

THE EFFECT OF THE FEDERAL TRADE COMMISSION IMPROVEMENTS ACT OF 1980 ON THE FTC'S RULEMAKING AND ENFORCEMENT AUTHORITY

EARL W. KINTNER*
CHRISTOPHER SMITH**
DAVID B. GOLDSTON***

On May 28, 1980, President Carter signed into law the Federal Trade Commission Improvements Act of 1980.¹ The Act authorizes \$225 million for the Commission through September 30, 1982,² the first time since 1977 that the agency has been funded through the traditional authorization process. Although the Commission's basic enforcement powers remain unchanged, the Act limits some of the FTC's more far reaching initiatives. The statute also provides important new safeguards for businesses that must submit proprietary information to the Commission.

Enacted after three years of wrangling over how to curb the FTC's discretionary authority, the compromise legislation fashioned by Congress satisfied neither the critics nor the supporters of the Commission. Having run the congressional gauntlet, however, the Commission will likely bring more enforcement actions in traditional antitrust and consumer protection areas and make fewer ventures into uncharted legal waters.

The FTC Improvements Act of 1980 significantly bolsters the confidentiality protections that apply to information obtained by the Commission.³ In addition, the Act requires the Commission to use a civil investigative demand (CID) instead of a subpoena in all future *pre-*

* A.B., 1936, LL.D., 1970, DePauw University; J.D., 1938, Indiana University. Member, District of Columbia and Indiana Bars; Senior Partner, Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C.

** A.B., 1969, Wabash College; J.D., 1972, University of Kansas. Member, District of Columbia and Kansas Bars; Partner, Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C.

*** A.B., 1973, University of Chicago; J.D., 1977, George Washington University. Member, District of Columbia Bar; Associate, Arent, Fox, Kintner, Plotkin & Kahn, Washington, D.C.

1. Pub. L. No. 96-252, 94 Stat. 374 (1980) (hereinafter cited as Improvements Act).

2. Improvements Act § 17.

3. See notes 18-33 *infra* and accompanying text.

complaint consumer protection investigations.⁴ The procedures the Commission must follow when issuing a CID are modeled after those now utilized by the Department of Justice under the Antitrust Civil Process Act.⁵

A number of the Act's provisions are applicable to rulemaking initiatives.⁶ Future trade regulation rules may be overturned within ninety days after promulgation by a two-House legislative veto.⁷ The Commission is required to publish advance notices of proposed rulemaking, and must prepare regulatory analyses of proposed and final rules. The legislation also restrains—but does not eliminate—the Commission's authority to issue trade regulation rules relating to voluntary standards and certification activities,⁸ children's advertising,⁹ and funeral industry practices.¹⁰

The Act permits the Commission to conduct antitrust investigations of agricultural cooperatives only when the alleged anticompetitive activities fall outside the antitrust immunity granted to co-ops¹¹ under the Capper-Volstead Act.¹² Future FTC investigations of the insurance industry may occur only when requested by Congress.¹³ Finally, the amendments prohibit the Commission from taking any action to cancel a registered trademark because the trade name has allegedly become the common name for a product.¹⁴

Another provision of the Act makes good faith reliance on a Federal Reserve Board consumer credit regulation or interpretation a defense in an administrative or judicial proceeding brought by the Commission.¹⁵ In addition, the legislation attempts to make the Commission more accountable to Congress in the future by requiring the Senate Commerce Committee to conduct semiannual oversight hearings on

4. See notes 34-40 *infra* and accompanying text.

5. 15 U.S.C. §§ 1311-1314 (1976). For a discussion of the Antitrust Civil Process Act procedures see Kintner, Griffin & Goldston, *The Hart-Scott-Rodino Antitrust Improvements Act of 1976: An Analysis*, 46 GEO. WASH. L. REV. 1, 3-11 (1977).

6. See notes 41-62 *infra* and accompanying text.

7. Improvements Act § 21. See note 41 *infra* and accompanying text.

8. Improvements Act § 7. See notes 50-56 *infra* and accompanying text.

9. Improvements Act § 11. See notes 57-58 *infra* and accompanying text.

10. Improvements Act § 19. See notes 59-62 *infra* and accompanying text.

11. See notes 67-69 *infra* and accompanying text.

12. 7 U.S.C. §§ 291-292 (1976).

