3) corporation with tax-exempt, tax deductible status. Virtually all our activities are funded

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188. For example, the application of the Iowa Consumers League in the Food Advertising proceeding (March 22, 1976) simply states: "The ICL is a volunteer, non-profit corporation serving the public. It is supported by low dues, and a great deal of volunteer work. No funds are available to the Executive Secretary at this time for travel expenses." The staff home economists of the Consumers Co-operative of Berkeley, who applied successfully in the Protein Supplements rulemaking, provided little, if any, more detail:

> The Co-op home economists are in no position to finance this study. Additionally, due to the nature of this corporation, neither the home economists, as employees, nor volunteers would be allowed to solicit money from individual shoppers.
>
> . . . . .
>
> The Education Department [of the Co-op] does not have resources that could be made available to the home economists for such a study. Furthermore, there is no way we could determine the resources of the population who shop at Co-op.

Application of Consumers Cooperative of Berkeley in Protein Supplements Proceeding, February 4, 1976, at 3. As Appendix A indicates, both of these applicants were successful. While the grants described above involved relatively modest amounts and were submitted by applicants who might well have been inexperienced in proposal-writing, this was not always the case. For example, San Francisco Consumer Action, which received several grants during the period covered by the study, submitted an initial application for over $20,000 in the Used Cars proceeding, and was awarded approximately half of this amount. The application dealt with the financial need issue by asserting that the costs of consumers from practices covered by the rule "probably total to hundreds of millions of dollars annually," and concluding:

> It is not feasible to expect any contribution to the costs of participation by individual consumers. Most are not in a position to individually provide sufficient support for others to represent them. Similarly, the applicant organization operates on a modest and fully committed budget. SFCA has no sources of general revenue which can be tapped for activities of this kind . . . . Without reimbursement for expenses, our participation in the hearings would be severely curtailed and would certainly not adequately represent consumers.

Application of San Francisco Consumer Action in Used Cars Proceeding, at 3. The Golden State Mobilhome Owners League, which was awarded nearly $30,000 for participation in another rulemaking, reported that it had an annual budget in excess of a half a million dollars. "However," the application states, "all of the funds obtained for [from?] membership are spent for designated budget categories. A copy of the budget for the year 1976 is enclosed for your purusal [*sic*], and you can see that the rulemaking income was spent on various budgeted items. The budget for 1977 does not anticipate or contemplate any participation in national mobile home warranty regulation hearings." Application of Golden State Mobilhome Owners League in Mobile Homes proceeding, October 20, 1976, at 2. The documentary record does not contain any indication that the FTC raised any questions about this assertion, or sought any further explanation.

> by foundation grants. All existing operating funds are earmarked for specific projects not directly related to this study. MAP has no general funds to support research of the type contemplated, nor do any of the participants in this project. This project could not be undertaken by Media Access Project, its consultants or its grassroots organization clients without direct financial assistance from the FTC.[189]

No balance sheet, annual report or other financial information was submitted with this application, which was funded for the full amount requested.[190] Another successful application, filed in the Thermal Insulation proceeding, indicated that the applicant had a current fund balance of almost $22,000.[191] No real explanation is given as to why the applicant could not finance its participation out of these funds, other than the conclusory statements that the group would "devote many uncompensated hours" to the proceedings, and that "[w]ithout financial support, we would be unable to participate beyond filing a statement and/or appearing as a witness at a hearing. Even then, no research would underpin our statement."[192] The vagueness of some applicants in describing their financial resources is understandable, since the 1977 Guidelines do not tell the applicants precisely what sort of information should be submitted in order to demonstrate financial need.[193] Moreover, while the Guidelines contain a standard budget from for applicants to use in setting forth the amounts of money they want,[194] there is no comparable standard form on which they could detail the resources they already have.

It would be easy to increase the quantity and quality of financial data provided by applicants with some minor changes in program administration. The harder question, however, is what the FTC could do with more detailed information. As previously noted, the FTC early reached the conclusion that the statute did not limit compensation to applicants who were absolutely indigent; rather, a group would be considered financially unable to participate if it had committed its available resources to other activities. This interpretation was supported by Senators Magnuson and Kennedy in a formal comment on the 1977 Guidelines,[195] and there are some practical

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189. Application of Media Access Project in Children's Advertising proceeding, June 15, 1978, at 13.

190. *See* Appendix A.

191. Application of National Consumers League in Thermal Insulation proceeding, Dec. 29, 1977, attachment containing Statement of Income and Expenses and Changes in Fund Balance, Jan. 1, 1977-Oct. 31, 1977.

192. Application of National Consumers League, *supra* note 191, at 3.

193. *See* 42 F.R. 30483 (June 14, 1977).

194. *Id.* at 30486.

195. Letter from Senators Warren G. Magnuson and Edward M. Kennedy to Margery Waxman Smith, Acting Director, BCP, Oct. 27, 1976, at 5:

> The statute, by its very language, is concerned solely with the necessity for represen-

reasons for preferring the FTC's construction. The opposite conclusion, that the Act required an absolute insufficiency of resources, would probably make the compensation program a nullity for all but the very small or narrow organization. However, the interpretation adopted by the FTC forces the agency to deal with a complex question: where should the line be drawn between the applicant that is financially *unable* to participate, and the applicant that is simply *unwilling* to devote available funds to the FTC proceeding?

Conceptually, applying the financial inability standard involves two related inquiries—does the applicant have enough resources to participate now, and does it have workable ways of raising additional money—that are likely to be both sensitive and beyond the expertise of an agency like the FTC. Barring the extreme situations in which the applicant has virtually no operating resources (the all-volunteer group), or has all of its operating funds contractually obligated to perform specific projects for other grantors, there is at least a theoretical possibility that the applicant could re-allocate funds. The real problem is whether re-allocation is also a practical possibility, and in this area there are no clear, easily applicable standards for an agency decision-maker to rely on. A consumer organization's decision to shut down an ongoing research, advocacy or complaint-handling project for the purpose of participating in a rulemaking proceeding would involve complex issues of staff expertise, interests, and morale, as well as questions of internal governance procedures, sunk costs and opportunity costs, the likelihood of attracting volunteers, and so on that are largely matters of management discretion. Similar, and perhaps more difficult, management judgments surround the issue of whether the applicant would be able to raise additional funds to support participation. Raising membership dues, or imposing a special assessment, or increasing the price of a product or service like *Consumer Reports* which finances Consumers Union's advocacy efforts, or undertaking direct-mail fundraising, or borrowing against future revenues, are all measures which may entail a significant financial risk to the organization, and have varying chances of success. It is at best difficult for an agency like the Federal Trade Commission to say that the risk is one which the applicant really ought to bear before it becomes eligible for funding.

The tradeoffs become more complex when the applicant is a large-budget organization engaged in numerous activities. The coalition of environmental groups which applied for, and received, funding in the

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tation of a particular interest or interests in a given proceeding. It does not require the Bureau to make judgements as to the value of an applicant's commitment of its own resources *other* issues or endeavors. All the Bureau is required to do . . . is to judge whether or not the applicant is able— based on its resources then available— to afford the costs of effective participation.

Thermal Insulation proceeding is perhaps the best example. Four national environmental organizations—the Sierra Club, Friends of the Earth, Natural Resources Defense Council, and Environmental Defense Fund—submitted a joint application. In the aggregate, these groups had annual budgets of more than 10 million dollars, and the largest of them, the Sierra Club, had annual expenditures of $6.5 million. Yet, all of them plausibly claimed to be operating at a deficit or to have experienced severe budget cutbacks. An organization like the Sierra Club is not only large, it is engaged in extremely diverse activities. The Club's funds are devoted to "studying and influencing public policy, information and education activities, outdoor activities, . . . public law activities . . . administrative costs, . . . costs of servicing memberships, and fund raising activities." Its revenues are derived from "membership dues and admission fees . . . contributions . . . sales, principally of publications . . . royalties on publications . . . and advertising, investment and other income." Faced with an application from such an organization, it would be a massive undertaking fo the Commission to review in depth the group's determinations on the possibility of diverting funds to finance participation in FTC rulemaking. The Commission could respond with a rule declaring large-budget organizations ineligible, on the theory that an entity with a sufficient amount of gross revenues should be able to find the money to participate somewhere in its budget. However, it is by no means clear where the line should be drawn, or whether the statute would permit it to be drawn at all.

Another difficulty with a strict interpretation of the financial inability standard is that it might tend to favor groups with a minimal stake in the outcome of the proceeding over those who were more seriously threatened by a proposed rule, and therefore cut against the "interest" test. That is, the group whose members are likely to be hurt badly by the rule—such as a trade association composed of small retailers who have reason to fear that the TRR would drive many of them out of business—might find it almost impossible to meet the test, because such an overwhelming threat should motivate the members to dig deep in their pockets in support of group participation. On the other hand, a "collective goods" consumer group whose individual constituents had a minimal pocketbook stake in the outcome would find it easier to convice the agency that dues hikes or other fundraising activities to support participation were not practicable. This kind of strict interpretation could be defended on theoretical grounds,[196] but it

196. If the principal purpose of the compensation provision is to remedy the disincentives to joint protection of small, diffuse interests, as posited in the theory of collective goods, then it would make sense to deny funding to those who have sufficient incentive to organize and support participation—as the trade association members would, if each of them faced a sufficiently high probability of being driven out of business.

would raise questions about the fairness of the compensation program and invite public criticism. The FTC also might find it politically difficult to defend decisions which in effect denied compensation on the ground that the applicant was being hurt too deeply to merit assistance.

Another problem to be confronted in trying to apply the financial inability test rigorously concerns the applicant who receives general budget revenues, as opposed to project grants or targeted contract funds, from government appropriations. There were two such applications in the Holder-In-Due-Course amendment proceeding, and the outcomes of their petitions seem difficult to reconcile. In the first application, an Assistant Attorney General from the Office of Consumer Protection in the Wisconsin Department of Justice sought travel expenses to testify at the hearings, claiming that "I have previously requested permission from my superiors to testify on this matter in Washington and have been advised that departmental funds cannot be authorized for this purpose."[197] The FTC denied his request, and the Acting Director of the Bureau of Consumer Protection explained this decision by stating:

> The statute is silent on the question of whether governmental entities can be considered financially unable to participate. . . . I believe there is sufficiently serious doubt that Congress intended these funds to be used for governmental officials acting within the scope of their official duties that compensation cannot be authorized in such a situation.[198]

On the same day that this letter was sent, the Acting Bureau Director signed another action letter granting compensation to the National Consumer Law Center, Inc. (NCLC) for participation in the same proceeding.[199] According to its application, NCLC had originated as one of the "backup centers" under the OEO Legal Services program, and currently received all of its operating funds from the federal Community Services Administration for the purpose of performing training, publishing and litigation activities for the Legal Services Corporation.[200] Later decisions apparently followed the pattern set in this proceeding.[201] Yet, it is not obvious why the two applications

197. Application of Richard A. Victor, Holder In Due Course Proceeding, Feb. 26, 1976, at 2.

198. Action letter of March 30, 1976, on Application of Richard A. Victor, Holder In Due Course Proceeding.

199. Action Letter of March 30, 1976, on Application of National Consumer Law Center, Inc. in Holder In Due Course Proceeding.

200. Application of National Consumer Law Center in Holder In Due Course proceeding, March 9, 1976, at 1.

201. *See generally* Appendix A, especially the applications of NCLC in the Vocational Schools and Credit Practices proceedings, and the applications of the Consumer Protection Division, Department of the Attorney General of Massachusetts in the Mobile Homes proceeding. However, the 1977 Guidelines seem to imply that state and local government entities are eligible: "Under these definitions, any entity except a part of the Executive branch of the U.S. Government can apply for compensation." 42 F.R. 30481 (June 14, 1977).

should be considered distinguishable. In form, the NCLC is a nonprofit corporation,[202] but it is at least arguable that the organization is in fact as much a governmental entity as the Wisconsin Department of Justice. It also seems open to question, as a matter of policy, whether the FTC is a more appropriate body than NCLC's parent agency, CSA, to determine whether the Center should be funded by the government to participate in trade regulation rulemaking. So far as the written record reflects, however, these questions were never considered by the FTC.

Timing problems would also arise in a rigorous application of the financial inability standard, since disputes could arise on the question of when an applicant's budget should be considered committed to other activities. The FTC might have to decide whether the applicant knew (or should have known?) about the impending rulemaking in sufficient time to allocate funds from its current-year budget—an issue that would be complicated by the FTC's current practice of publishing periodic regulatory agendas describing impending TRR proceedings.[203] For example, the question might arise as to whether a published reference to a projected TRR in the FTC's regulatory agenda should be sufficient notice to alert consumer and business groups to "re-program" some of their budget categories in order to support participation. Moreover, since TRR proceedings typically took several years to complete, a strict approach might also require the agency to limit any grant of funds to the current fiscal cycle of the applicant organization, and to compel the applicant to re-justify its need for compensation if it failed to allocate sufficient money for participation in the next year's budget. In practice, the FTC seemed to accept at face value the applicants' assertions that they had already committed their funds to other projects before becoming involved in the FTC proceeding, and did not re-open determinations of financial inability if the proceeding extended over several years.

Beyond the difficulties of formulating workable standards to govern individual decisions, more rigorous enforcement of the financial inability test could create significant administrative problems for the FTC. As the foregoing discussion suggests, financial inability criteria are likely to be complex and difficult to apply, and therefore would proliferate the factors that the agency must consider in making compensation decisions. In an agency like the FTC which has limited staff resources to administer the compensation program and often is under pressure to make prompt decisions on applications,[204] this could be a real detriment. Moreover, detailed information about the financial management and resource allocations of an

202. Application of NCLC, *supra* note 200, at 1.
203. *See, e.g.,* 44 F.R. 45178 (Aug. 1, 1979).
204. *See* text accompanying notes 209-218, 242-249, *infra.*

applicant organization is likely to contain sensitive data, and difficult confidentiality issues may arise if an adversary party seeks access to the information. This problem arose in the Mobile Homes proceeding, when a dealers' association that received some financial support from manufacturers sought compensation,[205] and a trade association representing manufacturers requested disclosures of the applications under the Freedom of Information Act. The dealers' association urged the FTC to deny the request, arguing that disclosure might compromise their independence and temper their advocacy in the proceeding:

> [T]he dissemination of information providing details [on financial inability] . . . may render a participant vulnerable to subtle pressures in the proceeding.
>
> . . . To reveal the confidential financial information contained in the application would work a great prejudice to mobile home dealers. . . . Indeed, such information could conceivably be put to uses which might make it difficult for the [applicant] to continue in the proceeding. . . . The public interest in adequate dealer participation would not be served by such a result, and the Commission's duty to protect the fairness and adequacy of its own proceedings would be violated.[206]

The FTC denied release of a portion of the financial information in the application on the ground that it was exempt as confidential financial information whose release would cause competitive harm.[207] But it is not clear that this interpretation would withstand a court challenge, especially if the application in question had not been submitted by a business group. Thus, the agency might well conclude that some eligible groups would be deterred

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205. Application of National Manufactured Housing Federation in Mobile Homes proceeding, Nov. 28, 1977.

