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ABSTRACT

Following a 10-page introduction covering the background of the National Home Study Council (NHSC), the Council's comments on the Federal Trade Commission's (FTC) proposed Trade Regulation Rule as published in the FEDERAL REGISTER, August 15, 1974, are stated. The Council maintains the proposed Rule is unprecedentedly severe and contrary to the public interest in its approach to proprietary vocational and home study schools. The NHSC regards the Rule as being based upon unstated biased, inaccurate, unfair and discriminatory assumptions concerning the nature and worth of private vocational education in general and home study in particular. To illustrate and document those assertions, part one (seven pages) shows that home study has a long reputation as an important and valuable component of the educational system; part two (14 pages) shows how home study already is covered by Federal and State legislation and regulation; part three (four pages) shows how the FTC has failed to make clear the basis and purpose of the Rule; and part four (100 pages) presents a detailed analysis on an item-by-item basis of the Rule's defects which require its rejection. (AG)

UNITED STATES OF AMERICA

BEFORE THE FEDERAL TRADE COMMISSION

In the matter of

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COMMENTS OF

THE NATIONAL HOME STUDY COUNCIL

Filed November 27, 1974

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COMMENTS OF

THE NATIONAL HOME STUDY COUNCIL

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Introduction

The National Home Study Council (NHSC), a national Association of 138 accredited, home-study schools and a party vitally interested in this proceeding, presents the following comments on the Commission's proposed Trade Regulation Rule as published in the Fedaral Register on August 15, 1974.[1/]

As historic background for these comments, NHSC is the outgrowth of a major study on adult education sponsored by the Carnegie Corporation of New York during 1924 and 1925. This study, under the direction of John S. Noffsinger, revealed for the first time the magnitude of the home-study field - more than one million two hundred and fifty thousand students then enrolled annually - and also showed that, for nearly three-quarters of the population of a large sample group of students surveyed, there were no other educational opportunities available except home study.

Despite the clear importance of home study as an educational method, the study also revealed a wide divergence in excellence among schools. Although there were many institutions offering outstanding education and service to their students, there were also questionable practices being

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1/ 39 Fed. Reg. 29385 (August 15, 1974).

used by others in the field, particularly in the areas of enrollment techniques and debt collection practices. Indeed, these shortcomings had given home study a bad name among many educational leaders.

In an effort to eliminate the evil and preserve the good within the field, the Carnegie Corporation sought to enlist the aid of some of the leaders among private home-study schools to create an organization whose objective would be to promote the values of home study through the establishment of sound educational standards and ethical business practices.

Thanks to the tireless efforts of Dr. Noffsinger and the decisions of several leading home-study schools to cooperate in these self-regulatory efforts at the urging of the National Better Business Bureau, NHSC was ultimately formed on October 29, 1926. Dr. Noffsinger was named its Executive Director.

Since its inception, NHSC has emphasized a three-fold program - (1) creation of sound educational and ethical standards and enforcement of the same, (2) cooperation with Federal and state agencies in the development of sound legislative controls, and (3) promotion of the general concept of home-study education.

In the area of ethical practices, one of the first acts of the newly created NHSC was to hold a Trade Practice Conference under the auspices of the Federal Trade Commission to develop Trade Practice Rules covering all

phases of the business activity in this field. Dr. Noffsinger was designated as permanent Chairman of the Enforcement Committee for these regulations, which were adopted by the Trade Commission in 1927 and revised in 1936. During the first twelve years of NHSC's existence, enforcement of these Trade Practice Rules was probably the most important part of its program.

NHSC's long history of cooperation with the Federal Trade Commission, state agencies, and others interested in the promotion of ethical practices in the home-study field has continued to this day. When the Trade Commission sought to update its 1936 Trade Practice Rules, NHSC was active in the proceeding which resulted in the adoption in 1972 of the Commission's current Guides for Private Vocational and Home Study Schools.[2/]

NHSC also continually informs its members concerning changing requirements of both state and Federal law in an effort to promote widespread understanding and compliance. Most recently, for example, NHSC has devoted considerable effort to informing its members how they can satisfactorily reconcile their obligations to comply with the Commission's new Door-to-Door Salesmen Trade Regulation Rule,[3/] requiring a cooling-off period, and with various overlapping duplicative, and conflicting state law requirements.

2/ 16 C.F.R. § 254 (1974).

3/ 16 C.F.R. § 429 (1974).

NHSC's member schools offer approximately 500 courses in nearly 300 different vocational and academic subject matter areas.

NHSC's membership includes some relatively large schools, and a few schools which are affiliated with large corporations. However, most NHSC members are small, closely-held enterprises. Some member schools offer a wide range of courses; others concentrate on one or a few specialized offerings. Some member schools employ salesmen, but most enroll students only through the mail. Also included in NHSC's membership are some 15 schools recognized as nonprofit institutions by the Internal Revenue Service.

In short, NHSC member schools, like the home-study field itself, are a diverse group. However, all NHSC schools have one thing in common - they have been accredited by meeting the educational and business standards established by NHSC's independent Accrediting Commission.

Established in 1955, the Accrediting Commission of NHSC was a natural outgrowth of NHSC's efforts to upgrade both educational and ethical standards in the home-study field. The Commission is completely independent, and application for accreditation is made voluntarily. Commission decisions cannot be vetoed or modified by any other individual or group.

Nine persons serve on the Commission. Five

Commissioners represent the public and four are Executive officers of accredited schools. To NHSC's knowledge, the Commission is the only recognized accrediting agency in the country with a majority of public commissioners. To provide additional assurance of independence for the Commission, NHSC's by-laws provide that no school may be represented on the Accrediting Commission and NHSC's Board of Trustees at the same time.

In 1959, after the Accrediting Commission had established its successful record, the U.S. Commissioner of Education approved it as a nationally recognized accrediting agency for private home-study schools. Since that time, the Commission has continued to fulfill a "quasi-governmental" function in the regulation of the home-study field, since various Federal and state statutes and regulations recognize accreditation as a key criterion in determining a school's eligibility to participate in such programs as the Federal Guaranteed Student Loan Program and the Veterans Administration Educational Benefits.

The qualifications of NHSC's independent Accrediting Commission to perform this function are subject to periodic review by the Office of Education, and HEW's continued listing of NHSC as a "nationally recognized accrediting agency" attests to the fact that the Accrediting Commission has met the criteria set forth in the pertinent

Office of Education Regulations, 45 C.F.R. 149 (1974).[4/]

NHSC's Accrediting Commission is also recognized by and a member of the National Commission on Accrediting and the newly organized Council on Postsecondary Accreditation. Both these organizations are national associations of public and private educational accrediting agencies whose major purpose is to upgrade and improve accrediting standards for all kinds of educational institutions.

4/ A more detailed description of NHSC's Accrediting Commission, its coordination with various governmental bodies including the Federal Trade Commission, and its history of cooperation with regulatory authorities in upgrading the quality of home-study education is contained in the Statement by William A. Fowler, Executive Secretary, Accrediting Commission of the National Home Study Council, presented to the Special Studies Subcommittee of the Committee on Government Operations, House of Representatives, July 24, 1974, and to the Special Subcommittee on Education and Labor, Committee on Education and Labor, House of Representatives, July 25, 1974. A copy of this Statement is attached as Appendix A. Attached as Appendix B is a Memorandum by the Accreditation and Institutional Eligibility Staff of the Office of Education, Department of HEW, prepared in August, 1974, entitled "Nationally Recognized Accrediting Agencies and Associations - Criteria and Procedures for Listing by the U.S. Commissioner of Education and Current List." This Appendix explains the role of voluntary accreditation in the development and maintenance of educational standards in the United States, the functions and process of accrediting, types of accreditation, significance of national recognition by the U.S. Commissioner of Education, and the procedures and criteria used by the Office of Education in granting and maintaining national recognition.

In addition to ensuring that educational standards are met, the Accrediting Commission requires an accredited school to:

1. Enroll only students who can be expected to benefit from the instruction offered;
2. Show satisfactory student progress and success;
3. Be truthful in its advertising and promotional materials;
4. Carefully select, train, and supervise its field representatives;
5. Show ample financial resources to discharge long-term obligations to students;
6. Use reasonable tuition collection methods and have a satisfactory refund policy;
7. Demonstrate a satisfactory period of ethical operation.

Compliance with these standards is checked in initial and periodic evaluations, with special reviews when the ownership of a school changes hands or when serious problems are evidenced. In connection with these accrediting reviews, NHSC's Accrediting Commission surveys approximately 400 regulatory and consumer agencies, including the Veterans Administration, Postal Service, Federal Trade Commission, U.S. Office of Education, State Departments of Education, and Better Business Bureaus concerning each school's reputation and business practices. Reports from all of these agencies are utilized by the Accrediting Commission in evaluating each school.

As shown by its continuing efforts to upgrade both educational and business standards in home study and its long history of cooperation with both State and Federal regulatory authorities to this end, NHSC wishes to be of all possible assistance to the Federal Trade Commission in the latter's efforts to prevent deception and unfair practices in the home-study field. At the same time, however, the proposed Rule as published on August 15, is so unprecedentedly severe and contrary to the public interest as to cause NHSC grave concern.

More specifically, the Rule as published appears to be based on various unstated biased, inaccurate, unfair and discriminatory assumptions concerning the nature and worth of private vocational education in general and home study in particular. This attitude, coupled with unawareness or misunderstanding of applicable educational considerations, has led to a totally negative Rule which will hurt rather than help students, compel rather than cure deception, significantly discourage the disclosure of useful information, impose intolerable burdens on schools, diminish the unique value of home study, and ultimately increase the cost of education without any positive effect on its quality.[5/]

5/ Belated placement on the public record of this proceeding of an October 30, 1974, Staff Statement concerning the proposed Rule has exacerbated rather than allayed our concerns that the proposal lacks any sound factual or policy basis. Although this Staff Statement (Continued on next page.)

In addition to the basic flaws just noted, the Rule as proposed raises a number of significant legal questions concerning the Commission's jurisdiction. Stated briefly, one problem is that the Commission cannot legally extend the Rule to all competing schools which may engage in the type of practices against which the Rule is apparently directed. At the same time, the Rule as proposed purports to cover certain schools which the Commission may not legally cover. Another jurisdictional problem is raised by the proposed refund policy, which may well be beyond the Commission's power as delineated in Heater v. FTC, ____ F.2d ____ Civil No. 73-1750, (9th Cir. Sept. 11, 1974), 1974-2 Tr. Cas. ¶ 75,244.

Moreover, the Rule appears to have been formulated with little or no consideration of other relevant Federal and State statutes and regulations.

Also, the Commission appears to have ignored its own 1972 Guides for Vocational and Home Study Schools,[7/] its 1972 proposed Statement of Enforcement Policy with respect

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5/ (Continued from preceding page.)
will be alluded to from time to time herein, no detailed refutation or counterargument will be attempted in these comments. In the first place, the Statement was placed on the public record too late to be fully analyzed. Second, virtually none of the factual assertions contained in the Statement are cited to identifiable material available in the public record or elsewhere, so that it is impossible to deal with the Statement directly. Finally, most of the purported problems discussed in the Staff Statement are unrelated, even by discussion in the Statement, to any provision of the proposed Rule here at issue.

[There is no footnote number 6.]

7/ 16 C.F.R. § 254 (1974).

to proprietary school student refunds,[8] and its recently promulgated Door-to-Door Salesmen Trade Regulation Rule[9] in formulating the proposed Rule.

Finally, despite intensive efforts to publicize the proposed Rule, the Commission and its Staff have done little or nothing to clarify the reasoning underlying it or to insure that the scheduled public hearings are conducted in a fair and equitable manner.[10]

NHSC sincerely hopes that it will ultimately be possible to cooperate with the Commission and its Staff in a serious effort to identify and analyze whatever problems exist in the home-study field which are appropriate subjects of the Trade Commission's concern, and to develop appropriate solutions.

At this time, however, NHSC will confine its comments to a presentation of facts and arguments which, we believe, demonstrate that the proposed Rule will not achieve its intended purpose of assisting students in

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8/ Appendix C is a copy of this proposed policy as announced on May 2, 1972.

9/ 16 C.F.R. § 429 (1974).

10/ In an effort to clarify the hearing procedures to be used in this proceeding, NHSC filed with the Commission on Nov. 4, 1974, a "Motion for Specification and Publication of Intended Hearing Procedures for Postponement of Hearing Dates Pending Adoption of Adequate Procedural Rules, And For Other Relief." On Nov. 7, 1974, NHSC also filed a "Supplemental Emergency Motion To Suspend Proceedings Pending Disposition of Pending Motions." However, as of Nov. 27, 1974, the date these comments were filed, no action had yet been taken on either set of NHSC's requests.

intelligent educational decision making.

To illustrate and document these points, we shall show herein:[11/]

I. Home Study Has Long Been Recognized As An Important And Valuable Component Of Our Country's Educational System

II. Home Study Is Already Subject To An Extensive Network Of Federal And State Legislation And Regulation Which Must Be Understood And Considered Before Any Further Federal Trade Commission Action In This Area Is Undertaken

III. The Commission Has Failed To Make Clear The Basis And Purpose Of Its Proposed Rule

IV. Detailed Analysis Of The Proposed Rule Exposes Serious Defects Which Require Its Rejection

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11/ By filing these comments and by other participation in these proceedings, NHSC does not waive or intend to waive in any way its rights to challenge either (1) the fairness and adequacy of the procedures being used by the Commission in formulating this Rule, or (2) the Commission's substantive legal authority to formulate Trade Regulation Rules generally.

I. Home Study Has Long Been Recognized As An Important And Valuable Component Of Our Country's Educational System

Home-study training has long been recognized as an important element of the American educational system. No other method of instruction offers its unique combination of advantages. Students may select the course or courses they specifically want or need, may study at their own pace, and may pursue their education wherever they are located. For many millions of Americans whose opportunities to attend full-time or part-time residence educational institutions have been limited by employment, military, or family responsibilities, home-study training has often been the only available method by which they could improve their education whether for vocational, avocational, or academic purposes, or any combination of these motives.

Home study as we know it today began in England around 1840. There, Isaac Pitman began offering courses in shorthand instruction based on lessons mailed to students and transcriptions returned by mail.

In the latter half of the nineteenth century, home study spread throughout Europe and to the United States. The first courses made available in this country were designed

to permit Americans living in remote areas of the country to complete their formal educations. Gradually, the subject matters covered by such courses expanded and began to include vocational in addition to academic topics.[12/]

An interesting early pioneer in the correspondence field was Thomas J. Foster. In 1891, he founded a private correspondence school to offer courses in industrial and mine safety to workers whose employment responsibilities would not otherwise permit them to receive such training. His courses rapidly proved successful, and today, The International Correspondence School, which he founded, and which later became a charter member of NHSC, continues to operate and to provide education in a number of fields.[13/]

The public demand for home-study education continues to this day. In 1973, some 4.3 million Americans from every walk of life actively pursued correspondence courses offered by the U.S. Armed Forces, public educational institutions, and several hundred private home-study schools. NHSC's 138 schools, the only nationally accredited private schools in the home-study field, served some one million of these students.[14/]

12/ B. Holmberg, Distance Education, pp. 4-5 (1974). See also 6 Encyclopedia Britannica, pp. 543-45 (1972).

13/ O. MacKenzie, E.L. Christensen and P.H. Rigby, Correspondence Instruction in the United States, pp. 38-39 (1968).

14/ Cited figures are from NHSC's 1973 Correspondence Education Survey.

Home-study training offers students significant educational advantages:

1. Home study is easily accessible to students. It is, in effect, as close as the nearest mail box.

2. Similarly, home study permits the student to study wherever it is convenient to do so, at home, at military bases or on ships, at the office -- wherever he has free time.

3. Whatever other interests of responsibilities an individual has, by utilizing the home-study method a student may readily adjust the time he or she wishes to devote to educational pursuits to the rest of his or her daily schedule.

4. Home-study students can study as their other employment and family responsibilities permit. Even those holding full-time jobs may continue their educational training through the use of home-study courses.

5. Home study permits students to study at their own pace, spending as much or as little time as is required for a complete understanding of the material involved.

6. Home study appeals to people reluctant to get into the competitive atmosphere of the ordinary formal classroom.

7. Most home-study courses are designed for practical application in real-life situations. Unlike many academic and residence school courses, their emphasis is on practical problems and on application of what is being taught.

8. Because the home-study method, and in many cases the subject matter, differs from traditional instruction, it appeals to those "turned off" by formal education.

9 In many instances, home-study courses are more economical than either full- or part-time residence study.

10. Home-study courses are often available in subjects not taught in regular, academic schools.

11. Home-study courses can provide personalized instruction and permit individualized contact between each student and his teachers as a given course progresses.

12. Where the student is employed, home study can provide training which can be immediately applied on the job.

As for variety of courses, among those subjects taught by accredited members of the National Home Study Council are the following: accounting, appliance servicing, architecture, automotive mechanics, bible study, boating and seamanship, business administration, celestial navigation, cost accounting, interior designing, dry cleaning, dress design, diamond setting and appraisal, electronics, English for Spanish-speaking people, high school, home teaching of pre-school deaf and blind children, hotel-motel operations, human relations, landscaping and gardening, locksmithing, radio-TV repair, real estate, surveying, theology, and yacht and boat design.[15/]

As can clearly be seen from the above list of courses, not all home-study courses are of a vocational nature. Many are designed to provide formal academic training

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15/ Appendix D contains the Fall, 1974, NHSC Directory of Accredited Private Home Study Schools. A complete course listing is also included in this directory.

and a significant number are directed at avocational and recreational interests. In short, and contrary to the assumption implicit in the title and content of the proposed Rule, "home study" is not necessarily "vocational."

People pursue these and similar courses for a variety of reasons. Many enroll to complete formal educational requirements for high school or college. Others seek to improve their employment skills either through pursuit of a new career or additional training designed to allow them to advance in a field in which they are already working. Still others enroll so that they may be better able to deal with physical handicaps of themselves or others such as deafness or blindness. Finally, many enroll just to learn something new or to find a new hobby to occupy their leisure time. Negating the purely vocational thrust of the proposed Rule, there are probably as many reasons for enrolling in home-study courses as there are students.

As might be expected, there is really no average home-study student. The Commission's October 30, 1974, Staff Statement on the proposed TRR asserts that the average proprietary school student is less than 21 years of age at the time of his enrollment. Data available to NHSC's member schools indicate, however, that the average home-study student, as opposed to the average resident school student, is generally older and more mature at the time he commences correspondence study. In fact, most home-study students are

at least 25 at the time they enroll. The vast majority are also married and employed full-time.[16/]

Many states recognize the validity and the value of home-study education, and such states as Alaska and Massachusetts maintain extensive home-study programs for their citizens. In addition, Federal agencies such as the Department of Agriculture and the U.S. Postal Service have home-study programs. Perhaps the largest purveyor of such courses is the United States military. All five branches of the Service use correspondence courses extensively as part of their regular training activities and to assist their members in improving their general educational skills. The Air Force's Extension Course Institute is a good example. It now enrolls over 245,000 active duty and reserve Air Force personnel in a variety of programs ranging from aircraft electronics to international law.

