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Funding Public Participation in Agency Proceedings: The Federal Trade Commission Experience

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Reflecting the recent political and economic climate, both Congress and the business community increasingly have scrutinized and criticized agency funding of public participation in administrative proceedings. They have charged that these funding programs represent expensive, one-sided subsidies for proponents of additional regulation. To determine the validity of this and other criticisms, Professor Boyer examines the Federal Trade Commission's compensation provision, its implementation over a four-year period, and its effects on rulemaking proceedings. Professor Boyer concludes that much of the criticism directed at the Commission was a result of the agency's limited resources, and the fundamental tension between the compensation statute's "technocratic" and "democratic" objectives. Professor Boyer notes that without clearer legislative direction as to the balance desired between these competing values, the ultimate success of the Federal Trade Commission's funding program is indeterminable.

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To preserve the confidentiality of the FTC, its members, and the applicants for compensation, some documentary sources are identified only by the title of Confidential Document or Staff Evaluation, and by catalogue numbers designated by the author. The editors of the *Georgetown Law Journal* have relied upon the author to verify the accuracy of statements in these documents. Any inquiries regarding these documents should be directed to the author, who must consult the FTC as to the disclosure of any confidential agency information.

Photocopies of all letters, applications for compensation, and interview memoranda cited in the article are on file at the *Georgetown Law Journal*.

Unless otherwise indicated, all tables, charts, and appendices have been derived by the author from information obtained through the witness survey.

The following acronyms used throughout the article are assigned the meanings below:

ACUS—Administrative Conference of the United States

BCP—Bureau of Consumer Protection

FTC—Federal Trade Commission

TRR—Trade Regulation Rule

PART ONE: IMPLEMENTATION

I. INTRODUCTION: THE UNEXPECTED PROGRAM

In 1975, the Federal Trade Commission (FTC) became the first major federal regulatory agency[1] possessing explicit statutory authority to fund public participation in agency proceedings. The Magnuson-Moss Act,[2] which confirmed and expanded the agency's power to issue trade regulation rules (TRR's) supported by strong legal sanctions,[3] also empowered the FTC to "provide compensation for reasonable attorneys fees, expert witness fees, and other costs of participating" in rulemaking proceedings.[4] The FTC had neither sought nor anticipated this grant of authority, and in many respects lacked both the organizational structure and experience to utilize it effectively. The direct funding program initially made few demands on agency resources, and operated in relative obscurity. By 1979, however, the political climate had changed dramatically. The Magnuson-Moss compensation plan became a major issue in the bitter controversy over the future role of the FTC and the direction of regulatory reform.[5]

Prior to passage of the Magnuson-Moss compensation authority, numerous legal and administrative victories had established broad rights of public participation in agency proceedings.[6] By the mid-1970's, however, private funding of such participation was declining. Private foundations that had provided "seed money" to establish advocacy groups began to limit their grants to particular program areas.[7] In 1975, the Supreme Court held that "fee-shifting" arrangements that imposed the costs of public interest participation on the regulated industry required specific legislative approval.[8] In addition, legislative

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1. *See generally* SENATE COMM. ON GOVERNMENTAL AFFAIRS, STUDY OF FEDERAL REGULATION, VOL. III: PUBLIC PARTICIPATION IN REGULATORY AGENCY PROCEEDINGS, S. DOC. NO. 71, 95th Cong., 1st Sess. 91-97 (1977).

2. Pub. L. No. 93-637, § 202(h)(1), 88 Stat. 2183-2203 (1975) (codified at 15 U.S.C. § 57a(h)(1) (1976)). The Federal Trade Commission Improvements Act of 1980 amended the FTC's compensation authority and the rulemaking provisions to which it relates. Pub. L. No. 96-252, 94 Stat. 374 (1980).

3. Until the United States Court of Appeals for the District of Columbia Circuit upheld the FTC's authority to issue substantive consumer protection rules in National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 698 (D.C. Cir. 1973), the agency's power to issue trade regulation rules (TRR's) with the force and effect of law had been in doubt. *See generally* A.L. FRITSCHLER, SMOKING AND POLITICS (2d ed. paper 1975).

4. 15 U.S.C. § 57a(h)(1) (1976).

5. *See* notes 21, 71 & 154 *infra* (reporting comments by members of Congress and congressional response thereto).

6. *See* Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1002 (D.C. Cir. 1966) (responsible representatives of listening public have standing as parties in interest to intervene and to contest renewal of broadcast license before FCC). The ACUS generally supported the liberalization of the public's right to participate in administrative proceedings, subject to adequate controls against tactics of delay or obstruction. 1 C.F.R. § 305.71-6 (1981) (*Public Participation in Administrative Hearings*, Recommendation 71-6). *See also* Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525 (1972); Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359 (1972).

7. *See generally* COUNCIL FOR PUBLIC INTEREST LAW, BALANCING THE SCALES OF JUSTICE: FINANCING PUBLIC INTEREST LAW IN AMERICA 234-37 (1976) [hereinafter FINANCING PUBLIC INTEREST LAW]; Foster, *Playing It Safe on $11 Million A Year*, JURIS DOCTOR, June-July 1973, at 9-12, 15; Jaffe, *Public Interest Law—Five Years Later*, 62 A.B.A.J. 982 (1976); Terris, *Hard Times Ahead For Public Interest Law*, JURIS DOCTOR, July-August 1974, at 22.

8. Alyeska Pipeline Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975). The United States Court of Appeals for the District of Columbia Circuit, which had been reversed by the Supreme Court in the

proposals to create a federal Consumer Advocacy Agency were defeated despite vigorous lobbying efforts by their proponents and strong support from the Carter Administration.[9] Thus, compensation programs like that of the Magnuson-Moss Act became increasingly important[10] to the continued effectiveness of the public interest movement.[11]

Many agencies were uncertain whether the authority to establish compensation programs was implied under existing authorization and appropriations statutes,[12] and they responded in markedly different ways to public partici-

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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, 1356 (D.C. Cir. 1975). The Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 2632 (Supp. III 1979), is a statute authorizing such fee-shifting.

9. *See generally* N.Y. Times, April 7, 1977, § A, at 1, col. 2; *id.*, June 30, 1977, § A, at 10, col. 3; *id.*, Nov, 2, 1977, § A, at 19, col. 6.

10. Another funding approach which gained at least limited acceptance is the "check-off" system, in which customers of regulated utilities authorize automatic additions to their bills to support public interest advocacy. *See generally* Nader, *Consumerism and Legal Services: The Merging of Movements*, in THE ROLE OF RESEARCH IN THE DELIVERY OF LEGAL SERVICES 97, 101-02 (L. Brickman & R. Lempert eds., paper ed. 1976). Many of the Nader-inspired public interest research groups (PIRG's) are supported by similar check-off systems attached to student tuition and fees at colleges and universities.

In addition, there was a limited revival of interest in the establishment of separate consumer advocacy offices within the agencies—an idea that traces back at least to the New Deal. *See generally* Nelson, *Representation of the Consumer Interest in the Federal Government*, 6 LAW & CONTEMP. PROB. 151 (1939). For discussions of more contemporary versions of this approach, see also REPORT BY THE COMPTROLLER GENERAL OF THE UNITED STATES, ORGANIZING THE FEDERAL COMMUNICATIONS COMMISSION FOR GREATER MANAGEMENT AND REGULATORY EFFECTIVENESS 23-24 (1979) (CED-79-107); Bloch & Stein, *The Public Counsel Concept in Practice: The Regional Rail Reorganization Act of 1973*, 16 WM. & MARY L. REV. 215, 218-21 (1975); Murphy & Hoffman, *Current Models for Improving Public Representation in the Administrative Process*, 28 AD. L. REV. 391, 402-07 (1976); Note, *Federal Agency Assistance to Impecunious Intervenors,* 88 HARV. L. REV. 1815, 1819-22 (1975).

11. The term "public interest movement" refers to the loose coalition of consumer, environmental, and similar constituency groups that arose in the 1960's. Use of the term is not intended to express an opinion on the much-debated question whether these advocacy groups actually do serve "the public interest." The term is used here as a shorthand reference to constituency or membership organizations whose supporters typically do not have a sufficiently large and individualized economic stake in the outcome of an administrative or judicial proceeding to make individual participation economically attractive. "Collective goods organizations" might be a more accurate description of such groups, but the term has not entered the general usage. *See* notes 191-92 *infra* and accompanying text (discussing consumer protection as "collective good"). For historical discussions of the emergence of these advocacy groups, see FINANCING PUBLIC INTEREST LAW, *supra* note 7, at 19-70; F. MARKS, K. LESWING & B. FORTINSKY, THE LAWYER, THE PUBLIC AND PROFESSIONAL RESPONSIBILITY 7-45 (1972); Rabin, *Lawyers in Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 209-27 (1976). The non-legal aspects of the public interest movement are described in J. BERRY, LOBBYING FOR THE PEOPLE (paper ed. 1977).

12. Whether agencies had such implied authority proved a surprisingly difficult question to answer. At the instigation of the FTC, the Comptroller General had issued a series of rulings concluding that many of the major regulatory agencies did have implied power at least in some circumstances. *See* Note, *Funding Public Participation in Agency Proceedings*, 27 AM. U. L. REV. 981, 984-88 (1978) (discussing Comptroller's criteria for determining when compensation appropriate).

In 1969, the FTC ruled that it would not prosecute cease-and-desist cases against indigent respondents because an unrepresented litigant might be denied due process of law. *In re* American Chinchilla Corp., 76 F.T.C. 1016, 1034-39 (1969). The Commission avoided the issue of its authority to provide compensation in *American Chinchilla* by dismissing the complaint against the respondent. *Id.* at 1039. A subsequent case involving an indigency claim, however, forced the agency to consider the question. *See 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, *id.* at 1651-54 (interlocutory order requiring affidavit of financial status), by arranging for volunteer counsel through the American Bar Associa-

pants' funding requests.[13] Bills designed to end this confusion by extending direct funding authority across a broad spectrum of regulatory agencies and

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tion's Section on Antitrust Law, *id.* at 1673-74 (interlocutory order), and by issuing a policy statement that institutionalized these approaches. 35 Fed. Reg. 18,998 (1970).

At about the same time, Students Opposing Unfair Practices (SOUP), a public interest group that had intervened in an FTC deceptive practices case to argue for a stronger remedy, petitioned the Commission to reimburse the group for some of its expenses. *In re* Firestone Tire and Rubber Co., 77 F.T.C. 1666, 1667-70 (1970) (opinion and order granting limited intervention). *See also In re* Campbel Coup [sic] Co., 77 F.T.C. 664, 671 (1970) (denial of SOUP's request for further intervention; grant of free transcript instead). SOUP requested that they be granted leave to proceed *in forma pauperis* and that the Commission provide them with three kinds of financial assistance: exemption from the rules that multiple copies of documents be filed, reimbursement of discovery expenses, and payment of witness fees by the FTC. *In re* Firestone Tire and Rubber Co., 78 F.T.C. 1572 (1971) (interlocutory order). The Commission divided sharply on whether it would be legal to use agency funds for such purposes. Therefore, the agency requested a formal ruling from the Comptroller General defining the scope of its authority to compensate participants. *Id.* at 1573. The Comptroller responded that the FTC could use its appropriations to underwrite 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 ensure full and fair consideration of a pending matter. In other words, the Commission had "reasonable discretion" to determine what constituted "necessary expenses" within the meaning of the appropriations statutes. *Public Participation in Federal Agency Proceedings: Hearings on S. 2715 Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. 281 (1976) (opinion of the Comptroller General) [hereinafter *Hearings on S. 2715*].

The United States Court of Appeals for the Second Circuit, however, disagreed with the Comptroller General. In the prolonged *Greene County* litigation, the court held that the Federal Energy Regulatory Commission (formerly known as the Federal Power Commission) could not reimburse intervenors in a licensing hearing without specific congressional approval. Greene County Planning Bd. v. Federal Power Comm'n, 559 F.2d 1237, 1239 (2d Cir. 1977) (en banc), *cert. denied*, 434 U.S. 1086 (1978). The court stated: "The authority of a Commission to disburse funds must come from Congress . . . and it is for Congress, not the Comptroller General, to set the conditions under which payments, if any, should be made." *Id.* at 1239.

Agency uncertainty regarding the scope of existing funding authority was aggravated by two additional factors. First, the *Greene County* controversy had been pending before the FPC and the courts for approximately a decade before certiorari finally was denied. Brief for the Federal Power Commission on Petition for a Writ of Certiorari at 3-8, Greene County Planning Bd. v. Federal Power Comm'n, 434 U.S. 1086 (1978). Second, the Department of Justice refused to follow the Second Circuit's holding, stating that *Greene County* should be limited to its facts. *See* Legal Times of Washington, June 26, 1978, at 4, col. 3 (Attorney General Bell reaffirms commitment to allow agencies broad discretion to award attorneys' fees to participants in proceedings). An official at the Justice Department stated that:

> 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.

Letter from John M. Harmon, Assistant Attorney General, Office of Legal Counsel, United States Dep't of Justice to Linda Heller Kamm, General Counsel, United States Dep't of Transportation 2 (March 1, 1978).

13. Some agencies launched experimental "implied authority" funding programs. *See, e.g.*, 43 Fed. Reg. 23,560 (1978) (Consumer Product Safety Commission, Interim Policies and Procedures for Temporary Program); 43 Fed. Reg. 17,806 (1978) (Final Rule, National Oceanic and Atmospheric Administration, United States Dep't of Commerce); 42 Fed. Reg. 2,864 (1977) (United States Dep't of Transportation, National Highway Traffic Safety Administration, Final Rule and Advance Notice of Proposed Rulemaking). *See also* 44 Fed. Reg. 23,044 (1979) (Food and Drug Administration, Proposed Rule); 44 Fed. Reg. 17,507 (1979) (United States Dep't of Agriculture, Notice of Proposed Rulemaking); 43 Fed. Reg. 30,834 (1978) (Federal Communications Commission, Notice of Inquiry). In a court challenge decided after the *Greene County* case, the Department of Agriculture successfully defended its power to support public participation. Chamber of Commerce v. United States Dep't of Agriculture, 459 F. Supp. 216, 221 (D.D.C. 1978) (even in absence of explicit statutory authority, federal agency can fund study by consumer group concerning probable impact of proposed rules on consumers).

Other agencies refused to act without a clearer expression of congressional support. The Nuclear Regulatory Commission's statement accompanying its decision not to establish a direct funding program expressed this view in part:

proceedings reached the committee hearing stage in the Ninety-Fourth and Ninety-Fifth Congresses.[14] These direct funding proposals gained some influential supporters. Prestigious professional groups endorsed the concept of support for public participation.[15] The Carter Administration's regulatory reform program[16] incorporated direct funding authority as a major feature, as did several related proposals in the Ninety-Sixth Congress.[17] Despite these efforts, however, by the late 1970's a strong backlash had developed against direct funding in general and the FTC's program in particular.

To the regulatory targets—the firms, trade associations, and individuals sub-

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> 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.

41 Fed. Reg. 50,831 (1976).

14. *See, e.g.*, S. 270, 95th Cong., 1st Sess. (1977) (to amend Administrative Procedure Act to permit awards of reasonable attorneys' fees and other expenses for public participation in federal agency proceedings); S. 2715, 94th Cong., 1st Sess. (1976) (same); H.R. 8798, 95th Cong., 1st Sess. (1977) (same); H.R. 3361, 95th Cong., 1st Sess. (1977) (same); H.R. 13,901, 94th Cong., 2d Sess. (1976) (same). *See generally Hearings on S. 2715*, *supra* note 12.

15. *See generally* AMERICAN BAR ASSOCIATION COMMISSION ON LAW AND THE ECONOMY, FEDERAL REGULATION: ROADS TO REFORM 124-26 (Exposure Draft 1978); 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); Statement of Sara-Ann Determan, Member, Special Committee on Public Interest Practice, American Bar Association, before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on Agency Proceedings (July 20, 1979). *See also* Committee on Federal Legislation, *Attorneys Fees for Public Interest Participation in Federal Agency Proceedings*, 31 RECORD OF THE ASS'N OF THE BAR OF THE CITY OF N. Y. 675 (1976). This Committee concluded that the desirability of funding such participation was no longer open to dispute:

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

16. *See* S. 755, 96th Cong., 1st Sess., § 302 (1979) (each agency to administer own funding program with ACUS reporting to President on agencies that fail to make effective use of compensation authority). Upon defeat of the consumer advocacy agency bill, the Carter Administration made several efforts to increase consumer advocacy. One step was to increase the policy-making power of in-house consumer advocate, Esther Peterson. Wash. Post, May 1, 1978, § D, at 9, col. 1. According to newspaper accounts, this approach was functionally similar in some ways to the proposed 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." Exec. Order No. 12,044, 43 Fed. Reg. 12,661-62 (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 COMP. OF PRES. DOC. 867 (1979).

17. *E.g.*, S. 262, 96th Cong., 1st Sess., § 403 (1979) (ACUS provides financial assistance); S. 1291, 96th Cong., 1st Sess., § 104 (1979) (ACUS provides financial assistance after consultation with agency); H.R. 254, 96th Cong., 1st Sess., § 201 (1979) (each agency to administer own funding program).

ject to rules written by the FTC and other agencies—the costs of regulation became an issue of great practical and symbolic importance. Aroused by the wave of safety, environmental, and consumer protection rules issued during the 1970's, and supported by a growing body of scholarship that questioned the basic purposes and effects of regulation,[18] the business community resisted with increasing vigor and success what it considered to be excessive or misguided regulation. This resistance was most apparent in demands for a regulatory analysis requirement that would force agencies to make detailed, systematic cost-benefit assessments of proposed regulations,[19] but the business community also resented the direct costs of participating in the administrative process. As regulators attempted to control more aspects of business behavior, the expense of complying with subpoenas, of submitting required reports, and of hiring lawyers and experts to defend against particular agency proposals mounted steadily. In this setting, the Magnuson-Moss compensation program easily was viewed by the regulated as a one-sided support system for opponents invariably seeking more onerous regulation.[20]

This theme was played repeatedly in legislative debates.[21] The compensation program was publicly denounced as a "slush fund"[22] that the FTC used to

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18. *See generally* G. STIGLER, THE CITIZEN AND THE STATE: ESSAYS ON REGULATION (paper ed. 1975); Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 549 (1979).

19. Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980) (requiring agencies to prepare preliminary and final regulatory flexibility analyses for purpose of minimizing economic impact of rules on small businesses); Exec. Order No. 12,044, 3 C.F.R. § 152 (1978) (directing executive departments to prepare regulatory analysis of major rules).

20. For example, the Chamber of Commerce of the United States denounced the program in the following terms:

> Evidence had begun to surface that the agency was using the taxpayers' money to "stack the record" in rulemaking proceedings by donating hundreds of thousands of dollars to biased "public interest" groups. These groups in turn merely parroted the FTC staff opinions in support of a proposed rule at public hearings.

REGULATORY ACTION NETWORK WASHINGTON WATCH 5 (No. 3 March, 1980).

21. *See* [1979] 907 ANTITRUST & TRADE REG. REP. (BNA) 5, § A. Senator Dale Bumpers, Democrat from Arkansas asked: "Aren't all those groups [that were funded in the Children's Advertising rulemaking] in favor of the FTC rule proposal?" *Id.* FTC officials admitted that the seven funded groups did favor some action, but noted that they had disagreed about the specific remedy. *Id.*

> [Senator] Danforth blasted the FTC for funding groups friendly to agency positions, and he questioned selection procedures. "How much of your money goes to people who tell the Commission you're all wet? he demanded of the four commissioners and the dozen FTC staff members seated before him. His line of questioning was joined in by Subcommittee Chairman Wendell Ford (D-Ky), who has authorized his staff to undertake a very close look at the program . . . . Commerce Committee Chairman Howard Cannon (D-Nev) also has raised questions about the program in a recent letter to the FTC.

[1979] 912 ANTITRUST & TRADE REG. REP. (BNA) 13, § A.

22. James J. Kilpatrick coined the phrase in a syndicated column that said in part:

> 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.
>
> 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.

maintain a stable of "kept critics."[23] Corrective legislation was thought necessary to achieve the original goal of providing public participation funding for "the needy, not the greedy."[24] The FTC and its dwindling circle of supporters defended the compensation program with equal vigor, albeit with less colorful rhetoric.[25] In the end, the direct funding authority survived the numerous 1980 amendments to the FTC Act with only a few additional limits on the agency's discretion.[26] These limitations were not the worst political setback the FTC suffered during this period,[27] but they reflected the shadow of suspicion the legislative oversight process had cast not only on the FTC's administration of the program, but also on the concept of compensating public participants in administrative proceedings.

This article evaluates the extent to which this criticism of the FTC and its direct funding program was justified. It examines the FTC's implementation of the compensation program and the program's effects, from its enactment in 1975 through January, 1979.[28] First, the article discusses the FTC's adminis-

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23. [1980] 951 ANTITRUST & TRADE REG. REP. (BNA) 8-9, § A (quote attributed to Sen. Alan K. Simpson).

24. *Id.*

25. *See* [1979] 931 ANTITRUST & TRADE REG. REP. (BNA) 26, § A (strong public presence necessary in regulatory proceedings that often proceed with only perfunctory public presence); [1979] 912 ANTITRUST & TRADE REG. REP. (BNA) 12-13, § A (Commissioner Pertschuk defending public participation funding as "the single most important action we have taken to improve the regulatory process"); [1979] 907 ANTITRUST & TRADE REG. REP. (BNA) 5, § A (funding program necessary to balance advocacy before Commission).

The FTC's general approach in defending the program is reflected in the following excerpt from a guest opinion column written by Chairman Michael Pertschuk in *The Washington Post*:

> [The] Chamber of Commerce, the toy manufacturers and some congressmen have generously offered to relieve us of the necessity of having to listen to consumers and small business advocates by urging termination of the public participation program . . . .
>
> 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].

Wash. Post, June 26, 1979, § A, at 19, col. 6.

26. The amendments stipulate that no person can receive more than $75,000 for participation in any single rulemaking proceeding, and no more than $50,000 in any fiscal year. They also require that 25% of the appropriated compensation fund be set aside for small business, and they direct the Commission to create a special small business outreach program. The FTC Improvements Act of 1980, Pub. L. No. 96-252, § 10, 94 Stat. 374.

27. At one point the FTC's appropriation lapsed, and the agency was forced to shut down. *See* Brown, *FTC Temporarily Closed in Budget Dispute*, Wash. Post, May 1, 1980, § B, at 1, col. 1. The FTC Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374, imposes various new substantive and procedural checks on the agency's power to issue trade regulation rules. Among other restrictions, the Improvements Act limits the FTC's ability to use unfairness theories in rulemaking, *id.* § 11(b), places special restrictions or bans on several pending proceedings, *id.* §§ 7, 11, 19, requires the agency to prepare a preliminary and final regulatory analysis of rules, *id.* § 15, directs the agency to publish and transmit to Congress an advance notice of proposed rulemaking, *id.* § 8, and subjects final rules to a legislative veto. *Id.* § 21.

28. This article relied on several data sources to reach its conclusions: agency records and documents relating to the compensation program, observations of meetings and rulemaking hearings, interviews with agency staff members and outside participants, and responses to a survey questionnaire by witnesses in several proceedings in which compensation was awarded.

The January, 1979 cutoff point was established primarily because the agency supporting this study, the Administrative Conference of the United States, required sufficient lead time to produce and evalu-

tration of the compensation program and the criteria and procedures the agency developed for awarding funding to public intervenors. This initial section also examines the compensation statute and notes the ambiguity of purpose inherent in its language. This examination suggests that a fundamental tension between the "technocratic" and "democratic" objectives of the statute hampered the FTC's development of funding criteria. The democratic and technocratic views of the rulemaking process imply different approaches to defining the types of persons and activities that should be funded, and the kinds of controls that should be established over their participation. The article argues that without consensus or clear legislative guidance on the focus of the compensation statute, the FTC was inevitably vulnerable to criticism.

Second, the article evaluates the FTC's actual implementation of the program. The picture that emerges from this examination of the program's implementation is more complex and ambiguous than the generalities of the political debate. This second section concludes that in administrative terms, the FTC's implementation efforts were at least partially successful; many of the Commission's difficulties were attributable to limited resources, and many of these deficiencies were cured by 1979. Moreover, the fundamental ambivalence in the statute and in the theory of public participation in rulemaking that evolved in the 1970's left the FTC with questions which had no right answers.

Finally, the article attempts to assess the effects of the compensation program, and concludes that the plan's ultimate success or failure is impossible to establish because of the obscurity of its objectives. Assuming that a major purpose of the drafters was balanced participation by all competing interests in rulemaking proceedings, this final section analyzes the program's effect upon balanced advocacy and upon final agency decisions. Although compensated participants performed as competently as their uncompensated counterparts in the proceedings studied, the article concludes that it is impossible to determine whether the compensated participants affected the FTC's final rules because there is no objective measure of a participant's influence on the final results of a rulemaking proceeding. In addition, this section concludes that direct funding programs are not likely to succeed, or to be perceived as successful, unless there is better legislative guidance as to the proper balance to be struck between technical competence and grassroots participation.

II. THE FTC ORGANIZES FOR IMPLEMENTATION[1]

When the Magnuson-Moss Act became effective, several basic implementation issues confronted the FTC. The most immediate task was to adapt the agency's organization and procedures to the consideration of requests for funding. The FTC needed to assign people to run the program, to establish lines of authority and areas of responsibility, and to devise a process for col-

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ate a report that it was required to submit to Congress by a fixed date. This cutoff date made it impossible to gather detailed information about public participation in some of the later (and most controversial) proceedings, such as the Children's Advertising and Standards and Certification TRR's. January, 1979, however, roughly corresponds to the point at which the FTC came under heavy public and congressional criticism for its handling of the compensation program. Thus, the data reviewed in this article provide a reasonably comprehensive picture of the compensation program's operation before it became the focus of public controversy.

lecting information and for ruling on funding applications. In addition, the agency had to choose from among several different strategies for applying the statute's broad standards[29] to individual cases. At one extreme, the FTC could seek to preserve maximum agency discretion by issuing vague operational standards and by failing to explain individual funding decisions. Following an intermediate course of action, it could confine its discretion by allowing detailed standards to evolve on a case-by-case basis—that is, by ruling on questions as they arose, and by using these rulings as precedents.[30] Finally, the FTC could have developed a highly detailed set of operational standards at the outset and then have refined these rules as problems or omissions became apparent.

The Commission faced another important set of decisions regarding the level of information, advice, and support to give to potential applicants—in short, what "outreach" policy to adopt. Some applicants would know about the compensation program and would have definite objectives in particular proceedings. In other situations, however, outreach activities might well determine the mix of applicants and the kinds of activities they proposed to undertake. Finally, because the program involved the expenditure of public monies, the FTC needed some oversight capability to ensure that the funds were used properly.

In general, resource and time constraints influenced both the timing of the FTC's response to these issues and, to a lesser extent, the content of agency policy. With limited administrative resources and little time to deliberate,[31] the program administrators tended to respond to problems rather than to an-

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29. In its entirety, the relevant section of the compensation statute provided:

> 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 proceeding because such person cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceedings.

15 U.S.C. § 57a(h)(1)(1976); *see* notes 65-69 *infra* and accompanying text (describing agency's development of funding criteria under Magnuson-Moss Act).

30. *See generally* K. DAVIS, DISCRETIONARY JUSTICE (1969). During the early development of standards, however, these rulings would have provided applicants with little guidance because "action letters" were neither readily available, nor were they informative as to the bases of the agency decisions. Insufficient resources primarily accounted for these deficiencies. The operation and maintenance of a precedent system would have required staff to write explanations of decisions, compile the decisions in a manner accessible to users, and check later cases against them. Instead, the letters that were then signed by the Bureau Director were not collected in any central system. One copy of the letter was sent to the applicant, one placed in the public record of the proceeding for which the application had been filed, and one retained in the central compensation files maintained by the Bureau of Consumer Protection (BCP). At the BCP, the action letters were intermingled with other documents relating to a particular compensation decision.

31. Time pressures were generated both internally and externally. When the Magnuson-Moss bill neared enactment, a cluster of rulemaking investigations reached the point at which agency staff and Commissioners were prepared to begin public proceedings. The FTC delayed these proceedings until rules of practice were issued under the new statute. Thus, staffers responsible for establishing these rules were understandably anxious to move quickly. Moreover, the Commission was under some pressure from external constituencies and congressional oversight bodies to act swiftly on the pending rules. *See generally* B. BOYER, ET AL., TRADE REGULATION RULEMAKING PROCEDURES OF THE FEDERAL TRADE COMMISSION §§ I-VI (May 1979) (unpublished report to Administrative Conference of the

ticipate them, and to defer action on questions that did not require an immediate decision. As various difficulties arose during the early implementation of the program, the FTC quickly and frequently changed its approach. The application of standards moved from an informal, highly discretionary process through a period in which decisionmakers provided relatively detailed explanations to support their determinations. Finally, in 1977, the Commission published a fairly detailed set of standards for ruling on compensation requests. After it became apparent that a small number of repeat applicants were receiving a substantial proportion of available funds, the agency also developed a systematic outreach effort. Audit procedures emerged very late; the FTC did not establish a general audit program until the very end of the period studied. Agency officials could have, and indeed had, anticipated many of these needs early in the program. Unfortunately, these officials lacked sufficient resources with which to solve problems at an earlier stage.[32]

A. FINDING A HOME FOR THE PROGRAM

In 1975, the Federal Trade Commission was organized and staffed primarily as a prosecuting agency. Its experience in the administration of grant and contract programs was modest, and confined primarily to the procurement of consultants and other litigation-support services. As a result, no existing unit within the agency could easily assume the administration of the compensation program. The immediate need in the early days of implementation, therefore, was to find an office with both adequate administrative resources to manage the program, and sufficient incentive to make it succeed. At the outset, these requirements eliminated several alternatives.

Two of the FTC's major operating units, the Bureaus of Competition and of Economics, were suitably large to afford a reallocation of staff resources. They were concerned almost exclusively, however, with the Commission's antitrust mission. By contrast, the compensation authority was tied to rulemaking, which was regarded as the domain of the Bureau of Consumer Protection.[33] Thus, both Competition and Economics were unenthusiastic about running a program that did not contribute to their work. Some general support units independent from the three major bureaus, such as the Office of General Counsel and the Executive Director's office, might have had some interest in the compensation program. They appeared, however, to possess neither the resources nor the motivation to assume a leadership role. Therefore, by pro-

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United States) (study of FTC rulemaking procedures under Magnuson-Moss Act) [hereinafter ACUS PHASE I REPORT].

32. S. REP. NO. 184, 96th Cong., 1st Sess. 4, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 1073, 1076 ("Initially, implementation of the compensation program was hampered by a lack of funds available for administrative staff"). After evaluating the FTC's implementation of the program, the ACUS recommended that Congress specifically appropriate funds for the administration of any similar programs established in the future.