206. Letter from Quincy Rodgers, Counsel for National Manufactured Housing Institute, to Bonnie Naradzay, Special Assistant for Public Participation, Jan. 20, 1978, at 1. The confidentiality disputes continued into the subsequent stages of the proceeding, when the Federation filed applications for supplemental funding. *See* Letter from Michael R. Lemov and Quincy Rodgers, Counsel for NMHF, to Bonnie Naradzay, Jan. 31, 1978, requesting confidential treatment for attorneys' time sheets as privileged work product; letter from Michael R. Lemov and Quincy Rodgers to Bonnie Naradzay, Feb. 1, 1978, requesting confidential treatment of application for supplemental funding for post-hearing stages on the ground it contains privileged work product (lawyers' strategies); Letter from Michael R. Lemov to Bonnie Naradzay, Apr. 24, 1978, requesting confidential treatment of financial information under exemption 4 of the Freedom of Information Act, 5 U.S.C. §552(b) (4) (1976); Letter from Quincy Rodgers to Bonnie Naradzay, May 11, 1978, at 2, requesting confidential treatment of billing information on the ground that it reflects applicant's financial condition and attorneys' strategies.

207. *See* Letter from Richard C. Foster, Deputy Director for Operations, BCP, to C.W. Quincy Rodgers, Feb. 8, 1978.

from applying for compensation if they knew that the details of their finances would be laid bare to adversaries or competitors. This problem would not arise, of course, if the FTC did not collect such fine-grained financial information in the first place.

In short, for a variety of theoretical and practical reasons, it is potentially very difficult for an agency like the FTC to give precise content to a financial inability test. This conclusion seems consistent with the experience of other agencies which have developed direct funding programs similar to the FTC's. While the different agencies have taken a variety of approaches in drafting their critera, the financial inability tests basically seem to come down to the question of whether an applicant's claim of financial inability seems reasonable to the agency.[208]

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208. For example, the FDA's compensation rules require the applicant to submit more detailed information than the FTC's, *see* 44. F.R. 23053-54 (April 17, 1979), but then direct the decision-makers to assess the information under the broad reasonableness standard: they must make a finding that "[t]he applicant does not have available, and cannot reasonably obtain in other ways, sufficient resources to participate effectively without reimbursement." *Id.* at 23055. The Environmental Protection Agency's temporary compensation rules under the Toxic Substances Control Act generally direct applicants to show how they comply with the financial eligibility requirements of the statute but they do require applicants to provide some more detailed discussion of the "opportunity cost" situation:

> It will be helpful if, in cases where eligibility is asserted on grounds of a small financial interest, rather than total inability to participate if compensation is not granted, the application also sets forth what other planned activities of the applicant will have to be curtailed if compensation is not granted. Such statement of curtailment should be supported by a budget. . . .

42 F.R. 60911 (Nov. 30, 1977). This is a novel approach, since it presumes that the applicant will curtail other activities and participate in the EPA proceeding if funding is denied—in which case it would be difficult to find that the applicant is truly unable to participate. The Agriculture Department's proposed compensation regulations dealing with financial eligibility are somewhat longer than the FTC's or EPA's, but the key provision on financial inability simply directs the decision-makers to consider "[t]he amount of an applicant's assets that are firmly committed for other expenditures." 44 F.R. 17510 (March 22, 1979).

It should also be noted that one agency which has adopted compensation rules to deal with the "absolute indigency" situation also uses a reasonableness test. The Federal Communications Commission's standard provide:

> The group [seeking funding] would be required to show that it cannot meet the necessary expenses of participating and "simultaneously carry on reasonable activities."
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> . . . . .
>
> In the case of an intervening group, the motion to proceed in forma pauperis shall contain specific allegations of fact sufficient to show that the moving party . . . cannot pay the expenses of litigation and still be able to carry out the activities and purposes for which it was organized.

Memorandum Opinion and Order In re Rules and Policies to Facilitate Participation of Indigent Persons in Commission Proceedings 2, App. A §1.224(c) (2) (FCC Docket 76-1046, Nov. 30, 1976).

IV. Administration of the Compensation Program

During the four-year period covered by this study, there were frequent changes in the procedures for processing compensation applications, and in the personnel making the compensation decisions. The authority to compensate participants was delegated to the FTC without much warning, and there was no substantial body of prior experience to build such a program on, either within the Commission or in other agencies. Moreover, there was initially a substantial lag in obtaining sufficient personnel to run the program. Given this rather inauspicious beginning, it is perhaps not surprising that it took some time to develop a workable administrative structure for making and supervising compensation awards.

A. Procedures for Decision-Making

The initial Rules of Practice under the Magnuson-Moss Act delegated final authority for acting on compensation requests to the Director of the Bureau of Consumer Protection, and provided that the Presiding Officer assigned to a rule would review applications and submit "initial findings" to the Bureau Director.[209] By the fall of 1975, as substantial numbers of compensation applications began to arrive at the Commission, a committee (called at various times the Screening Committee, the Grant Funding Committee and finally the Compensation Committee) was created to review the Presiding Officers' findings and make recommendations to the Bureau Director.[210] The committee was composed of the Assistant Directors who headed the divisions of the Bureau of Consumer Protection where trade regulation rules originated, as well as representatives from the General Counsel's office, the Division of Management, and the Bureau Director's personal staff.[211] Initially, the committee had no support staff of its own; scheduling and recommendation-writing tasks were handled by an Assistant to the Bureau Director, who was also a member of the Committee. By May of 1976, the new position of Special Assistant for Compensation was created within the Bureau to manage the growing administrative workload associated with the compensation program.[212] This system remained in

209. 40 F.R. 33969 (Aug. 13, 1975). The rule also stated that "[i]n connection with his determination the presiding officer may conduct such inquiry of the applicant or require the production of such documents as he deems necessary." *Id.*

210. Interview with Lee H. Simowitz, Assistant to the Director, Bureau of Consumer Protection, Jan. 27, 1976; Interview with James V. DeLong, Assistant Director, Division of Special Projects, Bureau of Consumer Protection (Jan. 27, 1976).

211. Through most of 1976, the divisions represented on the Compensation Committee were National Advertising, Market Practices, Evaluation, and Special Projects. Late in 1976 the Committee was expanded to include a representative from the Division of Special Statutes.

212. Interview with Bonnie J. Naradzay, Oct. 19, 1976. Originally the administrative work had been handled by one of the Bureau Director's personal assistants. *Id.*

effect until early 1978, when the two Acting Bureau Directors who had supervised the early stages of implementation had been supplanted by a permanent Director. After some initial experience in deciding compensation applications, the new Director delegated this responsibility to a Deputy Director in the Bureau of Consumer Protection.[213]

After a new FTC Chairman had been appointed and an internal review of the compensation program had been completed, responsibility for compensation decisions was shifted to the General Counsel's Office in the fall of 1978.[214] There was no official explanation of this shift,[215] but it was evidently motivated by concern to keep the compensation decisions as independent as possible from the Bureau and the staff attorneys assigned to the rule.[216] Other changes in the administration of the program were also adopted at about the same time. The Special Assistant for Public Participation was also transferred to the Office of General Counsel and her duties, which had previously included some Freedom of Information work, were limited to administration of the program compensation.[217] The membership of the Compensation Committee was also altered. The heads of the operating division in the Bureau of Consumer Protection were dropped because their attendance at committee meetings had declined; on the other hand, a survey research expert from the Office of Policy Planning was made available to critique research proposals in compensation applications.[218]

These multiple changes seem to reflect the FTC's efforts, through a process of trial and error, to find an administrative structure that would strike a workable balance among several potentially conflicting objectives. One such tradeoff involved both the need for substantive knowledge of the proceedings where funding was sought, and for sufficient perspective and impartiality to keep the program independent of the staff conducting the rulemaking proceedings. Another concerned the need to have sufficient clerical and administrative manpower to keep the paperwork (and money) flowing, while in the bureaucracy to give them status and legitimacy within

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213. Statement of Gale P. Gotschall, Deputy Director for Federal-State and Consumer Relations, Federal Trade Commission, on Senate Bill No. 707, Public Service Commission-Citizen Participation, Before the Economic Affairs Committee of the Maryland State Senate, Feb. 24, 1978, at 2.

214. 43 F.R. 39083 (Sept. 1, 1978).

215. The Presiding Officers in TRR proceedings were shifted to the General Counsel's office at the same time. The only explanation given in the Federal Register notice was that "[t]his transfer is being made as a matter of policy to enhance the management and work product of these programs." 43 F.R. 39083-84 (Sept. 1, 1978).

216. Interview with Michael Sohn, General Counsel, and Barry Rubin, Office of General Counsel, FTC, Jan. 15, 1979.

217. *Id.* The Special Assistant for Public Participation was also assigned a full-time clerical and administrative assistant.

218. *Id.*

the agency. Limitations on the availability of personnel "slots" precluded some alternatives at the outset, such as establishing an independent compensation office headed by a senior person with experience in grant administration, supported by full-time clerical and secretarial help. The alternative initially chosen was to set up a high-level advisory committee whose members would each devote part of their time to helping develop criteria, and to cannibalize sufficient staff resources to process applications wherever available people could be found. As the removal of the division heads from the Compensation Committee indicates, this strategy was not fully successful, but it did serve to get the program off the ground.

B. Roles of the Presiding Officers and Staff

On the face of the Rules of Practice, the Presiding Officer appears to be the key person responsible for gathering and analyzing facts relevant to a compensation decision. In practice, however, there were several reasons why the Presiding Officer's contribution often seemed more formal than substantive. A major problem was time pressure. Applications typically were not received until after the publication of Final Notice, when the Presiding Officer was busy trying to familiarize himself with the issues and the record. During this period, he was also completing a variety of tasks necessary to move the proceeding along toward hearing, such as grouping hearing participants and overseeing the selection of representatives for the designated groups, fielding prehearing motions, and working out the details of hearing management through prehearing conferences, letters, and phone calls. In this bustle of activity the Presiding Officers probably had little time or effort to devote to compensation questions. Also, when applications were deficient and decisions had to be made quickly because applicants needed time to prepare for the hearing, it was easier for the Special Assistant for Public Participation to deal directly with the applicant rather than following the three-step process that required separate consideration by Presiding Officer, Compensation Committee, and Bureau Director. Such deficiencies and ambiguities in applications could easily escape the Presiding Officer's attention because the Presiding Officers had no regular "feedback loop" through which they could know the detailed standards currently applied by the Compensation Committee.[219] Especially in the early days of the program, the absence of detailed guidelines, or a precedent system, or any other means for communicating the interpretations of the compensation standards that were evolving in the Compensation Committee, meant that the Presiding Officers could not provide fully informed recommendations.

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219. Interview with Henry B. Cabell, Presiding Officer, Jan. 21, 1976; Interview with Christopher Keller, Presiding Officer, Sept. 22, 1976; Interview with Jack Kahn, Presiding Officer, Jan. 21, 1976.

Given these practical limitations, it is not surprising that different Presiding Officers construed their duties under the compensation program quite differently. Some Presiding Officers made extremely conclusory, one-or-two-sentence recommendations which simply urged grant or denial of funding;[220] others made detailed findings on each of the elements enumerated in the Rules of Practice, supported by careful analyses of policy considerations;[221] and in a few instances Presiding Officers attended Compensation Committee meetings to discuss policy questions raised by a particular application.[222] There is no indication that Bureau officials tried to standardize or upgrade the Presiding Officers' recommendations.

In contrast to the Presiding Officers, the staff attorneys assigned to the rule had no formal role in the processing of compensation applications, but in practice they could have substantial influence. Staff recommendations, at least on initial compensation applications, were a routine feature of the program. In a sample of 84 files containing initial compensation applications from the early Magnuson-Moss proceedings, there was some indication on the written record that staff had expressed its views regarding the merits of the compensation requests for slightly more than half of the cases.[223] In addition, it seems clear that there were other cases in which staff opinions were expressed orally.[224] The reason for staff involvement is that the staff attorneys had better information than either the Presiding Officer or the higher-level Bureau officials with respect to two important compensation criteria: the novelty of the information that the applicant proposed to offer, and the general competence and expertise of the applicant organization.[225] By virtue of its pre-rulemaking investigation and hearing preparation, staff was more familiar than any other Commission personnel with the present and projected state of the record. Investigation and preparation also involved frequent personal contacts between staff and a wide variety of persons and organizations possessing some expertise in the subject-matter of the rule. As a result, staff was likely to have some independent information about the applicant's reputation and "track record."

The problem, however, is that staff attorneys' familiarity with the industry and their responsibility for developing the proposed rule often

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220. Confidential FTC Documents 22 and 23.

221. Confidential FTC Document 24.

222. Confidential FTC Documents 25 and 26.

223. *See* Appendix C.

224. Interview with William D. Dixon, Special Assistant for Rule-making, Bureau of Consumer Protection, FTC, Feb. 7, 1976; Interview with Arthur Angel, Staff Attorney, Funeral Practices rule, June 1, 1977. In one proceeding, the head of the operating division where the rule originated delegated his seat on the compensation committee to one of the staff attorneys assigned to a rule in which numerous compensation applications were pending.

225. Interview with Arthur Angel, Staff Attorney, Funeral Practices rule, June 1, 1977; Interview with Terry Latanich, Staff Attorney, Ophthalmic Goods rule, May 25, 1977; Interview with Bonnie J. Naradzay, Special Assistant for Public Participation, Oct. 19, 1976.

seemed to give rise to strong feelings about the need for regulation and the shape that rule provisions ought to take. In other words, the adversary atmosphere observed at some rulemaking hearings[226] could be firmly established by the time compensation applications were acted upon. When this happened, staff might tend to look more favorably on the compensation applicant who favored the rule than one who was critical of it. The extent to which staff's advocacy position actually colored their recommendations is impossible to measure. Staff attorneys' attitudes toward the compensation applicants seemed to cover a broad spectrum of views: resentment that outsiders would want to meddle in "staff's case"; enthusiasm for having a backup group that could fill gaps in the evidence marshalled by staff; a tactical preference for having a consumer group take a stronger pro-regulation position so that staff's proposed rule would become the reasonable compromise position; and neutrality if not indifference toward the compensation program. The aggregate figures on the correspondence between staff recommendation and final action, when that information could be found in the files, do not suggest that staff had markedly greater influence than the Presiding Officers on compensation awards. The agency decision agreed with the staff recommendation in 72 percent of the cases studied, whereas the Presiding Officer's recommendation was followed in 79 percent.[226A] One reason why the staff influence may not have been greater was that members of the Compensation Committee were aware of the staff attitudes and the incentives that gave rise to them, and may have weighted or discounted the staff recommendations accordingly.[227]

To the extent that potential staff influence over compensation decisions remains a problem, there appears to be a limited range of alternatives available to minimize any unfairness associated with that influence. The possibility of eliminating staff input altogether seems infeasible, so long as compensation decisions must take account of whether the information that the applicant proposes to present will duplicate other record material. Removing compensation authority from the agency altogether and placing it in some independent entity would not avoid the issue, because the compensating authority would have to turn to the FTC for some assessment of the state of the record, and the staff attorneys would be the only ones in a position to provide an informed response. Public disclosures of staff recommendations would minimize any appearance of unfairness, but some FTC officials are strongly resistant to this idea,[228] perhaps because a precedent

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226. *See* the section of Part I of the ACUS report on trade regulation rulemaking procedures relating to public hearings.