13. See notes 64-66 *infra* and accompanying text.

14. Improvements Act § 18.

15. *Id.* § 16 (to be codified at 15 U.S.C. § 57b-4(b)(1)). See text accompanying note 70 *infra*.

the Commission's activities.¹⁶

The Act's provisions become effective immediately.¹⁷ Many of the restrictions placed on the Commission, however, last only until September 30, 1982, when the appropriations authorized by the Act expire.

A more detailed analysis of the Federal Trade Commission Improvements Act of 1980 follows.

I. CONFIDENTIALITY

The FTC Improvements Act of 1980 provides major new substantive and procedural confidentiality protections to persons submitting sensitive business information to the Commission.¹⁸ The present prohibition in section 6(f) of the FTC Act¹⁹ against public disclosure by the Commission of "trade secrets and names of customers" is expanded so that the Commission is now prohibited from disclosing "any trade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential."²⁰ Thus, any information exempt from mandatory disclosure under Exemption 4 of the Freedom of Information Act²¹ may not be disclosed even as a matter of discretion by the Commission.²² Despite this prohibition, the Commis-

16. *Id.* § 22.

17. *Id.* § 23.

18. *Id.* §§ 3, 4, 14. Interim implementing regulations were published at 45 Fed. Reg. 36,337-45 (1980).

19. 15 U.S.C. § 46(f) (1976) (amended 1980).

20. Improvements Act § 3(a).

21. 5 U.S.C. § 552(b)(4) (1976).

22. The Conference Report states:

The effect of the provision is to remove any discretionary authority that the Commission has to make public any information which is exempt from disclosure under the fourth exemption of the Freedom of Information Act. The conferees intend no change in the accepted judicial interpretation of the phrase "trade secrets or commercial or financial information obtained from a person and privileged or confidential."

H.R. REP. NO. 96-917, 96th Cong., 2d Sess. 28 (1980). The Senate Report also takes the position that this provision is to be coextensive with the Freedom of Information Act, Exemption 4, citing *National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), as the leading case interpreting that exemption. S. REP. NO. 96-500, 96th Cong., 1st Sess. 10-11 (1979). The Senate Committee Report elaborates on the scope of the section 6(f) confidentiality provision as follows:

It is wholly improper, and forbidden by this section, for the Commission to disclose information provided by a company if, taking a realistic view of the environment in which that company operates, such disclosure would result in any significant financial harm to the company. While no conclusive formula can be devised, factors such as these are to be taken into account in determining whether a document comes within the prohibition: whether the information is considered confidential by the submitter and given

sion will be allowed to share such information with federal and state law enforcement agencies that certify that the information will be kept confidential and will be used only for law enforcement purposes.²³

In addition, any material provided to the Commission pursuant to compulsory process or "voluntarily in place of such compulsory process"²⁴ in an investigation to determine whether any person may have violated any law administered by the Commission is exempt from disclosure under the Freedom of Information Act.²⁵ This provision parallels the Freedom of Information Act exemption for material supplied to the Department of Justice under the Antitrust Civil Process Act.²⁶ The legislative history indicates that this section is intended to exempt from disclosure under the Freedom of Information Act all documents in the

appropriate protection; whether the information would reveal to competitors operational strengths and weaknesses or other valuable information to which the submitter does not have access about those competitors; whether the information would harm a third party, even if not the submitter; and whether the information is readily available from other sources. The following kinds of information would generally come within that category: profit and loss statements, balance sheets, financing details and strategies, product costs, detailed sales statistics, detailed production statistics, contract bids or terms, negotiation positions and strategies, marketing or advertising plans and strategies, plans for future organizational changes, production plans, key employees salaries and benefits, and customer names.

