HEARING AID INDUSTRY

STAFF REPORT

with Appendices A and B

Final Report to the Federal Trade Commission

and Proposed Trade Regulation Rule

(16 CFR Part 440)

BUREAU OF CONSUMER PROTECTION

September, 1978

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UNITED STATES GOVERNMENT

memorandum

DATE: September 25, 1978

REPLY TO ATTN OF: Albert H. Kramer, Director AK
Bureau of Consumer Protection

SUBJECT: Staff Report on the Proposed Hearing Aid Industry Trade Regulation Rule

TO: Commission

Transmitted herewith is the staff's report on the Proposed Hearing Aid Industry Trade Regulation Rule.

Buy U.S. Savings Bonds Regularly on the Payroll Savings Plan

HEARING AID INDUSTRY PRACTICES

Final Report to the Federal Trade Commission
and Recommended Trade Regulation Rule
(16 CFR Part 440)

Bureau of Consumer Protection

Attorneys

Steven D. Newburg-Rinn
Russell Hatchl
Paul Petruccelli
Donald Clark
Carol Jennings
Mary Ann Kane

Research Analysts

Teri Freundlich
Donald Bridges

Division of Food and Drug Advertising

Thomas J. Donegan, Jr., Assistant Director
James Skiles, Deputy Assistant Director

Bureau of Consumer Protection

Albert H. Kramer, Director

This report, required by Section 1.13(g) of the Commission's Rules of Practice, contains the staff's analysis of the record and its recommendations as to the form of the final Rule. The report has not been reviewed or adopted by the Commission. The Commission's final determination in this matter will be based upon the record taken as a whole, including the staff's report and the report of the presiding officer under Section 1.13(f) of the Rules, and comments upon these reports received during the 60-day period after the staff report is placed on the public record.

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G. Conclusions..... F-421

Summary

This summary is intended to provide only a very brief overview of the subject matter covered in this Report. Summarization necessarily involves simplification, so the full Report and its Appendices must be consulted for a thorough understanding of what is discussed here. It is the Report and its Appendices that constitute staff's analysis of the record and recommendations, and this summary should not be so construed.

In brief, staff recommends that the Commission issue a Trade Regulation Rule for the Hearing Aid Industry ("Recommended Rule"). The Recommended Rule will regulate the conduct of the several dozen hearing aid manufacturers and the ten to fifteen thousand retail hearing aid salespersons doing business in the United States. The numerous experiences reported of unusable hearing aids, purchased at great financial sacrifice, and of a multitude of abusive sales transactions and sales tactics, fully support the need for strong Commission activity to deal with such abuses.

The primary remedy in the Recommended Rule is the "buyer's right to cancel," which requires every retail seller to give every hearing aid buyer the opportunity to cancel the purchase any time within 30 days after delivery of the aid and receive a refund of most of the purchase price. Another important remedy deals with the way leads to sales prospects are solicited by requiring the disclosure that a salesperson may phone or write for an appointment. The problems created by unannounced home sales visits are addressed by requiring appointments for such home sales visits. The Recommended Rule also requires sellers to disclose their status as sellers and prohibits sellers from using misleading names to describe themselves and their firms. Finally, certain deceptive representations are prohibited and other representations are required to be explained clearly and conspicuously.

The Hearing Health Care Delivery System

A hearing-impaired person may be seen by a general physician, a physician ear specialist, an audiologist, a retail seller, or any combination of these individuals. Physician ear specialists are called "otologists," "otolaryngologists" or otorhinolaryngologists," depending upon whether they specialize only in the ear, in the ear and throat, or in the ear, nose and throat. Audiologists are non-medical professionals with graduate degrees, who specialize in helping persons with hearing loss and associated communications problems. Retail hearing aid sellers sell hearing aids for a profit, and rarely have the lengthy academic preparation possessed by physician ear specialists and audiologists.

While estimates vary, the numbers of physician ear specialists, audiologists, and retail sellers in the United States are approximately 4,500, 3,000, and 12-15,000 respectively. The American Council of Otolaryngology represented physician ear specialists

in this proceeding. Audiologists were represented by the American Speech and Hearing Association and retail sellers were represented by the National Hearing Aid Society ("NHAS"). The Hearing Aid Industry Conference ("HAIC") represented the more than 40 hearing aid manufacturers whose aids are sold in the United States.

An estimated 650,000 hearing aids are purchased annually in the United States, usually at a cost to the customer of $300 to $400 per aid. This suggests that yearly retail sales total somewhere between $195 million and $260 million. While the average salesperson is said to make between 60 and 100 sales each year, many sell considerably more. Sales to current users are about equal in number to sales to new users.

Only a minority of all hearing aid consumers have bought their aids after having seen a physician ear specialist (who will perform a medical évaluation) and an audiologist (who will provide a hearing evaluation and will often recommend a hearing aid). Most consumers buy directly from retailers, with approximately half of all sales being consummated in the consumer's home. This situation raises substantial questions for agencies charged with consumer protection, for the record demonstrates that while many hearing aid retailers are both competent and ethical, many others are not.

NHAS, the retailers' organization, certifies as competent those of its members who pass its 20-week home study course, have had 2 years of experience in the business, and can obtain the necessary endorsements from a physician and from two other certified NHAS members. This certification may mean very little, however; the home study course has been severely criticized by three different panels of experts; allegations have been made that copies of the course's final exam are available to test candidates, and that cheating on the final exam has occurred; and the practical experience and endorsements required apparently mean no more than that the certification candidate has been able to find someone who knows he was in the hearing aid business and who has not seen or heard anything which led him to believe that the candidate was not doing his work competently. Moreover, even the limited value of NHAS certification is possessed by fewer than one third of all retail salespersons, and the record further demonstrates that a similarly small percentage of sellers take advantage of the other educational opportunities available to them. Finally, the record also amply demonstrates the expected result of all this poor training--a wide variety of grossly incompetent hearing aid fittings.

The Limitations of Hearing Aids

The mechanics of hearing loss are much more complicated than those of the most common visual impairments. Hearing aids cannot correct a consumer's impaired hearing to "20--20," as is generally the case with prescription eyeglasses. While hearing aids can provide wonderful assistance to those who can benefit from them,

virtually all hearing aid wearers must learn to adjust to and accept the considerable shortcomings of their aids. For example, no hearing aid can provide its wearer with normal hearing, and a hearing aid certainly cannot physically cure a hearing loss. Furthermore, hearing aid wearers usually have great difficulty in groups and in other noisy situations. The sound experienced by hearing aid wearers is unnatural, with the wearer sometimes feeling as if his or her head is in a barrel.

In addition, many of those who think they have hearing problems really do not have hearing losses, or a loss that is significant enough to benefit from a hearing aid. Even among those who have significant hearing impairments, there are many who cannot benefit from amplification. Many of those who can benefit from one aid cannot benefit from binaural hearing aids (one for each ear). Many of those who can benefit from hearing aids will still have difficulty understanding conversation in noisy or group situations. These shortcomings may not be apparent until the consumer has worn a purchased aid in his or her own actual listening situations.

Some Characteristics of Hearing Aid Consumers

Approximately 30 percent of the 20 million Americans over the age of 65 have hearing impairments, with the figures rising to 90 percent among the nursing home and retirement home population. Thus, the elderly constitute nearly half of the more than 14.5 million persons in the United States who suffer from hearing problems.

Hearing-impaired persons typically are reluctant to acknowledge their hearing loss and seek assistance. The industry has blamed this attitude for the fact that only 15 percent of those industry regards as potential customers in fact have purchased hearing aids. When they do seek assistance, potential hearing aid consumers typically are poorly informed about hearing loss and hearing aids. Even those who own aids often hope--and sometimes actively search--for a hearing aid which can do the impossible, namely provide normal hearing.

There is also significant consumer ignorance and confusion about the existence, training and qualifications of physician ear specialists, audiologists, and hearing aid retailers. Sellers have taken advantage of this consumer naivete. Many successfully employ a wide variety of deceptive techniques to conceal the fact that they are salespersons, in an effort to establish themselves as "experts" whom consumers can trust implicitly. For example, salespersons are frequently called "consultants," deceptively suggesting that the advice they will give is financially disinterested from the sale of a hearing aid. Similarly, the use by NHAS members of the term "certified hearing aid audiologist" often deceives those consumers who have heard about audiologists, since the amount and quality of the education that NHAS-certified sellers receive

does not even begin to approach that required for a graduate degree in audiology.

Thus, many consumers rely heavily on the expertise of those with whom they deal, without any awareness of the factors which affect the wisdom of that reliance. This places them in a poor position from which to resist a high-pressure sales pitch. Even when such a sales pitch is not used, hearing aid consumers generally are not sufficiently knowledgeable to judge the quality of the services they receive or of the products they purchase. Relatedly, the record also indicates that, as a group, hearing aid consumers are poor comparison shoppers.

On the basis of the evidence produced in this proceeding, staff has concluded that hearing-impaired persons are not in a position to effectively protect themselves in the hearing aid marketplace. As subsequent discussion will make clear, this vulnerability has combined with the inherent limitations of hearing aids and many unfair or deceptive practices in the industry to generate significant consumer abuses.

Risk Factors

The most important consumer problem experienced by hearing aid consumers is not receiving any significant benefit from the hearing aids they buy. The risk that no significant benefit will be received exists with every hearing aid purchase, no matter how outstanding the qualifications of the tester and the testing performed. Only trial use of the selected aid in a representative variety of actual listening situations can remove this risk. Unfortunately, many hearing aid sellers do not offer trials. Even where trials are available, they are sometimes given only to those consumers who ask for them. Most consumers, however, are unaware of the existence of trial periods or of their crucial importance in any hearing aid purchase. Moreover, some of those sellers who do offer trials either do not offer them to those who need them most or fail to honor the trial when the consumer seeks to return the hearing aid. Thus, the record demonstrates that although only trial use can remove the risk that no benefit will be received from a hearing aid, marketplace mechanisms have failed to provide this essential protection to consumers.

A multitude of factors, too numerous and complex to be discussed here, affect the risk that any particular individual will not benefit from a particular hearing aid even when the qualifications of the tester and the testing are outstanding. Furthermore, the fact that many hearing aid sellers lack the requisite training and skills obviously increases this risk, as does the fact that many sellers have inadequate test equipment, test in inadequate testing environments, and rely upon an inadequate amount and variety of tests in making their hearing aid recommendations. In addition, the likelihood of an unsuccessful fitting is increased whenever too much is promised to the consumer and whenever an aid is sold

to a consumer who has been pressured by others into accepting an aid against his will.

Selling Abuses

Numerous industry practices operate against this background to create added problems for consumers. For example, hearing aid advertising often deceptively leads consumers to expect that they will have little difficulty hearing in the presence of competing noise. Similarly, hearing aid ads and oral sales presentations often deceptively promise consumers that hearing aid use will either physically cure hearing loss or prosthetically correct hearing loss to a state of normalcy. The hearing testing being performed is also used as a tool for deception. Many sellers deceptively use "master hearing aids" to demonstrate how well the prospective customer will hear with a hearing aid. This is deceptive because the master hearing aid almost certainly is technologically different from or superior to the actual hearing aid that will be purchased. In addition, the listening experience with the master hearing aid is an unrealistic approximation of the real world.

There is no shortage of additional deceptions in this industry. Some retailers sell used hearing aids as new, or at least fail to disclose the fact that the aid being sold has been used. Some sellers deceptively represent that hearing aids will function in a manner that is similar to the way a normal ear functions; that the quality of sound heard through a hearing aid will be as natural as that heard through a normal ear; that hearing aids will retard or arrest the progression of hearing loss; that hearing aid models or features are "new" when they are virtually identical to models or features have been on the market for years; that hearing aids will enable wearers to hear out of their essentially dead ears; that hearing aids can be "prescribed" with the same precision and results as eyeglasses and drugs; and that hearing aids can operate without batteries. Some sellers feature certain hearing aids as being smaller than others without disclosing that substantial performance trade-offs are involved in using the smaller aids.

A wide variety of lead generation techniques are employed by many retailers to identify those potential customers who have not yet sought help for their hearing problems. Although the record indicates that some sellers go so far as to engage in cold canvassing, falsely disguised telephone "county health surveys" and pseudo hearing aid market testing programs, the most common lead generation tactics are ads offering "free" tests, booklets, hearing aid replicas of listening devices. The typical consumer responds to these ads without any idea that a salesperson will personally deliver the promised "free" booklet along with a high pressure sales pitch. This salesperson often does everything possible to deny the sales nature of the transaction, concentrating first on getting in the door, then on establishing the existence of the prospect's problem, building his or her anxiety about that problem, and qualifying

as the expert with just what is needed to solve it. Overcoming the prospect's objections is the in-home seller's stock-in-trade, and the skilled craftsman can "close" the sale without ever permitting the consumer to stop and consider the wisdom of the purchase. Finally, it is during these unannounced home sales visits that many of the deceptive representations discussed above take place.

Consumer Protection Framework

The existing consumer protection framework has proven inadequate to fill the gaps left by the unavailability of trial periods. State licensing laws have failed to insure seller competency, because many if not most sellers were "grandfathered." Even those who have had to take a licensing examination have not really been required to demonstrate their competence. Moreover, "trainee" licenses often permit newcomers to sell hearing aids under little supervision before taking and passing the licensing exam. The boards established by state licensing laws seem to offer consumers little hope for redress of complaints. In the first place, few consumers know where to register an official complaint and fewer still have the ability and inclination to do so successfully. In addition, these boards often appear to lack the staff and funding needed to investigate and pursue consumer complaints. Because most boards are composed primarily of hearing aid retailers, they are perceived as favoring the seller in the disputes they hear. Some boards clearly exhibit such a bias. This facilitates the seller's ability to obtain the consumer's agreement to an unfavorable settlement, for the consumer may feel lucky to receive any refund at all when the cards seem stacked in the seller's favor. The same is true for delays inherent in the board's complaint resolution process. Even in those rare instances in which the consumer possesses the tenacity to see a complaint through to its resolution, most boards are relatively ineffective because their remedies are primarily revocation and suspension of the retailer's license. These remedies are likely to be considered by board members to be too harsh, and thus are seldom invoked. Furthermore, revocation or suspension does not get the consumer a refund of the purchase price.

Other consumer remedies promise no better help to dissatisfied hearing aid purchasers. The FDA's medical preclearance requirements focus on encouraging consumers to see physicians to insure that there are no medical contraindications to hearing aid use. However, they can be waived by anyone over 18. Although the FDA-required user instructional brochure contains helpful advice, it can hardly be expected to compete successfully with a determined salesperson. Cooling-off Rules clearly provide some protection to those who are sold hearing aids in their homes, but this protection is limited because most hearing aids are not even received by their purchasers until after the 3-day cooling-off period has expired. Nor have industry self-regulation efforts been effective, in part because of the large number of industry members who are not associated with either HAIC or NHAS and in

part because those organizations are not perceived to be credible complaint resolution forums. Finally, such existing remedies as litigation under the Uniform Commercial Code or other state laws have been ineffective because of proof problems and because the size of any judgment that might be forthcoming is rarely commensurate with the expense and other burdens associated with these procedures.

The Recommended Rule

As a result of all of the foregoing evidence, staff has concluded that adoption of the Recommended Rule, and each of its provisions, is necessary to protect hearing aid consumers from unfair and deceptive practices in the hearing aid marketplace.

The Recommended Rule is intended to fill many of the gaps in the existing consumer protection framework through a comprehensive and comprehensible regulation of the practices of the hearing aid industry. It has been written in "plain English," with valuable assistance from Dr. Rudolf Flesch, the noted communications expert. None of those being regulated should have to consult a lawyer in order to find out what the Rule requires. Special attention has been given to the consumer notices required by the Recommended Rule. These notices are designed to be read and easily understood by the hearing aid consumer, and to serve as a step-by-step guide in the event that cancellation of the purchase becomes necessary.

The Buyer's Right to Cancel

The buyer's right to cancel, as noted above, is designed to enable the consumer to return a hearing aid if it is determined to be unbeneficial after it has been used by the consumer in his own listening environment. There are two legal basis for the buyer's right to cancel. The first legal basis is the scientific fact that the risk of receiving no benefit can only be eliminated by trial use of the purchased hearing aid. Sales abuses provide the second legal basis for this remedy. For example, if too much is promised, the consumer will not receive the benefits expected, and should be entitled to cancel the purchase. Thus, the buyer's right to cancel will discourage sales abuses and will provide an effective remedy for those abuses that do occur.

When a buyer invokes the right to cancel and returns the purchased hearing aid, the Recommended Rule permits sellers to retain certain cancellation charges. The amount of these charges should be sufficient to encourage consumers to make a good faith effort to adjust to and benefit from their aids, and to discourage frivolous cancellations. The Recommended Rule provides for three different types of cancellation charges: a $30 charge for the returned hearing aid, plus charges for any custom earmold and a 30-day supply of batteries. If two hearing aids are returned, a $30 charge may be made for each of them.

In addition to these charges, the Recommended Rule permits an additional cancellation charge not provided by the Rule as initially proposed ("Proposed Rule"). This charge covers pre-sale testing services. No limit is set on the amount the seller may charge for these services, but before they are rendered, the buyer must be told the amount of the charges that will be made and that these charges will not be refunded if there is a subsequent cancellation.

The Recommended Rule differs from the Proposed Rule in several other respects. Under the Proposed Rule the buyer's right to cancel was not required for sales made pursuant to the written recommendation of a specific hearing aid by a financially independent physician or audiologist. This exemption has not been included in the Recommended Rule. Nor does the Recommended Rule contain the Proposed Rule's exemption for the sale of hearing aids that are identical to the aids they are bought to replace. The primary reason for the deletion of these exemptions is that the risk of not receiving benefit still exists in such situations. In addition, it has been asserted that the presence of those exemptions might encourage improper conduct between physicians or audiologists and sellers, leading to the sale of inappropriate hearing aids.

Lead solicitations and sales visits in the home

The Proposed Rule required the seller to obtain the potential consumer's prior written consent to a sales visit to his or her home or office. In response to comments made about this provision, staff is recommending somewhat different remedies to deal with the problems of deception in the initial contact and the unfairness of unannounced home sales visits. The Recommended Rule requires sellers who solicit leads to disclose that a salesperson may phone or write for an appointment. If such contacts are not planned, no disclosure is needed, but the seller must have a system to prevent these names and addresses from ending up as sales leads. In addition, the seller is required to make an appointment for any sales visit to the consumer's home or office, and to keep a log of appointments made orally. An exception is provided to avoid placing sellers in jeopardy of a Rule violation if a genuine service visit just happens to develop into a sale.

The Recommended Rule does not supersede the Commission's 3-day Cooling-off Rule for door-to-door sales, as had the Proposed Rule. Staff believes that consumers should be able to extricate themselves from high pressure in-home hearing aid sales without any financial loss as is currently the case with in-home sales. The consumer who exercises the buyer's right to cancel will forfeit in the neighborhood of $50. Such a forfeiture would be totally inappropriate in the case of a high pressure in-home sale canceled before the purchased hearing aid was received by the consumer.

Status disclosures and prohibitions

- The Recommended Rule requires sellers to disclose their status as sellers whenever they communicate with potential customers. It also prohibits sellers from deceptively calling themselves audiologists, counselors, or consultants, and from naming their firms in such a way as to deceptively suggest that they are nonprofit organizations, governmental or educational agencies, public service or research institutions, or medical or audiological organizations. This should place consumers in a better position to identify the qualifications and financial imperatives of those in whom they must place their trust.

Prohibitions of deceptive claims

The Recommended Rule prohibits sellers from making a variety of clearly deceptive claims. For example, they cannot say or imply that

- any hearing aid will help people get their normal hearing back or hear as well as someone with normal hearing
- the sounds heard through a hearing aid will sound natural
- any hearing aid will stop a hearing loss or slow it down
- any hearing aid can shut out all unwanted background noise
- a hearing aid model or feature is new if was marketed in the United States over a year previously
- a hearing aid is "prescribed" or is a "prescription hearing aid."

Claims That Must Be Clearly Explained

The Recommended Rule requires claims about most hearing aid features to be clearly and conspicuously explained, so that the consumer will know what the advertised feature is and what good it will do. When comparisons of features are made, the seller must say which aids are being compared and explain what the compared features enable one's hearing aid to do that the compared aids cannot do. If an aid is featured as smaller than other models, any significant trade-offs in power and sound quality must be disclosed. In addition, sellers must have and trust reliable proof for these types of claims. Retailers are permitted to consider manufacturers' claims as reliable proof, unless they know or should know that the claims are false or are not supported by reliable evidence, or unless they could check the claims quickly and easily themselves.

The Proposed Rule went further than the Recommended Rule by prohibiting any claims about hearing aid features unless those features provided a significant benefit to consumers. The Proposed

Rule also required a clear and conspicuous disclosure of the specific groups of consumers who would receive this benefit. The Proposed Rule similarly prohibited comparisons unless the compared features provided consumers with significant additional benefits not provided by the features of the compared hearing aids, and required a clear and conspicuous disclosure of the specific groups of consumers who would receive this additional benefit. Staff has concluded that the anticipated benefits of these provisions are outweighed by the burdens they impose and the danger that those burdens would discourage helpful, informative consumer advertising.

Affirmative Disclosure Requirements

The Proposed Rule would have required several affirmative disclosures whenever certain general types of hearing aid claims were made in advertising. All ads which made any performance claim would have had to disclose that many persons with a hearing loss will not receive any significant benefit from any hearing aid. Representations about a hearing aid's performance capabilities in group (or noisy) situations would have to be accompanied by a disclosure that many persons with a hearing loss will not be able to consistently distinguish and understand speech sounds in group (or noisy) situations by using any hearing aid. Finally, any ad featuring binaural (one for each ear) hearing aids would have to disclose that many persons with a hearing loss in both ears will not receive greater benefits from the use of two hearing aids, one in each ear, than from the use of one hearing aid.

In light of the concern expressed that requiring such disclosures might unnecessarily discourage potential consumers from purchasing hearing aids, however, staff has decided not to recommend those affirmative disclosures. This decision was based primarily on the expectation that the buyer's right to cancel and the remaining advertising provisions of the Recommended Rule will go a long way toward encouraging advertisers to correctly inform consumers about the benefit they can expect from the advertised aids.

Enforcement of the Recommended Rule

The Recommended Rule has been designed to balance the need for enforceability against the need to avoid imposing unreasonable burdens and restrictions on those being regulated. For example, the buyer's right to cancel is self-executing. Once the required consumer notices are provided, the buyer will understand and be able to assert his or her right to immediate relief from an undesirable purchase. The cancellation charges permitted will effectively discourage frivolous cancellations. While the numerous requirements and prohibitions dealing with oral conversations pose more enforcement problems than similar provisions concerning written materials, this fact alone cannot justify either disregarding oral sales abuses or imposing unreasonably burdensome written disclosures designed to protect consumers from all imaginable

oral sales abuses. The mere fact that civil penalties can be assessed for oral misconduct should provide a significant disincentive to engage in such conduct. A pattern of oral sales abuses will provide the government with the testimony of numerous consumer witnesses, all of whom cannot be disputed successfully by the defense that "it's only his word against my word." In addition, since written sales materials have often suggested oral sales abuses, enforcing the Rule with respect to such materials does not pose the enforcement problems encountered with oral prohibitions. Furthermore, prohibiting oral misconduct in a rule simplifies the government's burden of proof in an enforcement action, for the issue of whether the prohibited conduct violates the FTC Act need not be resolved in the enforcement forum. In addition, the failure to prohibit clearly improper oral sales abuses may be construed by some as an open invitation to perform abuses with impunity.

Finally, the Recommended Rule has imposed some reasonable safeguards against certain oral misconduct. For example, section 440.30 requires the seller to keep a written record of oral appointments for home sales visits. Section 440.37 requires a brief notice on the contract about the buyer's right to cancel, in addition to the oral disclosure required by section 440.36. The disclosure of one's status as a seller must be made in all signs, ads, and other written materials, in addition to the disclosure required when the seller first starts to talk to potential customers, which may be made orally or in writing.

PART ONE - ANALYSIS OF RECORD EVIDENCE

I. INTRODUCTION

A. General Considerations

This is a report about the hearing aid industry and related health professions.[1] Part One analyzes the evidence contained in the record of this proceeding and Part Two discusses the impact of that evidence on the FTC's Proposed Trade Regulation for the Hearing Aid Industry ("Proposed Rule") and makes recommendations for Commission action.[2]

Throughout the course of this proceeding staff has enjoyed the pleasure of knowing and receiving the assistance of numerous outstanding physician ear specialists, audiologists, hearing aid sellers, and other hearing health professionals, as well as dedicated civil servants and consumer advocates. Staff has come to appreciate deeply the needs of hearing-impaired Americans, and the truly joyful blessing that hearing help can be to them, be it in the form of medical attention, amplification, aural rehabilitation services, or any combination of all three. Staff would like to make clear from the outset its belief that a great many hearing aid consumers are thoroughly satisfied with the hearing aids they have purchased, and that there are indeed highly ethical and competent hearing aid sellers serving the hearing impaired. Nevertheless, the record also abundantly demonstrates that many consumers have never been able to get meaningful benefits from the hearing aids they were sold, and that many hearing aid sellers are incompetent or unethical or both.

In the course of this rulemaking, staff has become aware of several general factors which distinguish hearing aids from other consumer durables. First, hearing aids are acknowledged to be a

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1 Issues concerning the Commission's jurisdiction in this area are discussed in Appendix C, *infra*.

2 The analyses of certain technical matters are contained in Appendix F to this Report. Note that in this Report, staff has attempted to address all possible problems raised by the Proposed Rule. It is believed that *all* such problems have been addressed and that none were overlooked. This confidence derives in large part from the assumption that the interested parties have fully commented upon virtually all provisions of the Proposed Rule, an assumption that is believed to be justified by the practice and the inherent procedural necessity of FTC rulemaking activities. It would certainly be inappropriate for interested parties, in their comments on this Report, to raise problems with the Proposed Rule which could have been (but were not) raised during the proceedings. To do so, of course, would deprive the Commission of input from its staff on matters of potentially great import.

health-related device throughout this record.[3] As such, their impact upon the consumers who purchase them is considerably different from the impact of the purchase of a refrigerator or toaster, for hearing aids offer the promise of remediation of an often profoundly disturbing health problem. Second, staff believes that hearing-impaired consumers are especially vulnerable as purchasers of these health related devices, which promise the hope of a communications bridge to the world of sound around them. Staff has analyzed the hearing aid marketplace and found it in need of the type of remedies contained in the Proposed Rule, for the multitude of reasons set forth in this Report.[4] Staff believes that the implementation of the Proposed Rule, with the modifications suggested herein, will go far toward the goal of insuring fairness to all involved with the hearing aid industry.