More than 60 American colleges and universities also maintain "independent study" correspondence programs for their students. Indeed, the institutions offering such courses include some of the most prestigous in America.

16/ A recently completed survey by one NHSC member school, The National Radio Institute of Washington, D.C., indicates that approximately 68% of its home-study students are over 25 at the time they enroll with NRI, that 67% of these students are married and 40% have children, that 82% are at least high school graduates, and that over half have yearly incomes in excess of $9,000 when they enroll.

Today, American education authorities are showing renewed interest in improving the quality of vocational instruction available to our young people. Moreover, increasing concern has been shown for adult education and for periodic retraining of those whose formal educations have ended. Home study offers significant potential in both these areas. Indeed, academic authorities,[17/] employers,[18/] state educational officials and the Federal government itself[19/] continue to recognize the need to

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17/ An interesting discussion on the continuing need for educational reform and the desirability of increased use of non-resident forms of education may be found in an article entitled "Goodbye Tradition" in the October 21, 1974, Chronicle of Higher Education, at p. 5, attached as Appendix E.

18/ An increasing number of American corporations have formally recognized the educational potential of correspondence training. A good example is Kimberly Clark Corporation, whose "Kim Ed" program now permits corporate employees and their families to recover the cost of home-study courses taken from NHSC accredited schools. Benefits are available both for job related correspondence training and general educational, enrollment courses. See 1974 Kimberly Clark Educational Benefits Plan brochure at p. 6, attached as Appendix F.

Also included in Appendix F is an article by William A. Fowler, Executive Director of NHSC, entitled "Productivity and Home Study" from the November 18, 1974, NAM Reports, which details the experiences of a number of other leading American corporations with home-study training for their employees.

19/ Attached as Appendix G are three recent Federal government publications which refer to training through NHSC's accredited proprietary schools as an aid to vocational preparation: "Careers for the Home Bound," President's Commission on Employment of the Handicapped; "Get Credit for What You Know," Women's Bureau, Department of Labor; and "Twenty Five Technical Careers You Can Learn in Two Years or Less," U.S. Office of Education, D.H.E.W.

maintain the widest possible general availability of home-study courses.

Today, private home-study schools play an important role in educating the American public. Indeed, in an era when growing numbers of students have expressed dissatisfaction with traditional forms of resident training, home-study courses can be expected to become even more important in the future.

In light of the continuing potential of home study in an era of increasing educational demands, regulation which would threaten the existence and educational effectiveness of home-study schools could deny the American people an educational resource for which there is a demonstrated and a continuing need.

II. Home Study Is Already Subject To An Extensive Network Of Federal And State Legislation And Regulation Which Must Be Understood And Considered Before Any Further Federal Trade Commission Action In This Area Is Undertaken

Private and public home-study educational institutions are regulated today by a variety of Federal and state legislation. Indeed, few industries are subject to supervision by as many Federal and state governmental agencies.

A. Existing Federal Regulation

Among the principal Federal agencies concerned

with home-study education is the Veterans Administration. Its statutory authority permits eligible veterans and active-duty servicemen to use their educational benefits to pursue home-study education. Extensive regulations have been developed governing the types of courses which veterans may pursue and specifying the requirements which schools must meet in order to participate in this program.[20/]

Existing legislation contains, for example, specific refund policy requirements, course subject limitations, and a variety of other requirements designed to insure that schools do not abuse their privileges to participate in the Veterans Administration programs.

Another important source of regulation is the Department of Health, Education and Welfare. Its Office of Education supervises two programs of importance to correspondence schools. First, the Office of Education sets criteria for the recognition of nationally listed accrediting agencies such as the Accrediting Commission of NHSC.[21/] These criteria include strict provisions requiring such agencies to periodically re-evaluate accredited schools and to insure that they meet standards of organizational, educational, and business integrity.[22/] Indeed, legislation now pending before

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20/ See generally 38 U.S.C. § 1670 et seq. (1974) and 38 C.F.R. § 21.4200 et seq. (1973).

21/ 20 U.S.C. § 1141(a) (1972).

22/ See 45 C.F.R. § 149 (1974), reprinted at 39 Fed. Reg. 30041 (August 20, 1974).

Congress would strengthen the Office of Education's authority in this field.[23/]

The Office of Education is also involved in supervision of the Federal government's Guaranteed Student Loan Program.[24/] Under regulations proposed October 17, 1974, strict new standards would be established for all schools participating in this program.[25/]

Significantly, both the Veterans Administration and the Office of Education are operating to protect the interests of educational consumers. Both have jurisdiction over public and private and profit-making and nonprofit schools. Thus, unlike the Federal Trade Commission, whose consumer protection jurisdiction is limited to profit-making entities and those nonprofit entities designed to permit their members to make additional profits,[26/] these two governmental agencies have the necessary authority to insure that whatever requirements they establish are appropriately tailored to cover all affected educational institutions.

23/ S. 4014, 93d Cong., 2d Sess., "The Postsecondary Education Consumer Protection Act of 1974," introduced by Senator Percy on September 17, 1974.

24/ 20 U.S.C. §1071 et seq. (1972).

25/ 39 Fed. Reg. 37154 (October 17, 1974), amending 45 C.F.R. §177 (1973).

26/ See Part IV.A. of this memorandum for a detailed discussion of the Commission's jurisdiction with respect to this proceeding.

Proprietary home-study schools are, moreover, subject to a variety of requirements already laid down by the Federal Trade Commission. They are, first, subject to the Truth in Lending Act and the Federal Reserve Board regulations which enforce it.[27] Second, in 1972, specific Vocational and Home-Study School Guides were issued by the Commission.[28] Third, those schools which employ salesmen are subject to the Commission's Door-to-Door Salesmen Trade Regulation Rule.[29] Finally, the Commission has brought over the years a number of cases involving home-study schools which have established guidelines for business conduct in the field.[30]

Other Federal agencies are also concerned with correspondence and vocational schools. The Immigration and Naturalization Service, for example, regulates courses offered to resident aliens designed to prepare them for American citizenship. The Bureau of Indian Affairs performs similar functions with respect to correspondence and vocational training made available by private schools to American Indians on Federal reservations.

27/ 15 U.S.C. § 1601 et seq. (1972).
12 C.F.R. § 226 (1974).

28/ 16 C.F.R. § 254 (1974).

29/ 16 C.F.R. § 429 (1974).

30/ See, e.g., FTC v. Civil Service Training Bureau, 79 F.2d 113 (6th Cir. 1935); Tractor Training Service, Inc. v. FTC, 227 F.2d 420 (9th Cir. 1955), and Goodman v. FTC, 244 F.2d 584 (9th Cir. 1957). Each of these cases, as well as some recent pertinent complaints and consent orders, is discussed in more detail in subsequent sections of these comments.

B. State Regulation

Some 40 states have specific legislation regulating vocational and correspondence schools.[31] Almost all of these jurisdictions regulate proprietary school activity in considerable detail and have permanently established regulatory agencies to facilitate day-to-day supervision of such institutions. Applicable state statutes generally contain contract disclosure, cancellation, cooling-off and refund policy requirements. As might be expected, they vary widely in approach. Required cooling-off periods, for example, differ from state to state, and required contractual disclosures vary in at least some respect in almost every state.[32]

31/ The following states have either adopted entirely new proprietary school legislation or significantly amended their existing statutes within the past six months.

Florida
Georgia
Iowa
Louisiana
Massachusetts
Mississippi
Montana
Nebraska
Tennessee
Vermont
Virginia
West Virginia

Attached as Appendix H are NHSC Bulletins describing each of these new laws.

32/ Attached as Appendix I are sample contract forms from one NHSC member school which reflect the variety of state law requirements which now exist with respect to home study student contracts.

In addition, 47 of the states now have some form of state consumer protection legislation similar to the Federal Trade Commission Act.[33/]

Most importantly, this existing framework of detailed state regulation means that proprietary schools in almost every state are regulated both as educational institutions and as business enterprises. Few other fields are subject to such extensive, on-going state supervision.

C. Given This Extensive Network Of Existing Regulation, The Commission Must Bear The Burden Of Showing That Its Proposed Additional Regulation Is, In Fact, In The Public Interest

It has long been settled law that the Commission bears the burden of demonstrating that a "specific and substantial public interest" will be served by its proposed proceedings. FTC v. Klesner, 280 U.S. 19, 28 (1929). The courts have made clear that this "specific" determination as to whether a particular proceeding is in the public interest must be made on an ad hoc, case-by-case basis after consideration of all surrounding facts and circumstances involved. See e.g., Ford Motor Co. v. FTC, 120 F.2d 175, 182 (6th Cir. 1941); FTC v. Rhodes Pharmacal Co., 191 F.2d 744, 747 (7th Cir. 1951); and Guziak v. FTC, 361 F.2d 700, 704 (8th Cir. 1966), cert. denied, 385 U.S. 1007 (1967).

33/ See June, 1974, FTC Fact Sheet "State Legislation to Combat Unfair Trade Practices".

NHSC submits that the fact that an extensive and effective network of Federal and state regulation is already in place in the proprietary educational field casts doubt on whether this required public interest determination can be made for the proposed Rule. The Commission certainly bears a heavy burden in showing that its proposed Rule is really necessary on top of the complex existing framework of state and Federal statutes and regulation which exist in this field.

Such a showing will require at least a much more detailed analysis of existing regulatory schemes and the relation of the proposed Rule thereto than the Commission or its Staff appear to have attempted to date. We believe that any fair and objective analysis would result in the rejection of much if not all of the proposed Rule.

D. Additional Regulation Of Home-Study Schools By The Federal Trade Commission Will Inevitably Result In Contradictory State And Federal Requirements And Conflicts Among Federal Regulations

We have heard much in recent weeks concerning the dangers in an inflationary economy of over-regulation.[34/] Yet the Commission's proposed Trade Regulation Rule would add a host of potentially contradictory and conflicting

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34/ "Address by Chairman Lewis A. Engman of the FTC on Federal Regulatory Agencies," BNA Daily Executive Reporter No. 195, p. B-1 (October 7, 1974).

requirements to the existing regulations which govern the proprietary school field.

It is important to keep in mind, moreover, that the majority of institutions which face these additional requirements are not large businesses with extensive administrative and legal staffs. They are rather small concerns, often run by no more than a half dozen people. Each additional requirement imposed by the Commission will inevitably mean that these individuals will have less time to attend to the educational needs of their students, and will raise the costs of school operation.

1. Conflicts with Existing State Legislation

One important area of concern is the extent to which the Commission's proposed Trade Regulation Rule will overlap and duplicate existing state legislation regulating proprietary schools. No aspect of American life has traditionally been more completely subject to state control than education. The Commission's proposed Rule seems, however, to ignore this established framework of state concern and control.

As for regulations affecting the commercial practices of schools, applicable Supreme Court decisions made clear that Federal preemption of existing state regulation cannot be presumed unless specifically and expressly authorized by the Congress itself. In Parker v. Brown, 317 U.S. 341

(1943), the Court stated:

> This court has repeatedly held that the grant of power to Congress by the Commerce Clause did not wholly withdraw from the states the authority to regulate the commerce with respect to matters of local concern on which the Congress has not yet spoken. Id., p. 360.

The Commission's recently enacted Door-to-Door Salesmen Trade Regulation Rule[35/] illustrates the problem created by this presumption of non-preemption. In an effort to assist its members in complying with these new legal requirements, NHSC prepared an extensive memorandum, attached hereto as Appendix J, detailing the degree to which the Commission's new Door-to-Door Salesmen's TRR differs from existing state legislation requiring cooling-off periods and contract cancellation rights. NHSC discovered, after checking with the offices of all the State Attorney Generals, that the requirements of some 26 states' law were at variance with the Commission's Rule. A number of state officials also indicated that they were not willing to waive enforcement of their local statutes merely because of the enactment of the Commission's new TRR. As a result, schools may be required to conform to two different sets of requirements in some states or to take the risk of violating either the state or the Commission standard.

35/ 16 C.F.R. 429 (1974).

It is not hard to imagine the additional conflicts which may arise if the Commission's proposed proprietary schools TRR is issued in its current form.

For example, many states now have some form of required proprietary school refund policy. The Commission's proposed Rule would add another such policy whose terms in all likelihood will differ from various existing state laws. As a result, a home-study school doing business in a given state may well find itself facing contradictory refund requirements, and regardless of which policy it chooses to comply with, may still be held liable for violating the other.

Like the Door-to-Door Salesmen TRR, the Commission's proposed proprietary schools Rule makes no attempt at solving these serious problems. NHSC submits that the Staff bears the burden of both investigating and resolving conflicts between the proposed Rule and other educational and regulatory requirements. To ignore these problems may well create a situation in which schools are confronted with directly contradictory regulatory requirements which will significantly discourage their disclosure of any information to potential students and in which the little information which will be available to potential students is likely to be so confusing and contradictory that no one will be able to understand what is being said.

2. Conflicts with Existing Federal Regulation

The Commission's proposed Rule is also inconsistent with extensive Veterans Administration and Office of Education statutes and regulations in the educational area.

Existing VA legislation contains, for example, two separate refund policies applicable to home-study schools.[36/] The Commission's proposed Rule, § 438.2(f), would add a third different policy.

Pending legislation would require proprietary schools to demonstrate their eligibility to participate in Veterans' programs by meeting specified standards of placement success for their graduates. Significantly, the Veterans Administration would measure this placement performance only in terms of those students who had graduated from a given school and who were determined by that school to be "not unavailable for employment" at the time of their graduation.[37/]

By contrast, § 438.2(a) of the proposed Rule would

36/ 38 U.S.C. § 1776(c)(13) (1972) requires nonaccredited home-study schools to make essentially pro-rata refunds to their students based on the number of lessons actually submitted. 38 U.S.C. §1786(c) permits accredited correspondence schools to retain a $50.00 registration fee under such circumstances and does not require tuition refunds if more than half of the student's course has been completed.

37/ See H.R. 12628, 93d. Cong., 2d. Sess., "The Vietnam Era Veterans' Readjustment Assistance Act of 1974," as passed by both the House and Senate on October 10, 1974, reprinted in Senate Conference Report 93-1240, dated October 7, 1974. The bill is now awaiting presidential action.

require disclosure of placement information based on all students as well as graduates, without any provision for eliminating from such calculations those students whose reasons for taking a given course were not vocational or who were otherwise not "available for placement."

Pending Office of Education Guaranteed Student Loan Program regulations provide that students who become "dropouts" by failing to submit a home-study lesson within a prescribed period of time may nevertheless be permitted to continue their courses by stating in writing their desire to complete a given course.[38/]

Section 438.2(h) of the Trade Commission's proposed Rule, by contrast, creates an automatic 90-day mandatory drop mechanism and makes no provision to permit a student who experiences a 90-day lesson gap to reinstate himself. Thus, if both provisions become effective, a student who had reinstated himself under the Student Loan Program would nevertheless be regarded as dropped by the Trade Commission.

The proposed Office of Education regulation requiring schools to make a "good faith effort" to provide prospective students with information concerning the school, including employment information, may create conflicts with the proposed Rule's strict limitation on the type of and substantiation for

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38/ See 45 C.F.R. § 177.46(d) as proposed at 39 Fed. Reg. 37154, 37157 (October 17, 1974).

employment claims, as will be more fully detailed in Part IV below.[39/]

The Office of Education proposed regulations would also require schools to keep extensive student records reflecting loan account status, academic standing, periods of attendance, courses taken, and placement, if any, on graduation.[40/] The Commission's proposed § 438.2(a)(3) may well require schools to keep an additional set of records reflecting similar information in a slightly different form for the purpose of advertising substantiation. No attempt apparently has been made to coordinate the Commission's data requirements with those of the Office of Education. Similar record-keeping conflicts exist between the proposed Rule and V.A. and state requirements.[41/]

Another important instance of conflicting Federal regulatory provisions relates to the Veterans Administration's requirements for contract reaffirmation. Eligible veterans are required by 38 U.S.C. § 1786(b) (1972) to reaffirm in writing their desire to participate in a home-study course 10 days after they have signed the agreement to enroll in that course. Two copies of a specified V.A. form must be filled out. One is sent to the nearest V.A. Regional Office, the other to the school itself.

39/ See § 177.64, as proposed, 39 Fed. Reg. 37154, 37158 (October 17, 1974).

40/ Id., pp. 37153-54.

41/ See, e.g., the V.A. proprietary school record-keeping requirements contained at 38 C.F.R. § 21.4203 (1974).

Section 438.2(e) of the Trade Commission's proposed Rule provides different reaffirmation requirements. Under the Commission's plan, reaffirmation in writing to the school would be required within 10 days after a student has received from his school, by certified mail, summary information on drop-out and placement performance for that course, and a specified Commission reaffirmation form.

Apparently, the proposed Rule contemplates that students must reaffirm once for the purpose of veterans' benefits and a second time to comply with the Trade Commission's Rule. Both these requirements, of course, are in addition to any cancellation or cooling-off privileges a student may have under applicable state statutes.

At a minimum, the Commission must show that the proposed TRR would do more than simply add to the confusion of requirements which already exist in this field. Intelligent solution to whatever problems exist with respect to proprietary schools surely requires at least that the various governmental agencies involved not be working at cross purposes to each other.

E. The Federal Trade Commission Lacks The Experience, Expertise, Resources, And Statutory Authority To Effectively And Fairly Regulate The Educational Field

The problems just discussed are further aggravated by the Trade Commission's limited jurisdiction, expertise, and powers in the educational field.

Unlike either the Veterans Administration or the Office of Education, the Trade Commission has no jurisdiction over public educational institutions or over nonprofit private schools.[42/]

Nor can the Trade Commission be legitimately considered an educational expert. Both the VA and particularly the Office of Education have much wider experience in regulating proprietary education. In addition, these other Federal agencies have available a variety of remedial powers, in sharp contrast to the limited prohibitory orders which the Commission may enter.

For example, in dealing with student loan program problems at a particular school, the Office of Education may under its proposed Regulations either impose limits on the total amount of Federally guaranteed loans students at that school may receive, or, in the alternative, impose limitations on the number of students at a given institution who will be eligible to receive guaranteed loans. The Office of Education also has authority, which the Commission lacks, to temporarily

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42/ Part IV.A. of these comments discusses the implication of these FTC jurisdictional limitations.

suspend participation in Federal benefit programs pending formal resolution of questions raised about a given school.[43/]

Finally, the Office of Education, through its authority to supervise private and public agencies which accredit proprietary schools,[44/] is in the unique position of being able to assist these agencies in improving the quality of their own regulatory efforts in this field.

