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1979

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Recommended Citation

Note, Analysis of the FTC Line of Business and Corporate Patterns Reports Litigation, 28 Clev. St. L. Rev. 83 (1979)

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NOTES

ANALYSIS OF THE FTC LINE OF BUSINESS AND CORPORATE PATTERNS REPORTS LITIGATION

I. INTRODUCTION

UNDER THE AUSPICES OF THE INFORMATION-GATHERING AUTHORITY granted to the Federal Trade Commission (FTC) by the Federal Trade Commission Act,¹ the Commission has developed two corporate report programs entitled "The Line of Business [LB] Report Program" and "The Corporate Patterns Report [CPR] Program." These broad-based statistical surveys solicit from domestic corporations information on financial performance, value of shipments, net manufacturing activities, and significant acquisitions and disposals.² According to one observer: "The purpose of both programs was to give the Commission an adequate data bank on market structures for use in antitrust enforcement, economic analysis, and policy planning."³

The LB and CPR survey orders were issued to hundreds of corporations, mostly giant conglomerates.⁴ Predictably, the corporations resisted the report requirements. Such resistance was not necessarily indicative of any improper or illegal business practices on the part of the corporations. In each case there existed potential objections to the burdens which these report programs

¹ The Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1976) [hereinafter cited as FTCA], grants to the FTC, in addition to specific authority to prevent and prosecute violations of the Act, the following information-gathering authority:

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

(b) To require, by general or special orders, corporations engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the Commission in such form as the Commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the Commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the Commission may prescribe, unless additional time be granted in any case by the Commission.

FTCA § 6(a)-(b), 15 U.S.C. §§ 46(a)-46(b) (1976).

² *In re* FTC Line of Business Report Litigation, *In re* FTC Corporate Patterns Report Litigation, 595 F.2d 685 (D.C. Cir. 1978) [hereinafter cited as LB/CPR Litigation]. For a concise yet informative description of the LB and CPR programs, see *id.* at 690-93.

³ 47 U.S.L.W. 2031 (July 18, 1978).

⁴ *E.g.*, from the oil industry: Ashland, Atlantic Richfield, Gulf, Mobil, and Texaco; from the steel industry: Bethlehem and Republic; from the automotive industry: Chrysler, Ford, and General Motors; and from the rubber industry: Dunlop, Firestone, General, and Goodyear. "[T]he Commission at one time contemplated receipt of LB Reports from 500 large manufacturing corporations representing 70% of the manufacturing capacity of the United States. . . . [O]ne can infer the percentage of manufacturing capacity of the proposed reporting companies is significant." *A.O. Smith Corp. v. FTC*, 396 F. Supp. 1108, 1110 n.1 (D. Del. 1975), *aff'd in part and vacated in part*, 530 F.2d 515 (3d Cir. 1976).

would impose. For example, these federal reports, by their nature, incur costs with no subsequent contribution to corporate revenues. Also, there were legitimate questions as to whether the information requested was relevant and useful to the FTC's formulated purpose. Indeed, there were legitimate questions as to what in fact was the FTC's purpose, if any. There were potential objections to the FTC's attempt to acquire and possibly to publish information purported to be "trade secrets" or otherwise confidential. Finally, there were demands that the corporations be granted greater opportunity in both the administrative and the adjudicative processes to present these objections for serious consideration.

The inevitable result of this dispute over the LB and CPR programs has been a myriad of pre-enforcement claims, enforcement claims, and counterclaims, between several administrative agencies and hundreds of corporations, and in numerous federal courts. This horde of litigation is summarily styled *In re FTC Line of Business Litigation*; *In re FTC Corporate Patterns Report Litigation*.⁵

The formal dispute came to a virtual end with the recent denial of *certiorari* by the United States Supreme Court.⁶ The corporations had no remaining alternative but to comply with the report orders. Nonetheless the issue remains controversial as to how far and in what fashion the FTC may burden corporations in the enforcement of its statutory mission. This article analyzes the competing interests and examines some mutually beneficial alternatives.

II. BACKGROUND

The seeds of this controversy were planted in 1970, when the FTC began developing a Line of Business survey, designed to gather from domestic manufacturing corporations aggregate performance statistics in terms of a uniform set of market categories. Such statistics were meant to enable the Commission "to identify areas of the economy in which profits are relatively high or low and to assess relationships between market structure and performance, and to use this information to target particular markets for industry-wide investigations into potential antitrust violations or unfair trade practices."⁷

After lengthy consideration and extensive revision, a limited Line of Business report form was served on 345 companies for the collection of 1973 data.⁸ "Numerous motions to quash the 1973 orders were denied by the

⁵ 432 F.Supp. 291 (D.D.C. 1977), *aff'd*, 595 F.2d 685 (D.C. Cir.), *cert. denied*, 99 S. Ct. 362 (1978). See also related litigation: *FTC v. Atlantic Richfield Co.*, 567 F.2d 96 (D.C. Cir. 1977); *A.O. Smith Corp. v. FTC*, 530 F.2d 515 (3d Cir. 1976); *FTC v. Anderson*, 442 F. Supp. 1118 (D.D.C. 1977); *In re FTC Corporate Patterns Report Litigation*, *In re FTC Line of Business Report Litigation*, 1977-2 Trade Cas. 72,420 (D.D.C. 1977); *In re FTC Corporate Patterns Report Litigation*, *In re FTC Line of Business Report Litigation*, 1977-2 Trade Cas. 72,141 (D.D.C. 1977); *FTC v. Dresser Indus., Inc.*, 1977-1 Trade Cas. 71,489 (D.D.C. 1977); *In re FTC Corporate Patterns Report Litigation*, *In re FTC Line of Business Report Litigation*, 432 F. Supp. 274 (D.D.C. 1977); *A.O. Smith v. FTC*, 417 F. Supp. 1068 (D. Del. 1976); *A.O. Smith Corp. v. FTC*, 396 F. Supp. 1108 (D. Del. 1975); *Aluminum Co. of America v. FTC*, 390 F. Supp. 301 (S.D.N.Y. 1975); *A.O. Smith Corp. v. FTC*, 403 F. Supp. 1000 (D. Del. 1975).

⁶ 99 S. Ct. 362 (1978).

⁷ 595 F.2d at 691.

⁸ *Id.* at 690 n.3, 691.

Commission. Pre-enforcement actions [by the corporations] seeking to enjoin the 1973 survey were commenced in the District Courts of Delaware and the Southern District of New York.”⁹ The corporations alleged, *inter alia*, a failure of the FTC to promulgate the LB orders in accordance with the procedures for rulemaking prescribed by the Administrative Procedure Act (APA).¹⁰ The corporations charged that the FTC failed to publish notice of proposed rulemaking and failed to invite, receive, or consider comments from the public. Since the FTC did not characterize the LB orders as “rules” subject to the rulemaking formalities of the APA, it did not attempt to deny these allegations in the pre-enforcement litigation.¹¹

In August 1975, the FTC issued a more intricate LB form to approximately 450 corporations for the collection of similar data for the year 1974. Motions to quash these 1974 LB orders were filed by 180 companies, and similarly denied by the Commission.¹²

In addition to the Line of Business Report Program, the FTC began developing a Corporate Patterns Report Program in 1972. The CPR survey required the corporations “to report the value of shipments from their domestic manufacturing establishments . . . in terms of product classifications developed by the Census Bureau for use in the Quinquennial Census of Manufactures . . . [and] data regarding, *inter alia*, consolidated net manufacturing activities and major acquisitions and disposals.”¹³ In July 1975, the Commission served CPR orders on 1,100 corporations for 1972 data. Faced with 390 motions to quash, the Commission denied the motions, yet made some modification of the reporting requirements.¹⁴

The FTC commenced enforcement proceedings in the District Court of the District of Columbia against the companies which refused to comply with the 1974 LB and 1972 CPR orders. The district court consolidated these enforcement proceedings with the 1973 pre-enforcement proceedings. The district court upheld the FTC and denied every critical corporate claim.¹⁵ Upon appeal, the United States Court of Appeals for the District of Columbia

⁹ *Id.* at 690 n.3 (citing *A.O. Smith v. FTC*, 417 F. Supp. 1068 (D. Del. 1976); *Aluminum Co. of America v. FTC*, 390 F. Supp. 301 (S.D.N.Y. 1975); *A.O. Smith Corp. v. FTC*, 396 F. Supp. 1108 (D. Del. 1975), *aff'd in part and vacated in part*, 530 F.2d 515 (3d Cir. 1976); *A.O. Smith Corp. v. FTC*, 403 F. Supp. 1000 (D. Del. 1975)).

¹⁰ *A.O. Smith Corp. v. FTC*, 530 F.2d 515, 519 (3d Cir. 1976); Administrative Procedure Act § 4, 5 U.S.C. § 553 (1976) [hereinafter cited as APA].

¹¹ *A.O. Smith Corp. v. FTC*, 396 F. Supp. 1108, 1122 (D. Del. 1975), *aff'd in part and vacated in part*, 530 F.2d 515 (3d Cir. 1976). See also note 45 *infra* and accompanying text. In litigation subsequent to the pre-enforcement actions, the FTC argued hypothetically and alternatively that if the LB orders constituted rulemaking, the FTC adequately followed APA rulemaking procedures.

¹² 595 F.2d at 692. “Orders requiring reports for the 1975-76 Line of Business Survey have been served on 481 companies but the FTC has not instituted enforcement proceedings.” *Id.* at 691 n.3.

¹³ *Id.* at 692.

¹⁴ *Id.* at 693.

¹⁵ LB/CPR Litigation, 1977-2 Trade Cas. 72,420 (D.D.C.), 1977-2 Trade Cas. 72,141 (D.D.C.), 432 F. Supp. 291 (D.D.C.), 432 F. Supp. 274 (D.D.C. 1977). The earliest of these four opinions is one disposing of various motions for summary judgment, the second and third are the substantive opinions, and the most recent is an order denying a corporate motion to amend the final order and judgment.

unanimously affirmed the decisions rendered by the district court.¹⁶ The Supreme Court subsequently denied certiorari.¹⁷

III. ANALYSIS

The most noteworthy aspect of this litigation is the existence of several conflicting policies, each supported by express Congressional enactment. There is a conflict between the FTC's broad information-gathering authority and the confidentiality of information acquired by the Census Bureau under the Census Act.¹⁸ Likewise, conflict exists between the FTC's broad information-gathering authority and the Comptroller General's scrutinization of administrative information-gathering programs, required by the Federal Reports Act.¹⁹ Finally, there is a conflict between the FTC's information-gathering authority and the administrative procedural limitations imposed by the APA as well as the Constitution.²⁰ The challenge is to determine how to reconcile these conflicting policies appropriately, if at all.

A. Census Act

A conflict exists between the respective information-gathering authorities of the FTC and the Bureau of the Census. Congress granted to the FTC broad power to gather information in order to facilitate the formidable task of preventing unfair competition and deceptive trade practices.²¹ Congress also granted to the Census Bureau broad power to gather information. In order to minimize resistance by companies and individuals, and to enable the Census Bureau to gather this information in an uninhibited fashion, Congress provided in section 9(a) of the Census Act that information so furnished would be confidential and immune from acquisition or use by other government agencies.²² In order to underscore the legislative intent that census information should be immune, Congress amended section 9(a) in 1962 to provide that *copies* of census reports were also immune.²³

¹⁶ LB/CPR Litigation, 595 F.2d 685 (D.C. Cir. 1978) [since this court of appeals decision was the judicial climax of the litigation, all references hereinafter to "the court of appeals" are to this court and this opinion].

¹⁷ 99 S.Ct. 362 (1978).

¹⁸ See notes 21-67 *infra* and accompanying text.

¹⁹ See notes 68-96 *infra* and accompanying text.

²⁰ See notes 97-163 *infra* and accompanying text.