Certain background information is essential to the meaningful use of this Staff Report. The following format has been utilized for citations to the record:

--TR2120/3-10 means page 2120 of the transcript, lines 3 through 10.

--R13/288-98 means pages 288 through 298 in section 13 of the record.

--R1/D2-5 means the second through the fifth documents in section 1 of the record.

--R1/D2ip6 means internal page 6 of the second document in section 1 of the record. Citations to internal pages are necessary when record page numbers are unavailable.

--HX1/6 means page 6 of Hearing Exhibit 1.

--SPXD/25 means page 25 of Staff Physical Exhibit D.

--PX6/3 means page 3 of Physical Exhibit 6.

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3 See, e.g., Lentz, TR11233; Rassi, TR5781-82; Ince (Senate Hearings, 1973), R8/1189T-89U, 1189GG; Lesko, TR7225. Barnow, TR1643; Kojis, TR2007; Campagna, TR2621.

4 A brief listing of FTC adjudicatory-type matters involving the hearing aid industry is found in Appendix E, infra.

In most instances the identity of the author/witness will precede a citation or list of citations.[5] A semicolon will separate citations to different authors/witnesses in the same sentence. For example, Doe, HX3/2, TR123/3, R8/123; Roe, TR1234, HX32,5, 7, 11, R8/1234, 1243-47; HX29. In this example, Roe is not the author/witness for HX29. Note that more than one Hearing Exhibit was attributed to Roe, without repeating "HX" five times. Citations sometimes indicate parenthetically that the cited statements were made in testimony before a Senate committee (e.g., "(Senate Hearings, 1962)") or other governmental body (e.g., "(HEW Task Force Hearings)"). Some information about a citation is suggested by the section of the record in which it is contained. The record is composed of 15 sections.

- § 1 Public Notices, Petitions, Motions, and Answers Thereto (and certain other documents related to the conduct of the proceeding).
- § 2 Recommendations as to Disputed Issues of Material Facts.
- § 3 Industry Comments (Written).
- § 4 Consumer Comments (Written).
- § 5 Scientific and Technical Comments (Audiologists and Physician Ear Specialists) (Written).
- § 6 Government Agencies (Federal, State, local, etc.) (Written).
- § 7 General Comments (Written) (Unclassified sources).
- § 8 Commission Staff Submission.
- § 9 Presiding Officer's Report, Staff Report, and Comments Thereon.
- § 10 Advance Statements for Hearings.
- § 11 Hearing Aid Users Opposed to Rule (Written).
- § 12 Transcript of Hearing and Exhibits.

  A. Hearing Exhibits

  B. Physical Exhibits

  C. Transcript

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[5] Appendix D, infra, discusses the credibility of many of those who provided the comments and testimony appearing in the record.

- § 13 Rebuttal Submissions (Post-hearing).

- § 14 Excluded Evidence.

- § 15 Evidence *In Camera*.

The Report of the Presiding Officer[6] provided a lengthy discussion of the history of this proceeding, and of many procedural matters in addition to those discussed here. It should serve as the primary reference for those matters.[7]

The following abbreviations are utilized throughout this Report:

AAOO:	American Academy of Ophthalmology and Otolaryngology
ACO:	American Council of Otolaryngology
ASA:	Acoustical Society of America
ASHA:	American Speech and Hearing Association
Beltone I.D.:	Initial Decision in *In re* Beltone Electronics Corp., No. 8928 (FTC, Sept. 2, 1976)
CCC-A:	Certificate of Clinical Competency in Audiology, awarded by ASHA
CCC-SP:	Certificate of Clinical Competency in Speech Pathology, awarded by ASHA
CROS:	Contralateral Routing Of Signal
FDA Rule:	FDA's regulation requiring uniform professional and patient labeling requirements and conditions for sale of hearing aid devices, 21 C.F.R. § 801.420-21, 42 Fed. Reg. 9286-96 (Feb. 15, 1977)

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6 R9/D1.

7 *See*, *e.g.*, R9/D1ip 1-38.

GPHAG:	Greater Philadelphia Hearing Aid Guild
HAIC:	Hearing Aid Industry Conference (now HIA, Hearing Industries Association)
HEW Task Force:	HEW Intradepartmental Task Force on Hearing Aids
HEW Task Force Hearings:	Hearings before the HEW Task Force held on May 7, 1975
ISHA:	Illinois Speech and Hearing Association
ISPIRG:	Iowa Student Public Interest Research Group
MPIRG:	Minnesota Public Interest Research Group
NCSC:	National Council of Senior Citizens
NHAS:	National Hearing Aid Society
NYPIRG:	New York Public Interest Research Group
Ohio Div. C.P.:	Ohio Commerce Department, Division of Consumer Protection
P.O. Report:	Report of the Presiding Officer, R9/D1
Percy Report:	"Staff Study of the State Licensing Laws and Training Requirements for Hearing Aid Dealers," Permanent Subcommittee on Investigations of the Senate Committee on Government Operations, 94th Cong., 1st Sess., October 1975
PIRGIM:	Public Interest Research Group In Michigan
RPAG:	Retired Professional Action Group

Senate Report, 1962:	"Prices of Hearing Aids," Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, 87th Cong., 2d Sess., Oct. 1, 1962
Texas DHR:	Texas Department of Health Resources
WAGHH:	Washington Area Group for the Hard of Hearing

B. Legal Framework

The Federal Trade Commission's powers to define unfair or deceptive acts or practices in or affecting commerce, as per §§ 5 and 6 of its Act (15 U.S.C. §§45, 46), are broad in scope, as discussed by the Supreme Court in Sperry & Hutchinson Co. v. FTC, 405 U.S. 233 (1972).[8] Similarly, the Commission has wide discretion in fashioning regulations which are intended to prevent unfair or deceptive acts or practices. As emphasized by the Supreme Court in Jacob Siegel Co. v. FTC, 327 U.S. 608, 612-613 (1946),:

> The Commission is the expert body to determine what remedy is necessary to eliminate unfair or deceptive practices which have been disclosed. It has wide latitude for judgment and the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practice found to exist.

Further, as stressed by the Court, in enforcing its mandate to prevent unfair and deceptive trade practices, "... the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past ... [but may] effectively close all roads to the prohibited goal..." FTC v. Rubberoid Co., 343 U.S. 470, 473 (1942). Similarly, section 18(a)(1)(B) of the FTC Act itself provides that Commission rules "may include requirements prescribed for the purpose of preventing such [unfair or deceptive] acts or practices" (15 U.S.C. 57a).

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8 The Court, at 244, charged the Commission to act "like a court of equity, consider . . . public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws . . ." in determining what is unfair or deceptive behavior prohibited by Section 5 of the FTC Act. See also National Petroleum Refiners v. FTC, 482 F.2d 672, 685 (D.C. Cir. 1973).

It is within the framework set by the statute and these cases that the Commission has authority to act herein. Staff believes that promulgation of this Rule may be based upon three areas of violation, i.e., (1) deceptive acts or practices, (2) failures to disclose material facts, and (3) unfair acts or practices, as discussed hereinafter. In addition, the Rule is based upon the need to prevent or remedy such unfair or deceptive acts or practices.

1. Deceptive Acts or Practices. Advertising that prevents the consumer from making a free and informed choice of what or whose products to buy, by misrepresenting facts that consumers consider material to their decision, injures honest competitors and the consuming public. The body of law on deceptive acts and practices built up by the Commission and the courts in sixty years of law enforcement proscribes such conduct in all its various manifestations. The controlling legal standard is a simple one: If the seller's claims or representations have a tendency to deceive the consumer in any particular which could reasonably influence the latter's buying choice--if, in other words, any material false inducement is used, the seller commits deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.[9]

In the application of this standard to the many different factual patterns that have arisen in cases before the Commission certain principles have become well established. One such principle is that under Section 5 actual deception of particular consumers need not be shown. All that need be shown to support a finding of illegality is that the challenged representation has a substantial capacity or tendency to deceive.[10] It has

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9 See, e.g., FTC v. Raladam Co., 316 U.S. 149 (1942); FTC v. Royal Milling Co., 288 U.S. 212, 216-17 (1933); FTC v. Algoma Lumber Co., 291 U.S. 67, 78 (1934); FTC v. Standard Educ. Soc., 302 U.S. 112, 116-17 (1937); L. Heller & Son, Inc., v. FTC, 191 F.2d 954 (7th Cir. 1951); Spiegel v. FTC, 494 F.2d 59, 62 (7th Cir., 1974). See Barnes, False Advertising, 23 Ohio St. L.J. 597 (1962); Note, The Regulation of Advertising, 56 Col. L. Rev. 1018, 1025-34 (1956); Note, Developments in the Law--Deceptive Advertising, 80 Harv. L. Rev. 1005 (1967).

10 See e.g., FTC v. Algoma Lumber Co., 291 U.S. 67, 81 (1934); J.B. Williams v. FTC, 381 F.2d 884 (6th Cir. 1967); Montgomery Ward v. FTC, 379 F.2d 666 (7th Cir. 1967); Regina Corp. v. FTC, 322 F.2d 765 (3d Cir., 1963); Progress Tailoring Co. v. FTC, 153 F.2d 103, 105 (7th Cir. 1946); Bockenstette v. FTC 134 F.2d 369, 371 (10th Cir. 1943); Gimbel Bros., Inc. v. FTC, 116 F.2d 578 (2d Cir. 1941); FTC v. Winsted Hosiery Co., 258 U.S. 483, 494 (1922); FTC v. Balme, 23 F.2d 615, 620 (2d Cir. 1928).

been held many times that the test of unlawful deception under Section 5 is whether the practice in question is likely to deceive a substantial segment of the purchasing public, or of that part of the purchasing public to whom the representation is directed, and that this likelihood may be inferred by the Commission in the exercise of its accumulated administrative knowledge and experience on the basis of the challenged advertisement itself.[11]

The Act's objective in this field--to protect the consumer from being misled in the choice of goods and services to buy--is flouted no less by false and misleading implications, suggestions or insinuations than by explicit misstatements. Product sellers have found that the explicit claim is not the only effective method of selling their products to the consumer. Since other methods are widely used, it is the Commission's plain duty to require that they be used honestly.

It is now well settled that Section 5 proscribes "any advertising matter whatsover which creates a misleading impression in the mind of the ordinary purchaser,"[12] for:

> The skillful advertiser can mislead the consumer without misstating a single fact. The shrewd use of exaggeration, innuendo, ambiguity and half-truth is more efficacious from the advertiser's standpoint than factual assertions...[A]n advertisement may be deemed misleading even though the statements of fact it contains are not in and of themselves deceptive. The statutory ban applies to that which is suggested as well as that which is asserted.[13]

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11 See, e.g., Merck & Co. v. FTC, 392 F.2d 921, 925 (6th Cir. 1968); FTC v. Colgate-Palmolive, 380 U.S. 374, 385-92 (1965); Hillman Periodicals v. FTC, 174 F.2d 122 (2d Cir. 1949); Zenith Radio Corp. v. FTC, 143 F.2d 29 (7th Cir. 1944); New Am. Library of World Literature v. FTC, 213 F.2d 143 (2d Cir. 1954); Royal Oil Corp. v. FTC, 262 F.2d 741, 745 (4th Cir. 1959); Carter Products, Inc. v. FTC, 268 F.2d 461, 493-95 (9th Cir. 1959); DeGorter v. FTC, 244 F.2d 270, 283 (9th Cir. 1957); E.F. Drew & Co. v. FTC, 235 F.2d 735 (2d Cir. 1956). See also note 9, supra.

12 Handler The Control of False Advertising Under the Wheeler-Lea Act, 6 Law & Contemp. Probs. 91, 102 (1939). See cases cited in note 10, supra.

13 Handler, note 12, supra.

The decisions applying these principles are legion.[14]

As an examiniation of this Report amply demonstrates, the field of hearing aid sales has been plagued with deceptive acts and practices. The Rule recommended herein is intended to prevent or remedy these practices.

2. Failure to Disclose Material Facts: -- The failure of the seller of a product to disclose material facts, in circumstances where the effect of nondisclosure may be to deceive a substantial segment of the purchasing public, is fully equivalent to deception accomplished through misleading statements or suggestions. "To tell less than the whole truth is a well known method of deception." P. Lorillard Co. v. FTC, 186 F.2d 52, 58 (4th Cir. 1950).[15]

A requirement of disclosure is also appropriate in the light of affirmative claims or representations made by the seller where such claims, while not false or deceptive in themselves, nevertheless do not give an inaccurate impression to the purchaser. Such a principle is expressly stated in § 15 of the Federal Trade Commission Act with respect to the advertising of foods, drugs, devices and cosmetics and it has been applied in § 5 cases as well.[16]

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14 See, e.g., Kalwajtys v. FTC, 237 F.2d 654, 656 (7th Cir. 1956); C. Howard Hunt Pen Co., v. FTC, 197 F.2d 273 (3d Cir. 1952); P. Lorillard Co. v. FTC, 186 F.2d 52, 58 (4th Cir. 1950); Charles of the Ritz Dist. Corp. v. FTC, 143 F.2d 676, 679 (2d Cir. 1944); Serbone v. FTC, 135 F.2d 676, 679 (7th Cir. 1943); D.D.D. Corp. v. FTC, 125 F.2d 679 (7th Cir. 1942); Aronberg v. FTC, 132 F.2d 165 (7th Cir. 1942); Ford Motor Co. v. FTC, 120 F.2d 175 (6th Cir. 1941); Caldwell v. FTC, 111 F.2d 889 (7th Cir. 1940); Parker Pen Co. v. FTC, 159 F.2d 509 (7th Cir. 1946).

15 For example, if a seller has created in the minds of consumers a false impression of the quality or merits of its product, the Commission may enter an order not only forbidding the deceptive advertising, but in addition requiring the seller to make affirmative disclosure in all future advertising in order to correct the false impression created by the deceptive conduct. See, e.g., Haskelite Mfg. Co. v. FTC, 127 F.2d 765 (7th Cir. 1942).

16 In P. Lorillard Co. v. FTC, 186 F.2d 52 (4th Cir. 1950), the respondent advertised that a Reader's Digest survey had found its cigarettes to be lowest in tar and nicotine content. This was a true statement of the findings of the survey, but without additional disclosure the statement

(Continued)

Even if no affirmative representation is made, nondisclosure may constitute actionable deception.[17] The Commission has, for example, brought a number of proceedings against sellers who fail to disclose the country of orgin their products.[18]

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16 (Continued)

had misleading implications. The advertisement implied that respondent's cigarettes were less harmful than competing brands having high nicotine content. But the survey had concluded that no cigarette, including respondent's, had a sufficiently low tar and nicotine content to be significantly less harmful than other cigarettes. Respondent failed to disclose this qualifying fact, and thereby failed to correct the false impression created by its literally true representation. This was a deceptive half-truth and clearly unlawful. See also Gimbel Bros., Inc. v. FTC, 116 F.2d 578 (2d Cir. 1941); Royal Baking Powder Co. v. FTC, 281 Fed. 744 (2d Cir. 1922); Allen B. Wrisley Co. v. FTC, 113 F.2d 437 (7th Cir. 1940); Clinton Watch Co. v. FTC, 291 F.2d 838 (7th Cir. 1961); Raladam Co., 24 FTC 475 (1937), order aff'd., 316 U.S. 149 (1942).

17 See, e.g., Segal v. FTC, 142 F.2d 255 (2d Cir. 1944); L. Heller & Son, supra, note 9; American Tack Co., Inc. v. FTC, 211 F.2d 239 (2d Cir. 1954) (per curiam); Schachnow v. FTC, 1940-43 CCH Trade Cases Par. 56220 (2d Cir. 1942) (per curiam); Mary Muffet, Inc. v. FTC, 194 F.2d 504 (2d Cir. 1952 (per curiam); Mohawk Refining Corp. v. FTC, 263 F.2d 818 (3d Cir. 1959); Kerran v. FTC, 265 F.2d 246, (10th Cir. 1959); Theodore Kagen Corp. v. FTC, 283 F.2d 371 (D.C. Cir. 1960) (per curiam); Bantam Books, Inc. v. FTC, 275 F.2d 680 (2d Cir. 1960); New Am. Library of World Literature v. FTC, 227 F.2d 384 (2d Cir. 1955).

18 See, e.g., Waltham Watch Co., et al., (Doc. 7997) 60 F.T.C. 1692 (1962), aff'd, 318 F.2d 28 (7th Cir. 1963), cert. denied, 372 U.S. 944 (1963), reh'g denied, 375 U.S. 998 (1963), cert. denied, 382 U.S. 813 (1965), reh'g denied, 382 U.S. 922 (1965); Manhattan Brewing Co. (Doc. 4572) 42 F.T.C. 226, pet. to review dismissed, 1946-7 T.C. ¶ 57,439 (7th Cir. 1946); El Moro Cigar Co. (Doc. 2603) 28 F.T.C. 639 (1939), aff'd 107 F.2d 429 (1939). In addition to foreign-origin cases, sellers have been required to disclose, supra, in note 17, for example, that their oil is not new (e.g. Mohawk Refining Corp.), that their books are abridged (e.g., Bantam Books, Inc.), that their watch bezels are not gold (e.g., Theodore Kagen Corp.), that their fabrics are rayon (e.g. Mary Muffet, Inc.), or that their goods are used (e.g., Schachnow).

Another line of nondisclosure cases under § 5 involves products whose use may involve hazards.[19]

The principle crystalized in these decisions is that § 5 forbids sellers to exploit the normal expectations of consumers in order to deceive, just as it forbids sellers to create false expectations by affirmative acts.

As in the case of deceptive acts or practices, the record of this matter demonstrates widespread failures by hearing aid sellers to disclose material information to their prospective purchasers. Lack of this information often prevents such persons from making an informed purchase decision. The Recommeded Rule, by requiring disclosure of various types of material information, hopefully will correct much of this problem.

3. Unfair Acts or Practices. The S&H[20] and Keppel[21] decisions make clear that the prohibitions of Section 5 of the FTC Act embrace acts, practices, or methods of competition that are neither deceptive or misleading on the one hand, nor monopolistic or anticompetitive, on the other. This authority to proscribe "unfair" commercial practices which are not necessarily deceptive or misleading has been utilized frequently as an independent basis for Commission action.[22] While "deception" may fairly be viewed as a major subcategory of "unfairness," it does not exhaust its content. The Commission has broad quasi-legislative discretion to identify and proscribe those acts and practices which are "unfair"

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19 See, e.g., Seymour Dress & Blouse Co., 49 F.T.C. 1278 (1953); R. Siebert Co., 49 F.T.C. 1418 (1953); Academy Knitted Fabrics Corp., 49 F.T.C. 697 (1952); Fisher & Deritis, 49 F.T.C. 77 (1952); James B. Topkins, 63 F.T.C. 1644 (1963).

20 405 U.S. 233 (1972).

21 291 U.S. 304 (1934).

22 See, e.g., Pfizer, Inc., 81 F.T.C. 23 (1972), complaint dismissed; All-State Indus., 75 F.T.C. 465 (1969), aff'd, 423 F.2d 423 (4th Cir. 1970), cert. denied, 400 U.S. 828 (1970); FTC v. R.F. Keppel & Bro., Inc., 291 U.S. 304 (1934); First Buckingham Community Inc., 73 F.T.C. 938 (1969); Chemway Corp., 78 F.T.C. 1250 (1971).

to consumers.[23] While its interpretations must clearly have some foundation in the commercial realities and public policy of the time, no one particular underpinning (e.g. judicial precedent) is indispensable to sustain a finding of unfairness.[24]

The earliest formulation of the unfairness doctrine focused on whether practices employed against a specially vulnerable group of consumers inflicted injury by exploiting the consumers' disavantaged position. The special vulnerability approach was first and most notably employed in FTC v. R.F. Keppel Bros., 291 U.S. 304 (1934), in which the Commission banned certain techniques for marketing candy to children. The vulnerability of a particular group of consumers has been an important element in the finding of Section 5 violations in a variety of other cases.[25]

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23 The 1938 Wheeler-Lea Amendments made it clear that this authority extends to the direct protection of consumers, in addition to assuring traditional competitive practices. The amendments approved and codified the principle of Keppel--that though certain practices are neither deceptive nor anti-competitive, they nevertheless violate the Act. That principle is embodied in the provision of § 5, added by the Wheeler-Lea Act, that forbids "unfair ... acts or practices in commerce." If a practice both exploits consumers unfairly and injures competitors, it will be, as in Keppel, an unfair method of competition, as well as an unfair act or practice.

24 Lest it be thought that the Commission's recently recognized authority to explore the boundaries of "unfairness" is unworkably broad, it should be noted that courts regularly deal with similar concepts of law, such as the doctrines of "public policy" and "unconscionability".

25 See, e.g., General Foods Corp, 86 F.T.C. 831 (1975); Busch's Jewelry Co., 87 F.T.C. 394 (1976); State Credit Assn., 86 F.T.C. 502 (1975); Travel King, Inc., 86 F.T.C. 715 (1975); J.B. Williams Co., 81 F.T.C. 238 (1972); Topper Corp., 79 F.T.C. 681 (1971); Doris Savitch, 50 F.T.C. 828 (1954), aff'd per curiam, 218 F.2d 817 (2d Cir. 1955); J & J Furniture Corp., 87 F.T.C. 383 (1976).

Based on Keppel and a number of other decisions which followed it, the Commission may find unfairness where, because of imbalance in the bargaining power, sellers abuse their superior position and consumers are unable to protect themselves.[26]

The other unfairness analysis which may be applied to many hearing aid seller practices is that enunciated by the Commission in the Cigarette Rule Statement of Basis and Purpose[27] and cited with approval by the Supreme Court in the S & H case.[28] That outline contains three guidelines for determining unfairness.

1) whether a practice, without necessarily have been previously considered unlawful, offends public policy "as established by statutes, the common law or otherwise;"

2) whether a practice is immoral, unethical, oppressive, or unscrupulous; or

3) whether a practice causes substantial injury to consumers or competitors or other businessmen.

As the Supreme Court noted in discussing these criteria, the analysis and application of the unfairness standard involves a balancing of the consumer injury and public policies which disfavor a particular practice against any legitimate business justification which might justify the behavior.

For the Commission to find a practice unfair, all three criteria need not be satisfied. A practice which involves extensive consumer injury may be found unfair even if it does not fall within established public policy concepts of unfairness. Similarly, the Commission may find a practice to be unfair because of the degree of its repugnance to established public policy concepts of unfairness or to generally accepted standards of business ethic without inquiring extensively into the degree of injury actually inflicted on consumers.

Analytically, it appears that an act or the failure to

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26 See, Comment, Section 5 of the Federal Trade Commission Act--Unfairness to Consumers, 1972 Wis. L. Rev. 1071; Comment, Unfairness Without Deception, 5 Loy. U.L. Rev. 537, 558-59 (1974); MacIntyre & von Brand, Unfair Methods of Competition As an Evolving Concept--Prelude to Consumerism, 44 St. Johns L. Rev. 597, 618 (1970); Pitofsky, Beyond Nader: Consumer Protection and the Regulation of Advertising, 90 Harv. L. Rev. 661, 685, 685-86 (1977).

27 29 Fed. Reg. 8325, 8355 (1964).

28 405 U.S. 233, 244, n.5 (1972).

act may be prohibited as legally unfair if two elements are established.

- a) If it is determined that prohibiting the activity or lack of activity will provide substantially greater social or economic utility than permitting the activity or lack of activity. This can best be considered as a "balancing of interests" test or a "marketplace fairness" test which weighs the potential costs and burdens upon vendors of imposing a standard of behavior against the potential economic losses to consumers if the standard is not imposed.[29]

b) If it can be determined that a prohibition of activity or lack of activity, although to some extent "socially or economically desirable", is warranted as a legal constraint. This involves the discovery and definition, as Judge Hand has suggested, of the "conscience of the community",[30] or as the court in S & H held of the "public values beyond...the antitrust laws".[31]

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29 See Pfizer, Inc., supra. To better explain this concept, the Commission, in a footnote to Pfizer, offered the following comparison, which is reproduced in full:

> Compare Fletcher, Fairness and Utility in Tort Theory, 85 Harv. L. Rev. 537, 542 (1972).
>
> Reasonableness is determined by a straight forward balancing of costs and benefits. If the risk yields a net social utility (benefit), the victim is not entitled to recover from the risk-creator; if the risk yields a net social disutility (cost), the victim is entitled to recover. The premises of this paradigm are that reasonableness provides a test of activities that ought to be encouraged and that tort judgments are an appropriate medium for encouraging them. This balance admittedly gives more consideration to producers' interests than does the test suggested by Adam Smith: "[T]he interest of the producer ought to be attended to only so far as it may be necessary for promoting that of the consumer." Smith, An Inquiry Into the Nature and Causes of the Wealth of Nations, 625 (Modern Library Edition, 1937). [Pfizer, at 62, n. 12]:

This suggests that although the weight to be given to conflicting interests may vary according to the predispositions of those who do the balancing, some such balancing is necessary.

30 FTC v. Standard Education Society, 86 F.2d 692, 696 (2d Cir. 1936), rev'd on other grounds, 302 U.S. 112 (1937).

4. Conclusions - Although this report does not specifically attempt to apply the Keppel special vulnerability and the Cigarette Rule unfairness criteria to each of the individual provisions of the Rule and the specific unfair or deceptive practices which have inspired them, it does provide the information necessary to apply these analytical guidelines. The evidence that relates to the status of the hearing-impaired consumers as a specially vulnerable group and to the general market context for the practices under scrutiny is analyzed in this Report. Information concerning the nature and extent of the injury inflicted on consumers is also presented in the Report, as is the effect on business of the proposals.

The only aspect of the Cigarette Rule unfairness criteria which is not discussed in this Report is the analysis of how certain public policies bear on the unfairness of particular practices. For example, the public policy favoring the free flow of purchase-related information[32] may be relevant to the Commission's decision on whether to adopt the affirmative disclosure portions of the Recommended Rule. Similarly, the Commission may take cognizance of the long standing public policies

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31 FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972).

32 As the Supreme Court recently noted,

> Advertising though entirely commercial may often carry information of import to significant issues of the day. And commercial speech serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system. In short, such speech serves individual and societal interests in assuring informed and reliable decision making.