Moreover, there are occasions when the release of information that has been held in confidence will cause the person submitting the information commercial harm, even though such disclosure would not necessarily put it at a competitive disadvantage. The Committee further intends that the phrase "confidential commercial or financial information" be applied so as to prohibit the disclosure of proprietary studies that were prepared or obtained by a person and that if made public would likely cause that person to refrain from preparing or obtaining similar studies in the future. For example, a company might engage a consultant to prepare a candid research report about one or another aspect of its product. If the report were obtained by the FTC and subsequently made public, the company would likely be discouraged from supporting such research in the future, irrespective of whether disclosure would cause direct competitive injury because the company would reasonably desire that candid evaluations of this sort not become public knowledge. The Committee believes that such endeavors, which are undertaken outside the scope of customary business recordkeeping, are valuable and ought not to be chilled by the prospect of public disclosure.

Id. at 11.

23. Improvements Act § 3(a). In *Jaymar-Ruby, Inc. v. FTC*, No. 580-107 (N.D. Ind. Sept. 8, 1980), the court held that the amendment to section 6(f) authorizes the Commission to release trade secrets and other confidential information to state Attorneys General, even if the material was collected prior to the amendment's effective date. The court also held that such disclosures are a matter of agency discretion, not subject to judicial review.

24. Improvements Act § 14 (to be codified at 15 U.S.C. § 57b-2(f)).

25. *Id.* See *Dairymen, Inc. v. FTC*, [1980-2] Trade Cas. (CCH) ¶ 63,479, at 76,510 (D.D.C.). Disclosure to Congress and to federal and state law enforcement agencies is permitted. Improvements Act § 14 (to be codified at 15 U.S.C. §§ 57b-2(b)(3)(C), (b)(6)).

26. 15 U.S.C. § 1314(f) (1976).

Commission's possession on May 28, 1980, that previously were submitted to the Commission pursuant to compulsory process in a formal investigation.²⁷ Although the statutory language might appear to limit the Freedom of Information Act exemption to documents obtained during a pre-complaint investigation, the Commission has asserted that the exemption also applies to documents subpoenaed in a post-complaint adjudicative proceeding.²⁸

The amendments also establish new procedural safeguards with respect to any document or transcript of oral testimony received by the Commission pursuant to compulsory process in an investigation intended to determine whether any person may have violated any law administered by the Commission.²⁹ The Commission must designate a custodian to limit access to these materials to FTC employees and consultants retained by the Commission. The materials may be used in an adjudicative proceeding subject to appropriate *in camera* treatment or protective orders. The Commission may disclose the materials to congressional committees, and to state and federal law enforcement agencies that certify that the material will be maintained in confidence and will be used only for official law enforcement purposes. No other disclosure is permitted without the consent of the submitter. Once the proceeding has been completed, or if no proceeding has been commenced within a reasonable time, the submitter may obtain return of the materials (but not of any copies made by the custodian)³⁰ by filing a written request with the custodian. Under the previous Commission policy, documents submitted to the Commission were almost never returned to the provider.

The Act establishes a separate statutory scheme for documents marked confidential by the person supplying the information, and which are provided to the Commission other than pursuant to compul-

27. S. REP. NO. 96-500, 96th Cong., 1st Sess. 28 (1979). This position also was adopted in *Dairyman, Inc. v. FTC*, [1980-2] Trade Cas. (CCH) ¶ 63,479, at 76,510 (D.D.C.).

28. See FTC, "Statement Concerning the Status of Subpoenaed Documents as 'Agency Records' under the Freedom of Information Act" (May 21, 1980) at 5, filed in *FTC v. Anderson*, No. 77-0161 (D.D.C.): "It is our understanding that in Section 21(f) [15 U.S.C. § 57b-2(f)] 'investigation' is used in the broad sense of determining whether a person has violated laws administered by the Commission, and thus would apply to documents subpoenaed in an adjudicative proceeding."