By contrast, the Trade Commission has no comparable authority, and is limited to bringing cease-and-desist order proceedings against violators of the Federal Trade Commission Act (or of its proposed Trade Regulation Rule if and when effective).

As a practical matter, the effect of the Commission's TRR and any enforcement proceedings thereunder will be largely negative. Most legitimate schools, such as NHSC's members, will comply with the Rule's requirements (once they become final), even though such requirements will inevitably increase costs and affect these schools' educational programs. At the same time, many other schools probably will not comply. As a result, students faced with negative disclosures by complying schools may well elect to enroll in noncomplying institutions. And, while the Commission's enforcement procedures may ultimately

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43/ 39 Fed. Reg. 37154, 37159-60 (October 17, 1974).

44/ See 45 C.F.R. § 149 (1974).

catch up with these violators, students will be harmed in the interim.[45/]

In short, with neither the experience, nor the expertise, nor the resources, nor the statutory authority to effectively and fairly regulate the educational field, the Trade Commission's misguided efforts to protect student consumers may actually end up harming them.

Thus, substantial, legitimate questions exist as to whether the Trade Commission is the most suitable Federal agency to regulate proprietary schools. Considering the Commission's limited jurisdiction, its limited experience and its restricted remedial powers, NHSC believes that the Staff bears a heavy burden in attempting to show in what respects, if at all, the Commission is the proper agency to act in this field, and/or that any of the provisions of the proposed Rule are appropriate.

III. The Commission Has Failed To Make Clear The Basis And Purpose Of Its Proposed Rule

The proposed Rule is the latest in a series of actions undertaken by the Trade Commission in the proprietary educational field. Yet is is far from clear how the Commission's varied activities in this area relate to each other or to its newly proposed Trade Regulation Rule.

The terms of the proposed Rule suggest that the Commission has apparently now decided not to attempt to enforce the

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45/ As discussed in Section IV.A., infra, jurisdictional limitations prevent the Trade Commission from imposing its requirements on many schools. Thus, even with 100% compliance, students will be required to choose among schools which do not provide comparable information.

standards embodied in its May, 1972, Guides for Private Vocational and Home Study Schools.[46] Nor, apparently, does the Commission now wish to implement the refund and cancellation policy it suggested at the time these Guides were issued.[47] Moreover, terms of the proposed Rule are at significant variance with notice orders contained in recent Commission complaints against individual proprietary schools.[48] Finally, the proposed TRR differs inexplicably from the Door-to-Door Salesmen's TRR,[49] on which the ink is scarcely dry following its June 7, 1974, adoption.

46/ 16 C.F.R. § 254 (1974).

47/ "Cancellation and Refund Practices of Private Schools," Proposed Statement of Enforcement Policy, May 2, 1972.

48/ See, e.g., the proposed complaints filed against Control Data Corp. Lear Siegler, Inc., and Electronic Computer Programming Institute at 1970-73 CCH TRR TRANSFER BINDER ¶ 19,980 (May 2, 1972). The complaint against Control Data was formally issued October 10, 1973 [see 3 CCH TRR ¶ 20,456] and against Lear Siegler and ECPI on January 24, 1974 [3 CCH TRR ¶ 20,526]. None of these pending school cases contain notice order provisions which include either mandatory contract reaffirmation or ten-day cooling-off periods. Nor do any of these proposed orders seek to impose mandatory pro-rata refund requirements.

The Commission has, moreover, recently accepted three consent orders from proprietary schools which vary significantly from the proposed TRR; Career Academy, Inc., FTC Dkt. C-2546, accepted September 18, 1974, and Martin Industries, Inc., FTC File No. 7423297, provisionally accepted November 11, 1974, and Weaver Airline Personnel School, Inc., FTC File No. 7323167, provisionally accepted November 15, 1974. None of these orders includes mandatory contract reaffirmation, and all require only 3-day cooling-off periods. None requires pro-rata refunds for future students who fail to complete courses. Apparently, the Commission has made no attempt whatever to reconcile its proposed TRR with any of these individual cases.

49/ 16 C.F.R. § 429 (1974).

No explanation whatever has been offered as to why the Guides should no longer be followed, what the results were of the Commission's announced proprietary school refund policy study, or why the Commission should propose a Trade Regulation Rule at variance with the terms of its own recent individual cases in this field. Nor is any explanation offered as to why the Commission has concluded after less than two and a half months of effectiveness that its own Door-to-Door Salesmen Trade Regulation Rule is inadequate to cover any problems of personal selling in the home-study field.

The Commission has as yet failed to issue any adequate explanation of why it has drafted the proposed Rule in the manner it has.

Other agencies such as the Food and Drug Administration and the Consumer Product Safety Commission readily provide such statements of basis and purpose as an essential element of their rulemaking processes. The advantages of such a procedure are clear; such statements give the agency an opportunity to clearly delineate the factual and legal issues involved in a given proceeding and to insure that public comments will be addressed to those matters which affect the substance of a given proposal.[50/]

50/ See, e.g., the general explanations accompanying the FDA's proposed Food Labeling Rules at 39 Fed. Reg. 20878 (June 14, 1974). Also, the explanation included by the Consumer Product Safety Commission along with its proposed rule on swimming pool water slides, 39 Fed. Reg. 34382 (Sept. 24, 1974).

Indeed, the extensive and documented explanatory materials which the Commission provided in connection with the announcement of its own proposed Food Advertising Rule attests to the Commission's recognition that such a procedure is desirable if not essential in complex rulemaking. Why, NHSC asks, was no comparable procedure followed here?

Nor, despite the complex factual questions involved in this Rule, has the Commission been willing to hold any public informational hearings in this proceeding to help establish an adequate data base for its proposed Rule.[51/] Instead, the Staff has made public its October 30th Staff Statement in which a succession of undocumented and untestable factual assertions, many of which appear unrelated to the proposed Rule, are claimed to support its promulgation. Once again, NHSC asks why the Commission is apparently unwilling to get its facts straight before promulgating this harsh and negative proposal.

Finally and most importantly, the complete absence of an adequate explanation of the proposed Rule's basis and purpose is exacerbated by the fact that the Commission's proposal contains so many new and untested provisions. The parties to this proceeding know nothing, for example, of

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51/ The Commission has followed this procedure in two other pending Trade Regulation Rule proceedings:

1. Care Labeling of Textile Wearing Apparel, 39 Fed. Reg. 12036 (April 2, 1974).
2. Automotive Fuel Economy Claims, 39 Fed. Reg. 34382 (September 24, 1974).

the Staff's views on the practicality of the complex proposed procedures for contract reaffirmation. The Commission has never before insisted on such a requirement, and neither it nor the parties to this proceeding have had any actual experience under such circumstances. How, then, did the Staff determine that such a proposed requirement was a feasible one? Without an adequate statement of basis and purpose, no one can be sure that this legitimate issue with respect to the proposed Rule was raised or that it was reasonably and intelligently decided.

NHSC submits that until the Commission has clarified the interrelationships between its proposed Rule and its other recent activity in the proprietary school field, and given all interested parties adequate notice of the factual and legal assumptions which underlie its proposed Rule, it is both premature and unwise for any further action to be taken in this proceeding. Only when such information is made available can the parties to this proceeding intelligently respond to the Commission's proposal. Little will be gained by needless discussion of legal theories and factual assumptions not actually at issue, and much time and energy which would otherwise be available to attempt to solve whatever problems this industry has will be lost.

IV. Detailed Analysis Of The Proposed Rule Exposes Serious Defects Which Require Its Rejection

A. Definition of Seller in Section 438.1(a)

The proposed Rule's definition of what kind of educational institutions are to be considered "sellers" of vocational training delineates the intended coverage

of the proposed TRR. This section reads:

> (a) Seller.
>
> (1) Any individual, firm, corporation, association, or organization engaged in the operation of a privately owned school, studio, institute, office or other facility which offers residence or correspondence courses of study, training, or instruction purporting to prepare or qualify individuals for employment or training in any occupation, trade, or in work, requiring mechanical, technical, business, trade, artistic, supervisory, clerical or other skills or purporting to enable a person to improve his skills in any of the above designated categories.
>
> (2) Nothing in this Part shall be construed to affect in any way those engaged in the operation of not-for-profit residence or correspondence, public or private institutions of higher education which offer students a 2-year program of accredited college level instruction which is generally acceptable for credit towards a bachelors degree.

As drafted, this definition is legally too broad, since it covers schools outside the Trade Commission's jurisdiction. At the same time, it is unfairly discriminatory and inadequate to solve the problems presumed to exist in this field, since it fails to cover many educational institutions in which the same problems as those identified by the Commission are present. Finally, ambiguities in the definition may create problems for schools not intended to be covered or loopholes for schools intended to be covered.

1. The Trade Commission's Jurisdictional Limitations Invalidate The Proposed Coverage Of The Rule, A Situation Which Has Been Aggravated By The Commission's Failure To Insure That All Persons Interested In The Problems Attacked Will Participate In This Proceeding.

As authoritatively interpreted by the Courts, the Federal Trade Commission Act forbids the Commission to exercise jurisdiction over genuinely nonprofit vocational and home-study schools. Section 4 of the Act defines that class of corporations which are subject to the Commission's jurisdiction.

> "Corporations" shall be deemed to include any company, trust, so-called Massachusetts Trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts Trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members. § 15 U.S.C. § 44 (1973).

Community Blood Bank of the Kansas City Area, Inc. v. FTC, 405 F.2d 1011 (8th Cir. 1969), has now made clear that the Congress intended by this definition to exclude genuinely nonprofit corporations from the Commission's jurisdiction.

Concluding that a nonprofit community blood bank organized by several area hospitals could not validly be regulated by the Commission, the Court there agreed with dissenting Commissioner Elman's view of the relevant facts:

> It is conceded that corporate respondents are corporations validly organized and existing under nonprofit corporation statutes; that they have been granted tax-exempt status by the Internal Revenue Service; that they do not distribute any part of their funds to, and are not organized for the profit of, members or shareholders. Any profit realized in their operation is devoted exclusively to the charitable purposes of the corporation. They have a paid staff, of course, but none of the officers or directors is paid. There is no contention that any of the corporate respondents is a device or instrumentality of individuals or firms who seek monetary gain through the nonprofit organization. The majority opinion points out that Community Blood Bank conducts its affairs in a business-like fashion and makes profits on the sale of blood, but that is certainly of no relevance here. A religious association might sell cookies at a church bazaar, or receive income from securities it holds, but so long as its income is devoted exclusively to the purposes of the corporation, and not distributed to members or shareholders, it surely does not cease to be a nonprofit corporation merely because it has income or keeps its books and records (as indeed the law might require it to do) in much the same manner as a commercial enterprise. Id., p. 1019.

In short, the fact that the blood bank was in reality a genuinely charitable organization placed it

"beyond the reach of the [Federal Trade Commission] Act". Id.

Among NHSC's membership are 15 schools organized under applicable state nonprofit corporation statutes and granted tax-exempt status by the Internal Revenue Service.[52/] Like the Kansas City Community Blood Bank, these NHSC members do not distribute any of their income to their members or shareholders. Rather, they devote whatever monies they receive to the furtherance of the educational purposes for which they were founded. Indeed, two NHSC schools, the John Tracy Clinic and the Hadley School for the Blind, do not even charge for their courses. Community Blood Bank makes clear that the Commission may not exercise its jurisdiction over such not-for-profit schools.

Yet the proposed Rule, which limits the class of not-for-profit schools exempt from its proposed requirements to "academic" institutions offering at least a two-year program of accredited, college-level instruction "acceptable for credit towards a bachelor's degree" (§ 438.1(a)(2)), may impermissibly cover many not-for-profit home-study schools. Indeed, the text of § 438.1(a)(2) suggests that the Rule might even be construed to apply to any "privately-owned school," whether or not it operates for profit, which "offers" courses, even if, like the John Tracy Clinic or the Hadley School, it does not charge for them.

52/ A list of these not-for-profit schools with a brief description of their activities is attached as Appendix K.

Similarly, it may be inferred from the language of § 438.1(a)(2) that the Commission intends to include in the class of educational institutions subject to its proposed Rule state-run, public vocational schools which do not offer programs leading to college degree credit.[53/]

Clearly, the Trade Commission may not extend its jurisdiction so far.

At the same time, however, the Rule's necessary failure to cover not-for-profit academic institutions or public schools will confuse rather than clarify the information available to students and impermissibly discriminate against private home-study schools. For many schools which are exempt from the Commission's proposed Rule present conditions and engage in practices similar to those presumed by the Commission to exist in the private vocational school field.

53/ We note in this connection the recent decision in State of California, ex rel Christensen v. FTC, ___ F.Supp. ___ (F.D.C. N.D. Calif., Oct. 29, 1974), Civil No. 74-1927, 1974 Antitrust and Trade Regulation Reporter No. 688, pp. A-11-A-12, Nov. 12, 1974, where the California State Milk Producer's Advisory Board was granted a preliminary injunction prohibiting the Trade Commission from engaging any further legal proceedings against it. The Court held that:

> ...neither the Federal Trade Commission Act nor its legislative history indicates that states, state agencies, state instrumentalities, or state officers in their official capacities were intended by Congress to be included the terms persons, partnerships, or corporations' [subject to the Commission's jurisdiction].

See also Parker v. Brown, 317 U.S. 341 (1943).

For example, the 1971 Newman Report on higher Education[54/] indicates that less than half of the students who enroll in large state universities in America graduate within 10 years from the time of their first enrollment from any university and that less than 30% of those attending public junior colleges graduate from any such institution within that same time frame. The Newman Report puts it this way:

> Yet the fact that enormous numbers of students do drop out it is an index of the utmost significance, and we believe, an index which has escaped public notice and educational debate. Laymen are generally astonished to hear that most students who attend college never finish. Educators themselves are often surprised when confronted with the numbers involved.55/

Schools which are covered by the proposed Rule would be required to disclose their drop-out rates. Yet non-covered "academic" institutions, from which "enormous numbers of students" drop out, would face no comparable requirements. In the absence of comparable information concerning all educational alternatives from which prospective students might choose, required disclosure of drop-out rates by private vocational schools only may well mislead individuals into making poor educational choices.

54/ Report on Higher Education, U.S.D.H.E.W., March, 1971.

55/ Id., p. 2.

Similarly, public vocational schools often experience the same kind of difficulty in documenting successful placement of their students as do proprietary vocational schools. Neither type of institution can control the actions of their students as individuals or the various economic conditions which have a bearing on the employment of their graduates. Both kinds of institutions, moreover, are subject to the similar need to update and revise course material as job requirements change, and it is far from clear that the public institutions uniformly are able to respond either more quickly or more effectively than do the proprietary ones.[56/]

Actually, because private schools rely on satisfied students, who in turn develop student referrals, and on industry demand for their courses, and because such schools must provide quality education to stimulate continued enrollments in order to generate the tuition income which is their sole source of revenue, they are probably more likely to respond to current needs than are public, tax-supported institutions.

If the proposed Rule requires private schools to make detailed placement disclosures, while schools in the public sector remain free of such requirements, the prospective student will

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56/ Attached as Appendix L are a series of articles which recently appeared in The Chicago Daily NEWS entitled "Vocational Education - Chicago's Stepchild". These articles document in detail the failure of that city's public vocational schools either to adequately train or effectively place their students.

have no basis for an informed choice among educational alternatives and may actually be misled into making a wrong choice.

In another area of apparent Commission concern, there is growing evidence that many colleges are beginning to use the kinds of advertising and recruiting practices that the Commission questions. A recent Washington Post article, for example, describes a variety of the techniques being used by small, private colleges to deal with the declining enrollments they have experienced in recent years.[57/]

Among the recruiting devices noted are the following:

1. Payment of recruiting personnel on a Commission basis.

2. Payment of rebates to existing students for recruitment of new students.

3. Hiring of private "head-hunter" corporations to manage recruiting activities.

4. Use of unsolicitated direct mail advertising.

5. Extensive use of visits to potential students' homes by college representatives.

The article describes some of the recruiting materials used by these schools in the following manner:

> With the realization that they must sell their schools, some colleges have instituted recruitment programs that sound more like vacation advertisements than pitches for four years of long nights at libraries.

57/ "Randolph Macon Gets Students by Mail," Washington Post, June 6, 1974, pp. C-1, C-4. See also "Study by Mail Breathes Life Into Faltering College in Iowa," Washington Post, November 13, 1974, p. A-14.

Typical advertising copy quoted in the article includes the following:

> Weber State [College] - "Come ski with us. . .Utah has the best snow on earth."
>
> Fort Lewis College in Colorado - "We selected a handful of pictures we think convey something of the campus on the mesa overlooking the pretty and friendly small town of Durango. . . But pictures don't really tell the story. A picture doesn't quite make it in showing the blueness of the big sky, the drama of the mountains, the way everything seems to stand out sharply against them."

In an increasingly severe economic environment, use of these and similar techniques, and their potential for abuse, can be expected to continued to grow.[58/]

Here again, the potential for misleading students, created by the proposed Rule's inability to deal comprehensively with the practices of all educational institutions, is obvious.

Finally, many public and private institutions of higher education offer refund policies to those students who withdraw from their courses far less generous to the student than either the Commission's proposed TRR or that of the National Home Study Council.

58/ An interesting study on the need for increased "marketing" of higher education is contained in the November, 1974, ERIC Research Currents On Higher Education, at pages 3-6.

Typical residence college plans provide for little or no tuition refund for students who fail to complete a given term. University correspondence courses are often similarly administered, offering no refunds whatever to withdrawing home-study students, regardless of the percentage of the courses actually completed.[59/]

By contrast, NHSC's policies require its member schools to make a full refund of all monies paid by any enrollee in a proprietary home-study course who decides to withdraw from that course within 72 hours after midnight of the day on which he first signed his enrollment agreement. Thereafter, up until the time the student submits his first lesson, the school may retain no more than 10% of the course cost up to a maximum of $50.00 as a nonrefundable "registration fee". Once the student has submitted his first lesson, the school may retain only the registration fee and a proportionate amount of the remaining tuition due based on the following formula:

1. During the first quarter of the course, 25% of the total tuition cost.
2. During the second quarter, 50% of the tuition cost.
3. During the third and fourth quarters, the full tuition cost.[60/]

59/ See, e.g., 1973-74 Catalog of Utah State University's Independent Study Division, at p. 11. No tuition refunds of any kind are available to students at Utah State once they enroll in a correspondence study program, even if they never begin their intended course.

60/ See Section III B. of NHSC's Business Standards, attached as Appendix M.

The failure of the proposed Rule to cover all educational institutions also raises serious questions of discrimination.

It has long been settled that law enforcement classifications must be reasonable in terms of the purposes of the statute or regulations of which they are a part. Such classifications must, the Supreme Court has made clear, not be merely "arbitrary" and must rest on some ground of difference "having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

At a minimum, the Commission must demonstrate that the classification of proprietary schools which it is attempting to make in its proposed Rule can be rationally justified in terms of preventing the supposed abuses at which its Rule is directed and that the proposed Rule does not in fact amount to impermissible, invidious discrimination between those regulated and those similarly situated but not regulated. See, e.g., Morey v. Doud, 354 U.S. 457 (1957).