²¹ FTCA § 6(a)-(b), 15 U.S.C. §§ 46(a)-46(b) (1976), set out at note 1 *supra*. The extraordinary breadth of the FTC's information-gathering authority is illustrated comparatively with the Securities and Exchange Commission and the Federal Power Commission in 595 F.2d 694 n.46.

²² Section 9(a) of the Census Act provides:

(a) Neither the Secretary, nor any other officer or employee of the Department of Commerce or bureau or agency thereof, may . . .

(1) use the information furnished under the provisions of this title for any purpose other than the statistical purposes for which it is supplied; or

(2) make any publication whereby the data furnished by any particular establishment or individual under this title can be identified; or

(3) permit anyone other than the sworn officers and employees of the Department or bureau or agency thereof to examine the individual reports.

13 U.S.C. § 9(a) (1976).

²³ The 1962 amendment reads as follows:

No department, bureau, agency, officer, or employee of the Government, except the Secretary in carrying out the purposes of this title, shall require, for any reason, copies of

The Director of the Bureau of the Census stated that the purpose of the immunity was to create goodwill and cooperation on the part of respondents to Census Bureau inquiries, in turn resulting in greater accuracy, completeness, and promptness of response.²⁴

Conflict arises when the FTC desires information which is already in the hands of the Census Bureau. It is obvious that the *actual* documents in the files of the Census Bureau are beyond the scope of inquiry of the FTC.²⁵ However, it is also indisputable that, merely because the Census Bureau has asked a question and received an answer, such particle of information is not totally and permanently blotted from the subsequent purview of all other government agencies.²⁶ The task is to determine where between these two extremes to delineate the immunity.²⁷

census reports which have been retained by any such establishment or individual. Copies of census reports which have been so retained shall be immune from legal process, and shall not, without the consent of the individual or establishment concerned, be admitted as evidence or used for any purpose in any action, suit, or judicial or administrative proceeding.

Pub. L. No. 87-813, 76 Stat. 922 (1962).

²⁴ Affidavit of Manuel D. Plotkin, Director of the Bureau of the Census, Department of Commerce, *reprinted in* Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, No. 78-168 (Brief for Petitioner Goodyear Tire & Rubber Co., et al.) [hereinafter cited as Brief for Petitioner Goodyear Tire & Rubber Co.].

Even in mandatory programs, the accuracy and completeness of census data are dependent upon the goodwill and cooperation of respondents. The Census Bureau has developed a high degree of such cooperation because respondents are confident that information supplied the Census Bureau will be handled on a confidential basis and will be used solely for statistical purposes. . . . If . . . companies were requested to file such data with the FTC, many firms might decline to submit information based on estimates (as they have in the past) for fear that such data would be used for other than statistical purposes. Rather, firms might restrict their reporting to data that can be substantiated from back records, an alternative that is legally permissible. The result would be the submission of less reliable and useful statistical data the the Census Bureau.

Id. Addendum B at 3b-5b. *See also* 42 OP. ATT'Y GEN. 151 (1962) (confidentiality provisions apply to "voluntary" replies to the Census Bureau); 595 F.2d at 700 & nn.81-83 (confidentiality avoids unnecessary, time-consuming clearance procedures and verifications).

²⁵ *FTC v. Orton*, 175 F. Supp. 77 (S.D.N.Y. 1959) (Census Bureau immunity upheld as against FTC subpoena); *United States v. Bethlehem Steel Corp.*, 21 F.R.D. 568 (S.D.N.Y. 1958) (Census Bureau immunity upheld as against discovery procedure).

¹³ U.S.C. § 8 (1976) provides certain exceptions to Census Bureau immunity not relevant here. *See note 131 infra*.

²⁶ Two governmental agencies have stressed this point in Congressional legislative hearings regarding the 1962 expansion of Census Bureau immunity. The Bureau of the Budget (the predecessor to the Office of Management and Budget) stated: "[C]are must be taken not to extend [Census Bureau] confidentiality to such an extent as to interfere unduly with responsibilities of other agencies of Government in carrying out functions which require information. These include antitrust acts and other regulatory acts." H.R. REP. No. 2437, 87th Cong., 2d Sess. 5 (1962). The Commerce Department stated:

[T]he ability of a regulatory agency to formulate inquiries, even one identical with those asked by Census, would not be affected. The only restriction would be that the inquiry would not demand an answer by definition identical with that furnished the Census Bureau in another context and for another purpose.

Id. at 7; S. REP. No. 2218, 87th Cong., 2d Sess. 4 (1962), *reprinted in* [1962] U.S. CODE CONG. & AD. NEWS 3188, 3191. *See also Hearings on Confidentiality of Census Reports Before the House Comm. on Post Office and Civil Service*, 87th Cong., 2d Sess. 15, 27 (1962).

²⁷ An item which is of more value in identifying the conflict than in resolving it is § 132 of the Census Act, providing that "nothing in this title shall be deemed to revoke or impair the authority of any other Federal agency with respect to the collection or release of information." 13 U.S.C. § 132 (1976). Since the confidentiality provision was undoubtedly intended to have some force, an application must occur in each case, as opposed to the automatic deference to the agency implied by § 132.

Historically, the FTC has been aggressive in testing the limits of the Census Bureau immunity provision. The CPR litigation is but the most recent link in the chain of FTC attempts to acquire Census data by various means.²⁸ For example, in *FTC v. Orton*,²⁹ the FTC subpoenaed from a corporation the information which the corporation had submitted to the Census Bureau in furtherance of an antitrust investigation against that corporation. The district court made the following significant observation:

It is to be noted that the subpoena duces tecum does not require the respondent to submit any work papers or other material used by the respondent in compiling the information submitted to the Bureau of the Census, or file copies thereof, but schedules submitted to the Bureau, together with all correspondence clarifying or amending said schedules or reports.³⁰

The court reasoned that demanding copies of actual schedules was tantamount to demanding the original, confidential schedules. As such, the court enforced the immunity provision and rejected the FTC subpoena.

In the related case of *FTC v. Dilger*,³¹ again pursuant to an antitrust investigation, the FTC subpoenaed file copies of information submitted by the corporation to the Census Bureau. On appeal, the Seventh Circuit Court of Appeals enforced the immunity provision and rejected the FTC subpoena.

Soon a conflict between the circuits developed. In *United States v. St. Regis Paper Co.*,³² another antitrust investigation, the Second Circuit Court of Appeals enforced the FTC's subpoena of file copies of Census Bureau schedules retained by the corporation. The court expressly disagreed with the contrary holding of the Seventh Circuit in *Dilger*. The court analogized the Census Bureau immunity to the tax return immunity under section 6103 of the Internal Revenue Code of 1954,³³ which permits the subpoenaing of copies.³⁴

In light of this conflict between the Second and Seventh Circuits, the Supreme Court granted the writ of certiorari of the *St. Regis* corporate petitioner.³⁵ In its opinion, the Supreme Court accepted the reasoning of the

²⁸ See, e.g., *St. Regis Paper Co. v. United States*, 285 F.2d 607 (2d Cir. 1960), *aff'd*, 368 U.S. 208 (1961); *FTC v. Dilger*, 276 F.2d 739 (7th Cir.), *cert. denied*, 364 U.S. 882 (1960); *United States v. Becton, Dickinson & Co.*, 210 F. Supp. 889 (D.N.J. 1962); *FTC v. Orton*, 175 F. Supp. 77 (S.D.N.Y. 1959).

²⁹ 175 F. Supp. 77 (S.D.N.Y. 1959) (*Borden Co.*).

³⁰ *Id.* at 78.

³¹ 276 F.2d 739 (7th Cir.), *cert. denied*, 364 U.S. 882 (1960) (*Beatrice Foods Co.*).

³² 285 F.2d 607 (2d Cir. 1960), *aff'd*, 368 U.S. 208 (1961).

³³ Section 6103 (a) provides:

Returns and return information shall be confidential, and except as authorized by this title—

(1) no officer or employee of the United States,
(2) no officer or employee of any State or of any local child support enforcement agency who has or had access to returns or return information under this section, and
(3) no other person (or officer or employee thereof) who has or had access to returns or return information. . . , shall disclose any return or return information obtained by him in any manner in connection with his service as an officer or an employee or otherwise or under the provisions of this section.

I.R.C. § 6103(a) (1976).

³⁴ 285 F.2d at 614 (citing *United States v. O'Mara*, 122 F. Supp. 399 (D.D.C. 1954)).

³⁵ *St. Regis Paper Co. v. United States*, 368 U.S. 208, 215 & n.4 (1961).

Second Circuit and adopted the narrow view that the Census Bureau immunity did not extend to copies retained by the corporate respondent.

In response to the *St. Regis* decision, and at the request of the Commerce Department,³⁶ the bureaucratic parent of the Census Bureau, Congress legislatively overruled *St. Regis* in the 1962 amendment to the Census Act,³⁷ expressly providing that the section 9(a) immunity did extend to retained copies of Census Bureau reports.³⁸

In the Corporate Patterns Report litigation, the undaunted FTC once again sought information which was arguably in the hands of the Census Bureau exclusively. The corporate parties raised the section 9(a) immunity provision to thwart this request. To be precise, the dispute arose not because the FTC expressly sought to attain the actual Census information, but because it sought information for its own purposes, utilizing questions, definitions, classifications, and overall data-analysis methods identical to those used by the Census. The corporate parties concluded that by utilizing so identical a method, the FTC sought "to attain indirectly what it could not attain directly,"³⁹ to wit, information identical to that in the hands of the Census Bureau.

The disputed data-collection method found its source in neither agency but rather was developed by the Office of Management and Budget (OMB). Termed the "Standard Industrial Classification System" (SIC), this method classifies products and product classes into two, three, and four-digit categories:

The SIC system is designed to permit classification of establishments; to facilitate collection and presentation of data; and to "promot[e] uniformity and comparability in the presentation of statistical data collected by various agencies in the United States Government, State agencies, trade associations, and private research organizations."⁴⁰

In 1967, the Census Bureau extended the SIC into five-digit "product class codes" and seven-digit "product codes," designed to measure manufacturing

³⁶ S. REP. NO. 2218, 87th Cong., 2d Sess. (1962), *reprinted in* [1962] U.S. CODE CONG. & AD. NEWS 3188.

³⁷ See note 23 *supra* and accompanying text.

³⁸ Despite this legislative reprimand, the Supreme Court denied a motion by the corporation to recall and amend or correct the judgment, 369 U.S. 809 (1962), which included penalties of \$100 per day for several months during the course of the dispute. See 368 U.S. 227 (Black, J., dissenting). However, the 1962 amendment was passed just in time to be dispositive of another attempt by the FTC to obtain retained file copies of Census reports in furtherance of an antitrust action. *United States v. Becton, Dickinson & Co.*, 210 F. Supp. 889 (D.N.J. 1962).

³⁹ LB/CPR Litigation, 432 F. Supp. at 306. Reportedly the Bureau of the Census joined the corporations in opposing the CPR survey, describing it as "a subterfuge to obtain access to data determined by the Congress to be confidential and not reachable by subpoena." On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, No. 78-167, Reply Brief for Petitioners (*American Air Filter Co., Inc., et al.*) [hereinafter cited as Reply Brief for Petitioners] at 4 n.1 (quoting Vincent Barabba, Director of the Bureau of the Census, Department of Commerce).