29. Improvements Act § 14 (to be codified at 15 U.S.C. § 57b-2(b)).

30. The interim regulations provide that copies will not be returned unless, upon a showing of extraordinary circumstances, the Commission determines that return is required in the public interest. 45 Fed. Reg. 36,337, 36,345 (1980).

sory process.³¹ Before the material may be disclosed, the Commission must give the submitter at least ten days advance notice that the material is considered nonconfidential and unprivileged. Any person receiving notice from the Commission may bring an action in a district court to enjoin disclosure of the materials. During the pendency of any request for a stay of disclosure, the Commission is prohibited from releasing the documents at issue. Although these procedures are not applicable to congressional requests for disclosure, the Commission must notify the submitter of such requests.³²

Information obtained under the Commission's line-of-business statistical reporting program may not be disclosed to the public or to other federal agencies in a manner that identifies the business furnishing the information. In addition, data collected under the line-of-business program that can be attributed to an individual submitter may not be used for law enforcement purposes.³³

II. CIVIL INVESTIGATIVE DEMANDS

The Act requires the Commission to use a civil investigative demand (CID) instead of a subpoena in all future pre-complaint consumer protection investigations.³⁴ The Commission's new CID authority is modeled after the procedure now utilized by the Department of Justice under the Antitrust Civil Process Act.³⁵

Each CID must state the nature of the conduct under investigation and the provision of law applicable to the alleged violation.³⁶ This provision is intended to force the Commission to describe more precisely the subject matter of the inquiry. The new section also requires at least one commissioner to sign all forms of compulsory process, and this power can no longer be delegated.³⁷

The new procedures allow any person who receives a CID to file

31. Improvements Act § 14 (to be codified at 15 U.S.C. § 57b-2(c)).

32. *Id.* § 14 (to be codified at 15 U.S.C. § 57b-2(d)(1)(A)).

33. *Id.* § 4. Similar limitations previously had been incorporated in FTC appropriations legislation. See Pub. L. No. 94-362, 90 Stat. 937, 956 (1976); Pub. L. No. 94-121, 89 Stat. 611, 634 (1975); Pub. L. No. 93-563, 88 Stat. 1822, 1840 (1974). Proposed implementing regulations were published at 45 Fed. Reg. 57,230-35 (1980).

34. Improvements Act § 13 (to be codified at 15 U.S.C. § 57b-1(b)). Interim implementing regulations were published at 45 Fed. Reg. 36,337-45 (1980).

35. 15 U.S.C. §§ 1312-13 (1976). See note 5 *supra*.

36. Improvements Act § 13 (to be codified at 15 U.S.C. § 57b-1(c)(2)).

37. *Id.* § 13 (to be codified at 15 U.S.C. § 57b-1(i)).

with the Commission a petition to modify or quash the demand within twenty days after service.³⁸ Whenever any recipient fails to comply with a CID, the Commission may file enforcement proceedings in the district court where the recipient resides, is found, or transacts business.³⁹ In the past, the Commission could enforce a subpoena in any district where the investigation was taking place,⁴⁰ which allowed the Commission in most instances to file enforcement proceedings in the District of Columbia. The new venue requirement may often require the Commission to enforce a CID where a small business is located rather than in a distant forum.

The Commission may continue to use administrative subpoenas in antitrust investigations. In addition, once the Commission issues an administrative complaint, it may use existing discovery procedures. The new CID standards, however, may cause the Commission to carefully evaluate the standards for compulsory process in other agency proceedings. Some recent competition and consumer protection subpoenas in fact have been drawn more narrowly.

III. RULEMAKING REFORMS

The Act establishes a ninety day congressional review period for Commission trade regulation rules, after which the rule becomes effective unless both Houses of Congress have passed a resolution disapproving the rule—the so-called two-House legislative veto. The statute establishes procedures to ensure that both Houses will have an opportunity to vote on the rule prior to the expiration of the review period. If a rule is vetoed, the Commission may resubmit a revised rule, which is also subject to congressional review. Because of the many questions concerning the constitutionality of this procedure, the Act provides for expedited judicial review should the constitutionality of the legislative veto be challenged. The legislative veto provision remains in effect until September 30, 1982.⁴¹

The Act contains a number of changes in Commission rulemaking proceedings. Prior to commencing a rulemaking proceeding in the fu-

38. *Id.* (to be codified at 15 U.S.C. § 57b-1(f)). The Commission has amended its rules of practice to make the twenty day period also applicable to petitions to quash investigatory subpoenas. 45 Fed. Reg. 36,342 (1980) (amending 16 C.F.R. § 2.7(d)).