226A. *See* Appendix C.

227. Interview with Bonnie Naradzay, Special Assistant for Compensation, Oct. 19, 1976; Interview with James V. Delong, Assistant Director, BCP, June 11, 1976.

228. Interview with Michael Sohn, General Counsel, and Barry Rubin, Office of General Counsel, FTC, Jan. 8, 1979.

could be established that would create pressure for disclosure of other, more sensitive staff recommendations. Finally, there is some reason to believe that the restructuring of the Compensation Committee has significantly reduced staff influence. The heads of the operating divisions, who might have felt pressure to "back" their subordinate staff attorneys by supporting an application that the staff favored, are no longer members of the committee. Perhaps more importantly, the committee now has access to an independent survey research expert, and this change seems to have reduced staff influence over an important category of evidence. The survey expert can deal more effectively than staff attorneys with the qualitative aspects of an application to conduct systematic or expert studies—whether the study's design meets accepted professional or scientific standards, whether the applicant's researchers are qualified to undertake the study, and the like. Staff's unique input is effectively reduced to the quantitative issue of how much similar material is already on the record, or scheduled to be introduced. This is a fairly straightforward factual inquiry that is less prone to bias or manipulation than qualitative judgments.

As the compensation program evolved, then, the potential for staff influence or control may arise less in the structural process for deciding upon compensation applications than in the informal contacts between staff attorneys and representatives of the groups which are applying for compensation. This latter issue raises the broader question of the need for special notice-giving or "outreach" activities in a direct-funding program like the FTC's.

C. Outreach

Since the FTC had difficulty simply in assembling the personnel and designing the procedures to decide upon compensation applications, it is not surprising that agency officials devoted little attention in the early days of the program to the process of notifying potential applicants and inviting them to seek reimbursement. By default, the process of getting the word out fell to the rulemaking staffs;[229] the early Federal Register notices for TRR proceedings did not even mention the existence of the compensation program.[230] Compensation applicants in the pre-guidelines proceedings indicated that they had numerous pre-application and post-application informal contacts with staff. Some applicants had been solicited to testify

229. Interview with James V. DeLong, Assistant Director, BCP, March 10, 1976.

230. *See, e.g.*, 40 F.R. 41144 (Sept. 5, 1975) (Initial Notice of Protein Supplements proceeding); 41 F.R. 10232) (March 10, 1976) (Final Notice of Protein Supplements proceeding). More recnt rulemaking notices have contained a brief notice of the compensation program, and the name and address of a contact person. *See, e.g.*, 43 F.R. 17972 (Apr. 27, 1978) (Children's Advertising proceeding); 43 F.R. 57283 (Dec. 7, 1978) (Standards and Certification proceeding).

or to apply for compensation by staff members;[231] other had informal discussions with staff about the criteria being applied to compensation applications, or the amounts of compensation being awarded;[232] and some worked closely with staff attorneys in developing their strategies of participation.[233]

The 1977 Guidelines sought to put greater distance between staff and potential applications by advising applicants to direct their inquiries to other parts of the agency:

> The staff will assist any prospective applicant only by describing information on the material to be introduced into the rulemaking record. Direct your questions about the proceedings to the Assistant Director for Rulemaking and about the application process to the Special Assistant for Compensation.
>
> Neither the staff nor the Presiding Officer will help write an application, provide special favors or services to any particular applicant, or penalize any applicant for taking a position at variance with that of the staff. In addition, neither the staff nor the Presiding Officer can commit the Bureau to approving or rejecting a particular application.[234]

The published directive was supplemented by internal FTC efforts to prevent staff attorneys from contacting applicants for additional information or negotiating with them after an application had been filed.[235] Interviews with compensation applicants conducted after this policy had been put into effect seemed to indicate that most contacts relating to procedures for applying and criteria for granting compensation were being directed to the Special Assistant administering the program rather than to staff.[236]

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231. *E.g.*, Interview with Kathleen O'Reilly, Consumer Federation of America, Funeral Practices proceeding, Feb. 16, 1977; Interview with John C. Hendrickson, Vocational Schools proceeding, March 17, 1977; Interview with Margaret Phillips, Society for Nutritional Education, Food Advertising proceeding; Interview with James Turner, D.C. Consumer Action, Food Advertising proceeding, Aug. 16, 1976.

232. *E.g.*, Interview with Rebecca Cohen, Continental Assn. of Funeral and Memorial Societies, Funeral Practices proceeding, Oct. 26, 1976; Interview with Glen Nishimura and Timothy Holcolm, Arkansas Consumer Research, Funeral Practices proceeding, March 9, 1977.

233. *E.g.*, Interview with Lonnie Von Renner, counsel for Americans for Democratic Action and/or National Council of Senior Citizens in Prescription Drugs, Funeral Practices and Ophthalmic Goods proceedings, Feb. 15, 1977; Interview with Mark Silbergeld, Consumers Union, Funeral Practices and Food Advertising proceedings, Feb. 7, 1977.

234. 42 F.R. 30484 (June 14, 1977).

235. 1978 Revision of FTC Operating Manual, Section 7.3.14; Confidential FTC Document 27.

236. *E.g.*, Interview with Miles Frieden, CalPIRG, Used Cars, Credit Practices and Thermal Insulation proceedings, Apr. 3, 1979; Interview with Katherine Meyer, Center for Auto Safety, Used Cars and Mobile Homes proceedings, March 20, 1979; Interview with Gerald Thain, Center for Public Representation, Used Cars, Thermal Insulation and Children's Advertising proceedings, Apr. 5, 1978

However, there still was a significant amount of contact between applicants and staff for the purpose allowed in the Guidelines—that is, to find out what types of material were already in the record, and what kinds of testimony the staff expected to be introduced at the hearings.[237] Given the size and practical inaccessibility of many TRR records, this sort of contact seems an inevitable and desirable way to minimize duplication.

As the question of who should be contacting potential applicants was being resolved, the issue of how the Commission should try to get the word out was also receiving attention. One factor which may have led the Commission to reconsider its notice-giving activities was the pattern of compensation awards that was emerging from the early years of the program. Several consumer groups, primarily the larger organizations headquartered on the East and West Coasts, were applying for compensation repeatedly (and successfully); few applications were submitted by groups from other regions, and their proposals were often limited in scope. At the same time, small business applicants were notable by their absence. As discussed below,[238] this concentration of awards among "repeat player" applicants provided grounds for criticism by both supporters and opponents of the FTC.

To offset this tendency, the FTC initiated several "outreach" activities. In 1978, the Commission sponsored a conference organized by the Center for Public Representation, a Madison, Wisconsin public interest group, that was designed to find potential applicant groups in the Chicago area and educate them on FTC rulemaking and the compensation program.[239] In addition, a special effort to reach small businessmen was made in the Standards and Certification rulemaking. Four seminars were held in major cities, and the FTC contacted the Small Business Administration and the Chamber of Commerce with a request to inform their constituencies of the compensation fund.[240] It is still to early to evaluate the effects of these efforts, although it should be noted that a relatively large number of business representatives have applied for compensation in the Standards proceeding.[241] However, one general conclusion for the administration of direct funding program does emerge from the FTC experience. At least when an agency has constituencies as diverse and dispersed as the FTC,

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237. Interview with Edward Kramer, The Housing Advocates, Mobile Homes proceeding, March 27, 1979; Interview with Bruce Terris, March 8, 1979; Interview with Robert Choate, Council on Children, Media and Merchandising, Food Advertising, OTC Drugs, OTC Antacids and Children's Advertising proceedings March 23, 1979.

238. *See* _____.

239. Interview with Michael Sohn, General Counsel, and Barry Rubin, Office of General Counsel, FTC, January 8, 1979; [add cites].

240. Sohn-Rubin Interview, *supra* note 239; Telephone Interview with Bonnie Naradzay, Special Assistant for Public Participation, June 15, 1979; [add cite—Creswell interview].

241. *See* Appendix —.

the word will not automatically get out that the agency has funds available to support public participation. If the objective is to attract a wide variety of groups into the proceedings, then it is necesssary to devote time and effort to reaching those who are not already part of the network of contacts and acquaintances that operates for insiders.

D. Timing

Time pressures were a recurring problem in administration of the compensation program. Both early and late in the period covered by the study, compensation applicants complained of delays in getting a decision on their requests and of inadequate time to prepare testimony or submissions.[242] Of course, this sort of complaint is not unique to the compensation program; many of the uncompensated participants in TRR proceedings complained of deadline pressures and sought extensions of time. Nevertheless, there are some special timing problems that affect the successful functioning of a direct funding program.

(1) *Filing deadlines.*—Neither the Rules of Practice nor the 1977 Guidelines set filing deadlines for the submission of compensation applications. There are some policy considerations favoring this approach, including the desirability of keeping the application process as simple and flexible as possible and the very real possibility that, given the length and complexity of TRR proceedings, some applicants who start with adequate financial resources will later find themselves in need of assistance. Flexible deadlines also permit applicants to amend a deficient initial application in response to agency comments and criticisms. However, the absence of deadlines can cause problems for the agency. For example, when an application arrives on the eve of the proceeding stage where the applicant wants to participate, the decision-makers may have to wrestle with difficult questions as to whether the applicant really has enough time to prepare adequately. This was a common problem with survey research proposals. As Appendix D indicates, more than half of all initial applications arrived

242. *E.g.*, Interview with Katherine Meyer, Center for Auto Safety Mobile Homes proceeding, March 22, 1979; Interview with Irmgard Hunt, Consumer Action Now, Protein Supplements proceeding, Apr. 3, 1979; Interview with Miles Frieden, CalPIRG, Used Cars, Credit Practices and Thermal Insulation proceedings, Apr. 3, 1979; Interview with Robert Choate, Council on Children, Media and Merchandising, Food Advertising, OTC Drugs, OTC Antacids, Children's Advertising proceedings, March 26, 1979; Interview with Mark Silbergeld, Consumers Union, Funeral Practices and Food Advertising proceedings, Feb. 7, 1977; Interview with John Pound, Ken McEldowney and Karen Tomovick, San Francisco Consumer Action, Vocational School proceeding, Dec. 12, 1975. It should be noted that not all of the representatives interviewed criticized the FTC for timing difficulties. One interviewee reported that the response time on the group's application was faster than any other government agency's Interview with Edward Kramer, The Housing Advocates, Mobile Homes proceeding, March 27, 1979.

in the period between publication of Final Notice and the first deadline for filing testimony. This meant that organizations which were funded to do empirical research were operating on tight timetables, even if the "turn-around time" for granting their request was negligible. The problem was even more severe under the experimental expedited procedures used in the Thermal Insulation proceeding, which eliminated the two-notice procedure and greatly shortened the prehearing stage of the process. There, two applications were rejected on the ground that the proposed research could not be completed within the time available.[243]

The lack of deadlines also created a bit of a dilemma in the situation where applications for a given activity—such as hearing testimony—trickled in over a period of time. If the Commission acted promptly on the early applications, it might foreclose a better but slower applicant who appeared later.[244] If, on the other hand, the Commission waited until most or all of the applications were in before choosing among them, it could be penalizing the prompt applicant who needed substantial time to prepare his presentation. This dilemma ultimately seems insoluble; in practice, the FTC steered a kind of middle course by acting upon the applications in waves and trying to get some advance notification of which groups intended to apply later, and what kinds of proposals they would submit.[245]

(2) *Supplemental applications.*—The Commission's practice of requiring applicants to file supplemental funding requests at each discrete stage of the proceeding rather than granting compensation to cover all subsequent stages of the process[246] also created some timing pressures. There were probably several reasons why the FTC adopted this approach. In the early stages of a TRR proceeding, it was difficult for both the applicant and the Compensation Committee to determine whether, and why,

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243. Action Letter on Application of California Public Interest Research Group in Thermal Insulation Proceeding, Jan. 24, 1978; Action Letter on Application of Arizona Consumers Council in Thermal Insulation Proceeding, Jan. 24, 1978.

244. The foreclosure could be based on several grounds: the information that the second applicant proffered was being supplied by the first; the interest of the second applicant was already represented; the available funds were already committed; and so on.

245. *See generally* the detailed time charts in Appendix E.

246. 1977 Guidelines, 42 F.R. 30483 (June 14, 1977):

> You need not file a complete application at the outset. You may ask for compensation for one type of participation immediately and broaden your application after further study.
>
> . . . . .
>
> You should not submit an application for post-hearing rebuttal participation until after the hearings are over. At that time, you will be able to state with some specificity which issues you have determined to rebut.
>
> Your application for post-hearing comments should come after you have read either the Presiding Officer's report or the final staff report or both.

participation at the end stages of the process might be necessary. The use of supplementals also permitted the agency to avoid committing a large portion of available funds a long time before they would be used in a multi-year proceeding, a practice which might result in reversion of unexpended funds to the Treasury if they were not used in the current fiscal year. Requiring applicants to file supplemental applications for later participation might also give the FTC more leverage to cut off funding if the recipient performed poorly in the early stages.[247] However, supplemental funding decisions for some forms of participation were difficult to fit into the general timetables established in the Rules of Practice. For example, the Rules of Practice provide a period of 60 days after issuance of the final staff report during which interested persons may comment on the staff's and Presiding Officer's final reports. These staff reports frequently ran to several hundred pages, and they were dense with citations to materials scattered throughout the record. As a practical matter, it would often be impossible for an applicant to review the staff report, apply for compensation, within the 60-day period.[248] One method developed to deal with this problem was to grant such applications before the staff report was issued, but after the group had had time to review the Presiding Officer's report.[249] More generally, however, this issue suggests that careful advance planning of the relationship between compensation decisions and the procedural timetables used in the underlying proceedings is necessary in order to avoid either delaying the proceedings or placing an unreasonable burden on the applicants.

(3) *Advance payments.*—Perhaps the most serious timing problem from the applicants' point of view is delay between the time funding is approved and the money actually is disbursed. Many consumer groups, and some trade associations as well, seem to operate on minimal budgets and lack sufficient "front money" of their own to support participation. The FTC resolved this issue in its initial Rules of Practice by explicitly authorizing advance payments,[250] and this provision seems necessary if the groups which are most in need of funding are to participate effectively in a complex, expensive proceeding like trade regulation rulemaking. Even with this

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247. The 1977 Guidelines pointedly note: "Your performance on one phase will, of course, be considered in the review of applications for [compensation] in later phases." *Id.* On the other hand, grant of the earlier application could create some momentum to continue funding at the later stages. *See, e.g.,* Letter from Bruce Terris, representative of Environmental Coalition in Thermal Insulation Proceeding, to Bonnie Naradzay, Special Assistant for Public Participation, Aug. 11, 1978, where reference is made to the "drastic step of cutting off funding to a designated public group."

248. Confidential FTC Document 28.

249. Action letter on supplemental applications of NCSC, ADA-CAC, NYPIRG, CAFMS, ACR and CAMP in Funeral Practices proceeding, Sept. 30, 1977.