⁴⁰ On Appeal from the United States District Court for the District of Columbia, Brief for the FTC, Appellees, Nos. 77-1732, 77-1930, 77-1943, & 77-1952 [hereinafter cited as Brief for the FTC] at 25 (quoting Office of Management and Budget, *Standard Industrial Classification Manual*: 1972 at 9 (1972)). See also 595 F.2d at 697 n.61.

activity as well as quantity of shipments — this measure being termed “value of shipments.”⁴¹ This extended SIC system was designed for use in the Quinquennial Census of Manufactures.⁴²

Rather than utilizing the OMB's SIC system, which was designed for general use, or developing its own product classification system, the FTC adopted the extended Census Bureau “value of shipments” survey. The rationale for this adoption was simple — the FTC planned to compare the individual 1972 shipments data with aggregate data published by the Census Bureau in the 1972 Census of Manufactures.⁴³ The court of appeals noted: “FTC proposes to use the CPR survey data to create a data bank on market structures for use by the Commission in antitrust enforcement, economic analysis and policy planning.”⁴⁴ In other words, this data could ultimately be used to assist the FTC in its rulemaking, judicial, and public-information functions.⁴⁵ Although the court of appeals tangentially rationalized that the FTC inquiry differed from the Census Bureau inquiry in several respects,⁴⁶ it is important to note that the FTC data were relevant and useful only to the extent that they were comparable to the Census Bureau's aggregate data.⁴⁷

In order to reach its result in favor of the FTC and against immunity, the court analyzed, in a fragmentary fashion, the wording of the Census Act and its 1962 amendment, rather than sensing the overall intent of the statute. The court's analysis would have been improved if it had expressly considered the policies advanced by the competing statutes, with specific analysis of the particular facts of the dispute in light of such policies. Upon doing so the court could have sustained the broad policies which underlie both the Census Act and the Federal Trade Commission Act.

There is a semantic ambiguity in the 1962 amendment to section 9(a) of the Census Act which the FTC sought to exploit. The ambiguous portion provides that no agency outside of the Census

shall require, for any reason, *copies* of census reports, *which have been retained* by any such establishment or individual. *Copies* of census reports *which have been so retained* shall be immune from

⁴¹ 595 F.2d at 697 n.60; Brief for the FTC, *supra* note 40, at 25.

⁴² 595 F.2d at 692.

⁴³ *Id.* at 692, 697; 432 F. Supp. at 304.

⁴⁴ 595 F.2d at 692. “In antitrust cases, SIC and Census industry and product class definitions are frequently used in establishing the relevant market.” Brief for the FTC, *supra* note 40, at 28 & n.35 (citing *In re Beatrice Foods Co.*, 86 F.T.C. 1, 23, 70 (1975), *modified and aff'd*, 540 F.2d 303, 308-09, 311 (7th Cir. 1976); *In re Crown Zellerbach Corp.*, 54 F.T.C. 769, 782-83, 792 (1957), *aff'd*, 296 F.2d 800, 804-05, 811 (9th Cir. 1961); *A.G. Spalding & Bros. v. FTC*, 301 F.2d 585, 604-05 (3d Cir. 1962); *United States v. Mrs. Smith's Pie Co.*, 1977-1 Trade Cas. 72,017 (E.D. Pa. 1976); *United States v. International Business Mach. Corp.*, 1975-2 Trade Cas. 66,665 (S.D.N.Y. 1975).

⁴⁵ The corporate parties raised this precise point to argue that the potential use of this data in rulemaking required the FTC to collect the data only after formal rulemaking hearings required by § 4 of the APA, 5 U.S.C. § 553 (1976). 595 F.2d at 93-96. For a more thorough analysis, see the district court's opinion at 432 F. Supp. 302-04. Both district and appeals courts rejected the rulemaking argument. The particular analysis of that issue is beyond the scope of this note.

⁴⁶ 595 F.2d at 697-98 n.63.

⁴⁷ Reply Brief for Petitioners, *supra* note 39, at 3: “[T]he FTC clearly hopes and expects to obtain the same answers to its value-of-shipments question as the companies furnished to the Census Bureau. Any other result would be inconsistent with the FTC's professed desire to collect individual company data compatible with the Census Bureau's published aggregate data.”

legal process, and shall not . . . be admitted as evidence or used for any purpose in any action, suit, or other judicial or administrative proceeding.⁴⁸

In dispute is the scope of the phrase "copies which have been retained." The FTC argued that the immunity extended only to the actual document in the file of the Census Bureau respondent. The court of appeals accepted this interpretation. The court reasoned that "copies" plainly and unambiguously meant "actual file copies."⁴⁹

While it is undeniable that the FTC interpretation of the term "copies" has appeal, to say that the term is unambiguous is an oversimplification. In terms of the meaning of "copy," there is no difference between compelling the production of a confidential document and compelling a separate report containing responses identical to the information on the confidential document. In either situation, the information which Congress sought to immunize will have been "copied." To contrive a distinction between the two situations would be absurd.⁵⁰ The FTC implicitly conceded that the latter situation, like the former, would violate the section 9(a) immunity, when the FTC argued:

The companies seize upon the [Secretary of Commerce's] statement that an agency could "not demand an answer by definition identical with that furnished the Census Bureau," . . . a question requiring that the company specifically reveal as such the *actual answer* it gave to a Census question . . . such as " 'What information did you give to the Census Bureau.' " . . . This the CPR form does not do.⁵¹

Without necessarily accepting the FTC's exculpatory conclusion, it is logical that the term "copy" would include not only the actual file document but also the actual information which that document imparts. Otherwise, a subsequent agency process could compel manual copying of that information onto another non-confidential report.

The apparent conflict disappears once the overall Congressional intent is reconsidered. The critical impact of the 1962 amendment, as it supplements section 9(a), goes not to the issue of "copies" but to the issue of "immunity." Responses to Census Bureau inquiries were to be *immune*, unless voluntarily given.⁵² The facts must be analyzed to determine whether the substance of section 9(a) has been violated.

Among the facts indicating a contravention of the section 9(a) immunity were that: a) the CPR was a compulsory report; b) the CPR questions, classifications, and definitions were identical, or virtually identical, to those of

⁴⁸ 13 U.S.C. § 9(a) (1976) (emphasis added).

⁴⁹ 595 F.2d at 698 & n.66.

⁵⁰ See Reply Brief for Petitioners, *supra* note 39, at 3-4: "To require a company to surrender its file copies of census reports to the FTC is inconsistent with that kind of confidentiality. To require a company to provide to the FTC the same numbers that appear on those file copies is equally inconsistent."

⁵¹ Brief for the FTC, *supra* note 40, at 44-45 n.59 (FTC's emphasis). See the Secretary of Commerce's statement set out at note 26 *supra*.

⁵² Section 9(a) permits voluntary waiver of its immunity by the respondent to the Census Bureau inquiry. Many corporations in fact did voluntarily provide their census data to the FTC. See text accompanying note 54 *infra*.

the Census Bureau inquiry; c) the information sought was " 'statistical information specifically prepared for and submitted to the Census Bureau' that was 'not prepared or maintained in the ordinary course of business;' " ⁵³ d) the FTC desired to have data comparable to that collected and aggregated by the Census Bureau; and e) the FTC

observe[d] in a footnote in its statement denying motions to quash — in response to complaints concerning the burdensomeness of the Commission's use of the revised product categories — that some companies had found it convenient to refer to file copies of their 1973 Census reports, which showed the data filed by a company for 1972 restated by Census in accordance with the revised 1972 categories. ⁵⁴

The implication of this footnote was that the FTC was suggesting, if not artfully demanding, answers identical with those filed with the Census Bureau.

Among the facts indicating no contravention of the section 9(a) immunity were that: a) while the CPR was a compulsory report, there was no compulsion to copy Census Bureau answers onto the CPR answers; b) the CPR and Census questions were merely similar rather than identical; ⁵⁵ and c) any "misinterpretation" that may have been inferred as to the intent of the FTC in its suggestion that companies use their Census Bureau report to prepare their CPR was "clarified" in a subsequent FTC statement. ⁵⁶

The finder of fact in this litigation, the district court, made no express analysis of these facts in its opinion. There should have been specific findings to indicate what effect the above items of evidence had on the corporate respondents. A detailed analysis of this aggregate of facts might have revealed an *effect* prohibited by the section 9(a) immunity provision. Rather than making findings to determine whether the FTC in fact had attempted to compel the production of actual confidential information, the district court summarily granted to itself the authority to "balance" the competing interests and thereby capriciously tilted the balance in favor of the FTC, notwithstanding the reality of these facts. ⁵⁷ The reality is that the FTC wanted information which Congress had determined should be immune. Rather than offsetting one policy against the other, it was the duty of the court to seek to reconcile and uphold the FTC's information-gathering authority and the Census Bureau's immunity.

There is one element of the court of appeal's reasoning regarding Census Bureau immunity that is assuredly incorrect, albeit ever so subtly. The analysis

⁵³ 595 F.2d at 697 n.58.

⁵⁴ Brief for the FTC, *supra* note 40, at 31 n.39.

⁵⁵ 595 F.2d at 697-98 n.63. Some modifications had in fact been made by the FTC in response to complaints by the corporations of undue burden. *Id.* at 693.

⁵⁶ Brief for the FTC, *supra* note 40, at 31 n.39.

⁵⁷ In the court's own words:

Thus the court must balance the corporate parties' expectation of confidentiality with the FTC's legitimate information-gathering needs and cannot give maximum potential expression to policy considerations of confidentiality. Any confidentiality privilege granted by section 9, therefore, is but a qualified privilege that must be weighed in conjunction with the FTC's right to collect relevant data.

432 F. Supp. at 306.

of this error begins with the premise to which all parties and courts have agreed, to wit, that to compel a respondent to provide on the CPR the *identical answer* on the Census Bureau report contravenes the section 9(a) immunity.⁵⁸ The court of appeals was careful to distinguish the situation where the agency might compel an identical answer from the situation where the agency merely asks an identical question without requiring an identical answer.⁵⁹ The court attributed the FTC's CPR survey to be of the latter, lawful situation. In support of this conclusion, the court noted that although the corporation *may* provide the exact Census Bureau data to the FTC, there is no express compulsion to do so. The court apparently accepted the conclusion of the FTC that

[t]he fact that the answers given to Census and the Commission might differ as a result of the good faith use of better or more complete records, differences in the instructions or certifications, or voluntary application of higher standards of care would not create any risk of criminal liability, for 18 U.S.C. § 1001 (1970) applies only to one who "knowingly and wilfully" makes a "fictitious or fraudulent" statement to an agency.⁶⁰

There are two distinct messages in this statement. The first message is that confidential information is safe because identical answers are not required. This assertion, as previously noted, is not completely true. The hidden message, the significance of which was ignored by the court, is that if the confidential Census Bureau data are not supplied, the answers supplied in lieu thereof must be "better." Thus, the section 9(a) immunity is afforded only conditional respect. The condition is that the information supplied to the FTC may only differ from the confidential Census Bureau information if it has been made more accurate as a result of better or more complete records, a higher standard of care, or a more stringent degree of certification.⁶¹ To view it from another angle, if the confidential Census data is unchanged in light of the 18 U.S.C. section 1001 requirements, then the FTC quite simply will have compelled its disclosure, notwithstanding the section 9(a) immunity protection.

In its brief, the FTC scoffed at such a possibility:

Suffice it to say that, while some companies asserted that file copies of Census reports were the most convenient source in which the value of shipments data are readily available, no company

⁵⁸ See note 51 *supra* and accompanying text.

⁵⁹ 595 F.2d at 700. See also 432 F. Supp. at 306.

⁶⁰ Brief for the FTC, *supra* note 40, at 33 n.42. See also 595 F.2d at 700-01, repeating the substance of this statement.