As demonstrated above, both the practices and abuses which the Commission apparently assumes are present in proprietary vocational and home-study schools may well also be present in increasing degrees in the class of not-for-profit schools offering college-level training which the Commission would exempt from its Rule. NHSC submits that the Commission

must bear the burden of justifying the reasonableness of this seemingly illogical classification, which apparently bears no relation whatever to the purposes of the proposed Rule. In the absence of such a justification, the Commission's proposed Rule may not stand.

The Trade Commission's limited jurisdiction also creates significant questions as to whether this proceeding can or will be broad enough to constitute valid rulemaking. Indeed, the Commission's approach appears contrary to the very spirit of rulemaking, a procedure designed to bring before administrative decision makers all parties interested in a given set of problems.

In NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969), the Supreme Court described the importance of considering the widest possible range of points of view in formulating a proposed rule in the following terms:

> Agencies discover that they are not always respositories of ultimate wisdom; they learn from the suggestions of outsiders and often benefit from their advice. Id., p. 777.

The very court which confirmed the Federal Trade Commission's authority to make substantive trade regulation rules was also careful to point out the necessity for careful judicial scrutiny of the agency's reasoning in adopting such rules "to see whether the major issues of policy pro and con raised in the submission to the agency were given sufficient consideration." National Petroleum Refiners Association v. FTC, 482 F.2d 672, 692 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974).

NHSC submits that "sufficient consideration" of all the issues involved in the Commission's proposed proprietary school Trade Regulation Rule requires detailed analysis of whether it is in the public interest for an agency like the Trade Commission to attempt to regulate a single, small segment of American educational institutions when the problems alleged to exist in these schools may also be found in other, non-covered schools which cannot be reached by the agency.

Answering these important questions will require comment and testimony not only from and about the limited group of schools which are directly subject to the Commission's jurisdiction, but also from and about the considerably larger class of educational institutions which the Commission cannot regulate.

The Commission has apparently made no attempt to solicit views from or concerning nonproprietary schools or education in general. Its "Call for Comment" in this proceeding issued August 15, 1974, prominently noted that such schools would not be so subject to the proposed Rule, discouraging their active participation and testimony. The notice specifically asked for response only from the limited class of educational institutions intended to be subject to the proposed Rule:

> The FTC particularly invites comments which reflect personal experience in dealing with vocational schools or enrolling in vocational school courses. In addition, we would appreciate comments from persons who have had direct experience in operation, evaluation, or study of vocational schools.

Nowhere are views or data concerning other educational institutions requested, though it is clear that such testimony is vital to place this Commission proposal in proper perspective.[61/]

Under these circumstances, it is simply not realistic to expect that enough persons familiar with educational institutions other than proprietary vocational and home-study schools will participate in this rulemaking proceeding to provide the Commission adequate data to accurately assess the educational impact of its proposed Rule. Absent this testimony, the Commission's proceeding is necessarily suspect since it fails to insure that all the "major issues of policy pro and con" will be considered by the agency.

2. The Commission's Proposed Definition Of "Sellers" Subject To The Rule Is Subject To A Number Of Serious Ambiguities Which Must Be Corrected Before Any Final Rule Is Promulgated.

The jurisdictional problems created by the proposed Rule's definition of "seller" are aggravated by various ambiguities and other similar drafting problems.[62/]

61/ NHSC has reason to believe that the Commission Staff may have circulated the "Call for Comment" widely to sales representatives (or former representatives) of home-study schools, accompanied by letters stressing "the importance of your participation in these proceedings." We know of no comparable effort to involve witnesses with a broad educational perspective.

62/ Also disturbing is the Commission's insistence throughout its proposed Rule on describing proprietary schools and their students as "sellers" and "buyers." Indeed, this insistence on treating proprietary education as a purely commercial enterprise is typical of the biased and uninformed approach toward such schools taken throughout the Commission's proposed TRR.

For example, the definition as presently drafted would apply the proposed Rule to any "seller" who "offers" the courses described. Probably inadvertently, this definition could be construed to subject to the Rule schools which do not sell their courses, such as the John Tracy Clinic and the Hadley School for the Blind.

A further problem is created by ambiguities as to the circumstances in which a school may be considered a "seller" subject to the Rule, and when it may be considered an exempt "institution of higher education." Is a school which offers one or more vocationally-oriented courses covered by § 438.1(a)(1) subject to the Rule with respect to all of its courses, including such "academic" subjects as ordinary high school English? Conversely, is a school which offers one program of accredited college-level instruction generally acceptable for credit towards a bachelor's degree exempt from the Rule in its entirety under § 438.1(a)(2), even though that same school may offer other courses of the type covered by § 438.1(a)(1)?

The description in § 438.1(a)(1) of the courses intended to be covered may also create problems. What, for example, is a course "purporting to prepare or qualify individuals for . . . training . . . in work requiring . . . other skills?" Does this cover a high school course? What is its impact on courses which train parents in the skills of caring for handicapped children, or on courses training individuals in the skills necessary to pursue a hobby?

In short, whatever may be intended as to the coverage of the proposed Rule, in its present form it will be difficult

for many schools to reach any firm conclusion based on the definition of "seller" as to whether they or any of their courses are or are not covered by the Rule.

While not as serious as the difficulties created by the Trade Commission's jurisdictional limitations discussed above, these ambiguities must be clarified before any final Rule can be adopted.

B. Definition of Buyer. § 438.1(b)

Purchasers of educational services subject to the proposed Rule are defined as follows:

> (b) Buyer
>
> Any individual who purchases any correspondence or residence course of study, training or instruction from any seller purporting to prepare or qualify individuals for employment or training in any occupation, trade, or work requiring mechanical, technical, business, trade, artistic, supervisory, clerical or other skills or purporting to enable a person to improve his skills in any of the above designated categories.

This definition broadly but ambiguously extends the "protection" of the Rule to an extremely broad class of students. As we shall show, both the breadth and the ambiguity of the definition argue against its adoption.

1. The Commission Cannot Carry Its Burden To Show That Its Decision On Who Ought To Be Protected By Its Proposed Rule Is A Reasonable One In Terms Of The Characteristics of Home-Study Students

As will be further discussed in connection with various disclosure requirements, to support the proposed Rule, the Com-

mission must at least show that the class of persons to be "protected" has certain characteristics which justify requiring such disclosures. The breadth of the "buyer" definition makes it unlikely that any such justification can be made.

As for home-study students, present indications are that the Commission has made erroneous assumptions concerning their characteristics.

The Fact Sheet which accompanied the proposed Trade Regulation Rule states only that the majority of proprietary school students are less than 21 years of age at the time of their enrollment.[63/] It fails to identify what studies or other information were used by the Commission in reaching this decision.

As demonstrated above in Part I of these Comments, most home-study students are in reality at least 25 at the time that they are taking their courses, and many are well beyond this age. As further indication of their maturity and stability, most are high school graduates, married, and employed. It is not at all clear whether or why the mature adults who make up the great bulk of home-study students should be subjected to or burdened by the extensive "protection" extended by the proposed Rule.

63/ FTC Fact Sheet - Privately Owned Vocational Schools, August 8, 1974. See also October 30, 1974, Staff Statement, p. 3.

2. The Commission's Proposed Definition Of Course Buyers Is Ambiguously Drawn

As drafted, it is not at all clear whether the Commission's proposed definition of course buyers applies to all buyers who purchase any course whatever from sellers offering at least some "vocational" courses or whether it applies only to buyers who purchase courses meeting the Rule's definition of vocational training. Put another way, it is not clear whether a student who purchases an academic course not designed for vocational training from a school which also offers vocational courses is a covered purchaser. Conversely, what is the status of a "buyer" who purchases a vocational course from an "institution of higher education" exempt under § 438.1(a)(2)?

A number of NHSC schools offer both kinds of courses and would accordingly be confronted by this ambiguous definition as to status of their students. For example, would a student who enrolls in a high school course in an NHSC member school like the International Correspondence Schools be considered by the Rule a covered student simply because I.C.S. also offers courses designed to improve vocational skills?

A further ambiguity is created by comparing the definition of "buyer" as one who "purchases" a course with the definition of "seller" as a school which merely "offers" courses. Once again, where does this leave charitable schools which do not charge for their courses?

NHSC submits that these ambiguities in the coverage of the Rule must be resolved before the Commission promulgates any final regulations covering this field.

C. Ban On General Employment And Earnings Claims In Any Written Or Broadcasted Form. § 438.2(a)

As proposed, the Rule would prohibit covered proprietary schools from making any claims in a written or broadcast form with respect to general employment possibilities or general salary levels available for persons employed in a given profession. What the Commission seeks to do, in short, is to ban the dissemination of an entire class of information, regardless of the way in which this information would be used and regardless of the truthfulness of the data presented. Under the proposed Rule proprietary schools would even be forbidden from quoting verbatim from the Federal government's own statistical publications on employment opportunities, probably the most accurate and reliable source of such information available.

Such a broad ban is both unprecedented and beyond the Commission's powers under Section 5. Moreover, far from protecting students it may significantly discourage the disclosure of any information by proprietary schools and thus deprive potential students of information necessary to make informed vocational and avocational choices. Such a ban may also prevent nationwide home-study schools from doing any national advertising at all, thus severely limiting their ability to remain viable educational institutions.

1. Section 5 Of The Federal Trade Commission Act Gives The Commission No Authority To Ban Dissemination Of An Entire Class Of Information.

Applicable legal precedents make clear that the essence of the Commission's power under Section 5 is to cure deception,

not to limit the dissemination of truthful information. What the Commission is empowered to do is "to put a stop to present unlawful practices and to prevent their recurrence in the future." Coro, Inc. v. FTC, 338 F.2d 149, 153 (1st Cir. 1964), cert. denied 380 U.S. 954 (1965). See also New Standard Publishing Co. v. FTC, 194 F.2d 181, 183 (4th Cir. 1953).

The Commission is obligated, moreover, to select a remedy which is "appropriate to cure the problems identified" [Beckey and Gay Furniture Co. v. FTC, 42 F.2d 427 (6th Cir. 1930)] and which "goes no further than is reasonably necessary in meeting these objections" [FTC v. Royal Milling Co., 288 U.S. 212, 217 (1933)].

Thus, in Royal Milling, the Supreme Court rejected a Commission ban on any future use of a trade name saying that remedies short of an outright ban, including the use of qualifying words as part of the trade name, would be sufficient to cure the deception found. See also, Mangaflo Co., Inc. v. FTC, 343 F.2d 318, 320 (D.C. Cir. 1965).

Recent cases have shown renewed judicial concern with unduly broad advertising restrictions. In L.G. Balfour Co. v. FTC, 422 F.2d 1, 23 (7th Cir. 1971), for example, the Court faced a Commission order prohibiting the respondent from making any representations whatever concerning its competitor's activities in the relevant line of commerce.

> Petitioners also attack that part of the order which prohibits them from representing that "any competitor has manufactured, distributed or sold any or all types of fraternity products without permission or authorization of any fraternity or fraternities." Petitioners argue that this prohibits them from telling the truth and is therefore a violation of their First Amendment rights. We agree with this contention. The Commission may, of course, prohibit false statements or true statements which are in total effect misleading. [Citations omitted] But the Commission may not prohibit the telling of a true statement even if that representation perpetuates the domination of a monopolist. See Crosby v. Bradstreet Co., 312 F.2d 483 (2d Cir. 1963), cert. denied, 373 U.S. 911 (1963); Scientific Manufacturing Co. v. FTC, [supra]. The order must be modified to prohibit only false statements.64/

A similar result was reached in the case of National Dynamics Corp. v. FTC, 492 F.2d 1333 (2d Cir. 1974), cert. denied, ___U.S.___ (Nov. 11, 1974), 5 CCH TRR ¶67,100 (Nov. 18, 1974). There, a Commission order prohibited the respondent from making any representations about the potential earnings of its product distributors except on the basis of the average earnings of all the company's distributors. The Court, noting that there were in

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64/ The First Amendment concerns of the Balfour court are consistent with other pertinent decisions. See, e.g., N.Y. Times v. Sullivan, 376 U.S. 254, 265-66 (1964) (First Amendment guarantees of Freedom of Speech do apply to at least some kinds of paid advertisements); Scientific Manufacturing Co., Inc. v. FTC, 124 F.2d 640, 644 (3d Cir. 1941) (FTC may not make itself into a "final arbiter" of materials published in books or contained in other forms of expression); and Rodale Press, Inc. v. FTC, 407 F.2d 1252, 1258 (D.C. Cir. 1968) (Robinson, J., concurring) (FTC's assertion of powers to restrict advertising containing accurate statements from a particular book raises serious constitutional questions).

fact several distinct classes of distributors used by the Company, concluded that this general prohibition was broader than necessary to cure whatever deception was present.

> We likewise do not see why NDC should be limited to advertising only the average earnings or sales of its distributors rather than be permitted to state ranges for various types of distributors, provided it does not make deceptive use of unusual earnings realized only by a few. Id., p. 1335.

2. Indeed, Judicial Decisions In Proprietary School Cases Have Insisted That The Commission Not Ban The Dissemination Of Truthful Advertising Information.

In past proprietary school advertising cases, courts have insisted that the Commission not prohibit schools from making truthful disclosures concerning employment opportunities and salary levels.

In Federal Trade Commission v. Civil Service Training Bureau, Inc., 79 F.2d 113 (6th Cir. 1935), the Commission's final order prohibited the respondent home-study school from making any advertising representations concerning the availability of civil service positions for its graduates. The Court concluded that such a blanket ban could not stand.

> This part of the order should be modified so as to prohibit only untruthful representations as to the existence of government jobs or that persons are wanted to fill such jobs. There may be times in the future when such representation can truthfully be made. Id., p. 115

Similarly, in Tractor Training Service, Inc. v. FTC, 227 F.2d 420 (9th Cir. 1955), the issue was presented as to the scope of the Commission's power to control a proprietary school's advertising representations concerning its graduates' possible future salaries. As written by the Commission, the relevant order prohibited the respondent from representing

> that the earnings of any individuals completing respondent's correspondence course of study are in excess of the average net earnings consistently made by individuals who have completed such course over substantial periods of time under normal conditions and circumstances. Id., p. 425.

With respect to this paragraph, the court concluded:

> This seems plain enough to us. It does not preclude all future representations by petitioner of the earning experience of their graduates. It does preclude representations that petitioner's graduates do earn wages in excess of the average net earnings which they actually receive. In short, the order says no more than that further representations by petitioners must have a basis in fact. Id.

See also Goodman v. FTC, 244 F.2d 594, 600 (9th Cir. 1957), where a similar result was reached on the basis of the Tractor Training Service language.

In other industries as well, reviewing courts have consistently taken a similar position with respect to Commission prohibitions on disclosure of truthful advertising information. See, e.g., Bockenstette v. FTC, 1946-47 Trade Cases ¶ 57,437, p. 58,043 (10th Cir. 1945) (FTC order banning all representations as to U.S.D.A. approval of respondent's commercially

raised baby chicks amended to permit truthful representations to be made); U.S. Association of Credit Bureaus, Inc. v. FTC, 299 F.2d 220, 222-23 (7th Cir. 1962) (FTC order prohibiting commercial lender from ever advertising that it would make 6% loans repayable over a 15-year period ruled overbroad since it forbade such representations even if true when made); and Cotherman v. FTC, 417 F.2d 587 596 (5th Cir. 1969) (FTC Order prohibiting all representations that respondent made no charges for accounts handled unless actually collected modified to permit such a representation to be made when actually true).

In those few cases where the Courts have sustained Commission prohibitions against possibly truthful future representations, the Courts have required the Trade Commission to specifically find that the representations had never been accurately made in the past and were not likely ever to be truthfully made in the future. See, for example, Margulies v. FTC, 339 F.2d 603 (3rd Cir. 1964); and Consumer Sales Corporation v. FTC, 198 F.2d 404 (2d Cir. 1952).

In both these cases, the reviewing courts sustained orders against the respondents' ever advertising that they were conducting "consumer surveys" after specific findings that the firms had never in fact engaged in legitimate surveys in the past and were not likely to do so in the future.

In the specific context of this proceeding, the above cases make clear that the Trade Commission bears a heavy burden of proof in justifying its proposed total ban on the dissemination of general employment and earnings information to potential proprietary

school students.

At a minimum, the Commission would be obligated to show (1) that the truthful information the dissemination of which it seeks to prohibit is material to student decisions concerning educational alternatives; (2) that such information is uniformly deceptive when received by the class of potential purchasers involved; and (3) that a total ban on the dissemination of such information is necessary to cure whatever deception has been found since no other less severe remedy would be adequate to deal with the problems identified.

3. Applying The Foregoing Principles, The Proposed Ban On General Employment Information Is Clearly Unjustified.

We believe that no such showing can be made and that in fact the proposed ban would harm students by inhibiting their access to accurate and helpful information.

Intelligent educational decision making clearly requires that students have reliable information concerning employment and earnings possibilities for various professions. Indeed, the Federal government, state governments, and public educational institutions all regularly provide such information.

Perhaps the best known governmental publication of this type is the annual Occupational Outlook Handbook issued by the Department of Labor. This publication describes in detail employment opportunities and earnings potentials for some 850 occupational categories. As stated in the Foreword to the 1974-75 edition:

> Today young Americans must be aware of the effect sweeping changes in our society will have on their future careers. The 1974-75 edition of the Occupational Outlook Handbook is a key tool for helping young people make sensible career decisions.

President Ford, in his recent speech to the graduating class of Ohio State University on August 30, 1974, 65/ promised additional governmental effort to provide this kind of information to college and high school students.

Educational officials around the country also appreciate the need for dissemination of this kind of information. Almost every high school in the country now has some kind of "career night" or similar program for its students, and it is not at all unusual to find both colleges and vocational schools, both public and private, participating in these programs on a regular basis. 66/

If the Commission's proposed total ban on general employment information is allowed to stand, accurate and useful information which is recognized by other governmental officials and by educational authorities alike as important to intelligent decision making by potential students, will, as a practical matter, be kept from them. For example, the proposed Rule's ban on making general employment claims in writing might be construed to prohibit a representative of a hotel-motel school

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65/ Appendix N contains the full text of President Ford's remarks.

66/ Attached as Appendix O is a list of educational institutions which participated in this year's Fairfax County High School career program. A number of proprietary schools were included.

at a "career night" from handing out copies of the Occupational Outlook Handbook's section on "Hotel Front Office Clerks." But who else will furnish such information? And how realistic is it to expect a prospective hotel clerk to look it up for himself in the Handbook? The proposed Rule increases the chance that the student will remain ignorant of the general employment facts which a vocational school would be motivated to call to his attention, while at the same time he is bombarded by information of all kinds from non-covered "academic" institutions. The potential for unfortunate educational choices based on incomplete information is obvious.