250. 16 C.F.R. § 1.17(e) (1978): "The Commission may make any payments under this section in advance where necessary to permit effective participation in the rulemaking proceeding."

advance funding proviso, several consumer group spokesmen interviewed during the course of this study reported serious cash flow problems when there were delays in receiving compensation funds.[251] Fast action on requests for advance payments or claims for reimbursement should be a high priority in any effective compensation program—and this requires the assignment of sufficient personnel so that the necessary paperwork can be completed promptly.

E. Levels of Compensation

The question of what the maximum levels of reimbursement should be for compensable activities served as a continuing source of friction between the FTC and compensation applicants. Disputes centered on two related issues: maximum attorneys' fees and computation of overhead.

The Magnuson-Moss Act simply provides that the FTC may "provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating in a rulemaking proceeding."[252] As the dispute unfolded, it became clear that one issue dividing the FTC and the public interest bar concerned reimbursement of staff counsel for public interpretation of two words in the Act: the Commission emphasized the statute's reference to "costs" of participation and took the position that staff lawyers could be compensated only for their actual salaries, while the groups argued that "reasonable fees" should be determined by reference to the going market rate for lawyers with comparable qualifications and experience. By 1978, the agency had had some second thoughts about its interpretation of the statue, and it requested a ruling from the Comptroller General.[253] The result was a determination that the FTC's initial interpretation had been correct: granting compensation above the fee actually incurred "would represent a Federal subsidy to an interest group, and the Commission may not use its appropriations for such a purpose without statutory authority."[254]

A similar problem arose with respect to the maximum fees payable to "outside counsel" because there was also a substantial variance between the going market rate charged by private lawyers representing business interests, and the fees charged by "private public interest law firms" which frequently were retained by successful compensation applications. Here, the

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251. *E.g.*, Interview with Irmgard Hunt, Consumer Action Now Council on Environmental Alternatives, April 6, 1979; Interview with Robert Choate, Council on Children, Media and Merchandising, March 23, 1979; Interview with Dennis Kavenagh, Golden State Mobilhome Owners' League, March 28, 1979; Interview with John Pound, San Francisco Consumer Action, August 2, 1976.

252. 15 U.S.C. § 57a(h) (1) (1976).

253. Letter from Michael Pertschuk, Chairman, FTC, to Elmer B. Staats, Comptroller General of the United States, April 11, 1978.

254. Opinion of the Comptroller General B-139703, July 31, 1973, at 4.

Commission consistently took the position that maximum fees should be set below the general market rate, but it had considerable difficulty determining what that lower maximum fee schedule should be. After some initial false starts, the Commission eventually settled on a fee scale extrapolated from government lawyers' salaries, which had sliding maximum limits based on the attorney's years of experience after law school.[255] This position was also criticized by representatives of the public interest bar, who complained that the FTC's scale gave inadequate recognition to the limited number of billable hours which most public interest lawyers accumulated and the relatively high overhead costs many of them incurred.[256] This shifted the focus of the dispute to overhead computations, and the question of allowable overhead rates proved to be a surprisingly difficult matter to resolve. Part of the problem was that the FTC was dealing with a heterogeneous collection of organizations, ranging from small shoestring operations with minimal staffs and rudimentary accounting practices to sophisticated and experienced entities with annual budgets totalling several million dollars. Thus, there was likely to be a tremendous variance both in the percentage of actual overhead expenses the group would incur while participating in a TRR proceeding, and in the ability of the group to present a detailed justification of its overhead costs. The 1977 Guidelines hedged on the overhead question by essentially providing three ways an applicant could compute overhead. If the organization had an audited rate established by the GAO, it could apply that overhead rate; alternatively, the group could use a flat rate of 25% of employee salaries (excluding secretarial), or it could justify a different overhead rate.[257] By mid-1979, the FTC was reportedly re-examining this rather cumbersome approach to the overhead issue.

F. Audit and Quality Control

Since a compensation program like the FTC's disburses substantial amounts of public funds, there must be some follow-up capability to make sure that the money is being properly used. Functionally, this follow-up work can be divided into two related operations: auditing, to assure that claims for reimbursement are consistent with the relevant standards and supported by adequate documentation; and monitoring or quality control, to make sure that the compensated groups are actually performing the work they have undertaken in a competent fashion. These checking activities can also help to expose problems in the content or application of funding

255. *See* 1977 Guidelines, 42 F.R. 30485 (June 14, 1977) (maximum hourly rate of $42/hour for attorney with more than 5 years' experience).

256. *E.g.*, Observation Report of Meeting Between FTC Staff and Representatives of the Council for Public Interest Law, April 30, 1976.

257. 42 F.R. 30485 (June 14, 1977).

criteria, and suggest areas where the compensation standards need improvement. The FTC's experience also indicates that audit and quality control capability should be an integral part of the compensation program from the outset, so that reviews can be completed while the information is still fresh and the results still useful for avoiding future problems or mistakes. Here, as in other areas of the compensation program, lack of resources and inertia delayed the development of a workable system of administration. As a result, no audits were completed until several years after the compensation program began functioning. By that time some groups who were the targets of this first round of audits complained, with some justification, that they were being evaluated by standards of recordkeeping and use of compensation funds that had not been made clear to them, or indeed may not have existed when the compensation program first came into existence.[258]

By the fall of 1976, when the first big group of Magnuson-Moss proceedings had moved into hearing, FTC officials administering the compensation program were aware of the need to develop some systematic method for checking up on the performance and reimbursement claims of compensated groups.[259] Early in 1977, in preparation for congressional hearings, the Commission's Special Assistant for Compensation sought evaluations from the rulemaking staffs and Presiding Officers of the work done and contributions to the proceeding made by compensated participants.[260] The results of this internal survey, which were generally favorable to the compensated groups, were presented to Congress in hearings held during the spring of 1977. At these hearings, FTC officials also announced their intention to begin audits of groups which had received compensation, and they sought additional funding for audit personnel.[261] Audits did begin shortly

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258. *E.g.*, Letter from David A. Swankin, Swankin & Turner, to Margery Waxman Smith, Executive Director, Federal Trade Commission, November 30, 1978, at 2 (appealing in part disallowances of expenses in audit of Consumer Action, Inc., National Consumers Congress, Automobile Owners Action Council, and National Consumers League); Confidential FTC Document 29.

259. Interview with Bonnie J. Naradzay, Special Assistant for Compensation, FTC, October 19, 1976.

260. *E.g.*, Confidential FTC Documents 30-31.

261. *E.g., Hearings on H.R. 3361 and Related Bills Before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary*, 95th Cong. 1st Sess. 520 (1977) (statement of Margery Waxman Smith, Acting Director, Bureau of Consumer Protection, Federal Trade Commission):

> As the Comptroller General made clear three months ago, many Federal agencies, especially the smaller ones, lack adequate audit capability. A public participation program will automatically create a need for auditing and monitoring that agencies will have difficulty providing. . . . [Recipient groups] will need technical help, for their own sake, and careful monitoring, for the government's. Whatever the final structure of any program enacted by Congress, the necessary administrative infrastructure should be created concurrently.

See also id. at 531 (next fiscal year's budget includes request for additional fiscal officer to audit compensation awards; agency intends to perform field audits of recipients).

thereafter,[262] but the first audit was not completed until spring of the following year.[263] It was almost another year—February of 1979—until an auditor was assigned to work full time on the Magnuson-Moss compensation program.[264]

As the Commission developed audit capability, it began to codify and elaborate its rules for assuring financial accountability. While the original rules of practice[265] and the early action letters on applications[266] were generally vague and conclusory about the recipient's responsibility to maintain suitable records, the 1977 Guidelines spelled out the requirement at some length. Recipients were directed to keep "all records relating to the receipt and expenditure of FTC compensation award funds and to the expenditure of the participant's contributed share of the cost of a project" for at least three years.[267] Applicants were also advised of the procedures for appealing an adverse audit report,[268] and they were informed that if they received funding, "the presiding officer will be asked afterward to comment on the quality of your work. He will also report on his estimation of the appropriateness of your claimed expenditures in terms of your contribution to the proceeding."[269] Internal procedures were also regularized, and written guidelines for audit personnel were developed in April of 1979 to meet the special needs of the Magnuson-Moss funding program.[270]

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262. Interview with Robert Walton, Deputy Director, Division of Budget and Finance, FTC, July 20, 1979.

263. Confidential FTC Document 32.

264. Interview with Robert Walton, *supra* note 262.

265. The original rules of practice contained only the following paragraph relating to this topic:

> The Commission will compensate the applicant only for those authorized expenses actually incurred. Appropriate proof of actual expenditures may be required by the Commission. . . . Payment will be conditioned upon the execution by the applicant of an appropriate agreement setting forth the terms and conditions of the compensation.

16 C.F.R § 1.17(e) (1978). The suggestion in the latter sentence that the recipient's obligations would be specified in contractual form was never carried out; rather, the application itself, and the FTC's "action letter," constituted the specification of activities that had been approved for funding.

266. *E.g.*, Action Letter on Application of San Francisco Consumer Action in Vocational Schools Proceeding, October 24, 1975, at 2. This letter, following the general format of early action letters, simply advises the applicant:

> The amounts claimed for actual reimbursement could be subject to final audit for reasonableness and conformance to federal regulations by the Federal Trade Commission and the General Accounting Office.

267. 42 F.R. 30484 (June 14, 1977).

268. *Id.* (written appeal must be filed with Director of Bureau of Consumer Protection within 30 days). After the transfer of control over the compensation program to the General Counsel's Office, the appeal is taken to the FTC's Executive Director. Walton Interview, *supra.*

269. *Id.*

270. Division of Budget and Finance, FTC Rulemaking Program Generalized Audit Guide (April 1979) (unpublished intra-agency document).

The first wave of field audits conducted under the compensation program resulted in the disallowance of a number of items that had previously been reimbursed, and some funds were recovered as a result.[271] According to the Deputy Director of the FTC's Division of Budget and Finance, the rate of disallowance in the rulemaking compensation program was generally consistent with auditors' findings in other program areas, and is largely attributable to the rudimentary accounting systems used by volunteer consumer groups.[272] When disputes over disallowances did occur, they often concerned technical matters such as the definition of cost of participating,[273] or computation of allowable overhead.[274] In mid-1979, these disputes were reportedly causing the FTC to re-examine the portions of the Guidelines relating to overhead.[275]

While the financial auditing aspects of the FTC's compensation program appeared to be fairly well established by the middle of 1979, the quality control function seemed more problematic. The approach taken in the 1977 Guidelines, which gave the Presiding Officers the responsibility for reporting on the quality of work done by compensation recipients, may have been the best available choice: the Presiding Officer is familiar with the conduct of the particular proceeding, and he is cast in a more neutral role than the staff attorneys assigned to the rule. However, it is not clear that the Presiding Officer's training or experience would give him any basis on which to determine whether, for example, the number of hours that a compensated participant billed for preparation for cross-examination was reasonable. A more fundamental problem, discussed in the following section, is that attempts to assess the quality and impact of the compensated groups' participation are difficult at best, and usually involve a large element of subjective judgment. Thus, it is not clear whether the Presiding

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271. Interview with Robert Walton, *supra* note 262.

272. *Id.*

273. In one instance, a recipient organization was granted reimbursement for consultant services, then asked to repay the money when an audit revealed that the consultant had not been paid. The recipient group took the position that the consultant had decided to donate his services to the organization, and that the economic effect of the transaction was, for the FTC's purposes, the same as if the consultant had been paid and then had made an equivalent cash donation to the group. The FTC denied reimbursement on the ground that there was no real cost to the organization when they had not been billed for or paid the fee. Confidential FTC Document 33.

274. One law firm appealed disallowance of overhead expenses for one of the temporary personnel it had hired for a particular proceeding. The ground for the denial was that the person was an independent contractor rather than an employee whose salary could be included in the overhead computation. The firm had argued that its relationship to the person was functionally similar to other temporary employees they had added for TRR proceedings, and that if they had known of the FTC's strict interpretation the firm could and would have structured this relationship as employer-employee rather than independent contractor. The FTC denied the appeal. Confidential FTC Documents 34, 35.

275. Interview with Robert Walton, *supra* note 262.

Officer's evaluations will give the agency an accurate or consistent understanding of the compensated participants' contributions—or indeed whether any feasible quality control systems could fully meet this objective.

APPENDICES

Appendix A[a]

TABULAR SUMMARY OF COMPENSATION REQUESTS AND AUTHORIZATIONS

Introductory Notes

The following tables are arranged by rulemaking proceedings, in the order in which proceedings reached the hearing stage under the Magnuson-Moss Act. The sequence is as follows:

1. Vocational Schools—December 1, 1975
2. Prescription Drugs—December 1, 1975
3. Holder-in-Due-Course—April 5, 1976
4. Hearing Aids—April 12, 1976
5. Funeral Practices—April 19, 1976
6. Protein Supplements—May 10, 1976
7. Ophthalmic Goods—June 7, 1976
8. Food Advertising—July 12, 1976
9. Care Labeling—November 8, 1976
10. Used Cars—December 6, 1976.
11. OTC Drugs—February 28, 1977
12. Credit Practices—September 12, 1977
13. Health Spas—September 15, 1977
14. Mobile Homes—October 11, 1977
15. Thermal Insulation (R-Value)—February 13, 1978
16. OTC Antacids—December 4, 1978
17. Children's Advertising—January 15, 1979

Within each rulemaking proceeding, the applicants are arranged in alphabetical order.

The tables reflect information available at the FTC as of January 31, 1979. We have relied upon the figures used by the applicants and the FTC (even though these groups occasionally made errors in their calculations). Group totals that may be artificially inflated because of resubmissions are marked with an asterisk. Applications that were withdrawn or amended before the FTC acted upon them are not listed *unless* the withdrawn application was the only application filed by the group in that proceeding.

The following shorthand references are used in the column captioned "Proposed Activities":

Pre-Hearing Comments

Prepare and submit written comments during the first public comment period, which commences with the publication of Initial Notice and ends 45 days before hearing.

Testimony

All activities associated with presenting witness testimony at the public hearings, including conducting surveys or studies, locating and compensating witnesses, preparing witnesses, and the like.

Group Representative

Having a lawyer or other representative designated by the Presiding Officer as an interest-group representative who is entitled to conduct examination and cross-examination of witnesses at the hearings.

Rebuttal

All activities connected with preparing and submitting rebuttal evidence after the conclusion of the public hearings (includes review of transcripts, procurement of expert and attorney services, other miscellaneous expenses).

Post-Record Comments

All activities associated with preparing and submitting comments on the Presiding Officer's and Staff's reports during the second public comment period.

Oral Presentation to the Commission

All activities associated with participation in oral presentations to the full Commission following the second public comment period.