⁶¹ While Census Bureau inquiries merely require substantial accuracy and encourage the use of estimates and approximations in the name of expediency and efficiency, 595 F.2d at 700, "the CPR form requires a certification of accuracy and permits the use of estimates only where the underlying data is unavailable." *Id.* at 698 n.63. Some corporations "have indicated that the unreviewed answers to the census inquiry are not sufficiently reliable for the certification of truthfulness required of their answers to the Federal Trade Commission." *Id.* at 700-01. In such an instance, it would be erroneous for the respondent to submit the census data on its CPR response. See text accompanying notes 54, 56 *supra*.

established that it simply could not complete the CPR report without referring to file copies of Census reports.⁶²

The FTC nevertheless conceded that such a situation *might* constitute a violation of the section 9(a) immunity:

In the unlikely event that a company had no records other than a file copy of a Census report from which it could reasonably estimate the value of shipments data called for by the CPR report a different question might be presented if the Commission attempted to require the company to refer to the file copy as a basis for the information called for by the CPR report.⁶³

In short, subtle factual variations could result in a violation of section 9(a) immunity. Yet the courts failed to make particularized findings of fact despite the deliberate similarity of the CPR inquiry to the Census Bureau inquiry. While aware that the CPR inquiry requires an element of relevance,⁶⁴ the court ignored the significance of the fact that the relevance of this data is dependent upon its comparability to otherwise confidential data.⁶⁵ Calculations of burdensomeness and cost of compliance were indefensibly premised on the assumption that CPR respondents would waive their section 9(a) immunity,⁶⁶ while offering the CPR respondents the Hobson's choice of incurring additional costs to recompute the answers from underlying records with no assurance that such recomputation would necessarily result in data dissimilar from that in the hands of the Census Bureau.⁶⁷ With this realization, it is not nearly as clear as the court of appeals concluded that on these facts there was no breach of the section 9(a) confidentiality.

A conclusive overview is appropriate. The FTC has made the policy determination that it will utilize the revised SIC system as a tool in its fair trade and antitrust functions. The FTC has fortified its disregard of the competing confidentiality policy considerations with a highly technical, contrived statutory interpretation. In persuading the courts to embrace this nuance, the FTC has successfully chiseled another stone from the wall of Census Bureau immunity.

B. *Federal Reports Act*

Another set of conflicting Congressional policies involves the FTC's information-gathering authority and the coordination of federal reporting programs in the Federal Reports Act (FRA).⁶⁸ Essentially, the FRA creates a clearinghouse for any project designed by a federal agency which requires information from a business enterprise. Before adopting or revising

⁶² Brief for the FTC, *supra* note 40, at 30 n.38.

⁶³ *Id.*

⁶⁴ For discussion of the standard of relevance imposed by the APA, see notes 133-63 *infra* and accompanying text.

⁶⁵ See note 47 *supra*.

⁶⁶ For discussion of the measure of cost of compliance, see notes 108-20 *infra* and accompanying text.

⁶⁷ See notes 62-63 *supra* and accompanying text.

⁶⁸ 44 U.S.C. §§ 3501-3512 (1970 & Supp. V 1975) [hereinafter cited as FRA].

information-gathering plans or forms, the agency must submit them to the clearinghouse for examination and comparison with the information-gathering activities of other agencies. The policy of the FRA is to minimize both the burden upon businesses in furnishing information to federal agencies and the cost to federal agencies in collecting this information. It is the task of the clearinghouse to eliminate unnecessary duplication of efforts in obtaining information and to require the collection and tabulation of information in a manner so as to maximize the usefulness of the information to other federal agencies and the public.⁶⁹ To the extent that this clearinghouse is empowered to pass substantive or procedural judgment upon an agency project and to modify, limit, or prohibit all or part of an agency project in furtherance of the goals of the FRA, there is an imposition visited upon the otherwise legitimate information-gathering activities of the respective agency.⁷⁰

When developing the 1974 LB program, the FTC submitted the LB surveys to the clearinghouse authority, that is, to the Comptroller General of the United States, in the Government Accounting Office (GAO). After soliciting comments from interested persons, the Comptroller approved the 1974 LB form, specifically finding, according to the court of appeals, "that the information sought was not available to the FTC from another federal source and that the commission had sufficiently minimized the respondents' burden of compliance with the reporting requirement."⁷¹ In a footnote the court further explained that "[t]he Comptroller's . . . letter indicated that revisions in the LB form for 1973 had improved, in the Comptroller's view, the meaningfulness of the data to be collected. The Comptroller expressly indicated, however, that his views were advisory and not within the standards of review provided by [the FRA]."⁷²

The Comptroller's letter also contained a potentially significant reservation. According to the district court: "The . . . letter noted, *inter alia*, that the FTC had made 'constructive efforts' to minimize burden, and that 'a rather

⁶⁹ For application of the FRA to independent federal regulatory agencies, see 44 U.S.C. § 3512 (Supp. V 1975), set out at text accompanying note 84 *infra*. For application of the FRA to federal non-regulatory agencies, see § 3501:

Information needed by Federal agencies shall be obtained with a minimum burden upon business enterprises, especially small business enterprises, and other persons required to furnish the information, and at a minimum cost to the Government. Unnecessary duplication of efforts in obtaining information through the use of reports, questionnaires, and other methods shall be eliminated as rapidly as practicable. Information collected and tabulated by a Federal agency shall, as far as is expedient, be tabulated in a manner to maximize the usefulness of the information to other Federal agencies and the public.

44 U.S.C. § 3501 (1970 & Supp. V 1975).

No study of the FRA is complete without the following ironic observation of the Commission on Federal Paperwork:

There is little doubt that this Act, designed to eliminate duplicative Federal reporting requirements, has been largely ineffective. . . . Contentions have also been made that, because of the unduly restrictive provisions of § 3508(b) [between sharing agencies, both sets of penalties for unlawful disclosure apply in full], the Act may actually discourage, rather than encourage, the interagency exchange of data.

Commission on Federal Paperwork, Confidentiality and Privacy 45 (July 29, 1977).

⁷⁰ In the case of the FTC, this information-gathering authority is granted by the FTCA § 6(a)-(b), 15 U.S.C. §§ 46(a)-46(b) (1976), set out at note 1 *supra*.

⁷¹ 595 F.2d at 709.

⁷² *Id.* at n.147.

long test period of data collection and analysis will be required to fully reconcile FTC's data needs with minimum burden.' ”⁷³

The Comptroller's reservation reveals the fact that in his review of surveys submitted to him under the FRA, the Comptroller does not “engage in a wide-ranging, substantive inquiry into the proposed forms' appropriateness.”⁷⁴ The corporations contended that the term “appropriateness” is used here to mean that the inquiries are suitable for the intended purpose — that they meet “‘some minimum standard of meaningfulness and reliability in terms of the agency's stated need.’ ”⁷⁵

The corporations objected to the Comptroller's approval of the LB survey.⁷⁶ They suggested that the Comptroller should have made the wide-ranging substantive inquiry into “appropriateness” which the Comptroller conceded that he failed to make. They also said that, under FRA section 3512, the Comptroller should not have approved the LB form until after making a determination that the form would gather information that is useful and reliable for the FTC's stated need.⁷⁷

The court of appeals determined that the corporations' argument was “at odds with both the language and the legislative history of section 3512 of the Federal Reports Act.”⁷⁸ In its opinion, however, the court failed to elaborate on the language of the statute. Nonetheless, a more meticulous examination of both the language and the statute's legislative history illustrates that the court's conclusion was correct.

As originally promulgated in 1968 and codified in Chapter 35 of the United States Code, the FRA coordination policy applied to independent federal regulatory agencies in the same manner as it applied to all other federal

⁷³ 432 F. Supp. at 311.

⁷⁴ *Id.* at 308 & n.37 (citing 39 Fed. Reg. 24346 (1974)). In this Federal Register citation, Comptroller General Elmer B. Staats stated: “The basic subject of GAO reviews is not what information an agency needs or should collect, but rather whether particular plans or report forms are appropriate for collecting such information.”

⁷⁵ 595 F.2d at 709.

⁷⁶ Interestingly, the FRA dispute involved only the LB, not the CPR, program. It was no accident that while the corporate parties opposed the Comptroller's authorization of both the LB and the CPR programs at the trial level, they dropped their CPR objections on appeal. The corporate parties had been claiming, on one hand, that the Comptroller should have disapproved the CPR program on the basis that the program would duplicate the Census Reports and, on the other hand, that this same Census data was confidential and not available to the FTC. *See* notes 21-67 *supra* and accompanying text. While procedurally there is nothing wrong with alternative pleading in federal courts, FED. R. CIV. P. 8 (e) (2), in the final analysis, the corporations cannot have it both ways. Either the corporations must consent to disclosure of the data to the FTC, or they must concede that the data is *necessarily unavailable* to the FTC, taking the data out of the “unnecessary duplication” scope of the FRA. They obviously chose the latter option.

⁷⁷ In its brief to the Supreme Court, one of the corporate parties phrased the issue thus: Whether under the provisions of the Federal Reports Act, that an “independent regulatory agency shall make the final determination as to the necessity” of obtaining information, and that the Comptroller General “shall determine” the “appropriateness” of a proposed agency questionnaire, the Comptroller General can approve a form if he has not determined it will gather information that is meaningful and reliable for the agency's stated need.

Brief for Petitioner Goodyear Tire & Rubber Co., *supra* note 24, at 2-3 (quoting from 44 U.S.C. § 3512(d) (Supp. V 1975), set out at text accompanying note 84 *infra*).

⁷⁸ 595 F.2d at 709.

agencies. The Director of the Office of Management and Budget⁷⁹ was charged with implementing this coordination, and the OMB was designated as the clearinghouse for agency plans and forms for the acquisition of information.⁸⁰ The court of appeals observed that: "[T]he OMB possessed authority to undertake a substantive appraisal of the data that a regulatory agency sought and to bar collection upon a finding that the data were not necessary for effectuation of the agency's function or particular program's purpose."⁸¹ In 1973, Congress amended the FRA by removing the independent regulatory agencies from the overview of the OMB, and a new section 3512 placed the agencies under the overview of the Comptroller General.⁸² The court of appeals cited persuasive legislative history to support the proposition that one of the purposes of the 1973 amendment was the intent to reserve to the regulatory agencies the final decision as to the substantive necessity of the information sought and to remove from the clearinghouse agent any "veto power" on the basis of necessity.⁸³

Although the language of the new section 3512 is somewhat ambiguous, a detailed examination of the section reveals the same result as was suggested by the legislative history.

Section 3512 reads as follows:

(a) The Comptroller General . . . shall review the collection of information required by independent Federal regulatory agencies . . . to assure that information required by such agencies

⁷⁹ The original 1968 statute, Pub. L. 90-620, 82 Stat. 1302 (1968), refers to the Director of the Bureau of the Budget rather than to the Director of OMB. Later, the Bureau of the Budget was designated as the Office of Management and Budget. *See* Part I of Reorganization Plan No. 2 of 1970, set out at the appendix to 5 U.S.C., Government Organization and Employees (1976) at 824.

⁸⁰ 44 U.S.C. §§ 3503, 3504, 3506, 3509, 3510 (1970 & Supp. V 1975).

⁸¹ 595 F.2d at 710 (citing 44 U.S.C. § 3506 (1970 & Supp. V 1975)).
Section 3506 provides:

Upon the request of a party having a substantial interest, or upon his own motion, the Director of the [Office of Management and Budget] may determine whether or not the collection of information by a Federal agency is necessary for the proper performance of the functions of the agency or for any other proper purpose. Before making a determination, he may give the agency and other interested persons an opportunity to be heard or to submit statements in writing. To the extent, if any, that the Director determines the collection of information by the agency is unnecessary, for any reason, the agency may not engage in the collection of the information.

44 U.S.C. § 3506 (1970 & Supp. V 1975).

⁸² Pub. L. 93-153, 87 Stat. 593 (1973). The removal was implemented by § 409(a), and the new authority was established by § 409(b), which added the new section, 44 U.S.C. § 3512.

⁸³ 595 F.2d at 710. The court stated:

Congress' express purpose in establishing a different review process for the regulatory agencies was "to insure that the existing clearance procedure for questionnaires or requests for data does not become, inadvertently or otherwise, a device for delaying or obstructing the investigations and data collection necessary to carry out the important regulatory functions assigned to the independent agencies by the Congress."