Bates v. State Bar of Arizona, 433 U.S. 350 (1977). See also Va. State Bd. of Pharmacy v. Va. Citizen's Consumer Council, 425 U.S. 748 (1976); Bigelow v. Virginia, 421 U.S. 809 (1975).

against undue influence[33] in determining the need for special substantive protections for hearing-impaired purchasers, or of the long-established public policy concept of unconscionability,[34] which involves a balancing of harms and justifications similar to the analysis of unfairness. To the extent that the Commission relies on any such public policies in reaching its decision on the final issuance of the Recommended Rule, the policies will be analyzed in the Commission's Statement of Basis and Purpose.

Staff believes the evidence fully supports a finding that hearing aid sellers have engaged in numerous unfair and deceptive trade practices in violation of § 5 of the Act, 15 U.S.C. § 45, and that hearing aid sellers have also engaged in false advertising, in violation of § 12 of the Act, 15 U.S.C. § 52. In making this finding, staff has focused on the serious financial and personal risks faced by prospective hearing aid purchasers in purchasing a hearing aid. Such risks involve critical elements present throughout the hearing aid purchase relationship since the nature of hearing aids and hearing loss precludes advance knowledge of whether the hearing aid selected will in fact prove beneficial to the individual. This risk is markedly

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33 See, e.g., Comment, Undue Influence Judicial Implementation of Social Policy, 1968 Wis. L. Rev. 569; G. Grossman, Coerced Land Conveyances-A Survey of Texas Law, 41 Tex. L. Rev. 569, 584 (1963) ("The idea that some theory, be it designated 'duress' or 'undue influence' should be available to an aggrieved party to relieve him from the harshness of a coerced contract is deeply ingrained in Anglo-American jurisprudence. The policy reasons behind this idea are numerous, the following not to be considered exhaustive: the 'barbarism' effected when one party is judicially forced to live up to the terms of a contract he entered into unwillingly; the equitable concept that one should not be able to avail himself of the benefits of a contract acquired through dishonorable methods, the natural sympathy felt toward bargaining unequals . . . .'); Restatement of Contracts § 497 (1932) ("where one party is under the domination of another or by virtue of the relation between them is justified in assuming that the other party will not act in a manner inconsistent with his welfare, a transaction induced by unfair persuasion of the latter, is induced by undue influence and is avoidable.").

34 See, e.g., Speidel, Unconscionability, Assent and Consumer Protection, 31 U. Pitt. L. Rev. 359 (1970); Spanogle, Analyzing Unconscionability Problems, 117 U. Pa. L. Rev. 931 (1969); Ellinghaus, In Defense of Unconscibility, 78 Yale L. J. 757 (1968); Dawson, Unconscionable Coercion - The German Version, 89 Harv. L. Rev. 1041 (1976).

increased due to the wide variety of abusive sales practices which the record in this proceeding demonstrates to be present in the hearing aid industry.

C. Enforcement

The Recommended Rule has been designed to balance the need for enforceability against the need to avoid imposing unreasonable burdens and restrictions on those being regulated in an attempt to simplify enforcement efforts. Much of the Rule has been designed to be self-enforcing. This is especially true for the Recommended Rule's primary remedy -- the buyer's right to cancel.

The notices required to be given to effectuate the buyer's right to cancel have been written in a "plain English" format that will fully inform hearing aid purchasers of their rights under the Rule. Once the required consumer notices are provided, buyers will understand and be able to assert their rights to immediate relief from undesirable hearing aid purchases. Sellers are, however, permitted to retain a cancellation charge, which will effectively discourage frivolous cancellations. Because the buyer's right to cancel becomes a contract right of the hearing aid purchaser, it will be enforceable in local small claims courts in the event that sellers fail to live up to their obligations. In addition, the consumer notice provides the consumer with knowledge of the Federal Trade Commission's interest in hearing aid matters. This information will not only assist the consumer, but should aid the Commission's enforcement efforts.

Various other requirements in the Recommended Rule mandate that certain information be provided to consumers in advertisements for hearing aids. Such provisions are readily enforceable, for a quick perusal of a hearing aid seller's advertisements will make clear whether the seller is in compliance with the Rule's requirements.

Other requirements and prohibitions deal with oral conduct. Obviously such provisions raise more enforcement problems than similar provisions concerning written materials. Staff does not believe that this fact alone can justify either disregarding such conduct, which is often the most egregious conduct found in this record, or imposing unreasonably burdensome written disclosures designed to protect consumers from all imaginable oral sales abuses. The mere fact that civil penalities can be assessed for oral misconduct should provide a significant disincentive to engage in such conduct. Moreover, a pattern of oral sales abuses will provide the government with the testimony of numerous consumers, all of whom cannot be disputed successfully by the seller's assertion that no such conduct

had occurred.[35] In addition, since written sales materials have often suggested the oral sales abuses found in the record, enforcing the Rule with respect to such materials does not pose the enforcement problems encountered with oral prohibitions. Furthermore, prohibiting oral misconduct in a rule simplifies the government's burden of proof in an enforcement proceeding, since the question whether the conduct in issue violates the FTC Act will not have to be resolved in the enforcement forum.

After careful reflection, staff continues to recommend retention of the prohibitions of oral conduct. Staff believes that the buyer's right to cancel will provide some incentive for hearing aid sellers not to engage in the proscribed practices, although it may still be in a seller's economic interests to use abusive sales practices to make a sale when it otherwise looks as if no sale at all would be made. For this reason staff does not believe that the presence in the Rule of the buyer's right to cancel would justify elimination of the prohibitions contained in the Recommended Rule. The proscribed conduct is clearly deceptive, clearly induces consumers to make decisions that often prove to be their detriment, and generally represents the worst conduct found in the hearing aid industry. To eliminate these prohibitions might also be taken by some to an open invitation to engage in the very conduct that would have been prohibited had those sections of the Rule not been eliminated, a signal which staff believes should not be given to the hearing aid industry.

In addition to Commission-initiated investigations and individual consumer actions brought to enforce rights granted under the Rule, other significant mechanisms exist which will significantly impact upon enforcement of the Recommended Rule. First, a number of states consider violation of an FTC rule to be a violation of their own consumer protection statutes. These states are thus in a position to enforce the Recommended Rule in their own jurisdictions. Other states could adopt and enforce the Rule's requirements directly. In fact, the Rule was developed in cooperation with state consumer protection officials, and has always been designed to allow significant state enforcement activities. Lastly, those portions of the Rule which grant a private cause of action are subject to private enforcement through private class action lawsuits.

Together, the penalties that may be assessed for violation of an FTC rule, the self-executing nature of the buyer's right to cancel, and the viability of enforcement or damage-recovery actions by the Commission, state authorities and private individuals, create a viable enforcement scheme. The array of

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35 Since the Commission's inception it has dealt successfully with such oral misconduct on many occassions, establishing numerous violations of the FTC Act.

corrective actions available should significantly encourage compliance with the Rule, providing an effective means for remedying any intentional violations.

II. THE NATURE OF THE HEARING AID CONSUMER

A. Introduction

Any careful analysis of the hearing aid industry must begin with an overview of the characteristics of the population of hearing-impaired persons.[36] This is so since the sales practices and representations that highlight the need for the Proposed Rule are most appropriately viewed in light of their effect on the specially vulnerable audience of hearing-impaired persons. Consequently a brief portrayal of some of the distinctive characteristics of that audience is undertaken here.

B. General Demographic Information

While hearing loss is one of the most widespread chronic conditions in America, reliable statistics concerning its prevalence in the United States are difficult to find. Some estimates of the hearing-impaired population run as high as 20 million,[37] while others are as low as 8 or 10 million.[38] The most widely accepted figures are those reported by the National Center for Health Statistics in 1971.[39] According to this survey, there are 14-1/2 million people in the United States who suffer from hearing problems.[40] Moreover, these figures do not include the

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36 For purposes of this Report, the term "hearing-impaired persons" means all those whose hearing noticeably interferes with their ability to communicate. See National Center for Health Statistics, R8/D219ip4; Schein & Delk, SPXA/15.

37 McCurdy, TR31; Plotkin, TR6026-27; see Hull (Senate Hearings, 1973), R8/D227ip300.

38 National Center for Health Statistics (1963), R8/D219ip3; RPAG, R8/2595.

39 Health Resources Administration (1971), R8/D220.

40 Id. at R8/544; accord, Kojis, TR1770; Kloze (Senate Hearings, 1973), R8/D227ip6; MPIRG, R8/1197. About one-half of these people have bilateral hearing losses. Health Resources Administration (1971), R8/528.

1.2 million persons who are living in retirement or nursing homes,[41] where the incidence of hearing impairments is reported to be five times the rate in the general population.[42]

In discussing the hearing-impaired population, it is crucial to note the role of the elderly. Statistics indicate that of the roughly 20 million Americans over the age of 65,[43] approximately 30 percent are hearing impaired.[44] Moreover, it has been estimated that 90 percent of the 1.2 million older Americans who live in nursing or retirement homes have a significant hearing handicap.[45] Older Americans thus constitute a large proportion of the entire hearing-impaired population.[46] Consequently, in addition to the characteristics of the hearing-impaired consumer which may make him vulnerable to unfair sales practices,[47] it must be borne in mind that the consumer is very often an elderly person who is a vulnerable sales target in his own right.[48]

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41 Hull, R8/6186; see Flemming, TR608.

42 Flemming, TR608; Perrin, R8/585; see Hull, R8/6186.

43 See, e.g., Summers, TR8080; Hull (Senate Hearings, 1973), R8/D227ip300; Coleman, id. at 325.

44 Coleman (Senate Hearings, 1973), R8/D227ip325; NCSC, R10/445; see Church (Senate Hearings, 1973), R8/D227ip1.

45 Hull, R8/6186.

46 The 1963 survey of hearing-impaired persons reported that 55% of the persons with a bilateral hearing loss were 65 years of age or older, and that 80% of such persons were 45 years of age or older. National Center for Health Statistics (1963), R8/D219ip6; see Lybarger (Senate Hearings, 1973), R8/D227ip72; Wiedenmayer, id. at 102. In the 1971 study, however, which refers to all hearing impairments, it is estimated that 40% of all hearing impairments are suffered by the 65 and over group, and that 72% of all hearing-impaired persons are 45 years of age or more. See Health Resources Administration (1971), R8/544.

47 See Part One, Section II.G, infra.

48 See Part One, Section II.C, infra.

C. Vulnerability of the Elderly in General

Since it is widely agreed that the majority of hearing aid sales are to elderly persons,[49] it is important to note the susceptibility of many elderly persons to abusive sales practices. Obviously, the characteristcs and abilities of individual consumers vary greatly. Nevertheless, staff believes that the following discussion indicates clearly that the elderly as a group are particularly vulnerable to unfair and deceptive sales practices. Many witnesses expressed the view that the elderly often are a particularly vulnerable sales audience.[50] Indeed, several industry witnesses pointed out this trait.[51] Although other industry witnesses expressed general disagreement with that conclusion,[52] a discussion of some of the peculiar characteristics and circumstances of the elderly reveals many reasons for their increased vulnerability.

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49 See, e.g., Vreeland, TR3855; Hall, TR11059; Lentz, R8/237; Beltone, R13/2036.

50 See, e.g., Finkel, TR4478-79; Pastalan, TR4703-04; Jeffries, TR5629; Gunter, TR8238; Jungheim, TR8892-93; Waddell, R8/5749; Griesel, R10/6799. As long ago as 1965, the Subcommittee on Frauds and Misrepresentations Affecting the Elderly of the Senate Special Committee on Aging pointed out that the exploitation of the elderly through high-pressure sales techniques is both widespread and shameful. Subcommittee on Frauds and Misrepresentations Affecting the Elderly, R8/6037.

51 See, e.g., Gunter, TR8238; Krebs, TR11872. As Dr. Krebs explained:

> I think they [elderly persons] have lower sales resistance than younger people because most of the--and this, let's see, I think I gave some statistics on this--probably one or two a year that we see may have been talked into hearing aids that . . . weren't proper for their hearing loss. It seems like this happens in the senior citizen population. The older the senior citizen is it seems that they are more susceptible to buying things. You think they get more conservative as they get older, but they seem to be talked into something a little easier than the younger people are.

Id. See also Giglia, TR2764.

52 See, e.g., Samole, TR6732-33; Teter, TR10284. See also Clinkscales, TR10629-30.

Considerable evidence was presented concerning the physical deterioration that often occurs with age. In general, a large percentage of the chronic conditions that result in a limitation of activity occur among the elderly.[53] Various physical impairments--including hearing loss, eye trouble, and defects in tactile sense--are more likely to strike as an individual ages.[54] Due to a variety of factors, including a general slowing of the central nervous system, intellectual functioning may begin to drop during the late sixties and early seventies.[55] Relatedly, there is evidence that short-term memory often decreases with advancing age[56] and that the attention span of some older persons is shorter than that of young people.[57] Several individuals indicated that the elderly often tire quickly, which may resulting in an "acquiescent response bias"--a willingness to agree to almost anything in order to terminate a transaction.[58]

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53 The Department of Health, Education, and Welfare reported in 1971 that 44% of all persons aged 65 and over suffer from chronic conditions that limit their activity. See U.S. Department of Health, Education, and Welfare, Current Estimates 16 (1971). Persons in this age bracket thus account for more than one-third of all such chronic conditions in the country. See id. For comparative purposes, the percentage of persons in other age groups who suffer from such chronic conditions is as follows: age 45 to 64--20%; age 17 to 44--8%; age 16 and under--3%. See id.

54 Pastalan, TR4696, 4725-26. HEW reported in 1971 that more than 40% of all serious visual impairments occur to people who are 65 years of age or more. See Health Resources Administration (1971), R8/541. An additional 29% of such impairments strike between the ages of 45 and 64. See id. Similarly, the 65 and over population has nearly 70% of all severe visual impairments, with another 21% occurring in the 45 to 64 age bracket. See id. at 542. While 40% of hearing impairments were reported at age 65 or later, fully 72% of the cases occurred from age 45 on. See id. at 544. Finally, almost a third of the cases of paralysis were suffered by the 65 and over population, with nearly two-thirds of the instances occurring at or after age 45. See id. at 546.

55 Schaie, R8/6240; see Pastalan, TR4712; Tannenbaum, R8/7305.

56 Schaie, R8/6240.

57 Giglia, TR2762; Schaie, R8/6241.

58 Bennett, R8/8594; see Giglia, TR2762; Schaie, R8/6241; Lentz, R8/8002.

The general physical deterioration of many elderly bears significantly on their ability to protect themselves in the marketplace. It may, for example, sharply restrict their mobility, making it difficult or impossible for them to comparison shop or to verify advertising claims.[59] Moreover, many gerontological experts have noted that this physical deterioration often affects the mental and emotional capabilities of the elderly and is a factor in their vulnerability to sales abuses.[60] Only one witness, Darrell Teter, Ph.D., testified for NHAS that there is no such relationship. Specifically, the following exchange took place between witness Teter and the Presiding Officer:

> Q. Are you saying, sir, that in your opinion at least, there is no relationship between physical deterioration and deterioration emotionally or mentally?
>
> A. I am saying that there is no correlation between those two.[61]

This statement, however, is "in diametric opposition to the comments of established authorities in the area of aging."[62]

In addition to the physical decrements that may accompany the aging process, many experts have identified distinct psychological patterns among the elderly,[63] particularly their withdrawal and social isolation.[64] Although it has been hypothesized that this withdrawal is a voluntary act on the part of the elderly,[65] in many instances it derives from the relative immobility of that population.[66] In either case, the individual is much more

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59 Adkins, TR6071; MPIRG, R8/1215; see Lentz, R13/1749.

60 Schaie, R8/6238-41; Tannenbaum, R8/7305-06; see Pastalan, TR4703-04; Lundberg, R13/4157.

61 Teter, TR10291.

62 Lentz, R13/1749.

63 See generally Chown, R8/D683.

64 Pastalan, TR4704; Chown, R8/5903; Bennett, R8/8592, 8618-22, 8725; see Waddell, R8/5749-51; Tannenbaum, R8/7306; Adkins, R10/5318.

65 See Bennett, R8/8592-93.

66 A large number of witnesses testified concerning the immobility of the elderly population. E.g., Flemming, TR622; Brickfield, TR1460, 1461; Pastalan, TR4696, 4716, 4725; Vick, TR10565.

likely to be lonely and, consequently, is "susceptible to the blandishments of salesmen because they receive attention and a sort of pseudo-friendship which allay suspicion and doubt."[67] Indeed, the mere fact that this withdrawn, immobile population is likely to be at home makes them particularly subject to the hazards of door-to-door sales.[68] Moreover, the withdrawal of a particular elderly person may mean that there is no one on whom he or she can rely for consumer guidance.[69]

Many older persons are quick to rely on the advice of anyone who presents himself as an expert in his particular field.[70] This tendency may be related to the educational experiences of the elderly. It has been estimated that one-half of those over 65 years of age did not advance beyond the eighth grade in school, while more than three-fourths of such persons have a twelfth grade education or less.[71] Moreover, the little education received by most elderly persons has often been rendered obsolete by

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67 Waddell, R8/5750; see Pastalan, TR4704, 4738-39; Rich (Senate Hearings, 1967), R8/7214; Tannenbaum, R8/7306; Butler, Why Are Older Consumers So Susceptible?, Geriatrics (December 1969), HX140/84.

68 Pastalan, TR4704.

69 Tannenbaum, R8/7306; Waddell, R8/5750; Traynor, R8/6140; Bennett, R8/8592. It is noteworthy that two-thirds of the elderly over age 65 are female, Tannenbaum, R8/7305; Bennett, R8/8593, while three-fourths of those over age 75 are female. Id. Several experts noted that the upbringing and life experiences of women born early in this century may have left them unprepared to handle business and consumer affairs formerly taken care of by their husbands. See Rich (Senate Hearings, 1967), R8/7213-14; Tannenbaum, R8/7305; Bennett, R8/8593.

70 E.g., Schein, TR200; Schreiber, TR4053; Tobin, TR4094; Pastalan, TR4704, 4731; Bennett, R8/8594. A sales technique often employed by hearing aid sellers is the creation of an aura of seller expertise. See Part One, Section IX.D.2, infra.

71 Health Resources Administration (1971), R8/553. Others have estimated that two-thirds of the elderly received no more than an eighth grade education, Waddell, R8/5750; Lawton (Senate Hearings, 1967), R8/7215, and that 90% of such persons have a twelfth grade education or less. Id. See also Pastalan, TR4703; Summers, TR8066.

the phenomenal pace of modern technology.[72] Finally, because they grew up in an age when "consumerism" did not exist, elderly persons subjected to sales abuses are often unable or unwilling to pursue their rights.[73]

D. The Prevocationally Deaf Hearing Aid Consumer

A small, but nevertheless important, segment of the total hearing-impaired population can be classified as "deaf."[74] Although estimates vary somewhat,[75] the most recent and carefully

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> It is not surprising that the products of this rapidly advancing scientific age do confuse the older people. After all, during their lifetime, mankind has passed from the horse nearly to interplanetary travel, from voice communication to TV by satellite transmission, and from bedside symptomatic medicine to cardiac transplants. When a senior citizen has seen so many, once-impossible things, become reality during a single lifetime, it is hard to expect that he could differentiate between the true and the alleged miracles when both are being announced with the same amount of "advertising agency" fanfare.

Lawton (Senate Hearings, 1967), R8/7215; see Pastalan, TR4710; Schaie, R8/6238.

73 See, e.g., Bowen, TR1907; Luzi, TR7718; Hayes, R8/4962; cf. Appendix F, Section VII.B, infra.

74 Unfortunately, there is little standard terminology in the field of hearing impairments. Schein, TR212. For purposes of this report, the term "deafness" will refer to "the inability to hear and understand speech." Id. at 213.

75 Compare Corso, R8/9025 (236,000), and Levine, R8/5703 (250,000), with Alpiner, R8/5491 (300,000), and Alexander Graham Bell Ass'n for the Deaf (Senate Hearings, 1973), R8/D227ip340 (400,000). The discrepancies in these and other estimates may be due to varying definitions of the term "deafness." See note 74 supra. In addition, until 1974,

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prepared survey indicates that there are more than 1.7 million such persons in the United States.[76] Of particular interest here are the 410,000 persons who are classified as "prevocationally deaf;"[77] i.e., those who lost the ability to hear and understand speech prior to 19 years of age.[78] Because there is evidence that deaf persons[79] and the parents of deaf children[80] are especially vulnerable to selling abuses with respect to hearing aids, an examination of some of the characteristics of this relatively small group seems appropriate.

1. Education

Despite the obvious need for special educational programs for deaf children,[81] it has only recently become widely accepted

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75 (Continued)

the last nationwide study of the deaf population was conducted by the United States Bureau of the Census in 1930. Schein & Delk, SPXA/1.

76 Schein & Delk, SPXA/16.

77 Id. at 15.

78 This is the definition of prevocational deafness that was utilized by the authors of the 1974 survey, id. at 2, and it is adopted for purposes of this report.

79 See, e.g., Bowen, TR1910; Schreiber, TR4053; Bowen, R8/6954; Schein, R8/7806, R10/34.

80 See, e.g., Corbett, TR172-73; Bowen, R8/6951-52; Silverman, R8/7330; Schein, R8/7824-25.

81 Schein & Delk, SPXA/47. This is especially true for the "prelingually deaf" child; i.e., the child who either was born deaf or lost the ability to hear speech before the age of 3. Id. As one writer on deafness noted:

> Not to hear the voice is not to hear spoken language. Not to hear spoken language means that a preverbal child will remain in complete ignorance of this basic verbal tool for human communication and communion unless extraordinary measures are taken to teach him that there are such things as words, what words are for, how sounds are combined to form spoken words, how words are combined to form connected language,

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that early education is important for this group.[82] Approximately one-fourth of all deaf persons aged 25 to 34 began school before the age of 5,[83] while less than 4 percent of those aged 55 to 64 did so.[84] This may mean that older prevocationally deaf persons suffer from an even greater educational deficit than that of the average prevocationally deaf individual.[85] It is also noteworthy that the predominant educational facility for deaf children is the residential school; i.e., a school that provides living quarters for its students during the school year.[86] As a result, the deaf child may spend much of his time separated, at least physically, from the society with which he must eventually interact.

Irrespective of the type of school attended or the age of entry, however, it is clear that the prevocationally deaf individual suffers a significant educational disability. Although more than one-third of the deaf population has completed high school, and 12 percent have attended college for one or more years,[87] these figures do not begin to approach the 62.5 percent

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81 (Continued)

> and how verbal language is applied not only to objects, people, activities, and the like but to all aspects of living, feeling, thinking, and reasoning.

Levine, R8/5704; see D. Johnson, R8/6901; Rupp, R8/7126.

82 Schein & Delk, SPXA/47.

83 Id. at 47-48. Nearly 48% of individuals in this age bracket began school by the age of 5, and more than 80% had begun by the age of 6. See id. at 48.

84 Id. Less than 20% of the persons in this age group had begun school by the age of 5, and less than half of them began by the age of 6. See id. Indeed, more than 30% of all deaf persons aged 55 to 64 did not enter school until they were at least 8 years old. Id.

85 See notes 86-93 infra and accompanying text.

86 Schein & Delk, SPXA/49. The likelihood that a deaf child will attend a residential school is influenced by the age at which the impairment occurs, with those deafened at an early age being most likely to attend a residential school.

87 Id. at 51.

of the general population aged 25 and over that have completed high school or the 26.3 percent that have attended college.[88] More importantly, over half of the adult deaf population has not completed high school,[89] and fully 28 percent have an eighth grade education or less.[90] There is also considerable evidence that the deaf student generally does not achieve as much academically as his counterpart in the general population.[91] On standard achievement tests, the average deaf adult scores at approximately the fifth grade level.[92] In short, because of the difficulty of linguistic, and thus educational, development in the absence of functional hearing,[93] the prevocationally deaf individual suffers a significant educational handicap as compared with his hearing peers.

2. Work Background and Income

The severe developmental problems often associated with prevocational deafness translate directly into economic consequences. Admittedly, the overall percentage of prevocationally deaf adults who are unemployed is somewhat less than the comparable statistic for the general population.[94] When these figures are broken down according to sex and race, however, the favorable position of the prevocationally deaf disappears. Deaf females and nonwhite

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88 United States Department of Commerce, Bureau of the Census, Statistical Abstract of the United States 124, Table 200 (1976). Nearly 14% of the 25 and over population graduate from college, id., but only 6% of the prevocationally deaf population do so. Schein & Delk, SPXA/51.

89 Schein & Delk, SPXA/51. Only 37.5% of the general population failed to complete high school. See United States Department of Commerce, supra, note 88 at 124, Table 200.

90 Schein & Delk, SPXA/51. Only 21.9% of the general population have an eighth grade education or less. See United States Department of Commerce, supra note 88 at 124, Table 200. It is noteworthy that when persons aged 55 and over are excluded from this computation, the figure falls well below 20%. See id.

91 Schein & Delk, SPXA/8; see Syfert, TR5207; Levine, R8/5728.

92 Schein, TR229; Bowen, TR1907; Rupp, R8/7127. Frederick Schreiber testified for the National Association of the Deaf that the average reading level of a deaf adult is 3.5 years of school. Schreiber, TR4054.

93 See note 81 supra.

94 Schein & Delk, SPXA/74.

deaf persons experience significantly higher unemployment rates than do their counterparts in the general population.[95] Similarly, although deaf persons are represented in virtually all occupational fields,[96] more than 60 percent of them are employed as craftsmen and machine operators.[97] Moreover, the prevocationally deaf individual is often the victim of substantial underemployment; i.e., employment in a position incompatible with his intelligence, skills, and education.[98] For example, nearly 43 percent of deaf adults who have completed 13 or more years of school hold positions as clerical workers, machine operators, laborers, and service and household workers.[99]

Predictably, the lowered educational attainment and occupational status of prevocationally deaf individuals produce a noticeable economic impact. The incomes of families headed by prevocationally deaf adults, for example, fall significantly below comparable figures for the general population.[100] The personal income levels of employed deaf individuals present an even more distressing picture. Deaf earnings are only 72 percent of those for individuals in the general population.[101] Indeed, more than 40 percent of all prevocationally deaf adults earn less than $5,000 per year,[102] with the median income for all such persons being only $5,915 per year.[103]

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95 See id. at 74-76.

96 See id. at 79-81.

97 See id. at 82. Only 9.2% of the prevocationally deaf are employed in professional and technical positions. Id. In contrast, more than 15% of the general population is so employed. See United States Department of Commerce, supra note 88, at 372, Table 600.

98 Schein & Delk, SPXA/83.

99 Id. at 85, 86.

100 Id. at 99. The median income of families with prevocationally deaf heads of household is 84% of the United States average. Id. Once again, when the statistics are analyzed according to race and sex, the disparity between the general and deaf populations increases. Both nonwhite and female deaf heads of household have median family incomes that are 74% of those for their respective counterparts in the general population. Id.