Applicant	Date of Application	Proposed Activities	Request	Authorization
Consumer Action—San Francisco (SFCA)	First Application (9/19/75)	Testimony: review complaint files; test shopping; interviews with school officials; analysis of performance of state and federal regulatory agencies. Serve as group representative at San Francisco hearings.	$19,176	$ 7,060 (denied test shopping)
	Second Application (10/29/75)	Modify study to replace test shopping with interviews of vocational school students.	13,178	12,960
	Third Application (11/7/75)	Serve as group representative at Los Angeles hearings.	4,995	4,995
	Fourth Application (1/19/76)	Overrun	436	436
	Fifth Application (1/20/76)	Overrun	5,268	3,107
	Sixth Application (1/4/78)	Oral presentation to the Commission.	3,063	705 (reduced number of hours for preparation; personnel substitution hourly rate)
			$45,898*	$29,263
John C. Hendrickson, Attorney, Illinois	7/15/76	Submit post-record comments (to replace Joel Platt).	$ 3,099	None
National Consumer Law Center, Inc. (NCLC), Massachusetts	12/20/77	Oral presentation to the Commission.	$ 2,474.25	$ 2,474.25

VOCATIONAL SCHOOLS—Continued

Applicant	Date of Application	Proposed Activities	Request	Authorization
Joel Platt, Chief Legal Counsel in the Illinois Governor's Consumer Advocate Office	11/28/75	Serve as group representative at Chicago hearings. Mobilize witnesses.	$ 9,987	$ 5,460 (reduced hourly rate and number of hours allowed for research and secretarial assistance)
San Francisco Regional Office of the FTC	11/7/75	Testimony: four witnesses (expert and consumer).	$ 789.47	None
Mary Anne Vance, Staff Attorney, Consumer Advocate Office, State of Illinois	7/26/76	Submit post-record comments (to replace Joel Platt).	Not Stated	Request Withdrawn
Len Vincent, Former investigator with the Baton Rouge Consumer Protection Center, Louisiana	10/14/75	Testimony	$ 135	None
Total authorization for vocational schools:				$37,197.25

Applicant	Date of Application	Proposed Activities	Request	Authorization
Americans for Democratic Action-Consumer Affairs Committee (ADA), Washington, D.C.	11/6/75	Testimony: experts, managers of pharmacies, and lawyer; surveys and investigations of drug price disclosures in the D.C. area. Submit post-record comments	$14,558	None
Consumer Action — San Francisco (SFCA)	11/4/75	Testimony: update prior study of price disclosures. Have representative present at hearings to submit questions to be asked by the Presiding Officer. Submit rebuttal.	$16,100	None
Consumer Newsletter California	11/8/75	Testimony	$ 100	None
Consumers Union of United States, Inc. (West Coast Regional Office) (CU), California	10/24/75	Testimony: prior involvement in prescription drug pricing.	$ 944.30	None
National Association of Mail Service Pharmacies Craig W. Sandahl), Washington, D.C.	12/5/75	Travel expenses to testify at hearings.	$ 90.23	None
National Council of Senior Citizens, Inc. (NCSC) Washington, D.C.	12/3/75	Testimony: economist, lawyer, and advertising expert.	$ 9,227	$ 2,070 (reduced number of hours allowed for attorneys and expert witnesses)
Total authorization for prescription drugs:				$ 2,070.00

Applicant	Date of Application	Proposed Activities	Request	Authorization
Professor Richard A. Hesse, Franklin Pierce Law Center, New Hampshire	3/3/76	Testimony	Not Stated (estimated by FTC at $150)	None
Professor Richard S. Kay, School of Law, University of Connecticut	2/26/76	Testimony	$ 125	None
National Consumer Law Center, Inc. (NCLC), Massachusetts	3/9/76 and 3/20/76	Testimony: legal services attorneys. Serve as group representative.	$ 3,193.65	$ 3,093.25
David A. Scholl, Executive Director, Delaware County Legal Assistance, Association, Inc., Pennsylvania	2/18/76	Testimony	$ 28	No Record Found
Richard A. Victor, Assistant Attorney General, Office of Consumer Protection, Wisconsin Department of Justice	2/26/76	Testimony	$ 250	None
Total authorization for holder-in-due-course:				$ 3,093.25

Applicant	Date of Application	Proposed Activities	Request	Authorization
California Citizen Action Group (CalCAG)	6/1/76	Testimony: adequacy of state board's handling of consumer complaints and state board's efforts in consumer education.	$ 3,665	Request Withdrawn
Consumer Association of Kentucky (C.A.K.)	2/19/76	Testimony: expert and an attorney.	$ 2,856.92 (for one day's participation)	None
National Council of Senior Citizens, Inc. (NCSC), Washington, D.C.	First Application (1/30/76)	Testimony: consumers and experts. Serve as group representative at Washington, D.C. hearing. Submit post-record comments.	$34,926.00	$36,006.00
	Second Application (3/15/76)	Continue representation at final week of D.C. hearings and serve as group representative at Chicago and San Francisco hearings.	8,100.00	8,100.00
	Third Application (9/14/77)	Additional costs for post-record comments.	2,681.38	2,628.13
			$45,707.38	$46,734.13
National Hearing Aid Society (NHAS), Michigan	First Application (4/12/76 and 5/4/76)	Testimony: survey of hearing aid dealers to asses economic impact of the rule on consumers and dealers. Attorneys' fees to continue group representation for dealers.	$ 68,249.00	$34,364.00 (NHAS could not use these funds because of a successful solicitation that it sent to its members)
	Second Application (9/22/77)	Submit post-record comments.	35,636.60	33,495.80
	Third Application (4/11/78)	Additional time needed to do post-record comments.	15,651.00	15,651.00
			$119,263.60*	$83,510.80
New York League for the Hard of Hearing	6/3/76	Testimony: survey on effectiveness of notice of buyer's right to cancel under the proposed rule.	$ 5,500	None
Total authorization for hearing aids:				$130,244.93

Applicant	Date of Application	Proposed Activities	Request	Authorization
Americans for Democratic Action-Consumer Affairs Committee (ADA) *and* National Council of Senior Citizens, Inc. (NCSC), Washington, D.C.	First Application (2/23/76)	Testimony: consumers, labor union representative (who pays death benefits), economics (on structure of industry and effect of rule), and lawyer (on constitutional and ethical dimensions). Serve as group representative at D.C. hearings. Submit rebuttal and post-record comments.	$13,138.00	$ 8,315.00 (reduced attorney fees)
	Second Application (5/6/76)	Travel related to expert testimony (omitted from original application).	528.00	528.00
	Third Application (6/7/76)	Serve as group representative at the Chicago hearings (cost already incurred). Additional costs because underestimated length of D.C. hearings.	9,296.17	9,236.17
	Fourth Application (9/7/76 and 9/8/76)	Extend rebuttal and post-record comments to cover entire record of proceeding.	11,298.81	None
	Fifth Application (9/15/77)	Convene a meeting of all six consumer representatives. Prepare a final comment from the six consumer representatives.	28,781.00	27,483.00
	Sixth Application 7/14/78)	Additional costs to respond to the issues raised in the Staff Report.	5,968.00	6,254.00
	Seventh Application (10/18/78)	Overrun: cost of microfilm reader/printer machine was more than expected.	586.75	598.18
			$69,596.73	$57,474.35
Arkansas Community Organizations for Reform Now (ACORN)	4/2/76	Testimony: survey funeral homes in Arkansas to identify unfair trade practices; an internal survey ACORN membership for consumer desires and preferences.	$ 2,480.00	No Record Found

Arkansas Consumer Research (ACR)	First Application (5/12/76)	Testimony: consumers and expert in state regulation. Serve as group representative at Atlanta hearings. Submit rebuttal.	$ 7,676.00	$ 6,653.00 (reduced attorney and witness fees)
	Second Application (5/27/76)	Witness transportaion and per diem expenses omitted from original budget.	666.00	666.00
	Third Application	Purchase transcripts of Atlanta hearing for use in rebuttal	375.00	375.00
	Fourth Application (10/25/76)	Overrun	80.79	80.79
			$ 8,797.79	$ 7,774.79
California Citizen Action Group (CalCAG)	First Application (4/16/76)	Testimony: survey of recent purchasers of funeral services; present testimony of consumers, ministers, etc., who have experience with the bereaved.	$13,610.00	$12,658.00
	Second Application (5/4/76)	Errors in proposal of 4/16/76 and fact that hearings will run longer than expected necessitate revision of authorized budget.	13,441.00	New Total: 13,548.00
	Third Application (6/23/76)	Overrun: additional costs because hearings ran longer than expected.	2,657.41	1,650.41
	Fourth Application (6/23/76 and 7/20/76)	Submit rebuttal.	360.00	360.00
	Fifth Application (9/13/77)	Submit post-record comments.	8,758.00	8,210.00
	Sixth Application (6/30/78)	Additional costs for post-record comments.	3,120.00	3,120.00
			$41,946.41*	$26,880.41
Central Area Motivation Program (CAMP) Washington State	First Application (4/5/76)	Testimony: survey of recent purchasers of funerals; attitude survey of general public; interviews with senior citizens; survey of state laws. Serve as group representative. Submit rebuttal.	$ 9,792	None

FUNERAL PRACTICES—CONTINUED

Applicant	Date of Application	Proposed Activities	Request	Authorization
	Second Application (4/26/76)	Revises proposal of 4/5/76 to make to more specific; will limit focus to greater metropolitan area of Seattle.	8,411	7,410
			$18,203*	$ 7,410
Consumer Federation of America (CFA) Washington, D.C.	12/31/75	Testimony: survey of consumers regarding practices covered by the rule; analysis of existing state law; consumer and expert witnesses.	$26,024.50	$11,328.50 (CFA refused because attorney compensation rates thought to be inadequate and because of possible conflict of interest)
Consumers Union of United States, Inc. (CU) Washington, D.C.	10/28/75	Submit pre-hearing comments.	$ 3,830.70	$ 3,980.00
Continental Association of Funeral and Memorial Societies, Inc. (CAFMS)	First Application (2/23/76 and 2/24/76)	Testimony: survey of consumers and funeral homes; experts in economics and consumer behavior. Serve as group representative at all of the hearings. Submit rebuttal.	$24,080	$12,670 (denied funds for group representation)
Washington, D.C.	Second Application (5/27/76)	Purchase hearing transcripts.	4,500	4,500
	Third Application (7/15/76)	Additional attorney time for extra week of Washington hearings; costs for additional out-of-town witnesses.	Not Stated	$ 1,000

	Fourth Application (8/23/76)	Additional time for rebuttal. Submit post-record comments.	19,040	None
			$47,620	$18,170
Cremation Association of North America (CANA) California	First Application (12/28/76)	Submit post-record comments.	$12,900	None
	Second Application (9/23/77 and 6/28/78)	Submit post-record comments.	8,845	3,414
			$21,745*	$ 3,414
Michael Hirsh, Executive Producer for Public Chicago Public Television Illinois	2/23/76	Consumer representative (activities unclear; evidently group representative).	Not Stated	None
Minnesota Memorial Society (MMS)	4/6/76	Testimony: board member of Minnesota Memorial Society.	$ 112	None
New York Public Interest Research Group, Inc. (NYPIRG)	First Application (2/22/76)	Testimony: surveys of consumer experience in arranging funerals; literature search and interviews regarding impact of price itemization on the funeral industry; suvery of state regulations regarding use of display coffins and burial in inexpensive containers; price utilization study. Serve as group representative at New York hearings. Submit revbuttal.	$ 8,557.00	$8,377.00
	Second Application (5/25/76)	Overrun: underestimated costs for group representation. Delete rebuttal participation.	3,240.00	$ 3,363.00
	Third Application (12/5/78)	Oral presentation to the Commission.	443.60	Pending
			$12,240.60	$11,740.00

FUNERAL PRACTICES—CONTINUED

Applicant	Date of Application	Proposed Activities	Request	Authorization
Pre-Arrangement Interment Association of America (PIAA), Virginia	First Application (12/7/76)	Submit rebuttal and post-record comments.	$23,540.00	None
	Second Application (9/23/77 and 6/28/78)	Submit post-record comments.	14,772.50	$ 4,059.00
			$38,312.50*	$ 4,059.00
Total authorization for funeral practices:				$152,239.05

Applicant	Date of Application	Proposed Activities	Request	Authorization
Consumer Action—San Francisco (SFCA)	4/7/76	Testimony: questionnaire and interviews of potential users of protein supplements; cost of protein supplements compared to alternative protein sources; consumer testimony. Serve as group representative at San Francisco hearings.	$15,128	$15,507
Consumer Action Now's Council on Environmental Alternatives (CAN), New York	First Application (5/26/76)	Testimony: review relevant medical literature; analyze protein supplement information in sources other than ads; survey protein supplement outlets to determine information and attitudes communicated to consumers; demographic analysis of protein supplement users.	$12,730.00	$12,710.00
	Second Application (9/17/76)	Overrun: unanticipated expenses in connection with D.C. hearings	No Record Found	1,245.60
			$12,730.00	$13,955.60
Consumers Cooperative of Berkeley, Inc. California	First Application (2/4/76)	Testimony: in-store survey of consumer understanding of nutritional concepts used in regulation; comparative cost of protein in supplements vs. other products.	$ 3,507.00	$ 3,607.00
	Second Application (10/2/76 and 11/5/76)	Overrun: additional costs in preparing testimony.	No Record Found	360.70
			$ 3,507.00	$ 3,967.70
Chester W. Sutton (Sponsored by the Save the United States Movement, Washington, D.C.), North Carolina	6/15/76	Testimony: personal experiences recovering from cancer.	$ 300	None
Total authorization or protein supplements:				$33,430.30

Applicant	Date of Application	Proposed Activities	Request	Authorization
Americans for Democratic Action-Consumer Affairs Committee (ADA) Washington, D.C.	First Application (5/27/76)	Serve as group representative at D.C. and Cleveland hearings. Submit rebuttal.	$11,322.00	$ 6,652.00 (reduced number of hours allowed; denied rebuttal)
	Second Application (6/16/76)	Testimony: survey extent to which price information is available by phone; compare quoted prices with actual prices; assess correlation of price and quality with nature of provider.	6,280.00	None
	Third Application (8/13/76)	Serve as group representative at extended D.C. hearings. Analyze Supreme Court's *Virginia Pharmacy* decision.	2,855.00	2,855.00
	Fourth Application (3/10/77)	Submit post-record comments: bring all consumer representatives together to develop a position based on the whole record.	9,778.00	9,766.00
	Fifth Application (5/25/77)	Additional costs to prepare post-record comments for ADA and CalCAG.	1,933.00	2,372.00
	Sixth Application (8/3/77 and 8/8/77)	Additional costs to prepare post-record comments.	1,290.00	1,290.00
	Seventh Application (11/18/77)	Overruns because of new rate structure and underestimates of attorney and para-legal time.	6,035.70	5,365.33
	Eighth Application (11/26/77)	Oral presentation to the Commission.	1,902.00	1,902.00
			$41,395.70	$30,202.33
Arkansas Community Organizations for Reform Now (ACORN)	First Application (4/30/76)	Testimony: consumers and others. Serve as group representatives at Dallas hearings.	$ 1,962.00	$ 1,828.00