Id. (quoting H.R. REP. NO. 93-624, 93d Cong., 1st Sess. 31 (1973)). "Congress regarded the evaluation of the regulatory agency's need for data as essentially a policy determination and considered the reviewing agency's veto power as a source of interference with the independence of the regulatory agencies." *Id.* (citing Senator Bentsen, author of the enacted amendment, 119 CONG. REC. 24085 (1973); 119 CONG. REC. 23884-85 (1973)).

is obtained with a minimum burden upon business enterprises. . . . Unnecessary duplication of efforts . . . shall be eliminated as rapidly as practicable. Information collected and tabulated by an independent regulatory agency shall, as far as is expedient, be tabulated in a manner to maximize the usefulness of the information to other Federal agencies and the public.

(b) [T]he Comptroller General shall review . . . requests for additional information with a view toward —

(1) avoiding duplication of effort . . . and

(2) minimizing the compliance burden. . . .

(c) [A]n independent regulatory agency shall not conduct . . . the collection of information . . . unless, in advance of any adoption or revision of any plans or forms to be used in the collection —

(1) the agency submitted to the Comptroller General the plans or forms . . . and

(2) the Comptroller has advised that the information is not presently available to the independent agency from another source within the Federal Government and has determined that the proposed plans or forms are consistent with the provision of this section. . . .

(d) While the Comptroller General shall determine the availability from other Federal sources of the information sought and the appropriateness of the forms for the collection of such information, the independent regulatory agency shall make the final determination as to the necessity of the information in carrying out its statutory responsibilities and whether to collect such information.⁸⁴

The FTC interpreted section 3512 to require that the Comptroller's review was to be guided by two standards, section 3512(b) (1) (avoiding duplication of effort) and section 3512(b) (2) (minimizing compliance burden). The corporate parties bypassed these two clearly delineated standards and latched onto the word "appropriateness" buried in a dependent adverbial clause in subsection (d): "[T]he Comptroller General shall determine . . . the appropriateness of the forms for the collection of such information." The corporate parties argued that in order for the Comptroller General to determine "appropriateness" of the forms, he must eliminate from the forms repetitive, irrelevant, and excessively complicated questions. He must eliminate questions which, in pursuit of data on apples, require data on oranges, or which, in seeking data about butchers, require responses from bakers.⁸⁵ In short, they argue, the Comptroller has a duty to make a pervasive substantive inquiry into the meaningfulness and the reliability of the agency's stated need.

In rejecting the corporate parties' argument, the court of appeals summarily adopted the district court's finding that "appropriateness" was a

⁸⁴ 44 U.S.C. § 3512 (Supp. V 1975).

⁸⁵ Brief for Petitioner Goodyear Tire & Rubber Co., *supra* note 24, at 27 n.27.

mere "shorthand reference to the . . . compliance burden."⁸⁶ While this conclusion seems inevitable from a fair reading of the act as a whole, a semantic analysis makes the meaning even less disputable.

A clear pattern emerges from section 3512. That pattern is that each subsection contains one pair of related concepts, comparable to the pair of concepts in each subsequent subsection. Subsection (a) (goals) refers to the assurance of minimum burden and the elimination of unnecessary duplication. Subsection (b) (standards) refers to avoiding duplication of effort and to minimizing the compliance burden. Subsection (c) (2) (duties) refers to advice by the Comptroller General to agencies of "availability" of information from other federal sources and of "consistency" of the proposal "with the provision of this section." Undoubtedly "availability" is the initial shorthand reference to the overall duplication problem. "Consistency" appears to be a shorthand reference to the overall burden problem. The entire theme of the section is burden. What phrase could convey this theme more clearly than "consistent with the provision of this section"? Subsection (d) again utilizes a pair of terms to refer to the same problems. "Availability" is another shorthand reference to the duplication problem, and "appropriateness," like "consistency," is another shorthand reference to the overall burden problem. Again the compelling consideration indicating this meaning is that it would have been grammatically difficult to convey the burden concept other than by use of the word "appropriateness." Having identified this clear and consistent dual-problem pattern, the correctness of the court's interpretation of section 3512(d) becomes evident.

The district court deserves credit for noting that the word "appropriateness" is merely one word in a subsection which, rather than granting substantive authority to the Comptroller, as the corporate parties suggest, accomplishes the opposite by merely qualifying "the reservation of the determination of necessity to the agency."⁸⁷ The corporate parties' interpretation that the dependent clause gives authority to the Comptroller conflicts with the plain meaning of the independent clause reserving the same determination to the agency.⁸⁸

In this aspect of the litigation the corporations did not dispute the authority of the FTC to determine that certain line-of-business data were necessary. They merely argued that the questions on the LB survey were inadequate to give the FTC the meaningful and reliable data that it undoubtedly sought. The corporations argued that requiring them to submit meaningless and unreliable information was the kind of "burden" that the Comptroller had the authority and the duty to prohibit.⁸⁹

⁸⁶ 595 F.2d at 710 (citing the district court opinion, 432 F. Supp. at 307-10).

⁸⁷ 432 F. Supp. at 308; *see* 44 U.S.C. § 3512(d) (1970 & Supp. V. 1975), set out at text accompanying note 84 *supra*.

⁸⁸ As the court of appeals put it:

Appellants' construction of "appropriateness" as a requirement that the Comptroller evaluate the data sought in terms of the agency's need is untenable in light of this provision reserving for the agency the determination as to the necessity of the information in carrying out its statutory responsibilities. Statutes must be construed when possible to avoid disharmony among their provisions.

595 F.2d at 710 & n.156.

⁸⁹ Brief for Petitioner Goodyear Tire & Rubber Co., *supra* note 24, at 28.

This argument is based on the untenable premise that the requested data were in fact meaningless and unreliable. The aforementioned reservation in the Comptroller's letter of approval indicated that he had in fact made some inquiry into meaningfulness.⁹⁰ Apparently, his conclusion was that, while he might impose a higher standard of "appropriateness" at some later date, the FTC had done what it could during the formative stages of the LB program to make the questions as meaningful and reliable as possible. This reservation indicates that rather than failing to exercise his mandated discretion, as the corporations alleged, the Comptroller did exercise it, albeit tentatively, in favor of the FTC.

In terms of the implementation of the FRA, it should be noted that the Comptroller's approval is not technically mandatory. Having submitted the proposed survey to the Comptroller for approval, and having received no response within forty-five days, the individual regulatory agency may immediately proceed to obtain its information.⁹¹ Unlike the OMB which, in the case of non-regulatory agencies, may totally prohibit a plan for collection of information,⁹² the Comptroller has no such prohibition authority. His function is advisory.⁹³ It follows that the substantive determination of necessity remains vested in the agency.

Another related practical consideration was identified by the Delaware district court in *A.O. Smith Corp. v. FTC*.⁹⁴ As this case was an early contribution to the collection of LB/CPR litigation, the facts as well as the issues are substantially identical to the primary case. In concluding that the Comptroller's review embraced only a limited examination of burdensomeness and duplication, the court observed: "Indeed, the period of time in which the GAO must consider a proposal and report back — 45 days — would nearly obviate any extended evaluation of a proposed reporting program."⁹⁵

In the limited time available, and with the limited information available regarding the reliability of data not previously aggregated or analyzed, the Comptroller in giving a reserved approval preserved his opportunity to further minimize burden at a later date when such minimization would be appropriate. While the statute does not expressly provide for a temporary,

⁹⁰ See note 72 *supra* and accompanying text.

⁹¹ 44 U.S.C. § 3512(d) (Supp. V 1975): "If no advice is received from the Comptroller General within forty-five days, the independent regulatory agency may immediately proceed to obtain such information."

⁹² FRA § 3506: "To the extent, if any, that the Director determines the collection of information by the agency is unnecessary, for any reason, the agency may not engage in the collection of the information." 44 U.S.C. § 3506 (1970 & Supp. V 1975). See also FRA § 3509:

A Federal agency may not conduct or sponsor the collection of information . . . unless, in advance of adoption or revision of any plans or forms to be used in the collection, (1) the agency has submitted to the Director the plans or forms, . . . and (2) the Director has stated that he does not disapprove the proposed collection of information.

Id. § 3509.

⁹³ Whether, as the district court queried, "advice" was intended either in the sense of communication and notice or in the sense of a recommendation and opinion has no substantial effect on the non-mandatory nature of the Comptroller's review authority. See 432 F. Supp. at 307-08.

⁹⁴ 396 F. Supp. 1125 (D. Del. 1975), *aff'd in part and vacated in part on other grounds*, 530 F.2d 515 (3d Cir. 1976).

⁹⁵ 396 F. Supp. at 1132.

reserved approval by the Comptroller, the spirit of the law is preserved, rather than compromised, by the Comptroller's recognition that what is minimally burdensome presently might not be so at a later date.

These practical considerations supplement the language and legislative history and compel the conclusion that the Comptroller has no duty under the FRA to conduct a plenary inquiry into the usefulness and reliability of requested information to the agency's stated need, nor to withhold his approval pending such determination. The notion that such a duty to inquire should be levied upon the agency itself will be examined in a subsequent section.⁹⁶

C. Burden Analysis

Among the most significant of competing interests illuminated by the LB/CPR litigation is the inevitable conflict between the federal regulatory agency's need to acquire information in order to perform effectively its statutory function⁹⁷ and the corporation's need to be able to function in a competitive, free-market system unhampered by the various burdens inherent in any government intervention. The potential burdens on the corporation are numerous and awesome.⁹⁸ One example is the burden of the expense of manpower and other resources utilized in gathering, preparing, and submitting information to government agencies.⁹⁹ An important element of this expense is the cost of special accounting and legal services needed to properly verify, certify, and possibly defend the reports submitted as meeting the particular reporting standard imposed by the respective agency.¹⁰⁰ There is also a fear on the part of corporate respondents that trade secrets might find their way into the hands of competitors, notwithstanding statutory provisions to prevent such disclosure.¹⁰¹ In addition, there is a concern that other

⁹⁶ See notes 133-63 *infra* and accompanying text.

⁹⁷ For the FTC's information-gathering authority, see FTCA § 6(a)-(b), 15 U.S.C. §§ 46(a)-46(b) (1976), set out at note 1 *supra*.

⁹⁸ For example, as FTC Commissioner Elizabeth H. Dole has noted, the 60,000-plus pages of regulations set forth in the Code of Federal Regulations result in a cost to regulatees of \$45 billion a year. Dole, *Cost-Benefit Analysis Versus Protecting the Vulnerable: The FTC's Special Interest Groups*, 9 ANTITRUST L. & ECON. REV. (No. 2) 15, 17 (1977). The Commission on Federal Paperwork sets the cost of federal paperwork to private industry at a more conservative yet still formidable figure of \$25 to 32 billion a year. Commission on Federal Paperwork, Final Summary Report 5 (Oct. 3, 1977).

⁹⁹ See discussion of cost of compliance estimates at notes 108-20 *infra* and accompanying text. See also discussion of the unquantifiable psychological burden resulting from federal information requirements, Commission on Federal Paperwork, Information Value/Burden Assessment 4-6 (Sept. 9, 1977).

¹⁰⁰ For example, reports to the Securities and Exchange Commission must meet the standard known as "generally accepted accounting principles (GAAP)." On the other hand, Census Bureau reporting discourages stringent accounting formalities and encourages "estimates and approximations." See note 61 *supra*. The FTC reporting standard was somewhere in between. The district court found that the GAAP standard was too high. "[D]ata of such quality were not required by the Commission and . . . were more expensive to compile than data not meeting such high standards. . . . [T]he LB instructions in no way refer to GAAP." LB/CPR Litigation, 1977-2 Trade Cas. at 72,151 (D.D.C. 1977). The court of appeals found that the Census Bureau standard was too low. "[T]he unreviewed answers to the census inquiry are not sufficiently reliable for the certification of truthfulness required of their answers to the Federal Trade Commission." 595 F.2d at 700-01.