39. Improvements Act § 13 (to be codified at 15 U.S.C. § 57b-1(e)).

40. 15 U.S.C. § 49 (1976) (amended 1980).

41. Improvements Act § 21.

ture, the Commission must publish an advance notice of proposed rulemaking for public comment. The advance notice must set forth a description of the proposed rule, the objectives sought to be achieved by the proposal, and alternatives under consideration. The Commission is also required to submit any notice of proposed rulemaking to the Senate and House Commerce Committees thirty days in advance of its *Federal Register* publication.⁴²

In the future any notice of proposed rulemaking must include the text of the proposed rule and any alternatives under consideration.⁴³ The notice must be accompanied by a "preliminary regulatory analysis"⁴⁴ setting forth the need for and the objectives sought to be achieved by the proposed rule; any reasonable alternatives; and the projected benefits, adverse effects, and effectiveness of the proposed rule and each alternative. When the Commission promulgates a final rule, the agency must issue a "final regulatory analysis,"⁴⁵ which must include the types of information provided in the preliminary regulatory analysis as well as an explanation of the reasons the Commission chose a particular alternative. The Commission must also summarize the significant issues raised during the public comment period and its response. Regulatory analyses are not subject to judicial review (thereby limiting their usefulness, except in the case of congressional review) although a court may set aside a rule if the Commission has failed entirely to prepare a regulatory analysis.⁴⁶

The Act recognizes the adversarial nature of the rulemaking process by requiring the Commission to promulgate procedural rules for rulemaking proceedings that (1) permit ex parte contacts between outside parties and commissioners provided those contacts are made public and summaries of the contacts are placed on the rulemaking record, and (2) prohibit ex parte contacts between the rulemaking staff and commissioners and their personal staffs unless such contacts are made public and summaries of the contacts are placed on the rulemak-

42. *Id.* § 8.

43. Section 8 of the Improvements Act establishes the Commission's responsibility for publication of an advance notice of proposed rulemaking, which differs from a notice of proposed rulemaking. The Commission's duties with respect to notices of proposed rulemaking are set forth at 15 U.S.C. § 57a(b) (1976), as amended by Improvements Act § 8, and are expanded by Improvements Act § 15, adding 15 U.S.C. § 57b-3.

44. Improvements Act § 15 (to be codified at 15 U.S.C. § 57b-3(b)(1)).

45. *Id.* (to be codified at 15 U.S.C. § 57b-3(b)(2)).

46. *Id.* (to be codified at 15 U.S.C. § 57b-3(c)(1)).

ing record.⁴⁷ The amendments change current practice, under which outside parties have not been permitted to meet with commissioners, with no comparable restrictions on staff ex parte contacts.

The Act also contains provisions intended to increase the independence of Commission employees who preside over rulemaking proceedings.⁴⁸ In addition, the amendments limit the amount of compensation each participant (such as a consumer or small business group) can receive in a rulemaking proceeding to \$75,000, and prohibit any person from receiving more than \$50,000 per year for all rulemaking proceedings in which that person participates. Under the legislation the Commission must earmark twenty-five percent of its public participation funding for small businesses and initiate a small business outreach program to increase small business participation in Commission rulemaking proceedings.⁴⁹

The Act prohibits the Commission from adopting a rule with respect to "unfair or deceptive" voluntary standards and certification activities⁵⁰ pursuant to the Commission's rulemaking authority under section 18 of the Federal Trade Commission Act.⁵¹ Thus, the Commission may only attempt to proceed with a rule concerning "unfair methods of competition" pursuant to its rulemaking authority under section 6(g) of the FTC Act.⁵² Although the Commission's authority to issue a trade regulation rule under section 6(g) was upheld in *National Petroleum Refiners Association v. FTC*,⁵³ it is uncertain whether other courts will reach the same conclusion.⁵⁴ The Conference Report on the FTC Improvements Act of 1980 states that the conferees do not take a position on the Commission's authority to issue a standards and certification rule under section 6(g).⁵⁵

The Conference Report suggests that the Commission explore the

47. *Id.* § 12. Proposed regulations were published at 45 Fed. Reg. 50,814-17 (1980).