101 Id. at 101.

102 See id. at 102.

103 Id. At the time of the survey, the median income for the general population was $8,188 per year. Id.

3. Other Disabilities

In addition, prevocationally deaf individuals are relatively likely to have additional handicapping conditions. One out of every three such persons suffers from a disability in addition to deafness.[104] Moreover, the incidence of added disabilities is even higher for deaf students than for the total prevocationally deaf population. Approximately 40 percent of the students who are in school[105] suffer from physical and mental conditions that may create an educational problem.[106]

Finally, it is crucial that the data presented in this section be considered cumulatively. The mere fact that a prevocationally deaf individual is relatively likely to suffer an additional handicap does not, without more, indicate much about the nature of the prevocationally deaf population. But this fact must be considered in conjunction with the likelihood that such a person will suffer a quantitative and qualitative educational deficit, substantial underemployment, and a decreased income level. It is this matrix of circumstances that indicate that the marketplace abilities of the prevocationally deaf person simply are not commensurate with those of the average American consumer.

E. The Elderly Hearing Aid Consumer

Of the 14-1/2 million hearing-impaired persons in the country, nearly 40 percent are age 65 or older.[107] The general vulnerability

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104 Schein & Delk, SPXA/122. More than 8% of the prevocationally deaf population have an asthma condition in addition to a communicative disability, and 39% have a vision problem. Id. at 123.

105 This figure does not include children who are in long-term, custodial care. Id. at 124.

106 Id. at 124-25. For the academic years ending in 1969, 1970, and 1971, the percentages of deaf students with additional handicaps were 42%, 42%, and 39.3%, respectively. Id. at 125. When the figures for all 3 years are averaged, the most frequently reported disabilities were behavioral/emotional problems (11.6%), mental retardation (7.4%), perceptual-motor disorders (5.5%), and severe visual defects (4.5%). See id.

107 Health Resources Administration (1971), R8/544. For additional statistics concerning the number of elderly hearing-impaired persons, see note 46 supra.

of persons in this age group has already been discussed.[108] Their physical, mental, and emotional deterioration, their comparatively low educational attainment, and a number of other factors all help to make this group a vulnerable sales audience.[109] While these characteristics also describe the elderly hearing aid consumer, the peculiar circumstances of the elderly person who is hearing impaired make him even less capable of defending himself in the marketplace.

1. Education

The most recent survey of the hearing-impaired population[110] reveals that of the 5,695,000 hearing-impaired persons aged 65 or more, 55 percent of the heads of households have received less than 9 years of education,[111] and 68 percent have not completed high school.[112] In the total hearing-impaired population, on the other hand, only 38 percent have less than 9 years of schooling,[113] while roughly 55 percent have not finished high school.[114] This compares quite unfavorably to the general population of the United States, where only 23 percent of the heads of households attended school for less than 9 years,[115] with

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108 See Part One, Section II.C, supra.

109 See id.

110 See Health Resources Administration (1971), R8/544. Statistics describing the educational attainment of the entire hearing-impaired population have thus far been unavailable. The 1963 survey included only those individuals with a bilateral hearing loss, although it does report the educational attainment of the hearing-impaired person himself. See National Center for Health Statistics (1963), R8/D219ip23. The study reported that 64% of the bilaterally hearing-impaired persons aged 65 and over had less than 9 years of education. See id. Of the total number of persons with a bilateral hearing loss who were at least 17 years of age, 56% had completed less than 9 years of schooling. See id. Only 27% of those aged 17 to 44 had not advanced beyond the eighth grade. See id.

111 See Health Resources Administration (1971), R8/544; accord, Pastalan, TR4703; Summers, TR8066.

112 See Health Resources Administration (1971), R8/544.

113 See id.

114 See id.

115 See id. at 553.

only 40 percent having failed to complete the twelfth grade.[116] In short, the elderly hearing-impaired person suffers from a significant educational deficit vis-a-vis every other comparable population group.[117]

2. Income

Not surprisingly, the elderly hearing-impaired population also rests on the lower rungs of the income ladder.[118] In 1971, 38 percent of the families with an elderly hearing-impaired member earned less than $3,000,[119] while an astonishing 60 percent had income below $5,000.[120] Only 23 percent of the families in the total hearing-impaired population earned less than $3,000,[121] and only 38 percent earned less than $5,000.[122] The most significant comparison relates to the general population, where only 10 percent of the families in the country had incomes below $3,000 in 1971,[123] and only 20 percent earned less than $5,000.[124]

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116 See id.

117 According to the general population figures that were utilized for purposes of the 1971 survey, 50% of the family heads in households containing an elderly person attended school for less than 9 years. See id. The data also shows that 65% of such persons failed to complete high school. See id.

118 Consistent with its treatment of educational attainment, the 1971 survey reported the family income of families with a hearing-impaired member. Id. at 544. The 1963 survey also recorded only family income information. See note 125 infra.

119 See Health Resources Administration (1971), R8/544.

120 See id.

121 See id.

122 See id.

123 See id. at 553. (1971 figures).

124 See id. In the general population aged 65 and over, 33% had family incomes under $3,000, while 54% of the families earned less than $5,000. See id. Furthermore, 50% of the elderly persons who were living alone or with nonrelatives earned less than $2,956 in 1974. Ginsburg, R10/428; NCSC, R10/445.

Once again, the combined effects of advancing age and hearing loss produce a population whose economic position is substantially worse than that of other population groups.[125]

3. Other Disabilities

The general physical deterioration of the elderly population, as well as the increased likelihood that such persons will suffer from a variety of chronic conditions, have already been noted.[126] These consequences of the aging process are equally applicable to the aging hearing impaired. In addition, specific data are available concerning the prevalence of visual problems among the elderly hearing-impaired population.[127] In its 1963 survey of all persons with a bilateral hearing loss, the Department of Health, Education, and Welfare reported that 5.4 percent of such persons suffered from a "severe visual impairment,"[128] and that an additional 12.1 percent had other visual impairments.[129] In contrast, 8.8 percent of the bilaterally hearing-impaired persons aged 65 or more reported severe visual impairments,[130] while another 17.7 percent of such persons suffered from less serious eye problems.[131] Thus, more than one-fourth of the hearing-impaired population in the 65 and over age bracket is further hampered by a visual problem.[132] Not only is this percentage substantially larger

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125 In the 1963 survey of individuals with a bilateral hearing loss, 42% of the persons aged 65 and over had family incomes below $2,000 and 67% had incomes under $4,000. See National Center for Health Statistics (1963), R8/D219ip22. Out of the entire bilaterally hearing-impaired population, only 31% of the families earned less than $2,000, while roughly 55% of the family incomes were under $4,000. See id.

126 See Part One, Section II.C, supra.

127 See National Center for Health Statistics (1963), R8/D219ip43.

128 Id. For purposes of the survey, a person was classified as having a "severe visual impairment" if he was "unable to read ordinary newspaper print even when wearing glasses." Id. n.3.

129 Id. at 43.

130 Id. Less than 1% of those under 45 years of age, and only 2.3% of those aged 45 to 64, reported severe visual impairments. Id.

131 Id. Only 4.4% of those under 45 years of age, and 6.3% of those aged 45 to 64, reported other visual impairments. Id.

132 See id.

than that for any other segment of the hearing-impaired population,[133] it is much higher than that for any age group in the general population.[134]

The foregoing evidence demonstrates that the documented vulnerability of elderly persons as a group[135] is greatly compounded by the presence of a hearing impairment.

F. The Psychology of Deafness

Any discussion of a special "psychology of deafness" is hampered both by the paucity of scientific data on the subject and the individual nature of reactions to physical disabilities.[136] There is general agreement, however, that certain psychological traits appear quite frequently among hearing-impaired persons. These reactions to hearing loss impact significantly upon the behavior of such persons in the marketplace.

Hearing-impaired persons,[137] and particularly the elderly hearing impaired,[138] tend to withdraw from the rest of society. A variety of factors help to explain this withdrawal. The initial reaction of many individuals to their hearing loss often has been

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133 In both of the other age groups reported, the prevalence of visual impairments of any kind was less than 10%. See id.

134 See Health Resources Administration (1971), R8/541.

135 See Part One, Section II.C, supra.

136 Edward J. Hardick, Ph.D., an Associate Professor of Audiology at Wayne State University, suggested that there is not, strickly speaking, a "psychology of hearing loss." Hardick, R10/6401. He believes instead that there are "psychological reactions to illness or impairment and generally the reactions are the same whether we are talking about hearing loss, impaired vision, debilitating disease, or life threatening conditions." Id. Professor Hardick concedes, however, that "different conditions will impose their own unique alterations in life-style." Id.

137 See, e.g., Flemming, TR625; Stein, TR8971; Gardner, R8/4154-55; Pastalan, R10/418. Many witnesses associated with industry also expressed this view. See, e.g., Oberhand, TR3034; Elia, TR7513-14; ZumBrunnen, TR11927, 11995; Payne, R8/1459.

138 See, e.g., Hull, R8/6809; Lentz, R8/7903; Corso, R8/8974. The general tendency of the elderly to withdraw from the community, see notes 64-69 supra and accompanying text, is accentuated by the onset of a hearing loss. See Lentz, R8/7903.

a sense of shame and an accompanying desire to conceal the loss.[139] As a result, in many cases the individual will wait for years before taking any steps to remedy the disability.[140] In the interim, the hearing-impaired person gradually withdraws from interaction with both family and friends.[141] This occurs, at least in part, because "[f]rustration, ambiguity, [and] embarrassment . . . eventually become such an integral part of oral comunication that interpersonal relationships become more threatening than rewarding."[142] There is also a physical aspect to the withdrawal of the hearing impaired, however:

> By its very nature, decreased hearing ability simulates the sensation of increased distance between the person and the source of sound. As hearing fades, sound seems to be coming from farther and farther away. Ultimately, some sounds disappear altogether; others are distorted; patterns of sound are no longer recognizable. The resultant sensation of isolation, of detachment from the world, is forced upon all whose hearing no longer serves to keep them in "touch" with life.[143]

Thus, in addition to the communicative limitations imposed by the hearing loss itself, many individuals react to the disability by further restricting their interaction with family, friends, and society.

The other traits common to hearing-impaired persons are their timidity and passivity. Timidity, in this context, refers to the tendency of the hearing impaired to defer to the expertise of

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139 See, e.g., Rich (Senate Hearings, 1968), R8/988; P.O. Report, R9/D1ip42, 150; Anthony, R10/3450; Penalver, R10/4456. Hearing aid advertising does little to soothe these feelings of shame. Vicon, for example, runs ads that offer to send a free booklet on hearing aids in a "plain envelope." Vicon, R8/2320. Similarly, the testimony of Mrs. Lily Corbett is striking in its revelation of the psychological reactions of an early deafened child when confronted with an ad that, in her recollection, stated: "Ashamed to be deaf?" See Corbett, TR170-72.

140 See notes 161-66 infra and accompanying text.

141 See, e.g., Kojis (Senate Hearings, 1968), R8/1022; HEW Task Force Report, R8/3200-01; Epstein, R10/421; American Association of Retired Persons, R10/1178; Teder, R13/2208.

142 Gardner, R8/4154-55; see Hardick, R8/6851.

143 Levine, R10/5738-39.

an authority figure.[144] Early deafened individuals, often have been educated in separate, residential schools,[145] where they were taught to accept the superiority of the hearing world.[146] Not only do hearing-impaired individuals tend to be easily intimidated and deferential, however, they also are often relatively passive,[147] i.e., they tend simply to accept, rather than attempt to control, the situations in which they find themselves.[148] When they are treated unfairly as consumers, this attitude often leads them to believe that they are at fault, or that no one is at fault, but not that the other person has deceived them or taken advantage of the situation.[149]

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144 See, e.g., Stroup, TR991; Schreiber, TR4048; Tobin, TR4094; Rupp, R8/7129. It has already been noted that this trait is common among the elderly, see notes 63-65 supra and accompanying text, who constitute the majority of hearing aid purchasers. The existence of the trait is also demonstrated by the great deference typically accorded to hearing aid sellers, who are perceived by the hearing impaired as experts. See notes 193-96 infra and accompanying text.

145 See Bowen, TR1909; note 86 supra and accompanying text.

146 See Schreiber, TR4053. The experience of deaf persons leads them

> in other situations, even in this market situation, to accept as valid, to accept as true what other people tell [them]. Here is an authority figure. Here is a person who perhaps has got a nice title. You are not going to question that. That person tells you this is the best aid there is. Well, it is not your habit to question people when they tell you things like that. That is not your training. That is not your full background.

Schein, TR200; see Silverman, R8/7333.

147 See Levine, R8/5736-37; Rupp, R8/7129; Schein, R10/36-37.

148 See, e.g., Bowen, TR1909; Schwartz, TR4882; Rassi, TR5750; Schein, R10/36.

149 See, e.g., Schein, TR177; Corbett, TR183-84; Hull, R8/6140; O'Sullivan (ASHA Rebuttal), R13/4217-18.

Thus, in addition to the physical circumstances, level of education, and socioeconomic status of the hearing-impaired population,[150] the psychological traits that typify this group make them readily susceptible to abusive sales practices. Because they are withdrawn and lonely, the promise of improved communication--or even the opportunity to talk to a salesperson for a while--will be welcome.[151] Because they are timid and are easily swayed by the seeming expert, they can be overpowered by a sales presentation that plays upon these tendencies.[152] Finally, because they are passive and hesitate to complain, an unbeneficial purchase may just be accepted without an effort being made to obtain a refund.[153] Like the other characteristics of hearing-impaired persons that have already been discussed, these psychological traits create a special vulnerability, with added protection for this group being necessary.

G. Specific Characteristics of Hearing Aid Consumers

Hearing aid consumers, like other groups of consumers, differ considerably in their attitudes and behaviors. Some recognize their hearing loss soon after its onset and quickly take steps to remedy the problem. Some are sufficiently knowledgeable concerning hearing loss and hearing aids that they seek appropriate hearing health care and, if amplification is necessary, adjust rapidly to its limitations. Some shop carefully for the best buy. Despite differences among individual consumers, however, staff believes that the characteristics presented in this section are typical of hearing-impaired individuals. Moreover, as subsequent portions of this report will make clear, hearing aid sellers often take advantage of these traits--sometimes quite subtly--in generating and finalizing hearing aid sales.

1. Reluctance to Acknowledge Loss and Seek Assistance

It is widely recognized, and is stressed by industry, that hearing-impaired persons are reluctant to admit, either to

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150 See Part One, Sections II.D & E, supra.

151 See, e.g., Bowen, TR1908-09; Giglia, TR2739; Hull, R8/6811.

152 See Part One, Section II.G.3, infra. Indeed, the sales manuals provided by manufacturers to their dealers typically emphasize that the first step toward the completion of a successful sale is the establishment of an aura of seller expertise. See Part One, Section IX.D.2, infra.

153 See Bowen, TR1943-44; Alpiner, R8/5436; Schein, R8/5827-28. But see Barnow, TR1693-94.

themselves or to others, the existence of their handicap.[154] Although one witness suggested that the parents of hearing-impaired children do not share this tendency,[155] the consensus is that the hearing impaired believe that

> Those with a hearing loss and those who wear hearing aids are stigmatized by the rest of society. This feeling on the part of the hearing impaired individuals contributes to their reluctance to admit to themselves and to others that they have a hearing loss.[156]

A variety of factors account for this attitude. Retired persons, for example, often are less active than others, both mentally and physically; consequently, they may be slower to notice an impairment.[157] Some individuals, regardless of their age, consider a hearing loss to be a sign that they are getting old.[158] Moreover, "the societal attitude toward a hearing impairment, as contrasted with a visual impairment, seems to be laden with ridicule and shame rather than sympathy."[159] Whatever the cause of this denial mechanism, the typical effect is that the hearing-impaired person blames others for his inability to hear them.[160]

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154 See, e.g., Campagna, TR2597-98; Fortner, TR2856-57; Fechheimer, TR6963-64; Gardner, R8/4181; Hardick, R8/6851; Silverman, R8/7332.

155 Feder, TR8526. But see D. Sanders, SPXB/342.

156 Silverman, R8/7332; see K. Johnson, TR4381; Alpiner, R8/5488.

157 See Corso, R8/8967.

158 See, e.g., Barnow, TR1626-30; Scott, TR2321; Glorig, R8/2005; P.O. Report, R9/Dlip42; Winslow, R10/6937.

159 Gardner, R8/4181.

160 See Barnow, TR1626; P.O. Report, R9/Dlip42. Jerome Alpiner, Ph.D., pointed out at R8/5435 that:

> Often, since their hearing loss came on gradually, patients assume that the problem is an external problem and are not aware that there is a problem within themselves. They may ask their friends and family "why you are mumbling" and make other such statements. After a while when they have trouble with more people they may . . . realize and accept the fact that they have a hearing loss.

Even when an individual is finally forced to admit the existence of a hearing deficit,[161] it may be some time before any attempt is made to remedy the problem. Industry witnesses testified that this interim period may last for as much as 5 or 10 years.[162] On the other hand, a recent survey of Utah hearing aid users revealed that 61 percent of the respondents purchased their hearing aids less than 1 year after they "realized [they] might need an aid."[163] Even when an extended delay does occur, it may be due to a lack of information concerning the available sources of hearing health care.[164] In addition, many persons fail to seek assistance because the $350 to $400 investment in a hearing aid[165] is beyond their limited financial means.[166]

Perhaps the most important reason for any delay in seeking assistance, then, is the feeling of social stigmatization that

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161 Eventually, a hearing loss may become a threat to one's job, see Frisina, R8/6905, or family and friends may push an individual into recognition of the problem. See, e.g., Beltone, R3/3439; Alpiner, R8/5435; Giglia, R10/2922; Vreeland, R10/3417; Teder, R13/2208.

162 See, e.g., Barnow, TR1632 (5 years); Scott, TR2321 (same); Kojis (Senate Hearings, 1968), R8/880 (same); Campagna, TR2598 (10 years); Staab, TR7038 (same).

163 Powers, R13/980. When those who bought aids within 1 to 3 years are added, the survey shows that 82% of the 137 respondents purchased their aids within 3 years of recognizing their loss. See id.

164 See HEW Task Force Report, R8/3232; Powers, R13/976 (35% of respondents stated that they were "unaware" or "totally unaware" of where to go for help when their hearing loss first occurred); notes 172-76 infra and accompanying text.

165 This is the average cost of a hearing aid. Consumers Union, R8/1191b; RPAG, R8/2660; see Part One, Section III. J.1, infra.

166 See, e.g., K. Johnson, TR4259; Griesel, TR9381, 9418; HEW Task Force Report, R8/3232; Harrison, HX154/11. Several industry witnesses pointed out that some candidates for amplification have refused to accept free hearing aids, however. See Barnow, TR1630-31; Kojis, TR2072-73; Minnesota Hearing Aid Industry, R8/1297.

people feel accompanies hearing aid use.[167] Vanity, in other words, is often a factor in the person's refusal to seek a remedy for hearing loss.[168] Because a hearing aid has generally been perceived as a sign of old age--or even of stupidity[169]--many people simply refuse to advertise a disability that they consider shameful.[170] Several persons faulted hearing aid advertising for creating or fostering this attitude by stressing the shamefulness of hearing loss and for playing upon consumer vanity by emphasizing the miniaturization of hearing aids.[171] When the effect of such advertising is considered in conjunction with current attitudes toward hearing loss and hearing aids, and the bad experiences many people have had with hearing aid purchases, it is small wonder that many hearing-impaired individuals refuse to seek assistance for their disability.

2. Ignorance About Hearing Loss, Hearing Aids, and Members of the Hearing Health Delivery System

When a hearing-impaired person finally recognizes his disability and decides to remedy the situation, efforts toward rehabilitation are hampered by a dearth of consumer information. Hearing-impaired persons generally know almost nothing about the nature of hearing loss.[172] This problem may be particularly acute for members of the deaf population, whose sources of information

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167 See Gardner, R8/4159. Several witnesses testified that peer group pressure makes it especially difficult to get children who have reached their early teens to continue wearing their hearing aids. See Corbett, TR171; Rose, TR469; Stein, TR8977.

168 See, e.g., A. Smith, TR8149; Anthony, TR8496; Beiter, TR9952.

169 The label "deaf and dumb," which is often attached to the hearing impaired, exemplifies the social judgment that such persons lack intelligence. Scott, TR2321; see Burris, TR2500. This characterization is not lost upon the hearing impaired. As Robert Winslow noted: "The hard-of-hearing person says to himself, if I wear a hearing aid, I am advertising to the world . . . that I may be mentally deficient . . . ." Winslow, R10/6937.

170 See, e.g., Zelnick, TR438; Fechheimer, TR6966; Sandlin, TR10124; Alpiner, R8/5488.

171 K. Johnson, TR4259, 4381; Rosenberg, R3/4145; see Corbett, TR170-71.

172 See, e.g., B. Smith, TR334; Morgan, TR9508; Scitovsky & Hardy (Senate Hearings, 1963), R8/700; Lentz, R8/8195.

are limited[173] and who often have difficulty comprehending written material.[174] Surely a hearing-impaired individual cannot properly evaluate a recommended remedial procedure without at least a basic understanding of the fundamentals of hearing loss.[175] The Presiding Officer found that "[w]hen those with suspected hearing losses begin to explore the hearing health care delivery system, they

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173 Dr. Jerome Schein pointed out that deafness severely restricts one's ability to shop, use the telephone, or engage in face-to-face interviews with vendors. Schein, R10/38. Similarly, radio and television are not good sources of market information for such persons. Id.

174 Id.; see note 92 supra and accompanying text. The parents of deaf children may fare little better. Fern Feder, the parent of a deaf child and a teacher of the deaf, noted

> In speaking with other parents I don't really feel that they understand the implications of hearing loss . . . . I have seen it with parents of 20-year old children where they still don't understand what is involved in this kind of hearing loss that their child has. [TR8517-18].

175 See Drew & Eiler, R10/5182. Donald Morgan, Ph.D., articulated the ramifications of consumer ignorance quite well.

> [I]f a person who has very limited understanding of the nature or extent of their own hearing impairment is told by a sales person that a given hearing aid worn on a given ear is the very best help available at the present time, then that consumer may have no reason whatever to complain to a physician, to an audiologist, to the District Attorney, or to the Hearing Aid Dispensers Examining Committee even though the hearing aid is being used on a non-functional ear or is otherwise completely inappropriate. That consumer needs accurate information . . . . The consumer does not know he has been given inaccurate information and advice. [TR9509].

generally know little, if anything, about the nature, variety and causes of hearing impairments . . . ."[176] Staff agrees.

The hearing-impaired population is equally ignorant concerning the benefits and limitations of amplification devices. Despite general agreement that hearing aid consumers should be apprised of the limitations of the device,[177] witnesses repeatedly testified to the low level of consumer knowledge that characterizes the hearing aid market.[178] Many persons anticipate that through amplification their normal hearing can be restored;[179] others believe that speech sounds will be clarified, particularly when they occur against a background of noise.[180] That these erroneous beliefs[181] are held confirms what several witnesses describe as the extreme naivete of potential users when they first confront this specialized market place.[182] As Roger Kasten, Ph.D., noted:

> [M]any naive potential users equate the use of a hearing aid to the use of eye glasses. They realize that defective vision can be returned to normal and they expect that defective hearing can also be returned to normal. Unless they are made fully aware that this is not true, and all too often this does not appear to happen, they tend to become dissatisfied and disgusted with the product they have purchased.[183]

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176 P.O. Report, R9/Dlip151.

177 See, e.g., Wilson, TR10023-24; Bowe, R8/6952; J. Sanders, R8/7597; Naiman, R8/8580; D. Sanders, SPXB/335-36. For a detailed discussion of the limitations of hearing aids, see Appendix F, Section II.C, infra.

178 E.g., Lentz, TR11233; S. Graham, R8/5284; Bartels, R10/5623; see Brewer, TR3963; Beiter, TR9034.

179 See, e.g., Martinucci, TR8432; Schmitz, R8/7267; J. Sanders, R8/7597; Kasten, R10/70; Powers, R13/1023.

180 See Alpiner, R8/5434; Bowe, R8/6952; D. Sanders, SPXB/335-36.

181 Schmitz, R8/7267; see Appendix F, Section II.C, infra.

182 E.g., Kojis, TR2121; Giglia, TR2757; Heisse, TR3314; see Stallons, TR7869.

183 Kasten, R10/70 (emphasis added).

Indeed, hearing aid advertising often fosters such unreasonable expectations, instead of discouraging them.[184] Whatever the causes, there is considerable evidence that ignorance and unrealistic consumer expectations regarding the likely performance of a hearing aid are responsible for many hearing aid sales that prove, ultimately, to be unsatisfactory.[185]

It is also significant that some consumers do not even know of the existence of medical ear specialists and audiologists.[186] Other hearing-impaired persons are largely unaware that the skills and professional qualifications of the various members of the hearing health delivery system differ substantially.[187] Many persons have noted, for example, that consumers often refer to their hearing aid sellers as "Doctors"[188] or confuse them with audiologists:[189] i.e., persons who generally have at least a graduate degree in audiology.[190] Indeed, hearing aid sellers may encourage these mistaken impressions.[191] As a result, many hearing aid consumers obviously do not realize that the member of the delivery system who has the least education and training

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184 See, e.g., Schmitz, R8/7267; J. Sanders, R8/7597; P.O. Report, R9/D1ip156; Kasten, R10/70. See also Part One, Section III.D, infra.

185 See, e.g., Wilson, TR10023-24; Bowe, R8/6952; J. Sanders, R8/7597; Naiman, R8/8580; D. Sanders, SPXB/335-36.

186 See Kasten, R5/1438; RPAG, R8/2613; Warren, R8/5310. This lack of awareness may be attributable to the fact that doctors and audiologists, unlike hearing aid sellers, have been prohibited in the past by their ethical codes from advertising. See Eichelberger, TR8677; McLaughlin (HEW Task Force Hearings), R8/3463.

187 See, e.g., Shannon, TR1860-61; Rose, R8/4185; Lentz, R8/8000.

188 E.g., Loavenbruck, TR1547; Shannon, TR1860-61; S. Graham, R8/5278; Hull, R8/6138.

189 E.g., Griesel (HEW Task Force Hearings), R8/3428; S. Graham, R8/5278; Alpiner, R8/5433; Hull, R8/6138; see P.O. Report, R9/D1ip144-45.