¹⁰¹ See, e.g., FTCA § 6(f), 15 U.S.C. § 46(f) (1976), set out at text accompanying note 122 *infra*. See also APA § 2(b) (4), 5 U.S.C. § 552(b) (4) (1976): "[The Freedom of Information Act] does not

confidential information, which is not suitable for purposes other than the purpose for which it was submitted, will be misused by the agency to the injury of the corporation, despite statutory provisions to prevent such misuse.¹⁰² Just as there is the possibility that information will inappropriately be shared among government agencies,¹⁰³ there is also a possibility that information that could and should be shared among agencies will not be, resulting in the additional burden to the corporation of having to report in an uncoordinated and disintegrated manner information which could have been compiled in a coordinated fashion at a fraction of the cost and effort.¹⁰⁴

Furthermore, as within the agency itself, it goes without saying that the respective agency can simultaneously conduct legislative, administrative, and judicial "functions." While there are stringent procedural safeguards regarding the acquisition of information in the "legislative" and "judicial" forums, there may be no realistic way to assure the corporation that information already acquired by the agency via its information-gathering authority will not be filtered into concurrent, otherwise segregated, "legislative" and "judicial" proceedings, to the prejudice of the corporation.¹⁰⁵ Even more important is the burdensome possibility that corporations will be required to provide information to the agency for nothing more than a capricious purpose,¹⁰⁶ or, assuming a valid purpose, to provide information that is not meaningful or useful to the stated purpose.¹⁰⁷

The salient questions are: a) upon whose shoulders the responsibility for assessing and minimizing these burdens should rest, and b) by what means these burden assessments can be realistically and effectively implemented.

1. Cost of Compliance

While it is indisputable that there are corporate costs attached to the submission of the LB and CPR forms to the FTC, the amounts of such costs are subject to significant dispute. The dollar value of such costs were so

apply to matters that are . . . trade secrets and commercial or financial information obtained from a person and privileged or confidential."

¹⁰² See, e.g., Census Bureau confidentiality provisions, 13 U.S.C. §§ 8-9 (1976), set out at note 131 *infra* and notes 22-23 *supra*. See also *St. Regis Paper Co. v. United States*, 368 U.S. 208, 215-16 (1961), where neither a Presidential proclamation nor a legend on the Census Bureau forms was sufficient to prevent disclosure of the disputed information.

¹⁰³ For example, the efforts of the FTC to acquire confidential Census Bureau information. See notes 28-38 *supra* and accompanying text.

¹⁰⁴ See discussion on Federal Reports Act at notes 68-96 *supra* and accompanying text.

¹⁰⁵ This very issue was the topic of the LB/CPR litigation reported in *FTC v. Atlantic Richfield Co.*, 567 F.2d 96 (D.C. Cir. 1977). Therein, the dispute was remanded to the FTC so that it "could provide an interpretation of its procedural rule pertaining to the transfer of documents obtained by the FTC investigative staff for use in an adjudicative proceeding." *Id.* at 96. See also 595 F.2d at 707, where certain appellants who were also respondents in separate FTC adjudicative proceedings argued that the LB and CPR orders ought not be enforced as to them because the FTC "complaint counsel might obtain the LB and CPR data for use in the adjudications without complying with the Commission's discovery procedures, thereby violating appellants' rights under the due process clause, the Administrative Procedure Act and the Commission's own rules of practice." The court dismissed these arguments as premature.

¹⁰⁶ APA § 10(e) (2) (A), 5 U.S.C. § 706 (2) (A) (1976): "[The court reviewing agency action shall] hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

¹⁰⁷ See discussion on relevance at notes 133-63 *infra* and accompanying text.

uncertain at the time of the principal LB/CPR district court opinion that the district court deferred decision on that issue until additional affidavits could be submitted in order to provide the factual foundation for a supplemental decision.¹⁰⁸

The additional affidavits indicated that for large, diversified corporations submitting reports containing accurate, high quality data, the estimated cost of compliance was easily in the six-figure bracket.¹⁰⁹ While the district court discounted the estimates as inflated on the basis that the corporations had failed to reduce their costs by taking advantage of legally permissible estimates and lower accounting standards, the presumably conservative estimates of the GAO did not preclude the possibility of a six-figure cost.¹¹⁰ The GAO average estimate (\$24,000) and expected estimates (\$10,000 to \$75,000) coincided with numerous other corporate estimates (\$10,000 to \$100,000) to suggest, almost indisputably, that the cost of compliance would run into the tens of thousands of dollars for each corporation.¹¹¹

The district court pointed out that the absolute value of the estimated cost of compliance is irrelevant unless the corporation "has demonstrated that the cost of compliance threatens to unduly or seriously hinder normal operations of its business."¹¹² To satisfy itself as to the absence of business disruption, the court examined the estimated costs of compliance relative to the corporations' gross revenues. Upon calculating the estimated costs to a few corporations to be approximately one hundredth of one percent of gross sales, the court concluded that the costs of these programs were *de minimus* and, therefore, not unduly burdensome.¹¹³

Without suggesting here that the corporations in fact made a conclusive showing of undue burden, the manner in which the agency and the courts calculated cost estimates should be scrutinized.

The dispute regarding the confidentiality of Census Bureau data has already been explored.¹¹⁴ One contention raised by the corporations, but

¹⁰⁸ Notwithstanding the judiciousness of basing a decision on a solid factual foundation, Judge Flannery exposed his "prejudicial" attitude in the earlier district court decision. As to the LB program he stated: "Since the LB orders are directed at many of the largest companies in this country . . . the corporate parties *face an uphill battle* showing that compliance 'threatens to unduly disrupt or seriously hinder normal operations of a business.'" As to the CPR program he stated: "While the court again *considers it unlikely*, on the basis of evidence presently in the record, that the corporate parties will be able to make a sufficient showing of undue burden, it will permit them the opportunity to do so. . . ." 432 F. Supp. at 315-16 (emphasis added). Not surprisingly, the corporate parties were thoroughly unsuccessful in persuading the court on these issues.

¹⁰⁹ LB/CPR Litigation, 1977-2 Trade Cas. 72,141, 72,149. For a detailed cost analysis, see generally *id.* at 72,147-53.

¹¹⁰ *Id.* at 72,152.

¹¹¹ *Id.*

¹¹² *Id.* at 72,151. See also 432 F. Supp. at 315 (quoting *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (*en banc*) as the source of this "disruption" test).

¹¹³ Specifically, the court stated:

[E]ven for the companies presenting some of the most extravagant cost estimates the amount involved is relatively small. For example, DuPont's upper estimate of \$700,000 amounts to 0.0084% of its 1976 sales of \$8,361,000,000, while Grace's estimate of \$630,000 amounts to 0.017% of its 1976 sales of \$3,615,153,000, and Goodyear's estimate of \$150,000 amounts to 0.0028% of its 1974 sales of \$5,300,000,000.

1977-2 Trade Cas. at 72,151-52 (citations omitted).

¹¹⁴ See notes 21-67 *supra* and accompanying text.

unanswered by the courts, is that "FTC estimates of cost of compliance are based on the use of Census Bureau data."¹¹⁵ Presumably the implications of this contention were rendered moot by the court's determination that the information, as requested, was not confidential.¹¹⁶ Nevertheless, where the corporation has a claim of right to the confidentiality of certain information, the inquiring agency has no right to assume that the corporation will voluntarily waive its confidentiality privilege. It follows that the agency has no justifiable reason to calculate a lower cost of compliance based on the assumption that the corporation will voluntarily release otherwise confidential information. It is only appropriate for the agency to calculate cost estimates based on the assumption that the corporation will take advantage of every right and privilege to which it is legally entitled.

Moreover, it is sensible for the court to examine the extent of disruption caused by a particular program on a corporation's on-going operations. What is lacking, however, is an examination of the disruption to corporate operations which results from the aggregate federal reporting requirements. While the few thousands of dollars required to complete the LB and CPR programs might not, in and of themselves, significantly impair the functioning of the corporation, these programs might be the back-breaking straw when added to the multitude of other corporate reporting programs.¹¹⁷ With an awareness of the sizeable bite which taxes and other government-induced burdens take out of corporate revenues, it is meaningless, if not ludicrous, to compare this additional cost alone to gross sales.

The result is that, as noted by the Commission on Federal Paperwork: "[T]he cost is ultimately imposed on the consumer through higher prices and higher taxes."¹¹⁸ Ironically, the increase of costs of consumer goods results in increased corporate revenues, which in turn are used by agencies and courts to rationalize the proportionate government-imposed cost burden.

Of course, courts are in no position to make any aggregate cost-burden analysis. The court has no jurisdiction to inquire into programs unrelated to the dispute before it.¹¹⁹ Conversely, there seems to be no forum where the corporation has standing to raise such an issue. Ideally there should be some administrative process by which government programs could be examined

¹¹⁵ 432 F. Supp. at 316.

¹¹⁶ 595 F.2d at 698.

¹¹⁷ See the conclusion of the Commission on Federal Paperwork:

The total paperwork burden is important because even one series of justifiable requests for information can result in an excessive economic and psychological burden. This can occur when multiple Federal agencies and layers of government each impose reporting requirements on the same respondent. In such cases, the individual burdens of Federal forms from a particular agency need to be considered in the context of the greater cumulative burden and the ability of the respondent to meet those reporting requirements.

Commission on Federal Paperwork, Information Value/Burden Assessment 6 (Sept. 9, 1977).

¹¹⁸ Commission on Federal Paperwork, Final Summary Report 1 (Oct. 3, 1977).

¹¹⁹ See the notable constitutional law case, *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947): "As is well known, the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of Constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions' are requisite." *Id.* at 89 (Reed, J.) (citing, *inter alia*, *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 423 (1940); *Electric Bond & Share Co. v. SEC*, 303 U.S. 419, 443 (1938)).

for their comparative merit, so that the overall burden could be diminished by the elimination of relatively unbeneficial agency impositions. The concept of systematic value-cost assessment will be examined in a subsequent section.¹²⁰

2. Trade Secrets

Some of the corporate parties asserted that the CPR program was invalid because one of the FTC's purposes for the program was an intent to publish such data. The corporations argued that such information as "costs, sales, assets, value of shipments, and inter-corporate relationships" constituted trade secrets within the meaning of the Federal Trade Commission Act section 6(f).¹²¹ Section 6(f) provides:

The Commission shall . . . have the power to make public from time to time such portions of the information obtained by it hereunder, except *trade secrets* and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.¹²²

The district court concluded that while section 6(f) prevents the FTC from publishing trade secrets, there is no proscription against the FTC collecting trade secrets for its own purposes.¹²³ Such a conclusion is sensible in light of the purposes of the trade secrets protection. While the protection is designed to keep from competitors the fruits of the honest labor of the disclosing corporation, the protection should not be so broad as to keep from regulatory agencies evidence of the unlawful acts of the corporation.

The district court failed to make its own determination as to whether the requested information constituted trade secrets. Instead the court required the submission of the information to the FTC, leaving to that agency this threshold determination.¹²⁴ For additional procedural protection to the corporate parties, however, the court enjoined the FTC from publishing any individual corporation's data without ten days notice to the respective corporation.¹²⁵

It is laudable that this extra measure of procedural safeguard was afforded the corporations. Normatively speaking, where the government has the right to collect information, that information should be submitted unconditionally. Realistically speaking, however, if the government is careless in its handling of sensitive information, responses to subsequent requests for information are tainted by diminution of "integrity, completeness and timeliness."¹²⁶ Thus,

¹²⁰ See notes 133-63 *infra* and accompanying text.

¹²¹ 432 F. Supp. at 311.

¹²² 15 U.S.C. § 46(f) (1976) (emphasis added). See also APA § 2(b) (4), 5 U.S.C. § 552 (b) (4) (1976), set out at note 101 *supra*.

¹²³ 432 F. Supp. at 311.

¹²⁴ *Id.* at 312 (citing *FTC v. Texaco, Inc.*, 555 F.2d 862, 873-74 (D.C. Cir. 1977) (*en banc*)).

¹²⁵ 432 F. Supp. at 312.