48. Improvements Act § 9. Interim implementing regulations were published at 45 Fed. Reg. 36,337-45 (1980).

49. Improvements Act § 10.

50. *Id.* § 7. The Commission's proposed rule was published at 43 Fed. Reg. 57,269 (1978).

51. 15 U.S.C. § 57a (1976) (amended 1980).

52. *Id.* § 46(g) (1976).

53. 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974).

54. Congress left the validity of section 6(g) rules an open question under the 1975 FTC Improvements Act. See 15 U.S.C. § 57a(a)(2) (1976). For further discussion of this legislation see Kintner & Smith, *The Emergence of the Federal Trade Commission as a Formidable Consumer Protection Agency*, 26 MERCER L. REV. 651 (1975).

55. H.R. REP. NO. 96-917, 96th Cong., 2d Sess. 30 (1980).

possibility of issuing voluntary rules or guidelines in this area. The conferees also expect the Commission to closely follow the activities of other federal agencies, specifically mentioning the Office of Management and Budget's procedures for the development of standards applicable to products purchased by the federal government, as implemented by the Department of Commerce.⁵⁶

The Act suspends the Commission's children's television advertising rulemaking proceeding⁵⁷ until the Commission publishes the text of a proposed rule, and provides that any future proceeding may only be based on acts or practices that are "deceptive" (in contrast to practices that are merely "unfair"). In addition, "unfairness" may not be the basis for any new advertising rulemaking proceeding instituted before September 30, 1982. As opposed to rulemaking proceedings, however, the Commission may commence specific advertising enforcement proceedings based on an unfairness theory.⁵⁸

The Act allows the Commission to promulgate its proposed rule regulating funeral industry practices⁵⁹ in a somewhat restricted form.⁶⁰ The rule must be limited to mandating price disclosures, banning deceptive or coercive practices, and prohibiting unlawful practices such as boycotts or threats against other members of the industry. The Commission must publish a revised text of the proposed rule for public comment.⁶¹ If the rule is promulgated, states with laws that provide equal or greater protection to consumers may obtain exemptions from the rule, in a manner similar to the preemption scheme under the Magnuson-Moss Warranty Act.⁶²

IV. COMMISSION JURISDICTION

The Act significantly restricts the Commission's authority to investigate and impose reporting requirements on the insurance industry. The Commission is authorized to participate in the study of Medigap insurance with the Department of Health and Human Services (formerly HEW).⁶³ Otherwise, the Commission is prohibited from con-

56. *Id.* at 29-30.

57. 43 Fed. Reg. 17,967-72 (1978).

58. Improvements Act § 11.

59. 40 Fed. Reg. 39,901-06 (1975).

60. Improvements Act § 19.

61. *Id.*

62. 15 U.S.C. § 2311(c) (1976).

63. 15 U.S.C. § 46 (1976) as amended by Improvements Act § 5(b) (1980). Medigap insur-

ducting investigations of the "business of insurance" unless requested to do so by a majority vote of either the Senate or House Commerce Committee.⁶⁴ The Conference Report indicates that the conferees intended to reaffirm the basic policy of the McCarran-Ferguson Act⁶⁵—that the business of insurance is to be regulated by the states—and that the Commission's authority to investigate the insurance industry is to be restricted to "general review and analysis of insurance policy issues," rather than specific investigations of the industry.⁶⁶

The Commission is prohibited from conducting any study, investigation or prosecution of any agricultural cooperative pertaining to conduct that pursuant to the Capper-Volstead Act⁶⁷ is exempt from the federal antitrust laws. The Commission is also prohibited from studying or investigating any agricultural marketing orders. The Commission retains authority to prosecute its complaint against Sunkist⁶⁸ for alleged anti-competitive practices and to investigate other agricultural cooperatives to the extent that the alleged conduct exceeds the cooperative's Capper-Volstead protection. These prohibitions are in effect until September 30, 1982.⁶⁹

V. MISCELLANEOUS PROVISIONS

The Act provides that good faith reliance upon rules or interpretations issued by the Federal Reserve Board is a defense in any administrative or judicial proceeding commenced by the Federal Trade Commission.⁷⁰ Businesses that extend consumer credit or lease con-

ance is private health insurance sold as a supplement to Medicare coverage. Medicare covers less than 50% of health care costs. The FTC staff has expressed concern about the lack of consumer information in the Medigap market, the existence of non-standard policies that make comparison shopping difficult, the unnecessary duplication resulting from the purchase of two or more policies that overlap and the existence of unfair sales practices. See FTC Office of Policy Planning, "Private Health Insurance to Supplement Medicare" i-ii (July 1978).

