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FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

BUREAU OF
CONSUMER PROTECTION

February 5, 1981

PROCEDURES FOR STANDARDS AND CERTIFICATION RULEMAKING

On February 3, 1981 the Federal Trade Commission published a notice in the Federal Register announcing future steps in the standards and certification rulemaking. The notice directs the staff to complete its analysis of the record and submit a final report by July 15, 1981. The Presiding Officer's report will be completed by September 15, 1981, and will be followed by a 60 day public comment period. During the comment period, the record will be reopened to receive information about the impact of OMB Circular A-119, Federal Participation in the Development and Use of Voluntary Standards, on the practices reflected in the record.

A copy of the Federal Register notice is enclosed. If you have any questions, please call me at (202)523-3935.

Sincerely,

Robert J. Schroeder

Robert J. Schroeder
Division of Product Reliability

Enclosure

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

(The following has been reprinted from the Federal Register of February 4, 1981 -- 46 FR 10747.)

authority in Section 18 of the Federal Trade Commission Act, 15 U.S.C. 57a. Further, the Commission has determined that the most efficient way to decide what Commission action, if any, is necessary with regard to standards and certification activities on an industry-wide basis is to complete the analysis of the rulemaking record gathered to date.

Accordingly, the Commission has directed staff to prepare a report analyzing the rulemaking record. In this report, the staff has been directed to consider carefully the issues raised in the Conference Report on H.R. 2313, the Federal Trade Commission Improvements Act of 1980. As provided in the notice of proposed rulemaking, a Presiding Officer's report will also be prepared and interested persons will have an opportunity to submit written comments on both reports before the Commission determines whether to promulgate a rule with respect to standards and certification activities.

DATE: Effective February 4, 1981.

FOR FURTHER INFORMATION CONTACT: Robert J. Schroeder, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, (202) 523-3935.

SUPPLEMENTARY INFORMATION: On December 7, 1978, the Commission published in the Federal Register a notice of proposed rulemaking regarding the development and use of product standards and the related activity of product certification (43 FR 57269).¹ This notice was published pursuant to the Federal Trade Commission Act, as amended, 15 U.S.C. 41, *et seq.*, the provisions of Part 1, Subpart B of the Commission's Procedures and Rules of Practice, 16 CFR § 1.7, *et seq.*, and § 553 of Subchapter II, Chapter 5, U.S. Code (Administrative Procedure).

The proposed rule specifies acts and practices which are stated to be both unfair methods of competition and unfair and deceptive acts or practices within the meaning of § 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

Subsequently, Congress enacted the Federal Trade Commission Improvements Act of 1980, Pub. Law 96-252 (hereinafter the "Improvements Act"), which became effective May 28, 1980. Section 7 of the Act removes the authority of the Commission to issue trade regulation rules with respect to unfair or deceptive acts or practices under Section 18(a)(1)(B) of the Federal

¹The following additional notices amending the notice of proposed rulemaking or providing information were published: 43 FR 59517 (Dec. 21, 1978); 44 FR 17715 (March 23, 1979); 44 FR 35240 (June 19, 1979); and 44 FR 70485 (Dec. 7, 1979).

Trade Commission Act, 15 U.S.C. 57a(a)(1)(B), "with regard to the regulation of the development and utilization of the standards and certification activities." Section 7 of the Improvements Act does not affect the Commission's authority to issue rules with respect to unfair methods of competition relating to standards and certification, pursuant to Section 6(g) of the Federal Trade Commission Act, 15 U.S.C. 46(g).

In the Conference Report on H.R. 2313, several issues were raised concerning the need for any Commission rule in the standards and certification area. Specifically, the Report states:

* * * [T]he conferees believe the Commission should explore the possibility of issuing voluntary rules and guidelines in this area. The conferees note that the Office of Management and Budget has now issued OMB Circular No. A-119 which, among other things, sets out procedures for the development of standards applying to products purchased by the Federal Government. The conferees hope the Commission will closely follow the activities of other interested Federal agencies and, in the spirit of Executive Order 12044, will avoid inconsistent or duplicative activity in this area.²

Both of these issues—other Commission law enforcement alternatives and the effect of other Federal agency activities—have been under consideration by the staff for some time (as have alternatives for reshaping or limiting the proposed TRR). For example, in the Regulatory Calendar entry relating to this rulemaking (44 FR 68332, November 28, 1979), the staff stated:

Another alternative, in lieu of a TRR, would involve issuing an industry guide or statement of enforcement policy, in conjunction with enforcement on a case-by-case basis. In the latter case, we are reviewing other governmental reform efforts, to determine whether their effects on consumer or competitive problems in private standards would reduce the need for direct FTC action. We are also exploring in the rulemaking process the effectiveness of recent industry attempts at self-regulation.

Accordingly, the Commission intends to give careful consideration to the issues raised in the Conference Report on H.R. 2313 in deciding what law enforcement actions, if any, are necessary with regard to standards and certification activities. The Commission, particularly, will consider whether OMB Circular A-119 has resolved any competitive problems of concern to it before concluding whether to promulgate a rule. The Commission

²Statement of Managers, Cong. Rec. H3157, May 1, 1980.

FEDERAL TRADE COMMISSION

16 CFR Part 457

Standards and Certification; Proposed Trade Regulation Rule

AGENCY: Federal Trade Commission.