33. The possibility of conducting antitrust rulemaking proceedings occasionally was discussed both within and outside of the FTC during the period covered by this study. *See* Statement of Michael Pertschuk, Chairman, FTC, before the Annual Spring Meeting of the Antitrust Law Section of the American Bar Association 8-10 (April 7, 1978) (copy on file at *Georgetown Law Journal*). This interest, however, never produced any antitrust rulemaking proceedings.

cess of elimination, the Bureau of Consumer Protection (BCP) became the compensation program's first organizational home.

The agency was not entirely comfortable with delegating this responsibility to the BCP, because the Bureau often sponsored or supported the proposed rules considered in the proceedings where compensation would be granted. Bureau staff attorneys conducted pre-rulemaking investigations, drafted proposed rules, appeared at hearings to sponsor and cross-examine witnesses, and prepared final reports recommending action to the Commissioners. The BCP leadership—the Assistant Directors responsible for particular program areas, and the Bureau Director—reviewed and approved the staff's major decisions during the course of a rulemaking proceeding. Thus, the Bureau, and more particularly the staff attorneys, were likely to feel some commitment to serve as advocates for any proposed rule. There was a risk that this role would influence the exercise of discretion in deciding whether to award compensation. In fact, or in appearance, the program could be misused to support applicants agreeable to the Bureau's position and to exclude applicants critical of proposed rules.

The agency initially resolved this apparent conflict of interest by establishing a coordinating committee to represent a variety of constituencies and viewpoints. This group, at various times called the Screening Committee, the Grant Funding Committee, and finally the Compensation Committee, was intended to advise the Bureau Director, who then would "sign off" on particular compensation decisions.[34] The committee included the Assistant Directors of the BCP divisions from which rules originated, as well as representatives from the General Counsel's Office, the Division of Management, and the Bureau Director's personal staff.[35] This committee system remained in effect, with minor changes, for approximately three years.[36] The system had several advantages. It provided a collegial forum in which high level agency officials with different perspectives could wrestle with the meaning of the statute and the manner in which to allocate funds. Moreover, it offered a means of sharing responsibility—in the bureaucratic jargon, "getting a lot of fingerprints on the compensation decisions"—which could be useful if the program became a target of criticism.

Nevertheless, the committee structure had its shortcomings. The primary responsibilities of the committee members lay elsewhere. Members lacked suffi-

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34. Interview with Lee H. Simowitz, Assistant to Director, BCP (Jan. 27, 1976).

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

36. The system for providing support services to the Committee was modified during this period. Initially, one of the Bureau Director's personal assistants collected documents, scheduled meetings, and recorded decisions. By the spring of 1976, the position of Special Assistant for Compensation had been created within the Bureau to manage the growing administrative workload. Interview with Bonnie J. Naradzay, Special Assistant for Compensation, BCP (Oct. 19, 1976). Early in 1978, a permanent Bureau Director replaced two Acting Directors who had supervised the early stages of implementation. After some initial involvement in ruling on compensation requests, the new Director delegated this responsibility to a Deputy Director in the BCP. Statement of Gale P. Gotschall, Deputy Director for Federal-State and Consumer Relations, FTC, on Senate Bill No. 707, Public Service Commission-Citizen Participation, before the Economic Affairs Comm. of the Maryland State Senate 2 (Feb. 24, 1978) (copy on file at *Georgetown Law Journal*).

cient time to read documents, to attend meetings, or simply to think about issues raised by the compensation program. Consequently, it was often difficult to schedule meetings and to maintain reasonable continuity and consistency in the program. In addition, the Assistant Directors were subject to conflicting pressures when staff attorneys in their divisions felt strongly about funding a particular applicant. A supervisor incurs an organizational cost when he refuses to back subordinates' recommendations with higher levels of authority. At the same time, however, the Assistant Directors were obliged to protect both the Director and the agency against ill-considered or biased compensation decisions.

This dilemma, admittedly not unique to the compensation program, was inherent in an Assistant Director's role as middle manager. But at times the conflict seemed particularly keen because the compensation program was only a peripheral responsibility of the Assistant Directors. Refusing to support the staff's compensation recommendation would make it more difficult to disagree later on matters more central to the Assistant Director's function, such as the choice of cases to bring or the selection of rule provisions and theories to develop in TRR proceedings. Aware of these conflicts, the Compensation Committee adjusted for them in its funding decisions.[37]

Finally, the Committee lacked a sufficiently broad range of expertise to deal with recurrent compensation questions. Most Committee members had legal educations and some experience in public administration. These backgrounds did not equip the program administrators to develop formulae for calculating overhead expenses reimbursable to consumer advocacy groups, or to decide whether consumer surveys, which many applicants wished to conduct, were methodologically sound. Expertise on such matters was generally lacking at the FTC during the program's early phases, and the Committee clearly had no access to the limited expertise that was available.

In the fall of 1978, upon appointment of a new FTC chairman and the completion of an internal review of the compensation program, responsibility for the program was shifted to the General Counsel's Office.[38] No official explanation was offered for this change,[39] although it evidently was motivated by a desire to give the compensation decisions greater independence from the Bureau and the staff attorneys.[40] Complaints that rulemaking staffs were single-minded advocates engaged in an anti-business "vendetta" had become increasingly widespread.[41] The membership of the compensation committee also was

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37. The Compensation Committee, aware of staff attitudes, may have weighted or discounted staff recommendations accordingly. Interview with Bonnie Naradzay, Special Assistant for Compensation (Oct. 19, 1976); Interview with James V. DeLong, Assistant Director, BCP (June 11, 1976).

38. 43 Fed. Reg. 39,083 (1978).

39. The Presiding Officers in TRR proceedings were shifted simultaneously to the General Counsel's office. The *Federal Register* notice simply stated that "[t]his transfer is being made as a matter of policy to enhance the management and work product of these programs." *Id.* at 39,083-84.

40. Interview with Michael Sohn, General Counsel, and Barry Rubin, Office of the General Counsel, FTC (Jan. 8, 1979) [hereinafter Sohn & Rubin Interview].

41. Similar charges figured prominently in congressional oversight of the FTC during 1979. *See generally* Wash. Post, Oct. 6, 1979, § D, at 9, col. 4. The *Post* described the situation as follows:

> Federal Trade Commission Chairman Michael Pertschuk, fighting congressional attempts to limit the powers of his agency, yesterday admitted to the Senate Commerce Consumer Subcommittee that some FTC staffers had carried on a "vendetta" against certain industries.

modified. The Assistant Directors were dropped, reportedly because of their spotty attendance at committee meetings. A survey research expert from the Office of Policy Planning, however, became available to critique research proposals in compensation applications.[42]

The FTC's experience suggests that a funding program's structural independence may have greater symbolic than practical significance.[43] The critical factors are adequate resources, expertise, and incentive. Formal insulation of the decisionmakers from the operating bureaus provides only indirect assurance that these conditions will be met. Moreover, regardless of a program's location within the administrative hierarchy, the staff closest to an individual proceeding always has a significant voice in the agency decisions. The procedures and standards governing a compensation program are more likely to determine how influential that voice will be.

B. DEVELOPING PROCEDURES

Practical considerations significantly influenced the FTC's initial development of procedures for processing compensation applications, and ensured that the process established was simple and informal. First, the agency frequently made decisions under severe time pressures.[44] The FTC was pressed for two reasons: the managing officials' primary responsibilities lay outside the program, and a substantial backlog of proposed rules had accumulated during enactment of the new statute. Moreover, many of the funding applicants needed speedy decisions from the FTC because of the substantial lead time necessary to collect and to analyze emipirical data from consumer surveys or marketing practices statistics. Requests for funding, however, tended to arrive relatively late in the process, only shortly before the hearings began.[45] The

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> But, Pertschuk added, those staffers "are no longer at the agency," and he said the investigations they were working on—particularly those involving funeral homes, hearing aides [sic] and vocational schools—were ultimately not influenced by their alleged bias.

Id.

42. Sohn & Rubin Interview, *supra* note 40.

43. The independence of a compensation program is an issue discussed not only in relation to the FTC's program, but also in some general compensation proposals of the Ninety-Sixth Congress. *Compare* S. 755, 96th Cong., 1st Sess., § 302 (1979) (each agency administers own compensation program, with ACUS reporting to President on agencies "which have failed to make an effective use of the authority") *with* S. 262, 96th Cong., 1st Sess., § 403 (1979) (ACUS administers compensation) *and* S. 1291, 96th Cong., 1st Sess., § 104 (1979) (ACUS provides financial assistance after consultation with affected agency).

44. Throughout this study, interviewed applicants complained about both agency delays in decisionmaking and insufficient time to prepare for hearings. *E.g.*, Interview with Miles Frieden, CalPIRG, Used Cars, Credit Practices, and Thermal Insulation Proceedings (Apr. 3, 1979); Interview with Irmgard Hunt, Consumer Action Now, Protein Supplements Proceeding (Apr. 3, 1979); Interview with Robert Choate, Council on Children, Mdia and Merchandising, Food Advertising, OTC Drugs, OTC Antacids, and Children's Advertising Proceedings (March 23, 1979); Interview with Mark Silbergeld, Consumers Union, Funeral Practices and Food Advertising Proceedings (Feb. 7, 1977); Interview with John Pound, Ken McEldowney & Karen Tomovick, San Francisco Consumer Action, Vocational Schools Proceeding (Dec. 12, 1975); Interview with Katherine Meyer, Center for Auto Safety, Mobile Homes Proceeding (March 20, 1979). Not all of the representatives interviewed, however, criticized the FTC for tardiness. One interviewee reported that response time on the group's application was shorter than at any other government agency. Interview with Edward Kramer, The Housing Advocates, Mobile Homes Proceeding (March 27, 1979).

45. The agency's rules of practice under the new statute provided for a "two-step" notice prior to the start of hearings. After completion of the staff investigation (or of an investigation adequate to support

FTC's failure to publicize the program during its early stages, or to mention the program in its *Federal Register* notices, may account for the tardiness of some applications.[46] The limitations of some of the applicant groups also may have contributed to the delays. Many of the consumer groups were small organizations managed by volunteers or over-worked staff for whom constructing an adequate funding proposal required a major effort. In view of time limitations, telephone or other personal contacts frequently were used to resolve problems or omissions in written applications.

A second reason for the development of informal procedures was the need to gather information about the applicant from sources within the agency. The easiest method of getting this information was through conversations, meetings, or internal memos. Since many of the proceedings had taken on a highly adversarial tone, these informal contacts raised questions about the fairness and impartiality of the decisionmaking process. From an applicant's written submissions and follow-up contacts, the Committee could evaluate the nature of the applicant organization, its resources, its position toward the proposed rule, the type of participation planned, and the amount of funding necessary to support such participation. The Committee, however, could not judge the group's competence to perform the work it proposed, or determine the relation between an applicant's proposal and other materials in the record of the proceeding. Only individuals familiar with the proceedings, and the theories and evidence already developed, could make such assessments effectively. This meant that recommendations must come either from the Presiding Officer or from the staff attorneys assigned to the rule.

The initial Rules of Practice issued by the FTC suggested that the Presiding Officer would evaluate an applicant's likely contribution to a rulemaking proceeding. The Presiding Officer was to review the applications and submit "initial findings" to the Bureau Director; the rules made no provision for evaluations by the rulemaking staff attorneys.[47] In practice, however, the

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a decision to commence public proceedings), the Commission issued an Initial Notice of Rulemaking. This notice invited interested persons to propose "disputed issues of material fact" for consideration in the public hearings. After considering these submissions, the agency published a Final Notice which designated the issues on which the hearings would focus, and also established a schedule for the hearings. *See generally* 16 C.F.R. §§ 1.11-1.12 (1978). Generally, hearings were scheduled in several cities over a period of weeks. The Final Notice also stipulated a time in advance of each local hearing by which witnesses were to file summaries or outlines of their testimony so that "group representatives" (designated spokespersons for the major constituent groups) could prepare for cross-examination. *See generally* ACUS PHASE I REPORT, *supra* note 31, § VI, at 19-28 (discussing selection of hearing dates, locations, and affiliated problems).

Available figures indicate that in 14 proceedings conducted under these rules of practice during the period this study covers, nearly 60% of the initial applications for compensation (those that were not seeking a supplement to a prior grant) were submitted between publication of the Final Notice and the start of hearings. Another 14 percent arrived during hearings. For these same proceedings, the time between Initial and Final Notices averaged 10 months (ranging from a low of 2.5 months to a high of 24); the time from Final Notice to start of hearings averaged just under 3 months (ranging from a low of 2 to a high of 5.5). *See* ACUS PHASE I REPORT, *supra* note 31, at 89-90 app.

46. *See* 41 Fed. Reg. 10,232 (1976) (final notice of Protein Supplements Proceeding); 40 Fed. Reg. 41,144 (1975) (initial notice of Protein Supplements Proceeding). More recent rulemaking notices contain a brief mention of the compensation program, and the name and address of a contact person. *See* 43 Fed. Reg. 57,283 (1978) (Standards and Certification Proceeding); 43 Fed. Reg. 17,972 (1978) (Children's Advertising Proceeding).

47. 40 Fed. Reg. 33,969 (1975). The rule also stated that "[i]n connection with his determination the

Compensation Committee solicited input from staff attorneys, and the submission of staff recommendations became a routine part of the Committee process.[48] Staff recommendations regarding compensation requests tended to be somewhat more detailed and better informed than those issued by the Presiding Officers,[49] because staff attorneys had spent long time periods conducting rulemaking investigations. While in the field, staff attorneys became familiar with the positions and track records of the major interest groups involved, and with the evidence accumulated in the rulemaking record. By contrast, the Presiding Officer was appointed to the proceeding only after the Initial Notice of Rulemaking appeared in the *Federal Register*. During the prehearing period when most of the compensation requests arrived,[50] the Presiding Officer was preoccupied with other matters. Not only did he have to familiarize himself with the substantive issues in the proceedings, but he also had to manage the complex, unfamiliar hearing procedures required by the new statute.

The growing advocacy role of the agency staff, in proceedings analogous to adversary trials,[51] threatened to compromise the fairness and impartiality of the program. The staff was not short on incentives to abuse its Committee influence. Some of the rulemaking staffs were frustrated by resource limitations that had forced them to curtail their investigations. The compensation program had a substantial budget which could be used to generate additional evidence. Money was particularly tight for hiring contract consultants to generate technical evidence regarding the prevalence of certain commercial practices, the attitudes or behavior of consumers, or the economic effects of proposed rule provisions.[52] Many of the consumer groups that applied for compensation, however, proposed to present this kind of testimony. In addition, witness credibility could be enhanced if witnesses appeared as spokespersons for independent consumer groups rather than as "staff witnesses." Finally, the compensation fund could be used to build momentum behind the proposed rule by "stacking" the hearings with certain kinds of witnesses.[53]

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presiding officer may conduct such inquiry of the applicant or require the production of such documents as he deems necessary." *Id.*

48. A sample of 84 initial compensation application files relative to the early TRR proceedings conducted under the Magnuson-Moss Act indicates that in slightly more than one-half of the cases (43) the staff had expressed on the record its views of the merits of the compensation requests. In addition, staff opinions were expressed orally during a number of other situations. Interview with Arthur Angel, Staff Attorney, Funeral Practices Rule (June 1, 1977); Interview with William D. Dixon, Special Assistant for Rulemaking, BCP (Feb. 7, 1977). In one proceeding, the head of the operating division from which the rule had originated delegated his Committee seat to a staff attorney assigned to a rule for which numerous compensation applications were pending.

49. This is the general impression that emerges from a reading of the records relating to the program. A considerable variance in the length and complexity of the recommendations submitted by categories of agency personnel, however, should be noted. For example, some Presiding Officers made extremely conclusory, one-or-two sentence recommendations that simply urged grant or denial of funding; others made detailed findings on each of the criteria enumerated in the Rules of Practice, supported by careful analysis of policy considerations; and in a few instances, some attended compensation committee meetings to discuss policy questions raised by particular applicants. Confidential FTC Documents 22-26.

50. *See* note 45 *supra* and accompanying text (noting delays by agency).

51. *See generally* ACUS PHASE I REPORT, *supra* note 31.

52. Confidential FTC Document 5. In addition, the procedures for contracting out research were slow, cumbersome, and labor-intensive for staff. Confidential FTC Document 11.

53. Momentum for a rule might be increased if several consumer groups joined in support of it. Moreover, having a strong consumer spokesperson push for a stricter rule could make the staff proposal appear to represent a reasonable middle position.

Surprisingly, however, there was little evidence that staff dominated the compensation decisions. Statistically, the recommendations of the Presiding Officers were upheld more frequently than those of the staff.[54] Although the staff occasionally scored a telling point for or against a particular applicant, overall they exerted only slight influence over final funding decisions. Officials administering the program, aware of the gamesmanship opportunities in staff evaluations,[55] may have limited the staff's influence by discounting its recommendations. Moreover, the staff's ability and incentive to manipulate the program were more restricted than originally had been believed. In order to use the compensation program as a source of funds for friendly witnesses, the staff would have had to admit that its own investigation and advocacy were inadequate. In addition, consumer group intervention would have implied both loss of control over the case, and additional work at the end of the proceeding when the staff distilled the record into a final report and statement of basis and purpose.[56] Perhaps most importantly, the confused and rushed atmosphere in which the program initially functioned was not conducive to successful staff manipulation. Detailed funding criteria evolved rapidly within the Compensation Committee and the Bureau Director's office. This information, how-

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54. This conclusion is based on an examination of the files of 84 compensation decisions made prior to February, 1978. For purposes of this tabulation, only initial applications were counted, and requests for supplemental appropriations from successful applicants were ignored. In addition, partial or full grants or grant recommendations on a particular request were treated as a "grant," and only an absolute denial was recorded as a "denial."

Staff recommendations were present in 43 of the 84 cases; the FTC decision agreed with the staff recommendation in 31 of these cases, or 72% of the time. Presiding Officer recommendations were present in 76 cases; the FTC's decision agreed with those recommendations in 60 of these, or 79% of the time. In seven cases in which the FTC followed a staff or Presiding Officer recommendation, however, the rationale stated in the action letter differed significantly from the rationale of the recommendation. Detailed breakdowns of the correspondence between recommendations and decisions are as follows:

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

Staff, Presiding Officer, and FTC Decision Agree:	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 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 the determination of any agreement between recommendation and action.

55. Interview with Bonnie J. Naradzay, Special Assistant for Compensation, FTC (Oct. 19, 1976).

56. Here, as elsewhere, statements of general tendencies can mask significant variances among individuals and proceedings. Plainly, the staff's attitudes towards the compensation program and their relationships with advocacy group applicants varied a great deal. A significant portion of the staff, however, seemed convinced that the costs of public interest participation both to themselves and the agency (including the costs of a longer proceeding and a more complex record) exceeded any likely benefits in support for, or in improvement of, the rule.

ever, was not systematically communicated to the staff or the Presiding Officers. Thus, their analyses and recommendations often failed to address the points that most concerned the program administrators.

The staff could influence the compensation program more fundamentally by shaping the array of applicants from which the agency could choose. Because the FTC initially did not publicize the program,[57] staff contacts were the sole means for many potential applicants to learn about the program. By encouraging some groups to apply and discouraging others, staff could control the pool of applicants for a particular proceeding. Moreover, staff attorneys could use their knowledge of the issues raised and evidence presented in a proceeding to persuade applicants that they should take a particular position, or present certain kinds of evidence.[58] Successful applicants described frequent informal contacts with staff about their participation in the proceeding, and occasional direct and active recruitment of certain persons or groups to apply for funding.[59] Thus, the influence exerted by staff attorneys through such informal applicant contacts, although not determinable, was by every indication significant.

Once FTC officials gained more experience and received more resources for administering the program, they took measures to minimize the opportunities for staff influence. Detailed funding criteria established in 1977 reduced applicants' dependence on the staff for information on the program's operation, and decisionmakers' reliance on the staff and the Presiding Officers for information on the applicants. The addition of a survey research expert to the Compensation Committee enabled program administrators to evaluate funding proposals more independently. Administrators began an affirmative "outreach" effort to

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57. *See* note 46 *supra* and accompanying text (comparing former practice by agency not to publicize program with brief mention now provided).

58. Although frequently misinformed on these matters, the staff had some sense of both the criteria applied by the Committee, and the amounts of funding that could be awarded.

Several practical barriers prevented applicant groups from independently seeking this information. The legal theories underlying the proposed rules were frequently vague; the explanations published in the *Federal Register* with the Initial Notices often did not elucidate the theory behind the rule; the prehearing rulemaking records, containing primarily investigative materials and public comments, were huge and disorganized; and the records were in Washington, while many applicants were located in other parts of the country. *See generally* ACUS PHASE I REPORT, *supra* note 31, § II (describing prehearing record and its functions).

59. The following points are a fairly representative sampling of statements made in interviews with successful applicants that reported contacts with staff:

(a) Staff solicited group to testify or to apply for compensation. Interview with Lonnie Von Renner, Counsel for the Americans for Democratic Action and/or the National Council of Senior Citizens, 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).

(b) Staff provided information about criteria applied in compensation program. Interview with Rebecca Cohen, Continental Association of Funeral and Memorial Societies, Funeral Practices Proceeding (Oct. 26, 1976); Interview with Glen Nishimura & Timothy Holcolm, Arkansas Consumer Research, Funeral Practices Proceeding (March 9, 1977).

(c) Staff assisted applicant to develop participation strategy. Interview with Lonnie Von Renner, Counsel for the Americans for Democratic Action and/or the National Council of Senior Citizens, 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).

notify groups and individuals affected by a proposed rule, to encourage them to participate in the proceeding and, if necessary, to apply for compensation.

In addition, contacts between staff and applicants were minimized. Guidelines published in 1977 advised applicants to direct any inquiries to other parts of the agency.[60] The FTC designed internal procedures to prevent staff attorneys from contacting applicants for additional information and from negotiating with applicants that had filed funding requests.[61] Interviews with compensation applicants conducted after this new policy became effective indicated that the agency's efforts generally were successful.[62] Questions relating to procedures used in granting compensation were directed to the Special Assistant who administered the program, rather than to the staff.[63] Contact between applicants and staff continued for the purposes permitted by the Guidelines: to establish the types of material already in the record and the kinds of testimony the staff expected to be introduced at the hearings.[64]

The evolution of the FTC's decisionmaking procedures suggests that formal procedures or structural independence for program administrators may not be an effective way to ensure impartiality in the administration of a direct-funding program. Adequate resources were the most essential element to the exercise of independent judgment by the FTC administrators. The relocation of the program to an independent office or agency would not assure the availability of the necessary resources. In some respects, independence could reduce a program administrator's ability to control staff influence over compensation awards. Administrators working in the same office or agency as the staff are more sensitive to the personalities and incentives surrounding any given proceeding. As a result, these administrators can more easily regulate staff contacts and take account of staff bias or gamesmanship than could be done from a separate office. With support from the agency's leadership, FTC administrators obtained an internal directive requiring staff to limit contacts with appli-

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60. 42 Fed. Reg. 30,484 (1977) (Guidelines for Public Participation in Rulemaking Proceedings). In pertinent part, the guidelines stated:

> The staff will assist any prospective applicant only by describing information on the material to be introduced into the rulemaking record. Direct your questions to the Assistant Director for Rulemaking [i.e., the Chief Presiding Officer] 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.

Id.

61. *See* Revision of FTC Operating Manual, ch. 7, § 3.14 (1978) (available in FTC record room) (only assistance staff may provide applicants is to describe information expected to be introduced in record).

62. *See* notes 86-164 *infra* and accompanying text (describing criteria Guidelines established and applicants' reactions thereto).

63. Interview with Gerald Thain, Center for Public Representation, Used Cars, Thermal Insulation, and Children's Advertising Proceedings (Apr. 5, 1979); 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).

64. Interview with Edward Kramer, The Housing Advocates, Mobile Homes Proceeding (March 27, 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); Interview with Bruce Terris (March 8, 1979).

cants, and also accounted for possible staff bias in effectuating decisions. An independent agency administering a compensation program probably would find it more difficult to understand or to influence the norms and practices of a separate agency conducting the proceeding where compensation was sought.

C. INTERPRETING THE STATUTE

Translating the compensation program's legislative authorization into operational standards proved to be a more complex task than either establishing an organizational base for the program or developing procedures to process individual funding applications. The statutory language was broad, and rather opaque. In its entirety, the major substantive section of the compensation provision stated:

> 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 proceeding, and (ii) representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole, and (B) who is unable effectively to participate in such proceeding because such person cannot afford to pay costs of making oral presentations, conducting cross-examination and making rebuttal submissions in such proceedings.[65]

This section of the bill, which was added by the conference committee, is simply paraphrased rather than explained by the relevant portion of the conference report.[66] Second-hand reports of the drafters' intent, however, indicate that the "financing proviso emanated from the . . . conferees' belief that, since the new statute substantially formalized the FTC's rulemaking procedures, compensation for intervenors would better enable them to participate effectively in the newly structured hearings."[67]

Each of the three major factors mentioned in the statute—the interest of the applicant, the adequacy of representation, and the financial inability of the applicant—created a series of puzzles for the FTC to solve. In determining whether the applicant "represents an interest . . . [the] representation of which is necessary for a fair determination of the rulemaking proceeding taken as a whole," the program administrators were compelled to define interests in a

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65. 15 U.S.C. § 57a(h)(1) (1976).

66. *See* H.R. REP. No. 1606, 93d Cong., 2d Sess. 1, 36, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7702, 7768 ("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 . . . .") (emphasis added). Five years later, during the 1979 oversight hearings, a slightly different formulation of the congressional purpose was provided: "Congress established public participation funding program *to enhance the quality of Commission decisions* by aiding representation of small businesses and public interest groups which would not otherwise have an opportunity to participate." S. REP. No. 184, 96th Cong., 1st Sess. 3, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 1073, 1075 (emphasis added).

67. 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 of May 8, 1975 with staff of the Senate Commerce Committee).

broad policy rulemaking proceeding, and to determine when it would be "fair" to exclude a potential participant. The statute's emphasis on an interest's adequate representation implied a series of judgments regarding the technical skills and participatory activities necessary for effective representation in a complex "hybrid" rulemaking procedure.[68] Having made those determinations, the administrators would have to distinguish between financially needy applicants and those who were simply unwilling to spend their own money on the rulemaking proceeding. This question would have to be answered in many different factual settings, because most of the applicants were ongoing organizations with at least limited funds available to support their operations.

In determining how to apply the statutory language, the agency faced an immediate tension between the "fairness" and "adequacy of representation" criteria. Emphasis on the representation of interests essential to a fair determination of the proceeding suggests that the agency should focus on the applicant's constituency and its stake in the rulemaking. Thus, the statutory phrase might imply that the proceeding should be viewed as a democratic process in which the clash of interests among disparate constituency groups produces an acceptable compromise outcome. By contrast, the adequacy of representation test could be construed as a direction to fund competent technocrats: lawyers, social scientists, and other experts who would present evidence, analysis, and argument addressed to the economic effects of the proposed rule, and to whether particular trade practices were prevalent and harmful to consumers.[69]

The FTC never completely resolved the tension between the technocratic and democratic elements of the compensation program. As the program evolved, administrators seemed to stress technical factors relating to applicant competence. This emphasis coincided with the general character of many TRR hearings conducted between 1975 and 1979.[70] Moreover, the technical

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68. FTC rulemaking proceedings had a mixed or "hybrid" character with respect to the procedures the agency used and the nature of the underlying decision. The Magnuson-Moss procedures were hybrid in that they provided more elaborate rights for interested persons to participate than the simple notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. § 553 (1976). The FTC, however, was not obliged to use the formal trial-type hearing associated with formal rulemaking. *See generally* Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345; Williams, *"Hybrid Rulemaking" under the Administrative Procedure Act: A Legal and Empirical Analysis*, 42 U. CHI. L. REV. 401 (1975).

69. An Assistant Director of the Bureau of Consumer Protection expressed the following view:

> [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.
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> In administrating [sic] the compensation program, we have tried to recognize both these dimensions.

Letter from James V. DeLong, Assistant Director, BCP to David Rogoff 1-2 (Apr. 22, 1977). *See also Public Participation in Agency Proceedings: Hearings on H.R. 3361 and Related Bills Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 517-18 (1977) (statement of Margery Waxman Smith, Acting Director, BCP).

70. As stated by one agency official, a TRR hearing could be viewed both as "a technical inquiry into what is going on in a particular industry," and as a forum for "participatory democracy." Letter

tests were much easier to apply than the nebulous "interest" or "constituency" criteria. In the end, however, the agency incurred sharp criticism during the legislative oversight process for failing to achieve a proper balance of interests in its compensation decisions: too many Washington-based organizations, too many "repeat players" appearing in multiple proceedings, and too few small businesses had received support.[71] The agency might well have provoked equally strong criticism, however, had it emphasized "grassroots" participation and distributed funds to participants less technically competent to address issues raised in the proceedings. These two conflicting views of the program's purpose forced the agency to travel a narrow and treacherous path.

Two distinct phases marked the Commission's effort to develop feasible standards for awarding compensation.[72] The first phase lasted approximately three years and relied on nebulous standards and broad agency discretion. Indeed, the FTC's initial rules of practice simply tracked the statutory language.[73] During this period, many funding applicants were confused about the standards used to rule upon their requests, and there was no other written source of guidance for applicants.[74] In some instances, applicants felt that they

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from James V. DeLong, Assistant Director, BCP to David Rogoff, CalPIRG, Used Car Proceeding 1-2 (Apr. 22, 1977).

71. "These restrictions [imposed by the amendments to the compensation provision] will insure that a small number of groups do not receive an inordinate share of the available funds, and that the funds are provided to a broader cross section of the eligible small business and public interest applicants." S. REP. No. 500, 96th Cong., 1st Sess. 22, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 1102, 1123. *See also* S. REP. No. 184, 96th Cong., 1st Sess. 4, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 1073, 1076 ("One criticism of the public participation program was its inability to attract large numbers of applicants for funding, so, the early stages of this program are marked by many repeat applicants and fewer small business applicants"); *id.* at 17, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS at 1087 (additional views of Sen. Danforth) ("[W]hile there may be public interest groups in many parts of the country and in many communities, the FTC gave . . . 55.5 percent of all the money made available to the groups in San Francisco and Washington, D.C.").

72. Unless otherwise indicated, this article refers only to the period of time this study covers, from enactment of the Magnuson-Moss provisions in 1975 to January, 1979.