64. Improvements Act § 5.

65. 15 U.S.C. §§ 1011-15 (1976).

66. H.R. REP. NO. 96-917, 96th Cong., 2d Sess. 29 (1980).

67. 7 U.S.C. §§ 291-92 (1976).

68. Sunkist Growers, Inc., Dkt. 9100 (complaint filed May 31, 1977). The FTC's complaint alleged that Sunkist, an agricultural cooperative, had monopolized and attempted to monopolize various markets and submarkets of the western citrus fruit industry. The case generated political controversy because of Sunkist's assertion that its activities were immune from antitrust prosecution pursuant to the Capper-Volstead antitrust exemption for agricultural cooperatives. On August 20, 1980, the Commission withdrew the case from adjudication for purposes of settlement.

69. Improvements Act § 20.

70. *Id.* § 16 (to be codified at 15 U.S.C. § 57b-4(b)).

sumer goods will thus be protected from efforts by the Commission to impose requirements in enforcement actions that are contrary to the regulations and interpretations issued by the Board to implement the federal consumer credit laws. In addition, where the law is unclear, creditors and lessors will be able to obtain interpretations from the Board that will be binding upon the Commission.

The Act requires the Commission to reopen a cease and desist order whenever a person subject to the order files a request that makes a satisfactory showing that changed conditions of law or fact require the order to be modified or set aside. The Commission must act on the petition to modify or set aside the order within 120 days of the filing of the request.⁷¹

The Commission is precluded from challenging trademarks that allegedly have become generic terms under section 14 of the Lanham Trademark Act,⁷² until September 30, 1982.⁷³ In anticipation of the final adoption of the legislation, the Commission withdrew its petition to cancel American Cyanamid's registration of "Formica."⁷⁴

The Act requires the Commission to develop and implement a plan for reducing the reporting burdens imposed on small businesses by the Commission's quarterly financial report program.⁷⁵ The Commission must also publish semiannual regulatory agendas,⁷⁶ a practice that is currently followed by the Commission on a voluntary basis.

VI. CONCLUSION

Although the Federal Trade Commission Improvements Act of 1980 restrains some of the Commission's more controversial initiatives, the legislation does not alter the Commission's basic enforcement authority. Congressional criticism of the Commission, however, already has and will likely continue to cause the Commission to enter new frontiers of trade regulation law much more cautiously. The Commission's re-

71. *Id.* § 2. Interim implementing regulations were published at 45 Fed. Reg. 36,337-45 (1980).

72. 15 U.S.C. § 1064 (1976).

73. Improvements Act § 18.

74. On May 31, 1978, the Commission filed a petition with the Patent and Trademark Office's Trademark Trial and Appeal Board seeking cancellation of American Cyanamid's "Formica" trademark on the ground that it had become a generic term. The Commission withdrew its petition on April 30, 1980, in anticipation of passage of the Improvements Act.

75. Improvements Act § 3.

76. *Id.* § 15 (to be codified at 15 U.S.C. § 57b-3(d)(1)).

cent emphasis on attacking problems on an industry-wide basis through sweeping rulemaking proceedings probably will be replaced in large measure by a renewed commitment to case-by-case adjudication in the more traditional areas of the Commission's law enforcement responsibility. For example, the Commission recently has shown a renewed interest in enforcing the Robinson-Patman Act.⁷⁷ Although this course may ease the burden on some industries (*e.g.*, advertising), it could easily result in added attention to others (*e.g.*, automotive). Thus, the new law leaves the Commission free to pursue a wide variety of activities, and it is by no means a foregone conclusion that the "little old lady of Pennsylvania Avenue" will go back to sleep.

77. 15 U.S.C. §§ 13-13b, 21a (1976).