Far from being per se deceptive, general employment information is a necessary component of responsible school advertising. What is a school to say, for example, if there are in fact jobs available in those fields in which it has courses? Should a school be prevented from making accurate and truthful disclosure of such information? How can a school engaged in national advertising make accurate representations without using nationwide information? Should students be prevented from receiving such information which may allow them to make more intelligent decisions as to what kinds of careers to pursue? Should private vocational schools be prevented from disseminating information while non-covered institutions remain free to do so?

Neither logic nor common sense supports the Commission's position. The Commission's function should be to prevent deception, not to forbid transmission of useful information.

D. Required Format And Substantiation For Specific Employment And Earnings Claims. §§ 438.2(a)(2-4).

The proposed Rule would strictly limit the written or broadcast claims which may be made by covered schools concerning the specific employment opportunities available to graduates of a given course. Disclosure in accordance with a strictly limited, mandatory format is required by § 438.2(a)(4):

> (4) Employment and earnings claims covered by Paragraph (a)(2) of this section shall be confined to the following statements and no others, for each course for which such claims are made and if any one permitted statement is made, it shall be accompanied by the others:
>
> (i) For correspondence courses of study, a statement of the total number of buyers whose enrollment terminated during the school's last fiscal year and who obtained positions of employment within three (3) months of leaving the school in job positions for which seller's course of study prepared them; a statement of the monthly or yearly range of salaries obtained by such buyers; a statement of the percentage ratio of such buyers by salary ranges to the total number of buyers who were enrolled in the seller's course during the last fiscal year; and a statement of the percentage range of such buyers who graduated from seller's course during the last fiscal year. For purposes of this subparagraph (i), the last fiscal year shall be the most recent fiscal year that terminated at least three months before the claim is made.

Such stringent restrictions are beyond the Trade Commission's power and would foster rather than prevent deception of students.

1. The Trade Commission's Powers To Require Affirmative Disclosure Of Facts And Information Are Strictly Limited By Its Statutory Authority And Applicable Court Decisions.

Section 5 of the Federal Trade Commission Act gives the Commission the power to prevent persons, partnerships, and corporations from using "unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce." Thus, at a minimum, to require affirmative disclosure of a given fact, the Commission must establish that failure to disclose that fact would be an unfair or deceptive act or practice with respect to the specific class of consumers involved in a given proceeding.

In the proprietary schools field, therefore, the Commission would be obligated to show that failure to disclose the Rule's proposed placement information would uniformly result in deception of the relevant class of consumers involved, potential students.

Moreover, the Commission is obligated to show that the facts which it seeks to require to be affirmatively disclosed are material to consumer decision making. Otherwise, failure to disclose such facts could hardly be held to be an unfair or deceptive practice.

Applicable court decisions make clear that the Federal Trade Commission may not require affirmative disclosure meraly because it feels that the added information involved would be helpful to consumers. Like other Commission remedies, affirmative disclosure is appropriate only when it is shown to be necessary to cure and prevent deception.

In Alberty v. FTC, 182 F.2d 36 (D.C. Cir. 1950), cert. denied 340 U.S. 818 (1950), the Circuit Court specifically dealt with this issue. There the Commission argued that one of the purposes of the Federal Trade Commission Act was the encouragement of the "informative function of advertising." The Court disagreed, saying:

> We think that neither the purpose nor the terms of the act are so broad as the encouragement of the informative function. Both purpose and terms are to prevent falsity and fraud, a negative restriction. When the Commission goes beyond that purpose and enters upon the affirmative task of encouraging advertising which it deems properly informative, it exceeds its authority. Id., p. 39.

The court continued:

> But we think that the negative function of preventing falsity and the affirmative function of requiring, or encouraging, additional interesting, and perhaps useful, information which is not essential to prevent falsity, are two totally different functions. We think that Congress gave the Commission the full of the former but did not give it the latter. Id.

Even for foods, drugs and cosmetics, products concerning which the Commission has special powers to prevent deceptive advertising under its operative statute,[67/] affirmative disclosure may only be ordered in limited circumstances. Such orders are permissible only if, absent the disclosure, the use of the product might be dangerous or if such disclosures are necessary to place in perspective other claims made about the effectiveness of the food or drug product. See Alberty v. FTC, supra, at 39. See also, Consolidated Royal Chemical Corp. v. FTC, 1950-51 Trade Cases ¶ 62,930 (7th Cir. 1951) (Product use potentially dangerous); and J. B. Williams Company v. FTC, 381 F.2d 884 (6th Cir. 1967) (Affirmative disclosures necessary to place specific advertising claims with respect to product effectiveness in context).

For other products, affirmative disclosure has generally been ordered only when the product involved is deemed deceptive on its face and where no other remedy adequate to cure the deception is available.

67/ See 15 U.S.C. § 52 (1973).

Examples include the fact that a book has been abridged,[68] the true fiber content of a textile product,[69] the fact that a product is of foreign origin,[70] and the fact that an article is imperfect or second-hand.[71]

Educational services are not even remotely similar to the other products subjected by the Commission to affirmative disclosure orders. Such services cannot reasonably be viewed as uniformly deceptive on their face.

Nor has the Commission made any showing, as it must, that the required disclosures in the precise format of the proposed Rule are necessary to cure whatever deception, if any, is found to exist as a result of the advertising claims made for

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68/ See cases collected at 2 CCH TRR ¶ 7545 (1974).

69/ See cases collected at 2 CCH TRR ¶ 7547 (1974).

70/ See cases collected at 2 CCH TRR ¶ 7551 (1974).

71/ See cases collected at 2 CCH TRR ¶ 7553 (1973).

these services.

NHSC submits that the stringent approach taken by the proposed Rule is neither reasonable nor legally sustainable.

2. Nor May The Trade Commission Require Vocational And Home-Study Schools To Collect And Make Public Substantiating Information With Respect To Drop-Out And Placement Rates Which The Schools Cannot Feasibly Obtain From Their Students.

Applicable Trade Commission precedent indicates that, while the Commission may order that advertising claims not be made unless "a reasonable basis" exists for making them, the standard of what constitutes a reasonable basis is a flexible one which must be specifically tailored to the factual situation involved.

In Charles Pfizer, Inc., FTC Dkt. 8819, Final Order July 11, 1972, 1970-73 TRR TB ¶ 20,056, p. 22,029, the Commission discussed five factors to be considered in deciding what constitutes a reasonable basis for advertising claims:

> The question of what constitutes a reasonable basis is essentially a factual issue which will be affected by the interplay of overlapping considerations such as (1) the type and specificity of the claim made -- e.g. safety, efficacy, dietary, health, medical; (2) the type of product -- e.g., food, drug, potentially hazardous consumer product, other consumer products; (3) the possible consequences of a false claim -- e.g., personal injury, property damage; (4) the degree of reliance by consumers on the claim; (5) the type, and accessibility, of evidence adequate to form

> a reasonable basis for making the particular claims. The precise formulation of the reasonable basis standard, however, is an issue to be determined at this time on a case-by-case basis. Id., p. 22,034

See also Firestone Tire and Rubber Company, et al., FTC Dkt. 8818, Final Order September 22, 1972, 1970-73 TRR TB ¶ 20,112, affirmed 1973 CCH Trade Cas. ¶ 74,588 (6th Cir. 1973).

In applying these standards, subsequent decisions have insisted that the Commission not require respondents to collect data not practically available to them.

In National Dynamics Corp. v. FTC, supra, the Commission's order required the respondent to substantiate its distributors' earnings claims based on required collection of profit and earnings figures from several thousand independent distributors. The reviewing court agreed with the respondent that it could not be required to collect such data since it was not in fact feasible for the company to obtain these figures from the class of people involved.[72/]

3. The Evidence Available To NHSC And Its Member Schools Indicates That It Will Not Be Possible To Obtain The Substantiating Information Required By The Commission's Proposed Trade Regulation Rule.

Section 438.2(a)(3) of the Proposed Rule delineates those areas in which the Commission seeks to impose on proprietary schools an affirmative duty to collect specific

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72/ 492 F.2d 1333, 1335 (2d Cir. 1974).

substantiating information to support employment and earnings claims. The section reads:

> (3) Written or broadcast claims subject to the exception in Paragraph (a)(2) of this Section shall be limited to claims substantiated by the seller's actual knowledge of his buyers' experiences in obtaining placement at specific salary levels in the employment positions for which seller's course of study prepares buyers. Actual knowledge shall be verified, at a minimum, by a list including the following information for each enrolled person who meets the requirements of Paragraph (a)(4) of this Section.
>
> (i) His name, address and telephone number;
>
> (ii) The name, address and telephone number of the firm or employer who hired each enrollee;
>
> (iii) The name or title of the job he has obtained;
>
> (iv) The date on which the job position was obtained;
>
> (v) His monthly or annual salary.

The evidence available to NHSC and its member schools indicates that it will not be possible for home-study schools to obtain this type of exact placement and salary information for enough students to make the required disclosures accurate or reliable. NHSC's experience has consistently been that home-study graduates are reluctant to provide any such detailed information to their schools. Many students consider requests for such confidential information to be violations of their personal privacy. They may, for

example, be reluctant to disclose the existence of or the amount of money they are earning from second, "moonlighting" jobs out of fear that their other employers will find out.

A recent study conducted by the National Radio Institute of Washington, D. C. is a good example. As part of its regular follow-up procedures, NRI has for many years sent each of its graduates a letter approximately 12 months after their graduation requesting address information and data relating to the student's employment success. The letter specifically asks students to identify any jobs related to their NRI training which they have pursued since graduation and also requests specific salary information. In addition, as an inducement to encourage graduates to reply, NRI's letter offers at no charge two recently revised lessons in the same subject matter area as the student's NRI course.

The school's consistent experience has been that not more than 35% of its graduates are willing to take the time to supply the information requested, even given the offer of free additional lessons by the school. Experience with respect to students who failed to complete their course at NRI has generally reflected return rates greatly below even this 35% figure.

Information furnished to NHSC by other member schools suggests that NRI's experience is not unusual. Another typical

example is the experience of Park Management Associates. Like NRI, they regularly solicit employment and salary information from their graduates. In 1973, the school sent 400 of its recent graduates questionnaires requesting such information. Only 152 responded -- a return rate of 38%.

Under these circumstances, NHSC submits that it is entirely unreasonable for the Commission to require home-study schools to substantiate their advertising claims based on "actual knowledge" of employment and salary histories for "each" of their students. The controlling cases make clear that the Commission may not impose any such unreasonable or infeasible requirements.

Finally, the requirement that students supply highly personal employment and salary information to their schools may well present additional legal problems under the recently enacted amendments to the Elementary and Secondary Education Act of 1965 contained in Public Law 93-380, 93d. Cong. 2d Sess. Section 513 of that Act forbids educational institutions which receive Federal assistance in any form from releasing identifiable educational records relating to any of their students without the prior written consent of the individuals involved. Indeed, this new Act would not even permit the Trade Commission to subpoena such records without at least prior notification to all the individuals whose records were to be in any way affected. Here, as elsewhere,

the Commission has failed to coordinate its proposed Rule with other existing legal requirements in the educational field.

4. Far From Preventing Deception, The Required Format May Be Misleading In Numerous Respects.

As drafted, the proposed Rule requires placement disclosures on the basis of (1) all students who take and (2) all students who complete a given course regardless of whether or not these students enrolled for vocational purposes in the first place, or completed enough of their courses even to seek positions in the field for which they were being trained, and regardless of whether those students who do graduate are in fact actively seeking employment at the time of their graduation.

It is important to understand that the majority of home-study students are simply not interested in placement in the field in which they are studying. Many are already employed in the applicable field and seek to use their training in the jobs they already have. Others seek only to try out or sample a given subject. Still others desire to add to their general, academic knowledge. Finally, a considerable number are primarily interested in developing a new hobby or other leisure interest, or in going into business themselves on a part-time basis.

The proposed Rule's emphasis on placement rate disclosures ignores this wide variety of other possible reasons for enrollment in home-study courses. As a result,

the Rule unfairly and unreasonably implies that all those who take correspondence courses are vocationally oriented. In fact, many if not most home-study students are not interested in "placement" at all.

Even assuming that placement performance information may be of some value to potential students, the proposed Rule's required placement disclosures will inevitably lead to dissemination of incomplete and inaccurate information. As drafted, these disclosures would fail to accurately reflect home-study student placement performance and could actually mislead students as to the real educational value of courses they are considering.

The proposed Rule's insistence on counting students for placement purposes who fail either to start or to complete a given course is particularly difficult to understand. It is hardly fair to judge the placement performance of a given course on such a basis. Inclusion of non-starts and dropouts in the proposed Rule's required placement disclosure can only distort the data presented and mislead potential students as to the value of taking and completing particular courses.

Also, as noted in Part II of these Comments, Congress has recently passed as yet unsigned legislation requiring proprietary schools to provide the Veterans Administration with information as to their placement performance. Significantly, that legislation recognizes that valid measurement

of placement success cannot be made even on the basis of all a school's graduates. The law requires, rather, that placement performance be measured only on the basis of those graduates who at the time of their graduation are "not unavailable for employment."[73/]

The Conference Report accompanying the bill describes this requirement as follows:

> The conferees note that situations in which a graduate could be regarded as not available for employment would include a graduate who becomes disabled, is continuing schooling, is pregnant, or undergoes a change in marital status which compels the graduate to forego a new career. In addition, a graduate who unreasonably refuses to cooperate by seeking employment should not be counted in determinating whether the placement percentage has been obtained. Such a lack of cooperation can include unreasonable demands as to job location, renumeration, or working conditions.[74/]

The proposed Rule also requires that placement performance be reported only in terms of "job positions for which the seller's course of study prepared them."[75/] Illustrating the unreasonableness of this approach, it would apparently require that a student who completes a course in accounting could be counted for placement purposes only if he is subsequently employed specifically as an accountant and not if his job is in some related business management position in which he can utilize his accounting training.

73/ See the proposed amendments to 38 U.S.C. § 1673(a)(2) contained in H.R. 12628, 93d Cong., 2d Sess., "The Vietnam Era Veterans Readjustment Assistance Act of 1974," as approved by both houses of Congress Oct. 10, 1974.

74/ Conf. Rpt. 93-1240, 93d Cong. 2d Sess., October 7, 1974, pp. 29-30.

75/ § 438.2(a)(4)(i) of the proposed TRR.

Again, the Veteran's legislation referred to above takes a different position. There, placement performance is measured in terms of broader occupational categories which include not only positions in the exact employment category as the course itself but also those in related fields where the training could be successfully utilized.

The proposed Rule also fails to consider the placement status of proprietary school students who take courses to facilitate advancement in their present jobs, or to enter a part-time business for themselves.

The proposed Rule can be construed to require that a student who receives a promotion to a more responsible position because of his training not be counted as a placement. Any such construction would result in the required disclosure of substantially distorted "placement" rates. For example, one NHSC member, the Lincoln Extension Institute, offers courses designed to prepare employees for more responsible leadership positions in the job fields in which they are now employed. Successful students may be promoted or get raises or simply improve their job performance but may not be considered to have "obtained" job "positions for which seller's course prepared them." Surely a disclosure of a low or zero "placement" rate, based on this interpretation, would not show the worth of this school's courses.

The status under the proposed disclosure and

substantiation requirements of part-time employment, particularly self-employment, poses similar problems. We have pointed out that data on part-timers or moonlighters is difficult to obtain in the first place. But if a school does learn, for example, that a locksmithing student is practicing that trade on his own in his spare time, the "obtained position" requirement may require the school to count a successful and satisfied student as a non-placement.

The proposed Rule's limitation of placement reporting to students who have obtained positions of employment within three months of leaving a proprietary school will also force distortions and inaccuracies.

A multiplicity of reasons may prevent a recent home-study student from seeking employment immediately upon his graduation. He may have other educational commitments to fulfill. He may wish to move to another city before seeking employment. He may have family or military obligations to fulfill. Actually, most home-study students are already employed. They may not wish to or (as in the case of military service) cannot change jobs within three months after terminating their studies.

The failure of the proposed 90-day limitation to consider or allow for these very real possible constraints on students' employment efforts is still another factor

which will result in presentation of "placement" data which does not accurately reflect the employment success of home-study students.

The required disclosure of salary data will also be inaccurate and misleading. Precise information will be difficult or impossible for schools to obtain. The earnings of students utilizing their training for part-time employment will also distort the range of salaries reported. In addition, the Rule's failure to count those who get raises but who do not "obtain positions" as a result of their training will undoubtedly have a distorting effect.

Finally, for home study the proposed placement disclosures concerning students whose enrollments terminated during the school's last fiscal year are required to be compared to total enrollments and graduates during that same fiscal year. Here, the Rule simply fails to consider the realities of home-study education and thus would require the presentation of inherently meaningless figures based on an "apples/oranges" comparison.

Many schools permit their students periods of up to 3 or 4 years to complete a given course. Moreover, because economic conditions change, schools will very often experience extended periods in which enrollments are either higher or lower than normal. As a result of

both of these factors, there is often considerable variation in the number of students enrolling and graduating from a given course in any given year. Therefore, required placement disclosures based on a school's most recent fiscal year will almost always be inaccurate and misleading.

In sum, the placement and salary disclosure and substantiation requirements are utterly unrealistic and can result only in the forced publication of inaccurate and misleading information.

5. It Is Also Misleading, Confusing, Unnecessary, And Burdensome To Require Placement Disclosures Different From Those Specified By Other Applicable Federal Laws.

We have noted above that other applicable Federal educational statutes and regulations impose a variety of disclosure and record keeping requirements on proprietary schools with respect to placement performance. Unfortunately, the Trade Commission has apparently made no effort to insure that its requirements in this area are consistent with other relevant requirements.

For example, the proposed Office of Education Guaranteed Student Loan Regulations require that proprietary schools make a "good faith effort" to present prospective students "complete and accurate information" on placement and employment.[76/] Since, as demonstrated above, the

76/ 39 Fed. Reg. 37154, 37158 (October 17, 1974).

disclosures required by the proposed Trade Commission Rule are neither accurate nor complete, a school might well be in violation of this proposed Office of Education regulation if it limited its disclosures to this material. Yet it would also be in violation of the Trade Commission's proposed Rule if it chose to supply additional information to potential students to give a "complete and accurate" picture.

In addition, it is clear that the proposed Trade Commission Rule would require schools to keep student records of a different nature than is now required either by the Veterans Administration or by the Office of Education.

Indeed, schools might well be required in the future to keep three separate sets of student records -- one to comply with the Veterans Administration definition of placement performance success, a second in accordance with the requirements set down by the Office of Education in its Guaranteed Student Loan Regulations, and a third to insure that the school has what the Trade Commission considers "adequate substantiation" for its advertising claims.