73. Draft rules of practice for the compensation program and for trade regulation rulemaking proceedings in general were published for public comment on April 4, 1975. 40 Fed. Reg. 15,238 (1975). Approximately 30 comments were submitted in response to this notice. Only two of these comments, however, discussed the compensation program at any length. Former FTC Commissioner Mary Gardiner Jones, at the time Professor of Law at the University of Illinois, submitted one of these comments. A consortium of public interest groups headed by Paul Gewirtz, an attorney for the Center for Law and Social Policy, joined by Charles Halpern and Neil Levy of the Council for Public Interest Representation, prepared the other comment. FTC Docket No. 222-3-1 (summary of correspondence and comments in response to proposed regulation). These comments did not affect the final rule, which varied only stylistically from the version originally published for comment. *See* 40 Fed. Reg. 33,966 (1975) (final version of rule). The only significant elaboration of statutory language related 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," 16 C.F.R. § 1.17(c)(4)(iii) (1981), and "the feasibility of contributions to the costs of participation by individual representatives of the interest." *Id.* § 1.17(c)(4)(ii). These requirements evidently were intended to prevent a wealthy interest group from recruiting or creating an indigent "front" organization to apply for compensation.

74. Interview with Jack Hale, Connecticut Citizen Research Group (March 18, 1977) (using draft compensation guidelines, but FTC staff advised ignoring guideline formula for cost computation); Interview with Glen Nishimura & Timothy Holcomb, Arkansas Consumer Research (March 9, 1977) (better definitions required of acceptable compensation proposal and of allowable rate of compensation); Interview with William A. Dickert, United Consumers of the Alleghenies (March 9, 1977) (application for compensation denied without explanation); Interview with David Swankin, Counsel to National Consumers Congress (Feb. 11, 1977) (letter rulings on compensation requests not informative); Interview with Mark Silbergeld, Consumers Union (Feb. 7, 1977) (some aspects of criteria require clarification); Interview with John Pound, San Francisco Consumer Action (Nov. 10, 1976) (FTC un-

actually had been misled. Several incidents occurred during the early phases of program implementation in which staff attorneys had encouraged persons or groups to apply for funding—if not assured them that their requests would be granted—only for program administrators later to turn down the applications.[75]

This delay in developing standards was probably a result of the FTC's early reliance on part-time administrators. A sustained effort to clarify standards for granting compensation was not begun until one staff person was assigned to

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clear on criteria); Interview with Rebecca Cohen, Continental Association of Funeral and Memorial Societies (Oct. 26, 1976) (criteria lacked specificity); Interview with Ken Schorr, ACORN (undated, summer 1976); Letter from Anthony DiRocco, Executive Secretary, National Hearing Aid Society to Jamie Bennett 3 (Aug. 22, 1977).

75. Two incidents arose in the 1976 hearings on the Funeral Practices rule. Michael Hirsh, a television producer who had worked on a documentary program critical of the funeral industry, applied for compensation to become a consumer group representative at the Chicago hearing. As such a representative, he would have been eligible to cross-examine witnesses. After some time, the Presiding Officer informally advised Hirsh that his application had been denied because Hirsh was not an attorney and therefore presumably was unqualified to conduct cross-examinations. At Hirsh's request, the Presiding Officer put this explanation in writing, and added that the application also had been rejected because Hirsh was unaffiliated with a consumer group. Interview with Michael Hirsh, Executive Producer, WTTW Channel 11, Chicago (May 11, 1976). Hirsh sought assistance from the American Civil Liberties Union, which requested reconsideration of Hirsh's application on the grounds that neither the statute nor the rules of practice required that compensated consumer representatives 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, BCP (April 9, 1976). Three weeks later, the FTC's Acting Bureau Director formally denied Hirsh's request, primarily on the ground that his application lacked sufficient information regarding his projected expenses and the substance of his proposed participation. The applicant's lack of affiliation with a consumer group was not mentioned. Letter from Joan Z. Bernstein, Acting Director, BCP to Michael Hirsh (April 28, 1976). Bernstein 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.*

While the Hirsh application was pending, FTC staff attorneys actively solicited 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 (CFA) (Feb. 16, 1977). CFA applied for compensation and began preparation for the hearing in reliance on the staff's assurances that the application would be approved. A series of delays and problems developed, however, and CFA withdrew its application shortly before the start of the Chicago hearings. Contrary to FTC policy outlined in the Hirsh letter, the FTC staff then brought in as compensated consumer representative for the Chicago hearings another consumer group which had earlier been granted compensation for the Washington Funeral Practices hearings.

Not surprisingly, these two applicants criticized the FTC's administration of the compensation program. Hirsh believed, based on information from sources within the FTC, that his application had been denied because he had refused to follow the suggestions of staff attorneys who wanted him to testify in support of one part of the rule. Interview with Michael Hirsh, *supra.* Similarly, the CFA representative felt that the FTC had raised a series of minor objections to her participation because she had not cooperated sufficiently in supporting the rule. Interview with Kathleen O'Reilly, *supra.*

Two further incidents followed the general pattern of the CFA application. In both instances, FTC representatives from the Chicago Regional Office contacted individuals and urged them to apply for compensation. The applications were denied by the compensation program administrators in Washington, D.C. Interview with Sidney Margolis, Syndicated Columnist, Food Advertising Proceeding (March 22, 1977); Interview with John C. Hendrickson, Attorney, Vocational School Proceeding (March 17, 1977). One applicant criticized the FTC for "arbitrary decision-making." Interview with Sidney Margolis, *supra.* The other felt he was the victim of a "hoax" or a "political decision." Interview with John C. Hendrickson, *supra.* In part, Hendrickson's request for funding was denied because the program administrators doubted his ability to complete the work he proposed within the time he had estimated. Ironically, he had limited his request for compensation to 80 hours of attorney time, although he expected to invest additional uncompensated hours, because the FTC staff had advised him that this was the maximum the Commission would fund. *Id.*

administer the entire compensation program. Draft Guidelines for the program were prepared, circulated, revised, and finally published in June, 1977.[76] Publication of these Guidelines marked the second phase in the development of standards. The Guidelines generally communicated the FTC's thinking to prospective applicants,[77] and generated more informative applications in return. They also seemed to improve the consistency and quality of agency decisions. In some respects, however, the Guidelines highlighted rather than resolved basic conceptual problems implicit in the statute.

1. Interest in the Proceeding

The Magnuson-Moss Act's directive that compensation be granted to participants advocating "interests" that as a matter of fairness ought to be represented in the particular rulemaking forced the FTC to identify interests sufficiently affected by a proposed rule to warrant funding. Although the concept of "interest" has analogs in the law of standing to seek judicial review[78] and in the rules governing intervention in both judicial proceedings[79] and administrative adjudications,[80] use of an interest test in administrative rulemaking raised novel issues. Rulemaking procedures typically are designed to avoid the definition-of-interest question, at least during the early stages. 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,

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76. 42 Fed. Reg. 30,480 (1977). The Preamble to the final guidelines reflects the Commission's concern about publishing guidelines for public participation without providing a period for public comment. It 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 received from consumer groups, industry, Congressional committees and members of the public." *Id.*

77. In contrast to the confusion and uncertainty reported by applicants who had sought funding prior to the issuance of the Guidelines, *see* note 74 *supra,* later applicants generally found the standards clear and comprehensible. Interview with Gerald Thain, Center for Public Representation (April 2, 1979); Interview with Edward Kramer, The Housing Advocates (March 27, 1979); Interview with Katherine Meyer, Center for Auto Safety (March 20, 1979); Interview with Archie Richardson, Automobile Owners' Action Council (March 19, 1979); Interview with Bruce Terris (March 12, 1979). The one sharp criticism of the 1977 Guidelines contended that they were flawed and were designed for lawyers rather than laymen. Interview with Robert Choate, Council on Children, Media and Merchandising (March 23, 1979).

78. *See* United States v. Students Challenging Regulatory Agency Procedures, 412 U.S. 669, 685 (1973) (students' pleadings showed sufficiently that they were "adversely affected" or "aggrieved" within meaning of § 10 of Administrative Procedure Act); Sierra Club v. Morton, 405 U.S. 727, 739 (1972) (person has standing to seek judicial review under Administrative Procedure Act only if he suffered or will suffer injury).

79. In the federal courts, anyone may intervene as of right in a civil action:

> [w]hen 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.

FED. R. CIV. P. 24(a)(2). *See generally* 3B MOORE'S FEDERAL PRACTICE ¶¶ 24.08[2]-[6] (2d ed. 1980) (discussing right to intervene and adequacy of representation).

80. *Cf.* Gellhorn, *supra* note 6, at 379:

> As Professor Shapiro accurately observed [in *Some Thoughts on Intervention Before Courts, Agencies and Arbitrators*, 81 HARV. L. REV. 721, 729 (1968)] "[at] 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.

views, or arguments. Participants are free from any threshold requirement to demonstrate either a legally defined right or a particular stake in the outcome.

More significant than the procedural distinctions between rulemaking and adjudication is a fundamental difference between the type of decisions made in each setting. When an individual intervenes in a court proceeding, it is a relatively simple matter to identify the interests at stake. Substantive legal standards single out persons or organizations with a colorable claim of right; the subject-matter of the dispute is normally defined and reduced to a common medium of exchange;[81] and the outcome of the proceeding will allocate clearly the economic goods, authoritatively defining rights and liabilities, "winners" and "losers." In a sense, the proceeding is designed to refine, to elaborate, and to choose among interests already clearly delineated by the applicable rules of law. Administrative rulemaking, by contrast, generally addresses the antecedent problem of articulating general standards and values and creating interests that later are joined in particular disputes. Compared with an adjudication, this latter type of proceeding affects a wider range of persons, groups, and institutions, in a greater variety of ways.

When the FTC published its Guidelines, the agency recognized the difficulties inherent in defining the interests at stake at the outset of TRR proceedings:

> 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 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 common 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.[82]

In addition to these problems of defining economic stakes, the agency might also encounter claims that noneconomic interests should be represented.[83]

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81. In an action for money damages, the medium of exchange is the dollar value; similarly, a dispute over title to a particular piece of property involves narrow issues including precise allocations of the right to possess and control the property in question.

82. 42 Fed. Reg. 30,482 (1977).

83. For example, a coalition of environmental groups requested and received funding to participate in a proceeding regarding disclosure requirements in the marketing of home insulation materials. The groups believed that the rule would promote environmental values by encouraging consumers to insulate property and thus reduce both the demand for nonrenewable fuels and the pressure to extract fossil

Faced with these conceptual difficulties, the FTC shifted the burden onto the applicants to define their interests,[84] which typically were described as some variant of "the consumer interest."[85] The agency also relied more heavily on the adequacy of representation criterion, for which some relatively detailed standards existed. Thus, during the period studied, the definition of interest only rarely was of major significance to compensation decisions. Two other questions, however, did arise in the application of the interest test.

Narrow-focus versus broad-focus groups. By early 1976, the Compensation Committee clearly preferred to fund groups with a narrow or specialized focus, as opposed to general-purpose consumer advocate groups. The FTC's initial rationale for this preference was the belief that constituents of a group with a particular, well-defined interest would monitor the group's activities and thus provide the group with a strong, internal incentive to deliver high quality advocacy.[86] The 1977 Guidelines confirmed this preference for specialized groups, but relied on a kind of "conflict of interest" rationale.[87] The Guidelines suggested that specialization is preferred because the consumer interest consists of diverse, conflicting strands that one representative cannot effectively or consistently advance.[88]

A possible reason for this change in rationale was the sharp criticism of the FTC's earlier theory by consumer groups that had received early drafts of the Guidelines. Consumers Union, a broad-focus group certain to 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

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fuels from unspoiled natural areas. Application of Sierra Club, Friends of the Earth, Natural Resources Defense Council, and Environmental Defense Fund, Thermal Insulation (R-Value) Proceeding 2-3 (Jan. 16, 1978). Although it did not involve a compensation decision, the Funeral Rule's proposed ban on the embalming of corpses without permission of next-of-kin was another TRR that affected a noneconomic interest. This proposal drew support from religious groups opposed to embalming as an article of faith. *See* BUREAU OF CONSUMER PROTECTION, FEDERAL TRADE COMMISSION, FINAL STAFF REPORT ON FUNERAL INDUSTRY PRACTICES RULE 187 & n.1 (June 1978) (for example, Orthodox Judaism forbids embalming).

84. *See* 16 C.F.R. § 1.17(c)(1) (1978) (compensation application should contain "description of the interest the applicant has or represents in the rulemaking proceeding"); 42 Fed. Reg. 30,482 (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").

85. The FTC's 1977 Guidelines for public participation observe: "To date, most applicants have claimed to represent the interests of consumers or large subgroups of consumers." 42 Fed. Reg. 30,482 (1977).

86. Interview with James V. DeLong, Assistant Director, BCP (March 9, 1976); Confidential FTC Document 6.

87. *See* 42 Fed. Reg. 30,482 (1977) (disputes over issues involve complicated relationships of common interest between different types of consumer interests; in future, preference granted to applicants who define their interest with greater specificity).

88. The Guidelines note that:

> [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.

Id.

> 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 Bureau has already provided in the guidelines . . . for consideration of these two criteria . . . .[89]

These points seem cogent. To the extent that preference for narrow-focus groups seeks to ensure a particular content or quality of presentation, other criteria can achieve this end more efficiently. The narrow-focus preference also may be counterintuitive and difficult for participants to understand. Well after the FTC established the preference, instances arose in which compensation applicants argued for funding[90] and Presiding Officers designated applicants as consumer representatives,[91] or recommended that they be granted compensation,[92] precisely *because* they were broad-focus groups speaking to a wide spectrum of consumer experience.

On the other hand, the preference for narrow-focus groups could have both theoretical and practical value to the FTC's administration of the compensation program. If a major purpose of the compensation fund is to enrich the rulemaking record by encouraging advocacy of diverse and conflicting viewpoints, then a standard that encourages the funding of specialized groups holding disparate positions seems logical.[93] On a more pragmatic level, the preference would serve to disburse funds more widely among many consumer groups, rather than permitting concentration among large, multi-purpose national groups.[94] Favoring the funding applications of narrow-focus groups also could minimize the controversy that occasionally arose regarding the legitimacy or authority of compensated consumer groups to represent "the consumer interest." Participants and procedures tended to cast consumer groups

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89. Letter from Mark Silbergeld, Attorney, Washington Office, Consumers Union to Bonnie Naradzay, Special Assistant for Compensation, BCP 4 (Nov. 15, 1976).

90. In seeking funding, the Consumer Federation of America (CFA) reasoned: "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." Application for Compensation of the Consumer Federation of America, Thermal Insulation Proceeding 5 (Dec. 23, 1977).

91. In the Thermal Insulation proceeding, the Presiding Officer noted:

> The California groups, that is, the California Public Interest Research Groups 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.

Presiding Officer's Notice of Selection of Consumer Interest Group Representative, Thermal Insulation Proceeding 2 (Jan. 19, 1978).

92. Confidential FTC Document 7.

93. It would not, however, assist in choosing among various groups. At the logical extreme, this approach would argue for funding as many groups as possible, as long as they held distinguishable positions with respect to the proposed rule.

94. An organization like the Continental Association of Funeral and Memorial Societies, which exists solely to facilitate low-cost, prearranged funerals, would be unlikely to apply for funds in any proceeding other than the Funeral Practices rulemaking.

in this role—one that some uncompensated interests both challenged and resented.[95] 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 a spokesperson for all consumers.

Overall, the FTC's reliance on the narrow-focus test was not a marked success. Because few specialized groups applied for funding, the test did not prevent large, multipurpose groups from dominating the program.[96] Moreover, the agency was subjected to congressional criticism for favoring narrow, "unrepresentative" groups.[97] On this charge, the Commission was entangled not only by the tension between the technocratic and democratic elements inherent in the compensation program, but also by the problem of determining how a private group gains authority and legitimacy to represent a constituency in an administrative proceeding. The latter issue surfaced again in the agency's development of a second standard by which to define "interest."

Groups versus individuals. Program administrators created a strong presumption that organizations represented the interests of their members and constituents, whereas individual applicants represented only their own interests. Neither the Rules of Practice nor the 1977 Guidelines established such a preference,[98] but the distinction was clearly maintained in practice.[99]

Although the eligibility of individual applicants never became a major practical problem for the FTC, the group preference and related issues raised questions about the basic purposes of a direct funding program. Through the group preference, the FTC's compensation committee evidently tried to steer a middle course between extremes that seemed beyond the scope of the program. The first of these extremes might be called "the pure entrepreneurial expert"—the grant-seeker who viewed the FTC compensation fund as simply another

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95. *See* Interview with Gary J. Kushner, Staff Counsel, Scientific Affairs, Grocery Manufacturers of America, Inc. (Dec. 11, 1976); Interview with Howard Eglit, attorney for the National Council of Senior Citizens, Chicago Hearing Aids Proceedings (July 5, 1976). One compensated consumer participant in the Food Advertising Proceeding, appearing on behalf of the Indiana Home Economics Association, expressed some surprise at being "lumped together" with consumer advocate groups at the hearings, because home economists were hardly typical consumers. Interview with Mary Ruth Snyder, Indiana Home Economics Ass'n (March 18, 1977).

96. *See* text accompanying notes 272-83 *infra* (describing "repeat player" phenomenon).

97. Senator Danforth asserted: "It would seem logical that groups that claim to represent the 'public interest' should have broad as compared with narrow memberships." S. REP. No. 184, 96th Cong., 1st Sess. 16, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 1073, 1087 (additional views of Sen. Danforth).

98. *See generally* notes 161-64 *infra* and accompanying text. The Guidelines only refer to constituency support as a factor bearing on the adequacy of representation. 42 Fed. Reg. 30,482 (1977).

99. Of the 16 individuals who applied for compensation in their own names during the period covered by this study, only three received any compensation and two of these received less than $300 each.

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

target for proposal-writing.[100] The other extreme is manipulation by agency staff. Rulemaking staffs might try to funnel their witnesses through the compensation program for the purposes of obtaining more support money or bolstering the credibility of staff witnesses.[101]

Requiring that the applicant be an established, independent organization with a defined mission was undoubtedly valuable in avoiding either entrepreneur or staff dominance of the compensation program. The organizational preference, however, was an imperfect means to accomplish this end. First, the distinction between individuals and organizations was not necessarily meaningful; an individual with a cause and modest resources can establish an organization to advocate his viewpoint.[102] The Council on Children, Media

Proceeding	Applicants	Action
Care Labeling	Seymore Goldwasser	Denied
Food Advertising	Wendy Gardner	Granted
Food Advertising	Mary Ruth Nelson	Granted
Food Advertising	Kurt Oster, M.D.	Denied
Food Advertising	Sidney Margolis	Denied
Funeral Practices	Michael Hirsh	Denied
Holder in Due Course	Prof. Richard Kay	Denied
Holder in Due Course	Prof. Richard 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

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 in the Children's Advertising proceeding which were pending when data collection for this study ended in 1979. Additional information about these applications is available in the tabular summaries of Appendix A.

Most of these individual applications were filed in the first wave of postamendment TRR proceedings that went into hearings in 1975 or 1976. Later, as the correct interpretation filtered down to the operational levels of the agency, individuals presumably were advised not to seek reimbursement through the compensation program, but rather to apply for funding from allocations that the BCP maintained to support staff witnesses. Confidential FTC Document 8.

100. A good example of this entrepreneurial effort is the application filed by several university faculty members in the Food Advertising Proceeding. *See* Proposal to Federal Trade Commission from R. Garth Hansen, Bonita Wise & Ann M. Sorenson, Utah State University (June 21, 1976). 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 that the proposed rule's nutrition advertising provisions would cover. The application reads much like the narrative portion of a conventional research grant proposal, with no reference to any interest the researchers might represent, or to the need for representation. Although the proposal evidently was of high quality and relevant to the issues in the proceeding, the compensation committee concluded that the researchers did not represent any interest, and thus they were not funded. Confidential FTC Documents 9 & 10. As Appendix A indicates, no "action letter" on this application could be located in FTC files. Commission records of disbursements under the program, however, clearly indicate that this application was not funded.

101. *See* notes 51-54 *supra* and accompanying text (discussing potential for FTC staff conflicts of interest).

102. A Ford Foundation study described one of the compensated participants in an FTC rulemaking in those terms. *Preface* to PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS at viii (Weisbrod, Handler & Komesar eds., paper ed. 1978) [hereinafter PUBLIC INTEREST LAW].

and Merchandising (CCMM), which received substantial sums to participate in the Food Advertising, OTC Drugs, OTC Antacids, and Children's Advertising Proceedings, is an example. CCMM was characterized as the virtual "alter ego of its founder and principal member, Robert Choate," who was 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?' "[103] The Council's application in the Food Advertising Proceeding indicates that its "organizational base" consisted of thirteen persons in addition to Mr. Choate.[104]

A related issue arose when very small organizations received large grants for extensive participation in major rulemaking proceedings. Often, the organization subcontracted most of its participation functions to persons or organizations that were ineligible for funding, such as law firms, survey research companies, or individual experts-for-hire. One such example was the Consumer Affairs Committee of the Greater Washington Chapter, Americans for Democratic Action (ADA-CAC). Prior to becoming involved in trade regulation rulemaking, ADA-CAC operated on an annual budget of approximately $2,000.[105] During the three-year period from 1976 to 1979, the group received compensation to participate in six different rulemaking proceedings, with authorizations totalling approximately $200,000.[106]

With such funding available, an organization risked becoming little more than a conduit for the money it received, rather than an active participant that shaped and controlled its contribution to the decisionmaking process.[107] As in other areas, the FTC needed to reach an equilibrium between assisting a participant to obtain competent technical representation, and assuring that a

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103. Thain & Snow, *Non-Law Public Interest Advocacy: Advertising on Children's Television*, in PUBLIC INTEREST LAW, *supra* note 102, at 473, 477 & 498.

104. Letter from Robert B. Choate, Council on Children, Media, and Merchandising to J. Thomas Rosch, Director, BCP (April 24, 1975) ("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.

105. Application for Compensation of the Consumer Affairs Committee, Greater Washington Chapter, Americans for Democratic Action, Ophthalmic Goods Proceeding 3 (May 27, 1976).

106. *See* Appendix A (itemizing recipients of funding).

107. The ADA, for example, eventually applied for and received funding for some of its members to work with outside counsel in formulating the group's position on a proposed rule. This request arose in the joint application of ADA-CAC and the National Council of Senior Citizens for compensation in the OTC Antacids TRR Proceeding. Letter from Ann Brown, Consumer Affairs Committee, Americans for Democratic Action, and David Marlin, National Council of Senior Citizens to Bonnie Naradzay, Special Assistant for Compensation 6 (Nov. 18, 1977) (requesting supplemental funding for Brown and Marlin to meet with attorneys from outside law firm representing them in proceeding "to determine the positions which we will take on the various issues presented in this proceeding"). This 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 conditionally approved this supplemental request:

> 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 from Richard C. Foster, Deputy Director, BCP to Ann Brown, Consumer Affairs Committee, Americans for Democratic Action, and David Marlin, National Council for Senior Citizens 2 (Feb. 10, 1978).

spokesperson legitimately represented a meaningful constituency. Seeking this balance raised both practical and theoretical questions as to the meaning of "representation" in a policy rulemaking proceeding.

2. Necessity and Adequacy of Representation

Need for representation. For an applicant to be funded, the statute required that it possess or speak for an interest, and that "representation of [the interest be] necessary for a fair determination of the rulemaking proceeding taken as a whole."[108] Early in the program's administration, both the applicants[109] and the agency[110] occasionally ignored this statutory requirement, or provided only a cursory analysis of need.[111] Applicants more frequently argued that their opposing interests, "the other side," were well-funded and vigorously represented.[112] At times this approach led to rather abstract "generic balance" arguments wholly divorced from the array of interests in the particular proceeding.[113] Other applicants, however, emphasized the aggregate dollar

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108. 15 U.S.C. § 57a(h)(1)(1976); *see* notes 65-69 *supra* and accompanying text (discussing difficulty in determining interest to be represented). The initial Rules of Practice simply tracked the statutory language, thereby requiring that applicants demonstrate the need for representation of their interests in the first instance. 16 C.F.R. § 1.17(c)(2) (1978).

109. *See generally* Application for Compensation of the New York Public Interest Research Group (NYPIRG), Funeral Practices Proceeding (Feb. 22, 1976).

110. Appendix A indicates that NYPIRG received a substantial grant of compensation to serve as a group representative and to present testimony in the Funeral Practices rulemaking. As far as the documentary record indicates, the need for representation was never questioned.

111. For example, the relevant portion of one application for funding, in its entirety, reads as follows:

> 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.

Application for Compensation of the Golden State Mobilhome Owners League, Inc., Mobile Homes Proceeding (Oct. 20, 1976). This applicant received compensation. *See generally* Appendix A.

112. One applicant argued that:

> 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.

Application for Compensation of the Center of Auto Safety, Mobile Homes Proceeding 6 (Oct. 24, 1975); *see, e.g.*, Application for Compensation of the Association of Physical Fitness Centers, Health Spas Proceeding 5 (May 31, 1977) (at least one of several participating consumer groups is funded by FTC and will condemn entire industry); Application for Compensation of the National Hearing Aid Society, Hearing Aids Proceeding 2-3 (April 12, 1976) (small business person with annual income of $15,000 cannot compete effectively against forces of federal government in protracted proceeding); Application for Compensation of the Americans for Democratic Action & National Council of Senior Citizens, Funeral Practices Proceeding 5 (Feb. 23, 1976) ("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").

113. For example, one application read as follows:

> 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.
>
> . . . .

stake of the interests they represented,[114] the relevance of the information they sought to present,[115] or the expertise they offered.[116] Few participants attempted to demonstrate need for representation based on the record in the particular proceeding,[117] or on the contents of compensation requests filed by other applicants.[118] Given the difficulty of obtaining access to these materials,[119] this omission is not surprising. There is no clear evidence that any final compensation decisions turned on the adequacy of the applicant's claim of need for representation.

The 1977 Guidelines continued to hedge on the question of what factors adequately demonstrated need for representation, noting that "it is difficult to define precisely when representation of an interest is 'necessary for a fair determination of the rulemaking proceeding taken as a whole.' "[120] The Guidelines did establish some boundaries, however, by sketching two situations in which the FTC believed the test could be applied easily: "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."[121] Both situations deserve brief comment.

In the abstract, it is difficult to quibble with the proposition that an interest needs representation when a proposed government action will affect it in some concrete, substantial way. The difficulty here, however, as with the standing doctrine, is making the threshold determination without becoming entangled in the merits of the controversy. Under the Magnuson-Moss Act, the economic impact of a proposed rule, particularly on the interests of small business and

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> 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.

Application for Compensation of the Automobile Owners Action Council, Used Cars Proceeding 11 (undated, date-stamped May 18, 1976 by the FTC).

114. *See* Applications for Compensation of the National Consumer Law Center, Holder in Due Course Proceeding 2-3 (March 9, 1976) and Credit Practices Proceeding 2-3 (Feb. 26, 1976).

115. *See* Application for Compensation of the Association of Physical Fitness Centers, Health Spas Proceeding 4 (May 31, 1977); Application for Compensation of the National Consumers Congress, Food Advertising Proceeding 2 (May 11, 1976); Application for Compensation of the Consumers Union, Funeral Practices Proceeding 3 (Oct. 28, 1975).

116. Application for Compensation of the National Consumer Law Center, Credit Practices Proceeding 3 (Feb. 26, 1976); Application for Compensation of the Consumers Union, Funeral Practices Proceeding 3 (Oct. 28, 1975).

117. Application for Compensation of the California Citizen Action Group, Health Spas Proceeding 5-6 (Oct. 25, 1976). The California group presented its rationale in these terms:

> 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.

Id.

118. *See* Amended Application for Compensation of the Americans for Democratic Action, Health Spas Proceeding 5-6 (April 13, 1977) (no other consumer group proposes to find expert witnesses to testify upon economic effects of proposed regulation).

119. *See generally* ACUS PHASE I REPORT, *supra* note 31, § III (section relating to rulemaking record in TRR proceedings).

120. 42 Fed. Reg. 30,482 (1977).

121. *Id.*

consumers, was one of the ultimate issues to be decided in a TRR proceeding.[122] In the proceedings studied, this question had not been addressed systematically on the record prior to the commencement of public hearings. Instead, the FTC often published multiple versions of a proposed rule, or multiple rule provisions, and there was considerable uncertainty as to their ultimate economic effects on industry or consumers.[123] In this setting, prehearing determinations of economic effect could be only rough guesses. Thus, program administrators would have very little basis upon which to reject any applicant's superficially plausible claim of economic threat to its interests. The situation might have differed if the statute had required the FTC to have a tight theory supporting each proposed rule provision, and to assess carefully the available evidence at the beginning of the proceeding.[124] During the period this study covered, however, the "significant effect" test was a perfunctory requirement. It probably would have had little utility in any policy rulemaking proceeding in which an agency exercised broad discretion over both legal theories and evidentiary requirements.

The second situation in which the Guidelines found the need test readily applicable was when "the particular interest [of the applicant] is not significantly affected by the proceeding *as bounded by the Commission*."[125] This "scope-of-proceeding" test was logically founded in FTC experience, but it required agency personnel to make some elusive distinctions.[126] One objective of the funding program presumably was to generate fresh perspectives on consumer problems. Any new approach or criticism of a proposed rule, however, was likely to generate "new" issues previously not in contention. Thus, agency resistance to enlarging the scope of a proceeding could frustrate a basic purpose of compensation. These conflicting imperatives required the program administrators to determine when the bounds of a proceeding were being overly expanded.[127]

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122. *See* 15 U.S.C. § 57a(d)(1) (1976) (Commission's statement of purpose to accompany rule shall include statements as to prevalence of practices treated by rule, manner and context in which such acts are unfair or deceptive, and economic effect of rule, taking into account effect on consumers and small businesses).

123. Confidential FTC Document 13. *See also* ACUS PHASE I REPORT, *supra* note 31.

124. The 1980 amendments to the Magnuson-Moss Act moved the agency toward such control by restricting the use of open-ended unfairness theories and by requiring the Commission to issue preliminary regulatory analyses. *See generally* Pub. L. No. 96-252, § 10, 94 Stat. 374 (1980); notes 26-27 *supra* and accompanying text (discussing changes wrought by amendments).

125. 42 Fed. Reg. 30,482 (1977) (emphasis added).

126. The scope-of-proceeding test probably was inspired by the FTC's concern over the manageability of TRR proceedings under the Magnuson-Moss Act. These proceedings frequently generate enormous, unwieldy records and require several years to complete. With proceedings already so large and slow, it is not surprising for the agency to have resisted attempts to broaden the scope of proposed rules. Moreover, if a group were to enlarge the scope of a TRR, opposing groups might be able to have the resulting rule invalidated for inadequate notice upon judicial review.

127. The following examples, which are based upon issues and positions observed in the proceedings studied, illustrate the range of questions that could arise under this standard.

(a) A consumer group asserts that the rule as drafted will not protect and therefore might not affect the consumer interest because the remedies provided will not halt abuses.