	Second Application (8/6/76)	Additional attorney time because hearings will run longer than expected.	840.00	No Record Found (but see overrun authorization below)
	Third Application (8/14/76)	Serve as group representative at D.C. hearings.	770.00	None
	Fourth Application (8/19/76)	Overrun	144.67	984.67
			$ 3,716.67	$ 2,812.67
California Citizen Action Group (CalCAG)	First Application (4/16/76 and 4/30/76)	Testimony: consumer information survey relating to adequacy of existing information disclosures, importance of price to consumers, special needs of elderly and Spanish-speaking, and need for copy of prescription; performance, composition, and attitudes of state regulatory boards and professional associations. Serve as group representative with SFCA at San Francisco hearings.	$31,992.00	$33,372.00
	Second Application (7/21/76)	Overhead costs omitted from original budget.	850.00	850.00
	Third Application (7/31/76)	Serve as group representative at D.C. hearings. Additional expert witness costs. Submit rebuttal.	3,582.00	545.00 (rebuttal only)
	Fourth Application (11/18/77)	Oral presentation to the Commission.	5,813.00	3,518.00 (reduced number of hours allowed; denied contract management)
	Fifth Application (1/4/78)	Overrun	5.30	No Record Found
			$42,242.30	$38,285.00

OPHTHALMIC GOODS—CONTINUED

Applicant	Date of Application	Proposed Activities	Request	Authorization
Consumer Action—San Francisco (SFCA)	First Application (4/15/76)	Testimony: "consumer impact study" to compare consumer price awareness in California and Arizona; economic effect of price advertising on retailers; study quality of ophthalmic goods and services sold in Arizona. Serve as group representative at San Francisco hearings. Submit rebuttal.	$38,630.00	$37,766.00
	Second Application (5/28/76)	Rental cars	216.00	216.00
	Third Application (6/19/76)	Rental cars, telephone, printing costs and-researcher time associated with field research.	1,604.00	1,604.00
	Fourth Application (8/4/76)	Preparation for and attendance at D.C. hearing.	4,250.00	No Record Found
	Fifth Application (9/18/76)	Overruns associated with preparation for and attendance at D.C. hearing.	5,324.58	3,958.60
	Sixth Application (11/8/76)	Request for reconsideration of balance of fifth application.	1,527.98	None
			$51,552.56*	$43,544.60
New York Public Interest Research Group, Inc. (NYPIRG)	5/14/76	Testimony: legal expert who is a consumer advocate. Legal and economic research in preparation for cross-examination. Serve as group representative at New York hearings. Submit rebuttal.	$12,665	$12,575
United Consumers of the Alleghenies, Inc. (U.C.A.), Pennsylvania	6/17/76	Testimony: evidently personal experiences.	$ 253.20	No Record Found
Total authorization for ophthalmic goods.				$127,419.60

Applicant	Date of Application	Proposed Activities	Request	Authorization
Connecticut Citizen Research Group (CCRG)	8/13/76	Testimony: surveys to test consumer understanding of terms used in the rule.	$ 8,242.60	$ 6,777.00 (denied literature survey)
Consumer Action—Washington, D.C. (DCCA)	First Application (Undated)	Serve as group representative for all of the hearings.	$46,990	$38,158 (reduced attorney fees and number of hours allowed)
	Second Application (8/24/76 and 10/5/76)	Testimony: linguistic analysis of words such as "natural", "organic", and "health foods"; analysis of the constitutional and social policy implications of the ban on use of terms "organic", "natural", etc.; expert testimony of two nutritionists.	10,912	2,746 (constitutional and policy analysis denied; linguistic analysis limited)
	Third Application (10/5/76)	Additional preparation and hearing time for attorneys. Submit rebuttal.	14,915	5,940 (denied preparation time for associate attorney; deferred decision on rebuttal)
			$86,781*	$46,844
Consumers Union of United States, Inc. (CU) Washington, D.C.	First Application (9/23/75 and 1/16/76)	Submit pre-hearing comments.	$ 8,793.20	$ 5,760.00
	Second Application (2/20/76)	Revision of the rate of compensation for attorneys set forth in the FTC budget.		New Total: 7,360.00
			$ 8,793.20	$ 7,360.00

FOOD ADVERTISING—CONTINUED

Applicant	Date of Application	Proposed Activities	Request	Authorization
Council on Children, Media and Merchandising (CCMM) Washington, D.C.	First Application (5/10/76)	Testimony: conduct literature review "complemented by field tests where necessary" on children's understanding of advertising claims; "focus group analysis" of children's reactions to advertising. Serve as group representative.	$52,400.00	$51,267.00
	Second Application (11/5/76)	Continue participation (hearings ran longer than anticipated). Submit rebuttal and post-record comments.	9,895.28	6,709.78 (deferred decisions on rebuttal, post-record comments and the funding of aides)
	Third Application (12/8/76)	Resubmission of request for funding of aides.	1,000.00	1,000.00
	Fourth Application (12/22/76)	Overhead for aides.	300.00	300.00
	Fifth Application (12/1/78)	Submit post-record comments.	3,158.00	3,158.00
			$66,753.28*	$62,434.78
Wendy Gardner (Home Economist, Consumers, Cooperative of Berkeley, Inc.)	3/30/76	Testimony	$ 295	$ 295
Indiana Home Economics Association	8/30/76 and 9/6/76	Testimony. Serve as group representative at Chicago hearings.	$ 39.70	$ 39.70 (testimony only)
Iowa Consumers League (ICL)	3/22/76 and 8/26/76	Testimony. Cross-examination.	$ 173	$ 200 (testimony only)

Sidney Margolius	No Record Found	Testimony: updating prior research on health foods.	$ 1,043	No Record Found
National Consumers Congress, Inc. (NCC), Washington, D.C.	5/11/76	Testimony: survey consumers regarding their understanding of the terms "natural" and "organic".	$ 7,334	$ 9,295
The National Health Federation, California	3/23/76, 4/30/76 and 9/3/76	Testimony: expert witnesses. Cross-examination. Submit rebuttal.	$50,000	None
Mary Ruth Nelson (Home Economist, Consumers Cooperative of Berkely, Inc.), California	3/31/76	Testimony: research. Serve as group representative.	$ 270	$ 270 (testimony only)
Kurt A. Oster, M.D. Connecticut	8/16/76 and 10/2/76	Testimony: research on milk enzymes.	Not Stated (travel and hotel)	None
Society for Nutrition Education (SNE), California	First Application (6/9/76 and 6/14/76)	Testimony: review nutrient composition data for foods considered good nutrient sources and compare with treatment under proposed rule; analyze whether rule is likely to suppress nutrition ads or or lead to a "fortification race"; try to develop alternative definitions of "nutritious"; review alternative forms of protein advertisements.	$21,228	$18,904 (denied a "contingency" category of 10% of the request)
	Second Application (7/27/76)	Indirect costs not covered in first application.	1,956	1,956
			$23,184	$20,860
Spanish Speaking/Surnamed Political Association, Inc. California	3/30/76	Testimony: translators, legal fees, preparation of witnesses and research.	$ 2,850	None
Utah State University Faculty Members	6/21/76	Testimony: perform detailed analysis of traditional foods to compute an Index of Nutritional Quality reflecting nutrient density.	$28,940	No Record Found
Total authorization for Food Advertising:				$154,375.48

Applicant	Date of Application	Proposed Activities	Request	Authorization
Seymore Goldwasser (Consultant in the area of textiles and detergents), New Jersey	9/19/76	"Technical representation" for the consumer.	Not Stated	None
National Consumers Congress (NCC merged into the National Consumers League on 6/27/77), Washington, D.C.	First Application (11/9/76)	Testimony: survey of consumer experience with care instructions and reactions to glossary of care terms; survey of commercial cleaners regarding their experience with care labeling and responses to instructions. Serve as group representative.	$48,498.67	$47,352.67
	Second Application (6/23/78)	Submit post-record comments.	9,940.00	9,940.00
			$58,438.67	$57,292.67
Total authorization for care labeling:				$57,292.67

Applicant	Date of Application	Proposed Activities	Request	Authorization
Automobile Owners Action Council (AOAC), Washington, D.C.	First Application (Undated; received 5/18/76)	Testimony: review complaint files; undertake study in which used car dealers voluntarily adopt proposed rule's requirements; develop economic model; assist other consumer groups in preparing testimony. Serve as group representative at D.C. hearings.	$31,000.00	$ 7,300.00 (approves only AOAC's testimony based on complaint files)
	Second Application (9/20/76)	Serve as group representative at Boston, Cleveland and D.C. hearings.	22,790.00	16,960.00 (reduced number of hours allowed for associate attorneys)
	Third Application (5/23/77)	Overrun: additional expenses because of development of alternative rule.	12,574.90	432.00
	Fourth Application (11/15/78)	Submit post-record comments with CalPIRG and SFCA.	10,355.00	5,475.00 (reduced number of hours allowed)
			$76,719.90*	$30,167.00
California Public Interest Research Group, Inc. (CalPIRG)	First Application (10/1/76 and 10/21/76)	Testimony: test shopping to see what disclosures are made; diagnostic tests and re-shopping for faulty cars; search of public record sources to seek background information on cars involved in test shopping; telephone survey of consumer attitudes toward used car dealers. Serve as group representative at Los Angeles hearings.	$43,574.00	$37,988.68 (reduced hourly rates for attorneys and the number of hours allowed for attorneys and paralegals)
	Second Application (telephone call on 12/27/76)	Transcripts and other miscellaneous costs of participation.	No Record Found	595.00

USED CARS—CONTINUED

Applicant	Date of Application	Proposed Activities	Request	Authorization
	Third Application (3/5/77)	Serve as co-group representative at D.C. hearings.	4,828.00	None
	Fourth Application - joint application from CalPIRG and SFCA (11/15/78)	Submit post-record comments with AOAC.	15,736.00**	7,770.00** (reduced number of professional hours allowed)
			$64,138.00	$46,353.68
Center for Auto Safety (CFAS) *and* Americans for Democratic Action - Consumer Affairs Committee (ADA), Washington, D.C.	First Application (11/5/76)	Testimony: review complaint files; survey disclosure practices of used car dealers; study Department of Transportation recalls to determine how many safety-related defects remain uncorrected and are passed on to used car buyers. Serve as group representative at all of the hearings.	$63,205.00	$ 4,500.00 (only approved dealer survey)
	Second Application (5/17/77)	Overrun: additional cost in preparing and presenting testimony.	774.59	774.59
	Third Application (10/24/78)	Submit post-record comments.	4,030.00	4,030.00
			$68,009.59	$ 9,304.59
Center for Public Representation (CPR), Wisconsin	8/23/76	Testimony: study the impact of rules promulgated by Wisconsin's Department of Transportation.	$33,188	$33,146
Consumer Action—San Francisco (SFCA)	First Application (10/3/76)	Serve as group representative at Dallas and San Francisco hearings.	$21,434.00	$10,976.52 (denied bookkeeping costs; reduced number of hours allowed for attorneys and paralegals)

	Second Application (telephone call on 12/27/76	Transcripts and other miscellaneous costs of participation.	No Record Found	775.00
	Third Application - joint application from CalPIRG and SFCA (11/15/78)	Submit post-record comments with AOAC.	15,736.00**	7,770.00** (reduced number of professional hours allowed
			$37,170.00	$19,521.52
Used Motor Vehicle Study Team, California	7/19/76	Testimony: test shopping to see what disclosures are made, including diagnostic inspections and reshopping for vehicles with defects; search public records and interview prior owners to see what information was available to dealers on cars involved in test shopping; cooperating with dealers to undertake a "test run" of the proposed rule.	$63,046	None
Total authorization for used cars:				$130,722.79

** This was a joint request and a joint authorization for CalPIRG and SFCA. The request figure and the authorization figure appear twice in this chart. In fact, however, these amounts were requested and authorized only once. For this reason, the request and authorization totals for CalPIRG and SFCA are inflated. The total authorization figure for the rulemaking, however, has been adjusted and is accurate.

Applicant	Date of Application	Proposed Activities	Request	Authorization
Americans for Democratic Action-Consumer Affairs Committee (ADA), Washington, D.C.	First Application (11/3/76)	Testimony: functioning of FDA review panels and monographs. Serve as group representative at all of the hearings. Submit post-record comments.	$18,765.00	$ 7,545.00 (deferred decision on post-record comments; reduced hourly rate for attorneys)
	Second Application (1/21/77)	Witness fees for former members of FDA drug review panels.	1,705.00	1,411.00
	Third Application (2/17/77)	Additional attorney time because hearings are scheduled to run longer than anticipated.	10,280.00	6,604.00 (reduced hourly rate for attorneys)
	Fourth Application (4/8/77)	Submit rebuttal and post-record comments.	7,637.00	7,637.00
	Fifth Application (5/25/77)	Overrun: additional costs for expert witness.	534.68	498.90
	Sixth Application (8/7/77)	Overrun: expenses for expert consultants used on rebuttal.	775.00	775.00
			$39,696.68*	$24,470.90
California Citizen Action Group (CalCAG)	First Application (7/20/76)	Testimony: consumer survey concerning assumptions about the safety and efficacy of over-the-counter drugs, understanding of present system of regulation, attitude toward regulation expert witnesses on advertising. Coordination with other consumer groups and assistance in preparing testimony. Serve as group representative. Submit rebuttal.	$32,350.00	$26,620.00 (denied coordination with other consumer groups)
	Second Application (12/1/76)	Revision of evidence-gathering portion of initial proposal.	6,992.00	6,492.00

	Third Application (4/20/77)	Overrun: increased costs because the hearings ran longer than expected ($6,827.13). Additional rebuttal expenses. Submit post-record comments.	10,233.13	7,541.13 (verbally requested additional information on post-record comment and rebuttal expenses)
	Fourth Application (5/24/77)	Revision of rebuttal budget proposed in prior request.	3,030.00	3,030.00
			$52,605.13*	$43,683.13
Council on Children, Media and Merchandising (CCMM), Washington, D.C.	First Application (11/17/75)	Not clear; evidently expert testimony relating to effects of advertising on children.	$22,536	None
	Second Application (11/4/76)	Testimony: to represent children as well as adults who are deaf, blind, illiterate or possessing minimal schooling; will consult with behavioral scientists and pharmacologists. Participation at the hearing. Submit post-record comments.	43,966	None
	Third Application (12/23/76)	Testimony: Prepare questions for other witnesses.	27,560.	21,203
	Fourth Application (3/3/77)	Revision of authorized budget categories.		New Total: 20,311
	Fifth Application (5/3/77 and 5/19/77)	Revision of authorized budget categories. Submit rebuttal and post-record comments.	25,249	New Total: 25,249.
			$119,311*	$25,249
Total authorization for OTC drugs:				$93,403.03

Applicant	Date of Application	Proposed Activities	Request	Authorization
California Public Interest Research Group (CalPIRG)	First Application (7/20/77)	Serve as group representative at the Dallas and San Francisco hearings.	$24,435.00	None
	Second Application (7/26/77)	Testimony: study of consumer credit in California.	28,796.32	None
			$53,231.32	None
Council of State Credit Institutes, Georgia	7/21/77	Submit pre-hearing comments: compile statistical information from members. Testimony. Cross-examination at D.C. hearings. Post-hearing participation.	$ 6,802.00	$ 6,228.00 (plus the cost of hearing transcripts)
		Transcripts		2,741.05
		Transcripts		760.95
			$ 6,802.00	$ 9,730.00
Legal Aid and Defender Society of Greater Kansas City, Inc. (Richard F. Halliburton), Missouri	8/28/75	Testimony: representing the Society's clients (all poor persons in the Greater Kansas City area).	$ 222	None
National Consumer Law Center (NCLC), Massachusetts	First Application (2/26/76)	Testimony: consumers, consumer representatives and experts (relating to prevalence and impact of abuses and the failure of similar state regulation to lessen the availability of credit). Survey of legal aid lawyers.	$119,415.00	$ 91,020.00 (substantially reduced number of witnesses allowed; denied category of fringe benefits for personnel)
	Second Application (6/25/76)	Trips to review the record.	1,332.00	1,332.00