190 The professional qualifications of members of the hearing health delivery system are treated in Part One, Sections VI & VIII.B, infra.

191 It has been suggested that both advertising (see Shannon, TR1860-61) and the practices of hearing aid sellers (see id. Owens, R8/6487; Silverman, R8/7332) create or promote this consumer confusion. For a more detailed discussion, see Appendix F, Section IV.D, infra.

is the hearing aid seller.[192] Regardless of the genesis of consumer ignorance in this area, however, it is beyond argument that hearing-impaired persons need to be informed of the qualifications of those who propose to remedy a complex medical problem.

3. Reliance Upon Seller Expertise

Despite the absence of medical training among hearing aid sellers, many participants noted the tendency of the hearing-impaired population to rely on the expertise of such persons.[193] There is evidence that the hearing aid industry is well aware of this aura of seller expertise[194] and that in many instances steps are taken to promote this impression.[195] Whether this is so or not, industry and nonindustry sources alike confirm

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192 Klein, TR7583; S. Graham, R8/5284; see Powers, R13/986-87.

193 See, e.g., Schein, TR200; Stroup, TR991; Kasten, R10/67; ASHA, R10/2124.

194 For example, in a booklet that is distributed to potential customers, Qualitone gives this answer to the question whether there is any advantage in trying out an aid before buying it.

> Frankly no, there is little actually gained learned from trying an instrument because it normally takes four to six weeks to adjust to the aid properly and in a few days there isn't time enough to know much about the results you can obtain. Place your confidence in your Qualitone aid and your hearing aid expert.

Qualitone, R8/2536 (emphasis added); see Bill Wellman Hearing Aid Center Ad, R8/3061.

195 Arthur Lynch, for example, testified that "[t]he impression that you are being taken care of by a trained scientist when it comes to selling you a hearing aid, is one that you can't escape," Lynch, TR1442. Specifically, he noted that "the trappings of the office, the testing that you go through, the making of the graph, the conversation that goes with it," all convey this aura of seller expertise. Id.; see Hull, R8/6141. For a thorough discussion of the techniques used by hearing aid sellers to establish their expertise, see Part One, Section IX.D.2, infra.

the fact that hearing aid sellers are believed by the hearing-impaired public to be experts in the testing, selection, and fitting of hearing aids.[196]

4. The Search for Normalcy

Another characteristic prevalent among the hearing-impaired population is the desire to regain normal hearing.[197] Moreover, many of these persons believe that through some means--whether it be surgery, amplification, or some other treatment--their hopes can be fulfilled.[198] As one witness pointed out in discussing the parents of hearing-impaired children:

> Every otologist and audiologist has experienced the parent who seeks miracle cures through surgery, acupuncture, faith healing, and space-age electronic gadgetry. Not only is such searching painful for the parents, but it also diverts their attention from the realities of the situation . . . .[199]

With respect to amplification in particular, there are a great many consumers who "believe that somewhere in the world there's a hearing aid that will make everything better . . . ."[200] Such persons often buy hearing aid after hearing aid in a vain search for improved communication.[201] Nor is the search for normalcy limited to the novices among the hearing-impaired population. As the Presiding Officer noted:

> Even many long-time hearing aid users . . . who know the limitations of their current instruments, continue to search

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196 See, e.g., Corbett, TR199; Brennan, TR267; Scott, TR2370; Dunlavy, TR3454; Vreeland, TR3873; Stallons, TR7869; Hull, R8/6141.

197 Lankford, TR8062; Stein, TR8978; see Plotkin, TR6023; P.O. Report, R9/Dlip42.

198 See, e.g., B. Smith, TR285-86; Plotkin, TR6023; Lankford, TR8062; AAOO R8/4137. Kasten, R10/68.

199 Stein, TR8978.

200 Kasten, R10/68; see Harford, TR59; P.O. Report, R9/Dlip42; Fortner, R13/1054.

201 See, e.g., Kasten, R5/1439; Fabray (Senate Hearings, 1973), R8/871; Jerger & Hayes, R8/4962-63; Alpiner, R8/5436; Hull & Traynor, R8/6811; Hardick, R8/6852.

> for something better, being under somewhat of the same handicap [as the first-time user]. They, too, look for the "ultimate answer"--the breakthrough that will enable them to improve the quantity and quality of their hearing.[202]

Indeed, the hearing aid industry is well aware of this consumer trait[203] and often takes advantage of it by proclaiming that hearing aids are "new"[204] or "unique"[205] or capable of returning the wearer's hearing to normal.[206]

5. Lack of Sales Resistance

Related to the search for normalcy by the hearing-impaired population is the sales resistance of this group, a characteristic that has been a matter of controversy throughout this rulemaking proceeding. Some persons associated with industry--but not all[207]--have steadfastly maintained that hearing-impaired persons have as much sales resistance as any other consumer group.[208] Others have asserted that hearing aid consumers are

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202 P.O. Report, R9/Dlip150.

203 For example, a handbook that is distributed to Audivox dealers declares:

> [I]t does not make one whit of difference whether the individual already wears an aid or not, it does not matter that he may have bought his present hearing aid 4 months ago. The nature of his impairment, and its psychological implications will always keep him wondering whether he really hears as well as he might and should. [R13/1153.]

204 See Kasten, R5/1439; Jerger & Hayes, R8/4962-63; Rupp, R8/7120; Part One, Section III.D, and Appendix F, Section VII.I, infra.

205 See Appendix F, Section IV.K, infra.

206 See Appendix F, Section IV.G, infra.

207 Both Hubert Gerstman, Ph.D., TR2404, and Vincent Giglia, TR2739, indicated that hearing-impaired persons might have less sales resistance than other groups.

208 E.g., Barnow, TR1693-94; J. Johnson, TR2262; Harris, TR10413; Dahlberg, R3/3378; HAIC, R3/3895.

a particularly vulnerable group[209] and that their strong desire to improve their hearing reduces their sales resistance dramatically.[210] In addition, as noted above, many hearing-impaired persons believe in and continually search for the "one" device that will return their hearing to normal.[211] These individuals are easy prey for the fantastic promises of the unscrupulous seller,[212] which may lead to the purchase of aid after useless aid.[213] Thus, once the existence of a hearing loss and the need for amplification are accepted,[214] then, staff believes that the hearing-impaired population generally suffers from a lack of sales resistance.

6. Comparison Shopping

One final characteristic of hearing aid consumers warrants attention: their inability to engage in careful comparison shopping in an attempt to secure the best possible amplification at the lowest available price. Robert Baesemann, an Assistant Professor of Economics at Northwestern University, testified on behalf of HAIC that the

> consumer's ability to accumulate information and make comparisons and their uncertainties about their future satisfaction with the purchase of a hearing aid are comparable to their abilities to acquire information and the kinds of uncertainties they face with the purchase of most other durable consumer goods.[215]

There are several responses to this assertion. The record contains considerable evidence to support the view that the

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209 See Bowen, TR1903; Silverman, R8/7334; note 151 supra and accompanying text.

210 See B. Smith, TR285-86; Harford, R10/144; Kelly, R10/5650. Some referred specifically to the reduced sales resistance of the elderly hearing impaired. E.g., Rupp, R8/7120; Willeford, R8/8002.

211 See notes 197-98 supra and accompanying text.

212 See Kasten, R5/1439; Alpiner, R8/5436; Rupp, R8/7120; Lankford, R10/4889. See generally Part One, Section III.E, infra.

213 See Kasten, R5/1439; Alpiner, R8/5436; Rupp, R8/7120; Epstein, R10/421.

214 See Part One, Section II.G.1, supra.

215 Baesemann, TR7360.

marketplace abilities of hearing-impaired persons simply are not commensurate with those of other consumer groups. Unlike most other consumers, the typical hearing-impaired person is uniquely ignorant about both the problem to be remedied[216] and the product to be purchased.[217] In addition, many individuals are extremely reluctant to admit their loss to others;[218] such persons are not likely to engage in comparison shopping, which requires that the loss be discussed with several people.[219] The largest group of hearing aid consumers is the elderly; significantly, due to financial, transportation, and health

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216 See notes 172-76 supra and accompanying text.

217 See notes 177-85 supra and accompanying text.

218 See notes 154-56 supra and accompanying text.

219 This problem may be particularly acute for the deaf. Jerome Schein, Ph.D., elaborated on the reasons why a deaf person would be inclined to contact only one hearing aid seller, even if the contact proved to be relatively unsatisfactory:

> [T]he basic problem is in finding someone who won't convey all of the impatience when you go in and you can't be understood the first time and you don't understand what is told you the first time. Here is someone with whom you shared the secret. I don't hear well. You have to tell someone in order to begin the process of purchase. Your own experience, for most hearing-impaired people, is that in the past when you are known to be deaf, or hard-of-hearing, . . . people begin to pull away from you.
>
> We talk often about the withdrawal of the deaf person. That is what is apparent. What is not apparent, is the withdrawal of the general society from the person who is going to be a bother to communicate with. I think that is a part of what is feared: first of all, the fear of admitting the loss. You share it with that person.
>
> Secondly, it is the difficulty, the terrible difficulty in communicating . . . . [TR200-01].

considerations they are frequently the least able to comparison shop.[220] The very nature of a hearing loss, in fact, may make it difficult for a hearing-impaired person to discern which hearing aid performs best for him.[221] Finally, even if hearing aid consumers could engage in comparison shopping, the record indicates that such shopping does not occur[222] -- especially with respect to hearing aid prices.[223] Staff concludes that hearing aid consumers are poor comparison shoppers.

H. Conclusions

The several critical points that emerge from an examination of the nature of the hearing aid consumer must be kept in mind throughout the remainder of this report. First, the psychological implications of a hearing loss are significant. They often lead to social withdrawal and loneliness, deference to others, and a reluctance to complain about abusive treatment--characteristics that are hardly conducive to effective self-protection in the marketplace. Second, a tremendous informational deficit confronts hearing aid consumers with respect to the quality of

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220 See Ginsburg, TR4640; Pastalan, TR4709; Hull, R8/6141; Murphy, R13/2068. But see Barnow, TR1693-94 (elderly hearing-impaired persons often comparison shop).

221 For example, it is especially difficult for the early-deafened individual who has never experienced "normal" hearing to determine whether an aid's performance is the best that can be expected. Cf. ASHA, R10/1787. Moreover, a physical problem surfaces when a person comparison shops for a hearing aid.

> Practically any hearing aid that is tried on for the first time "sounds better" than that currently used by the customer. The reason is that each hearing aid has its own pattern of reproducing frequencies. Changing aids causes one to hear frequencies which he heard very poorly with his old aid. He thus gets the impression that he hears better with the new instrument. But this impression is only temporary . . . . [Georgescu-Roegen (Senate Hearings, 1973), R8/D227ip364].

222 See, e.g., Stallons, TR7870-71; Beiter, TR9067-68; McGurk, R8/8565; ASHA, R10/1801; NCSC Affidavit, R10/4593. But see Krebs, TR11871 ("guessing" that perhaps 20% of the people he sees are comparison shoppers).

223 See, e.g., Ginsburg, TR4682; W. Murray, TR4850-51; Conlin, TR7772; H. Davis, HX150/5.

the product being purchased, the quantum of hearing improvement that can reasonably be anticipated, and the professional qualifications of the providers of hearing health care. This information gap, when combined with an overwhelming desire for normal hearing and the almost casual reliance of hearing-impaired persons on the expertise of hearing aid sellers, produces an extremely vulnerable consumer. Third, the overwhelming majority of hearing aid consumers labor under severe physical, educational and economic handicaps that multiply the problems of hearing loss and heighten their inability to act as effective consumers. Finally, the enormous burden--both economic[224] and psychological[225] --of an erroneous decision to purchase a hearing aid should not be overlooked.

III. PROBLEMS EXPERIENCED BY HEARING AID USERS

A. Introduction

The problems experienced by this especially vulnerable group of consumers must be viewed with their vulnerability in mind.

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224 See Brickfield, TR1468; P.O. Report, R9/Dlip271; McPherson, R10/289. The record abounds with complaints about the high price of hearing aids, which average between $350 and $400. See notes 370-373 infra and accompanying text. In addition, several persons noted that the erroneous expenditure of several hundred dollars may be "financially crippling" to the elderly hearing-impaired. Legal Research for the Elderly, R8/3883; see P. Ginsburg, TR4627; Adkins, TR6071; Babcock (Michigan Hearing Aid Board), R8/6569.

225 See Legal Research for the Elderly, R8/3883; AARP, R10/866. The psychological impact may be particularly harsh for the elderly.

> In addition to the financial loss . . ., the psychological effect of seeking help only to be disappointed can be significant. We must understand that coping with losses of every sort is the name of the game for many older persons. Often they are faced with loss of job status, loss of old friends, loss of spouse, loss or curtailment of physical abilities. When they have spent a sizeable amount of money to overcome hearing loss--money which is needed for other basic necessities--only to find that the equipment purchased does not bring improvement, the discouragement and resulting depression can be so overwhelming as to cause them to give up and be resigned to the isolation which comes from not being able to hear . . . . [Slaughter, R10/3156].

It is probably not possible to describe completely the myriad difficulties that hearing-aid consumers confront at one time or another. Aside from the magnitude of the numbers of people experiencing problems, the types of problems range from abusive sales practices to incompetent testing and fitting. What emerges from an overview of these consumer problems, however, is the stark realization that a very significant number of those who seek help for their hearing impairments take a financial and psychological beating in the bargain.

B. Failure to Obtain Benefit from Purchased Aid or Aids

The record in this proceeding is filled with reports of consumers who received no benefit from the purchase of a hearing aid.[226] In many instances, hearing-impaired persons were sold a single aid that proved to be unbeneficial.[227] Others reported the purchase of binaural hearing aids[228] when only monaural amplification was appropriate.[229] Still others purchased two hearing aids from which they received no benefit at all.[230] This section of the report will thus attempt to catalogue some of the typical situations in which consumers have failed to receive benefits from the aid or aids they have purchased.

Various reports are contained in the record of the sale of one or more hearing aids to individuals whose hearing was essentially normal.[231] For example, one hearing aid dealer sold an aid

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226 A more detailed analysis of the prevalence of consumer abuses in the hearing aid market appears at Appendix F, Section VII, infra.

227 See, e.g., Paschell, TR855; Benenson, TR882-83; Diogo, TR4414-16; Schwartz, TR4880; Peterson, TR6108-11; Stutz, TR8936; Percy Letters, R8/232, 408; NCSC Affidavits, R10/4530-31, 4755.

228 Binaural hearing aids are fitted to both ears. They are discussed in detail at Appendix F, Section II.B.5, infra.

229 See, e.g., Lankford, TR8007-08; Percy Letter, R8/222; Marlin, R10/446; AARP Letter, R10/1279-80; ASHA, R10/1745; Youngquist, R10/5873-74; Westover, R10/5881; Gunterman, TR9662-63.

230 See, e.g., Kuptz, TR5647-48; Varga, TR6367-73; Percy Letters, R8/81, 278; S. Graham, R8/7505-06; Lentz, R8/8003; Berberich, R8/8292; Boe, R10/5910; O'Neill, R13/1491-92; Gunterman, TR9658.

231 E.g., Rose, R5/705; MPIRG, R8/1246-47; Green (Senate Hearings, 1975), R8/3843 (relating three examples); AARP Letter, R10/3991-92.

to the parents of a 12-year-old child with normal hearing.[232] A consumer whose hearing for speech was "well within normal limits for both ears"[233] was nevertheless convinced by a seller that he needed a $379 aid.[234] Subsequent testing at an audiology clinic revealed that the man's performance was significantly poorer with the aid than without it.[235] A graduate student was fitted with binaural amplification despite the fact that one ear had perfectly normal hearing.[236]

Some consumers whose hearing loss is such that they cannot possibly benefit from amplification also are sold hearing aids.[237] Frederick Tyszka, Ph.D., reported his examination of a patient

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232 ISPIRG, R8/1346-47; see Simon, TR9155-56 (11-year-old child); Jerger, R8/4573 (4-year-old child). Lloyd Mosley reported at TR7551-52 that

> "We had a child referred less than six months ago, referred by the health department. The child failed to have a hearing loss determined by medical examination . . . . a hearing aid dealer . . . . fitted him for so much down and so much a month . . . . We saw the child in the clinic and the child supposedly had a significant hearing loss. This child's articulation, voice and range were beautiful . . . . After further audiological evaluation this child was found to have normal hearing. He does have other problems, but not in hearing."

233 Lentz, R8/8233.

234 Id.

235 Id. In a quiet environment, the patient's ability to understand speech (speech discrimination) without amplification was excellent in both ears. Id. In a noisy environment, his speech discrimination scores were 96% in one ear and 78% in the other. Although speech discrimination in a noisy environment was thus rated an "easy task" without amplification, the patient's performance in the same environment was rated 34% poorer with a hearing aid. Id. at 8233-34.

236 B. Smith, TR278-79; see Gunterman, TR9663.

237 See, e.g., Rose, R5/705; Jerger, R8/4958; Kasten, R8/6986; Winston, R8/7391; PIRGIM, R8/D231ip18, 20; B. Graham & T. McGee, R10/5331; Lentz, R10/6535.

who had purchased two hearing aids from a Beltone dealer "while in a tavern."[238] Dr. Tyszka's testing revealed a very minimal loss, and the patient reported that the aids were of no benefit to him, but he was unable to secure a refund of his $800.[239] An 82-year-old woman testified that the pair of hearing aids she bought "blocked up all of my sinuses, and then I felt as though I had a splitting cold in my head, and I couldn't breathe so I took the thing out."[240] Subsequent testing revealed that one of her ears could not be helped by an aid and that she was a poor candidate for amplification in the other ear.[241] Michael Stahl reported the experience of a 79-year-old woman who had worn one aid for some time.[242] When she visited a new dealership, however, she was sold a second aid for her other ear, which was in fact clinically dead.[243] Mr. Stahl noted:

> When we questioned her why she entered into the purchase agreement for the second amplification system, she said she knew she couldn't hear out of that ear, but the hearing aid audiologist told her she would receive improvement over the time. This woman did not successfully respond. Through the intervention of her son, she was given $75.00 of the purchase price [$485.00] back.[244]

Equally distressing are the cases of hearing aid sales to persons whose hearing difficulties were medically or surgically remediable.[245] A consumer, who had purchased several aids without any results, noted:

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238 Tyszka, R8/5658.

239 Id.

240 Burt, TR4422.

241 Id. A similar story of useless binarual aids was reported by Eva Doucette. See TR 4435-36.

242 Stahl, TR5542.

243 Id.; accord, S. Graham, R8/5273; Gannaway, R13/1616.

244 Stahl, TR5542.

245 Stephen Kasden, an audiologist from Providence, Rhode Island, conducted a review of his files to determine what percentage of his patients suffering from otosclerosis were aware that it is a medically or surgically treatable condition. Out

(Continued)

> Finally, I took my wife's advice--I visited our specialist. . . .
>
> Well, after three visits, each a week apart, with drops in my ears twice a day and his tearing the impacted wax (which was very painful) from my left ear, I can now hear better without an aid than I could before with one.[246]

Another individual reported:

> I've had a hearing aid for years but don't even need one since my doctor examined my ears and removed a polyp from my right ear. It was the one that I used to wear a hearing aid in. Never did the salesman for the aids, ever examine my ears. The last hearing aid cost me $495.00, he allowed me $100.00 for my old one as a down payment. I wore the last one for over a year, until my doctor examined my ears and I haven't worn an aid since.[247]

Even among individuals with hearing losses for which amplification is appropriate, there are numerous cases of unbeneficial sales.[248] It is not unusual to find people who can benefit

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245 (Continued)

of 2,369 persons with confirmed cases of otosclerosis, 1500, or 63.32%, were first seen by a hearing aid dealer. The dealers had sold hearing aids to 98.86% of these individuals without telling them that medical or surgical treatment was available. Kasden, R5/1282. See also MPIRG, R8/1247; Wilber, R8/5327; Hull, R8/6136; ASHA, R10/1723-24; NCSC Affidavit, R10/4546-47; Kramer, R13/1619.

246 AARP Letter, R10/4045. Similarly, Romie Crossett, a blind man, was sold an aid that quickly proved to be useless. An ear specialist's examination shortly thereafter revealed an enormous accumulation of wax in his ears. Removal of the wax fully restored Mr. Crossett's hearing. S. Graham, R8/7529; see Dolowitz, R5/1611; Abromowitz, R8/4216 (sale of two unnecessary aids).

247 AARP Letter, R10/3957. See also AARP Letter, R10/4064; B. Smith, TR278-79; Lentz, R8/8200.

248 E.g., Doucette, TR4436-38; Franks, R10/525; AARP Letters, R10/1272, 1408, 3983.

greatly from amplification, but whose aids have been fitted to the wrong ear.[249] Some consumers are simply sold the wrong type of hearing aid and, consequently, derive little or no benefit from it.[250] In these situations, there is precious little comfort in the knowledge that the fitting errors can be corrected, since the consumer might not discover the error until the purchase of yet another hearing aid.[251]

C. Failure to Obtain Additional Benefit From Replacement Aid

In addition to situations in which consumers have been sold hearing aids that provided no benefit, the record contains many examples of individuals who, at the urging of their sellers, replaced their current aid with another one, only to find that it performed no better than the previous aid.[252] Roger Kasten, Ph.D., and Marilyn Warren reported that they see at least one patient per week "who has been sold an aid with some 'new' feature that really did not provide benefit better than the 'old' aid."[253] One

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249 See, e.g., Byrne, TR1037; Winston, R8/7466; Lentz, R8/8184; PIRGIM, R8/D23lip20. One witness was sold one aid, and then a replacement for it, neither of which was usable. Both aids had been fitted to the left ear. After further testing it was determined that a different model altogether should have been fitted to the man's right ear. The new aid could not be purchased by the consumer, however, because the dealer refused to refund any money for the two unsatisfactory aids that had been purchased previoulsy. Wortzell, TR4858-62.

250 See, e.g., Gunterman, TR9663; Harford, R5/848; MPIRG, R8/1247; Harvey, R8/6894; Kasten, R8/6985; Winston, R8/7391; Simon, R10/5597. William Lentz, Ph.D., reported that his clinic saw a patient who had been fitted with aids for both ears, but was unhappy with the results. Testing revealed that one aid was totally inoperable and that the other actually reduced the patient's discrimination ability from 78% to 28%. Lentz, R8/8168-69.

251 E.g., Georgescu-Roegen (Senate Hearings, 1973), R8/1189MMMMMMMM; AARP Letter, R10/1250. Indeed, the father of one hearing-impaired girl purchased nine useless aids before finally discovering the type that provided her with benefit--a type that had never been suggested by any of the dealers from whom he had bought the previous aids. Kasten, R8/6987.

252 See, e.g., Wortzell, TR4859-60; Noffsinger, R8/5422; Stroup, R10/133-34; Starks, R10/5431; Lindeman, R10/5656; Campbell, R10/5659.

253 Kasten & Warren, R8/6985.

individual who had bought a useless aid decided to go to a different retail outlet for another hearing test.[254] She reported:

> After giving me the examination, the man from Haven Hearing Aid said to me that I needed to get a new hearing aid. The hearing aid you brought in, he said, was not fitted properly. He said Goldberg Electronics had just come out with a new and different model which would work just fine for me . . . . The price was $385.00. He said he would give me an $85.00 allowance for the first aid. I decided to buy it.
>
> . . . I soon discovered the new aid was impossible to wear . . . . [I]t made a terrible noise which drove me crazy. . . . I went back to Haven's three or four times. Each time I was told that there was nothing wrong with the aid.[255]

Another consumer related the purchase of several hearing aids, all of which were equally unsatisfactory:

> The one I selected wasn't satisfactory. It wasn't volume I wanted, I just wanted to understand what was being said. So he soon had me wearing a $390.00 aid. But it was the same.
>
> I talked about another certain make; friends of mine were satisfied with theirs, so he supplied one of them (behind the ear) but it was the same and it came apart as I took it from my ear one night.
>
> Another man, an electronics engineer, college graduate took over the business. He said, "I'll give you one that'll do the trick." But it too failed to help.[256]

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254 NCSC Affidavit, R10/4562.

255 Id. at 4562-63.

256 AARP Letter, R10/4045. The testimony of Lily Corbett also illustrates the costly purchase of numerous hearing aids, none of which proved to be particularly better than the others. See Corbett, TR172-76.

Moreover, some consumers purchase replacement aids that not only provide no additional benefit, but perform worse than the aids they previously owned. For example, Rose Just had difficulty for 6 months with her $330 hearing aid.[257] As a result of her complaints

> a Mr. Lyksett came to my home and said I needed a new hearing aid to replace the earlier fitting, also an aid for the other ear. He proceeded to fit me then and there and I paid him $666.00. I still had no help in hearing and, in fact, seemed to have greater difficulty, then finally in June, 1973, I returned to the Hilger Clinic . . . . They examined the aids, stated I was improperly fitted, that, not only did the aids not help but they decreased my hearing ability by an additional 20%.[258]

D. Inability to Use Aid in Noisy or Group Situations

Hearing aid users confront their most difficult listening situation when they attempt to hear while they are in a group or are in the presence of competing noise.[259] Although certain hearing aid models clearly help some people to distinguish speech somewhat better in a noisy or group environment,[260] there is considerable evidence that, for many people, the hearing aid amplifies

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257 Just, R10/5774.

258 Id. Similarly, Lily Corbett testified at TR172-73 that

> About three days later, after they bought the hearing aid, I could not use them. I could not benefit anything from [the] behind-the-ear model, and I resorted back on the body aid; but I never let my parents know this. They paid a lot of money for it, and I felt very guilty for putting my parents in the position where they had to spend so much money and not knowing it didn't help me.

259 See Lankford, R10/4904. See generally Appendix F, Section II.C.2, infra.

260 E.g., Perrill, TR11636. See generally Lentz, R8/8022-25; Appendix F, Section II.C.2, infra.

background sounds to a level that makes hearing virtually impossible.[261] Audrea Stutz reported that her grandmother's aid performed so badly in noisy environments that they returned the aid to the seller.[262] Similarly, Frederick Tyszka, Ph.D., noted that a patient fitted with an aid by his clinic had returned it within 2 weeks because the background noise was simply too much for her.[263]

Unfortunately, hearing aid advertising often leads consumers to expect that they will have little difficulty hearing in the presence of competing noise.[264] When people rely on these representations, however, they are often disappointed. As Helen Getchell testified:

> [H]e assured me that I would hear better when I was in a group--that is when I have a great deal of difficulty--and that I could hear my television better, you see, but that didn't happen, of course.[265]

Similarly, Maurice Byrne reported that one consumer paid $700 for an aid upon the seller's representation that background noises would be removed.[266] The patient did better without the aid, however, but the seller refused to refund any part of the purchase price.[267] In short, the record is replete with examples of consumers

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261 See, e.g., Harford, TR52; Loavenbruck, TR1595; Burke, TR6409; Mastricola, TR8620; Consumers Union, R8/1191d; Alpiner, R8/5434. Mike Pasiewicz, for example, testified that he turns his aid off when there is too much background noise. TR9949.