ACTION: Amendment to notice of proposed rulemaking.

SUMMARY: This amendment to the notice of proposed rulemaking gives notice that, due to changes in Federal Trade Commission authority, as contained in the Federal Trade Commission Improvements Act of 1980, Pub. Law 96-252, the Commission will no longer conduct this matter, in part, under the

believes that the most sensible way to address these issues is through analysis of the current rulemaking record in this proceeding,³ supplemented by information interested persons may wish to present on the impact of OMB Circular A-119. The Commission, therefore, has directed its staff to continue its analysis of the factual information and legal and policy arguments contained in the rulemaking record and preparation of a staff report. The staff has been directed to pay special attention to the issues raised during consideration of the Federal Trade Commission Improvements Act of 1980 when it examines the rulemaking record and prepares its recommendations. The Commission has also directed that the rulemaking record be reopened, during the post record comment period which will follow publication of the staff and Presiding Officer's reports, for submission of information about the impact of OMB Circular A-119 on the practices reflected in the record.

Due to changes in Commission authority contained in the Federal Trade Commission Improvements Act of 1980, this rulemaking will no longer be conducted, in part, under the authority of Section 18 of the Federal Trade Commission Act, 15 U.S.C. 57a. The rulemaking will be conducted solely under § 6(g), 15 U.S.C. 46(g). The notice of proposed rulemaking (43 FR 57269), and the procedures followed in this rulemaking to this time, fully satisfy the requirements of 5 U.S.C. 553 and Part I, Subpart C of the Commission's procedures and rules of practice, as applicable to rulemaking under Section 6(g) authority. The Commission intends to follow the remaining procedural steps set forth in the notice of proposed rulemaking.⁴ The Commission also recognizes that, in considering a rule

³The record includes 1200 written comments, testimony of 200 witnesses (13,000 pages of transcript), 500 hearing exhibits, plus supplementary material and rebuttal submissions. In all, the record is approximately 90,000 pages. The Commission believes it has an obligation to review this extensive record before determining whether a Commission rule is necessary.

⁴In accordance with the Commission's instructions in the notice of proposed rulemaking, interested persons have been accorded the right to submit written comments, present their views orally at public hearings, question and cross-examine witnesses at the public hearings, and file rebuttal submissions.

Although several of the remaining procedural steps set forth in the notice of proposed rulemaking are not required by APA § 553 for proceedings under Section 6(g), the Commission has determined to follow those remaining steps. Further, the Commission has directed that the requirements of § 12 of the Improvements Act, relating to staff *ex parte* contacts with Commissioners and presiding officers, be followed in this proceeding.

under Section 6(g) as one option, the record must be analyzed solely with respect to unfair methods of competition, and has not yet determined whether the current record supports the promulgation of any standards and certification rule under section 6(g).⁵ (Order Denying Petition No. 5 of the National Fire Protection Association, Inc., No. 215-61, October 29, 1980). Parties will have an opportunity to address these and all other issues during the post-record comment period.

Therefore, the staff will prepare and submit its report and recommendations based on the rulemaking record by July 15, 1981.⁶ The Commission also believes it would benefit from a Presiding Officer's report, which will be submitted not later than 60 days after the staff report. The Presiding Officer's report will make a recommended decision based upon his findings and conclusions as to all relevant and material evidence, and taking into account the staff report.⁷ Both of these reports will be made available to the public, and the Commission will then invite all interested persons to submit their views on all issues relevant to this proceeding, including the issues raised in the Conference Report on H.R. 2313. Written comment and information will be requested specifically about the impact of OMB Circular A-119 on the practices reflected in the record. New factual material will be accepted only as to this issue. This written comment period will be for 60 days. Immediately following the comment period will be a period of 30 days to receive rebuttal submissions relating to comments about the impact of OMB Circular A-119. The Commission may also afford interested persons an opportunity to present their views orally on some or all issues, at the Commission's discretion. By following these procedures, which are consistent

⁵While the portions of Section 457.1 of the proposed rule discussing unfair and deceptive acts and practices can no longer be contained in any final rule that the Commission might issue in the area, the issues raised relating to those practices are still relevant to other enforcement actions the Commission might take. The Commission therefore has directed the staff to analyze the full record and to make recommendations with respect to practices that raise questions of unfair or deceptive acts or practices as well as unfair methods of competition.

⁶The notice of proposed rulemaking stated that the staff report would be submitted 120 days after the close of the rebuttal period. This did not occur, because of passage of the Improvements Act and the length of the rulemaking record. We believe that the July 15, 1981 date gives staff sufficient time while not unduly delaying the proceeding.

⁷Following the post record comment and rebuttal periods, the Presiding Officer may submit to the Commission revisions of his findings, conclusions, and recommendations, which are based on his consideration of the new information presented about the impact of OMB Circular A-119.

with the requirements set forth in the notice of proposed rulemaking, the Commission believes it will have the best record on which to base its decisions about what actions, if any, are necessary in the area of standards and certification.

The Commission has not made any findings or conclusions in this matter. Such findings or conclusions can be made only after careful consideration of the rulemaking record and shall be based solely on this record.

By direction of the Commission.

Carol M. Thomas,

Secretary.

[FR Doc. 81-4024 Filed 2-3-81; 8:45 am]

BILLING CODE 6750-01-M