(b) A trade association that represents an industry covered by a proposed rule argues that the rule should be expanded to include some competitors, for example, the nonprofit competitors of proprietary vocational schools, because otherwise they would have an unfair economic advantage that could lead to market distortions.

(c) A consumer group contends that the proposed rule, which covers certain deceptive prac-

The scope-of-proceeding test apparently was developed primarily to handle situations in which narrow-focus consumer groups charge that a proposed rule fails to provide adequate relief to the groups' constituencies of particularly vulnerable consumers. Three applications raised this issue in the pre-guidelines period. The Council on Children, Media and Merchandising (CCMM), which sought special protections for children in the Food Advertising and OTC Drug Proceedings, filed two of these requests; the Spanish Speaking/Surnamed Political Association, which sought bilingual disclosure requirements in the Food Advertising rule, filed the third. The FTC rejected the Hispanic group's application, explaining 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."[128] CCMM, however, obtained funding in response to both of its applications, despite an initial denial in the OTC Drug Proceeding based upon the irrelevance of children's advertising issues to the proposed rule.[129] The FTC later commenced a separate

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tices, should be broadened to include other such practices. The group reasons that the additional practices are functionally similar to those covered 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 for the group's constituency of peculiarly vulnerable consumers, such as the elderly, children, or Spanish-speaking persons.

128. Action Letter from Margery Waxman Smith, Acting Director, BCP to Ricardo A. Callejo, Counsel to the Spanish Speaking/Surnamed Political Association, Food Advertising Proceeding 1 (July 19, 1976).

129. Initially, the agency responded to CCMM's request in the following manner:

> 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 "the 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 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.

Action Letter from Joan Z. Bernstein, Acting Director, BCP, to Robert B. Choate, Chairman, Council on Children, Media and Merchandising, OTC Drug Proceedings 1-2 (March 1, 1976). After some intermediate correspondence, CCMM reapplied for reimbursement. Application for Compensation of CCMM, OTC Drug Proceeding (Nov. 4, 1976).

Once again, the Acting Director of the Bureau of Consumer Protection rejected the application, explaining that "[t]he proposed rule . . covers only affirmative claims by advertisers; it does not cover warnings, contra-indications, or any language of that nature. I cannot find in your application evidence that children, or the deaf, blind, or illiterate require separate representation in this proceeding, inasmuch as the rule does not cover" requirements that advertisers make specified disclosures. Action Letter from Margery Waxman Smith, Acting Director, BCP, to Robert Choate, Council on Children, Media and Merchandising (Dec. 16, 1976). CCMM responded with a one and one-half page letter that provided little additional information about the group's position. Letter from Robert B. Choate, CCMM to Margery Waxman Smith, Acting Director, BCP (Dec. 23, 1976).

After noting that CCMM personnel involved in the proceeding felt "there is a great need to examine" the rule's theory that FDA labeling requirements could be extended to advertisements, the letter stated:

> 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.

Id. at 2. The FTC then approved CCMM's application. Action Letter from Margery Waxman Smith, Acting Director, BCP to Robert B. Choate, CCMM, OTC Drug Proceeding (Jan. 21, 1977); *cf.* Confidential FTC Documents 14-16.

rulemaking proceeding to address some general problems of advertising directed at children.[130] How these results can be reconciled, or which of these seemingly conflicting approaches is the correct interpretation of the Guidelines, is unclear. That CCMM nonetheless received compensation to represent the special interests of children and illiterates in the Antacids rulemaking,[131] after the Guidelines became effective, suggests that at least in some cases the FTC did not interpret the scope-of-proceeding requirement very strictly.

Adequacy of representation. Among the most detailed standards contained in the Guidelines were those explicating the statutory provision that the applicant must have, or represent, an interest "which would not otherwise be adequately represented in the proceedings."[132] Factors bearing on the adequacy of available representation generally can be divided between those relating to activities the applicant proposed to undertake, and those concerning characteristics or attributes of the applicant. As discussed below, these two groups of standards rely upon differing assumptions regarding the nature of interest representation in a rulemaking proceeding.

Activity tests related to information provided. The statute did not explicitly require that the FTC examine the activities a compensation applicant proposed to undertake. Nonetheless, from the outset this inquiry was a central feature in the administration of the compensation program. The agency emphasized this factor because:

> The Bureau cannot determine that an applicant's participation is 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.[133]

This interpretation of the statute had common-sense appeal; Congress hardly could have intended to let the FTC spend public funds to produce cumulative or redundant information. Nevertheless, this reading raised a series of subsidiary questions.

First, the "new information" standard did 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 designated group representatives 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 activities—prehearing comments, hearing testimony, and rebuttal submissions—were designed primarily to gen-

130. 43 Fed. Reg. 17,967 (1978).

131. Application for Compensation, CCMM, OTC Antacids Proceeding (Sept. 21, 1977); Action Letter from Richard C. Foster, Assistant Director for Marketing Practices, BCP to Robert B. Choate, CCMM, OTC Antacids Proceeding (Sept. 30, 1977).

132. 15 U.S.C. § 57a(h)(1)(A)(i) (1976).

133. 42 Fed. Reg. 30,482 (1977).

erate "data" as opposed to "views or argument." Even for these data-generating activities, however, the new information standard sometimes proved difficult to apply.

One question arose regarding the significance of the mode in which information was presented. For example, if the prehearing comment record or the investigative file material contained certain information, should compensation be denied to an applicant wishing to present the same kind of data through witness testimony at the hearing? In some cases examined in this study, the answer seemed to be affirmative.[134] This approach would be reasonable if all parts of the record were treated as functionally equivalent in decisionmaking[135] or if there were precise evidentiary standards in trade regulation rulemaking. In practice, however, neither condition existed.[136] Thus, agency decisions based on this criterion were open to dispute.

The absence of clear evidentiary standards also left uncertain the absolute weight of evidence necessary to support a rule. The statute required "substantial evidence,"[137] but there was no consensus as to what this requirement meant in particular proceedings.[138] This made it extremely difficult for a program administrator to conclude that the record contained sufficient evidence to support a rule, and that additional testimony would therefore be superfluous.

In addition, the new information test required program administrators to know both the present and the future state of the rulemaking record.[139] As a practical matter, staff attorneys, being closest to the rule, had a virtual monopoly on this information. Therefore, the staff had some leverage to compromise the independence of the compensation applicants, or to defeat applications by

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134. For example, the Center for Auto Safety and the Americans for Democratic Action jointly applied for compensation in the Used Cars Proceeding. They proposed, in part, to search the Center's records of approximately 50,000 complaints from car owners, and to prepare a report that analyzed complaints relating to used automobiles. Application for Compensation of the Center for Auto Safety & Americans for Democratic Action, Used Cars Proceeding 9 (Nov. 5, 1976). The FTC denied funding to the applicants because their proposal would have duplicated material already on the record. The groups were advised that:

> 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.

Action Letter from Margery Waxman Smith, Acting Director, BCP, to Thomas K. Wilka, Staff Attorney, Center for Auto Safety, Used Cars Proceeding 2 (Dec. 21, 1976).

135. Regarding the relative weights of the comment record and the hearing testimony, an 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 cross-examination. In addition, the problems involved in gaining access to the record, as well as in locating and in obtaining relevant material, were often greater with the comment record than with the hearing testimony. Thus, prehearing comments were more likely to get lost or overlooked in the avalanche of documents in many rulemaking records.

136. For a general discussion of the evidentiary and record-access problems in trade regulation rulemaking, see ACUS PHASE I REPORT, *supra* note 31, § III.

137. The statute required "substantial evidence" to support a rule. 15 U.S.C. § 57(a)(e)(3)(A) (1976) (court may set aside rule if not supported by substantial evidence in rulemaking record).

138. Applying the substantial evidence test to a rulemaking record is a problem common to many contemporary statutes. *See generally* DeLong, *Informal Rulemaking and the Integration of Law and Policy*, 65 VA. L. REV. 257 (1979); McGowan, *Congress and the Courts*, 62 A.B.A.J. 1588, 1589-90 (1976).

139. This approach was thought necessary because "replication of material already on the record or scheduled to be put on the record does not meet the standard." 42 Fed. Reg. 30,482 (1977).

disfavored groups. This situation gave disappointed applicants grounds for attacking the integrity of compensation decisions.[140]

Activity tests related to advocacy provided. The legislative history of the Magnuson-Moss Act suggests that cross-examination in TRR hearings was provided to protect those parties who would be regulated by a proposed rule.[141] As soon as the compensation program came into existence, however, applications arrived indicating that consumer groups expected the same procedural right. The issue arose for the first time in the Vocational Schools Proceeding, when the FTC decided that the statutory language was sufficiently broad to permit funding of applicants who wanted to serve as group representatives with rights of cross-examination.[142] Authorizations for "procedural par-

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140. The FTC's handling of the Center for Auto Safety's application in the Mobile Homes proceeding illustrated these problems. The FTC initially denied compensation for two proposed activities on the basis of redundancy. 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." Action Letter from Joan Z. Bernstein, Acting Director, BCP, to Michael M. Landa, Center for Auto Safety, Mobile Homes Proceeding 2 (Jan. 19, 1976). The applicants responded angrily, questioned the authority of the FTC to dictate the content of a compensated group's presentation, and requested discovery of the staff's "case" so they could dispute the claim of duplication. The group charged:

> [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 home owner 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 witneses will present and (2) the economic material the staff will present.

Letter from Clarence M. Dittow, III & Michael M. Landa, Center for Auto Safety to Joan Z. Bernstein, Acting Director, BCP 2 (Feb. 26, 1976). The level of detail and the burden to the FTC staff that this discovery request encompassed is suggested by the Center's specifications on the economic issues, for 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 that these specifications would require the FTC to take a position on unresolved questions of evidentiary standards or burden of proof, they provided the agency with an additional incentive to avoid a confrontation. This particular controversy was resolved through informal negotiations between the applicant and the staff. *See generally* Letter from Joan Z. Bernstein, Acting Director, BCP to Clarence M. Ditlow, III & Michael M. Landa, Center for Auto Safety (April 12, 1976). It did illustrate effectively, however, the dilemmas of applying a new information standard.

141. *See, e.g., Consumer Warranty Protection: Hearings on H.R. 20 and H.R. 5021 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 1st Sess. 156-59, 197 (1973) (remarks of Rep. Eckhart); *id.* at 707 (statement of Rep. McCollister); *id.* at 64-65, 69 (remarks of Rep. Broyhill).

142. Confidential FTC Documents 18-19; Action Letter from Joan Z. Bernstein, Acting Director,

ticipation" soon became a regular feature of the compensation program.[143] The presumption in favor of consumer group representatives participating at all hearings became so well established that both staff and Presiding Officers occasionally solicited consumer groups to apply for compensation when no consumer spokesperson was slated for the hearing.[144] At least one consumer representative was present at a majority of the hearings in thirteen of the first fourteen TRR proceedings conducted after passage of the Magnuson-Moss Act.[145]

Once the FTC had established that procedural participation was compensable, the question arose whether the agency as a general policy should fund different local groups to represent the consumer interest at each of the regional hearings on a particular rule, or conversely, whether it should fund one group to participate in all of the hearings. In the early proceedings, most consumer group applicants requested funding to serve as group representatives at no more than one or two regional hearings. Both the Presiding Officers and the consumer groups soon found this system ineffective for representing consumer interests. The Presiding Officers generally preferred for one group to represent the consumer interest throughout the proceeding. The Officers believed that a single representative would be familiar with the procedural ground rules of the hearing, and would be less likely to duplicate points established at earlier hearing sites.[146] Similarly, as consumer group lawyers gained experience in Magnuson-Moss rulemaking, they realized that entering in the middle or late stages of an ongoing proceeding was a serious handicap, and resulted in fragmented consumer representation.[147]

Some consumer groups began to seek funding to participate at all stages of the proceedings. They argued that without this continuity of representation the consumer advocates could not achieve equality with the other participants:

> [Funding different consumer representatives in different cities] severely interferes with effective cross-examination since material ad-

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BCP to Kay Pachtner, San Francisco Consumer Action, Vocational Schools Proceeding (Nov. 24, 1975).

143. *See* 1977 Guidelines, 42 Fed. Reg. 30,481 (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").

144. Interview with Kathleen O'Reilly, Consumer Federation of America, Funeral Industry Proceeding (Feb. 16, 1977) (FTC solicited CFA because no other strong local consumer group); Interview with James Turner, counsel for Consumer Action, Inc., Food Advertising Rule (Aug. 16, 1976) (Turner contacted after application period for designated party status had closed).

145. *See generally* ACUS PHASE I REPORT, *supra* note 31, at 199-217 app. The exception was the Protein Supplements Proceeding. In that hearing a consumer group representative was present in the audience and submitted written questions for the Presiding Officer to ask during at least part of the hearings. Interview with Margaret Godwyn, San Francisco Consumer Action, Protein Supplements Proceeding (Nov. 8, 1976).

146. Interview with William D. Dixon, Special Assistant for Rulemaking, BCP (Feb. 7, 1977).

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

> duced 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.[148]

This description of the proceedings is fairly accurate.[149] Most hearings did not have a distinct regional focus, and many uncompensated group representatives adopted a strategy for developing evidence and arguments in support of their "case" throughout the series of hearings. Moreover, effective participation in the later stages of the proceeding, particularly during oral arguments before the Commissioners, seemed to require detailed knowledge of what had come before. Consumer group officials, however, did not unanimously support the single representative policy.

Some consumer spokespersons thought the FTC should try to fund diverse local groups, so as to support more "grassroots" participation in rulemaking.[150] They contended that smaller local and regional groups might be unwilling or unable to assume the responsibilities of group representation throughout a long and complex proceeding.[151] Moreover, funding only one consumer representative could breed conflict among public interest groups

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148. Joint Application for Compensation of the Center for Auto Safety & Americans for Democratic Action, Used Cars Proceeding 6 (Nov. 5, 1976).

149. This opinion is based on hearing observations and other data collected in this study.

150. Interview with Margaret Godwyn, San Francisco Consumer Action, Protein Supplements Proceeding (Nov. 8, 1976); Interview with Rebecca Cohen, Continental Association of Funeral and Memorial Societies, Funeral Practices Proceeding (Oct. 26, 1976). Some FTC officials involved in the compensation program disagreed. They found the prehearing comment records and hearing testimony adequate to give the Commission an understanding of "grassroots" sentiment in TRR proceedings, and felt that adequate technical expertise, including legal skills, was necessary for the effective representation of the consumer interest. Sohn & Rubin Interview, *supra* note 40.

151. Interview with Mark Silbergeld, Consumers Union, Funeral Practices & Food Advertising Proceedings (Feb. 7, 1977) (not all consumer groups could afford preparation and consultation time to provide lawyer for all hearings); Interview with Margaret Godwyn, San Francisco Consumer Action, Protein Supplements Proceeding (Nov. 8, 1976) (consumer groups have limited staffs and may be overextended if they try to serve as consumer representative at all hearings); Interview with Rebecca Cohen, Continental Association of Funeral and Memorial Societies, Funeral Practices Proceeding (Oct. 26, 1976) (not always possible for group to be available for all hearings); Interview with John Pound, San

were they to begin competing with one another for the right to be the sole consumer spokesperson.[152]

From its later funding decisions and from statements by agency officials,[153] it became clear that the FTC had opted for technical competence over grass-roots representation. This policy probably contributed to the concentration of compensation awards among the relatively few organizations and law firms that comprised a specialized "pro-consumer FTC bar."[154]

The "new information" test was not a useful standard for ruling upon proposals for procedural representation in hearing and post-hearing stages of TRR proceedings, and therefore the FTC needed to develop additional criteria for evaluating such applications. The 1977 Guidelines, however, provided only limited insight: "Evidence that the applicant has a point of view, not already represented by the FTC staff attorneys or any other party, that would

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Francisco Consumer Action, Ophthalmic Hearings (Aug. 2, 1976) (proceedings should be more regionalized; when record is in Washington, difficult for consumer groups to work with it).

152. Some indication of this appeared in the Children's Advertising Proceeding. 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 Freedom 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).

153. Sohn & Rubin Interview, *supra* note 40.

154. *See* notes 272-83 *infra* and accompanying text (noting geographic and political concentrations of funding awards). The FTC received considerable criticism during the 1979 legislative oversight process for allowing the program to be dominated by a few repeat applicants. In the 1980 amendments Congress responded by limiting the total funding any single applicant could receive in any rulemaking proceeding. Section 10(a) of the Federal Trade Commission Improvements Act of 1980 provides that no person may receive more than $75,000 of compensation funds for any single rulemaking proceeding, or more than $50,000 in any single fiscal year. Pub. L. No. 96-252, § 10(a), 94 Stat. 374 (1980). This limit is sufficiently high so as technically not to preclude the FTC's continuation of its one-representative policy. It does, however, encourage the distribution of funding in any single proceeding. Thus, the amendment's principal effect might be either to raise the total cost of procedural representation because of the additional preparation time each separate regional representative would need to become familiar with the issues and evidence, or to fragment and to reduce the effectiveness of consumer representation. As the table below indicates, in 17 proceedings that reached some stage of public participation during the period this study covered, lawyers' fees and related support costs exceeded the $75,000 statutory limit twice. The $50,000 yearly limit was exceeded in 11 of the 17 proceedings.

help illuminate [key] issues can be [a] favorable [factor]."[155] Documentary records of the compensation program do not indicate how the "unique point of

Attorneys' Fees As a Proportion of Total Costs Authorized for Reimbursement

Proceeding	Total Amount Atty's Fees		Total Amount Atty's Fees and Related Cost (%)		Total Authorization
Vocational Schools	17,924.49	(53%)	24,677.49	(73%)	33,654.25
Prescription Drugs	630.00	(30%)	910.00	(44%)	2,070.00
Holder in Due Course	1,248.10	(40%)	2,703.60	(87%)	3,073.25
Hearing Aids	78,083.50	(81%)	83,289.50	(87%)	95,880.93
Funeral Practices	78,045.50	(55%)	90,782.50	(64%)	141,363.38
Protein Supplements	4,050.00	(12%)	5,455.00	(16%)	33,970.30
Ophthalmic Goods	40,343.00	(32%)	54,591.00	(43%)	127,274.33
Food Advertising	46,368.00	(30%)	63,712.00	(42%)	153,075.48
Care Labeling	19,200.00	(33%)	21,506.00	(37%)	57,948.67
Used Cars	36,990.00	(28%)	51,308.20	(39%)	131,930.11
OTC Drugs	37,265.00	(40%)	38,015.00	(41%)	93,403.03
Credit Practices	56,275.00	(40%)	69,789.00	(49%)	141,996.24
Health Spas	48,934.00	(56%)	56,601.00	(65%)	87,339.00
Mobile Homes	46,945.00	(30%)	64,928.00	(42%)	154,558.81
R-Value	56,617.00	(60%)	58,048.00	(62%)	93,488.07
OTC Antacids	34,461.00	(27%)	54,339.00	(43%)	126,884.63
Children's Advertising	65,115.00	(20%)	72,308.20	(22%)	325,690.20
TOTAL	668,494.59	(37%)	812,963.49	(45%)	1,803,670.38

(This table is derived from an FTC chart entitled, "Attorney Fees and Costs Compared to Total Budget as of Feb. 1, 1979")

Since proceedings usually ran for several years and many of the legal fees did not greatly exceed the $50,000 yearly limit, monetary considerations probably would not bar continuation of the single representative policy. Moreover, near the end of the period this study covered, the FTC decided to hold fewer regional hearings. Sohn & Rubin Interview, *supra* note 40. This policy also would reduce the total costs of procedural representation. Continuation of the single representative policy, however, probably would force groups to choose between procedural representation and presentation of empirical evidence. Between 1975 and 1979, many groups received funding for both activities.

Consumer representatives who had questioned the funding of a single consumer representative in each proceeding suggested several alternatives the agency might adopt to make shared representation effective. For example, the FTC could designate a "lead" consumer group representative and require that spokesperson to keep in contact with smaller regional or local groups, and thus more accurately represent their interests at the hearings. Interview with James Turner, counsel to D.C. Consumer Action, Food Advertising Proceeding (December 2, 1976). Alternatively, the Commission could compensate multiple consumer representatives and provide sufficient funding for them to meet periodically to develop a common strategy. Interview with Michael Schulman & John Reed, California Citizens Action Group, San Francisco Ophthalmic Hearings (July 30, 1976). A similar technique would compensate regional representatives to attend and observe hearings preceding those for which they already have been funded. *See* Supplemental Application for Compensation of Golden State Mobilhome Owners League, Inc., Mobile Homes Proceeding (June 7, 1977) (requesting $1,843.00 additional funding for attorney to observe hearings in Washington, D.C. before participating in San Francisco hearings). *But see* Action Letter from Albert H. Kramer, Director, BCP to Golden State Mobilhome Owners League, Inc. (July 13, 1978) (agency granted $500.00 for purchase of transcript of Washington hearings instead of funding attorney's personal observation). Depending upon the size of the hearing and the number of participants involved, these approaches could increase markedly the costs of the compensation program. One suggestion to offset these increased costs is to fund consumer representation only in major, controversial proceedings. *See* Interview with David Swankin, counsel to National Consumers Congress, Care Labeling Proceeding (February 11, 1977) (agencies should determine which proceedings would benefit most from public participation, as well as amount to be spent in each of these high priority proceedings).

155. 42 Fed. Reg. 30,482 (1977).

view" test was applied. The applicant presumably would at least be required to show that it favored an outcome different from that supported by staff, industry, or other applicants.[156] In practice, however, grants to engage in procedural representation seemed to depend more heavily on factors relating to the status of the applicant.

Status tests. The 1977 Guidelines included six criteria relating to the characteristics or status of the applicant.[157] These factors relate either to the representative qualities or to the technical competence of the applicant.

Three qualifications relating to technical competence were to be weighed in an applicant's favor: 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.[158] Because these criteria were reasonable factors to consider in estimating the utility of a group's participation,[159] no significant problem or controversy involving their application developed. The emphasis on demonstrated expertise, however, particularly in FTC issues, tended to create a preference for "repeat players"—groups that previously had received funding. A repeat applicant had several advantages over an inexperienced group: a successful grant application format to copy in later applications, a reputation within the agency for competence, access to program administrators and staff attorneys, and the precedential value from the agency's previous determination that the applicant met the status tests.[160]

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156. One law professor addressed the point by writing: "I am not aware of any other individual who shares my views on this subject. Therefore, these views could not be adequately otherwise represented." Application for Compensation of Professor Richard S. Kay, Holder in Due Course Amendment Proceeding (Feb. 26, 1976). The agency denied him compensation on the ground that his "participation would be more in the nature of an expert witness rather than as a representative of an interest." Action Letter from Joan Z. Bernstein, Acting Director, BCP to Richard S. Kay (March 30, 1976).

157. These factors were: the applicant's point of view, the specificity of that view, expertise in both the substantive area and in trade regulation matters generally, the relation between the applicant and the interest, the applicant's constituency, and the applicant's willingness to spend his own money on the proceedings. 42 Fed. Reg. 30,482 (1977).

158. *See generally id.* In addition, the Guidelines noted with regard to an applicant's general performance and competence that: "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." *Id.*

159. The Guidelines set forth the agency's reasoning as follows:

> [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.

Id.

160. On occasion, both FTC personnel and applicants suggested that receipt of a prior grant of compensation indicated that questions regarding the applicant's status or characteristics had already been resolved, and did not need to be re-examined. *See generally* Application for Compensation of the California Citizen Action Group, Health Spas Proceeding 8 (Oct. 25, 1976) ("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. Statistically, repeat applicants were highly successful in obtaining compensation. Ten groups applied for funding in three or more rulemaking proceedings. Of the 42 total applications this group filed, the Commission approved 35. Even this figure understates the momentum resulting from a prior

In this respect, the FTC's attempts to ensure the applicants' technical competence left the agency vulnerable to criticism for allowing a few large groups to dominate the compensation program.

The second group of status tests concerned the relationship between the applicant and the interest it purported to represent. The Guidelines required that the applicant be a bona-fide spokesperson for the interest in question.[161] Factors to be considered in an applicant's favor included its status as a membership organization, its receipt of contributions from its constituency,[162] and its willingness to spend some of its own funds to participate in the proceeding.[163]

The emphasis on constituency ties may be explained by two rather different rationales. First, a group accountable to its membership or contributors might be pressured to produce quality work. Second, the existence of a defined constituency could perform a legitimizing function: when questions in a rulemaking proceeding involve policy tradeoffs or value preferences, it may be desirable or necessary to ensure that the representative group has actual authority to speak on behalf of its constituents.[164]

These justifications, however, are subject to a variety of practical criticisms. As a factual matter, rank and file members of consumer organizations or other voluntary groups tend neither to participate in this kind of proceeding, nor to monitor the quality of representation.[165] Decisions regarding the positions,

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grant, because two of the denials in the Prescription Drug TRR, the Americans for Democratic Action (ADA) and the Consumers' Union West Coast Office (CU), were rejections of the groups' first applications. ADA subsequently received six compensation awards without any rejections, and CU successfully applied for funding in two later applications. In summary, only four out of 42 applications by repeaters who had succeeded on a prior application were rejected, and one was withdrawn by the applicant.

161. 42 Fed. Reg. 30,482 (1977). The Guidelines explain that "[a]n industry trade association that claims to represent consumers would be viewed skeptically, and vice versa, for example." *Id.*

162. *See id.* (willingness of individuals to support applicant demonstrates that applicant responsive to their interests). *See also* Health Research Group v. Kennedy, 45 Ad. L. 2d 133, 142 (D.D.C. 1979) (court denied standing to seek judicial review to Nader-affiliate organization that had no members, only contributors). In reaching its decision, the court reasoned:

> So long as the courts insist on some sort of substantial nexus between the injured party and the organizational plaintiff—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 140-41 (emphasis in original).

163. *See* 42 Fed. Reg. 30,482 (1977) (Section E(8)).

164. Documentary records and interviews with FTC officials suggest that in practice, the dominant consideration of agency decisionmakers was "quality control," and not ensuring legitimization of the representative groups.

165. The practical obstacles to such participation are formidable, both because of the complexity of the issues involved in determining whether or how to participate in an administrative proceeding and because of the difficulties in polling a dispersed membership on these matters, or even providing advance notice of the representative's activities. Also, members are unlikely to have access to detailed information about the proceedings and the conduct of the group's representatives, except through the association and its publications. Members usually will have expectations about the basic objectives the organization pursues and will form impressions about its general level of success in realizing those objectives. They are unlikely, however, to become involved in the details of representation. *See gener-*

strategies, and tactics to be adopted in a particular controversy usually are made by the staff of the organization in conjunction with boards of directors or executive committees, or by the lawyers and other technicians participating in the proceeding. Membership influence probably derives more from the choice between "exit" and "loyalty" than from opportunities for "voice" within the organization.[166] Moreover, inferences drawn from this sort of evidence are at best ambiguous.[167] Therefore, in order to determine whether the varying relationships between public interest groups and their constituencies are properly relevant to FTC funding decisions, it is necessary to consider briefly some theoretical aspects of the representative relationship.

Theoretical considerations. In large measure, the lack of focus and coherence in the FTC's funding criteria may reflect an unresolved debate regarding the kind of representation the program was intended to foster. Despite its familiarity and frequent use in discussions of public participation, the concept of representation—whether of persons or of interests—is complex and varies from one context to another. For present purposes, two dimensions of the concept of representation should be considered in relation to the FTC compensation program: the functional and the formalistic aspects of the representative's status.

Functional considerations refer to the relationship between the characteristics or activities of the representative, and the kinds of decisions being made.[168] Regulatory decisions, including those in trade regulation rulemak-

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ally J. BERRY, LOBBYING FOR THE PEOPLE (paper ed. 1977); S. EBBIN & R. KASPER, CITIZEN GROUPS AND THE NUCLEAR POWER CONTROVERSY: USES OF SCIENTIFIC AND TECHNICAL INFORMATION (paper ed. 1974); T. LOWI, THE POLITICS OF DISORDER (paper ed. 1974); C. PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY (paper ed. 1970).

166. One consumer group spokesperson interviewed felt that opinions expressed in constituents' letters provided more reliable "feedback" for the organization than attempts to determine how to keep a constituency happy. Interview with Robert Choate, Council on Children, Media and Merchandising (March 23, 1979). The Council is a non-membership organization.

167. Members may join, or leave, an organization for a great variety of reasons, some of which are totally unrelated to the group's position on particular issues. Even assuming that an organization's participation in a given proceeding does influence membership decisions, the proper interpretation of a rise or fall in membership is arguable. The compensation application of the National Hearing Aid Society (NHAS), a membership association of hearing aid dealers, illustrates this problem. NHAS argued that it should be funded to continue its participation in the Hearing Aids rulemaking because it had taxed its members to the limit and it had been unable to raise the money necessary to pay its lawyers. As evidence of its financial inability to participate, NHAS noted that its dues had nearly tripled over a three-year period, and that several hundreds of members had refused to pay either these increased dues or a special assessment to support participation. Application for Compensation of the National Hearing Aid Society 1-2 (May 4, 1976). A rival association, however, 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 the American Speech and Hearing Association to G. Martin Shepherd, Presiding Officer, BCP (May 21, 1976).

168. One commentator on political representation explains 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 . . . ignore the tastes of those for whom he is supposed to be acting. If political choices are

ing, can be ranked on a continuum ranging from the normative to the expert. The location of a particular decision on this continuum implies the kind of representation that is most appropriate. 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 upon the constituency purportedly represented.

The conceptual difficulty the FTC confronted, as some agency officials have realized,[169] was that most issues raised in trade regulation rulemaking fall at neither extreme of this continuum. A few proceedings included relatively narrow technical inquiries.[170] Somewhat more frequently, TRR proceedings raised issues that could be described as pure policy questions.[171] Nevertheless, the majority of issues in trade regulation rulemaking lie between these extremes, mixing normative and expert considerations. For these middle-range questions, the "political" or "technical" character of a particular issue is largely a matter of discretion.[172] Moreover, as the FTC was forcefully reminded, the rulemaking process occurs within a larger political context. Even if the agency believes its decision on a proposed rule should be based solely on technical considerations, it still has to generate sufficient political support to allow its final product to survive congressional oversight.

The mixed and shifting character of issues involved in FTC rulemaking probably renders it impossible to develop simple, uniform standards that reconcile the conflicting bases of representation outlined above.[173] In theory, however, the representation tests could be utilized to give appropriate emphasis to the kind of presentation the applicant proposed to make. Thus, if the applicant planned to develop technical information, such as survey research data or economic modeling, its expertise would become a predominant factor in the agency's decision. If, on the other hand, the applicant sought to address

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> 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 . . . .
>
> . . . 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.