By failing to coordinate its reporting requirements with those already in existence, the proposed Rule would add considerably to the burden of administrative costs already imposed on proprietary schools. Since, as we have shown, the record keeping requirements of the proposed Rule

will lead only to forced disclosure of misleading information, the imposition of such additional costs cannot be justified.

6. Finally, The Proposed Placement Disclosures Are Inherently Misleading Because The Proposed Rule Would Not Permit Proprietary Schools To Place The Information Disclosed In A Meaningful Context.

As drafted, the proposed Rule would preclude proprietary schools from offering any explanation which might help potential students to understand the significance of the data which would be presented to them.

Just what, for example, would a high placement rate figure imply for a given course? It might mean that the given course had in fact been good preparation for a given occupation. It might also mean, however, that there was an extraordinarily high level of job demand in that particular field during the limited time period reflected in the statistics, or that most of those taking the course were already well qualified to obtain employment in that industry.

Conversely, a low placement rate would not necessarily imply that a given school's training was not valuable. More likely, it would only indicate that, for any number of reasons, the successes of the school's students could not be counted under the proposed Rule's technical requirements. 76A/

Moreover, the required placement figures for the most recent fiscal year required for home-study schools will not necessarily relate to current or anticipated job market

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76A/ Indeed, there are some courses in NHSC member schools which are specifically limited to people already employed in the applicable field. Clearly, placement calculations for such courses would be entirely meaningless.

conditions (as to which the school is forbidden to inform the student).

These reporting period problems will be particularly significant for the many vocational, home-study courses which take more than one year to complete. The proposed Rule's placement data will reflect a comparison of "placements" in the last year (last year's job conditions) with the number of students enrolling in still earlier time periods. For the potential student in such courses, emphasis on past enrollment and employment conditions will tell him nothing about what the job market can reasonably be expected to be eighteen or twenty-four months later at the time he will graduate. The proposed Rule's wholly retrospective reporting period requirement will simply not provide such students with useful employment information.

Clearly, these bare figures standing alone would really tell a potential student very little about educational quality or the value of a particular course, and might actually mislead him seriously.

Finally, of what value are isolated, unexplained placement figures for one kind of educational institution when similar comparative data is not provided for other kinds of schools which offer he same kinds of training? Is a potential student really better off knowing one school's placement rates if he cannot use this information to compare that

school's performance with the other types of educational institutions he might choose?

* * *

In their current form, the Commission's required placement disclosures do not serve the public interest and may not properly be required by the Commission. They neither cure deception nor encourage intelligent decision making. They serve no legitimate purpose and may well mislead the very people they were intended to help.

E. Required Advertising Disclosures For New Schools And New Courses. § 438.2(a)(5).

1. The Commission's Required Advertising Disclosures For New Proprietary Schools and Courses Are Both Unrealistic And Likely To Mislead Students.

Section 438.1(i) of the proposed Rule defines a covered new proprietary home-study school as one which has been in operation for a period of time not exceeding 3 months after completion of the new school's first fiscal year. A covered new home-study course is similarly defined, i.e., a course remains "new" for a period of 3 months after the completion of the first fiscal year in which it has been offered. See §438.1(h).

The proposed Rule would strictly limit the employment-related written or broadcast claims which could be made concerning new schools and new courses. Schools would be per-

mitted to make only the following statement:

> This school has not been in operation long enough, or this course of study has not been offered long enough to indicate how many enrolled students will obtain employment in positions for which this course trains them. However, [number] employers have indicated they will make available [number] jobs to students who complete this course of study. [Number] jobs represent [percent] of our expected total enrollees which will number [number]. § 438.2(a)(5).

By permitting proprietary schools to advertise only firm job commitments for their new schools and new courses, the Commission is in effect prohibiting them from making any employment-related claims.

Particularly for home-study schools whose students live in widespread geographic areas and progress at varying paces, it is entirely unrealistic to expect employers to precommit themselves to employ graduates of newly established schools or courses. Given today's rapidly changing employment and economic conditions, no prudent personnel officer would commit in advance to hiring a fixed number of graduates who may not be available for many months or on any fixed schedule and whom the officials of the relevant school may not even have met. Even if such commitments are made, there is no assurance that they can be kept open for any substantial period of time. Thus, any statement of commitment is likely to misrepresent actual conditions at the end of any home-study courses of more than minimal length.

No one can "guarantee" placement, and any such "guarantees" are prohibited both by NHSC's business standards and the Commission's 1972 Guides for Proprietary Schools. Yet this portion of the proposed Rule requires what is virtually a guarantee as the only permissible employment related claim for new schools and new courses.

Though the Trade Commission seems intent on insuring that covered schools will not be able to make any employment-related advertising claims concerning their new offerings, other applicable Federal government requirements could compel schools to make at least some affirmative representations with respect to their new courses. Thus, as noted above, Section 177.64 of the Guaranteed Student Loan Regulations proposed on October 17, 1974, would require both new and old schools to make a "good faith effort" to supply all their potential students with accurate employment information concerning both their new and their old courses.

As with the other advertising disclosures discussed above, the Commission's proposed requirements with respect to new schools and new courses will do more to misinform potential students than to assist them in making intelligent educational choices. Far from providing useful information to prospective students, the Commission's draft language will most likely prevent any advertising concerning the vocational purpose and value of such new offerings.

F. Affirmative Disclosure of Drop-Out Rate And Placement Information. §§ 438.2(b) and (c).

The proposed Rule would require all covered schools to provide anyone who has signed an enrollment agreement with specified disclosures of drop-out and placement performance for the particular course in which the student is interested.

If the school has made no oral, written or broadcast representations as to its course's employment or earnings potential, the drop-out rate disclosures based on all course "buyers" -- including those who did not even start the relevant course -- for the school's most recent fiscal year must be accompanied by a disclaimer stating in substance that the school has no employment information and that the particular course is not vocational training. If the school has made any form of employment or salary representation, then additional placement rate disclosures would also be imposed based on the format required by § 438.2(a)(4) for school advertising.

The disclosures would be required to be made in the form of a certified mail letter, return receipt requested, to each prospective student. Significantly, schools would not be permitted to supplement or explain the bare statistical data presented. See § 438.2(c)(1).

Like the advertising disclosures discussed above, the Commission's proposed post-contract drop-out and placement rate disclosures are beyond the Commission's authority

and more likely to confuse and mislead potential students than to assist them in intelligent educational decision making. As drafted, these disclosures are based on numerous unexplained assumptions. They are, moreover, required to be presented in a manner which will significantly add to the confusion they are likely to create.

1. As Outlined Above, The Trade Commission Has No Authority To Order Schools To Affirmatively Disclose This Information.

In Section IV.D. of these comments, NHSC has demonstrated that the Commission's power to order affirmative disclosure of specific information is strictly limited and does not extend to the kind of information and the circumstances involved in its proposed Rule. Moreover, if the Commission lacks the authority to require affirmative disclosure of drop-out and placement information when employment claims are made in proprietary school advertising, a fortiori it cannot compel such disclosures to be made in a non-advertising context to all those who enroll.

We are again confronted with the very situation seen in Alberty v. FTC, supra. There, as here, the Commission sought to require disclosure of information which it felt might be helpful to potential consumers. There, as here, there was no showing made that these required additional disclosures were necessary to cure any existing deception with respect to the products or services involved. Indeed,

Alberty's strictures apply a fortiori to these proposed required disclosures, the obvious purpose of which is to require information to be given to enrollees whether or not such disclosures are even arguably necessary to correct possible misimpressions.

2. As Drafted, The Commission's Proposed Drop-Out Rate Disclosures Are Irrelevant And Misleading.

As drafted, the Commission's proposed drop-out and placement rate disclosures will inevitably lead to confusion of potential students. Since the problems with the placement and salary disclosures have been discussed above, we will focus here on the drop-out rates.

As with the required disclosure of placement rates, the proposed Rule's mandatory drop-out rate disclosures will significantly over-emphasize the importance of home-study school drop-out rates. The bare, out-of-context statistics required to be disclosed will inevitably imply to potential enrollees that past home-study students who have failed to complete their courses have obtained nothing of educational value from their studies. Such a conclusion is clearly incorrect. In fact, there are a wide variety of possible reasons why home-study students fail to complete their courses.

Many home-study students seek only to sample a given field, or to refresh past knowledge, or to become familiar with a specific part of the material contained in a given course. When such students have achieved their intended purposes,

they may well decide not to complete the rest of their courses. Yet it would clearly be wrong to assume, as the Commission's proposed Rule apparently does, that these students received nothing of value from their training. In fact, they may have gotten everything out of their courses they ever wanted.

NHSC's member school John Tracy Clinic is a good example. Among its courses is a 12 to 15 month home-study program designed to help parents adjust to the special problems of raising pre-school deaf children. Tracy Clinic's experience has consistently been that parents seek its assistance in times of family crisis when such a problem first arises and that, after the family has begun to learn how to adjust to its new situation, many parents will fail to complete their courses. The course is simply designed to be long enough to compensate for the varying personal abilities of its students. No one would seriously argue that those parents who drop-out have failed to benefit from their training. Indeed, dropping out may well mean that such individuals have overcome the very problem the course was designed to meet.

Even assuming that drop-out rate data might be useful to potential home-study students, the proposed Rule will not really accurately measure the number of people who drop out of such courses.

The Commission's proposed Rule considers as drop outs not only those students who fail to complete all the lessons included in a given course but also "non-start" students, who

never really begin their courses. Such "non-starts" can hardly be realistically called "dropouts."

Also, § 438.2(h)(2) of the proposed Rule would force the school to count as a "drop-out" any student who failed to submit a lesson for 90 days. One NHSC member school (LaSalle) has informed us that, based on a recent survey, 53% of its graduates had 90-day or more gaps in their lesson submission. To count such students as drop-outs unfairly degrades both school and student performance and gives potential students a negative and distorted picture.

Second, the drop-out rate disclosures, even if accurately measured, are so incomplete and out of context as to inevitably mislead students. As demonstrated above with respect to the required placement disclosures, isolated drop-out statistics will not really provide students with any useful information about the schools they are considering. A low drop-out rate may mean only that the course is not comprehensive enough to cover the subject or is improperly structured as an educational program. A high drop-out rate may really show that a course has rigorous academic standards and not that it has little or no educational value. The prospective student reading the required disclosures will have no basis to judge.

Also, some NHSC member schools offer unique courses. Drop-out disclosures for these schools cannot be compared with anything else and are hence even more meaningless to the

student. Even more serious problems of non-comparability are created for students by the fact that the proposed Rule does not and cannot require public and non-profit institutions to disclose similar drop-out data for their courses.

In short, given only the Rule's bare statistical evidence, students will not really be able to make any meaningful judgment about a particular course or school. Indeed, potential students would probably be better off without any such information than they would be with the misleading figures required by the proposed Rule.

3. The Required Statement For Schools Which Do Not Make Any Oral, Written, Or Broadcasted Employment Or Earnings Representations May Well Be False In Fact And Is Clearly Not Needed To Prevent Deception.

Section 438.2(c) of the proposed Rule would require schools which make no representations whatever concerning the earnings or employment potential of their courses to make the following disclosure in their contract forms:

> This school has no information on the number or percentage of its students who obtained jobs in the occupation in which we train them. Consequently, this school and its representatives have no basis on which to make any representations or claims about job opportunities available to students who take [name of course].
>
> Prospective students are advised that enrollment in this course should not be considered vocational training that will result in employment in job positions for which this course offers instruction.

It can hardly be argued that this statement is necessary to cure deception in a context where the school involved has made no employment representations which relate to these subjects. In any event, the proposed disclosure is misleading and may be false in many cases.

First, even though the school may have chosen not to make employment claims in its advertising -- a choice which may increasingly be forced on schools by the proposed Rule's advertising strictures --, its courses may in fact have a general vocational purpose. To unnecessarily require a school to state that its proposed training is not vocational may well mislead students as to the nature of the course and may even lead some students not to apply for educational benefits which they desire and could benefit from.[77/]

The Commission's required disclosure is also directly contrary to the proposed Guaranteed Student Loan Regulation Section mentioned above which requires schools to make good faith efforts to provide placement information to potential students.[78/] To require schools to say on the one hand that their training is not vocational and on the other hand to insist that they provide vocational information to their prospective students is likely to result only in confusion.

77/ Requiring schools to state that their courses designed for vocational purposes are "non-vocational" also poses serious problems under applicable V.A. statutory requirements, which limit the kinds of courses for which veterans may receive educational benefits to those designed either for formal, academic training or to improve vocational skills. See 38 U.S.C. § 1673(a)(3) (1972).

78/ 39 Fed. Reg. 37154, 37158 (October 17, 1974).

Above all, the fact that the school has not made employment or earnings claims in enrolling the student does not mean that the school has "no information on the number or percentage of its students who obtain jobs . . . ." It may well have such information, although not in the precise scope, form, and detail the proposed Rule would require. This could be the case, for example, if a school had data based on a survey of graduates. The proposed disclosure would (a) force such a school to mislead prospective students and (b) conceal from them information which could be useful in evaluating the suitability of a particular school or course for their needs.

4. The Procedures Proposed By The Commission For Providing Potential Enrollees With This Disclosure Information Are Cumbersome, Inefficient and Unnecessarily Expensive.

Section 438.2(c) of the Commission's proposed Rule would require schools to send the required drop-out and placement information to potential enrollees in the form of a certified mail letter with a required return receipt. Such a procedure cannot be expected to work efficiently.

Postal regulations require that, before a certified, return-receipt letter can be delivered, its intended addressee or the addressee's authorized representative must sign for it either when the letter is delivered or at the local post office. As a result, because no one is home when mail is normally delivered at many American residences, certified letters often are infinitely more difficult to deliver than regular first class mail, which may simply be left at a person's home.

Also, Postal Regulations require that a form notice be left in any case where a certified letter cannot be delivered. The intended addressee must then call his Post Office and arrange either for redelivery when someone will be home or for pickup of his letter during regular business hours at the relevant Post Office. Until such a response is received, no further attempt to deliver the letter is made. This delay awaiting the recipient's response often adds considerably to the time necessary to deliver certified letters.

Moreover, because many post offices are now closed evenings and on weekends, addressees of certified letters who are working during normal weekday delivery hours may find it difficult if not impossible to find time to go to their local post office to pick up such mail.

Finally, and most importantly, because the addressee of a certified, return-receipt requested letter does not necessarily have to sign for it to have it delivered, there is no guarantee that such letters will ever really get to their intended recipients. The Commission's proposed Rule, moreover, would unfairly require proprietary schools to bear all of the risks of such possible misdeliveries by its requirement voiding all course contracts 10 days after the date on which such letters are supposedly received.[79/]

Based on all these factors, the likely result of a certified mail requirement will be that considerable unnecessary delivery delays can be anticipated for almost all such letters and that many such letters will not be delivered at all. Indeed, estimates furnished to NHSC by member schools tend to confirm that a certified mail requirement will sharply increase the percentage of undeliverable mail.

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In summary, the combined effect of the advertising restrictions and the required drop-out and placement dis-

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79/ See generally 39 C.F.R. § 168 (1974).

closures to enrollees will be to prevent the dissemination of meaningful employment and earnings information, while at the same time forcing the schools to make essentially negative, misleading, and outright deceptive disclosures within the limited and artificial format required by the proposed Rule. As we have shown, such disclosures will affirmatively mislead the prospective student because the figures in themselves will be inherently inaccurate and distorted, and because the student will have no pertinent background information or comparable figures from other educational institutions to put the information in context.

Above all, the required negative disclosures will tell the student nothing about the quality of education he can expect to receive from a given course or school. Indeed, the Rule may well lead students to forget the goal of choosing a good educational program.

Moreover, by forcing schools to devote time, energy, and money to amassing the records required by the proposed Rule's cumbersome substantiation requirements, the proposed Rule may well adversely affect the quality of education offered. Such a result would clearly be detrimental to the student and must be avoided since no countervailing benefit is apparent.

G. Affirmation And Cooling-Off Period §§ 438.2(d) and (e).

The proposed Rule would require all students in covered proprietary schools to reaffirm in writing their intent to enroll in a given course within 10 days after receipt of the drop-out and placement information described above. Sections 438.2(d) and (e) would require each school to send the following notice to all enrollees along with the required drop-out and placement information:

> NOTICE TO THE BUYER:
> The enrollment contract that you signed with [name of school] on [date] to enroll in [name of course] is not effective or valid unless you first sign this statement and return it to the above named school within ten (10) days from the time that you received this statement. You are free to cancel your enrollment and receive a full refund of any monies you have paid to the school by not signing or mailing this statement within ten (10) days. At the expiration of this ten (10) day period the school has ten (10) business days to send you your refund (if any) and to cancel and return to you the evidence of indebtedness that you signed. However, if you do want to enroll in the above named school, you should sign you name below and mail this statement to the school within ten (10) days. Keep the duplicate copy for your own records.

This unprecedented requirement is beyond the Trade Commission's power and unjustified by the facts. Particularly when considered in light of existing state and Federal Trade Commission cooling-off requirements applicable to door-to-door salesmen, it has no apparent purpose other than discouraging enrollment in proprietary home-study schools and detracting from the considerable efforts most

home-study schools make to motivate their students to start and complete their courses.

1. The Commission's Proposed Contract Reaffirmation Requirement Goes Far Beyond The Scope Of Its Permissible Remedial Powers As Construed By The Courts.

The Commission has no legal authority whatever to order contract reaffirmation. Indeed, its authority to order even the milder three-day cooling-off period now contained in its Door-to-Door Salesmen's Trade Regulation Rule[80/] is subject to some doubt.

In the statement of basis and purpose issued in conjunction with the Door-to-Door Rule, the Commission cites only a single judicial precedent as authority for the imposition of such a requirement. This case, Windsor Distributing Company v. FTC, 437 F.2d 443 (3d Cir. 1971), a per curiam order, provides no explanation of the reasons why cooling-off periods ought to be considered appropriate Commission remedies. Nor has any judicial decision since Windsor provided further explanation or justification for the Commission's asserted powers in this area.

80/ 16 C.F.R. § 429 (1974).

Moreover, an important recent opinion has cast considerable doubt on the Commission's ability to order novel remedies in Section 5 cases. Heater v. FTC, ____ F.2d ____ (9th Cir. Sept. 11, 1974), Civil No. 73-1750. There the Court concluded:

> Consumer protection is an important task. However, the Commission's endeavors must be limited to the exercise of powers granted by Congress. If there exists a deficiency in the Act, the cure must come from Congress, not by judicial enlargement of the statute. "To supply omissions transcends the judicial function." Iselin v. U.S., 270 U.S. 245, 251 (1926) (Brandeis, J.).