Third Application (7/2/76)	Increased time for statistician.	2,000.00	2,000.00
Fourth Application (9/17/76)	Additional time needed to complete the survey, as modified.	4,005.24	4,005.24
Fifth Application (9/16/77)	Additional expenses necessitated by fourth hearing. Submit rebuttal and post-record comments.	18,635.00	11,035.00 (denied rebuttal and post-record comments)
Sixth Application (3/8/78)	Submit rebuttal.	22,864.00	22,864.00
		$168,251.24*	$132,256.24
Total authorization for credit practices:			$141,986.24

Applicant	Date of Application	Proposed Activities	Request	Authorization
Americans for Democratic Action-Consumer Affairs Committee (ADA), Washington, D.C.	First Application (4/13/77)	Testimony: test shopping survey of health spas in D.C. area; consumer witnesses; expert economic witness; former employees of health spas. Serve as group representative at all of the hearings. Submit rebuttal and post-record comments.	$42,362.00	$ 9,408.00 (approve survey only)
	Second Application (8/5/77)	Serve as group representative at all of the hearings with CalCAG/CU.	22,402.50	16,539.00 (reduced number of hours allowed for attorneys)
	Third Application (9/12/77)	Resubmission of application for compensation for the time of ADA Committee members.	450.00	450.00
	Fourth Application (9/29/77)	Additional witness	167.00	192.00
	Fifth Application (10/7/77)	Additional witnesses	735.00	853.00
	Sixth Application - joint application from ADA and CU/ CalCAG (10/14/77)	Retain Public Interest Economics Foundation to assist in analysis of economic issues, including testimony and cross-examination.	5,192.00**	5,028.00**
	Seventh Application - joint application from ADA and CU/ CalCAG (11/10/77)	Purchase two copies of transcript (or purchase one copy and then photocopy it, which would be less expensive).	4,772.60**	3,000.00**
	Eighth Application (12/27/77)	Participate in additional negotiations and hearings dealing with questions of access to data underlying industry surveys.	3,323.00	3,743.00

	Ninth Application - joint application from ADA and CU/ CalCAG (1/23/78)	Additional transcript costs	109.00**	109.00**
	Tenth Application (3/6/78)	Submit rebuttal jointly with CalCAG/CU.	8,143.00	8,143.00
	Eleventh Application - joint application from ADA and CU/ CalCAG (3/16/78)	Additional transcript costs	315.00**	315.00**
			$87,971.10*	$47,780.00
Association of Physical Fitness Centers (APFC), Washington, D.C.	5/31/77	Witness preparation and attorney representation at all hearings. Submit rebuttal and post-record comments.	$58,972.00	None
Consumers Association of Kentucky, Inc. (C.A.K.)	2/19/76	Testimony: application filed in Hearing Aids proceeding would also cover participation in the Health Spas rulemaking.	Not Stated	None
Consumers Union of United States, Inc. (West Coast) (CU) *and* California Citizen Action Group (CalCAG), California	First Application (12/29/76, 1/3/77, and 2/17/77)	Testimony: legal analysis of existing state law; longitudinal study of consumer complaints in California before and after enactment of regulatory legislation; analysis of health spa contracts; survey of consumer experience with health spas. Serve as group representative for West Coast hearings. Submit rebuttal.	$15,420.00	$ 8,850.00 (defer decision on rebuttal and group representative funds)
	Second Application (5/24/77)	Resubmission of proposal to review and analyze submissions in the record.	3,670.00	3,850.00
	Third Application (8/15/77)	Serve as group representative with ADA.	15,590.00	15,812.00

HEALTH SPAS—CONTINUED

Applicant	Date of Application	Proposed Activities	Request	Authorization
	Fourth Application - joint application from ADA and CU/ (10/14/77)	Retain Public Interest Economics Foundation to assist in analysis of economic issues, including testimony and cross-examination	5,192.00**	5,028.00**
	Fifth Application - joint application from ADA and CU/ CalCAG (11/10/77)	Purchase two copies of transcript (or purchase one copy and then photocopy it, which would be less expensive).	4,772.60**	3,000.00**
	Sixth Application - joint application from ADA and CU/ Cal/CAG (1/23/78)	Additional transcript costs	109.00**	109.00**
	Seventh Application (3/6/78)	Submit rebuttal jointly with ADA.	7,354.00	7,354.00
	Eighth Application	Serve as group representative with ADA at additional hearings to be held in New York.	2,245.00	2,245.00
	Ninth Application - joint application from ADA and CU/ CalCAG (3/16/78)	Additional transcript costs	315.00**	315.00**
	FTC Notice (4/26/78)	The FTC revised the hourly rates for attorneys.	N/A	1,428.00
			$54,667.60*	$47,991.00
Total authorization for health spas:				$87,319.00

** These were joint requests and joint authorizations for ADA and CU/CalCAG. Each request figure and each authorization figure appears twice in this chart. In fact, however, these amounts were requested and authorized only once. For this reason, the request and authorization totals for ADA and CU/CalCAG are inflated. The total authorization figure for the rulemaking, however, has been adjusted and is accurate.

Applicant	Date of Application	Proposed Activities	Request	Authorization
Center for Auto Safety (CFAS), Washington, D.C.	First Application (10/24/75)	Testimony: consumers and experts. Serve as group representative.	$27,749 (plus $480 per day during the hearings for CFAS attorneys)	$ 9,133 (denies economic study, postpones computation of hearing time for CFAS attorneys until hearing dates set)
	Second Application (4/22/76)	Testimony: economic analysis. Serve as group representative. Submit rebuttal and post-record comments.	10,460	9,915
	Third Application (6/8/76)	Participation of CFAS attorneys at hearings.	7,134	7,134
	Fourth Application (10/19/77)	Analysis of existing complaints; survey of new mobile home owners; further economic analysis. Additional costs for participation in expanded hearings.	16,654	14,819 (denied survey of new owners)
	Fifth Application (1/9/78)	Submit rebuttal.	7,656	7,656
			$69,653*	$48,657
Department of the Attorney General, Consumer Protection Division, Massachusetts	8/5/77	Travel and per diem expenses for three attorneys to participate in D.C. hearings.	$ 547	None
Golden State Mobilhome Owners League, Inc. (GSMOL), California	First Application (10/20/76, 1/4/77 and an undated revised budget that was received on 6/2/77)	Testimony: survey of mobile home owners to determine experience with warranty performance. Serve as group representative.	$28,555.00	$28,280.00

MOBILE HOMES—CONTINUED

Applicant	Date of Application	Proposed Activities	Request	Authorization
	Second Application (6/7/77)	Travel to Washington to observe hearings.	1,843.00	500.00 (to purchase transcripts of D.C. hearings)
	Third Application (5/25/78)	Overrun: additional survey expenses.	1,028.52	None
			$31,426.52	$28,780.00
The Housing Advocates, Ohio	First Application (5/25/77 and 7/1/77)	Testimony: statewide survey of Ohio mobile home owners; attorney to assist in preparation of testimony. Serve as group representative at San Francisco hearings.	$43,794.50	$36,723.60 (denied personal interview followup to mail survey; limited role at hearings)
	Second Application (8/16/77)	Travel and per diem expenses to attend pre-hearing conference in D.C.	238.00	No Record Found
	Third Application (8/16/77)	Additional expenses in development and implementation of survey of mobile home owners. Participation as alternate group representative at California hearings. Post-hearing preparation of proposed findings and conclusions. Submit post-record comments.	11,384.86	6,595.60 (deferred decision on post-hearing participation)
	Fourth Application (12/29/77)	Additional expenses in prehearing preparation; hearing transcripts.	2,729.26	No Record Found
	Fifth Application (2/18/78)	Submit rebuttal: includes follow-up with persons who didn't respond on the survey.	9,313.05	9,313.05
	Sixth Application (3/10/78)	Keypunch and computer time for late respondents.	405.00	405.00

	Seventh Application (5/6/78)	Data processing and telephone costs in preparation for hearing; salary and travel expenses for research coordinator and project consultant to participate at hearings.	1,715.60	1,715.60
			$69,580.27	$54,752.85
Manufactured Housing Institute (MHI), Virginia	11/30/77	Testimony: study of the economic impact of the proposed rule on the mobile home industry and alternative forms of regulation.	$40,000.00	None
Michigan Mobile Homeowners Association	6/22/77	Testimony: survey of mobile home purchasers to determine form and content of warranties, experiences with requests for service under warranty, and physical characteristics of mobile homes.	$57,986.00	$ 2,224.00 (because of insufficient time, participation is limited to analysis of and testimony on consumer complaints they already have)
National Manufactured Housing Federation (NMHF), Washington, D.C.	First Application (11/28/77)	Testimony: presenting the dealer interest and point of view. Serve as group representative at San Francisco hearings.	$10,987.00	$ 8,627.00 (no separate authorization for overhead — included in hourly rates)
	Second Application (1/31/78)	Overrun: additional expenses because the hearings were extended ($1,662.96). Purchase hearing transcript.	2,662.96	2,662.96
	Third Application (2/1/78)	Submit rebuttal.	8,855.00	8,855.00
	Fourth Application (5/11/78)	Overrun: additional costs for rebuttal.	873.41	No Record Found
			$23,378.37	$ 20,144.96
Total authorization for mobile homes:				$154,558.81

THERMAL INSULATION (R-VALUE)

Applicant	Date of Application	Proposed Activities	Request	Authorization
Arizona Consumers Council	12/9/77	Testimony: surveys of consumers (regarding their understanding of and their desire for further disclosures) and sellers (cost perceptions of various regulatory alternatives).	$11,060	$ 1,036 (testimony only - no time to do survey)
California Public Interest Research Group, Inc. (CalPIRG) *and* California Citizen Action Group (CalCAG)	1/6/78	Testimony: test shopping of insulation sellers to determine what disclosures are made; consumer "focus groups" to explore understanding of meanings of R-Value.	$27,521	None
Center for Public Representation (CPR), Wisconsin	12/23/77	Testimony: documentation of the need for the rule (surveys) suggested refinements of the rule.	$ 4,573.09	$ 4,573.09
Coalition (Sierra Club - California; Friends of the Earth - California; Natural Resources Defense Council - New York; Environmental Defense Fund - New York)	First Application (1/16/78, 1/18/78 and 1/19/78)	Testimony: expert witnesses on measurement techniques for testing thermal resistance; general policy positions; environmental impact. Representation at hearings.	$17,495	$17,645
	Second Application (2/3/78)	Additional attorney costs because the hearings will run longer than expected.	2,080	2,080
	Third Application (3/2/78)	Purchase transcript.	1,260	1,260
	Fourth Application (3/21/78)	Submit rebuttal.	4,030 (in addition to reprogramming $3500 in previously granted	3,950 (plus approval of funds transfer)

			funds for rebuttal)	
	Fifth Application (8/11/78)	Submit post-record comments.	8,860	3,000 (reduced number of hours allowed)
	Sixth Application (11/9/78)	Oral presentation to the Commission.	2,256	2,306
			$35,981	$30,241
Consumer Federation of America (CFA), Washington, D.C.	12/23/77, 1/18/78, and 1/20/78	Submit pre-hearing comments. Representation at hearings. Testimony: expert witnesses on economic and other technical issues; mobilize other consumer groups to gather evidence.	$19,465.00 (amended to a lower figure orally - exact amount not known)	$ 2,141.10 (testimony only)
Insulation Contractors Association (ICA), California	2/3/78	Testimony: two witnesses (nature of testimony not specified).	$ 1,000	No Record Found
National Association of Home Insulation Contractors (NAHIC), Washington, D.C.	First Application (1/10/78, and 1/16/78 and 1/26/78)	Representation at hearings. Testimony: three contractors.	$ 5,800.00	$ 5,560.00
	Second Application (2/23/78)	Additional attorney costs because hearings will run longer than expected. Submit rebuttal.	6,210.00	6,210.00
	Third Application (3/10/78)	Submit post-record comments. Purchase transcript.	2,420.00	3,000.00
	Fourth Application (4/28/78)	Request reimbursement for costs of duplication and transportation that have already been incurred.	242.98	242.98
	Fifth Application (6/20/78)	Overrun: additional attorney costs.	38.21	38.21

THERMAL INSULATION (R-VALUE)—CONTINUED

Applicant	Date of Application	Proposed Activities	Request	Authorization
	Sixth Application (11/30/78)	Overrun: additional attorney costs.	836.87	836.87
			$15,548.06	$15,888.06
National Consumers League (NCL), Washington, D.C.	First Application (12/29/77)	Testimony: technical expert (technical aspects of home insulation) and non-technical (labeling and advertising requirements). Representation at hearings. Submit rebuttal.	$24,912	$18,512 (deferred decision on rebuttal)
	Second Application (2/2/78)	Additional costs for participation of representative in extended hearings.	8,112	8,112
	Third Application (3/9/78)	Submit rebuttal. Purchase transcript.	8,160	8,160
	Fourth Application (7/27/78)	Submit post-record comments.	16,780	7,700 (reduced number of hours allowed)
			$57,964*	$42,484
Total authorization for thermal insulation:				$96,363.25

Applicant	Date of Application	Proposed Activities	Request	Authorization
Americans for Democratic Action-Consumer Affairs Committee (ADA) *and* National Council of Senior Citizens, Inc. (NCSC), Washington, D.C.	First Application (Undated; received 7/14/77)	Submit pre-hearing comments.	$ 5,563	$ 4,115 (request additional explanation for the expenses of ADA members)
	Second Application (11/18/77)	Researcher. Resubmission of request for reimbursement for application member for time spent preparing for and attending meetings to formulate applicant's position.	2,722	2,722
	Third Application (5/8/78)	Attendance at special conference on television advertising and medicine.	245	245
	Fourth Application (11/16/78)	Testimony: expert witnesses. Serve as group representative.	14,510	14,510
			$23,040*	$21,592
California Citizen Action Group (CalCAG)	8/24/77	Testimony: research studies concerning development of criteria to determine when a cautionary statement is required in mass media advertising, effects of different formats that might be used in disclosing cautionary statements, and current in-store label inspection by consumers. Serve as group representative.	$64,228	$64,228
Council on Children, Media and Merchandising (CCMM), Washington, D.C.	First Application (Undated; received 9/21/77)	Testimony: research to examine vulnerability of children and deaf, blind, or functionally illiterate adults to radio and television advertising of antacid products.	$26,644.00	$26,644.00