H. PITKIN, THE CONCEPT OF REPRESENTATION 211-12 (paper ed. 1972).

169. *See* note 69 *supra* and accompanying text (discussing technocratic and democratic aspects of rulemaking proceedings).

170. The Protein Supplements Proceeding, for example, addressed the issue of processes by which humans metabolize amino acids. *See generally* Report of the Presiding Officer, Protein Supplements Proceeding 14-30 (June 15, 1978).

171. The Credit Practices rulemaking discussed the proper regulatory policy to be adopted if economic theory shows that abolition of creditors' summary remedies will raise the cost of credit, reduce the availability of credit for low income consumers, or both. *See* 40 Fed. Reg. 16,349 (1975).

172. One could, for example, convert the policy question concerning creditors' remedies described above into a factual question whether the projected economic effects and other possible costs or benefits in fact would occur. These issues then could be resolved through field research on the behavior of lenders and borrowers and comparisons of experience in states that had abolished summary remedies with those that had not.

173. It is theoretically possible that choice or conflict between these two bases of representation could be avoided if a large enough number of organizations willing to participate possessed a broad membership which was both knowledgeable of technical issues, and involved sufficiently in the organization to participate in decisions regarding the group's advocacy positions in a given proceeding. This condition apparently did not exist in the proceedings conducted by the FTC during this study, and because of the practical difficulties previously described, it probably does not exist in many regulatory fields.

policy issues, its ability to speak for an affected constituency would become the key factor. The 1977 Guidelines were generally consistent with this approach, although they neither explicitly required it nor clearly elaborated upon it.[174]

Whenever the policy or value-preference component of a funding applicant's proposed participation warrants examining the applicant's ability to speak on behalf of a particular constituency, it becomes necessary for the agency to investigate the formalistic aspects of the group's representative relationship. In other words, the agency should consider whether an adequate mechanism exists to ensure the legitimacy of the applicant as a spokesperson for the interest it purports to represent.[175]

The occasional criticism that public interest groups are "self-appointed spokesmen" for the consumer interest[176] reflects concern for the formal authority of an organization to represent a constituency. This concern also manifested itself in the lines of questioning some industry spokespersons used to challenge the legitimacy of compensated consumer group witnesses during TRR hearings.[177] Even the consumer groups seemed to have varying concepts of their representational role. Thus, groups funded to participate in TRR's

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174. *See generally* 42 Fed. Reg. 30,482 (1977) (factors used by agency to determine funding decisions address applicant's expertise and competence, as well as constituency support and representation).

175. Professor Richard Stewart has described the problem in the following manner:

> 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 administrative 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.

Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1806 (1975).

176. *See generally* A. MCFARLAND, PUBLIC INTEREST LOBBIES: DECISION-MAKING ON ENERGY (paper ed. 1976) (discussing public interest groups as representatives of specialized interests that conflict with general welfare); *Public Participation in Agency Proceedings: Hearings on H.R. 3361 and Related Bills Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 563 (1977). The public interest spokespersons, however, also have their supporters. A. MCFARLAND, *supra*, at 67 ("Critics 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.").

177. The following excerpt from the Eyeglass Rule hearing transcript is a fairly typical, if lengthy, example of this concern. Mr. Markey, counsel for the National Association of Optometrists and Opticians, is interrogating Ms. Schletter, a witness from San Francisco Consumer Action. She had conducted two field surveys of price advertising among sellers of ophthalmic 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 members?
> MS. SCHLETTER: Yes.

employed diverse tactics to develop and validate their positions in the FTC proceedings. Some groups met with individual consumers who would be affected by a proposed rule,[178] or discussed the rule with other consumer organizations;[179] others informally surveyed consumer opinion on particular rule provisions,[180] or maintained tentative positions pending completion of their research for the proceeding.[181] A number of groups either required staff members working on a rule to seek approval of their recommendations from a Board of Directors,[182] or adopted a position only when they could achieve

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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 consumers 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.

Ophthalmic Goods Proceeding, Transcript 6401-02, 6406 (available in FTC record room).

This line of cross-examination is notable both for its implicit assumption that there are, or should be, formal criteria for authorizing the representative to represent, and for its confusion in suggesting what those criteria ought to be. The questions can be read to imply that San Francisco Consumer Action is both too elitist and too undifferentiated from the mass. The examination mixes issues concerning the characteristics of the group's membership with questions relating to its internal decisionmaking procedures.

178. Interview with Edward Kramer, The Housing Advocates, Mobile Homes Proceeding (March 28, 1979) (Housing Advocates frequently returned to its constituents for input to ensure representation of their interests).

179. Interview with Miles Friedan, California Public Interest Research Group, Used Cars Proceeding (April 3, 1979) (organization "distilled a consumer view" from contacts with many consumer groups).

180. Interview with Irmgard Hunt, Consumer Action Now, Council on Environmental Alternatives, Protein Supplements Proceeding (April 3, 1979) (consumer survey conducted to ascertain whether consumers believed they were informed sufficiently to make decisions on rule).

181. *See* Interview with Jack Hale, Connecticut Citizen Research Group, Food Advertising Proceeding (March 17, 1977) (formulating position on rule involved some problems of identifying and accommodating subgroups of consumers, especially when objective data unavailable); Interview with Lonnie Von Renner, counsel to Americans for Democratic Action & National Council of Senior Citizens, Prescription Drugs, Funeral Practices, and Ophthalmic Goods Proceedings (February 15, 1977) (when evidence indicates consumer interests not uniform, group's position should be flexible to accommodate evidence offered at hearing; firm position can be delayed until post-hearing comment stage of proceedings); Interview with Rebecca Cohen, Continental Association of Funeral and Memorial Societies, Funeral Practices Proceeding (October 26, 1976) (proposed to hire economist to investigate whether disclosures mandated by Funeral Rule would raise prices to consumer, as industry claimed).

182. Interview with Gerald Thain, Center for Public Representation, Used Cars, Thermal Insulation, and Children's Advertising Proceedings (April 5, 1979) (Center required to obtain Board approval for projects exceeding specified dollar amount); Interview with Glen Nishimura & Timothy Holcomb, Arkansas Consumer Research, 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).

consensus of the staff members.[183] In a few groups, the legitimacy question did not arise because the organization already had adopted an official position on the issues prior to becoming involved in the FTC proceeding.[184]

To analyze these competing notions of authority to represent, it is useful to analogize the consumer group's role to more familiar representative relationships. The most significant factor in these relationships is whether the representative is expected to have a formal, specific mandate to act on behalf of a principal. In the common law master-servant relationship, for example, the employee's scope of authority to bind the employer is formally circumscribed by contractual and legal standards. The servant's actions are totally subordinate to the directives of the employer. Somewhat less constrained and specific is the lawyer's authority to act on behalf of a client. The relationship remains essentially contractual, and the client retains control over important decisions. The lawyer, however, has more latitude for independent judgment as a result of technical expertise and professional responsibilities.[185] Both the master-servant and the lawyer-client relationships typically involve situations in which the represented party is either a natural person or a hierarchy, and in both relationships the represented party has access to most of the information needed to make decisions.

When the focus of the relationship shifts to the representation of dispersed groups, or from personal to political representation, the need for prior approval of particular decisions tends to decrease, and the representative's independence increases. Three forms of such representation can be distinguished: lobbying, electoral representation, and "descriptive representation." According to one commentator, lobbying is functionally similar to the lawyer-client

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183. Interview with Mark Silbergeld, Staff Attorney, Consumers Union, Funeral Practices, and OTC Antacids Proceeding (February 7, 1977) (position arrived at collegially by discussions between staff lawyers and technical experts); 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 majority vote).

184. Interview with Robert Choate, Council on Children, Media and Merchandising (March 23, 1979) (ad hoc group formed nonprofit corporation to represent specific, limited interests).

185. One seasoned Washington lawyer has described the interplay between client desires and lawyer judgment in the following terms:

> [An] 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.

Califano, *The Washington Lawyer: When to Say No*, in VERDICTS ON LAWYERS 187, 190 (R. Nader & M. Green eds. 1976). Another view of such relationships has concluded that:

> There are two ideas about the proper distribution of power in professional consulting 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 sharing of control over many of the decisions arising out of the relationship.

D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 7 (1977).

representation described above, with somewhat broader latitude accorded the lobbyist to translate the diverse, inchoate wants of his constituency into a unified position.[186] Other observers have noted that lobbying organizations and similar voluntary associations tend to become staff-dominated or "oligarchical" in form, with little opportunity for the rank-and-file members to influence policy directly.[187] There are several practical reasons why this situation exists. A voluntary association usually consists of numerous dispersed "principals" with little direct involvement in the political environment in which their "agent" lobbyist operates. Moreover, the tactical decisions that the lobbyist makes can neither be specified easily in advance, nor subjected to membership ratification within the limits of available time and resources. To be effective, a lobbyist must have considerable discretion to define and to advance the group position; occasionally, even limited disclosure of his activities is not feasible.

The elected representative's role is in many ways comparable to that of the lobbyist. The number of issues on which a typical legislator has a true mandate from his constituency is probably small; few political issues are sufficiently visible or important to affect the outcome of an election. Even when specific policies are widely desired, a consensus might not be reached on the best means with which to achieve or to implement them.[188] Consequently, the elected representative must exercise independent judgment in representing the interests of his constituency.

Finally, a different form of political representation, "descriptive representation," avoids the problem of providing the representative with a mandate by structuring the representative body to mirror the composition of the constitu-

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186. This commentator notes that:

> 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.

J. BERRY, LOBBYING FOR THE PEOPLE 5 (paper ed. 1977).

187. This tendency has been described in the following manner:

> In few areas of political life is the discrepancy between formal juridical guarantees of democratic procedure and the actual practice of oligarchic rule so marked as in private or voluntary organizations such as trade unions, professional and business associations, veterans' groups, and cooperatives. . . . almost all such organizations are characterized internally by the rule of a one-party oligarchy. That is, one group, which controls the administration, usually retains power indefinitely . . . .

S.M. LIPSET, M. TROW & J. COLEMAN, UNION DEMOCRACY 1 (1956). *See also* R. MICHELS, POLITICAL PARTIES (1958) (stating how political organizations become naturally oligarchic). Distinguishing between a "representative" and a "democratic" organization, one commentator noted that: "An association is 'representative,' but undemocratic, if member interests are congruent with leadership policies but the members do not, as a practical matter, choose these leaders in meaningful elections or participate in the formulation of leadership policies." J.Q. WILSON, POLITICAL ORGANIZATIONS 237-38 (1973). *See generally* T. LOWI, THE POLITICS OF DISORDER 73 (paper ed. 1974) (comparing alternative pluralistic social processes with traditional political government).

188. *See generally* Miller & Stokes, *Constituency Influence in Congress*, 57 AM. POLITICAL SCI. REV. 45 (1963) (discussing theories of representation and analyzing measure of control local constituencies exert over specific actions of representatives).

ency.[189] Just as a scientific sample epitomizes the universe from which it is drawn, the representative body inherently reflects the preferences, values, and knowledge of the larger group, and thus dispenses with the need for directives or consultation.[190]

Ordering typical representative relationships in this fashion implies certain realities about consumer representation in administrative proceedings. If a representative's legitimate discretion to act without a prior specific mandate expands as his constituency grows and diversifies and disperses outside the confines of a hierarchical organization, then consumer representatives necessarily would be expected to exercise a high degree of independent judgment. Even relatively narrow consumer protection issues, such as the sales practices of hearing aid dealers or advertisements promoting protein supplements, can affect geographically dispersed, unorganized individuals. Moreover, consumer protection is, at least in some respects, a "collective good"[191] for which economic theory posits major disincentives to organized action.[192] Thus, it seems clear that consumer representatives need considerable independence if they are to represent their constituencies effectively. The difficulty is reconciling this independence with the need to hold the representatives answerable for the positions they advocate.

The representative relationships described above suggest that common

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189. It has been argued that

> true representation . . . 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."
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> . . . .
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> . . . 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 rather than doing 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.

H. PITKIN, THE CONCEPT OF REPRESENTATION 60-61 (paper ed. 1972) (emphasis in original).

190. The cross-examiner quoted in note 177 above apparently was using this theory when he sought to contrast the membership of San Francisco Consumer Action with the population of the San Francisco Bay Area.

191. *See generally* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (paper ed. 1977) (presenting notion of "collective good"). For discussions of the theory in the context of public participation in administrative or political decisionmaking, see A. MCFARLAND, *supra* note 176, at 27-40; Snow & Weisbrod, *Consumerism, Consumers, and Public Interest Law*, in PUBLIC INTEREST LAW 395, 401-06 (Weisbrod, Handler & Komesar eds., paper ed. 1978).

192. These disincentives are explained in the following manner:

> [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.

M. OLSON, *supra* note 191, at 48.

methods for ensuring the accountability of a representative share two general characteristics. First, as the constituency becomes large and diverse, the representative generally must account for decisions made or actions taken after the fact, rather than obtaining prior authorization. The elected representative does not receive detailed instructions from his district. He realizes, however, that he would be replaced if his votes or public positions diverged too sharply from constituent preferences. Similarly, the executive of a voluntary association understands that the leadership cannot often take positions distasteful to the members without witnessing a decline in the organization's membership, resources, and influence. A second characteristic of representative relationships is that accountability tends to become general rather than specific as the interest represented shifts from personal to diffuse. When the constituency group is large and dispersed, the representative need not seek clearance or approval for each decision he makes; instead, the general quality of his performance is reviewed periodically.

Thus, although it would seem nonsensical to criticize a consumer group for failing to poll its membership regarding particular issues raised in a rulemaking proceeding, it is feasible and appropriate to require some assurance that the leaders are exposed to the risk of membership disaffection by public advocacy of certain positions in a proceeding.[193] This assurance would involve a showing that the organization obtains a substantial proportion of its revenues from membership dues or public contributions,[194] and that its constituents have been informed, or will be informed, of the positions the group is advocating. Whether a group has advocated positions in the past similar to that taken in a present proceeding would be an important consideration in determining constituency accountability. When the organization has no prior history of involvement in the particular subject matter, either the funding recipient should be requested to file reports of its communications with its membership, or future grants should be conditioned on a showing that the organization has informed constituents of positions taken under prior compensation grants.

Finally, the role of "descriptive representation" in a compensation program like the FTC's should be considered. This theory would require an inquiry into the composition or characteristics of the applicant relative to the constitu-

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193. This statement is accurate, however, only as long as material the group submits is not so purely technical that constituency ties are irrelevant.

194. Organizations that provide noncollective goods or services present a special problem under this approach. For example, Consumers Union is financed principally by sales of the *Consumer Reports* magazine. Application for Compensation of the Consumers Union, Food Advertising Proceeding 1 (Sept. 23, 1975). Many trade or professional organizations provide valuable information, advice, and assistance to their members. Some public interest organizations sponsor trips, social events, or product discounts. When the noncollective goods are basically incidental to a predominant advocacy purpose, such as Sierra Club outings or calendar sales, their provision should not materially affect the accountability of organization spokesmen. The situation becomes less clear, however, when the product sale component seems predominant. For example, as to Consumers Union it could be argued that because proceeds of the magazine sales finance advocacy efforts, the purchase price of the magazine represents both a sale of goods and a contribution to advocacy efforts. Because the contribution is "tied" to a sale that seems likely to be the dominant feature in constituent decisions, however, it may well be that the organization's accountability to its constituency for advocacy positions is fairly attenuated. Agencies that administer compensation programs might consider requiring applicants to provide information about their dues structure and the nature of any noncollective goods or services they provide to members.

ency it purports to represent. The objective of the inquiry would be to determine whether the membership of the consumer group adequately reflected the relevant consumer population.[195] Depending upon how technically the sampling notion were pursued, the issues could become unmanageably complex.[196] Instead of seeking existing groups whose memberships constitute acceptable samples, the agency could obtain a more efficient and reliable opinion sampling by commissioning a survey research firm to select and poll a random sample of the relevant population. This does not suggest that agencies should be indifferent to the constituencies of groups that actively participate in rulemaking proceedings. An expressed preference for a particular rule provision by a group whose members comprise a large and typical segment of interested consumers or businesses would be entitled to more careful consideration than if the organization's constituency were small and atypical. Nevertheless, this practice should be the general norm in rulemaking, rather than a feature unique to a compensation program. The composition of a group's constituency normally should not serve to include or exclude the group's participation; rather, decisionmakers should only consider it in determining how to weigh the group's position. This approach would preserve the role of the compensation program in increasing the number and diversity of constituency positions actively pressed.[197]

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195. The political science literature suggests that consumer-group members generally are not typical of the average population. Individuals who join organizations engaged in advocacy related to political or governmental affairs usually are, like those who vote in general elections, disproportionately upper-middle class in terms of income, education, and status. *See generally* D. IPPOLITO, T. WALKER & K. KOLSON, PUBLIC OPINION AND RESPONSIBLE DEMOCRACY (1976); L. MILBRATH, POLITICAL PARTICIPATION 110-141 (paper ed. 1969); S. VERBA & N. NIE, PARTICIPATION IN AMERICA: POLITICAL DEMOCRACY AND SOCIAL EQUALITY (paper ed. 1972). In the present context, however, it is unclear whether, or in what ways this socio-economic "bias" should be presumed to affect the policy positions of group members. By joining an advocacy group, members haave demonstrated their disregard for the economic incentives described in the theory of collective goods. Consequently, their policy preferences, as reflected through the group, appear to be based on noneconomic or altruistic considerations.

196. For a group like San Francisco Consumer Action that does not recruit members on a national scale, it presumably would be necessary either to establish a relevant "geographic market," or to determine that there were no significant regional differences to bias the sample. Moreover, apart from the rare and probably nonexistent marketing practice that affects all consumers with absolute uniformity, it arguably would be necessary to create a stratified sample to account for specially affected subgroups. Sample stratification is a potential slippery slope, because a critic with a modest amount of ingenuity quickly can proliferate variables on which one plausibly could argue that 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 arguments suggest points that could be raised in a strict sampling approach:

> (a) Because visual problems tend to increase with age, the sample has to account for the age distribution of eyeglass wearers.
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> (b) The cost of eyeglasses absorbs a proportionately greater share of the income of the poor than of the wealthy, and the benefits and burdens of the rule are likely to be felt disproportionately by low-income consumers. Consequently, the sample should be stratified by income level.
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> (c) Price advertising through the mass media is considerably more important to consumers lacking the mobility to comparison shop, either because they are physically handicapped, because they lack transportation, or because they live in rural areas. The sample should be structured to account for these consumer differences.

197. " '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." Stewart, *supra* note 175, at 1764.

3. Financial Status of the Applicant

The most detailed eligibility standard in the Magnuson-Moss Act concerned the financial status of the applicant. Funds were to be granted only to persons "unable effectively to participate in such proceeding because [they] cannot afford to pay costs of making oral presentations, conducting cross-examination, and making rebuttal submissions in such proceedings."[198] Both the Rules of Practice and the Guidelines translated this standard into three general requirements. First, the applicant needed to provide information describing the economic stake of the interest it wished to represent, as compared with the cost of participation. The Commission assumed that a group with a small economic stake, or a noneconomic interest, would encounter difficulties raising funds to participate.[199] Second, when the interest's economic stake was large in comparison to the cost of participation, the applicant was obliged to bear its own costs. The rule provided an important exception, however, "when a large total stake" was "divided among many separate people so that each individual" had "little incentive to participate."[200] Applicants claiming this "collective goods exception" were required to demonstrate that they could not raise funds to participate through individual contributions. Finally, the applicant was required to provide information about its own resources. The Guidelines reflected the notion that well-funded organizations should make stronger showings of need for support to participate in rulemaking proceedings.[201] Again, however, an exception provided that:

> [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.[202]

Despite the prominence accorded to financial inability in the statute, the Rules of Practice, and the Guidelines, in practice this standard played a surprisingly minor role. Only two compensation applications apparently were rejected because the applicant was financially able. The first of these applications was submitted by an individual witness sufficiently candid or unsophisticated to admit to the FTC that he would testify whether or not he was reimbursed.[203] The second application was submitted by an industry trade association.[204] In a third situation, an initial compensation award to a trade association was not used. The FTC had required that the award be offset by membership dues and

198. 15 U.S.C. § 57a(h)(1) (1976); *see* note 29 *supra* (text of relevant section of statute).

199. *See* 16 C.F.R. § 1.17(c)(4)(i) (1978); 42 Fed. Reg. 30,482-83 (1977) (if applicant represents rich interest, there should be other means for it to obtain funds).

200. 42 Fed. Reg. 30,483 (1977).

201. *Id.* (well-funded organization or interest has more difficult time making requisite showing of inability to participate effectively without FTC compensation).

202. *Id.*

203. Application for Compensation of Dr. Kurt Oster, Food Advertising Proceeding (Aug. 16, 1976); Letter from William D. Dixon, Presiding Officer to Kurt Oster (Sept. 23, 1976); Action Letter from Margery Waxman Smith, Acting Director, BCP to Kurt Oster, Food Advertising Proceeding (Nov. 12, 1976).

204. *See* Action Letter from Albert H. Kramer, Director, BCP to Jimmy D. Johnson, Association of Physical Fitness Centers, Health Spas Proceeding (July 14, 1977).

contributions, and the association raised more money from these sources than the grant would have provided.[205] The association later submitted a supplemental application containing updated budget information and received funding to participate in the post-hearing stages of the proceeding.[206] The FTC apparently did not invoke the financial inability standard more frequently for two reasons. First, the FTC did not demand, and often did not receive, very detailed financial information from applicants. Second, and more important, the Commission interpreted and applied the financial inability standard so as to render unnecessary a detailed examination of applicant finances.

Applicants in the later proceedings generally tended to provide more extensive financial information than those who sought funding in the early Magnuson-Moss TRR's.[207] Nevertheless, in 1977 and 1978 some applicants

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205. *See* Action Letter from Margery Waxman Smith, Acting Director, BCP to Anthony DiRocco, National Hearing Aid Society, Hearing Aids Proceeding (July 20, 1976) (budget attachment, footnote*); Letter from Margery Waxman Smith, Acting Director, BCP to Anthony DiRocco, National Hearing Aid Society (Oct. 29, 1976) (total reimbursable amount to be reduced by total member contributions received between application filing date and submission of reimbursement claim); Letter from Anthony DiRocco, National Hearing Aid Society to Margery Waxman Smith, Acting Director, BCP (March 30, 1977) (grant was nullity in light of requirement that any NHAS solicited funds offset amount of funding).

206. Supplemental Application for Compensation of the National Hearing Aid Society, Hearing Aids Proceeding (Sept. 26, 1977); Letter from Timothy J. Waters, Counsel for the National Hearing Aid Society to Bonnie J. Naradzay, BCP (Sept. 30, 1977) (supplying further information in reference to NHAS's supplemental application for funds).

207. For example, one application had stated simply that: "The ICL [Iowa Consumers League] 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." Application for Compensation of the Iowa Consumers League, Food Advertising Proceeding (March 22, 1976).

The staff home economists of the Consumers Cooperative of Berkeley applied successfully for funding in the Protein Supplements rulemaking. They provided little, if any, more detail than ICL. *See generally* Application for Compensation of the Consumers Cooperative of Berkeley, Inc., Protein Supplements Proceeding 3 (Feb. 4, 1976) (financial assistance limited because budget limited). As Appendix A indicates, both of these applicants were successful. Although these grants involved relatively modest amounts and might have been submitted by applicants inexperienced in proposal-writing, this was not always the case. For example, San Francisco Consumer Action (SFCA), which received several grants during the period studied, initially applied for over $20,000 in the Used Cars Proceeding; it obtained approximately one-half of this amount. Application for Compensation of San Francisco Consumer Action, Used Cars Proceeding (Oct. 3, 1976); Action Letter from Marjorie Waxman Smith, Acting Director, BCP to Kathryn Pachtner, San Francisco Consumer Action (Dec. 14, 1976). In addressing the financial need issue, SFCA's application asserted that the costs to consumers from practices covered by the rule "probably total to hundreds of millions of dollars annually," and concluded that:

> It is not feasible to expect any contributions to the costs of participation by individual consumers. Most are not in a position to individually provide significant 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 for Compensation of SFCA, Used Cars Proceeding 3 (Oct. 3, 1976). The Golden State Mobilhome Owners League was awarded nearly $30,000 for participation in another rulemaking although it had reported an annual budget in excess of one-half million dollars. *See* Application for Compensation of the Golden State Mobilhome Owners League, Inc., Mobile Homes Proceeding (Oct. 20, 1976) (annual revenue anticipated at $510,000); Action Letter from Albert H. Kramer, Director, BCP to Dennis Kavanaugh, Golden State Mobilhome Owners League (June 6, 1977). "However," the application states

> all of the funds obtained [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

submitted only cursory financial data and were granted compensation.[208] The vagueness with which some applicants described their financial resources was attributable to the lack of direction provided by the Guidelines as to the kind of information necessary to demonstrate financial need.[209] Ironically, the Guidelines contained a standard budget form for applicants to use in setting forth their funding requests,[210] but provided no comparable standard form on which to detail the resources applicants already had.

Minor changes in program administration could have increased both the quantity and quality of financial data provided by applicants. What the FTC would have done with more detailed information, however, is unclear. As previously noted, the agency had concluded that the statute did not limit compensation to applicants who were absolutely indigent.[211] Senators Magnuson and Kennedy supported the FTC's interpretation in a formal comment on the Guidelines.[212] Moreover, practical reasons favored the Commission's construction. A conclusion that the Act required absolute unavailability of resources probably would have excluded all but the smallest or narrowest

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> membership 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 for Compensation of the Golden State Mobilhome Owners League, Inc., Mobile Homes Proceeding 2 (Oct. 20, 1976). The documentary record does not indicate whether the FTC questioned this assertion, or sought any further explanation from the group.

208. The "financial need" section of one application in the Children's Advertising Proceeding, for example, stated 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 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.

Application of the Media Access Project, Children's Advertising Proceeding 13 (June 15, 1978). No balance sheet, annual report, or other financial information accompanied this application, which was funded for the full amount requested. *See* Appendix A (comparing amounts requested and amounts actually funded). Another successful application indicated that the applicant's current fund balance was almost $22,000. Application for Compensation of the National Consumers League, Thermal Insulation Proceeding (Dec. 29, 1977) (attachment with Statement of Income and Expenses and Changes in Fund Balance, Jan. 1, 1977-Oct. 31, 1977). The applicant did not truly explain why it could not finance its participation with these funds. Instead, it stated conclusorily that the group would "devote many uncompensated hours" to the proceeding, 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." *Id.* at 3.

209. *See generally* 42 Fed. Reg. 30,483 (1977) (section of application explaining need for compensation should include information on applicant's operating budget, financial statements describing sources and uses of funds, and any other pertinent information).

210. *Id.*

211. A group could be considered unable to participate if it had committed its available resources to other activities. *See generally* text accompanying note 202 *supra*.

212. Letter from Senators Warren G. Magnuson, Chairman, Commerce Committee, and Edward M. Kennedy, Chairman, Subcommittee on Administrative Practice and Procedure to Margery Waxman Smith, Acting Director, BCP (Oct. 27, 1976). The Senators wrote that:

> The statute, by its very language, is concerned solely with the necessity for representation of a particular interest or interests in a given proceeding. It does not require the Bureau to make judgments as to the value of an applicant's commitment of its own resources to *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.

Id. at 5.

organizations from the compensation program. The FTC's interpretation, however, forced the agency to distinguish between an applicant that was financially *unable* to participate and one that was *unwilling* to devote its own funds to participation.

Applying the financial inability standard involved two conceptually related inquiries: whether the applicant could "reprogram" funds in its existing budget to finance participation, and whether it reasonably could raise additional money. This analysis, however, was likely to be both sensitive and beyond the expertise of the FTC. Barring extreme situations, in which the applicant had virtually no operating resources or had all of its operating funds contractually committed to perform specific projects for other grantors, the theoretical possibility existed that the applicant could re-allocate funds. Nevertheless, whether reallocation was also a practical possibility was unclear. Program administrators had no standards to rely on in evaluating the practical possibility of reallocation. A consumer organization's decision to shut down an ongoing research, advocacy, or complaint-handling project in order to participate in a rulemaking proceeding involved considerations of staff expertise, interests, and morale, as well as questions of internal governance procedures, sunk and opportunity costs, membership disaffection, and the likelihood of attracting new volunteers. These issues were largely matters of management discretion.[213]

Whether an applicant could raise additional funds for participation involved similar, and perhaps more difficult, management decisions. To raise membership dues, to impose a special assessment, to increase the price of a service or product,[214] to undertake direct-mail fundraising, or to borrow against future revenues, would all entail significant financial risks to the organization with varying chances of success. An agency like the FTC could not easily say that the applicant ought to bear such risks before it became eligible for funding.[215]

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213. When the applicant is a large-budget organization engaged in multiple activities, these tradeoffs can be extremely complex. The coalition of environmental groups that applied for and received funding in the Thermal Insulation proceeding perhaps best illustrates these problems. Four national environmental organizations—the Sierra Club, Friends of the Earth, Natural Resources Defense Council, and Environmental Defense Fund—submitted a joint application for compensation. Application for Compensation of the Sierra Club, Friends of the Earth, the Natural Resources Defense Council, and the Environmental Defense Fund, Thermal Insulation Proceeding (Jan. 16, 1978). In 1977, these groups had aggregate annual budgets of more than 10 million dollars, and the largest of them, the Sierra Club, had annual expenditures of six and one-half million dollars. *Id.* at 9-10. Yet, all of the groups plausibly claimed to operate at deficits or to have experienced severe budget cutbacks. *Id.* An organization like the Sierra Club not only is large, but is engaged in extremely diverse activities. The Club's funds were 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." *Id.* at 10. Its revenues are derived from "membership dues and admission fees . . . contributions . . . sales, principally of publications . . . royalties on publications . . . and advertising, investment and other income." *Id.* To review such a group's decisions regarding the feasibility of diverting funds from these other operations to finance participation in FTC rulemaking would be a massive undertaking for the Commission. The Commission could rule that large-budget organizations are ineligible, on the theory that entities with sufficient amounts of gross revenues should be able to divert the resources for participation from somewhere in their budgets. Exactly where to draw the line and whether the statute permits it to be drawn at all, however, is by no means clear.

214. Many public interest organizations provide services or products both to their membership and the public at large. For example, the Consumers Union finances its advocacy efforts through sales of *Consumer Reports.* Application for Compensation of the Consumers League, Food Advertising Proceeding 1 (Sept. 23, 1975).