¹²⁶ Affidavit of Manuel D. Plotkin, Director of the Bureau of the Census, *supra* note 24, Addendum B at 3b.

both the corporations and the government stand to gain from a conservative protection of purported trade secrets.

Unfortunately, this protection is not always steadfast. On occasion, agency personnel are guilty of indiscreet disclosure of trade secrets.¹²⁷ Congress, with its vast power to procure information from an administrative agency,¹²⁸ is uniquely capable of leaking confidential agency information to the public, with little or no redress available to the injured party.¹²⁹ With the passage of the Freedom of Information Act, agencies were probed by ambitious competitors eager to acquire corporate trade secrets for their own purposes.¹³⁰

Perhaps there is no practical way for any entity the size of modern administrative agencies to prevent occasional inadvertent disclosure of trade secrets. However, the agencies can, and should, be liberal in the granting of notice and hearing on trade secret status to corporations prior to the publication of submitted data. The agencies should be conservative in their decisions to publish disputed data in a manner other than aggregate form which would conceal individual respondent identity.¹³¹ By the granting of information freely to the agency, which by virtue of its statutory authority and expertise is in the best position to effectively use the information for the public good, and by the imposing of stringent safeguards on subsequent publication of individual data, there is an automatic separation of the "wheat" of

¹²⁷ See section on "The Commission's Incapacity to Assure Confidentiality" in E. ROCKEFELLER, *DESK BOOK OF FTC PRACTICE AND PROCEDURE* 61 (2d ed. 1976).

¹²⁸ See generally Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153 (1926).

¹²⁹ Note, *Congressional Treatment of Confidential Business Information: Proposals to Avert Unwarranted Disclosure*, 52 IND. L.J. 769 (1977). This note analyzes *Ashland Oil, Inc. v. FTC*, 409 F. Supp. 297 (D.D.C.), *aff'd*, 548 F.2d 977 (D.C. Cir. 1976), where a corporation unsuccessfully attempted to prevent release of agency information to Congressman John E. Moss, notorious for his leaking of confidential information to the public.

¹³⁰ See, e.g., *Burroughs Corp. v. Schlesinger*, 403 F. Supp. 633 (E.D. Va. 1975).

¹³¹ Such a situation could be realized statutorily in much the same way as provided for in the Census Act:

[T]he Secretary may furnish copies of tabulations and other statistical materials which do not disclose the information reported by, or on behalf of, any particular respondent . . .

In no case shall information furnished under this section be used to the detriment of any respondent or other person to whom such information relates, except in the prosecution of alleged violations of this title.

13 U.S.C. § 8 (1976).

An interesting sideline to the LB/CPR litigation is that several high corporate officials met with James McIntyre, Director of the OMB, requesting that the President use his authority under the government reorganization law to remove the LB program from the auspices of the FTC and transfer it to the Census Bureau. The purported rationale is to take advantage of the Census Bureau's more effective privacy guarantees. While the Census Bureau favors such a transfer, the FTC argued against it, suggesting that the type of information gathered by the Census would not be useful to the FTC's needs. *Wall Street Journal*, July 10, 1978, at 3, col. 1; *Automotive News*, July 24, 1978, at 24, col. 4. While it is not implied here that the corporations entertained any motivation to frustrate the FTC in the utilization of this data in antitrust enforcement, it does seem less than logical for one agency to collect for a second agency data which the second agency has a need and a right to collect for itself.

Assuming proper corporate motives, it would seem that their objections would be easily resolved by the simple Congressional fortification of FTC privacy requirements suggested above. This solution is to be encouraged, and would be much less complicated and difficult than any extensive interagency transfer of the program.

corporations with valid trade-secrets claims from the "chaff" of corporations whose real intent is to delay and obstruct disclosure to the agency.¹³²

3. Relevance and Burden

The fourth amendment to the Constitution prohibits "unreasonable searches and seizures."¹³³ This proscription applies to unreasonable impositions by government agencies. However, the concept of "unreasonableness" has varied over time.

In the early years of the FTC's existence, Justice Holmes warned against administrative "fishing expeditions" conducted on no other basis than "the possibility that they may disclose evidence of a crime."¹³⁴ In his analysis regarding a broad FTC subpoena served upon a corporation prior to the issuance of a formal complaint, Justice Holmes went on to examine considerations of both burden and relevance:

The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the Commission's wholesale demand would cause are the least considerations. It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant. . . . Some evidence of the materiality of the papers demanded must be produced.¹³⁵

Over the years, however, subsequent Supreme Court decisions have eroded the duty of the agency to justify the burden it imposes upon corporations.¹³⁶ In one of these decisions, *Oklahoma Press Publishing Co. v. Walling*,¹³⁷ Justice Rutledge determined that corporations are not entitled to the same constitutional guarantees as natural persons and that, as to corporate reporting requirements, the fourth amendment search and seizure protections applied only to the extent that the information requested had to be

¹³² Ironically, the FTC has been criticized for overprotecting corporations by withholding information from the public. In a critical evaluation of the FTC, a group of students under the auspices of consumer advocate Ralph Nader suggested, rather dogmatically, that the FTC should abandon its so-called considerate, cooperative stance with the corporations and make full coercive use of the enforcement authority at its disposal. E. COX, R. FELLMETH, & J. SCHULZ, "THE NADER REPORT" ON THE FEDERAL TRADE COMMISSION 111, 166 (1969). "[T]he FTC fails to perceive and take advantage of the enforcement potential of its most extensive authority—the power to require disclosure of information and publish it in the public interest." *Id.*

¹³³ The fourth amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. See also APA § 10(e) (2) (A), 5 U.S.C. 706(2) (A) (1976), set out at note 106 *supra*.

¹³⁴ *FTC v. American Tobacco Co.*, 264 U.S. 298, 306 (1924).

¹³⁵ *Id.*

¹³⁶ See, e.g., *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946); *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501 (1943). *Caveat*, some courts may find subtle distinctions between a fact situation involving actual search and seizure and a fact situation involving merely a corporate report order. For a detailed analysis of the procedural significance of this distinction, particularly as it applied to the LB/CPR litigation, see Jacobs, Collin, *Summary Enforcement of FTC Orders Under the Federal Rules of Civil Procedure*, 30 *Am. L. Rev.* 331 (1978).

¹³⁷ 327 U.S. 186 (1946).

“particularly described.” In expounding this restrictive interpretation, he outlined the test by which to determine “reasonableness”:

[T]he fair distillation [of prior cases], in so far as they apply merely to the production of corporate records and papers in response to a subpoena or order authorized by law and safeguarded by judicial sanction, seems to be that . . . the Fourth [Amendment], if applicable, at most guards against abuse only by way of too much *indefiniteness or breadth* in the things required to be “particularly described,” if also the inquiry is one the demanding agency is *authorized by law* to make and the materials specified are *relevant*.¹³⁸

Here, clearly, Justice Rutledge identified a three-pronged test: a) definiteness; b) legal authorization; and c) relevance. He went on to underscore the subjective nature of each application of this test, particularly the relevancy determination:

The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable. . . . Necessarily, as has been said, this cannot be reduced to formula; for relevancy and adequacy or excess in the breadth of the subpoena are matters variable in relation to the nature, purposes and scope of the inquiry.¹³⁹

In the LB/CPR litigation, there was little dispute over the legal authorization or definiteness aspects of the reporting requirements.¹⁴⁰ The hotly disputed issue was relevance. The corporate parties identified several areas where the nature of the requested LB data failed to coincide with the stated agency need:

Identifying the Commission’s purpose in the LB program as the development of “good market performance data” for antitrust and resource allocation purposes, the corporate parties suggest that the LB data is entirely unsuited for these purposes because of four deficiencies: (1) individual company LB data and published LB data aggregates would be noncomparable; (2) the LB aggregates to be published would not bear any reasonable relationship to economic data; (3) the LB aggregates to be published would not bear any reasonable relationship to market data; and (4) the LB aggregates to be published would be unreliable because of contamination caused by arbitrary and improper assignment to LB categories on a primary activity basis.¹⁴¹

¹³⁸ *Id.* at 208 (emphasis added). Another significant holding of this case was that corporations are not entitled to the fifth amendment self-incrimination rights of natural persons. *Id.*

¹³⁹ *Id.* at 208-09 (citing, *inter alia*, *FTC v. American Tobacco Co.*, 264 U.S. 298 (1924)).

¹⁴⁰ As the court of appeals noted:

During oral argument, counsel for appellants stated that the corporations were not *faulting with the power* of the Commission to conduct the Line of Business and Corporate Patterns Report surveys, but rather challenging only the alleged *procedural unfairness* of the way in which the Commission has exercised its authority.

595 F.2d at 694 n.39 (emphasis added).

¹⁴¹ 432 F. Supp. at 314-15.

There were similar allegations that the CPR data would be unsuitable "for any purpose other than publishing aggregates."¹⁴²

As evidence of the unresolved issues pertaining to the relevance of the requested data to the stated need, the corporate parties pointed to reservations made by the Comptroller in his approval of the 1974 LB form. These reservations were summarized by the district court as follows: "The GAO clearance letter noted, *inter alia*, that the FTC had made 'constructive efforts' to minimize burden, and that 'a rather long test period of data collection and analysis will be required to fully reconcile FTC's data needs with minimum burden.'"¹⁴³ How could it be said that the relevance test had been met when such further testing and reconciliation remained to be made?

The corporate parties offered an interesting interpretation of the strictures of cases such as *Oklahoma Press*. They suggested that the factors of burden and relevance were interrelated and should have been examined in tandem with each other.¹⁴⁴ The corporations contended that since relevancy issues remained in dispute, and cost-of-compliance issues remained in dispute, the FTC had failed to perform its procedural duty. They stated:

Resolution of the issues requires, among other things, a careful evaluation of how relevant the information demanded is to the purposes articulated by the agency in support of its incursion into private business records compared with the burden that the incursion places on the business proprietors. No such balancing took place with respect to the line of business program, despite the open acknowledgement by the lower courts that (a) the burden of compliance would run into hundreds of thousands of dollars annually for some respondents, and (b) the information that would be produced may or may not be useful in effectuating the kind of educational regulatory endeavor which the line of business program represents.¹⁴⁵

The courts refused to consider the interrelationships between burden and relevance.¹⁴⁶ Instead, they purported to weigh these two considerations separately. Whether any weighing took place at all is subject to question. The deficiencies in the burden analysis have already been noted.¹⁴⁷ The courts' so-called relevancy analyses were typically passive and deferential to the FTC. In its brief to the Supreme Court, one of the parties noted:

The most the District Court was able to conclude was that the

¹⁴² *Id.* at 315.

¹⁴³ *Id.* at 311.

¹⁴⁴ The corporations stated: "Both experience and precedent support the view that however the ultimate test may be framed, whether as 'reasonable relevance' or as 'undue burden,' a balancing of costs against benefits lies at the heart of the judiciary's role in protecting businessmen and others against overly broad intrusions by Government." Reply Brief for Petitioners, *supra* note 39, at 7 (citing, *inter alia*, *United States v. Morton Salt Co.*, 338 U.S. 632 (1950); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946); and *FTC v. American Tobacco Co.*, 264 U.S. 298 (1924)). While this conclusion is plausible, it is far from indisputable.

¹⁴⁵ Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, No. 78-167, Brief for Petitioners (*American Air Filter Co., Inc., et al.*) [hereinafter cited as Brief for Petitioners] at 28 (citations omitted).

¹⁴⁶ 432 F. Supp. at 314; 595 F.2d at 704.