Indeed, the very Court which affirmed the Commission's TRR power stated:

> The Commission is hardly free to write its own law of consumer protection and antitrust since the statutory standard which the rules may define with greater particularity is a legal standard. Although the Commission's conclusions as to the standard's reach are ordinarily shown deference, [citations omitted] the standard must get [its] final meaning from judicial construction. National Petroleum Refiners Association v. Federal Trade Commission, 482 F.2d 672, 693 (D.C.Cir. 1973), cert. denied 415 U.S. 951 (1974).

One looks in vain for any case in which the Commission has even asserted that it has the authority

to order mandatory contract reaffirmation. Such a requirement is, moreover, directly contrary to the traditional contract law principle applicable in every American jurisdiction that at least some affirmative action is required to cancel a binding bilateral contract which has been freely entered into.[81/]

Clearly, this novel reaffirmation requirement constitutes an impermissible attempt by the Trade Commission to "write its own law of consumer protection."

2. Even Assuming That The Commission Does Have Authority To Order Cooling-Off Periods, Its Own Cases Make Clear That The Remedy Is To Be Invoked Only Under Very Limited, Specific Circumstances.

Applicable Commission precedent makes clear that even the more limited remedy of a cooling-off period may only be ordered after proof of the existence of intensely emotional and subjective sales techniques and normally only for home sales solicitation situations.

In Household Sewing Machine Co., et al., FTC Dkt. 8761, Final Order August 6, 1969, Commissioner Jones described these standards as follows:

> What is required is an order that will dissipate the effects of deceptive invasions of the privacy of the home where high pressure tactics may result in the ill-advised purchase of expensive merchandise which would not be bought upon careful reflection. The most effective protection

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81/ See, e.g., 2 Williston on Contracts § 234, p. 26 (3d Ed. 1957).

> is that which the consumer can provide for herself by taking a second look at the product to reconsider whether she can really afford it, all free from the influence of deceptive sales techniques.82/

As might be expected, the Commission has never ordered the imposition of even a cooling-off period in conjunction with sales made by mail.

In the instant proceedings, therefore, the Commission must demonstrate that sales techniques used throughout the proprietary school industry are so uniformly emotional and subjective as to require imposition of this unusual remedy. NHSC submits that the Commission will be unable to demonstrate consistent use of any such deceptive tactics by all proprietary schools, and that, in any case, such a showing is unlikely for home-study schools which do not employ salesmen. A majority of NHSC's member schools are in this category.

3. Even Assuming Arguendo That The FTC Has The Legal Authority To Order Contract Reaffirmation, It Must But Cannot Bear The Burden Of Showing That Sales Techniques Used In The Home-Study Field Justify The Imposition Of So Severe A Requirement.

Nor has any explanation been offered by the Commission as to why contract reaffirmation is needed in the

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82/ Id., Slip Opinion at 10.

educational field. Indeed, the Commission has not even attempted to explain why the policies adopted in its recent Door-to-Door Salesmen's TRR[83] are inadequate to deal with whatever problems exist in this area.[84] Interested parties can only guess at the factual assumptions the Commission has employed.

The proposed Rule seems to assume that the majority of proprietary school students are somehow incompetent to enter into binding personal contracts. In fact, however, most home-study students are not minors or people who are otherwise incompetent to handle their own affairs. They are mature adults with employment and family responsibilities. The Commission presents no evidence whatever to demonstrate why these individuals cannot be trusted to make their own decisions.

In addition, the Rule seems to assume that home-study schools will necessarily fail to provide individuals who decide not to begin a given course with an equitable refund of any monies they have paid. On the contrary, it has long been the policy of NHSC to require its schools to

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83/ 16 C.F.R. § 429 (1974).

84/ In this connection, we also note that the Commission has recently accepted three consent orders from proprietary schools containing three-day cooling-off period requirements. Career Academy, Inc., FTC Dkt. C-2546, September 13, 1974; Martin Industries, Inc., FTC File No. 742 3297, provisionally accepted November 11, 1974; and Weaver Airline Personnel School, Inc., FTC File No. 732 3167, provisionally accepted November 15, 1974. Apparently, no attempt has been made to reconcile the proposed TRR with these recent proprietary school cases.

make equitable refunds to students who fail to start home-study courses. A full refund of all monies paid is given if cancellation takes place within three days; otherwise the school is entitled to retain no more than 10% of the tuition cost for the course or $50, whichever is less, to defray the administrative expenses of enrolling and then reprocessing such students.

Finally, the Commission has provided no evidence whatever as to why contract reaffirmation ought to be applied to schools which enroll students only by mail. Clearly, no "invasions of privacy" or "high-pressure sales tactics" are present in such sales. The many home-study schools which use this method in effect provide their students with built-in cooling-off and reaffirmation periods as part of their regular advertising and enrollment processes.

In mail enrollments, interested potential students, in response to an advertisement placed or mailing piece sent by a school, or due to spontaneous interest or referrals, request that additional information be sent them concerning a given course of study. When the school answer this request, it will send descriptive brochures and a blank enrollment contract. When the materials are received by the student, he has as long as he possibly wants to consider whether or not to enroll and to reconsider any decision he has made to fill out the enrollment agreement. No explanation whatever has been offered as to why this ought not to be an entirely adequate procedure to permit

such students to consider and reconsider whether or not they wish to enroll in a given course.

4. The Commission's Proposed Required Contract Reaffirmation Will Have Significant Adverse Effects On Home-Study School Students.

Nor is the Commission's proposed contract reaffirmation remedy consistent with the educational interests of home-study students.

Home-study educators have long recognized that, if a student can begin immediately to work on a course in which he has enrolled, he is much more likely to have the interest and motivation necessary to finish that course. By contrast, the student who, for whatever reason, fails to begin studying immediately almost invariably is more prone to drop his course, simply because his initial energy and enthusiasm for it have been wasted.

The proposed Rule's contract reaffirmation requirement would necessarily result in periods of considerable delay in which home-study students would not be able to begin actual study. The inevitable result of this procedure will be to significantly lessen student motivation and to create substantial risks of increased drop-out rates.

The time delays between enrollment and course commencement under the Commission's proposed Rule could well be as long as 30 days. First, perhaps a week or more will elapse between the time a student first signs his enrollment

agreement and the time his school is able to mail him the required drop-out and placement information and contract reaffirmation form. Second, a period of several additional days should be anticipated while this information is en route to the student. Third, this new information would have to be considered by the student sometime within the following ten days. Fourth, the student would have to return his reaffirmation form to the school sometime within this ten-day period.[85/] Only then could the school send the student his first lesson.

During this entire period, the Rule specifically forbids schools from having any other contact with their potential students. By the time a student has complied with all the proposed legal requirements, he may well be discouraged by the complex procedure and the negative language of the reaffirmation form, and he is very likely to have lost a considerable amount of his interest and enthusiasm for the particular course. As a result, rather than encouraging students to begin and complete their studies, the Commission's proposed Rule is likely to discourage many from taking courses which would benefit them and, because of lost motivation, encourage dropping out by those who finally do start.

Finally, these extensive administrative requirements will undoubtedly result in increased tuition costs for

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85/ The Commission has recognized that "negative option" selling schemes may disadvantage some consumers because of people's natural tendencies to procrastinate. See "Statement of Basis and Purpose" accompanying Negative Option TRR, 38 Fed. Reg. 4896, 4902 (Feb. 22, 1973). The proposed Rule creates a "negative option" situation in reverse and could prevent students from pursuing courses they want simply because they lose the form or otherwise fail to beat the 10-day deadline.

students who do decide to enroll. These additional costs will not provide students with higher quality courses or training. They will simply be required to cover the expense of the burdensome requirements created by the Commission.

5. Existing Veterans Administration Requirements For Contract Reaffirmation Provide No Precedent For Imposition By The Commission Of Its Proposed Reaffirmation Requirements.

It cannot be argued in support of the Rule's proposed contract reaffirmation requirement that it is an extension of requirements now embodied in applicable Veterans Administration statutes. In reality, existing V.A. practices provide no support for imposition of contract reaffirmation by the Trade Commission.[86/]

Under 38 U.S.C. § 1786(b)(1972), eligible veterans who enroll in correspondence courses may not receive educational benefits until such time as they have reaffirmed their agreement to enroll. This reaffirmation cannot take place earlier than 10 days after the date on which they initially signed the enrollment agreement for that course. Reaffirmation forms may be left with the student, and contact with the student prior to reaffirmation is not forbidden.

86/ It is clearly fallacious to argue, as is apparently done in this instance, that the existence of other Federal regulatory programs in the educational field somehow also supports the exercise of the Trade Commission's jurisdiction in this area. If problems exist with respect to Veterans Administration Educational Benefits or with respect to the Office of Education's Guaranteed Student Loan Program, the agencies actually involved and primarily concerned, not the Trade Commission, are the proper parties from which to seek corrective relief. It is simply not reasonable to argue that an agency with no educational expertise and with only very limited jurisdiction in the field provides a better regulatory alternative.

The V.A. procedure is simpler than the proposed Trade Commission Rule. Nor is reaffirmation imposed by the V.A. as a condition for taking a given course. It applies only to eligible veterans and servicemen who are seeking V.A. educational benefits to defray the expense of such courses. Even if such students fail to return their V.A. reaffirmation forms, they may still continue to take courses in which they have enrolled at their own expense.

In sharp contrast, the Trade Commission's proposed cumbersome reaffirmation is a necessary precondition to any student's participation in a given course, and failure to follow the proposed mandatory requirements would result in automatic cancellation of the student's course.

It is clear, therefore, that the V.A. requirements are in no way comparable to those the Commission seeks to impose. To argue that the one set of requirements justifies the other is simply to misunderstand the factual circumstances involved.

In addition, imposition of a second set of reaffirmation requirements, with differing specific terms than are now used by the Veterans Administration, will inevitably result in additional unnecessary confusion of potential proprietary school students.

Finally, as demonstrated in Part II.D. of these comments, imposition of the Commission's proposed reaffirmation requirement will create inevitable conflicts with state statutes which specify varying cooling-off and reaffirmation provisions.

6. Nor Has The Commission Demonstrated Why A Ten-Day Reaffirmation Period Should Be Required For Proprietary School Students

A final unexplained feature of the Commission's proposed reaffirmation remedy is its substitution of a ten-day reaffirmation period for the three-day cooling-off period now required in door-to-door sales situations.

The Commission's adoption of the Door-to-Door Salesmen's TRR reflects a recent decision that three-day cooling-off periods are entirely adequate to cover all home sales solicitation situations including those for home study.

Since early 1972, NHSC's member schools have voluntarily observed a three-day cooling-off period on all of their enrollment contracts. The uniform experience of NHSC's members has been that this period is entirely adequate to permit all students who wish to change their minds about enrolling to do so. In the time since this ruling went into effect, NHSC has not received a single student complaint saying that more time was needed to make such a decision. And, needless to say, the Commission's limited experience since the Door-to-Door Rule went into effect on June 7, 1974, can provide no basis to say that a three-day period is inadequate.

At a minimum, the Commission must bear the burden of demonstrating that the suggested 10-day reaffirmation requirement is necessary in this field. NHSC believes that this burden cannot be successfully carried.

H. Refund Upon Cancellation and Disclosure of Cancellation and Refund--Sections 438.2(f), (g), and (h)

Section 438.2(f) of the proposed Rule would require all covered schools to adopt a uniform, mandatory pro-rata refund policy for students who cancel affirmed contracts to enroll in their courses.

> (f) Refund Upon Cancellation.
> (1) Upon Cancellation of an affirmed contract the seller shall not receive, demand or retain more than a pro rata portion of the total contract price, plus a registration fee of five percent (5%) of the total contract price but not to exceed twenty-five dollars ($25).
>
> (2) The pro rata refund shall be determined by dividing the number of classes attended by buyer or held up to the time of buyer's cancellation or, for correspondence courses, the number of correspondence lessons submitted by the buyer prior to cancellation, by the total number of classes or lessons contained in the course, and then by multiplying the total contract price by the result thereof. This amount shall constitute the buyer's total obligation. The difference between this amount and the amount the buyer has already paid the seller shall constitute either the buyer's refund or the amount of the buyer's remaining obligation to the seller.

Cancellation would be affected in accordance with the following procedure contained in § 438.2(h) of the proposed Rule.

> (h) Method of Cancellation.
> (1) After buyer has signed and affirmed

an enrollment contract, seller shall furnish buyer with a postage pre-paid card, plus duplicate card, addressed to seller and captioned

NOTICE OF CANCELLATION

I hereby cancel this contract

_____.
(Date)

_____
(Buyer's Signature)

The buyer's cancellation is effective on the date that the buyer mails or delivers to seller a signed and dated copy of the above described cancellation notice or any other written notice or, in the alternative;

(2) The buyer's cancellation is effective on the date that buyer gives the seller constructive notice of his intention to cancel his contract by failing to attend residence classes or failing to utilize residence instruction facilities for such a period of time, of 30 days or less, that the seller should reasonably conclude that the buyer has cancelled the contract; or for correspondence courses of instruction, by failing to submit a lesson for any period of 90 days.

All refunds would be required to be made within 10 business days of the time the school received the buyer's notification of cancellation.

The refund and cancellation requirements of the proposed Rule are beyond the legitimate powers of the Trade Commission. They are likely to be directly harmful to both home study schools and their students. Finally, the proposed 90-day automatic cancellation provision would

significantly diminish one of the principal educational advantages of home study, the home-study student's ability to pursue his educational training whenever it is possible for him to do so.

1. **Legislative History and Pertinent Judicial Interpretations Make Clear That The Federal Trade Commission Has No Authority To Require Any Refund Policy, Let Alone The Particular Refund Policy Prescribed By The Proposed Rule.**

The refund policy and related provisions contained in Sections 438.2(f), (g), and (h) of the proposed Rule are without legal foundation and beyond the authority of the Trade Commission.

The Commission has never been given authority to fix prices or otherwise regulate the terms of private contracts. Senator Newlands, a principal spokesman for the Federal Trade Commission Act, spoke as follows during the 1914 Senate debates on the Act, 51 Cong. Rec. 11094 (1914):

> "[S]hall the power be given, as originally in the railroad act, to condemn only an unfair or unreasonable price, or, as was later done with the railroad act, shall the power now also include that of fixing a reasonable price? Personally I am opposed to any attempt at present to fix prices." (Emphasis supplied)

The Federal Trade Commission Act of 1914 did not provide the Commission with price fixing powers and the Act has

never been amended to do so.

This prohibition against setting substantive contract terms takes on particular significance in light of the recent case of Heater v. FTC, ___F.2d___ (9th Cir. 1974), Civil No. 73-1750. There the court held that the Commission's power to define unfair practices did not permit it to order refunds by the pretext of directing a respondent to "cease and desist" from retaining "moneys of which he had bilked the franchisees and members." A fortiori, if the Commission cannot order refunds to persons who have been "bilked" into purchasing worthless services or franchises, it cannot force refunds to students by the pretext of defining as an "unfair practice" the failure to include particular refund provisions in valid contracts to provide valuable educational services. 87/

87/ FTC v. Sperry-Hutchinson Company, 405 U.S. 233 (1972) is not to the contrary. That case held only that the FTC might, upon a proper record, go beyond the letter of the Antitrust laws in defining unfair practices. In dicta, the Court further quoted an earlier assertion by the Commission that it could, in making a determination of unfairness, properly consider the following factors:

> "(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise - whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concepts of unfairness; (2) whether it is immoral, unethical, oppressive or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)" 405 U.S. at 244, n. 5.

Even if it were conceded (which we do not) that the Commission might, on a proper record, outlaw some practices based on a showing on point (3) alone, this language does not overcome the Commission's total inability to fix prices or order refunds. Furthermore, it is obviously impossible to establish that the failure to include a particular refund policy in a contract as opposed to any other properly described refund policy, in and of itself causes "substantial injury to consumers."

As the Heater opinion stated:

> "Consumer protection is an important task. However, the Commission's endeavors must be limited to the exercise of powers granted by Congress. If there exists a deficiency in the Act, the cure must come from Congress, not by judicial enlargement of the statute."

This language parallels that of the Court which affirmed the Trade Commission's rulemaking powers. In that case, National Petroleum Refiners Association v. FTC, supra, the court made it clear that the Commission was not "free to write its own law of consumer protection and antitrust since the statutory standard which [its trade regulation] rules may define with greater particularity is a legal standard." 482 F.2d 672, 693 (D.C. Cir. 1973).

Indeed, the Commission's own prior practices conform to the foregoing views. Thus, prior litigated proceedings under Section 5 have sought only (1) to prevent misrepresentation of refund policies, and (2) to insure that schools abide by whatever refund policies they have decided upon themselves. See, e.g., Goodman v. FTC, 244 F.2d 584, 600-01 (9th Cir. 1957), Franklin Institute, 55 FTC 14 (1958), Civilian Service Bureau, 53 FTC 1185 (1956).

Several recent Commission consent orders have required proprietary school respondents to make full refunds of all monies paid by individuals who exercise their right to cancel course contracts under cooling-off period provisions. Career Academy, Inc., FTC Dkt. C-2546, Sept. 13, 1974; Martin Industries, Inc., FTC File No. 742 3297, provisionally accepted Nov. 11, 1974;

Fuqua Industries, Inc., FTC File No. 712 3709, provisionally accepted Nov. 12, 1974; and Weaver Air Line Personnel School, Inc., FTC File No. 732 3169, provisionally accepted Nov. 15, 1974. None of these orders, however, seeks to impose mandatory pro-rata refund requirements with respect to students who begin but fail to complete their courses.

In sum, there is simply no precedent for requiring a particular refund policy, and ample authority confirming that the Commission may not do so.

2. Even If The Commission Had The Power To Order A Refund Policy, No Satisfactory Explanation Has Been Or Can Be Offered As To Why The Particular Refund Policy Contained In The Proposed Rule Is Necessary Or Appropriate.

Even assuming that the Commission has some legal power which might support some kind of refund policy requirement, NHSC submits that it will simply be impossible in this proceeding for the Staff to carry the burden of demonstrating that a failure to adopt the particular refund policy contained in the proposed Rule is somehow "unfair" or "deceptive".

For example, the Office of Education and Congress have concluded that the Refund Policy contained in Section III.B of NHSC's Current Business Standards is a fair and equitable one. If this policy is fair, how can the failure to adopt the Trade Commission's proposed policy be unfair?