215. An interesting variant of this problem arose when FTC compensation applicants received general budget revenues, as opposed to project grants or targeted contract funds, from government appro-

A futher difficulty with a strict interpretation of the financial inability standard was the likelihood that it would favor groups whose members had minimal stakes in the outcome of the proceeding over those groups comprised of individuals more seriously threatened by a proposed rule. Such an application of the standard would cut against the "interest" test. A group with a strong financial interest in a rule, for example a trade association composed of small retailers who feared the rule would drive many of them out of business, might not meet the test; the overwhelming threat theoretically should motivate members to dig into their pockets in support of group participation. On the other hand, a "collective goods" consumer group whose individual constituents had a minimal pecuniary interest in the outcome could more easily convince the agency that increased dues or other fundraising activities to support participation were not practicable. A strict interpretation therefore was theoretically defensible,[216] but it would have invited public criticism of the program's fairness. As it was, Congress became sufficiently concerned about the FTC's failure to fund small business participation that it set aside twenty-five percent of the program's authorization for representation of regulated industries, and directed the Commission to develop a special "small business outreach" effort.[217]

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priations. Two such applications were submitted in the Holder In Due Course amendment proceeding, and their outcomes seem difficult to reconcile. First, an Assistant Attorney General from the Office of Consumer Protection in the Wisconsin Department of Justice sought travel expenses to testify at the hearings. He claimed that he had "previously requested permission from . . . superiors to testify on this matter in Washington" and had been "advised that departmental funds cannot be authorized for this purpose." Application of Richard A. Victor, Assistant Attorney General, Wisconsin Department of Justice, Holder in Due Course Proceeding 2 (Feb. 26, 1976). The FTC explained the denial of this request 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.

Action Letter from Joan Z. Bernstein, Acting Director, BCP to Richard A. Victor, Assistant Attorney General, Wisconsin Department of Justice, Holder In Due Course Proceeding (March 30, 1976). On the same day this letter was mailed, another action letter granted compensation to the National Consumer Law Center, Inc. (NCLC) for participation in the same proceeding. Action Letter from Joan Z. Bernstein, Acting Director, BCP to the National Consumer Law Center, Inc., Holder In Due Course Proceeding (March 30, 1976). NCLC had originated as a "backup center" under the Office of Economic Opportunity's Legal Services program. At the time, it received all of its operating funds from the federal Community Services Administration (CSA) for the purpose of training, publishing, and litigating for the Legal Services Corporation. Application for Compensation of the National Consumer Law Center, Holder In Due Course Proceeding 1 (March 9, 1976).

It is doubtful that these two applications are distinguishable. In form, the NCLC is a nonprofit corporation; in fact, it is arguably as much a government entity as the Wisconsin Department of Justice. As a matter of policy it is also questionable 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. As far as the written record reflects, however, these questions were never considered by the FTC. Later decisions seem to follow the same pattern. *See generally* Appendix A (applications of NCLC, Vocational Schools & Credit Practices Proceeding, and applications of Consumer Protection Division, Department of Attorney General of Massachusetts, Mobile Homes Proceeding). The 1977 Guidelines seem to imply, however, that state and local government entities are eligible for compensation. *See* 42 Fed. Reg. 30,481 (1977) ("Under these definitions, any entity except a part of the Executive branch of the U.S. Government can apply for compensation").

216. If, as posited by the theory of collective goods, the principal purpose of a compensation provision is to remedy the disincentives to joint protection of small, diffuse interests, then funding logically should be denied to those with sufficient incentive to organize and to support participation—as trade association members would have if they each faced a sufficiently high probability of being driven out of business.

217. Pub. L. No. 96-252, § 10(b)-(c), 94 Stat. 374 (1980).

Timing problems also could have developed under rigorous application of the financial inability standard, because program administrators would have had to decide when an applicant's budget truly was "committed" to other activities. In proceedings lasting several years, the participants passed through several budget cycles in which they had some latitude to reallocate their funds in response to changing priorities. Thus, the agency could have limited any grant of funds to the current fiscal cycle of the applicant organization and required a fresh justification for later claims of financial inability. Moreover, current requirements that agencies periodically publish regulatory agendas describing their plans for future rulemaking proceedings complicate the determination of whether an applicant knew of the rule in time to modify its budget.

Finally, the administrative costs of applying a strict financial inability test probably would have been prohibitive. The agency not only would have needed to collect and to analyze detailed financial data under ambiguous standards, but also could have become embroiled in collateral disputes over public disclosure of this information. Few organizations are willing to have their financial secrets exposed to rivals or opponents, as was illustrated by one Freedom of Information Act dispute over financial data in a compensation application.[218] More disputes over disclosure might have arisen had the FTC collected more detailed information about the financial management and re-

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218. This problem arose when a dealers' assocation that had received some financial support from manufacturers sought compensation from the FTC. *See generally* Application for Compensation of the National Manufactured Housing Federation (NMHF), Mobile Homes Proceeding (November 28, 1977). A trade association that represented manufacturers requested disclosure of the applications under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (1976). *See* Letter from Richard C. Foster, Deputy Director for Operations, BCP to C.W. Quincy Rodgers, Leighton & Conklin, Mobile Homes Proceeding (February 8, 1978) (counsel to Manufactured Housing Institute submitted FOIA request dated January 19, 1978 for copy of NMHF's application for compensation). The dealers' association urged the FTC to deny the request, arguing that disclosure might compromise its independence and temper its advocacy in the proceeding. Counsel for the association wrote that:

> [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.

Letter from Quincy Rodgers, Counsel for NMHF to Bonnie Naradzay, Special Assistant for Public Participation, BCP (January 20, 1978). The FTC denied release of a portion of the financial information requested on the ground that it was exempt as confidential financial information whose release would cause competitive harm. *See* Letter from Richard C. Foster, Deputy Director for Operations, BCP to Quincy Rodgers, Leighton & Conklin (February 8, 1978) (under § 552(b)(4) of FOIA information withheld as competitively harmful). Whether this interpretation could withstand a court challenge, however, is unclear, especially if the application in question were not submitted by a business group.

These confidentiality disputes continued into the subsequent stages of the proceeding, when NMHF applied for supplemental funding. *See* Letter from Michael R. Lemov & Quincy Rodgers, Counsel for NMHF to Bonnie Naradzay, Special Assistant for Public Participation, BCP (January 31, 1978) (requesting confidential treatment for attorneys' time sheets as privileged work product); Letter from Michael R. Lemov & Quincy Rodgers to Bonnie Naradzay (February 1, 1978) (requesting confidential treatment of application for supplemental funding for post-hearing stages because lawyers' strategies are confidential work product); Letter from Michael R. Lemov to Bonnie Naradzay (April 24, 1978) (requesting confidential treatment of financial information under § 552(b)(4) of FOIA); Letter from Quincy Rodgers to Bonnie Naradzay 2 (May 11, 1978) (requesting confidential treatment of billing information that reflects applicant's financial condition and attorneys' strategies).

source allocations of its applicants. Considering these many problems, the FTC was reasonable in according a relatively minor role to the financial inability standard, and in accepting at face value applicants' assertions of financial need. Other agencies operating direct funding programs appear to have adopted similar approaches. Although the wording of the eligibility criteria varies widely, the financial inability tests amount to whether an applicant's claim of financial need seems reasonable to the agency.[219] Barring the adoption of a completely different approach to funding participation,[220] such discretion cannot easily be confined.

D. MANAGING THE MONEY FLOW

The final implementation task the program administrators faced was to establish a system regulating the disbursement of funds to compensated participants. The administrators also needed to address tangential questions relating to the amounts to be paid, the timing of the payments, and assuring proper use of the funds. As in other areas of implementation, the statute provided little guidance to the program administrators who were hampered both by their lack of experience and by lack of staff.

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219. The Food and Drug Administration's (FDA) compensation rules, for example, require the applicant to submit more detailed information than those of the FTC. *See* 44 Fed. Reg. 23,053-54 (1979). The FDA rules, however, then direct the decisionmakers to assess the information under a broad reasonableness standard. *Id.* at 23,055. They must find that "[t]he applicant does not have available, and cannot reasonably obtain in other ways, sufficient resources to participate effectively without reimbursement." *Id.* The Environmental Protection Agency's (EPA) temporary compensation rules under the Toxic Substances Control Act generally direct applicants to show how they comply with the statute's financial eligibility requirements, but they also require applicants to provide some detailed discussion of potential "opportunity costs" that would be incurred. 42 Fed. Reg. 60,911 (1977). The regulation provides that:

> It will be helpful if, in cases where eligibility is asserted on the grounds of 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 a statement of curtailment should be supported by a budget . . . .

Id.

This novel approach presumes that the applicant will curtail other activities and participate in the proceeding if funding is denied. In such a case, it would be difficult to find the applicant truly financially unable to participate. The Department of Agriculture's proposed compensation regulations relative to financial eligibility criteria are somewhat longer than the FTC's or EPA's, but nevertheless simply direct the decisionmakers to consider "[t]he amount of an applicant's assets that are firmly committed for other expenditures." 44 Fed. Reg. 17,510 (1979).

One agency that has adopted compensation rules to address the "absolute indigency" situation also relies on a reasonableness test. The Federal Communications Commission's standards 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."
>
> . . .
>
> 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.

In re Rules and Policies to Facilitate Participation of Indigent Persons in Commission Proceedings, 61 F.C.C. 1143, 1144, 1148-49, app. A., § 1.224(c)(2) (1976).

220. An alternative approach would provide matching funds for specified categories of applicants without regard to their available resources.

1. Levels of Compensation

Disputes over the maximum levels of reimbursement that could be awarded for compensated activities were the source of continuing friction between the FTC and the compensation applicants. This conflict centered on two related issues: maximum attorneys' fees and the computation of overhead.

The Magnuson-Moss Act authorized the Commission to "provide compensation for reasonable attorneys' fees, expert witness fees, and other costs of participating in a rulemaking proceeding."[221] As program administrators tried to give content to the "reasonable fees" standard, the FTC and the public interest bar divided over what each considered the proper method for calculating reimbursement of staff counsel fees to public interest groups. This question technically turned on the construction of two phrases in the Act. The Commission emphasized the statute's reference to "costs" of participation and declared that staff lawyers could be compensated only for their actual salaries. The applicant groups argued that "reasonable fees" ought to be determined by reference to the current market rate for lawyers with comparable qualifications and experience. By 1978, the agency reconsidered its construction of the statute and requested a ruling from the Comptroller General.[222] The Comptroller General confirmed the accuracy of the FTC's initial interpretation: to grant compensation in excess of 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."[223]

Because of the substantial gap between the market rate earned by private lawyers representing business interests and the fees charged by the "public interest law firms" retained by many successful compensation applicants, a similar problem arose regarding the maximum fees reimbursable for outside counsel services. The FTC consistently asserted that maximum fees should be set below the general market rate, but it had considerable difficulty determining exactly what that ceiling should be. After trying several approaches, the Commission eventually settled on a fee scale extrapolated from government lawyers' salaries, which had sliding limits based on an attorney's years of experience.[224] Representatives of the public interest bar criticized this position, complaining that the FTC's fee schedule gave inadequate recognition to the limited number of billable hours most public interest lawyers accumulated and the relatively high overhead costs many of them incurred.[225] This charge shifted the focus of the dispute to permissible overhead rates, which proved surprisingly difficult both to calculate and to establish.

The diverse collection of organizations dealt with by the FTC created some of this difficulty. These organizations ranged from small shoestring operations

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221. Pub. L. No. 93-637, § 202(h)(1), 88 Stat. 2183-2203 (1975) (codified at 15 U.S.C. § 57a(h)(1) (1976)).

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

223. *In re* Attorneys' Fees—Federal Trade Commission, 57 Comp. Gen. 610, 612 (1978).

224. *See* 42 Fed. Reg. 30,485 (1977) (maximum hourly rate of $42 per hour for attorney with more than five years experience).

225. Observation Report of Meeting Between FTC Staff and Representatives of the Council for Public Interest Law (April 30, 1976) (copy on file at *Georgetown Law Journal*).

with minimal staffs and rudimentary accounting practices to sophisticated entities with annual budgets totalling several million dollars. Thus, tremendous variances were not uncommon either in the percentage of overhead expenses incurred while participating in TRR proceedings, or in the ability of the groups to present detailed breakdowns of their overhead costs. The Guidelines compromised on the overhead question by offering applicants three alternative methods of computation.[226] Although program administrators were not entirely satisfied with this rather cumbersome system, they could devise no other workable alternative.

2. Timing of Disbursements

Awarding compensation to an applicant involved a two-step process for the FTC. First, the agency committed funds for the activities the applicant proposed to undertake, then it actually disbursed the money. Agency policy was conservative with regard to making early funding obligations, but was liberal with regard to providing advance payments once agency resources had been committed.

By 1977, the FTC had established a firm policy of deciding upon only those portions of funding requests that related to the next immediate stage of the proceedings. If an applicant sought funding for a later stage, the program administrators would defer their decision and treat this portion of the application as a "supplemental request" to be acted upon as the relevant stage of the proceedings drew near.[227] This practice had several administrative advantages. The agency maximized the resources available for other applicants by avoiding the premature commitment of funds that might not be expended in the same fiscal year and thus would revert to the Treasury. Deferral also allowed the FTC an opportunity to eliminate funding if the recipient had performed poorly in the early stages of a proceeding. Despite the additional administrative burdens the supplemental applications imposed on the FTC and the applicants, and the difficulty involved in meshing the compensation decisions with the schedule of the proceedings,[228] on the whole this system worked reason-

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226. If the organization had an audited rate established by the General Accounting Office, it could apply that rate; alternatively, the group could use a flat rate of 25% of employee salaries (excluding secretarial), or it could try to justify a different overhead rate. 42 Fed. Reg. 30,485 (1977).

227. The Guidelines provided:

> 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.

Id. at 30,483.

228. For example, the Rules of Practice provided 60 days after issuance of the posthearing staff report during which interested persons could submit final comments. These reports were often several hundred pages long, with copious citations to the record. As a practical matter, it would have been impossible for an applicant to review this document carefully, apply for compensation, await the agency's decision, and still have any time remaining in which to prepare final comments within this 60-day period. The program administrators responded to this problem by acting on applications for final comments before the staff had issued its report, but after the Presiding Officer had made his final report

ably well.

Delays in disbursement could cause hardship to the applicants, and perhaps undermine effective participation. Many consumer groups, and some trade associations, seemed to operate on minimal budgets with insufficient "front money" to prepare their presentations. The FTC recognized this problem, and in its initial Rules of Practice the agency authorized advance payments to compensated groups.[229] Yet even with this advance funding policy, some consumer groups reported serious cash flow problems when payment of compensation funds was delayed.[230]

3. Audit and Quality Control

The final money management task the program administrators faced was to design an adequate monitoring system to prevent the misuse of public funds. This system involved two related operations: auditing, to ensure that claims for reimbursement were consistent with agency standards and were supported by adequate documentation; and quality control, to ensure that the compensated groups performed competently. In addition, a good monitoring system could expose more general problems in the program, and suggest areas needing improvement. Program administrators recognized the need for adequate follow-up capability from the early days of implementation,[231] but they had difficulty finding the necessary personnel to carry out their plans. In 1977, the performance of compensated groups was evaluated systematically in preparation for congressional hearings on bills providing for direct funding authority to other agencies. Program administrators solicited reports from both rulemaking staffs and presiding officers on the quality of work produced by

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available. *See generally* Action Letter from Albert H. Kramer, Director, BCP to Bruce J. Terris, Counsel to the National Council of Senior Citizens, Inc., the Consumer Affairs Committee of Americans for Democratic Action, the New York Public Interest Research Group, Inc., the Continental Association of Funeral and Memorial Societies, Inc., Arkansas Consumer Research, and the Central Area Motivation Program—Consumer Action Project, Funeral Practices Proceeding (Sept. 30, 1977).

Timing problems also developed when the FTC began to experiment with modified procedures that substituted a single rulemaking notice for the two-stage Initial and Final Notice procedure embodied in the Rules of Practice. In the first proceeding to use a single notice approach, the agency rejected two applications because it did not believe the proposed research could be completed within the available time. Action Letter from Richard C. Foster, Deputy Director for Operations, BCP to Miles Friedan, Executive Co-Director, California Public Interest Research Group, Thermal Insulation Proceeding (Jan. 24, 1978) (sufficient preparation time a problem); Action Letter from Richard C. Foster, Deputy Director for Operations, BCP to Albert Sternam, Special Projects Director, Arizona Consumers Council, Thermal Insulation Proceeding (Jan. 24, 1978) (reimbursement for proposed questionnaire denied because lack of sufficient time to carry out survey of professional quality). In contemporary rulemaking, the regulatory agenda and advance notice of proposed rulemaking can serve the function of the FTC's two-notice procedure if the advance notice is publicized adequately. *Cf.* The FTC Improvements Act of 1980, Pub. L. No. 96-252, § 8, 94 Stat. 374 (Commission required to publish and transmit to Congress advance notice of proposed rulemaking).

229. 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").

230. *E.g.*, Interview with Irmgard Hunt, Consumer Action Now-Council on Environmental Alternatives (April 3, 1979) (cash flow from FTC to compensated groups must move faster); Interview with Dennis Kavanaugh, Golden State Mobilhome Owners League, Inc. (March 28, 1979) (same); Interview with Robert Choate, Council on Children, Media and Merchandising (March 23, 1979) (biggest time problem is delay in receiving advances and reimbursements); Interview with John Pound, Consumer Action of San Francisco (Aug. 2, 1976) (same).

231. Interview with Bonnie J. Naradzay, Special Assistant for Compensation, FTC (Oct. 19, 1976) (initially, oversight too sporadic).

compensated participants. The results of this investigation were presented in congressional hearings held during the spring of 1977. At these hearings, FTC officials announced their intention to audit groups that had received compensation.[232] Although audits began shortly afterward,[233] the first audit was not completed until the spring of the following year,[234] and an auditor was not assigned to work full time on the compensation program until February, 1979.[235]

This delayed audit of compensated groups' expenditures caused some resentment among organizations that had participated in the early proceedings. They complained, with some justification, that they were being held accountable to standards that either had not been explained to them, or that had not even existed when they spent the money.[236] The Guidelines markedly changed the advice and information provided to applicants. Prior to 1977, the FTC's rules of practice[237] and action letters on particular applications[238] contained only vague statements concerning a recipient's responsibility to maintain suitable records. The Guidelines, however, instructed applicants to retain all financial records relating to expenditures for the proceeding for a period of three years,[239] advised them that the presiding officer would evaluate the quality of their work and the reasonableness of their claims,[240] and informed them of their right to an administrative appeal of an adverse audit report.[241] Some disputes might have been avoided if similar notice had been furnished to early

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232. *Public Participation in Agency Proceedings: Hearings on H.R. 3361 and Related Bills Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 520 (1977) (statement of Margery Waxman Smith, Acting Director, BCP, FTC). Ms. Smith asserted that:

> 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 governments'.[sic]. Whatever the final structure of any program enacted by Congress, the necessary administrative infrastructure should be created concurrently.

Id. See also id. at 531 (next fiscal year's budget includes request for additional fiscal officer to audit compensation awards; agency plans to audit all recipients).

233. Interview with Robert Walton, Deputy Director, Division of Budget and Finance, FTC (July 19, 1979) (FTC undertook internal auditing function) [hereinafter Walton Interview].

234. Confidential FTC Document 32.

235. Walton Interview, *supra* note 233.

236. *See* Letter from David A. Swankin, Swankin & Turner to Margery Waxman Smith, Executive Director, FTC 2 (Nov. 30, 1978) (grossly inequitable to apply guidelines in ex post facto manner).

237. 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 fulfilled; rather, the application and the FTC's action letter constituted the specification of activities approved for funding.

238. *See generally* Action Letter from Joan Z. Bernstein, Acting Director, BCP to Kay Pachtner, Executive Director, Consumer Action of San Francisco, Vocational Schools Proceeding 2 (Oct. 24, 1975). This letter, which followed the general format of early action letters, simply advises the applicant that: "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." *Id.*

239. 42 Fed. Reg. 30,484 (1977).

240. *Id.*

241. *Id.* (written appeal must be filed with Director of Bureau of Consumer Protection within thirty

compensation recipients. Many of the reimbursement disallowances that resulted from the first wave of audits[242] were attributed to the groups' failure to maintain sufficiently detailed records[243] and to their uncertainty over the treatment of donated services under the compensation program.[244] The FTC's failure to conduct timely audits also concerned the 1979 congressional oversight committees; consequently the General Accounting Office was directed to conduct full field audits of all funding recipients.[245]

III. SUMMARY: EVALUATING THE FTC'S IMPLEMENTATION

The most visible shortcoming in the FTC's implementation of the public participation funding program was its tardiness in elaborating the criteria for granting compensation, in providing advice and assistance to applicants, and in monitoring the use of compensation funds. These delays were largely attributable to staff shortages, and most of the deficiencies were cured by the end of the period covered by this study. Viewed purely in administrative terms, the implementation effort was at least partially successful; the program administrators performed as well as could be expected with the resources available to them. It is less clear, however, that their interpretations of the statute were substantively sound.

The language of the Magnuson-Moss Act was sufficiently broad to encompass the two different theories of public participation that have been described as the "technocratic" and "democratic" forms of representation. In practice, the program administrators seemed to place primary emphasis on the technical competence of the applicant and the quality of evidence or argument it wished to present. Several reasons could explain the primacy of this concern for the technical quality of participation. The procedures and issues in most of the proceedings were complicated, and it was doubted that unsophisticated "grassroots" participation would contribute much to the agency's final decision. Many of the applicants were eager to undertake technically complex activities such as survey research or cross-examination, and this interest reinforced the

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days). After administration of the compensation program was shifted to the General Counsel's office, appeals were taken to the FTC's Executive Director. Walton Interview, *supra* note 233.

242. According to the Deputy Director of the FTC's Division of Budget and Finance, the rate of disallowance in the rulemaking compensation program was not disturbing. Walton Interview, *supra* note 233.

243. *Id.*

244. In one instance, a recipient organization that received funding for consultant services was asked to repay the money when an audit revealed that the consultant had not been paid. The recipient group asserted that the consultant had donated his services to the organization, and that for FTC purposes the economic effect of the transaction was 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 no real cost had accrued to the organization when they had neither been billed for nor paid the fee. Confidential FTC Document 33.

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

245. S. REP. NO. 184, 96th Cong., 1st Sess. 5, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 1073, 1077.

belief held by some program administrators that the FTC needed better technical evidence in its rulemaking proceedings. Finally, standards relating to the applicant's competence and the quality of proposed research generally were easier to apply than the nebulous "interest" tests. The pattern of funding that resulted from this emphasis on technocratic factors, however, left the agency vulnerable to charges that its administration of the compensation program was neither balanced nor impartial. Part Two of this article addresses the meaning of "balance" in a program of this nature, and whether it can be measured.

PART TWO: RESULTS

I. THE GOALS OF THE PROGRAM

In order to evaluate the effects of a program and the wisdom of an agency's decisions implementing it, the logical starting point is to determine the object of the program. The Magnuson-Moss compensation provision, however, never clearly indicated the objectives of the drafters.[246] The only available indication of intent was an unconfirmed report that some legislators feared that the more formalized procedures required by the Act would hinder the participation of consumer organizations and other constituency groups in trade regulation rulemaking. If this report is accurate, the compensation provision seems premised on a belief that agencies will make more informed decisions if participation is balanced properly among all competing interests.

The Senate Committee on Governmental Affairs noted in its regulatory reform studies that agencies often hear only the regulated industry's side of a controversy and rarely receive much information from consumers or other public constituencies.[247] This view suggests two possible bases for evaluating

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246. *See* notes 65-70 *supra* and accompanying text (examining conflicting objectives of Magnuson-Moss statue).

247. The situation was portrayed thus:

> Agencies must often depend on outside sources of information and political support. This outside input largely comes from regulated firms with a great stake in regulatory decisions. By contrast, the personal stake of individual citizens in these decisions is usually too small to warrant intervention—or even attention . . . .
>
> Thus, we do not need to subscribe to the theory of regulatory "capture" in order to explain this tendency toward industry domination. Rather, the reason appears to be simply in the fact that regulatory agencies respond to the inputs they receive—in the same fashion as any other decisionmaking body. And, until the recent past, the source of almost all input to the agencies was the regulated industries.

SENATE COMM. ON GOVERNMENTAL AFFAIRS, STUDY ON FEDERAL REGULATION, VOL. III: PUBLIC PARTICIPATION IN REGULATORY AGENCY PROCEEDINGS, S. DOC. NO. 71, 95th Cong., 1st Sess. 1-2 (1977). The report described the following example of imbalance involving the FTC:

> There is substantial evidence that this imbalance of representation does, in fact, exist to the detriment of the regulatory process. Robert Pitofsky, former director of the Federal Trade Commission's Bureau of Consumer Protection has stated that, "In vast areas of Commission regulatory activities, no consumer input was ever felt by any Commissioner or staff member to my knowledge."
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> For example, on flammable fabrics standards, Pitofsky stated that industry representatives were constantly urging the Commission to modify standards and increase exemptions from standards, but there was no input from consumer representatives. That this is a problem found not only in Federal agencies, but generic to regulatory agencies in general, is suggested by former Pennsylvania Insurance Commissioner Herbert Denenberg who stated, after his first 2 years as commissioner, that he had never encountered an insurance expert representing

the program: (1) whether compensation grants affected the array of interests represented in proceedings, and (2) whether this participation significantly influenced the agency's final decisions.

In the FTC setting, both of these expected effects are extremely difficult to assess. Detailed statistics are available for some factors, such as the balance of testimony and advocacy in the proceedings, but they are subject to conflicting interpretations. Moreover, no objective measures exist to determine the impact of compensated participants on a final decision; assessment must depend upon the subjective judgments of participants and observers who were close to the proceedings. The difficulty of quantifying or demonstrating convincingly the program's actual accomplishments may have contributed to the FTC's problems during the 1979 legislative oversight process. Discussion at those hearings focused primarily on perceived imbalances that were readily measured, such as concentrations of grants to groups on the east and west coasts,[248] or to groups that supported the agency's position.[249] In other words, balance in the pattern of funding decisons was easier to understand and measure than balance in the underlying proceedings. This congressional criticism represented a fundamental shift in premises; if, as originally assumed, compensation was needed to offset systematic imbalances in the proceedings, one would not expect perfect balance in the funding decisions. The FTC and other supporters of the program, however, were unable to gain acceptance of this reasoning. Congress ultimately imposed controls designed to achieve a more even distribution of the funds.[250]

A. BALANCED ADVOCACY

In order to analyze the effect of the compensation program upon balanced advocacy and upon final FTC decisions, seven early proceedings in which compensation was awarded were examined in detail.[251] Although the characteristics and activities of compensation participants were readily identifiable, less detailed information was available regarding the program's impact on agency decisions because only one of these seven proposed rules had reached final agency action when data collection for this study ended.[252]

The two most important activities performed by the compensated partici-

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consumer groups. He contrasted this situation to the daily presence of "dozens of insurance lobbyists" that present the views of the insurance industry.

Id.

248. *See* S. REP. NO. 184, 96th Cong., 1st Sess. 16-17, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 1073, 1087 (additional views of Sen. Danforth).

249. *See Senate Panel Grills Pertschuk on Funding of FTC Consumer Groups*, [1979] 907 ANTITRUST & TRADE REG. REP. (BNA) 5, § A (Senators urged FTC to seek out wider variety of groups to fund).

250. *See* S. REP. NO. 500, 96th Cong., 1st Sess. 22, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 1102, 1123 ("These restrictions will insure that a small number of groups do not receive an inordinate share of the available funds, and that the funds are provided to a broader cross section of the eligible small business and public interest applicants"). For a summary of the 1980 amendments to the compensation provision, see notes 26-27 & 124 *supra*.

251. The proceedings are Food Advertising, Care Labeling Amendment, Holder in Due Course Amendment, Protein Supplements, Ophthalmic Goods, Funeral Practices, and Hearing Aids. To study these proceedings and to collect information about the characteristics and activities of compensated participants, the author relied on witness survey questionnaires, hearing observations, and interviews.

252. *See* ACUS PHASE I REPORT, *supra* note 31, § I.

pants were presenting witness testimony and serving as "group representatives." The group representatives resembled parties in litigation. Through counsel they examined and cross-examined witnesses at the hearing, submitted documents for the record, commented on the reports of the staff and presiding officer, and made oral presentations to the Commissioners. Often the same group was funded both to present testimony and to act as group representative in a given proceeding.[253]

1. Witness Testimony

Most compensated groups sought and received funding to present witness testimony.[254] Nonetheless, the consumer "presence" at hearings, as measured by the number of individual consumers and consumer group spokespersons who testified in the seven proceedings, was relatively modest. Individual consumers, for example, comprised only eleven percent of the total number of witnesses who testified, and consumer group representatives accounted for only another seven percent.[255] These aggregate figures, however, reveal little about the compensation program because some of these consumer and consumer group witnesses appeared without compensation, while other types of witnesses, such as experts or government officials, were recruited and supported by compensated consumer groups.

Before examining data on the costs of testimony and the sources of support for witnesses, it may be useful to compare the overall proportions of various types of witnesses who appeared in trade regulation rulemaking before and after passage of the Magnuson-Moss Act. As Table A below indicates,[256] the most dramatic changes occurred in the "industry" and "expert" categories. Although industry had dominated the pre-amendment hearings with more than

253. *See generally* Appendix A.

254. Only nine out of 68 applicants did not receive reimbursement for witnesses. *See* Appendix A. Of those groups that unsuccessfully sought funding, four of them were granted compensation after the hearing stage—when it was too late to present testimony. *Id.*

255.

Kinds of Witnesses Testifying in Proceedings

Witness Constituency Category	Number	Percent Total
Individual Consumer	107	11%
Consumer Group Spokesperson	67	7%
Retailer or Fee-for-Service Professional	238	24%
Manufacturer or Wholesaler	43	4%
Trade or Professional Association	74	7%
Government-Special Jurisdiction Agency	101	10%
Government-General Jurisdiction Agency	18	2%
Government-Elected Official	32	3%
Expert	228	23%
Other/Unknown	92	9%
	1,000	100%

256. Data on witness characteristics in pre-Magnuson-Moss proceedings were taken from the cover sheets of FTC hearing transcripts, and therefore may be somewhat less accurate than data on post-amendment witnesses, which were generated by questionnaire responses, hearing observations, telephone follow-ups, and transcript reviews.

TABLE A

Comparison of Witness Mix Testifying Before and After Passage of the Magnuson-Moss Act

	Individual Consumers and Consumer Group Representatives		Industry (Retail, Fee-for-Service, Trade or Professional Association).		Government Officials		Experts		Others	
	N	%	N	%	N	%	N	%	N	%
All TRR Hearings Before Magnuson-Moss Act*	112	15.3%	368	52.0%	105	14.8%	86	12.2%	37	5.2%
First Nine Hearings After Magnuson-Moss Act*	226	17.8%	465	36.5%	253	19.9%	251	19.7%	78	6.1%
Percent Change		+2.0%		−15.5%		+5.1%		+7.5%		+0.9%

* Excluding Vocational Schools, in which part of the hearing was held before passage of the Magnuson-Moss Act, and part after.

one-half of all witnesses, this figure dropped substantially after the statutory amendments. Industry witnesses remained the largest single category, but comprised only about one-third of the total. The most substantial increases were reflected in the proportions of experts and government officials. These increases correspond with the more technical nature of some of the post-amendment proceedings.[257] Thus, the effect of the compensation program on the mobilization of expert witnesses should be a matter of particular interest.