262 Stutz, TR8996.

263 Tyszka, R8/5659. Earl Harford, Ph.D., who wears a hearing aid, actually had difficulty in a noisy environment at one point during his testimony. See Harford, TR81.

264 E.g., Fidelity Ad, R8/2018 ("disturbing background noises are COMPLETELY SUPPRESSED"); Beltone Letter, R8/2562 ("providing the ability to pick up what you want to hear in noisy surroundings"); Audivox Ad, R8/3100 ("give you constant comfort yet let you hear clearly even in noisy places"); see Dahlberg Ad, R8/1409 ("reduces most background noise").

265 Getchell, TR4402.

266 Byrne, R8/6461.

267 Id.; accord, Tillman, R8/447.

who found--much to their dismay--that their hearing aids did not provide them with benefits in noisy or group situations.[268]

E. Misleading Dealer Advertising or Lead Solicitation

Another problem encountered by a great many hearing aid consumers is that misleading advertising and lead solicitation techniques are often utilized by hearing aid dealers.[269] As a result of these techniques, hearing-impaired persons will send away for free literature or a free replica of an aid, or will register for a free hearing test, without realizing that a dealer will at some point attempt to sell them a hearing aid.[270] As the Presiding Officer noted concerning ads for free information and gifts:

> Although such ads may be so worded as to prevent the consumer from identifying the advertiser as a sales agency, his indication of interest in any aspect of the ad's content generally brings a high-pressure salesman to his doorstep . . . .[271]

Examples of such occurrences are abundant. Arthur Peterson testified that he responded to an advertisement for free literature about hearing aids, and he noted that "[i]f the ad had said that a

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268 See, e.g., AARP Letters, R10/1272, 1313, 1318-19, 1420, 4214.

269 A detailed discussion of the seemingly endless variety of lead generation techniques employed by hearing aid sellers is reserved for Part One, Section IX.B, infra.

270 Drew & Eiler, TR7182-83; McShane, TR126. An analysis of consumer letters submitted to the Commission by the American Association of Retired Persons demonstrates that 10% of those who wrote to the AARP complained about misleading dealer advertising or lead solicitation. Freundlich, R13/1975.

271 P.O. Report, R9/D1ip95. The RPAG Report quotes Dr. Robert Keith as follows:

> I have seen advertisements that are as few as four paragraphs long in which the word "free" appears upwards of a dozen times. The implication is that they (the consumer) will get a diagnostic hearing evaluation free, that it will be interpreted for them and that they will be under no obligation. Although they are not under an obligation, they will certainly be subjected to what is often a hard sell if they have any impairment at all. [R8/2628 (footnote omitted)].

sales representative would bring the literature along with the testing equipment, I would not have responded."[272] A salesman did call, however, who tested Mr. Peterson's hearing "without obligation"[273] and sold him a $350 hearing aid from which he received no benefit.[274] A relative of an elderly woman who had sent away for a free hearing aid related a similar experience:

> She received nothing back in the mail in reply to this advertisement. The next thing she knew a man from Beltone's local office knocked on her door--and the biggest mistake of her life was when she let him in. She did inform him she only wanted what was advertised in the paper--she definitely did not want a salesman or she did not want to purchase anything. She complained about her financial difficulties--and being a widow. This salesman . . . said the hearing aid she had sent for WAS NOT ANY GOOD . . . . IT WAS JUST A PLASTIC THING, NOT WORTH ANYTHING AT ALL. She did ask him how they were permitted to advertise in the newspaper--how could they get away with such things. He just laughed. After he got through with his pitch . . . he convinced her to purchase a hearing aid from him with the promise it would work.[275]

The hearing aid "certainly did not help her hearing one little bit."[276] Still another consumer responded to an ad for a free "U.S. government publication on hearing."[277] Although the publication was never received, a salesman called and sold the individual

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272 Peterson, TR6108.

273 Id.

274 See id. at 6109-11. After approximately 1 year of haggling, Mr. Peterson finally received a $275 refund. Id. at 6113.

275 Ohio Div. C.P. Letter, R8/2970.

276 Id. at 2971; see Penalver, TR4963-65. Richard Conlin, the Project Director for PIRGIM, testified that they answered an ad for a free nonworking model of a hearing aid, but were contacted by a salesperson instead. Conlin, TR7768.

277 AARP Letter, R10/1436.

an "expensive hearing aid" that proved unbeneficial.[278]

- A tactic employed by many hearing aid sellers is to advertise small, inconspicuous aids in order to arouse the interest of potential customers; when the customer visits the office, he is switched to a more powerful aid that is appropriate to his loss.[279] Other dealers have adopted more imaginative approaches. One salesman set up a prize booth at a home and builders' show in Detroit.[280] Visitors to the show were invited to fill out a card containing their own name and address and the name and address of one hard-of-hearing person.[281] When the drawing was held, the registrant was to receive a "fabulous free prize," and the winning hard-of-hearing person was to be awarded a new Beltone hearing aid.[282] The winning hearing-impaired person was, in fact, notified that he had won a free hearing aid.[283] When the dealer visited the man's home, however, he never again mentioned the free aid; instead, he sold the "winner" binaural hearing aids for $738.[284]

Nor are current hearing aid users immune to such abusive practices. Several persons noted that they were called by their sellers and told to come in to have their hearing aids serviced,

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278 There is no shortage of similar examples in the record. E.g., NCSC Letter, R10/482 (free testing device to be provided "via the mails"); AARP Letter, R10/3953 (free information); NCSC Affidavit, R10/4680 (free hearing test); Kampf, R10/5408 (free hearing device for outer ear); see Gunterman, TR9664 (free hearing aid).

279 See, e.g., Vick, TR10562; Miller, R8/5684; AARP Letter, R10/1040-41.

280 Beltone Detroit Company, R10/6425.

281 Id.

282 Id.

283 Id.

284 Id. Another interesting ploy was reported by Helen Kelly, Special Assistant Attorney General of the State of Minnesota: a hearing aid seller inserted an advertisement in the local papers indicating that a hearing aid study was being conducted and that participants were required. The ad indicated that a participant would be qualified for a reduction in the price of a hearing aid after the test was concluded. This misleads consumers into thinking that they are involved in a bona fide experiment when in fact they are only being induced to purchase a hearing aid. Kelly, R10/5650.

when the purpose of the office visit was actually to sell them new aids.[285] Indeed, one obviously disgruntled consumer wrote:

> I've been contacted by telephone on several occasions and the conversation went something like this: Mr. Keene, we have been thinking about you. Yours is a very special case and we want you to come down, have your hearing aid checked over and meet Mr. Squeeze Em Dry! He has a new instrument recently perfected which renders all others obsolete, so compact and so efficient. This is something different, an entirely new concept; and we are calling only our preferred customers, a select few of which you are one.[286]

Some consumers may in fact benefit from aids that are purchased under these circumstances. Nevertheless, there is little doubt that, through such deceptive practices, many consumers are unfairly confronted with a high-pressure sales presentation at a time when they least expect it.[287]

F. Improper Dealer Sales Tactics

Once the potential hearing aid consumer seeks out, or is confronted by, the hearing aid seller, a veritable barrage of improper sales tactics may come into play.[288] Chief among these is the oft-made claim that the use of a hearing aid will restore

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285 See, e.g., Cook, R8/468-69; AARP Letter, R10/1040. As Henry Hecker noted:

> It is a common practice of many hearing aid dealers to hit the list of previous customers when a new model comes out and to tell them that their old aid is no longer any good (even when only three short months before they had told the customer that their "old" aid was the best in the country). [R10/4639].

See Kelly, TR7526 (dealer called customers and indicated that aids needed adjustment due to "factory recall notice").

286 AARP Letter, R10/4005-06.

287 See P.O. Report, R9/Dlip74-75.

288 An analysis of the letters submitted to the AARP reveals that 26% of the people who wrote in complained about improper dealer sales tactics. Freundlich, R13/1975.

an individual's normal hearing.[289] Although there appears to be unanimous agreement that this claim is false,[290] the record is replete with accounts of precisely this representation being used to induce consumers to purchase hearing aids. For example, Mary Ruth Whitman testified that her mother-in-law purchased binaural hearing aids with the assurance that her hearing would gradually come back if she wore the aids regularly.[291] At the time of the hearings in this proceeding, the mother-in-law had worn the aids for 3 or 4 years without noticing any improvement in her hearing.[292] Yet, Ms. Whitman noted:

> [T]he last time that I talked to her about this, I guess, in a way, you could say she is still thinking maybe her hearing is going to gradually improve. She, you know, did not--I don't think she complained to the dealer, . . . but she said the dealer told her that it would be very gradual, and so she is being very patient and waiting until this happens.[293]

Similarly, Frank Bowe, Ph.D., reported that when he was very young, hearing aid dealers led his parents to believe that his hearing would slowly get better if he used the aids regularly.[294] As a result, his parents were very eager to have him use the aid every day and were constantly watching him for

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289 E.g., Bartels, TR6309; NYPIRG, R8/1335L; RPAG, R8/2610; P.O. Report, R9/D1ip153; Elkins, R13/4130; see Hayes, R8/4958; Schmitz, R8/7267; Lentz, R8/8001.

290 See, e.g., Kojis, TR2121; Burris, TR2509, 2560; Dunlavy, TR3397; Qualitone, R8/2534; Alpiner, R8/5426; Winston, R8/7407; S. Graham, R8/7541; Bode, SPXB/301; D. Sanders, SPXB/335; Berger & Millin, SPXD/489.

291 Whitman, TR8562.

292 Id. at 8563.

293 Id. at 8564. Perhaps the most disgusting cases that turned up in NCSC's Florida inquiry involved persons who were hopelessly deaf and bought a hearing aid after being promised that they would be able to hear with it. These persons were promised that hearing would be restored "gradually" after continued use of the aid. Penalver, R10/4462.

294 Bowe, R8/6951.

signs of hearing improvement.[295] An elderly consumer told of his visit to a local seller, which resulted in the sale of an aid:

> The Zenith dealer assured me that I would get the benefit from my new hearing aid after I used it regularly. Hearing would be restored gradually after continued usage of the hearing aid. This did not happen . . . . I decided to give up and figured that I had made a big mistake. I should have sought professional advice from a doctor or an audiologist before purchasing such an expensive equipment for my ear. I did not ask the dealer for a refund. I knew he would have never returned one cent back to me. Why go through all the trouble for a lost cause? I do not even like to talk about my experience with the hearing aid.

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295 Id.; see Dahlin, R10/5667 (hearing would be restored within 6 months); Halvorson, R10/5675-76 (hearing would be restored within 1 year). Another consumer told of a casual visit to a dealer's office, which resulted in the sale of two aids:

> Mr. Sharlone told me I was getting the best pair of hearing aids on the market--just the ones I needed. He told me I would be able to hear normally again. Since I was so eager to hear well again, I decided to go ahead with the purchase . . . .
>
> When I went home I started to worry about the money. $700.00 is a great sum for a person in my condition. I would have to borrow some of it. I have to live in a small room all by myself. I wouldn't be living in a tiny place like this if I could afford something better. Can you imagine how $700.00 hurt me? Nevertheless, I decided to make this great financial sacrifice. I wanted to hear again. Deafness brings about a terrible isolation. I wanted to be able to know what was going on around me and talk to my friends again. I had confidence in the Beltone representative . . . .
>
> The two hearing aids were absolutely useless. I could not hear at all from one ear and only "fair" from the other. [NCSC Affidavit, R10/4536.]

> I did a foolish thing in the way I went about its purchase. I didn't shop around nor compared prices and models. I took the dealer's word for it and I just paid the price.[296]

Many similar experiences are reported.[297]

Closely related to the foregoing cases are those in which hearing aid consumers have been told that an aid will halt or retard the progression of their hearing loss.[298] A consumer who spent more than $850 for binaural aids wrote:

> At the time they told me by wearing them it would preserve what hearing I had.
>
> In a years [sic] time I lost my hearing comletely in my left [ear] and my right ear was so bad I could not distinguish words.[299]

An elderly woman who had had continued trouble with her 6-month old aid reported:

> [O]n November 3, 1975, Richard came out to the house again and tested my hearing again. He told me I had lost quite a bit of hearing in my right ear [she already wore an aid in the left ear] and if I did not get an aid for that ear I would lose what little hearing I had left. He told me the aid would cost $509.00. Because I did not want to lose the rest of my hearing, I agreed to buy the aid . . . .

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296 NCSC Affidavit, R10/4582-83.

297 E.g., id. at 4492-93, 4500-01, 4509-10, 4561-62, 4638. Unfortunately, some people are completely discouraged from ever trying hearing aids again as a result of such occurrences. See, e.g., Whitman, TR8558; Kasten, R10/70.

298 See, e.g., Byrne, R8/6465; P.O. Report, R9/Dlip87; AARP Letter R10/1419; NCSC Affidavit, R10/4688; id. at 4725; id. at 4730; Kampf, R10/5409. This representation is, of course, patently false. See, e.g., Loavenbruck, TR1560; Kojis, TR2121; Scott, TR2343; Burris, TR2560; E. Johnson, R8/4494; Rupp, R8/7121; Silverman, R8/7328.

299 Ohio Div. C.P. Letter, R8/2941. When the consumer related this experience to the dealer, he was sold another hearing aid, to the tune of $547.58. Id.

> I am eighty-six (86) years old and have spent $935.00 and have two aids which are of little use to me. I wish I had my money and that I had not bought these aids which are useless to me.[300]

Elda Mae Sewell also was told that she needed a hearing aid "right away."[301] Although she felt her hearing was normal, Mrs. Sewell feared that the sales woman was right and, consequently, purchased an aid.[302] When she quickly realized that the aid was useless to her, she asked for, but was refused, a refund of her deposit.[303] Moreover, "[u]nder extreme pressure, [she] paid her the balance owed for the aid."[304] Only after retaining an attorney was Mrs. Sewell able to secure even a partial refund of the purchase price.[305]

Similarly, a number of people have bought hearing aids after being told that an aid is needed to "stimulate nerve endings."[306] The effect of this "stimulation," according to the sellers, will be to save whatever hearing the individual still has.[307] There is no scientific basis, however, for this claim.[308] Yet, Mrs. Linda Craig related that a dealer had told her that

> had he [the dealer himself] gotten a hearing aid much earlier he would not have lost the nerve out of his ear and that the hearing

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300 NCSC Affidavit, R10/4739.

301 Sewell, R13/1653.

302 Id.

303 Id. at 1654. Subsequent testing revealed that Mrs. Sewell's hearing was normal. Id.

304 Id.

305 Id.; see Dunn, R8/5275.

306 See, e.g., Morgan, TR9559-60; Gunterman, TR9656; Harvey, R8/6696; Lentz & Willeford, R8/7997.

307 Morgan, TR9559; MPIRG, R8/1234; Tyszka, R8/5655; Lentz & Willeford, R8/7997; see Hamburger, TR5355-56.

308 Morgan, TR9559; see Hardick, R8/6855; Tweed, R8/7633.

> aid stimulates a nerve in the ear and therefore keeps it alive, or something to that effect. When I asked him how much the hearing aid cost he told me $350 but I could do it in small payments and all that.[309]

Similarly, Paul Myers, M.D., recorded his examination of a Mrs. Sasseville as follows:

> She sustained a skull fracture two years ago and has been deaf in her left ear since. She was sold a binaural glasses type hearing aid approximately two years ago . . . . The salesman apparently informed her according to her history that the auditory stimulation might improve her hearing. Both she and her husband are disabled persons. They have had a financial struggle to pay for her aids. Final payment was made on Nov. 3, 1975 . . . . I do not believe she should have been sold an aid for her deaf left ear.[310]

Similar to the "nerve stimulation" claim is the representation that unless two hearing aids are purchased, the unaided ear will deteriorate.[311] A number of individuals reported such assertions.[312] For example, Robert Traynor, Ed.D., noted the case of an 18-year-old girl:

> [A] dealer told her that she would need amplification in both ears because without amplification the [other] ear would suffer and cause brain damage. This girl was earning about $1.75 per hour and obviously could not afford to spend hundreds of dollars on unneeded hearing aids but was nevertheless saving to purchase a second aid.[313]

In addition to the representations and threatening suggestions that have already been discussed, a great variety of other selling tactics are utilized by hearing aid sellers.

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309 Craig, R8/8163-64. Fortunately, Mrs. Craig was able to resist the purchase of this aid, and audiological testing showed that she had normal hearing. Id. at 8164.

310 Myers, R13/419.

311 This claim, too, is false. See Appendix F, Section IV.H, infra.

312 See, e.g., Hardick, R8/6747; Sigler, R8/8202; Bendler, R8/D2311p19; Hecker, R10/4837.

313 Traynor, R8/6136.

Many consumers feel that they have been "high-pressured" into buying an unwanted hearing aid.[314] For example, Fern Feder testified that a dealer attempted to break down her sales resistance by asking: "You do take a vacation, don't you? How can you take a vacation when your kid needs a hearing aid?"[315] Another consumer noted that a salesman

> tried to make me feel like a dummy if I did not buy the hearing aid from him. He told me about his family--his father needed a hearing aid but refused to wear one. He became isolated and became dumb and stupid. In other words, unless I bought the aid I, too, would become dumb and stupid.[316]

Franklin Estes reported that some sellers will tell potential buyers "that they may be run over by a car coming from the side where their hearing is poorest."[317] Other consumers stated that they asked for trial periods, but were told that such trials were illegal.[318] Finally, an assortment of other sales tactics is available.[319] One 81-year-old woman had fallen down and broken

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314 See, e.g., Getchell, TR4402-03; AARP Letters R10/4025, 4171-72; NCSC Affidavit, R10/4652. One individual wrote:

> I wish one of the officials would go to a hearing aid dealer without saying who they are and I would guarantee they would come out with a hearing aid needing it or not. The hearing aid salesman is the fastest talking person in the world. He could convince his own mother she never had a child! [AARP Letter, R10/4150].

315 Feder, TR8529.

316 NCSC Affidavit, R10/4570. Susan Klein testified that two of the MPIRG volunteers were told that if they bought only one aid instead of two, they would lose their balance and experience vertigo. TR7580.

317 Estes, R8/6500. Although such a statement is not always false, the number of persons whose hearing loss is so profound that the statement might apply to them is very small.

318 E.g., AARP Letters, R10/4025, 4034-35.

319 Some consumers complained that they paid for, but never received, their hearing aids. E.g., Hood, R8/5275; Byrne & Gallion, R10/3100; Boersma, R10/5704; Ziebell, R10/5812.

(Continued)

both of her aids. When she attempted to have them repaired, the dealer told her that both aids were destroyed and would "never be satisfactory." When she then asked what could be done, the dealer replied: "Just write me out a check--I have two on hand that I can fit you with right now." Instead, she took the aids to another dealer and discovered that they were under warranty; in fact, because she had paid for a 2-year loss and damage certificate, the aids were repaired at the factory without charge.[320] A reselling tactic employed by another seller was noted in the ISPIRG Report: the parents of a severely hard-of-hearing child were told that it was necessary to replace the child's aids annually because the high-powered model being used wore out so quickly. The family followed this advice and repurchased for several years in a row, until an audiologist informed them that the average useful life of a hearing aid was 5 to 7 years.[321] Similarly, Laura Ann Wilber reported that one of her patients had been told by a seller that after he bought body aids and became accustomed to them, he could purchase behind-the-ear aids; when he got used to those, he would be able to get in-the-ear aids. According to the dealer, this was the proper approach for both ears, and would have amounted to more than $2,000 worth of hearing aids. The buyer, who was unaware that hearing aids were not dispensed in this manner, was surprised to discover that an appropriate aid was available for less than $200.[322]

These examples certainly do not constitute a complete listing of the types of abusive sales practices utilized to sell hearing aids.[323] They do reveal, however, that the repertoire of tactics is limited only by the imagination of the particular seller involved. Such tactics are successful in far too many cases, resulting in serious injury to the consumer.

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319 (Continued)

Others found that the aid that was delivered to them was not the one that they had agreed to purchase. E.g., Hand, R13/660; Bell, R13/705; Wallace, R13/709.

320 White, R13/619. For other examples of repairable aids that were replaced instead, see Kuptz, TR5647; Harford, R5/846; cf. Hill, R8/7830.

321 ISPIRG, R8/1347.

322 Wilber, R8/5327-28.

323 Other sales practices will be discussed in Part One, Section IX, and Appendix F, Sections IV & V, infra.

G. Dealer Incompetency

In addition to the numerous examples of abusive sales practices, the record reveals many instances of incompetent testing and fitting by hearing aid dealers. The most distressing occurrences in this area involve the fitting of a hearing aid in the face of medical contraindications.[324] A number of individuals have reported the fitting of hearing aids on persons whose ears were draining.[325] For example, Wynnette Moneka testified that one of her patients was sold hearing aids by three different sellers despite the presence of drainage from the patient's ear.[326] Similarly, Darrell Rose, Ph.D., reported that a 69-year-old woman was sold binaural in-the-ear aids, despite the presence of ear infections, and consequent draining, in both ears, a medical contraindication to the placement of an ear mold in either ear canal.[327] Other instances in which a medical referral should have been but was not made are plentiful.[328] Persons who had perforated ear

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324 All of the examples that are discussed in the text involve fittings in the face of medical contraindications. For a discussion of the various situations in which medical attention is needed and should be suggested by the dealer, see Appendix F, Section I.B, infra.

325 See, e.g., B. Smith, TR278-79; Harvey, R8/6897-98; Dalton, R10/5610; Kramer, R13/1619.

326 Moneka, TR6146-49. The third unit was fitted even after the dealer had been notified that the ear was draining. Id. at 6149. Jack Willeford, Ph.D., a Colorado audiologist, reported at R8/8200 that one of his clients have been sold a second aid for her left ear, but never wore it because the ear was chronically draining. He concluded that her left ear was not likely to dry up and that, in any event, the second aid should not have been sold under the circumstances.

327 Rose, R5/705. Dr. Rose concluded that, at best, a bone-conduction aid should have been used pending medical treatment for the infections. Id.

328 See Urban, TR1847; Ruben, TR4014-15; Rose, R10/83. One of the volunteers for the ISPIRG study needed immediate medical attention, but was not so informed by the two dealers she visited. When she finally asked each of them whether she should see a doctor, both replied in the negative. ISPIRG, R8/1358. Similarly, four of the five dealers visited by an elderly PIRGIM volunteer who needed medical attention attempted to sell her an aid immediately. PIRGIM, R8/D231ip21.

drums[329] or wax in their ears[330] were nevertheless fitted with aids. Several who were suffering from Meniere's disease just were sold hearing aids.[331] Donald Morgan, Ph.D., reported that one of his patients was sold a hearing aid despite a marked and obvious asymmetry in sensitivity between the two ears; audiological evaluation, and subsequent surgery, revealed a life-threatening space-occupying lesion involving the cranial nerves.[332] Mrs. Julia Smego was sold a hearing aid for her right ear in 1972. During subsequent testing, however, an audiologist discovered a cholesteatoma--a condition that is sometimes life-threatening.[333] Perhaps one of the most upsetting situations was that reported by Leslie Dalton, Ph.D., who testified that a seller had recently fit an aid on an ear with a large tick in it.[334]

In still other cases, hearing aids were sold to people with surgically treatable ear pathologies.[335] Mrs. Jacqueline Rae Bati, who suffered from otosclerosis, had been wearing a hearing aid for some time when she visited Dr. Robert Kramer. He recommended a stapedectomy, which was successful for both

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329 See, e.g., Moneka, TR6146; Boden, R13/1616; Smego, R13/1620.

330 See, e.g., Gunterman, TR9656; Dolowitz, R5/1611; Abramowitz, R8/4216; S. Graham, R8/7529.

331 See, e.g., Consumers Union (Senate Hearings, 1973), R8/1189PPPP-QQQQ; NCSC Affidavit, R10/4546-47.

332 Morgan, R10/7330.

333 Smego, R13/1620. The hearing aid was switched to Mrs. Smego's left ear with positive results, and the cholesteatoma was later removed. Id.; see McShane, TR8098; Dalton, R10/5610.

334 TR8734. Dr. Dalton has also seen, for example, a young boy with a sprouting bean in the ear, on which a hearing aid had just been fitted. TR8726, R10/5618.

335 For example, Dr. Stephen Epstein testified that he sees about 20 patients each month who have worn or are wearing hearing aids, and that two or three of these have losses that could have been medically or surgically corrected. Epstein, TR4573. He added that most of these people have not had any medical advice when they purchase their aids. Id. at 4607-08; see Kasten, R5/1281 (98.86% of otosclerosis patients who were first seen by hearing aid dealers were sold aids and were not informed of the availability of medical or surgical treatment). See also PIRGIM, R8/D23lip22; Powers, R13/1024.

ears, and her hearing is now normal.[336] Henry Hecker reported that one individual he had seen had been buying sets of hearing aids for the past 12 years (four sets in all) at $700 a set, yet Mr. Hecker's testing revealed a surgically remediable hearing loss in one ear, the correction of which rendered amplification unnecessary.[337] Similarly, a Mrs. Harmon was tested by a seller in 1964 and was sold hearing aids for both ears. In 1968, when she had just finished making the payments on her aids, the same dealer sold her two more aids on the grounds that her old ones were no longer adequate for her hearing loss. In 1973, just as she was completing the payments on these aids, the dealer attempted to sell her yet another set. She saw an audiologist instead, who tested her and recommended surgery. Mrs. Harmon no longer needs hearing aids.[338]

Aside from the many instances in which medical contra-indications to hearing aid use are overlooked or ignored by dealers, the record contains considerable evidence of incompetent dealer testing and fitting.[339] For example, consumers whose hearing is perfectly normal are often tested by hearing aid dealers and informed that they have a hearing loss.[340] William Lentz, Ph.D., noted the experience of a middle-aged man who had worked in a

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336 Id. Kramer, R13/1619. Dr. Kramer stated that proper audiological testing would unquestionably have indicated a medical pathology. Id.; see MPIRG, R8/1247; RPAG, R8/2616-17; Wilber, R8/5327; Hull, R8/6136; Merrell, R13/1659-61.