NHSC's current refund policy, which has been in effect since October 1, 1972, provides that:

> a. An applicant student may cancel his course within seventy-two hours after midnight of the day on which the enrollment agreement is signed. An applicant student requesting cancellation in whatever manner within this time shall be given a refund of all money paid to the school or its representatives.
>
> b. From seventy-two hours after midnight of the day on which the enrollment agreement is signed and until the time the school receives the first lesson from the student, upon cancellation, the school is entitled to a registration fee of not more than 10% of the tuition or $50.00, whichever is less.
>
> c. During the first six months following the date of the student's enrollment, if no lesson or written request for continuation is received by the school for a period of 90 days, the school must advise the student that cancellation will be made under the terms outlined below.
>
> d. After receipt of the first lesson, if the student requests cancellation or if cancellation is made by the school under the provisions of c. above, the school shall be entitled to a tuition charge which shall not exceed the following:
>
> (1) During the first quarter of the course, the registration fee plus 25% of the tuition.
>
> (2) During the second quarter of the course, the registration fee plus 50% of the tuition.
>
> (3) If the student completes more than half of the course, the full tuition.
>
> The amount of the course completed shall be the lessons received for service by the school as compared to the total lessons in the course.
>
> e. Upon cancellation, all money due the student shall be refunded within 30 days.
>
> 2. In the case of student illness or accident, death in the family, or other circumstances beyond the control of the student, the student shall be entitled to consideration and the school shall make a settlement which is reasonable and fair.

At the time this policy was adopted, the Office of Education specifically approved its use and commended NHSC for adopting it.[88/]

Congress has also written the exact terms of NHSC's refund policy into the statute which governs payment of educational benefits for accredited correspondence courses to veterans and other eligible individuals.

> (c) In the event a veteran or wife or widow elects to terminate his enrollment under an affirmed enrollment agreement, the institution (other than one subject to the provisions of section 1776 of this title) may charge the veteran or wife or widow a registration or similar fee not in excess of 10 per centum of the tuition for the course, or $50, whichever is less. Where the veteran or wife or widow elects to terminate the agreement after completion of one or more but less than 25 per centum of the total number of lessons comprising the course, the institution may retain such registration or similar fee plus 25 per centum of the tuition for the course. Where the veteran or wife or widow elects to terminate the agreement after completion of 25 per centum but less than 50 per centum of the lessons comprising the course, the institution may retain the full registration or similar fee plus 50 per centum of the course tuition. If 50 per centum or more of the lessons are completed, no refund of tuition is required. 38 U.S.C. § 1786(c) (October 24, 1972).

Indeed, both the Veterans Administration statute and the Office of Education's proposed Guaranteed Student Loan Regulation recognize that determination of what constitutes a fair and equitable refund policy must be made on

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88/ See the Sept. 6, 1972, letter of John R. Proffitt, Director, Accrediting and Institutional Eligibility Staff, Office of Eduation to Mr. William A. Fowler, Executive Director, NHSC, attached as Appendix P.

an ad hoc case-by-case basis for different kinds of educational courses and methods of instruction. Thus, the Veterans Administration statute mandates a different refund policy from NHSC's for non-accredited home study courses, [89/] and the Office of Education's proposed Guaranteed Student Loan Regulations recognize six different factors which must be considered in judging the refund policies of eligible educational institutions. [90/]

It is hardly reasonable, therefore, for the Trade Commission to argue that only its proposed refund policy for proprietary home-study schools can be considered fair and equitable. The Congress has taken a different view in relevant veterans legislation, as has the Office of Education. Moreover, unlike the Trade Commission, both of these agencies have recognized that blanket undifferentiated refund policies which fail to consider the particular educational environment in which a given method of instruction is offered are inappropriate to protect the legitimate interests of schools and their students.

3. The Commission Has Even Failed To Demonstrate Why The Refund Policy Proposed In Its TRR Is Preferable To That Proposed By The Commission Staff In May, 1972.

Even the Commission itself seems to have some doubts as to what constitutes a fair and equitable refund

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89/ See 38 U.S.C. § 1775(c)(13) (1972).

90/ See 39 Fed. Reg. 37154, 37158 (Oct. 17, 1974).

policy for proprietary vocational and home-study schools.

In May, 1972, the Commission Staff issued a "proposed Statement of Enforcement Policy concerning Cancellation and Refund Policies of Private Schools." In substance, this proposed Policy provided for pro-rata refunds, subject to the school's entitlement to retain (1) 5% of the "cash price" of a course up to a maximum of $50.00, and (2) the "fair market retail price" (if separately stated) of any equipment or supplies furnished to the student and not promptly returned "in condition suitable for resale." Eligibility for refund (or cancellation of obligations) would have been triggered by a written notice of cancellation from the student or the school.

The Commission indicated at that time that it had "launched an investigation of the refund and cancellation policies" of private vocational and home-study schools.[91/]

Then, on August 15, 1974, the Commission published the proposed Rule which, with respect to refund and cancellation policies, differs from the 1972 proposed enforcement policy in significant respects - i.e. by imposing a 5% or $25 maximum "registration fee," by omitting any provisions for the value of course materials or equipment sent to and retained or damaged by the student, by requiring a blank "Notice

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91/ FTC NEWS, No. 2-0503, May 2, 1972, p. 2.

of Cancellation" to be given to the student, and by providing for automatic cancellation if the student fails to submit a lesson for 90 days.

No explanation was then offered as to why the newly proposed policy was deemed preferable, nor was any attempt made even to provide a rational basis for the argument that a failure to adopt the newly proposed refund policy, rather than some other refund policy, would necessarily be "unfair" or "deceptive."

Attempts to develop essential information as to why and how the Commission arrived at the refund and cancellation policies reflected in the proposed Rule have been rebuffed. In a letter to Bernard H. Ehrlich, dated November 4, 1974, William D. Dixon, Special Assistant Director for Rulemaking, Bureau of Consumer Protection, stated that various unspecified materials had been collected in the investigation of refund and cancellation policies announced in 1972 and that this investigation and subsequent work by the Division of Special Projects resulted in one or more reports to the Commission. Per Mr. Dixon, "all of this work, taken together, resulted in the proposal [i.e. this proposed Rule] with which you are now concerned" but "no member of the Commission's Staff could release or make public any of the reports which were submitted to the Commission." NHSC understands that disclosure of the material in question has now been requested under the Freedom of Information Act.

Certainly, if the Commission seriously intends to attampt to justify the refund and cancellation requirements contained in the proposed Rule, a minimal first step would be to expose to public view the facts and arguments relied on to justify the differences between the 1972 and 1974 proposals.

4. As Drafted, The Proposed Refund Policy Will Create Severe Problems For Covered Schools And May Seriously Affect The Educational Quality Of The Courses Offered By These Institutions.

As noted above, the Commission's proposed school refund policy is in direct conflict with existing Veterans Administration statutory refund requirements and with existing and proposed Office of Education regulatory policies in this area. Here again, as in so many other places in its proposed TRR, the Commission has simply failed to consider the interrelationships of its proposals with other existing Federal regulatory requirements. Conflicts with various state refund policies can also be anticipated.

Even aside from the problems created by these conflicts, the refund policy in the proposed Rule is unworkable and unrealistic in numerous respects.

The proposed Rule's 5% or $25 maximum "registration fee" for "non-start" students simply would not cover normal student acquisition costs and the overhead expenses necessary to enroll a student in a home-study course. Indeed, the

suggested "registration fee" would not even cover the additional administrative costs which would be imposed by compliance with the proposed Rule.

The 5% requirement would also result in totally unrealistic maximums for low-tuition courses, since the administrative costs involved in enrolling a non-start do not vary with the cost of a course. Indeed, NHSC has evidence to indicate that its own 10% maximum fee for non-starts may have harsh results as applied to low-tuition courses.[92/]

For example, The National Safety Council, an NHSC member, offers a course, "Supervising for Safety" for $48.00. Included in this figure are approximately $5.00 in processing costs (out-of-pocket expense for setting up cards and records), and $7.50 for a textbook, which is sent along with lesson materials valued at $12.00. Packaging, handling, and postage add additional expenses.

Under the Commission's proposal, if the student fails to return a lesson, The National Safety Council could retain only 5% of the $48.00 course cost ($2.40) as its "registration fee" for this course even though the cost of enrolling a non-start student and sending him his materials exceeds $24.50.

92/ The effect of NHSC's refund policy must be considered in light of the policy taken as a whole, and not by focusing solely on individual segments such as the 10% or $50 registration fee. For example, because NHSC does not require strict pro-rata refunds, the adverse impact of the low registration fee is somewhat mitigated.

Similar problems would be created for the many other NHSC member schools offering low tuition courses.

Also, the proposed maximum registration fee makes no provision for continuing inflation. Even if the Rule were arguably fair now, which it is not, the $25 maximum figure may well appear totally ridiculous in a few years.[93/]

In addition, NHSC believes that most schools would find it entirely impractical to complete refund processing within 10 business days, a problem aggravated by the 90-day automatic cancellation provision discussed below. In this connection, we note that the Office of Education's proposed Guaranteed Student Loan Regulations would permit schools 30 days to make such refunds. 39 Fed. Reg. 37154, 37158 (October 17, 1974).

The proposed Rule could also force home-study schools to subordinate educational considerations in scheduling when equipment and supplies needed for successful completion of courses should be sent to students. Under the Commission's proposed refund policy, home-study schools will have to give great weight to the financial risks of sending equipment and supplies to a student before the student completes enough of the lessons in his course so that, if a cancellation occurs, the pro-rata amount which could be retained by the school would defray the

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93/ Congressional recognition of the problem of inflation is illustrated by H.R.16916 (93rd Cong. 2nd Sess., September 26, 1974) introduced by Chairman Staggers of the Committee on Interstate and Foreign Commerce. That Bill, in defining "small bottler" for purposes of exemption from per se antitrust doctrines applicable to exclusive territorial arrangements, applies a "1974 constant dollars" concept to the pertinent dollar size measurement.

cost of the supplies or equipment. Yet educational considerations may dictate that equipment or supplies be furnished on a different schedule. The Rule's strict pro-rata policy thus creates a conflict which may adversely affect educational quality.

As a further objection, the proposed FTC Notice concerning "Cancellation and Refund" positively encourages cancellation, thus tending to destroy the student's motivation to complete a course and counteracting the many positive efforts which home-study schools employ to encourage course completion.

The Rule's required Notice language is as follows:

CANCELLATION AND REFUND

> You are free to cancel this contract at any time. You will have to pay only for lessons submitted to the school plus a registration fee of five percent (5%) of the total contract price, not to exceed twenty-five dollars ($25).
>
> You may cancel the contract by mailing or delivering to the school a signed and dated copy of the "Notice of Cancellation" sent to you by the school or by mailing or delivering to the school your own written letter of cancellation. Cancellation will be effective on the date of mailing or delivery. You may also cancel by failing to submit a lesson for ninety (90) days.
>
> The amount you will have to pay for the lessons submitted will be determined by dividing the number of lessons submitted up to the time of your cancellation by the total number of lessons contained in the course. If prior to cancellation, you have paid more than this amount plus the registration fee, the excess will be refunded to you within ten (10) business days.

Home-study educators have long recognized that student motivation is particularly important to successful home-study course completion. Many students choose home-study courses precisely because they have had difficulty in the past in successfully completing formal, residence school training. To tell such students that they may drop their home-study courses whenever they want may well result in a higher drop-out rate for those very home-study students who most need positive motivational assistance. Again, the Commission has simply failed to consider the educational impact of its proposed Rule.

5. The Proposed Rule's 90-Day Automatic Cancellation Provision For Home-Study School Courses Is Not In The Best Interests Of The Students Involved.

No provision of the proposed Rule is more educationally unsound than its automatic cancellation of a home-study student who fails to complete a lesson assignment for a period of 90 days. As drafted, the Rule does not even provide a mechanism for such a student to continue his enrollment by indicating his desire to continue and complete his course. By contrast, the proposed Office of Education regulations, § 177.46, contain such a mechanism.

Information available to NHSC indicates that the 90-day Rule would result in cancellation of many students who could normally be expected to complete their courses. In this connection, one member school, LaSalle, has informed us that its grade records for October, 1974, graduates show that 53% of those graduates would have been cancelled out by the proposed 90-day Rule. Available information from other member schools suggests

this is a typical situation.

The experience of most NHSC schools has consistently been that a significant percentage of successful home-study students can be expected to have at least one such 90-day lesson gap sometime during the pursuit of their courses. These lapses may occur for many reasons, such as moving, military service, family problems, change of employment, etc. As one specific example, some home-study students serve on nuclear submarines, which may not be able to send or receive mail for periods of more than 90 days.

Indeed, one of the major educational advantages of home study is its inherent scheduling flexibility. Home-study students can and often do put aside their courses during periods when other personal concerns become unusually time-consuming. With home-study training, the student may simply pick up where he left off as soon as his schedule permits. He is not tied to the more rigid and inflexible schedules of residence schooling.

The Commission's proposed 90-day Rule would eliminate this scheduling flexibility for a significant portion of home-study students without any compensatory advantages to the students involved. NHSC can conceive of no set of facts which would justify imposition of such a requirement.

6. The Proposed 90-Day Automatic Cancellation Provision Will Also Create Considerable Practical Difficulty.

The proposed Rule's 90-day automatic cancellation

provision, coupled with its 10-day refund processing requirement, will create massive practical difficulties for home-study schools.

Whether a home-study school has thousands of students or only a few, the proposed Rule will require daily posting of detailed records for each student, the date on which that student submitted his last lesson, when the required automatic cancellation period would expire and when the Rule's required refund would fall due. Such a task would be difficult even with computer assistance, and for the many NHSC member schools with no such equipment, it may prove extremely burdensome, unreasonably costly, and virtually impossible. All these records would be required to be kept even if sometime during the 90-day period the student submitted his next lesson and no actual refund ever became due to that student.

The Rule's automatic cancellation requirement makes no provision for inevitable delays at the Post Office in delivering lessons back to home-study schools. Can a student who mails a lesson near the end of such a 90-day period which does not arrive at the particular school until after this period has elapsed reasonably be viewed as an automatic cancellation? What if a school sends a student a refund check under this procedure only to find it has crossed in the mails with a timely submitted lesson which has been delayed in transit? The proposed Rule provides no procedures to deal with these inevitable problems.

Additional problems could arise if a student paying on a per-lesson or other installment basis mailed a check at or

near the end of the 90-day period. If payment and refund checks cross in the mail, it may become necessary to recompute and adjust the refund. Another possibility is that the school may receive a payment check late in the 10-day period following cancellation. If the school waits for the check to clear before making the refund, it may violate the Rule. On the other hand, if the school mails the refund within the 10-day period, it takes the risk that the student's check may not clear. Indeed, mailing the refund check to the student may encourage him to stop payment on his own check. The school would in either case have paid out more than it was obligated to.

Such difficulties can have serious consequences for schools. One simple but overlooked fact is that if a home-study student ends up owing the school money, it is virtually impossible to collect. The proposed refund policy would increase home-study schools' risks in this connection.

7. The Rule's Proposed Refund And Cancellation Requirements Fail To Consider The Economic Realities Of Home-Study Education And Will Inevitably Result In Unjustifiable Imposition Of Extra Costs On Diligent Students Who Do Complete Their Home-Study Courses.

The Commission has apparently formulated its proposed pro-rata refund and cancellation policies without any regard for the economic realities of home-study education.

Like many other service industries, home-study schools have substantial fixed costs. Such schools must make extensive investments in physical facilities and administrative equipment and personnel, and they must expend considerable sums to develop, review, and upgrade their courses in order to

insure that they meet the changing educational needs of our society.

These "fixed costs" do not vary substantially with the number of lessons a student completes. They continue to confront the school whether a student submits only one or all of the lessons in a particular course.

Moreover, student service costs do not vary directly with the number of lessons a student submits. As might be reasonably expected, they are greater at the beginning of a course, when a student must be processed and more materials sent to him, than they are later on. Moreover, for many schools, some lessons may require detailed analysis and criticism and hence be more costly to service than others.

For these reasons, it should be obvious that a straight pro-rata refund policy, allowing for only a minimal "registration fee," will require schools to increase the cost of their courses to obtain the same average net tuition per student after refunds.

This point can be illustrated by data provided by Truck Marketing Institute, a NHSC member offering a course in Motor Truck Selection and Application, for which the stated tuition is $75. Under its present refund policies, the school obtains an average net tuition per student after refunds of $72, generating adequate gross revenues and a small operating profit. The school's cost analysis indicates that its average cost per student is $63.36, its cost per graduate $69.25, and its cost per non-start $54.29. Based on a careful and detailed analysis, the school estimates that its desired cash flow of

$72 per student can be attained under the proposed Trade Commission pro-rata refund policy only by raising stated tuition per student to $108. The automatic 90-day cancellation would increase dropouts and thereby increase the required stated tuition per student to $147. Of course, by this time the desired $72 per student average revenue would undoubtedly have become inadequate as increasing tuition lowers the numbers of students contributing to gross revenues.

While the exact figures will, of course, vary among different schools, the Truck Marketing Institute analysis (which will be set forth in detail in its own comments) illustrates an important and basic point. The inevitable effect of the Commission's mandatory pro-rata refund policy will be to transfer a large part of the basic cost of home study from non-starts and early dropouts to the diligent students who complete all or most of their home-study courses.

Proprietary schools have only one source of income -- student tuition. If the Commission imposes an unreasonable refund policy on such schools, which does not even reflect their real fixed and variable costs, then the only way schools can recover these lost funds is by increasing tuition charges to successful students.

The question of who, as among dropouts and graduates and those in between, should bear what share of a school's costs is a debatable one. What is clear, however, is that the requirements of the proposed Rule, which encourage non-starts and dropouts, and then severely limit the amount of revenue which may be recovered from such persons, will ultimately

force home-study schools to deliver less education per tuition dollar to those diligent students who complete all or a substantial part of their courses. Such a result harms rather than protects students.

Conclusion

In sum, far from preventing deception and unfairness, the Commission's proposed Rule may result in substantial impairment of the valuable educational resource of home study.

As drafted, the Rule simply fails to take into account the inherent advantages of the home-study method of education, the diversity of schools within the home-study field, the characteristics of home-study students, or the economic realities of providing students such instruction. Indeed, some of the requirements of the proposed Rule are so unprecedentedly harsh and negative in their impact on both schools and students that we can only wonder whether the real purpose of the proposed Rule is to destroy home-study education rather than to protect consumers.

Nor will the proposed Rule even achieve the intended purpose of protecting educational consumers.

Instead, the proposed Rule would deprive students of helpful information necessary for informed choices concerning their educational alternatives. At the same time, it would force those schools subject to the Rule to furnish students inaccurate, distorted, and out-of-context information which does not answer the real question the student faces -- i.e., what is the educational worth of a particular school or program?

In its present form, the Rule serves no legitimate goal of the Federal Trade Commission properly cognizable under Section 5 of the Federal Trade Commission Act.

NHSC is confident that any fair and objective exploration of the fact, law, and policy issues involved will lead to a better understanding of the nature and role of proprietary home-study schools in America today. With such an understanding, we are confident that the Commission will reject the proposed Rule.

NHSC pledges its continued cooperation to the Federal Trade Commission in helping to identify those problems in the home-study field which may be a legitimate subject of the Commission's concern and in helping to develop feasible solutions for these problems which will prevent deception and unfairness while enabling home-study schools to offer better quality education to the millions of students who are served by them.

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