The compensation statute assumed that costs deter public testimony in FTC proceedings. To determine the average participation costs, witness questionnaires asked respondents to report their total out-of-pocket expenses for testifying in a proceeding, and to estimate what amount of the total would be reimbursed. For those witnesses who did report expenses, the median cost figure was $175. Nearly one-half of the witnesses (45.3%) incurred expenses of $125 or less. The distribution of costs was fairly uniform among the primary

257. These aggregate trends mask considerable variances from one proceeding to another. One way to illustrate this variance is to compare the high and low percentages of different witness types in the Magnuson-Moss hearings with the comparable percentages in the larger, more recent pre-amendment hearings:

interest groups—industry members, trade associations, consumer groups, and expert witnesses. Government officials and individual consumers, however, reported substantially lower costs for testifying.[258]

	Witness Type			
Pre-Amendment	Consumer	Industry	Government	Expert
Low%	0 (Franchising)	17.9 (Holder Base Rule)	2.0 (Care Label)	6.1 (Door-to-door)
High%	41.1 (Holder Base Rule)	78.1 (Franchising)	31.8 (Door-to-door)	32.0 (Detergents)
Post-Amendment				
Low%	2.9 (Holder Amendment)	5.9 (Protein Supplements)	5.8 (Food Advertising)	3.4 (Used Cars)
High%	24.6 (Hearing Aids)	57.1 (Holder Amendment)	36.2 (Used Cars)	64.7 (Protein Supplements)

The aggregate increase in expert witnesses in the post-amendment hearings is almost entirely attributable to two proceedings, Food Advertising and Protein Supplements, in which more than 60% of the witnesses were experts; none of the other post-amendment hearings had more than 21% expert witnesses.

258. The costs reported were relatively low, in part because the FTC held a number of regional hearings in each of the seven proceedings. Thus, witness travel expenses were minimized.

Percentage of Each Type of Witness Reporting Specified Amount of Out-of-Pocket Expenses

Type of Witness	Expenses None	$1-$50	$51-$125	$126-$250	$251-$500	Over $500
Individual Consumer (n=65)	7.7	38.5	18.5	16.9	13.8	4.6
Consumer Group Spokesperson (n=32)	6.3	34.4	15.6	15.6	9.4	18.8
Industry-Retail (n=87)	4.6	4.6	13.8	27.6	28.7	20.7
Professional Fee-for-Service (n=68)	7.4	17.6	17.6	14.7	26.5	16.2
Trade or Professional Association (n=36)	5.6	11.1	19.4	19.4	16.7	27.8
Industry-Manufacturer or Wholesaler (n=26)	7.7	7.7	19.2	11.5	23.1	30.8
Government-Consumer Protection (n=20)	10.0	20.0	40.0	15.0	10.0	5.0
Government-Occupational Licensing (n=35)	8.6	5.7	20.0	25.7	34.3	5.7
Government-Executive, Legislative, Atty-Gen. (n=30)	16.7	40.0	26.7	10.0	6.7	0
Expert-University (n=100)	3.0	18.0	20.0	26.0	16.0	17.0
Expert-Nonuniversity (n=47)	4.3	23.4	8.5	14.9	25.5	23.4
Other (n=37)	16.2	29.7	18.9	21.6	2.7	10.8

Number of missing observations: 94

Total costs are less significant than unreimbursed expenses in assessing the effectiveness of the compensation program, because the prospect of uncompensated expenses is most likely to deter potential witnesses from testifying. Table B summarizes these anticipated costs for some of the primary interest groups.

TABLE B

Percentage of Each Type of Witness Reporting Specified Amounts of Uncompensated Expenses

Type of Witness	Uncompensated Expenses: None	$1-50	$51-125	$126-250	$251-500	Over $500	"Profit"
Consumer Group Representative (n=29)	48.3	41.4	3.4	3.4	0	3.4	0
Industry-Retail (n=79)	30.4	8.9	8.9	24.1	17.7	10.1	0
Industry-Manufacturer, Wholesaler (n=23)	65.2	0	8.7	4.3	4.3	8.7	0
Professional Fee-for-Service (n=66)	19.7	19.7	13.6	15.2	19.7	10.6	1.5
Trade or Professional Association (n=30)	76.7	0	6.7	3.3	3.3	10.1	0
Expert-University (n=90)	36.7	25.6	11.1	14.4	7.8	2.2	2.2
Expert-Nonuniversity (n=44)	38.6	22.7	13.6	6.8	4.5	9.1	4.5

These figures can be interpreted in various ways. For example, the relatively low proportion of witnesses reporting uncompensated expenses of more than $125 may indicate either the generally low cost of testifying in FTC rulemaking, people's reluctance to spend much money without some prospect of reimbursement, or the effects of the compensation program. Fortunately, more direct information concerning the number and type of witnesses funded under the program is available.

Responses to the witness questionnaire show that only six percent of the respondents expected to receive compensation from a consumer group.[259] The most frequently cited sources of compensation were trade associations (22%), employers (16%), and the FTC (14%). More than forty percent of the respondents anticipated no reimbursement of their out-of-pocket expenses. Table C shows more specifically that the compensation program supported the testimony of some consumer group representatives and a few experts and individual consumers.

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259. The complete breakdown of questionnaire responses is as follows:

Frequencies of Sources of Compensation (Survey Respondents in 7 Proceedings)		
No Compensation	272	(41%)
Compensated by FTC	95	(14%)
Compensated by Consumer Group	37	(6%)
Compensated by Trade Association	142	(22%)
Compensated by Employer	102	(16%)
Compensated by Consumer Group and Employer	1	(0%)
Compensated by Trade Association and Employer	7	(1%)
	656	(100%)

If the respondents traced the funding back through the consumer group to its ultimate source in the FTC, these responses may reflect some under-reporting in the "compensated by consumer group" category and corresponding over-reporting in the "compensated by FTC" category. The questionnaire was open-ended on this point. Witnesses were asked, "Will you be compensated or reimbursed for any of these expenses? If yes, by whom?" Responses were coded according to the categories noted above and, when feasible, they were checked against witness lists obtained from the FTC and compensated consumer groups. Needless to say, compilation of these kinds of statistics would be much easier and cheaper if the FTC and other agencies administering compensation programs required compensated participants to supply information on a standard form about the witnesses they sponsored.

TABLE C

Source of Compensation Reported by Different Categories of Witnesses

Type of Witness	Source of Compensation: Consumer Group		FTC		Trade, Professional Assn.		Employer		None or no data	
	N	%	N	%	N	%	N	%	N	%
Individual Consumer	5	6.8	11	15.1	10	13.7	1	1.4	45	61.6
Consumer-Group Representative	14	34.1	14*	34.1	0	0	0	0	13	31.7
Industry-Retail	0	0	4**	4.1	28	29.2	18	18.8	43	44.8
Professional Fee-for-Service	1	1.2	1	1.2	28	35.0	8	10.0	41	51.3
Trade of Professional Association	0	0	0	0	28	62.2	3	6.7	14	31.1
Manufacturer or Wholesaler	1	3.7	0	0	9	33.3	12	44.4	3	11.1
Government-Consumer Protection	2	7.4	1	3.7	1	3.7	11	40.7	12	44.4
Government-Occupational Licensing	0	0	2	5.4	6	16.2	14	37.8	15	40.5
Government-Executive Legislative, Atty. Gen.	0	0	10**	25.8	2	4.8	8	19.0	22	52.4
Expert-University	9	8.1	37+	33.3	15	13.5	15	13.5	33	29.7
Expert-Nonuniversity	0	0	17	30.9	9	16.4	8	14.5	20	36.4
Other	5	11.6	13++	6.9	7	16.3	8	18.6	20	46.5

* Includes four respondents compensated by FTC and trade association.
** Includes one respondent compensated by FTC and employer.
\+ Includes one respondent compensated by FTC and trade association, and one compensted by FTC and employer.
++ Includes two respondents partly compensated by FTC.

Overall, then, the compensation program could not have shifted the balance of witnesses very far in any direction. The notion of balance, however, implies more than the proportions of different types of witnesses who testified. In a proceeding designed to produce a reasoned decision, the content of testimony is a more significant consideration.

The witness survey inquired whether the respondent generally favored or opposed the proposed rule. In the aggregate, pro-rule witnesses predominated: 56.5 percent of all respondents supported the rule in whole or in part, and 43.5 percent thought it would be harmful or ineffective.[260] Most of the witnesses supported by compensation funds would be expected to favor the proposed rule because the consumer groups were the only applicants funded to testify in the seven core proceedings. It is not surprising that the consumer groups almost exclusively recruited and compensated pro-rule witnesses. Nevertheless, as Table D indicates, the FTC staff in these proceedings did virtually the same thing, on a larger scale. More than ninety percent of the witnesses who reported that they were funded in whole or in part by the FTC supported the proposed rule. Moreover, the FTC compensated more than double the number of witnesses the consumer groups did.

260. The proportions are generally consistent across proceedings.

	Witnesses Favoring		Witnesses Opposing	
Rule	N	%	N	%
Protein Supplements	30	62.5	18	37.5
Food Advertising	77	60.2	51	39.8
Care Labeling	41	69.5	18	30.5
Holder in Due Course	13	41.9	18	58.1
Eyeglasses	104	57.1	78	42.9
Hearing Aids	122	64.9	66	35.1
Funeral Practices	143	47.7	157	52.3
Total	517	56.5	398	43.5

(Percentages exclude noncommital responses)

TABLE D

Relationship Between Source of Compensation and Witness Attitude Toward Rule

Witness Attitude Toward Rule	Source of Compensation: Consumer Group		FTC		Trade, Prof. Assn.		Employer		Other		None or no response		Total
	N	%	N	%	N	%	N	%	N	%	N	%	
Generally Favor	36	97.3	80	94.1	33	23.2	46	45.1	12	66.7	180	66.2	387
Generally Oppose	1	2.7	5	5.9	109	76.8	56	54.9	6	33.3	92	33.8	269
Total	37	100	85	100	142	100	102	100	18	100	272	100	656

The trend is even more pronounced when the focus is narrowed to the experts, probably the most important class of witnesses to testify in the proceedings studied. Table E demonstrates that the FTC staff was the most active recruiter of expert witnesses, and that almost three-quarters of all experts who responded to the witness survey[261] favored the proposed rule. Thus, if the compensation program was supposed to achieve a balance of pro-rule and anti-rule witnesses, it apparently was unsuccessful.

TABLE E

Compensation of Experts in Relation to Attitude Toward Rule

Experts Compensated By	Favor Rule		Oppose Rule		Total Number
	N	%	N	%	
FTC	45	93.8	3	6.3	48
Consumer Group	9	100	0	0	9
Trade, Professional Association	7	30.4	16	96.6	23
Employer	10	47.6	11	52.4	21
FTC and Trade Association	1	100	0	0	1
FTC and Employer	1	50.0	1	50.0	2
Trade Association and Employer	1	50.0	1	50.0	2
No Compensation or No Data Available	41	77.4	12	22.6	53
Total	115	72.8	43	27.2	158

These simple measures of support and opposition to a proposed rule tell nothing about the cogency of the presented testimony. When witnesses are subject to cross-examination and rules must be based on substantial evidence, a witness who supports a rule incompetently may be useless to the rule's proponents. This issue merges into the determination of the influence exerted by compensated participants over agency decisions. First, however, it is necessary to consider whether the compensation program altered the balance of advocacy in the proceedings studied.

2. Group Representation

The second major expenditure by the compensated paticipants was for representation by counsel. Overall, more than $800,000, or nearly one-half of the total compensation funds awarded during the period of this study, were for attorneys' fees and related costs.[262] It is difficult to establish how these abso-

261. A total of 234 experts testified in the core proceedings. As Table E indicates, 158 responded to the survey—a response rate of 67.5%. The response rate among all witnesses was 67.7%.

262. See next page.

Attorneys' Fees As A Proportion of Total Costs Authorized for Reimbursement

Proceeding	Total Amount Atty's Fees (%)	Total Amount Atty's Fees & Related Cost (%)	Total Authorization
Vocational Schools	17,924.49 (53%)	24,677.49 (73%)	33,654.25
Prescription Drugs	630.00 (30%)	910.00 (44%)	2,070.00
Holder in Due Course	1,248.10 (40%)	2,703.60 (87%)	3,073.25
Hearing Aids	78,083.50 (81%)	83,289.50 (87%)	95,880.93
Funeral Practices	78,045.50 (55%)	90,782.50 (64%)	141,363.38
Protein Supplements	4,050.00 (12%)	5,455.00 (16%)	33,970.30
Ophthalmic Goods	40,343.00 (32%)	54,591.00 (43%)	127,274.33
Food Advertising	46,368.00 (30%)	63,712.00 (42%)	153,075.48
Care Labeling	19,200.00 (33%)	21,506.00 (37%)	57,948.67
Used Cars	36,990.00 (28%)	51,308.20 (39%)	131,930.11
OTC Drugs	37,265.00 (40%)	38,015.00 (41%)	93,403.03
Credit Practices	56,275.00 (40%)	69,789.00 (49%)	141,986.24
Health Spas	48,934.00 (56%)	56,601.00 (65%)	87,399.00
Mobile Homes	46,945.00 (30%)	64,928.00 (42%)	154,558.81
R-Value	56,617.00 (60%)	58,048.00 (62%)	93,488.07
OTC Antacids	34,461.00 (27%)	54,339.00 (43%)	126,884.63
Children's Advertising	65,115.00 (20%)	72,308.20 (22%)	325,690.20
TOTAL	668,494.59	812,963.49	1,803,670.38

(Table derived from FTC chart entitled "Attorney Fees and Costs Compared to Total Budget as of Feb. 1, 1979").

lute and relative amounts compare to the legal expenses of uncompensated participants. There is some indication, however, that the compensated groups generally spent less on lawyers' fees than the non-compensated groups.[263]

The activities the lawyers undertook for compensated groups are more significant than the dollar amount spent. Consumer group representatives generally played negligible roles in the prehearing "motions practice" when lawyers for participants proposed "disputed issues" to be designated for hearing and sought discovery of FTC records and documents.[264] At the hearings, however, the attorneys played a prominent role in cross-examining witnesses, making objections, and arguing points before the Presiding Officer. In purely quantitative terms, this participation did help to balance the hearings because pro-rule and anti-rule witnesses consequently were subjected to roughly equivalent periods of questioning. Hearing observations and review of the transcripts indicate that the presence of the compensated consumer groups also contributed to a qualitative balance. The FTC attorneys were generally younger and less experienced than their industry counterparts, and the quality of their questioning was uneven. The compensated consumer group lawyers were often more experienced than the staff, and they frequently developed lines of questioning that had not been fully explored in agency staff examination of the witness.[265]

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263. Some information was obtained from the FTC regarding staff hours logged to the core TRR proceedings. A large proportion of the hours clocked represents staff-attorney time. For purposes of illustration, a rate of thirty dollars per hour was applied to the number of hours recorded to generate dollar comparisons with the attorneys fees of compensated participants reflected in note 262 *supra*. The results suggest that the FTC's legal expenditures were substantially greater than those of compensated participants. It must be remembered, however, that the staff had additional responsibilities, such as writing the staff investigative report, helping to compile the rulemaking record, scheduling hearings, and responding to public inquiries.

Proceeding	Prehearing Manhours	Imputed Cost (at $30/hr.)	Hearing Manhours	Imputed Cost (at $30/hr.)	Total Imputed Cost
Food Advertising	15,500	$465,000	5,500	$165,000	$630,000
Funeral Practices	6,800	$204,000	4,800	$144,000	$348,000
Holder in Due Course	2,800	$ 84,000	(not available)		$ 84,000
Protein Supplements	4,100	$123,000	4,100	$123,000	$246,000
Care Labeling	(not available)		600	$ 18,000	$ 18,000
Hearing Aids	(not available)		3,500	$105,000	$105,000
Ophthalmic Goods	(not available)		(not available)		(not available)

264. In the seven proceedings, a total of 94 disputed issue proposals were filed. Of these, industry representatives filed 78, and consumer spokespersons filed one. Similarly, of 107 prehearing motions, industry filed 104 and consumer spokespersons filed two. For a general discussion of "motions practice" in trade regulation rulemaking, see ACUS PHASE I REPORT, *supra* note 31, § IV.

265. The presence of consumer representatives possibly influenced the behavior of agency staff attorneys. Some FTC lawyers might have prepared less carefully or questioned less thoroughly because they knew a consumer group spokesperson was waiting to make a particular point.

In the post-hearing stages, the balance of advocacy was rather mixed. Two forms of post-hearing participation, the filing of rebuttal submissions and the preparation of "post-record comments" that critiqued the final staff and Presiding Officer reports, were not confined to lawyers. Legal representatives, however, were generally able to use these opportunities more effectively. As a result, general statistics that relate to the number of submissions at these stages are not very meaningful.[266] Nevertheless, a selective review of these documents suggests that although the compensated consumer groups were unable to match the resources that the industry lawyers devoted to rebuttal and final comments, the compensation program enabled them to play a significant role. Finally, compensated consumer group spokespersons participated very actively in oral arguments before the Commissioners in proceedings that reached the final stages during the period of this study.[267]

These final stages, when the issues were clearly defined, were the most crucial for the participants and their lawyers. Effectiveness at this stage, however, required familiarity with the massive record, either through participation at the hearing, reading of documents, or, in most instances, through both. Awards for attorneys' fees and related costs averaged just under $50,000 per proceeding during the period covered by this study.[268] Without compensation, it is unlikely that the consumer groups participating in these proceedings would have found the resources to master the records. In this respect, the compensation program allowed consumer groups to participate on a reasonably equal basis with industry representatives.

B. BALANCE IN FUNDING PATTERNS

During the 1979 legislative oversight hearings, Congress appeared most concerned about imbalances in the distribution of compensation funds. Congressional charges took two general forms: complaints that the agency allocated a disproportionate share of funds to a small cluster of "insider" organizations, and claims that the FTC only funded groups that supported the agency position.[269] As previously noted, the assumption that funding decisions should be balanced in these respects is at best questionable. The original basis of the

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266. Of 103 total rebuttal submissions filed in the seven proceedings, 15 came from consumer groups and 69 from industry spokesmen. On the other hand, consumers and consumer groups held an 853 to 622 edge over industry in the post-record comments. This lead is largely attributable, however, to two proceedings, Food Advertising and Funeral Practices, in which the consumer groups apparently made a concerted effort to mobilize public comments supporting the rule. In these and other proceedings, many post-record comments were not useful to the agency. The final round of comments is meant to analyze the existing rulemaking record and to focus issues for Commission deliberation. *See* 16 C.F.R. § 1.13(h) (1980) (comments should be confined to material already in record and requests for Commission review of Presiding Officer's determinations). A substantial proportion of the final comments reviewed in this study, however, tried to introduce new evidence, repeated points that had been explored thoroughly on the record, or simply stated that the writer favored or opposed the rule.

267. The Ophthalmic Goods and Funeral Practices proceedings were the only two of the seven rules to reach the Commissioners before data collection ended. In these two proceedings, seven consumer group spokespersons appeared, as compared with nine industry representatives and three other participants.

268. This average was computed from data compiled in note 262 *supra*.

269. *See FTC Public Participation Funding is Focus of Commerce Committee Actions*, [1979] 913 ANTITRUST & TRADE REG. REP. (BNA) 18-19, § A; notes 248-49 *supra* and accompanying text (discussing congressional criticism of FTC). It was reported that:

compensation provision seemed to be a concern that more complex procedures would increase the costs of participation and thereby worsen the existing imbalance of representation, already unfavorable to consumer interests.[270] The statute therefore placed a twenty-five percent ceiling on the amount of compensation funds that could be awarded to business interests. Beyond this ceiling, the legislature did not limit the kinds of groups to be funded or the amounts to be given to particular applicants. The statute's broad definition of reimbursable costs, however, reasonably could have been interpreted as a directive to commit whatever resources were necessary to assure effective participation in a proceeding. Congress had agreed to underwrite the full range of costs of representation. Thus, the FTC did not misread a clearly expressed congressional intent when it undertook the pattern of funding decisions that emerged during the period covered by this study.

Whether or not the original compensation program implied a notion of balanced allocation, the 1980 amendments to the FTC's compensation authority and their legislative history clearly established the concept.[271] Although no empirical basis exists by which to assess these amendments, one of their primary effects probably will be further confusion of the conceptual basis for the program.

1. Repeat players[272]

To a considerable extent, the statistics support the contention that compensation awards have been relatively concentrated in a few repeat applicants. In the proceedings studied, seventy-seven compensation awards were granted to

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> Both [Senators] Danforth and Long said they were bothered by the fact that, according to Danforth's figures, only 10 percent of FTC participation funds in 1976 and 1977 had been used to solicit information from small businessmen. According to Danforth, 49 percent of the money had been used by Washington-based groups and 41 percent goes to consumer groups which represent a very small segment of the population.

FTC Public Funding of Private Groups Comes Under Attack in Senate Hearing, [1979] 912 ANTITRUST & TRADE REG. REP. (BNA) 12-13, § A ("Another question raised about the program has been why these groups have received a large share of the funding").

270. *See* notes 65-69 *supra* and accompanying text (noting problems in allocating funding).

271. Congress took three major steps to ensure more widespread distribution of the compensation funds: allocation of a minimum proportion of funding for small businesses, establishment of a maximum funding limit for any single participant, and encouragement of FTC "outreach" efforts to attract more applicants. The amendments provided that no person could receive more than $75,000 for participating in any single FTC rulemaking, nor more than $50,000 in any fiscal year. Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 10(a), 94 Stat. 374. Moreover, the FTC was required to set aside 25% of the compensation fund for those parties or their representatives that would be regulated by the proposed rule. *Id.* § 10(b). Finally, the Act directed the FTC to establish a small business outreach program through which the agency could:

> (A) solicit public comment from small businessmen whose views otherwise would not be adequately represented, in order to ensure a fair determination in rulemaking proceedings under this section; and
>
> (B) encourage the participation of small businesses in the compensation program administered by the Commisssion under this subsection by disseminating to small businesses information which explains the procedures and requirements applicable to the receipt of compensation . . . .

Id. § 10(c).

272. The phrase is borrowed from Marc Galanter's analysis of the practical and theoretical advantages that a "repeat player" litigant has over the "one-shot" plaintiff or defendant. *See* note 283 *infra* and accompanying text.

applicants from fifteen different states and the District of Columbia.[273] Of this total, thirty-one groups were from the District of Columbia and twenty-one from California.[274] These figures double-count groups that were funded in more than one proceeding. When those groups are counted only once, the total drops to thirty different groups funded under the program, of which fourteen were from California or the District of Columbia.[275] Moreover, from the start of the compensation program through January of 1979, approximately sixty-five percent of all compensation funds obligated by the FTC went to only

273. *See* Appendix A. For purposes of these calculations, joint or coalition applicants were considered independently. Thus, the joint award to a coalition of four environmental groups in the R-Value Proceeding was considered as four awards.

274. *Id.* Other states that scored relatively high were New York (five awards), Massachusetts (four), and Wisconsin (three). *Id.*

275. *Id.*

eight groups.[276] As already noted, the experienced applicant had a substantial advantage over the neophyte.[277] Overall, groups that applied for funding three or more times had a success rate of better than eighty percent.[278]

The FTC also was charged with awarding disproportionately large compensation to particular groups. Reimbursement of an applicant's participation in a single proceeding ranged from less than one-hundred dollars to more than one-hundred thousand, largely because the applications varied considerably in the activities they proposed and the costs they projected. Applicants that re-

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276.

Applicants Whose Authorizations Total More Than $100,000
(cumulated from authorizations in each of the Magnuson-Moss rulemakings through January 31, 1979)

Applicant	Authorization Total	Rulemakings in Which Reimbursement Was Authorized
California Citizen Action Group	$221,075.54	Funeral Practices Ophthalmic Goods OTC Drugs Health Spas Thermal Insulation OTC Antacids
Americans for Democratic Action—Consumer Affairs Committee	$190,824.17	Funeral Practices Ophthalmic Goods Used Cars OTC Drugs Health Spas OTC Antacids
Council on Children, Media and Merchandising	$187,140.41	Food Advertising OTC Drugs OTC Antacids Children's Advertising
National Consumer Law Center, Inc.	137,823.74	Vocational Schools Holder-in-Due-Course Credit Practices
National Council of Senior Citizens, Inc.	127,870.48	Prescription Drugs Hearing Aids Funeral Practices OTC Antacids
Consumers Union of United States, Inc. (West Coast Regional Office)	$121,907.00	Health Spas Children's Advertising
National Consumers Congress/National Consumers League*	$109,071.67	Food Advertising Care Labeling Thermal Insulation
Consumer Action—San Francisco	$107,836.12	Vocational Schools Protein Supplements Ophthalmic Goods Used Cars
TOTAL	$1,203,549.10	

*NCC merged into NCL on 6/27/77.

277. *See* note 283 *infra* and accompanying text (describing advantages to "repeat players").
278. *See* Appendix B.

ceived large compensation awards generally undertook a wide variety of activities, including both the presentation of technical evidence and extensive legal representation. Large awards consumed a substantial portion of the FTC's compensation budget: the ten largest authorizations represented nearly forty percent of the total compensation funds committed during the period studied.[279] A significant overlap also existed between the groups that received large awards, and those that applied in multiple proceedings.[280]

A third aspect of the concentration issue was the frequent appearance of a few law firms as representatives of compensated consumer groups. The Washington, D.C. firm of Swankin & Turner, for example, represented four compensated clients in five proceedings.[281] The Bruce Terris law firm, also considered to be part of the Washington "private public-interest bar," was

279.

Ten Largest Authorizations For Reimbursement To An Applicant In A Single Magnuson-Moss Rulemaking As Of January 31, 1979

Applicant	Authorization Total	Rulemaking
National Consumer Law Center, Inc.	$221,075.54	Credit Practices
National Hearing Aid Society	$ 83,510.80*	Hearing Aids
Action for Children's Television *and* Center for Science in the Public Interest	$ 77,016.20	Children's Advertising
Consumers Union of United States, Inc. *and* Committee on Children's Television	$ 73,916.00	Children's Advertising
California Citizen Action Group	$ 64,228.00	OTC Antacids
Council on Children Media and Merchandising	$ 62,434.78	Food Advertising
Americans for Democratic Action-Consumer Affairs Committee *and* National Council of Senior Citizens, Inc.	$ 57,474.35	Funeral Practices
National Consumers Congress/National Consumers League**	$ 57,292.67	Care Labeling
The Housing Advocates	$ 54,752.85	Mobile Homes
Total	$721,273.89	

* NHAS was unable to use $34,364 of this authorization because of a successful solicitation that it sent to its members.

** NCC merged into NCL on June 27, 1977.

280. *See* note 276 *supra* (providing data on amounts received by certain groups).

281. Swankin & Turner represented the National Consumer Congress in the Care Labeling Rulemaking, and its successor organization, the National Consumers League, in the R-Value rulemaking. Other clients included the Automobile Owners' Action Council in the Used Cars Proceeding, the

even more active: firm members represented compensated groups in nine proceedings, including six in which they represented the Consumer Affairs Committee of the Americans for Democratic Action.[282]

The repeat appearances by these organizations and law firms was fostered, if not ensured, by the FTC's insistence on technically competent representation. If a major purpose of the program was to produce testimony based on sound empirical research and to allow for expert legal representation, then groups and lawyers who are familiar with the process and who have demonstrated their competence in prior proceedings should be preferred. In theory, at least, the "repeat player" has substantial advantages over the "one-shot" or new participant.[283] The behavior of participants representing industry in TRR controversies seems to confirm this observation: a number of former FTC officials, including two former commissioners, represented business clients; in several instances the same individual lawyers and law firms appeared on behalf of different clients in different proceedings.[284] The large awards that concentrated funds in a few applicants were probably not large in comparison to the amounts that the FTC and other participants paid to mount a full-scale defense of their positions in the proceeding. Moreover, some economies of scale undoubtedly resulted from combining functions such as testimony and advocacy, or maintaining continuity of representation across different stages of the proceeding.

In the absence of some radical reduction in the overall costs of participation, the 1980 statutory limits on the amount that can be granted to any single participant seem likely to raise the total cost of representation in a proceeding, and may reduce the effectiveness of that representation. In this respect, the trade-off between the democratic and technocratic aspects of the program seems inevitable: gains in grassroots participation will only be purchased at the cost of effective representation.

Continental Association of Funeral and Memorial Societies in the Funeral Practices rule, and Consumer Action of Washington, D.C. in the Food Advertising hearing.

282. The Terris firm performed work for ADA-CAC in the Funeral Practices, Health Spas, Ophthalmic Goods, OTC Drugs, Antacids, and Used Cars Proceedings. They also represented the environmental groups in the R-Value Proceeding, and the joint participation of Action for Children's Television and Center for Science in the Public Interest in the Children's Advertising TRR. Finally, the firm evidently performed some limited services for the Council on Children, Media and Merchandising in the Food Advertising Proceeding. *See* Letter from Robert Choate, Council on Children, Media and Merchandising to Bonnie Naradzay, Special Assistant for Public Participation, FTC (Sept. 7, 1976) (requesting reimbursement of fees paid to Bruce Terris).

283. *See generally* Galanter, *Afterword: Explaining Litigation*, 9 LAW & SOC'Y REV. 347 (1975); Galanter, *Why the "Haves" Come Out Ahead*, 9 LAW & SOC'Y REV. 95 (1974).

284. The firm of Leighton & Conklin, for example, represented the Clorox Company in the Care Labeling rule, the National Manufactured Housing Federation in Mobile Homes, and the Grocery Manufacturers of America in Children's Advertising. ACUS PHASE I REPORT, *supra* note 31, at 200, 202, 209 app. Thomas Vakerics appeared on behalf of the Hearing Aid Industry Conference in the Hearing Aids Proceeding, and the urea foam insulation manufacturers in the R-Value Proceeding. *Id.* at 207, 214 app. Edward Groobert represented the American Automotive Leasing Association in the Used Cars Proceeding, and the American Optometric Association in the Ophthalmic Goods TRR. *Id.* at 211, 216 app. Some duplication of representation occurred when different rules covered related subjects, so that a lawyer representing a single client might be active in multiple proceedings. This duplication is illustrated in the Food Advertising, Protein Supplements, and Children's Advertising Proceedings, all of which touched on the marketing of food products; in the Holder In Due Course and Credit Practices Proceedings, which dealt with consumer credit; and the OTC Drugs and OTC Antacids Proceedings, which concerned proprietary nonprescription drugs.