337 Hecker, TR5260; see Hecker, R10/4834.

338 Anderson, R10/7284-85; see also Stroup, TR948.

339 Lack of dealer competency was mentioned in 14% of the letters submitted by the AARP. Freundlich, R13/1977; see Minnesota Hearing Aid Industry, R8/1315 (9%). Eight RPAG volunteers made a total of 21 visits to hearing aid dealers. In nine instances (42%), the dealers recommended aids when audiologists had not done so. RPAG, R8/2601. Similarly, NYPIRG volunteers were tested 28 times by dealers. In 50% of the cases, the dealer stated that a hearing aid was warranted after an audiologist had indicated that it was not. NYPIRG, R8/1335h.

340 See, e.g., Hecker, TR5270; Stahl, TR5541; Beiter, TR9031; ISPIRG, R8/1355; Hardick, R8/6748. For other examples of hearing aid sales to normal hearing persons, see notes 231-36 supra and accompanying text.

noisy environment for many years. Out of concern over the possibility of damage to his ears, this man answered an advertisement for a free hearing test. After being tested in a hotel room near a busy street, he was sold a hearing aid. When the aid proved unbeneficial, he visited Dr. Lentz, who found that the man's hearing was "excellent" and that he could not be considered even a "borderline" hearing aid candidate.[341] Frank Butts' testimony included the following case:

> I had a child in my office last Thursday with normal hearing in both ears, and the hearing aid dealer's audiogram also reported normal hearing in both ears. But the dealer sold him a hearing aid and the boy liked it and liked it quite a bit. Upon questioning, I found out the reason for it was--he left it off most of the time--he was able to turn it on when the teacher spoke to another teacher in the doorway and he was able to hear the conversation and nobody else could.[342]

At the opposite end of the spectrum are instances in which individuals with "dead" ears have been sold hearing aids.[343] Darrell Rose, Ph.D., for example, noted that a 66-year-old man with no discrimination ability in his right ear had been sold an aid for that ear which "could not possibly have been of any benefit."[344] Similarly, James Jerger, Ph.D., reported that a 19-year-old woman was fitted with an aid for an ear that had no discrimination ability with or without the aid.[345]

A variety of incompetent hearing aid fittings fall between these two extremes.[346] Sometimes dealers will fit a hearing

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341 Lentz, R10/6535-36.

342 Butts, TR4180. Although the dealer in this case correctly concluded that the child's hearing was normal, an aid was fitted in an attempt to improve the child's performance in school. Id. at 4181. The child has a learning disability, not a hearing loss. Id.

343 See, e.g., Byrne, TR1037; Hecker, TR5270; Beiter, TR9031; Krebs, TR11836; NYPIRG, R8/1335i. For additional examples of hearing aid fittings on dead ears, see notes 231-36 supra and accompanying text.

344 Rose, R5/705.

345 Jerger, R8/4958.

aid to the wrong ear.[347] In other instances, consumers are sold hearing aids that are not powerful enough,[348] or are too powerful,[349] for the particular individual's hearing loss. Or a consumer might simply be fitted with the wrong type of hearing aid.[350] For example, Henry Hecker testified that one seller ignored his recommendation and fitted a completely different aid, which actually worsened the patient's hearing.[351] Bonita Simon noted that a patient who had been fitted by a dealer with binaural ear-level aids displayed virtually no improvement in hearing. A CROS hearing aid was recommended by her, and the patient successfully adapted to amplification.[352] Similarly, Ralph Rupp, Ph.D., recommended a particular aid for an elderly woman, who then purchased the aid from a hearing aid seller. When she found the aid impossible to use, he checked it and discovered that the dealer had not followed his recommendations concerning the internal settings of the aid. Adjustment of the aid in accordance with his original recommendation remedied the problem.[353]

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346 Darrell Rose, Ph.D., Director of Audiology at the Mayo Clinic, testified that his staff decided to begin keeping a "bad fit" file; i.e., a file of all cases of grossly misfitted individuals. Rose, TR456. In 1 year, they documented more than 40 such cases. Id. Moreover, it had been agreed in advance that no case would be placed in the bad fit file unless every audiologist on the staff agreed that the individual was grossly misfitted. Id. at 515-16. See Appendix F, Section VII.I.3 for a discussion of this "file."

347 E.g., Madell, TR5861; Beiter, TR9031; Rose, R5/705; Byrne, R8/6461; Hardick, R8/6711; see note 249 supra and accompanying text.

348 See, e.g., Madell, TR5861; MPIRG, R8/1247; Kasten, R8/6985; Winston, R8/7391.

349 See, e.g., Madell, TR5861; Kasten, R8/6985.

350 See, e.g., Beiter, TR9031; Gunterman, TR9663; Harford, R5/848; Alpiner, R8/5432; Lentz, R8/8168-69. Still another evidence of dealer incompetency, and a cause of consumer dissatisfaction, is the sale of improperly fitted earmolds. See, e.g., Percy Letter, R8/240; Dynneson, R8/5269; Kelly, R10/5959.

351 Hecker, TR5270-71; see Traynor, R8/6802.

352 Simon, R10/5597.

353 Rupp, R8/7113; cf. Franks, R10/6525.

Thus, evidence of the incompetence of some hearing aid sellers is abundant. Many consumers are sold unnecessary or inappropriate hearing aids as a result.

H. Quality Control

Another important problem for hearing aid users concerns the sale of defective hearing aids.[354] One consumer reported that:

> from the very beginning it has been producing whistling sounds which were very, very embarrassing. It seemed to me that the mold fitting into the ear was defective. How do I know: Simple enough. Whenever I pressed the mold into the ear the whistling was eliminated. From the very beginning I called the attention of the hearing aid dealer. His response?
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> That is the best we could do. Latter [sic] on his excuse was that my ear is out of shape. However, HE DID TAKE MY MONEY. THERE WAS NO REFUSAL ON HIS PART . . . . But I was left to hold the bag. Out of money and no satisfaction.[355]

A long-time hearing aid user recounted one of his more aggravating purchases:

> The second hearing aid was a disaster namely: Shortly after being fitted with the hearing aid at price of $485. (Each hearing aid cost $485.) I went on vacation to Asheville, North Carolina . . . and enroute the hearing aid suddenly cease [sic] to function after only two weeks.
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> Upon arriving in Asheville I called a local BELTONE representative office . . . who upon examining the instrument discovered the inside of the unit was completely corroded. The small screws that held the sides together fell apartment [sic] from rust.[356]

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354 AARP Letters, R10/1191-92, 1359-60, 1453-54, 3967-71, 4062.

355 Id. at 955.

356 Id. at 4016.

Finally, a consumer who spent $293 on a hearing aid lamented:

> My hearing aid lasted about four or five months. This was a lot of money spent for nothing. I would like to know how long one can expect results, when buying a hearing aid.[357]

I. Dealer Refusals to Make Refunds or Honor Promised Trial Periods

When consumers purchase hearing aids from which, for one of the many reasons already noted, they receive no benefit, they may attempt to obtain a refund of the purchase price. Formidable obstacles stand in the way of a refund, however. Even if the seller promised that a refund would be available, the consumer is often "strung along" with repeated adjustments to the hearing aid until the time limit for the refund has expired.[358] For example, one individual wrote:

> I have been wearing a Hearing Aid for 1 year and 3 months. In that time I have had many talks with them and their so-called adjustments have not helped. The guarantee has expired and they will not refund--just keep telling me to come back for adjustments.[359]

Similarly, an elderly person reported this experience:

> 1st Hearing aid was a behind the ear type from Sears (10 day money back trial). I paid cash. After 10 days and the aid going "dead" on me several times I asked for money back. Hearing aid man said I had not given it a long enough trial. (Then I lost my money back guarantee). I paid $289 for the aid and after a years [sic] quibbling they finally offered me $132 which I refused.[360]

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357 Id. at 4116.

358 See, e.g., Byrne, R8/6462-63; Harvey, R8/6894; NCSC Affidavit, R10/4667. In some instances, a series of different--and equally useless--aids are substituted for the one originally sold, and then a refund is refused. See, e.g., Byrne, R8/6460-62; Hardick, R8/6761; AARP Letters, R10/1250, 1441.

359 AARP Letter, R10/1272.

360 Id. at 1241.

Moreover, in some instances, sellers simply refuse to honor their refund agreements.[361] As the Presiding Officer noted:

> In some cases, promises of refunds in the event that the hearing device proves unsatisfactory are used to lay resistance to rest; in fact, many so-called guarantees are not honored although consumers in the past have gone to some lengths in attempts to obtain satisfaction where such representations have been made to them.[362]

The testimony of Mamie Diogo bears out this conclusion.

> I gave him $200, but I told him, I said before I give him the $200, I told him this is not going to work. He said, "We are going to make a bargain. If it doesn't work, I will give you $200 back."
>
> I used it two or three times. It wouldn't work, and I called him up. He said, "Use it again and it will work." I called him up three times, but he didn't answer the telephone.
>
> He had a tape recorder, and after he called me back at night, but the last time, I called him to tell him I wanted my money back, and then he didn't answer me back; never did.[363]

Similarly, Michael Winston, Ph.D., reported that an elderly woman spent $750 on a hearing aid, with the assurance that she could get a refund if the aid was not satisfactory. The woman did return the hearing aid, but never received the promised refund.[364]

Finally, it is noteworthy that some sellers offer trial periods to consumers, but later renege on this promise. William Lentz, Ph.D., reported that four customers of one local seller had recently told him that this seller offers a $35 trial period,

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361 See, e.g., S. Graham, R8/5274, 7490; AARP Letter, R10/953; Hovey, R10/5864.

362 P.O. Report, R9/Dlip89-90 (footnote omitted).

363 Diogo, TR4416.

364 Winston, R8/7392; see Byrne, R8/6464.

but then threatens those who wish to cancel their purchases.[365] David McPherson, Ph.D., testified that some consumers are "badgered" if they attempt to return their aids in accordance with an agreed upon trial period.[366] In fact, it took one consumer 2 years and a small claims court judgment to secure the refund that the seller had promised him during the trial period.[367]

J. Problems Not Directly Addressed by the Proposed Rule

Several problems that impact significantly upon hearing aid consumers were not directly addressed by the Proposed Rule. The most important of these are the high price of hearing aids and difficulties associated with hearing aid repairs.

1. High Prices

Although precise figures are difficult to come by, it is safe to say that the average price of a hearing aid is between $300 and $400.[368] These high prices raise significant problems for hearing-impaired persons, many of whom are elderly, and complaints on this score are plentiful.[369] For example, Gertrude Jackson wrote:

> I hate to admit we were taken in and charged an exhorbitant [sic] price for double hearings

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365 Lentz, R8/7998.

366 McPherson, TR5140.

367 Stoll, R8/7836; see Kelly, R8/5648. Indeed, in Mr. Stoll's case, the initial 10-day trial period had been extended at the suggestion of the seller. Stoll, R8/7836.

368 See, e.g., Flemming, TR609; Pratt, TR3698; Vreeland, TR 3854; Adkins, TR6071; Bartels, TR6321; Wilson, TR10076; Consumers Union, R8/1191e; Minnesota Hearing Aid Industry, R8/1309; RPAG, R8/2839; Byrne, R8/6447; Ginsberg, R10/429; ASHA, R10/2549. Prices vary, of course. Some consumers are charged well over $500 for a single aid, e.g., Percy Letter, R8/353 ($650); Brakebill, R13/738 ($685), while others pay considerably less than the average, e.g., Lentz, TR 11235-37 ($100 plus wholesale price of aid); Freeman, R8/4045 ($209 and up). Richard Schneider of San Diego sells a single aid for $1,000. Schneider, R13/170.

369 A number of organizations have studied consumer opinion on the cost of hearing aids. In the MPIRG survey 89% of the 146 respondents stated that hearing aids and supplies

(Continued)

> for my husband. We paid $861.00 plus a used set of hearing aids . . . which cost $500.00 While we cancelled the Beltone order the day after the order, Mr. Morely of Charleston would not admit receiving the letter.[370]

An elderly person complained:

> My main gripe about hearing aids is the exhorbitant [sic] price one has to pay. I just recently bought a Beltone Hearing Aid and the asking price was $469.00. Either the manufacturer or the dealers are making an excessive profit, which we elderly people can ill afford to pay.[371]

Similarly, a consumer from California argued:

> How is it that you can buy a pretty good radio or even a calculator for around $10 and have to pay anywhere from $300 to $500 for a hearing aid, which has far less circuit complexity?
>
> Big profits for someone along the line has to be the answer. Hearing aid makers say, "Well it's not a very big market, and we have to make a profit on the few we sell." Hogwash! . . . . [N]o one has the guts to mention that the vast majority of [hearing-impaired persons] are old, retired people trying to live on the lousy $300 or $400 a month that S.S. gives them. How in hell can they afford a hearing aid?[372]

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369 (Continued)

were "too costly." R8/1207. PIRGIM reported that 32 of the 40 people surveyed complained that aids were too expensive. R8/D23lip50. In response to RPAG's call for general comments on the cost of aids and supplies, 73% of the respondents said the cost was too high. RPAG, R8/2659-60. The Minnesota Hearing Aid Industry found that 37% of their survey respondents felt that aids were "overpriced." R8/1310; see NHAS, R3/3759; Market Facts, R8/644; Kady, R8/2933; Powers, R13/1001; Freundlich, R13/1977.

370 Percy Letter, R8/6.

371 Id. at 313.

372 Sly, R8/6709.

In short, the record contains numerous complaints about the high price of hearing aids, often in conjunction with a more generalized complaint that the aids were useless despite the expenditure of what seemed to the consumer to be a great deal of money.[373] It has been suggested by some that the cost of hearing health care might be reduced if the prices of hearing aids were "unbundled."[374] The Proposed Rule, however, was never directly aimed at pricing issues. Staff believes that the marketplace effects of the Proposed Rule, combined with the Commission's efforts against anticompetitive activities in this field,[375] should help to insure that hearing aid prices remain at an acceptable level.

2. Hearing Aid Repairs

The consumer whose hearing aid malfunctions faces yet another series of pitfalls. The most serious problem is the attempt by some sellers to sell new aids to people whose current aids need a very minor repair.[376] Michael Stahl, for

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373 See, e.g., Percy Letters, R8/18, 224, 245, 252, 353, 417; Hardick, R8/6747.

374 "Unbundling" means separating the cost of hearing aid services from the cost of the device. Currently, the price of a hearing aid generally includes not only the device itself, but pre-fitting testing and post-fitting consultation and adjustments as well. See NHAS, R3/3529; HAIC/NHAS, R10/2780-81. The HEW Task Force recommended that these costs be unbundled, so that those consumers who need little or no post-fitting counseling, for example, would not be forced to pay for those services through higher hearing aid prices. See HEW Task Force Report, R8/3238-39. It is far from clear, however, that the overall price to the consumer would actually be reduced in this manner. Also, it has been suggested that some consumers would forgo needed post-fitting services if they were forced to pay for them on a fee-for-service basis. See HAIC/NHAS, R10/2783.

375 The record contains copies of four consent orders and one Administrative Law Judge's decision in cases initiated by the Bureau of Competition against hearing aid manufacturers. See R13/D15.

376 See, e.g., Stroup, TR944; Lynch, TR1440; Kuptz, TR5647; Rose, R8/4179; Bowe, R8/6952; Mosley, R10/5313-14; Bowen, HX35/13. As one industry member put it:

> Another problem to be decided by the dealer is whether or not a new aid

(Continued)

example, testified that an elderly woman who lived in a rest home was told by a dealer that repairs to her hearing aid would cost almost as much as a new aid. A social worker at the rest home referred the woman to Mr. Stahl, however, whose evaluation revealed that the aid simply had a broken cord.[377] Similarly, Laura Ann Wilber, Ph.D., reported that a blind man whose hearing aid malfunctioned was told that he needed a new one when, in fact, the earmold was merely clogged with wax.[378] Such experiences appear to be all too common.[379]

Other consumers are not so fortunate and end up actually buying a new hearing aid when their old one was repairable. Pauline Schwartz testified that first one dealer and then another informed her that her old aid could be repaired only at great expense.[380] As a result, she bought new aids from both of them, neither of which was satisfactory.[381] Finally, she took her old aid to a third man, who fixed it with no trouble at all.[382]

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376 (Continued)

> should be recommended instead of a repair. There is only one answer to this question. If the aid is over a year old, always suggest that the client look over the new aids that are now available. You never can tell. No matter what he has told you, he may be ready for a new one right then.

RPAG, R8/2624, quoting Hoffman, A Cheap Repair . . . It Favors No One, National Hearing Aid Journal, November 1967, at 22.

377 Stahl, TR5536.

378 Wilber, TR1392; see Lankford, TR8004; Simon, TR9161-62; Ohio Div. C.P. Letter, R8/2946-47; Scharf, R10/6335.

379 See, e.g., Percy Letters, R8/13, 257; Davenport, R8/8283; Mitchell, R10/5270; Bengston, R10/5949-50.

380 Schwartz, TR4879.

381 Id. at 4880.

382 Id.

One consumer reported the following:[383] when the negative battery spring in his hearing aid broke, he took the aid to his local dealer. Although the spring had been repaired in the past, this seller insisted that the aid had to be sent to the factory. In addition, he refused to loan an aid to the consumer, who therefore purchased an inexpensive model. When the consumer returned to pick up his repaired aid, the dealer informed him that it was "too far gone inside." He then took the aid to a different dealer, who repaired the broken spring without difficulty.

If the hearing aid dealer does undertake repairs on an aid, several other problems are possible. First, a number of persons complained that repairs take far too long--into weeks and even months.[384] Second, the record contains a great many complaints about the high cost of repairs.[385] Related to this is the charge that some sellers refuse to give itemized repair bills; instead, they simply demand a flat--and high--fee.[386] For example, one individual reported that when her aid needed repair, the dealer stated that it would have to be sent to New York to be fixed for $60, with no guarantee. She went to another seller, however, who repaired the aid for $12.50.[387] Likewise, another consumer complained that a seller had returned his aid to the factory at least six times for reconditioning, each time charging $70 cash in advance.[388]

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383 Percy Letter, R8/160-62. Closely related to the foregoing cases are those in which the seller informs a consumer that parts for the hearing aid are no longer available and that a new aid must therefore be purchased. See, e.g., Percy Letter, R8/73; RPAG, R8/2623-24. An 83-year-old consumer who suffered this experience lamented:

> I can not afford two new hearing aids and why should I be compelled to buy them when all I need at present is cords and batteries for an aid that is only four or five years old . . . . [AARP Letter, R10/1059].

384 See, e.g., Percy Letters, R8/81, 188, 250.

385 See, e.g., id. at 37, 87, 250; AARP Letters, R10/1247, 4009. See also Market Facts, R8/661.

386 See, e.g., Percy Letter, R8/251; Kenneson (HEW Task Force Hearings), R8/3415; Kolter, R8/8286; Davenport, R8/8288-89.

387 Percy Letter, R8/206.

388 Id. at 56-59.

Finally, even if a hearing aid user is able to get repair work done, there is little assurance that the aid will function properly. One consumer, for example, was supplied with replacement earmolds that were useless.[389] Another was charged $90 for repairs that failed to correct the problem, which was later remedied by a different seller for only $11.[390] In short, the record contains numerous examples of inadequate repairs by hearing aid sellers.[391]

K. Conclusion

It is undoubtedly true that many hearing aid consumers are competently tested and fitted for hearing aids that greatly benefit them.[392] It is also true that many individuals purchase hearing aids from which they derive no benefit. A variety of factors account for such occurrences. In some instances, misleading advertising or improper sales tactics convince consumers who cannot be helped by amplification that they will benefit from the purchase of an aid. In other cases, those who are likely to benefit from a hearing aid are led to expect far greater benefits than current amplification systems are capable of providing. Not infrequently, an incompetent seller fits a consumer with the wrong aid, or sells an aid to someone who cannot be helped by amplification. Some hearing aids are defectively manufactured or are somehow damaged before they reach the buyer.

When a consumer does purchase a hearing aid from which he is not benefitting, additional difficulties surface. Often, the buyer is placated by unhelpful adjustments to the aid or by the substitution of a different--but equally unsatisfactory--hearing aid. Eventually, any warranty or trial period covering the device will run out, justifying the seller's refusal to refund any part of the purchase price. Indeed, some persons are refused refunds despite the seller's promise that the hearing aid can be returned if it proves unsatisfactory. Finally, not only are hearing aid prices high, but when the aids break down, repairs are often tardy, expensive, of poor quality, or unavailable.

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389 Hardick, R8/6774.

390 Byrne, R8/6467.

391 See, e.g., Percy Letters, R8/198, 259, 283, 300, 403; Berberich, R8/8292.

392 Section 11 of the record contains letters from many satisfied consumers.

In light of the evidence presented in this section, then, there is little doubt that many hearing aid consumers face formidable obstacles in their attempts to secure adequate and economical assistance for their hearing handicaps.

/There are no pp. 85, 86/

IV. THE NATURE OF HEARING LOSS IN SUMMARY[393]

The ear is a highly complicated organ which detects and transmits sounds to the brain. It is divided into three parts: the outer ear, the middle ear, and the inner ear. Sound waves pass into the outer ear and through the ear canal where they vibrate the ear drum. This in turn causes the bones of the middle ear to vibrate, which in turn vibrates the fluid of the inner ear (cochlea). The fluid vibration stimulates the delicate nerve fibers to the cochlea. The electrical impulse thus generated is in turn transmitted to the brain by the "eighth nerve" and interpreted.

There are five basic types of hearing impairment: conductive, sensori-neural, mixed (conductive and sensorineural), central, and nonorganic or functional.

A. Types of Hearing Loss

1. Conductive Loss

The term "conductive loss" is used to describe a problem with either the outer ear or the middle ear which prevents sound pressure waves from reaching the cochlea through normal air-conduction channels, or from reaching it with sufficient intensity. Various factors can cause such a loss, including impacted ear wax or other objects blocking the ear canal, rupture of the ear drum, inflamation of the outer or middle ear, immobilization of the bones of the middle ear, or tumor.

Typically, conductive losses can be successfully treated by medication or surgery, following which the hearing returns to normal or near-normal levels. The need for a hearing aid is therefore eliminated, or at least decreased to the extent that a less powerful aid is needed than would otherwise have been the case.[394] It is estimated that between 5% and 20% of the individuals with hearing impairment have a conductive hearing problem which should be alleviated by surgery or other medical means, or at the very least medically treated.[395]

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393 For a more detailed discussion of this subject matter, see Appendix F, Section I, infra.

394 E.g., Winston, R8/7440; Consumers Union, R8/1189mmmm; Delk, R10/7149; Price, SPXD/195; ISPIRG, R8/1402; ASHA, R10/2588.

395 E.g., Marcus, TR5507-08; NHAS, R3/3638.

2. Sensorineural Loss

Sensorineural hearing loss (also called nerve deafness) results from damage to the nerve fibers in the inner ear. Sensorineural losses typically are characterized by the inability to hear particular sound frequencies or tones, which may lead to varying degrees of difficulty in understanding certain words and sounds used in normal speech. While national data are apparently unavailable, indications are that in adults most hearing losses which interfere with an individual's ability to function are sensorineural in whole or in part. Sensorineural losses can be caused by exposure to loud sounds, various disease processes, ototonic drugs, and often occur as a concomitant part of the aging process. Such losses may be characterized by complicating factors such as recruitment (where small increases in sound intensity result in rapid increases in apparent loudness to the individual), prosbycusis (where, in addition to recruitment-type effects, an individual's inability to understand speech is greater than the degree of hearing loss might indicate), and Meniere's Syndrome (where the amount of hearing loss varies with time).

Sensorineural losses are usually permanent in nature and typically do not respond to treatment by medication or surgery. Contrary to popular misconception, many persons with a sensorineural loss will benefit from the use of a hearing aid.

3. Mixed Conductive and Sensorineural Loss

The term "mixed loss" is used to refer to the impairment of not only the conduction mechanism (that is, the mechanical transfer of sound waves through the outer and/or middle ear), but also the perception mechanism in the cochlea. In other words, both a conductive and a sensorineural disability are present in the same ear at the same time in a mixed loss. The conductive component of a mixed hearing loss may be corrected medically or surgically, but that part of hearing loss due to nerve damage cannot be corrected.

4. Central Loss

Central hearing loss is a defect due to malfunction of that portion of the auditory nervous system beyond the ear itself. A central disorder prevents the proper processing of auditory signals coming to the brain and causes an inability of the brain to recognize or understand sounds either in whole or in part. Among the causes of central impairments are tumors or abscesses, brain hemorrhages, syphilis, arteriosclerosis, multiple sclerosis, and Rh incompatibility.

5. Nonorganic or Functional Loss

A nonorganic or functional hearing impairment (also known as pseudohypocusis, hysterical deafness, psychogenic hearing disorder, or simulated hearing problems) is an auditory dysfunction which occurs in an emotionally unstable individual, and is based on subconscious motivational factors and often caused by emotional stress or tension. Although it has no known physical or organic basis, the individual usually is not faking (malingering), and is firmly convinced that he cannot hear. A person with organic loss may have nonorganic loss (overlay) in addition.

B. Problems Needing Medical Attention

Since a hearing loss may be the first symptom to be noticed of various diseases, it clearly should be the object of competent medical attention prior to the fitting of a hearing aid. Some of these diseases can be life threatening if not detected and treated in time. The range of available medical remedies for a hearing problem varies depending on the cause of the hearing loss. For example, although some losses can be totally corrected by medical attention, others can be only partially corrected. In some situations the progression of loss can merely be halted or retarded, while in other situations no medical remediation is possible. Finally, the use of a hearing aid itself may cause medical problems which need not have developed if a physician had been seen first.

C. The Nature of Hearing Loss As It Impacts Upon Hearing Aid Selection

Hearing aids can be used to varying degrees of satisfaction by persons with the various types of hearing loss. In addition, there are problems inherent in adjusting to and receiving benefit from a hearing aid, and those problems vary with the type, severity, stability and complexity of the hearing loss, the age of the person involved and the emotional and psychological response to these problems.

1. Physical Factors

Individuals who have a purely conductive loss and elect not to have surgery can expect maximum benefits from a hearing aid. Such individuals, whose loss simply prevents sound from getting into the nervous system (and is not complicated by neurological problems which have a negative effect on amplified sound), are thus the most likely persons in terms of physical factors to benefit from a hearing aid.