WASHINGTON UNIVERSITY LAW QUARTERLY

VOLUME 58

NUMBER 4

1980

EDITORIAL BOARD

Editor in Chief
R. MARK MCCAREINS

Managing Editor
ALAN R. BLANK

Article & Book Review Editor
ANNE GRAFF BROWN

Executive Editors
ELIZABETH BLAICH
ALAN B. BORNSTEIN
JEFFREY N. KLAR

Note & Comment Editors
LINDA J. DOUGLAS
JOAN HAGEN SPIEGEL
KAREN M. STRAY-GUNDERSEN

Special Projects Editor
MICHAEL D. ARRI

Topics Editor
LAWRENCE G. ROSE

STAFF

Senior Editors

DAVID P. BAILIS
BRIAN BERGLUND
JEFFERY L. BOYHER
RANDAL J. BROTHERHOOD
STEPHEN D. COFFIN
ARTHUR B. CORNELL

HENRY FINKELSTEIN
JEANNE FISCHER
JUDITH GEISS
PATRICIA D. GRAY
SHELDON KARASIK

JANE L. KLION
AMY R. MELTZER
S. GENE SCHWARM
DAVID STARR
CAROL ROBIN STONE
BARBARA I. WURMAN

Staff

ROBIN A. CASTELLANO
EDWARD A. COHEN
GLENN EUGENE DAVIS
MARK EISEMANN
PENNY RODEEN FORKER
BEALL D. GARY, JR.
EDWIN G. HARVEY
CRAIG HEBERTON IV
MARK S. HOCHMAN
TODD ANTHONY JOHNSON
ROBERT S. JONES
STEPHEN C. JONES

JEFFREY B. KATZ
ANDREW M. KRAMER
GARY W. KULLMANN
CHRISTOPHER ALLEN LAUSE
ROBERT OLIVER LESLEY
CRIS E. LORD
BRAD S. MARKOFF
CARL S. NADLER
ROBERT KAISER NEIMAN
ALAN NEMES
ROBERT JAY PREMINGER

FRED WILLIAM QUATTLEBAUM
DAVID J. RASNICK
RICHARD LANE SCHNAKE
KATHLEEN SNYDER SCHOENE
LINDA C. SHUBOW
HOLLY GAYLE SIMONS
BRAD H. SMITH
SANDRA K. STRATTON
NANCY A. STREHLOW
TERRY R. THOMAS, JR.
TRACY J. VAN STEENBURGH
JOHN M. WOLFF, JR.

BUSINESS MANAGER: AMY R. MELTZER
SECRETARY: SYLVIA H. SACHS

ADVISORY BOARD

CHARLES C. ALLEN III
MARK G. ARNOLD
FRANK P. ASCHEMEYER
G. A. BUDER, JR.
DANIEL M. BUESCHER
REXFORD H. CARUTHERS
MICHAEL K. COLLINS
DAVID L. CORNFELD
DAVID W. DETJEN
WALTER E. DIGGS, JR.
GLEN A. FEATHERSTUN

ROBERT A. FINKE
FRANCIS M. GAFFNEY
JULES B. GERARD
DONALD L. GUNNELS
MICHAEL HOLTZMAN
GEORGE A. JENSEN
LLOYD R. KOENIG
ALAN C. KOHN
HARRY W. KROEGER
FRED L. KUHLMANN
PAUL M. LAURENZA
WARREN R. MAICHEL

JAMES A. MCCORD
DAVID L. MILLAR
GREGG R. NARBER
DAVID W. OESTING
NORMAN C. PARKER
CHRISTIAN B. PEPER
ALAN E. POPKIN
ROBERT L. PROOST
ORVILLE RICHARDSON
W. MUNRO ROBERTS
STANLEY M. ROSENBLUM
A. E. S. SCHMID

EDWIN M. SCHAEFFER, JR.
KARL P. SPENCER
JAMES W. STARNES
JAMES V. STEPLETON
MAURICE L. STEWART
WAYNE D. STRUBLE
DOMINIC TROJANI
ROBERT M. WASHBURN
ROBERT S. WEININGER
JUDITH BARRY WISH
WAYNE B. WRIGHT