Another question that the 1980 amendments raised was the extent to which the predominance of repeat applicants was due to the FTC's failure to mount a substantial "outreach" effort during the early stages of implementation. By 1978, the Commission had begun to experiment with techniques for attracting more diverse participants.[285] These notice-giving activities seem generally useful in the administration of direct funding programs, especially when the program is new and the agency has diverse constituencies.[286] Nevertheless, it is questionable whether outreach alone could increase the diversity of applicants, particularly from among consumer groups. No reliable current statistics seem available on the total number of private-sector consumer advocacy organizations in the United States. Public estimates suggest, however, that the total is small, perhaps less than a hundred in all, and that many of these groups are ephemeral, shoestring operations.[287]

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285. The agency sponsored a conference in Chicago for potential applicant groups. Sohn & Rubin Interview, *supra* note 40. It also held a series of seminars in major cities. These seminars were designed to reach small businesses which might be affected by the Standards and Certification rulemaking. Interview with Bonnie Naradzay, Special Assistant for Public Participation, FTC (June 15, 1979).

286. An active outreach program, however, can subject the agency to criticism, and can generate procedural wrangles over the credibility of compensated participants, particularly when the rulemaking staff or Presiding Officer plays an active role in informing groups about the compensation fund or in encouraging them to apply for compensation. This problem was most apparent in the Food Advertising Proceeding. A controversy developed when it appeared that agency staff had written statements for friendly witnessess who were not reimbursed under the compensation program. As the following colloquy between an industry lawyer and the Presiding Officer indicates, rule opponents tried to develop a line of impeachment to show that staff had misused the compensation fund to recruit other friendly witnesses:

> [INDUSTRY LAWYER]: . . . I understood you to say that it would not be possible for the Staff to ask somebody to participate and then have that group obtain funds [from the compensation program]. . . .
>
> . . . .
>
> [PRESIDING OFFICER]: I don't rule out the possibility . . . .
> The point I am trying to make is . . . . I don't think the staff here has a fund they can dip into for the purpose of presenting the witnesses that they might be affirmatively going out and soliciting to testify, though I think it is possible . . . the Staff notifies certain groups that are interested in it, and the only way they can afford to participate is getting compensation of some sort, and the only fund they can get compensation from would be Magnuson-Moss.
>
> [INDUSTRY LAWYER]: So the impetus could come from the Staff?
>
> [PRESIDING OFFICER]: It could even come from me because in talking to various groups about [whether] they may be interested in testifying, I have suggested myself, perhaps the avenue they will have to follow is see if they can qualify for compensation under the fund. I frequently do that myself in an effort to obtain consumer representation . . . .

Food Advertising Hearings Transcript 4726-27. Even if the primary responsibility for outreach efforts is placed in a separate office, the staff and Presiding Officer assigned to a particular proceeding necessarily will have frequent informal contacts with a wide range of potential participants. Opposing participants consequently may believe, or for tactical reasons may charge, that these officials try to subvert or misuse the compensation fund.

287. One author surveyed lobbyists of national public interest groups with offices in Washington, D.C. J. BERRY, LOBBYING FOR THE PEOPLE (paper ed. 1977). From a total of 83 organizations interviewed, which was estimated to be "an extremely high percentage—surely above 80 percent—of the true number of public interest groups that existed at the time of the interviewing" in 1972-73, there were only 13 consumer groups. *Id.* at 14. Relying on secondary sources, other authors found that "[b]y 1973, there were more than 80 national, state, and local non-profit consumer organizations supplying information to consumers and attempting to influence the formation of governmental and privately sponsored consumer protection programs." Snow & Weisbrod, *Consumerism, Consumers and Public Interest Law*, in PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS 395-96 (Weisbrod, Handler & Komesar eds., paper ed. 1978). The Council for Public Interest Law focused more narrowly on public interest law centers, which they defined as "nonprofit, tax-exempt groups that devote a large share of their programs to providing legal representation to otherwise unrepresented

Unless the subject matter were of very high priority to the group, organizations that live hand-to-mouth existences and rely on small staffs and volunteer labor probably could not afford to divert their limited personnel to a major project like a TRR proceeding—even with compensation. Two of the "repeat player" consumer groups interviewed reported that they would not participate in future FTC proceedings, in part because the work on TRR's disrupted their normal operations and jeopardized their fund-raising activities.[288] If the number of potential public interest group applicants truly is limited, then an agency that administers a compensation program may be forced to choose between funding a small cluster of repeat applicants and letting the applicants' interests remain unrepresented. Given that the Magnuson-Moss Act directed the FTC to fund spokespersons for unrepresented interests, the latter choice may not have been available to the agency.

2. Supporting Rule-Supporters

The second major criticism of the FTC's funding pattern was that the agency too frequently granted funds to groups that favored rules proposed by the staff. Thus, opponents charged that the Commission "doled out . . . taxpayer dollars . . . to proponents of Commission rules"[289] and that "the FTC distribute[d] 95 percent of its funds to regulation supporters."[290] Agency officials responded that "the great majority of aid recipients [had] opposed staff proposals in one way or another."[291]

Once again, how one judged the compensation program seems to have depended upon whether one emphasized the objectives of technical representation or participatory democracy. If the decision in trade regulation rulemaking depended primarily on the desires and value preferences of the principal constituency groups, then whether particular participants favored or opposed the rule would be determinative of the decision. If, on the other hand, the proceeding was viewed primarily as a process of reasoned decisionmaking dependent upon the collection and analysis of data and argument, then the participants' attitudes toward the proposed rules would be much less significant than the technical support they had for those views.

Under either view of the process, the FTC's critics clearly were overgeneralizing. In several instances, the initial agreement between the staff and the com-

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interests in court or administrative agency proceedings involving questions of important public policy." FINANCING PUBLIC INTEREST LAW, *supra* note 7, app. C-1. The Council located a total of 92 groups, only seven of which specialized in consumer protection matters. *Id.* This study also found that: "[c]onsumer and women's law centers tend to be the smallest in the universe of public interest law. Together, the 12 groups in these two areas have received only three percent of all contributions made to public interest law . . . and virtually all have annual incomes of less than $300,000." *Id.* at 95-96. Berry discovered that most of the organizations he studied had been created within the five years preceeding his survey. J. BERRY, *supra*, at 33-34.

288. Interview with Michael Heffer, Co-Director, Consumer Action of San Francisco (Nov. 2, 1979) (day-to-day operations disrupted by participation in rulemaking); Interview with Robert Choate, Chairman, Council on Children, Media and Merchandising (March 23, 1979).

289. *See Authorizations for the FTC: Hearings on S. 1020 Before the Subcomm. on the Consumer of the Senate Comm. on Commerce, Science and Transportation*, 96th Cong., 1st Sess. 182 (1979) (prepared statement of Richard J. Leighton, Special Counsel, Grocery Manufacturers of America, Inc.).

290. *Public Participation Under Attack*, 11 NAT'L J. 1678 (1979).

291. *Id.*

pensated consumer representatives vanished once the original staff attorneys left either the rule or the agency upon completion of the hearings, and a new set of staff attorneys was assigned to analyze the record.[292] These new rulemaking staffs were less committed to the original rules than their predecessors had been, and they were also more sensitive to the antiregulatory climate prevailing at the time. They recommended substantial reductions in the rules, which ended the original overlap in position between staff and compensated participants. By that point, it would have been virtually impossible for a new group to enter and to master the record sufficiently to mount a convincing case for the original rule. Moreover, compensated consumer groups occasionally differed not only with FTC staff, but also with each other.[293] In the course of

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292. Thus was the case with the Funeral Practices and Hearing Aids Proceedings.

293. In the Ophthalmic Goods Proceeding, for example, several consumer organizations were funded to serve as group representatives and to develop empirical evidence regarding the need for the rule. The rule proposed to remove bans on the price advertising of eyeglasses that had been imposed by state action or private associations. One compensated participant, the California Citizens Action Group (CalCAG), conducted a consumer survey that suggested consumers lacked the information they needed to make informed purchase decisions on eyeglasses, but that they could make reasoned decisions when exposed to truthful advertising. *See* Ophthalmic Goods Proceeding, Transcript 3648-730 (testimony of Paul Fine); Exhibits HX 279, HX 228. In the survey, consumers were shown a sample advertisement for eyeglasses priced under twenty dollars, and were asked their attitude toward the product. A majority of respondents said they doubted the quality of the advertised glasses, or thought they would need to buy a much more expensive pair if they went to the advertiser. The researchers then provided the respondents with information about the eyeglass industry, including fabrication and distribution costs and quality control practices. Following these disclosures, the interviewers asked the respondents again whether they would be interested in the cheap eyeglasses; a higher proportion answered affirmatively.

A second consumer group, San Francisco Consumer Action (SFCA), had studied price advertising in a state that already permitted it, and had found very little price competition. The group concluded that the rule was "likely to have little effect" and "may be worse than doing nothing" unless the agency revised it to account for various social and economic pressures that inhibit advertising. This group principally found that despite the absence of legal restraints in Arizona, there was virtually no price advertising of eyeglasses, and no lessening of the dispersion of eyeglass prices as predicted by economic theory. *Id.* at 6301-03 (testimony of Delia Schletter). The organization suggested several reasons for this lack of price competition. Norms of professional culture held that price advertising by optometrists and opticians was distasteful, if not unethical. *Id.* at 6303. Moreover, market research by sellers had found, and this study confirmed, that price was not an important motivating factor in eyeglass purchases or in consumer choice of other health-related goods and services. *Id.* at 6305, 6308. At the same time, style and fashion recently had become increasingly important to eyeglass wearers and this factor was particularly significant for the most profitable segment of the market, wealthy consumers. *Id.* at 6305. As a result, sellers found little competitive advantage in price advertising. SFCA also questioned whether price advertising, if it occurred, would be an unmixed blessing for the consumer. It could lead to market dominance by large multistate corporations that would be less responsive to consumer complaints and less susceptible to effective supervision by state regulatory agencies. *Id.* at 6307.

A third funded group, the Consumer Affairs Committee of the Americans for Democratic Action, made a stinging credibility attack on the San Francisco group's witness on cross-examination. *See generally id.* at 6339-509. Among other things, the ADA spokesman implied that SFCA had misrepresented the facts in its compensation application and had violated the terms of its compensation award by substantially modifying its study design without notice to the FTC. *Id.* at 6354-56. The dispute among these consumer spokespersons continued throughout most of the proceeding. During testimony, the SFCA witness had criticized the CalCAG study. *Id.* at 4101-09. CalCAG responded by charging her with naivete, misrepresentation, incompetence, and sloppiness in conducting her own research. *See* Rebuttal Comments of California Citizens Action Group 18-25, Ophthalmic Goods Record 17,273, 17,431 (Nov. 15, 1976). Under this barrage of criticism, SFCA moderated its stand. In its own rebuttal submission, SFCA sought to emphasize areas in which it agreed with CalCAG, concluding that "[t]he conflict between our policy conclusions . . . is, we feel, largely based upon the different evidence available to us, regarding the realistic limitations on possible price advertising . . . and regarding the probabilities of accompanying adverse consumer consequences." Rebuttal Comment of San Francisco Consumer Action 3, Ophthalmic Goods Record 17,428, 17,431 (Nov. 15, 1976). Later, SFCA and Cal-

such disagreement a variety of potentially useful information was added to the rulemaking record.

II. CONCLUSION: THE RESULTS OF THE PROGRAM

The most important question regarding the FTC's compensation program is also the most difficult and subjective to answer: what was its impact on the agency's decisionmaking process? One way to answer the question would be to determine whether the presence of the compensated groups affected the final rules in any way.[294] This determination unfortunately is impossible, both because the FTC reached a final decision on only a few rules during the period studied, and because no objective or reliable means exist to measure any single participant's influence on the outcome of a broad policy rulemaking proceeding.[295] It would be fair to conclude, however, that the compensated participants generally performed as competently as their uncompensated counterparts.

The FTC Commissioners were generally enthusiastic about the participation of the compensated consumer groups. Both Chairmen who held office during the period studied publicly stated that the compensation program had made substantial contributions to the quality of FTC deliberations.[296] In interviews, Commissioners noted some of the benefits they saw from the public participation program: the program brought different perspectives to the Commis-

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CAG joined in a post-record comment submitted by all the compensated consumer groups, which supported the proposed rule and urged that it be strengthened. *See generally* Presiding Officer's Report, Ophthalmic Goods Proceeding, at 60-62, 116, 124, 136, 142, 158, 159, 170-71; Staff Report, Ophthalmic Goods Proceeding, at 127-34, 145-49, 180, 268. CalCAG's mention of the ineffectiveness of state regulation also was discussed and relied upon. *See generally* Presiding Officer's Report at 18 n.34, 27-28, 85-86; Staff Report at 100, 210, 213, 283, 291.

294. It could be argued that the effectiveness of the program should not be assessed by measuring the extent to which compensated groups "won," or convinced the agency to accept their position. Just as the criminal defendant may have had effective representation by counsel even when he does not go free at trial's end, so also a rulemaking participant may have effectively presented his views and received careful consideration by the agency, even though the views ultimately are rejected. Similarly, the public participation program might be valued because it enabled consumer groups to meet industry as equals, or because it helped struggling citizen organizations to survive.

295. In some instances, it was even difficult to determine exactly what outcome the participating groups preferred. The procedures did not require applicants to file detailed statements describing the rule provisions they preferred, and occasionally the positions of the group representatives seemed to change as the proceeding progressed. Also, groups may have assumed positions for tactical reasons. For example, a consumer group might assert an extreme position, in the belief that the Commission ultimately would cut the rule back to a level acceptable to the group. Nevertheless, even assuming the participants' positions were clearly stated and sincerely held, if the final rule adopted the position a compensated participant favored, there would be no way to determine whether the group's participation had caused this result. Other participants frequently had similar preferences, and the proceedings were characterized by broadly framed legal theories, vague standards of proof, and voluminous records. Thus, it was rarely possible to single out one piece of evidence or one participant's argument that clearly made a difference.

296. *See Public Participation in Agency Proceedings: Hearings on H.R. 3361 and Related Bills Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 498 (1977) (statement of FTC Chairman Calvin Collier) ("Based upon our experience operating this program for a year and a half, my opinion is that its benefits to Commission proceedings are substantial"). This view also was expressed by Chairman Pertschuk. *Authorizations for the FTC: Hearings on S. 1020 Before the Senate Subcomm. for Consumers of the Comm. on Commerce, Science and Transportation*, 96th Cong., 1st Sess. 12 (1979) (statement of FTC Chairman Pertschuk) (participation of compensated groups "emphatically" improved FTC's decision making process). *See also* Pertschuk, *Listening to the Little Guy*, Wash. Post, June 26, 1979, § A, at 19, col. 6.

sion,[297] it helped to focus major issues,[298] and it provided the Commissioners with more confidence that they were deciding on the basis of a complete record.[299] None of the Commissioners interviewed was critical of the program or of the contributions of the funded participants.[300]

At the operational levels of the agency, opinions were more mixed.[301] Staff attorneys predictably thought that the most important contribution by the funded participants was to present new evidence. They felt that the consumer groups' role in conducting cross-examination was less crucial, because they believed that the FTC staff adequately performed that function.[302] Presiding Officers, on the other hand, seemed to emphasize primarily the consumer group representatives' role in balancing the hearings and providing additional perspectives. As one officer stated, the consumer representatives were not necessarily better than the staff, just different. This difference was useful to the Presiding Officers.[303] Two of the Presiding Officers interviewed in this study explicitly noted that the consumer group lawyers were generally on a par with industry lawyers in ability and expertise—although they appeared to operate on much more limited budgets.[304] Some interview subjects noted additionally, however, that the "public interest bar" seemed spread thin during the period of intensive FTC rulemaking; these subjects found that preparation was sometimes spotty and inexperienced junior asssociates frequently substituted for more expert senior partners in particular proceedings.[305] Evaluations of particular witnesses or written submissions ranged from "terrific,"[306] "excellent,"[307] and "one of the better consumer witnesses I have had the privilege to hear"[308] to "repetitive,"[309] "absolutely not supported by data,"[310] and "fairly worthless"[311] at the other. Several staff members noted the problems of time pressure, limited expertise, and underfunding faced by the consumer groups when trying to conduct surveys or other empirical studies.[312]

These characterizations are consistent with the impressions of the research

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297. Interview with Elizabeth Hanford Dole, Commissioner, FTC (Nov. 2, 1978) (groups provide diversified views).

298. Interview with Michael Pertschuk, Commissioner, FTC (Dec. 6, 1978) (groups raised issues on which agency had not fully focused).

299. Interview with Calvin Collier, Chairman, FTC (Dec. 29, 1977) (more comfortable making judgments with input from consumer groups).

300. The most skeptical of the Commissioners interviewed was Paul Rand Dixon. He felt that the compensated participants had done an adequate job, but wished it were possible to encourage public participation without government funding. Interview with Paul Rand Dixon, Commissioner, FTC (Aug. 2, 1978). Time pressures prevented Commissioner Clanton from commenting at length on the compensation program during his interview. Interview with David Clanton, Commissioner, FTC (June 2, 1978).

301. To preserve the confidentiality of interview subjects and internal agency documents in this sensitive area, supporting data will be cited as "Staff Evaluation —."

302. *See* Staff Evaluations 4 & 13.

303. *See* Staff Evaluations 1, 7, 11 & 12.

304. Staff Evaluations 7 & 11.

305. *See* Staff Evaluations 4 & 7.

306. Staff Evaluation 8.

307. Staff Evaluation 3.

308. Staff Evaluation 9.

309. Staff Evaluation 11.

310. Staff Evaluation 4.

311. Staff Evaluation 6.

312. Staff Evaluations 4 & 6.

staff involved in this study. The variances in perceived quality of testimony and advocacy among the compensated groups did not differ markedly from the variances observed among the unfunded participants. Within the constraints of a relatively small resource base, a rather cumbersome set of rulemaking procedures, and an array of vague legal theories that made it difficult for anyone to "win on the facts," the compensated consumer groups made a respectable showing.

If the FTC's compensation program succeeded in these respects, why was it not similarly perceived by Congress and other observers? Part of the reason may lie in the political atmosphere of 1979. The agency's activism had provoked powerful opposition and most of its activities were regarded with suspicion, if not hostility. The agency's aggressive use of its rulemaking powers during the period studied also tended to make the compensation program less necessary and its accomplishments less visible than they otherwise might have been. If direct funding is intended to counterbalance the persuasive powers of the regulated industry, it was hardly desirable to test the concept in an agency like the FTC, where the chairman admitted publicly that staff attorneys had conducted anti-business "vendettas" in rulemaking proceedings.[313] The FTC of the 1970's, in many respects, was a particularly unfortunate time and place to experiment with direct funding for public participation. Beyond the unhappy circumstances in which the agency compensation program developed, however, was the underlying dilemma involved in striking an acceptable trade off between participants' technical competence and grassroots participation. The FTC's experience suggests that in the absence of a broader political consensus or a clearer legislative mandate, this is an extremely difficult balancing act to perform.

313. *See* note 41 *supra* (quoting Chairman Pertschuk).

Appendix 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. The study has 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 submit-

ting 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.

VOCATIONAL SCHOOLS

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 lowered 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
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 Ann 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

PRESCRIPTION DRUGS

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 disclosure 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 hearing 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

HOLDER-IN-DUE-COURSE

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

HEARING AIDS

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)	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
Washington, D.C.	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)	First Application (4/12/76 and 5/4/76)	Testimony: survey of hearing aid dealers to assess 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)
Michigan	Second Application (9/22/77)	Submit post-record comments.	35,363.60	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

FUNERAL PRACTICES

Applicant	Date of Application	Proposed Activities	Request	Authorization
Americans for Democratic Action-Consumer Affairs Committee (ADA) *and* National Council of Senior Citizens, Inc. (NCSC).	First Application (2/23/76)	Testimony: consumers labor union representative (who pays death benefits), economist (on stucture 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)
Washington D.C.				
	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 (costs already incurred). Additional costs because underestimated length of D.C. hearings.	9,296.17	9,296.17
	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 of 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 transportation and per diem expenses omitted from original budget.	666.00	666.00
	Third Application (6/14/76)	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

FUNERAL PRACTICES continued

Applicant	Date of Application	Proposed Activities	Request	Authorization
	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*	$26,888.41
Central Area Motivation Program (CAMP) Washington State	First Application (4/5/76)	Testimony: survey or recent purchasers of funerals; attitude survey of general public; interiews with senior citizens; survey of state laws. Serve as group representative. Submit rebuttal.	$ 9,792	None
	Second Application (4/26/76)	Revises proposal of 4/5/76 to make it 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) Washington, D.C.	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)
	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

FUNERAL PRACTICES continued

Applicant	Date of Application	Proposed Activities	Request	Authorization
	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 Affairs, Chicago Public Television	2/23/76	Consumer representative (activities unclear: evidently group representative).	Not Stated	None
Illinois				
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; survey 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 rebuttal.	$ 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
Pre-Arrangement Interment Association of America (PIAA)	First Application (12/7/76)	Submit rebuttal and post-record comments.	$23,540.00	None
Virginia				
	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

PROTEIN SUPPLEMENTS

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)	First Application (5/26/76)	Testimony: review relevant medical literature; analyze protein supplement information in sources other than ads; survey proten supplement outlets to determine information ant attitudes communicated to consumers; demographic analysis of protein supplement users.	$12,730.00	$12,710.00
New York				
	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.	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
California				
	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.)	6/15/76	Testimony: personal experiences recovering from cancer.	$ 300	None
North Carolina				

TOTAL AUTHORIZATION FOR PROTEIN SUPPLEMENTS: 33,430.30

OPHTHALMIC GOODS

Applicant	Date of Application	Proposed Activities	Request	Authorization
Americans for Democratic Action-Consumer Affairs Committee (ADA)	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)
Washington, D.C.	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 representative at Dallas hearings.	$ 1,962.00	$ 1,828.00
	Second Application (8/6/76)	Additional attorney time because hearing 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

OPHTHALMIC GOODS continued

Applicant	Date of Application	Proposed Activities	Request	Authorization
	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
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 cost 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.	$12,665.00	$12,575.00
United Consumers of the Alleghenies, Inc. (U.C.A.)	6/17/76	Testimony: evidently personal experiences.	$ 253.20	No Record Found

Pennsylvania

TOTAL AUTHORIZATION FOR OPHTHALMIC GOODS: $127,419 60

FOOD ADVERTISING

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
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

FOOD ADVERTISING continued

Applicant	Date of Application	Proposed Activities	Request	Authorization
Wendy Gardner (Home Economist, Consumers Co-operative of Berkeley, Inc.) California	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 Co-operative of Berkeley, 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 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

FOOD ADVERTISING continued

Applicant	Date of Application	Proposed Activities	Request	Authorization
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

CARE LABELING

Applicant	Date of Application	Proposed Activities	Request	Authorization
Seymore Goldwasser (Consultant in the area of textiles and detergents)	9/19/76	"Technical representation" for the consumer.	Not Stated	None
New Jersey				
National Consumers Congress (NCC merged into the National Consumers League on 6/27/77)	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
Washington, D.C.				
	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

USED CARS

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
	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**	7,700.00** (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 costs 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

USED CARS continued

Applicant	Date of Application	Proposed Activities	Request	Authorization
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 re-shopping 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.

OTC DRUGS

Applicant	Date of Application	Proposed Activities	Request	Authorization
Americans for Democratic Action-Consumer Affairs Committee (ADA)	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)
Washington, D.C.	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 (orally 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)	First Application (11/17/75)	Not clear; evidently expert testimony relating to effects of advertising on children.	$ 22,536	None
Washington, D.C.	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

OTC DRUGS continued

Applicant	Date of Application	Proposed Activities	Request	Authorization
	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

CREDIT PRACTICES

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	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)
Georgia		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)	8/28/75	Testimony: representing the Society's clients (all poor persons in the Greater Kansas City Area).	$ 222	None
Missouri				
National Consumer Law Center (NCLC)	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)
Massachusetts	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

HEALTH SPAS

Applicant	Date of Application	Proposed Activities	Request	Authorization
American for Democratic Action-Consumer Affairs Committee (ADA)	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)
Washington, D.C.	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 Economic 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

HEALTH SPAS continued

Applicant	Date of Application	Proposed Activities	Request	Authorization
Consumers Union of United States, Inc. (West Coast) (CU) *and* California Citizen Action Group (CalCAG)	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)
California	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
	Fourth 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**
	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/CalCAG (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 (3/7/78)	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.

MOBILE HOMES

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
	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 follow-up 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 hearing. Post-hearing preparation of proposed findings and conclusions. Submit post-record comments.	11,384.86	6,595.60 (deferred decision on post-hearing participation)

MOBILE HOMES continued

Applicant	Date of Application	Proposed Activities	Request	Authorization
	Fourth Application (12/29/77)	Additional expenses in pre-hearing 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)	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
Virginia				
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)	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)
Washington, D.C.	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 survey involving ten 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) and 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 funds for rebuttal)	3,950 (plus approval of funds transfer)
	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)

THERMAL INSULATION (R-VALUE) continued

Applicant	Date of Application	Proposed Activities	Request	Authorization
Insulation Contractors Association (ICA)	2/3/78	Testimony: two witnesses (nature of testimony not specified).	$ 1,000	No Record Found
California				
National Association of Home Insulation Contractors (NAHIC)	First Application (1/10/78, 1/16/78 and 1/26/78)	Representation at hearings. Testimony: three contractors.	$ 5,800.00	$ 5,560.00
Washington, D.C.	Second Application (2/23/78)	Additional attorney costs because hearing 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 transportaiton that have already been incurred.	242.98	242.98
	Fifth Application (6/20/78)	Overrun: additional attorney costs.	38.21	38.21
	Sixth Application (11/30/78)	Overrun: additional attorney costs.	836.87	836.87
			$15,548.06	$15,888.06
National Consumers League (NCL)	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)
Washington, D.C.	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

OTC ANTACIDS

Applicant	Date of Application	Proposed Activities	Request	Authorization
Americans for Democratic Action-Consumer Affairs Committee (ADA) *and* National Council of Senior Citizens, Inc. (NCSC)	First Application (Undated; received 7/14/77)	Submit pre-hearing comments.	$ 5,563	$ 4,115 (request additional explanation for the expenses of ADA members)
Washington, D.C.	Second Application (11/18/77)	Researcher. Resubmission of request for reimbursement for applicant 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)	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
Washington, D.C.	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
Virginia 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

CHILDREN'S ADVERTISING

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 pre-school 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 members' 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; deferred decision on disputed issues)
			$182,225.70*	$77,016.20
Center for Public Representation (CPR)	First Application (4/26/78)	Testimony: studies of the effect of television advertising on 350 children.	$17,700	$16,350 (deferred decision on travel expenses)
Wisconsin	Second Application (6/26/78)	Expand the number of children interviewed for the research project.	2,674	2,674
			$20,374	$19,024
Community Nutrition Institute (CNI)	First Application (8/3/78)	Testimony: studies to determine shopping practices and knowledge of nutrition information of low-income parents.	$32,768	$32,768
Washington, D.C.	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

CHILDREN'S ADVERTISING continued

Applicant	Date of Application	Proposed Activities	Request	Authorization
Consumers Union of United States, Inc. (CU) *and* Committee on Children's Television (CCT)	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 hearing.	$149,244	$19,700 (preparation for San Francisco hearing deferred; a more detailed explanation of many of the projects is needed)
California	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)	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)
Washington, D.C.	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
	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	7,676.00 (approval for one person)
	Eighth Application (1/3/79)	Additional preparation for hearings.	3,360.00	Pending
			$287,556.71*	$58,392.00

CHILDREN'S ADVERTISING continued

Applicant	Date of Application	Proposed Activities	Request	Authorization
Media Access Project (MAP)	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
Washington, D.C.	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)	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
Washington, D.C.				
Safe Food Institute (SFI)	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)
California				
Daniel B. Wackman Professor, University 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

Frequency of Application and Authorization as of January 31, 1979

Applicants Who Requested Reimbursement Funds in Three or More Rulemakings	Number of Rulemakings in Which Application Was— Filed	Authorized	Rulemakings in Which Application was Filed	Action on Application Amount Authorized
Americans for Democratic Action-Consumer Affairs Committee	7	6	Prescription Drugs	Denied
			Funeral Practices (with NCSC)	$ 57,474.35
			Ophthalmic Goods	$ 30,202.33
			Used Cars (with CFAS)	$ 9,304.59
			OTC Drugs	$ 24,470.90
			Health Spas (in part with CU/CalCAG)	$ 47,780.00
			OTC Antacids (with NCSC)	$21,592.00
California Citizen Action Group	7	5	Funeral Practices	$ 26,888.41
			Hearing Aids	Withdrawn
			Ophthalmic Goods	$ 38,285.00
			OTC Drugs	$ 43,683.13
			Health Spas (with CU and, in part, with ADA)	$ 47,991.00
			Thermal Insulation (with CalPIRG	Denied
Consumer Action-San Francisco	5	4	Vocational Schools	$ 29,263.00
			Prescription Drugs	Denied
			Protein Supplements	$ 15,507.00
			Ophthalmic Goods	$ 43,544.60
			Used Cars (in part with CalPIRG)	$ 19,521.52
Council on Children, Media and Merchandising	4	4	Food Advertising	$ 62,434.78
			OTC Drugs	$ 25,249.00
			OTC Antacids	$ 41,064.63
			Children's Advertising	$ 58,392.00
National Council of Senior Citizens, Inc.	4	4	Prescription Drugs	$ 2,070.00
			Hearing Aids	$ 46,734.13
			Funeral Practices (with ADA)	$ 57,474.35
			OTC Antacids (with ADA)	$ 21,592.00
California Public Interest Research Group, Inc.	3	1	Used Cars (in part with SFCA)	$ 46,353.68
			Credit Practices	Denied
			Thermal Insulation (with CalCAG)	Denied
Center for Public Representation	3	3	Used Cars	$ 33,146.00
			Thermal Insulation	$ 4,573.09
			Children's Advertising	$ 19,024.00
Consumers Union of the U.S. (West Coast Regional Office)	3	2	Prescription Drugs	Denied
			Health Spas (with CalCAG and, in part, ADA)	$ 47,991.00
			Children's Advertising (with CCT)	$ 73,916.00
National Consumers Congress/ National Consumers League*	3	3	Food Advertising	$ 9,295.00
			Care Labeling	$ 57,292.67
			Thermal Insulation	$ 42,484.00
National Consumer Law Center, Inc.	3	3	Vocational Schools	$ 2,474.25
			Holder in Due Course	$ 3,093.25
			Credit Practices	$132,256.24
TOTAL:	42	35		

*NCC merged into NCL on 6/27/77.