¹⁴⁷ See notes 108-32, *supra*, and accompanying text.

information to be produced would not be "totally useless." It was only on the basis of applying this far too lenient standard that the District Court determined not to take and hear evidence on the issue of relevance and to grant summary judgment for the Commission.¹⁴⁸

To say that the court of appeals applied a standard of "reasonable relevance" is an overstatement. In the words of the court itself: "We defer to the Commission's expertise in concluding that this information is necessary and useful to performance of its regulatory responsibilities."¹⁴⁹

Scrutiny of relevancy and burdensomeness and the lack thereof should not be taken so lightly.¹⁵⁰ The unrestrained growth of government-imposed burdens has reached critical proportions. The reality of this problem has been substantiated by the creation in 1974 of the Commission on Federal Paperwork, whereby Congress affirmed its policy to minimize the "unprecedented paperwork burden upon private citizens, recipients of Federal assistance, businesses, governmental contractors, and State and local governments," which is created by federal information reporting requirements.¹⁵¹

Among its reports, the Federal Paperwork Commission emphasized the burdensomeness of data-collection programs such as the LB and CPR:

As a general rule, that information which supports the direct operation of the program is the most valuable, that is, it is directly related to achieving the program goal of citizen well-being. Information for planning, auditing, research and evaluation has lesser value, since it supports the program, and does not in itself lead to an improvement in the general welfare. . . .

When information resources are heavily weighted in favor of those activities that do not produce direct value for a program, it is an indication of unnecessary burdens.¹⁵²

The LB and CPR programs are highly susceptible to this type of criticism since they merely create data banks for general, embryonic purposes.¹⁵³ The burden and relevancy tests should have been applied by the courts with much less passivity and deference.

In pursuit of their contention that there should be substantive inquiry into relevance as it relates to burden, the corporate parties also argued that there

¹⁴⁸ Brief for Petitioners, *supra* note 145, at 28 n.34 (citations omitted).

¹⁴⁹ 595 F.2d at 703 n.103. The court curtly noted: "[A]ppellants have failed to persuade us that the District [sic] Court erred in its refusal to disregard the long and consistent line of authority supporting independent consideration of relevance and burdensomeness." *Id.* at 704.

¹⁵⁰ *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 217 n.57: "The issues of authority to conduct the investigation, relevancy of the materials sought, and breadth of the demand are neither minor nor ministerial matters."

¹⁵¹ Pub. L. 93-556, 88 Stat. 1789 (1974), §§ 1(a)-1(b).

¹⁵² Commission on Federal Paperwork, *Information Value/Burden Assessment* 33 (Sept. 9, 1977).

¹⁵³ 432 F. Supp. at 299: "[T]he LB and CPR programs are not focused investigations. . . . [T]he FTC admits that the LB and CPR programs are broad-based and not aimed simply at suspected violators. . . . [T]hese statistical reporting programs are more in the nature of a fishing expedition."

ought to be conducted prior to the imposition of the report programs, a cost-benefit analysis as a measure of reasonableness.¹⁵⁴ Cost-benefit analysis is a method of evaluating service activity in terms of measurable results. It attempts to determine whether the expense of providing a service is more or less than the value of the benefits derived from the service.

Cost-benefit analysis has been utilized in a limited fashion in some FTC activities.¹⁵⁵ Such utilization has not been without opposition. FTC Commissioner Elizabeth H. Dole, in an address before the American Council on Consumer Interests, expressed her own reservations to cost-benefit analysis. She stated: "[T]here is a very real danger that preoccupation with dollar cost-benefit analysis, with its aura of quantitative precision and economic specificity, can lead to the neglect of other goals and objectives that are at times as critical to the FTC's mission as dollar economic benefits."¹⁵⁶ She went on to outline several ends which she believes are not sufficiently quantifiable to be subject to measurement by cost-benefit analysis, such as health and safety improvements, correction of quantitatively insignificant yet flagrant violations of FTC regulations, and consumer information. Commissioner Dole's critics suggest that the FTC's mission is little more than altering the overall imbalance of power between producers and consumers—by taking from the rich and giving to the poor. "A good FTC case is . . . nothing more nor less than a case that saves the poor a lot of dollars. A bad FTC case, by the same token, is simply one that saves them a smaller number of dollars."¹⁵⁷ If this latter view be accepted, then the results of FTC activities are easily quantified and subject to cost-benefit analysis. In reality, however, this view is an oversimplification. The FTC's function is more than merely "taxing" producers and "transferring" dollars to consumers. Its purpose is not to inject "equality" into the free-market system, but "fairness."¹⁵⁸

Generally, cost-benefit analysis is viewed in terms of cost to the taxpayers, i.e., cost to the government. In the LB/CPR litigation, the corporate parties put an interesting twist on cost-benefit analysis. They began with the premise that an agency activity which has no "benefit" is arbitrary and capricious, and thereby prohibited by the Administrative Procedure Act and the fourth amendment.¹⁵⁹ They then suggested that whenever the cost of compliance to the corporation, as opposed to the agency, exceeds the benefits derived from compliance, this activity as well is unreasonable.¹⁶⁰ Both the district court and the court of appeals rejected this argument.¹⁶¹

¹⁵⁴ 595 F.2d at 710-11 n.159.

¹⁵⁵ Dole, *Cost-Benefit Analysis Versus Protecting the Vulnerable: The FTC's Special Interest Groups*, 9 ANTITRUST L. & ECON. REV. (No. 2) 15, 20 (1977).

¹⁵⁶ *Id.* at 21.

¹⁵⁷ *Id.* at 16. Neither Commissioner Dole nor her critics went beyond their premises to demonstrate how these activities in fact were or were not quantifiable.

¹⁵⁸ FTCA § 5(a) (2), 15 U.S.C. § 45(a) (2) (1976): "The Commission is empowered and directed to prevent persons, partnerships, or corporations . . . from using *unfair* methods of competition in or affecting commerce and *unfair or deceptive* acts or practices in or affecting commerce." (Emphasis added.)

¹⁵⁹ APA § 10(e) (2) (A), 5 U.S.C. § 706 (2) (A) (1976), set out at note 106 *supra*; U.S. CONST. amend. IV, set out at note 133 *supra*.

¹⁶⁰ See note 144 *supra*.

¹⁶¹ 432 F. Supp. at 309; 595 F.2d at 703-04.

Despite the absence of any express statutory provision obligating the FTC or any other agency to utilize cost-benefit analysis to determine whether the costs to it or to the regulatee justify the benefits, the policy question remains as to whether there *should* be such a provision. Should there be a presumption that the agency activity is arbitrary or capricious or unreasonable until the agency has demonstrated, for example with the use of an "Economic Impact Study," that the ends justify the means?

The Commission on Federal Paperwork suggested that mandatory cost-benefit analysis imposed upon agencies would be impractical:

[T]he Commission found that the traditional benefit/cost approach to reducing the paperwork burden "while insuring lawful needs for information" is of limited utility. Information value is largely subjective and tends to be political in character; burdens on the other hand are more quantifiable and tend to be objectively measurable and assessed. Values and burdens cannot be put together in a simple equation that can be "solved" on a computer.¹⁶²

Although the agency might not be able to apply "traditional" cost-benefit analysis, it can take steps to maximize value and minimize burden separately.¹⁶³ In its value assessment, the agency should clearly make three separate determinations: a) what is the relative value of the primary goal, as established by Congress (*e.g.*, maintenance of fair trade); b) what is the value of the secondary goal in terms of accomplishing the primary goal (*e.g.*, establishing a data bank on market structure); and c) what is the value of the actual information requested in terms of accomplishing the secondary goal (*i.e.*, are the requested data meaningful and reliable?). While the court should not substitute its own judgment for that of the agency, it should remain cautious until the agency is able to demonstrate deliberate consideration of the above questions. Instead, it appears that the cursory relevance examination applied in the LB/CPR litigation was so deferential to the FTC that the corporations received no meaningful assurances.

IV. CONCLUSION

The following facts are undeniable. The constitutional separation of powers requires an element of deference between the branches of the federal government.¹⁶⁴ Congress intended independent regulatory agencies to have broad and independent discretion.¹⁶⁵ Congress intended the FTC specifically to have broad and independent discretion.¹⁶⁶ However, the courts in the

¹⁶² Commission on Federal Paperwork, Information Value/Burden Assessment 2 (Sept. 9, 1977).

¹⁶³ *Id.* See also Wall Street Journal, February 12, 1979, at 12, col. 1, outlining an interesting alternative introduced by Senator Orrin Hatch to compel each agency to consider value of information collected by requiring the agency to compensate the regulatees out of its own budget for costs incurred in information reporting.

¹⁶⁴ *United States v. Nixon*, 418 U.S. 683, 707-08, 715 (1974) (citing *United States v. Burr*, 25 F. Cas. 187, 191-92 (C.C. Va. 1807) (Marshall, C.J.)).

¹⁶⁵ See discussion of authority of independent regulatory agencies under the Federal Reports Act at notes 68-96 *supra* and accompanying text.

¹⁶⁶ According to a study of the FTC by the American Bar Association: "When Congress

LB/CPR litigation have immoderately transcended these premises, engendering the unarticulated conclusion that, within the scope of the FTC's statutory authority, "fishing expeditions" will be sanctioned.

As corporate conglomerate structures become increasingly vast and complex, the FTC must have at its disposal broad information-gathering procedures adequate to meet the challenge. On the other hand, a strong substantive information-gathering authority must exist in harmony with procedural safeguards designed to protect the legitimate interests of the corporate respondents. In the LB/CPR litigation, the court supported strong information-gathering authority to the detriment of valid procedural safeguards.

For example, it is indisputable that measures such as the Census "value of shipments" survey will provide valuable data to the FTC. However, when it is apparent that the use of such a survey by the FTC will result in damage either to respondents of confidential Census Bureau inquiries or to the Census Bureau itself in the exercise of its own information-gathering authority, the FTC should be limited to two feasible alternatives: a) to solicit such information with the express assurance that any submission of data similar to confidential information is strictly voluntary or b) to replace the Census Bureau "value of shipments" survey with the OMB's SIC system which is nearly identical and does not threaten a breach of confidentiality or similarly to design an exclusive FTC manufacturing activity system to replace the "value of shipments" survey. While these undoubtedly are not the most convenient alternatives, they could provide the FTC with a reasonable measure of effectiveness while at the same time preserving the legitimate confidentiality interests of the corporations and the Census.

The review of the Comptroller provided by the Federal Reports Act provides only a limited check on the agency against duplication and burdensomeness imposed on the corporations. Any greater authority on behalf of the Comptroller would excessively thwart the substantive information-gathering authority of the FTC.

On the other hand, to the extent that the Comptroller's scrutiny of needless duplication and burdensomeness is limited, the FTC should be required to scrutinize itself. Even if the FTC, or any inquiring agency, does not examine the aggregate cost-burden imposed upon a corporation by the government as a whole, there should be an examination by the agency of its own aggregate cost-burden. Cost estimates should not be calculated with the assumption that the corporation will voluntarily waive any of its legitimate rights or privileges. The agency should reimburse or share corporate reporting costs.

In any information-gathering program, the FTC, as well as other agencies, should be able to demonstrate the steps taken to minimize the cost and to maximize the value of the information gathered. Whenever possible, the agency should be able to demonstrate the relationship between the information gathered and the actual accomplishment of the formulated goal.

enacted the FTCA, it was aware of the Supreme Court's prior narrow construction of investigatory powers contained in the Interstate Commerce Commission Act. To avoid a similar stifling of FTC investigatory activity, Congress used extremely broad language in defining the FTC's powers in this area." Report of the ABA Comm'n to Study the FTC 69 (1969) (citations omitted).

Trade secrets and confidential information should receive conservative protection for the benefit of the respondent and of the reputation of the agency.

While some deference should be given to the agency's own assessment of the above issues, it is ultimately in the interest of the agency as well as the corporation for the court to insure that the agency has in fact given serious consideration to these issues. Such assurance was lacking in the LB/CPR litigation.

In the face of spiraling government information-gathering activity, the concept of arbitrary and capricious agency action should embrace the failure to address thoroughly issues of value, relevance, and burdensomeness. The agency owes a duty, to the public as well as to respondents, to demonstrate that it is gathering only appropriate, useful information and that it is making good use of such information.

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