OTC DRUGS—CONTINUED

Applicant	Date of Application	Proposed Activities	Request	Authorization
	Second Application (3/10/78)	Survey of 160 functionally illiterate persons (migrant camps, Appalachia and urban poor).	11,256.74	None
	Third Application (6/9/78)	Additional personnel time to prepare for hearing. Revision of prior application (survey in migrant camps).	19,325.74	11,356.74 (most additional personnel time not approved)
	Fourth Application (8/3/78)	Overruns	No Record Found	No Record Found
	Fifth Application (12/5/78)	Serve as group representative in conjunction with ADA and CalCAG. Review testimony. Prepare witness to testify on survey.	3,063.89	3,063.89
	Sixth Application (12/22/78)	Round-trip air fare to attend D.C. hearings, should the schedule necessitate such a trip.	460.00	No Record Found
			$60,750.37*	$41,064.63
Virgina Citizens Consumer Council (VCCC)	3/5/78	Survey of consumer interests in regard to antacid products.	$46,597	None
Total authorization for OTC Antacids:				$126,884.63

Applicant	Date of Application	Proposed Activities	Request	Authorization
Action for Children's Television (ACT), Massachusetts, *and* Center for Science in the Public Interest (CSPI), Washington, D.C.	First Application (5/16/78)	Testimony: three research studies; expert testimony (dentists, pediatricians, nutritionists, and child psychiatrists). Submit pre-hearing comments. Outreach project to generate comments from the public. Participation of attorney and staff member at hearing. Proposal of disputed issues.	$97,901.00	$13,497.50 (deferred everything outside of the comment period; approval of remaining budget for comments and studies deferred pending submission of detailed breakdown of attorney expenses and Galst study budget)
	Second Application (6/28/78)	Survey to catalog information on existing public service announcements designed for children.	4,449.20	None
	Third Application (7/5/78 and 8/1/78)	Resubmission of request concerning Galst study of television commercials as a determinant of preschool children's snack preferences.	11,920.00	11,920.00
	Fourth Application (7/17/78)	Resubmission of request concerning attorney expenses during the comment period.	36,129.00	35,725.00
	Fifth Application (8/22/78)	Request that FTC deobligate funds previously authorized for reimbursement of CSPI staff member's expenses.	−7,598.00	−7,598.00
	Sixth Application (10/25/78 and 10/31/78)	Analysis of statements by witnesses and written comments. Testimony. Participation at hearing. Proposal of disputed issues.	39,424.50	23,471.70 (only one attorney authorized to monitor hearing;

CHILDREN'S ADVERTISING—CONTINUED

Applicant	Date of Application	Proposed Activities	Request	Authorization
				deferred decision on disputed issues);
			$182,225.70*	$77,016.20
Center for Public Representation (CPR), Wisconsin	First Application (4/26/78)	Testimony: studies of the effect of television advertising on 350 children.	$17,770	$16,350 (deferred decision on travel expenses)
	Second Application (6/26/78)	Expand the number of children interviewed for the research project.	2,674	2,674
			$20,374	$19,204
Community Nutrition Institute (CNI), Washington, D.C.	First Application (8/3/78)	Testimony: studies to determine shopping practices and knowledge of nutrition information of low-parents.	$32,768	$32,768
	Second Application (12/12/78)	Review material on the record in preparation for the legislative hearings; monitor legislative hearings; proposal of disputed issues.	20,383	7,898 (deferred decision on proposal of disputed issues)
	Third Application (12/23/78)	Additional time for review of the record.	6,162	Pending
			$59,313	$40,666
Consumers Union of the United States, Inc. (CU) *and* Committee on Children's Television (CCT), California	First Application (5/16/78)	Testimony and written comments: studies on what is unfair and deceptive to children, industry self-regulation, remedies, age cut-off point for children, the First Amendment, and corporate liability. Analysis of comments and preparation of questions for Presiding Officer at San Francisco	$149,244	$19,700 (preparation for San Francisco hearing deferred; a more detailed explanation of many

		hearing.		of the projects is needed)
	Second Application (7/3/78 and 7/11/78)	Detailed explanation of some of the projects.	22,238	22,238
	Third Application (7/28/78)	Detailed explanation of some of the projects.	51,024	None (Information will be available from others; some projects not significantly material)
	Fourth Application (11/7/78)	Analysis of comments and preparation of questions for Presiding Officer at San Francisco and D.C. hearings. Witness preparation.	16,348	16,348
	Fifth Application (Undated; received on 11/21/78)	Expenses for nine witnesses. Participation at San Francisco and D.C. hearings (three persons).	26,838	15,630 (only one attorney approved for attendance at hearings)
			$265,692*	$73,916
Council on Children, Media and Merchandising (CCMM), Washington, D.C.	First Application (4/27/78)	Testimony: research to determine children's present knowledge of dental health and good nutrition, the extent to which children can be taught to evaluate advertising, the role of parents in teaching children about advertising, and children's actual eating patterns; study effects of advertising on children.	$182,759.00	$26,664.00 (methodology and personnel for research projects must be presented in more detail; some projects not significantly pertinent)
	Second Application (7/7/78)	Request to withdraw prior application and authorization. Research to explore the combination of "child protective efforts" that can awaken parents and children to the role of commercials in television today.	35,230.00	New Total: 35,230.00

CHILDREN'S ADVERTISING—CONTINUED

Applicant	Date of Application	Proposed Activities	Request	Authorization
	Third Application (10/20/78)	Review written comments and prepare questions for hearings.	15,498.00	15,498.00
	Fourth Application (10/30/78 and 11/18/78)	Revision of authorized budget.	35,218.00	Revision of 35,230 Total: 35,218.00
	Fifth Application (12/5/78)	Expenses incurred in negotiations for withdrawn applications	2,657.95	None
	Sixth Application (12/11/78)	Overruns in expenses for principal interviewer and evaluator.	1,658.76	No Record Found
	Seventh Application (12/22/78)	Request for three persons to attend the San Francisco and D.C. hearings.	11,175.00	7,67.00 (approval for one person)
	Eighth Application (1/3/79)	Additional preparation for hearings.	3,360.00	Pending
			$287,556.71*	$58,392.00
Media Access Project (MAP) Washington, D.C.	First Application (6/15/78)	Study to determine the effectiveness of nutritional information in advertisements directed to children; will submit a report containing findings and legal analysis.	$35,163	$35,163
	Second Application (7/27/78)	Consultant to assist in study (as requested by FTC).	1,650	1,650
	Third Application (8/3/78)	Request that FTC deobligate part of prior authorization because of reduced cost of administering test instrument.	−3,000	−3,000
			$33,813	$33,813

Public Interest Economics Foundation (PIE-F) Washington, D.C.	Undated; received 6/28/78	Preparation of three statements suitable for use as expert testimony (concerning the role of advertising in a market economy, the financial impact of proposed rule on industry and children's programming, and the relationship between children's television advertising and consumption patterns).	$17,659.19	None
Safe Food Institute (SFI), California	7/18/78	Testimony: dental surveys (California and national) and interviews with California health professionals.	$37,527	$12,265 (only approved the interviews with California health professionals)
Daniel B. Wackman Professor, University of of Minnesota	1/19/79	Travel expenses to appear at D.C. hearing to testify about his independent research on the effects of television advertising on children (with colleagues Scott Ward and Ellen Wartella).	$ 316	Pending
Ellen Wartella Assistant Professor, The Ohio State University	1/26/79	Travel and per diem funds to cover expenses of traveling to D.C. to testify about her independent research on the effects of television advertising on children (with colleagues Scott Ward and David Wackman).	$ 143	Pending
Total authorization for children's advertising:				$315,092.20

APPENDIX B

COMPARISION OF COMPENSATION PROVISIONS OF SELECTED REGULATORY REFORM BILLS INTRODUCED IN THE NINETY-SIXTH CONGRESS

The Administration Bill — S.755, 96th Cong., 1st Sess. (1979), Section 302 (adding a new section 591 to Title 5, U.S. Code)
The Ribicoff Bill — S.262, 96th Cong. 1st Sess. (1979), Section 403 (adding a new section 593 to Title 5, U.S. Code)
The Kennedy Bill — S.1291, 96th Cong., 1st Sess. (1979), Section 104 (adding a new section 558a to Title 5, U.S. Code)
The Dellums Bill — H.R.254, 96th Cong., 1st Sess. (1979), Section 201 (adding a new section 560 to Title 5, U.S. Code)

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I. Agency Administering Compensation Program

A. *Administration Bill.*—Each agency administers own program, ACUS reports to the President from time to time on agencies "which have failed to make an effective use of the authority" to compensate.

B. *Ribicoff Bill.*—ACUS provides financial assistance.

C. *Kennedy Bill.*—ACUS provides financial assistance after consultation with affected agency.

D. *Dellums Bill.*—Each agency administers own program.

II. Types of Agency Proceeding Included in Compensation Program

A. *Administration Bill.*—Any agency proceeding in which there may be public participation "pursuant to statute, agency rule, or agency practice."

B. *Ribicoff Bill.*—Any agency proceeding or analysis involving a regulatory function when participation by the applicant "is otherwise authorized by statues, regulation, agency practice, or the exercise of agency discretion."

C. *Kennedy Bill.*—Same as Ribicoff Bill.

D. *Dellums Bill.*—Agency proceedings governed by 5 U.S.C. §§553-557 (rulemaking and adjudication under the Administrative Procedure Act).

III. Types of Costs Which are Reimbursable

A. Administration Bill.—Costs of participation, including the costs of attorneys and other experts. Advance payments explicitly authorized.

B. *Ribicoff Bill.*—Costs of participation, including the costs of attorneys, transcripts and experts. Advance payments explicitly authorized.

C. *Kennedy Bill.*—Same as Administration Bill.

D. *Dellums Bill.*—Reasonable attorney fees and other reasonable costs, including fees for witnesses and the costs of filing and reproducing materials. No mention of advance payments.

IV. Applicant's Interest in the Proceeding

A. *Administration Bill.*—Person represents an interest which, if represented in the proceeding, could reasonably be expected to contribute substantially to a fair disposition of the proceeding, taking into account whether the interest is adequately represented by another person in the proceeding, the need for representation of a fair balance of interests, and the complexity and importance of the issues involved.

B. *Ribicoff Bill.*—Person represents an interest "the representation of which could reasonably be expected to contribute substantially to a fair disposition of the proceeding, taking into account the need for representation of a fair balance of interests, and the complexity and relative importance of the issue involved."

C. *Kennedy Bill.*—person represents an interest "the representation of which could reasonably be expected to contribute substantially to a fair disposition of the proceeding, taking into account

(A) the need for representation of a fair balance of interests,

(B) the complexity and relative importance of the issue involved,

(C) whether the person represents a substantial public interest, and

(D) the importance of public participation after considering the need to encourage participation by segments of the public who may have little economic incentive to participate."

D. *Dellums Bill.*—No interest test.

V. Applicant's Competence or Ability to Contribute to the Decision

A. *Administration Bill.*—Applicant must be "an effective representative" of the interest in question.

B. *Ribicoff Bill.*—Same as Administration Bill.

C. *Kennedy Bill.*—Same as Administration Bill.

D. *Dellums Bill.*—Applicant must have "made a substantial contribution toward agency implementation of the intent of any law pursuant to which such proceeding is conducted."

VI. Applicant's Financial Condition or Economic Stake

A. *Administration Bill.*—The "economic interest of the person, or of the majority of the members of such person as individuals, in the disposition of the proceeding is small in comparison to the costs of effective participation in the proceeding, or the person does not have sufficient resources available to participate effectively in the proceeding in the absence of financial assistance."

B. *Ribicoff Bill.*—Same in substance as Administration Bill.

C. *Kennedy Bill.*—Same as Administration Bill.

D. *Dellums Bill.*—Applicant is "unable to bear the burden of such fees and costs" of participating.

VII. Procedural Requirements

A. *Administration Bill.*—Each agency must publish procedural rules for comment within 90 days of enactment of statute, and publish final rules within 180 days. Compensation decision cannot be made "by any office, bureau, or other division of an agency having responsibility for the presentation of the case or the initial decision or recommendation [in the proceeding where funding is sought] . . . except that agency personnel involved in such proceeding may provide information relevant to such determinations." ACUS must review agency rules and procedures to assure compliance, and report to the President.

B. *Ribicoff Bill.*—ACUS is directed to issue rules governing implementation of the compensation program (§595(a)).

C. *Kennedy Bill.*—ACUS is directed to consult with agencies in making compensation decisions. The Conference must propose regulations within 90 days of enactment of the statute, "to guarantee that the funds are distributed fairly and expeditiously to the participants in agency proceedings." The regulations must contain provisions for (1) annual estimations by agencies of their needs for public participation funds, (2) procedures for submitting applications, (3) rules to avoid duplicative presentations, (4) procedures for evaluating the performance of compensated participants and recovering overpayments, as well as auditing recipients. The regulations must be adopted within 270 days of enactment of the statute. ACUS and the individual agencies must report annually to OMB on the disbursement of compensation funds.

D. *Dellums Bill.*—Agencies are directed to prescribe rules governing compensation. No directives as to timing or content of rules.

VIII. Judicial Review of Compensation Decisions

A. *Administration Bill.*—Judicial review of compensation decisions is precluded by statute.

B. *Ribicoff Bill.*—No provision.

C. *Kennedy Bill.*—No provision.

D. *Dellums Bill.*—No provision.

IX. Authorization of Appropriations for Compensation Awards

A. *Administration Bill.*—$20 million per year thorugh FY ending September 30, 1982.

B. *Ribicoff Bill.*—A general authorization of appropriation for ACUS activities is included, but the amount is left blank (*see* §403(d)).

C. *Kennedy Bill.*—Same as Administration Bill.

D. *Dellums Bill.*—No provision.

APPENDIX C

SUMMARY TABULATION OF CORRESPONDENCE BETWEEN PRESIDING OFFICER AND STAFF RECOMMENDATIONS AND ACTION ON COMPENSATION REQUESTS*

(Considers only initial applications; partial and full grants or grant recommendations are treated as a grant, and only total denial is treated as denial)

In 42 cases, staff recommendations, Presiding Officer recommendations, and action letters were present in the file:

Staff, Presiding Officer, and FTC Decision Agrees	28
Staff and Presiding Officer Agree, Decision Differs	9
Staff and Presiding Officer Disagree, FTC Decision Follows Staff Recommendation	2
Staff and Presiding Officer Disagree, FTC Decision Follows Presiding Officer Recommendation	3

In 34 cases, Presiding Officer recommendations and FTC action letters were present in the file, but staff recommendations were missing:

Presiding Officer and Decision Agree	29
Presiding Officer and Decision Differ	5

In one case, the Presiding Officer's recommendation was missing from the file; in that instance, the staff recommendation and the FTC decision agreed.

In seven cases, files were too fragmentary to permit determination of agreement between recommendation and action.

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Overall, staff recommendations were present in 43 of 84 cases; the FTC decision agreed with the staff recommendation in 31 of these cases (72%).

Presiding Officer recommendations were present in 76 of 84 cases; the FTC decision agreed with the Presiding Officer's recommendation in 60 of these cases (79%).

Note: in seven cases where the FTC followed a staff or Presiding Officer recommendation, the rationale stated in the action letter was significantly different from the rationale of the recommendation followed.

Staff and Presiding Officers concurred in 37 out of the 42 cases where both recommendations were present (88%).

When both staff and Presiding Officer concurred, the FTC decision agreed with their recommendation in 28 out of 37 decisions (75%).

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* This chart does not include any recommendations or actions after February 1978.