A hearing aid can help a person with a sensorineural loss only to a lesser degree. These individuals have sustained damage to the cells in the inner ear necessary to perceive and transmit sound, or they do not have sufficient nerve elements leading

to the brain to carry the complex acoustics signal. As a result such losses involve a distortion of sound, and therefore mere amplification - i.e., making sounds louder - does not solve their hearing problem. No hearing aid can do anything but make sounds louder, however. Furthermore, the presence of a recruitment problem on presbycusis among many of those with a sensorineural loss often makes use of a hearing aid difficult.[396] Similarly, since a hearing aid cannot make speech sound any clearer than the resolving power of the individual's damaged hearing mechanism, the presence of a discrimination problem may preclude hearing aid use or may allow only limited benefits.

Persons with central auditory problems will not receive any benefit from a hearing aid for their central problem. Such central auditory problems often involve a reduction of the ability of the central nervous system to deal with even a good signal. It is only when an individual has both a central and a sensorineural or conductive loss that benefit can be obtained through hearing aid usage.

Obviously, a person with a non-organic hearing loss does not need a hearing aid, and can derive no real benefit from hearing aid use.

2. Psychological Factors

The ability of a person to wear a hearing aid may ultimately depend upon psychological and emotional factors. The factors include motivation to hear better, capability for adjusting to a new sensory experience, the poor image that hearing aids have had with the lay public in the past, environmental influences, social influences, the psychological stability of the patient, and vanity or cosmetic factors.

Some of the physical characteristics of the hearing loss can be measured by hearing testing, but there is no objective manner in which the potential hearing aid user's psychological reaction to hearing aid use can be measured. Many elderly will experience difficulty in making the psychological adjustment to a hearing aid. The aging process often affects motivation, learning ability, motor capacity and general outlook on life.

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396 E.g., Kasten, R8/6981-82; Harford, R8/4548.

V. THE NATURE OF HEARING AIDS IN SUMMARY[397]

A. In General

There are two basic types of hearing aids: air-conduction aids and bone-conduction aids. Bone-conduction aids are available in eyeglass, body, and behind-the-ear versions. Almost all hearing aids sold are however, air-conduction aids, which are available in four basic fitting types: in-the-ear, behind-the-ear, eyeglass, and body. The first three types of fitting can be modified to provide CROS amplification.[398] In its basic form, each type of fitting provides monaural, or single-ear, amplification. Binaural amplification can be provided by using a hearing aid for each ear. An air-conduction hearing aid uses a receiver that transmits sound into the outer ear, from which it is transmitted in the normal way through the middle ear to the cochlea.

The bone-conduction hearing aid, on the other hand, uses a receiver which is placed against the mastoid bone, located behind the ear. The receiver sets up vibrations in the mastoid, which are transmitted to the inner ear. The bone-conduction process thus bypasses the apparatus of the middle ear. This type of aid is only appropriate for a small part of the hearing-impaired population.[399] It is also less efficient, and has a narrower frequency range, than its air-conduction counterpart.[400] Bone-conduction aids should therefore be used only when an air-conduction fitting is impractical (such as in the case of a chronic middle ear condition).

As a general rule, there is a direct correlation between the size of a hearing aid and its power.[401] Thus, the body aid is the most powerful type of hearing aid,[402] while the in-the-ear

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397 For a more detailed discussion of this subject matter, see Appendix F, Section II, infra.

398 With a CROS fitting, the microphone is placed near the user's poorer ear, while the receiver is positioned in his better ear.

399 For example, Patricia Mastricola estimates that the bone-conduction arrangement is appropriate for less than one percent of her clinic's patient population. Mastricola, TR8620. In 1963, approximately 5% of the population of hearing aid users were wearing bone-conduction aids. National Center for Health Statistics, R8/D219ip11, 31 (Table 12).

400 NHAS Basic Course, R8/4292-93.

401 Pollack, SPXB/25; Berger, R8/5047.

402 E. Johnson, R8/4523.

aid is the least powerful.[403] In addition, there is a positive correlation between the distance separating microphone and receiver, and the output that the hearing aid can produce without generating feedback.[404] Hence, the in-the-ear aid is susceptible to feedback at much lower output levels than the body aid. The behind-the-ear and eyeglass fittings lie between these extremes in terms of feedback susceptibility.

Binaural (two ear) amplification is generally considered appropriate only for people with a relatively symmetrical hearing loss, although some industry representatives dispute this point.[405] Manufacturers and dispensers are understandably enthusiastic supporters of binaural amplification, since it means the sale of two hearing aids, rather than one.[406] Audiologists are less enthusiastic, principally because of the dearth of clinical evidence of binaural superiority,[407] and because many of their clients have reported that the binaural arrangements with which they fitted proved little or no benefit beyond that provided by a monaural arrangement (one hearing aid).[408] The advantages cited

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403 Pollack, SPXB/23.

404 Id. at 33. Mechanical feedback is produced by the vibration of the internal components of the hearing aid during the transmission of sound. The microphone picks up the vibrations and introduces them into the system, where they are amplified and re-amplified. The end result is an obnoxious and rather low-pitched squeal. Id. at 37. Acoustical feedback is produced when sounds emanating from the hearing aid receiver are picked up by the microphone and reamplified, producing a high-pitched squeal. Higher-gain instruments, because of the greater intensity of the signal they produce, are more likely to be afflicted with acoustical feedback. Additionally, such feedback is more likely to develop at higher frequencies. For a more detailed discussion, see id. at 33-37.

405 A "symmetrical loss" is characterized by no more than a 15 dB difference in hearing ability between ears through the speech range. Pollack, SPXB/252. See, e.g., Delk, TR10934.

406 Pollack, SPXB/244

407 Id.

408 See, e.g., Bentzen et al., R13/2398; Kasten, R8/6984; Rose, R8/4183.

for binaural amplification include improved localization ability,[409] better speech discrimination ability, greater ease of listening, and better sound quality.[410] These advantages are essentially subjective, and therefore often cannot be demonstrated with existing clinical techniques.[411]

Hearing aids are basically low-fidelity amplification systems[412] with relatively limited frequency ranges.[413] Sound quality is consequently not very good when compared with the sound fidelity provided by normal ears. Hearing aid sound quality has been variously described as "brassy," "tinny," or generally unnatural, by hearing aid users.[414] The sound quality of most hearing aids is worsened by distortion, often a concomitant of miniaturization.[415] Speech intelligibility generally declines as distortion increases.[416]

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409 The full localization advantage of binaural amplification can be realized only when ear-level hearing aids (behind-the-head, in-the-ear, or eyeglass) are used, since it is the presence of the head between the microphones which produces localization improvement. Pollack, SPXB/245.

410 See generally id. at 246-49.

411 Id. at 248.

412 See, e.g., Pollack, SPXB/49; Winston, R8/7408.

413 The full range of normal hearing covers the interval from 50 to 10,000 Hz. Consumers Union, R8/1191d. Most hearing aids operate over the interval from 300 to 4,000 Hz, which represents the range covered by most speech, but is not sufficiently wide to provide totally accurate sound reproduction. Winston, R8/7407; Consumers Union, R8/1191d.

414 Re "brassy," see, e.g., Consumers Union, R8/1191d; Powers, R13/1026. Re "tinny," see, e.g., RPAG, R8/2742; ASHA, R10/2582; Breman, HX41/2. Re "unnatural," see, e.g., Rassi, TR5732 (unnatural); Willeford, R8/7973 (same); AARP Letter, R10/1312 (same); id. at 1011 (noise); NCSC Affidavit, R10/4498 (same); Murray, TR4843 (same); Van Bibber, R10/4422 (same); AARP Letters, R10/1452 ("buzzes and hums"), 1463 (same), 1500 (rattling marbles); Jungheim, TR8879 ("mechanical"); RPAG, R8/2833 ("thin").

415 Zelnick, TR428. For an extended discussion of distortion, see Pollack, SPXB/49-57.

416 Pollack, SPXB/51-52.

Most people who wear hearing aids have significantly more difficulty understanding speech in noisy situations than do people with normal hearing.[417] This problem arises from the fact that a hearing aid merely amplifies all sounds and, with the exception (in some environments) of directional hearing aids, does not provide a capacity to "focus on" or "pick out" a particular sound, as a person with normal hearing is able to do. The record is replete with complaints which refer particularly to an inability to hear in group situations where more than one person is speaking,[418] and to the inordinate amplification of background noises which hearing aids provide.[419]

The directional microphone is designed to improve speech discrimination in some noisy environments[420] by reducing the amplification of sounds coming from all directions except in front of the user. When used with an impaired ear, however, a hearing aid with a directional microphone certainly does not provide better discrimination ability in noise than either an aided or an unaided normal ear.[421] In some noisy situations, however, use of a directional microphone may provide better speech discrimination than use of an omnidirectional microphone.[422] In other noisy situations, however, the directional microphone may not provide any additional benefit.[423]

No hearing aid is capable of restoring natural hearing.[424] An aid can provide amplification, but cannot restore speech discrimination capacity.[425] It is erroneous to compare the

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417 Lentz, R8/8024; Harford, TR52; Loavenbruck, TR1595.

418 See, e.g., AARP Letters, R10/1044, 1046, 1259, 1272, 1318, 1405, 1437, 1450, 1500, 4291; Percy Letters, R8/246-47, 300.

419 See, e.g., Stutz, R10/5274; Wilber, TR1350. A number of complaints concerning the amplification of extraneous noises are summarized by Kelly at TR7527. See also Carter, TR3651.

420 See Appendix F, Section II.A, infra.

421 This conclusion derives from a study conducted by Lentz in 1976. The results are summarized at R13/1743-44.

422 Id. at 1745.

423 E.g., Lentz, R10/6530; see Rose, R8/4177.

424 See, e.g., HAIC, R3/3963; Epstein, TR4569; Kojis, TR2121; ASHA, R10/1786; D. Sanders, SPXB/335; Berger & Millen, SPXD/489.

425 See, e.g., AA00, R8/4140; Winston, R8/7407.

assistance provided by eyeglasses to that provided by hearing aids, as the uninformed often tend to do.[426] In addition, the sound quality provided by a hearing aid is considerably different from the sound quality provided by a normal ear.[427]

The use of a hearing aid will not retard the progression of hearing loss.[428] It follows, of course, that the use of a hearing aid is not required in order to prevent further deterioration of one's hearing,[429] and representations to the contrary are patently false. The use of a hearing aid may, however, damage the user's hearing in some circumstances.[430]

It is not easy for hearing-impaired individuals to adjust to the use of a hearing aid. Most people who are fitted with their first hearing aids have not heard normally for years. Therefore, the sudden impact of forgotten sounds may be disturbing initially. Careful counseling is therefore required in order to prevent initial bad experience with the newly-acquired hearing aid. In general, a gradual process of adjustment is recommended.

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426 Kasten, R10/70. Eyeglasses can provide nearly normal visual acuity, while hearing aids are at best imperfect substitutes for normal hearing. See Resnick, TR5433; Hamburger (Senate Hearings, 1973), R8/1188n; Schein, R8/5685.

427 See, e.g., Alpiner, R8/5428. See also NCSC, R10/1500; Mabe, R8/7833. One user complained: "Everything is pianissimo or fortissimo, [with] nothing in between." James Payne, R8/1461.

428 E.g., Elia, TR7471-72; Ruben, TR4021-22; ASHA, R10/1792, citing H. Newby, Audiology 51 (3d ed. 1972). Rose, TR464; Rupp, R8/7121; Silverman, R8/7228; Berger, R8/4988; E. Johnson, R8/4494; Noffsinger, R8/5407; McNeill (Mather litigation, 1969), R8/2243-44.

429 E.g., RPAG, R8/2608; MPIRG, R8/1234; ISPIRG, R8/1367; Illinois Department of Public Health, R10/5554; Jerger, R8/4574.

430 For a discussion of this issue, see Appendix F, Section II.C.5, infra.

B. The Percentage of Those with Perceived Hearing Losses Who Can Benefit from Amplification

1. Monaural Amplification

Notwithstanding assertions to the contrary,[431] a substantial percentage of those with perceived hearing losses[432] will not benefit from amplication. This conclusion is clearly supported by estimates made by Beltone which deal only with those whose hearing loss in the better ear averages 35 dB or more.[433] Note that Beltone's figures may overstate the percentage who can benefit from amplification since they exclude those persons with losses milder than 35 dB who are less likely to have a communications problem from which an aid is needed. The estimates are broken down by age as follows:

Age	% of Persons with 35 dB or greater loss	% who can benefit from amplification
18-24	3.06%	93%
25-34	3.87%	95%
35-44	7.93%	95%
45-54	9.79%	95%
55-64	14.86%	93%
65-74	42.28%	75%
75-79	18.20%	50%
18-79	100%	77.99%

431 E.g., Barnow, TR1662; HAIC/NHAS Fact Sheet, R10/2676; see Appendix F, Section VI.H, infra.

432 An individual has a perceived hearing loss he, or someone such as his spouse, thinks that he has one.

433 Beltone, R3/3429. Beltone adapted its estimates from those of Hallowell Davis, M.D., and S. Richard Silverman, Ph.D., in Hearing and Deafness 321 (1970), one of the two textbooks for the NHAS Basic Course. The demographic data was derived from HEW figures. See Beltone, R3/3429, n.1.

Thus, even understated, of those 65 and over, who in the aggregate represent over 60% of the total hearing-impaired population with a 35 dB or greater hearing loss, approximately 32% cannot benefit from amplification with 50% of those aged 75-79 being unable to benefit.

The Beltone estimates are corroborated by many experts, based on their personal experiences. Most estimates placed the percentage of persons who cannot benefit from the use of a hearing aid, even though they have a perceived hearing loss, at between 30% and 50%.[434] It should be noted that these estimates also probably err on the side of understating the percentage that cannot be helped. Because the patients seen by these individuals are much more likely to have been previously seen by physicians than are potential hearing aid consumers in general, many of those who falsely perceive a hearing loss have already been screened out.[435]

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434 E.g., Jerger, R8/4576 (28%); Kasten R5/1437, R8/6982, R10/65 (30%); Alpiner, R8/5427 (1/3); Epstein, TR4574 (40%); Resnick, R8/4779 (40%); Loavenbruck, TR1580 (40%); Olsen, R8/4436 (40%); Urban, TR1811, TR1815A (47%); Hardick, R8/4328 (50%); Kemker, R8/6936 (half); M. Miller, R8/5841 (over half). Some estimates were lower, e.g., Harford, R8/4547 (10%); Butts, TR4168 (20%), and some were higher, e.g., Willeford, R8/7972 (over 80%).

435 See, e.g., Kasten, R8/6978; Loavenbruck, TR1580. 40% of those referred by Stephen Epstein, an otolaryngologist, to the Washington Hospital Center as possible hearing aid candidates were determined by the Center's audiology clinic not to be hearing aid candidates. TR4574. Note that many of those making these estimates are very proamplification, and would recommend trying an aid to anyone who might possibly be helped, while the record is silent with respect to the views on amplification of the remainder of these individuals. (See, e.g., Kasten, TR756; Harford, TR81; Alpiner, R8/5429; Willeford, R8/7974; see Rose, TR475 (Rose is Olsen's superior at the Audiology Department of the Mayo Clinic)). In addition, one of the estimates included as candidates those already wearing hearing aids and whose aids were adequate, at least when repaired. Urban, TR1815A. And another estimate did not include as persons who could not benefit the many who came in with normal hearing or problems capable of medical remediation. Butts, TR4168.

Some important reasons why a person with a perceived hearing loss would not be found to be a hearing aid candidate[436] are: (1) essentially normal hearing;[437] (2) hearing loss so mild that an aid is either not necessary or provides no assistance;[438] (3) dynamic range of hearing is too narrow;[439] (4) reduction in the ability to understand when a hearing aid is used;[440] and (5) inability of the individual to manipulate a hearing aid and the absence of someone else who can perform this task.[441]

It may seem peculiar that someone with essentially normal hearing would think they have (or be thought by others to have) enough of a hearing loss to merit seeking help. In fact, however, this occurs frequently.[441A] Apparently, such misapprehensions are often the result of a poor communications environment, in which even those with normal hearing experience difficulty. For example, it is not uncommon for a wife to complain about her husband's hearing when he fails to hear her talking from the kitchen while he is in the living room--she may urge him to find out what is wrong with his hearing and what can be done to correct it.[442]

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436 These matters are discussed in more detail in Appendix F, Sections II.C and VI.C, infra.

437 E.g., Noffsinger, R8/5421; Kemker, R8/6936; M. Miller, R8/5841.

438 E.g., Kasten, R10/65; Alpiner, R8/5427.

439 Kasten, R10/65; Alpiner, R8/5427.

440 E.g., Kasten, R10/65.

441 E.g., Alpiner, R8/5427. Arthritis, among other disease processes, can produce this result. Id.

441A E.g., Winston, R8/7397 (16% had essentially normal hearing, 25 dB or better); Barwell, TR5192-93 (average of one of the 40 new clients seen each week); Giglia, TR2746 (not unusual at all); M. Miller, R8/5841 (2% of those seen); Kemker, R8/6936 (4% of those seen); Rose, TR510 (occasionally); Rupp, R8/7111 (20% of those seen have normal or functioning normal hearing); Noffsinger, R8/5421 (28% of those seen did not have a significant hearing loss). Dr. Oberhand, an NHAS witness, commented that people frequently come to see him (an otolaryngologist) believing that they have a hearing problem, but in fact do not. TR3079. Of those he sees with a hearing problem, he estimates that at least 85% to 90% can be medically or surgically treated. Id.

442 Kasten, TR756. See also Winston, R8/7388; Barwell, TR5193-95. It may also seem strange that the communications problems (Continued)

In conclusion, the record amply supports, and indeed mandates, the Presiding Officer's conclusion that a "fairly substantial" number (40-50%) of those who seek health care because of a perceived hearing loss do not in fact have a hearing loss.[443] An even more substantial number of those who seek help for a perceived hearing loss will not benefit from amplification.[444]

2. Binaural amplification.

There is a dearth of quantitative data regarding the percentage of those who can benefit from binaural hearing aids. It should be noted at the outset that only about half of those persons with a hearing loss have a loss in both ears (bilateral loss), which might even remotely make them a candidate for binaural amplification.[446] In a 1967 study by Bentzen et al., 250 persons with an average age of 77 were given binaural hearing aids by the Danish State Hearing Centre.[445] The subjects all had bilateral hearing impairments, but no one was excluded from binaural candidacy by virtue of age, cause of loss, shape of the audiogram, or asymmetry of the two ears' losses.[447] The results were that 55% used both aids at least part time.[448] Dr. Kasten has observed, however, that most children fitted with binaural hearing aids

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442 (Continued)

resulting from a mild hearing loss can often be satisfactorily alleviated without resorting to a hearing aid. However, followup consultations have assured Dr. Kasten that consciously improving the communications setting is often a completely satisfactory alternative to the expense, bother, and other problems of a hearing aid. Kasten, TR759-60, R8/6980. Some of the suggestions made by Dr. Kasten are as follows: (1) avoid trying to shout from room to room; (2) provide clues to get the attention of the listener before speaking, (3) move around so that the speaker's face is as visible and as well lighted as possible, and (4) position oneself as favorably as possible in unfavorable listening situations.

443 P.O. Report, R9/D1ip210.

444 See id.

445 Bentzen et al., R13/2393-2400.

446 See Health Resources Administration, (1971), R8/528.

447 Id. at 2397-98.

448 The figure has to be calculated from the table at R13/2398. It also appears on R13/2399. This is the same percentage found in an earlier (1965) survey by Bentzen et al. Id. at 2399.

will choose to use only one aid, as soon as they are old enough to state their preference. In addition, most binaural owners he has seen are monaural wearers, although he acknowledges that dissatisfied binaural owners are more likely to come to him, because they want to know why the second aid isn't helping them.[449]

These experiences nevertheless indicate that a substantial number of those persons with a bilateral hearing loss who can benefit from monaural amplification will not be able to receive additional benefit from binaural hearing aids.

Ernest Zelnick, Ph.D., a hearing aid dealer who is one of the most enthusiastic and articulate supporters of binaural fittings, has written an article in which he explains why different individuals are and are not good candidates for binaural fittings.[450] Among those he considers generally not to be binaural candidates are:

(1) those with approximately symmetrical bilateral mild sensorineural losses;

(2) those with asymmetrical bilateral sensorineural losses, where one ear has a mild loss and the other ear has a moderate loss;

(3) those with asymmetrical bilateral sensorineural losses, where one ear has a mild loss and the other ear has a serve loss;

(4) those with asymmetrical bilateral sensorineural losses, where one ear has a mild loss and the other ear has a profound loss;

(5) those with asymmetrical bilateral losses, where one ear has a moderate loss and the other ear has a profound loss.[451]

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449 Kasten, R8/6983.

450 Zelnick, R10/61-63.

451 Id. at 62-63.

VI. THE HEARING AID INDUSTRY: A BRIEF ANALYSIS OF THE HEARING HEALTH CARE DELIVERY SYSTEM

A.- Introduction

A hearing-impaired person may seek assistance from a physician specializing in diseases of the ear, an audiologist, or a hearing aid seller.[452] This section will discuss briefly these three members of what is sometimes referred to as the "hearing health care delivery ststem," their professional organizations, and their relationship to hearing aid sales.

It should also be noted that the hearing health care delivery system is in a state of flux, with a great deal of sparring among the parties as to their respective roles.[453] The National Hearing Aid Society has sent out materials to otologists accusing audiologists of attempting to take over the medical diagnosis of hearing loss,[454] obviously heightening the tensions between the groups. While staff does not believe, on the basis of all evidence it has seen,[455] that audiologists have in fact attempted to do this, the dispute is nevertheless a factor that must be recognized in evaluating some of the statements made in this proceeding.

B. Physicians

Physicians specializing in diseases of the ear may be called "otologists," "otolaryngologists" or "otorhinolaryngologists," depending upon whether they specialize only in the ear, in the ear and throat, or in the ear, nose and throat.[456]

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452 Unless otherwise noted, the term "seller" is used in this Report to describe hearing aid dealers and sales-persons.

453 See Mosley, TR7735.

454 E.g., Audecibel, R10/1888-92; id. at 3400A-G; Fortner, HX46.

455 E.g., Walker, R10/2851-53; Frazer, HX46; McMurray, HX47; Loavenbruck, TR1549; ASHA, R10/1751-52; Rose, TR488-90.

456 E.g., Fargo, R5/677; ASHA, R10/2586; Gardner, TR10343-44; B. Smith, R8/273; Rompala, R10/5281; Woodard, HX65/E5463; ISPIRG, R8/1363; Delk, R10/7182; ACO, R13/0763; RPAG, R8/2843; Marcus, TR5482; Glasscock, R13/770.

Two groups represent ear specialists: the American Council of Otolaryngology (ACO), which coordinates activities relating to governmental affairs, and the American Academy of Opthalmology and Otolaryngology (AAOO), which primarily engages in and coordinates educational activities.[457] ACO was the designated group representative for physicians in this proceeding.[458] According to ACO, there are currently 4,500 practicing otolaryngologists in the United States,[459] 3,422 of whom are ACO members.[460]

A number of surveys indicate that of the 14.5 million Americans who have hearing problems, more than 10 million are not using the available physicians and have never received medical attention for their hearing loss.[461] Other statistics show that approximately 70 to 75 percent of the people who buy hearing aids do so without having first seen a physician or an audiologist.[462] In addition, 75 percent of hearing aid wearers over 65 years of age have not consulted a medical ear specialist.[463]

Two industry studies report contrasting data. However, the Payne and Payne study reported that 61.4 percent of hearing aid users had consulted an ear specialist and that 72 percent had consulted either a general practitioner, an audiologist, or an ear specialist about their hearing problem, in additon to the

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457 RPAG, R8/2768.

458 P.O. Report, R9/Dlip4.

459 ACO, TR3726.

460 Id. at 3725.

461 Link, TR1103.

462 E.g., Resnick, R8/1188wwwww; Sullivan, R8/1188FFFFF; HEW Task Force Report, R8/3203-04; Epstein, TR4563; Koch, R5/1779; RPAG, R8/2613; Helfer, R5/774; Kloze, R8/11885; National Hearing Aid Journal, R10/6434. Note that in RPAG's survey of 86 hearing aid sellers, only 19 thought that a consumer should see a doctor before buying a hearing aid. R8/1188k. Hearing aid seller participants in a New York survey suggested seeing a doctor first in only 18 out of 34 cases. NYPIRG, R7/332.

463 Ruben, R8/1189ww.

hearing aid dealer.[464] In the same study, however, interviews with sellers revealed that only 23.8 percent of their customers are referred by them to a physician or an audiologist for medical examination or for testing.[465] Of these same dealers, 97.3 percent stated they would not fit a child under 18 years of age without a medical referral; however, 94.5 percent would fit an adult without a medical referral.[466] The Market Fact study reports that in only 31 percent of all cases was the consumer's first consultation with an ear specialist. An additional 13 percent consulted general practitioners.[467] Of the 36 percent who visited a seller first, only 3 percent were referred to a physician or ear specialist.[468] Whether one accepts the industry or other figures, it is clear that a sizable proportion of potential hearing aid consumers have not consulted a physician about their hearing problem and only a small percentage of sellers refer their potential customers for a medical examination.

To assure that people buying a hearing aid are not suffering from medical pathology, the Food and Drug Administration in 1976 required that a medical examination be obtained before a hearing aid. The examination must take place within 6 months before the consumer is fitted for a hearing aid. Consumers 18 years of age and older may waive the medical examination, however. The User Instructional Brochure for every hearing aid must contain a warning statement about eight conditions which indicate a problem that should be evaluated by a physician, preferably an ear specialist. They are: dizziness; ear deformity; fluid drainage; rapid onset or progression of hearing loss; a foreign body in the ear; pain or discomfort in the ear; unilateral hearing loss of recent onset; and excessive air bone gap. Prior to the signing of the waiver statement, the seller is required to give the prospective buyer a copy of this User Instructional

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464 Payne & Payne, R8/1445. It is noteworthy that there are severe reliability problems concerning the Payne & Payne survey. See Appendix F, Section VII.F, infra.

465 Payne & Payne, R8/1492.

466 Id. at 1494.

467 Market Facts, R8/623.

468 Id. at 625.

Brochure, review its contents with him, and give him an opportunity to read it.[469] The FDA Rule does not specify to whom the consumer should go after receiving medical clearance, and therefore does not mandate participation by an audiologist.

C. Audiologists

An audiologist, as that term has traditionally been used by virtually all of those in the hearing health field,[470] is a university-trained professional who almost always[471] has at least a master's degree in audiology[472] and who specializes in the rehabilitation of persons with hearing loss and associated communication problems. The rehabilitative services offered by audiologists include any combination of the following: speech reading, auditory training, conservation of speech, language development, counseling and amplification.[473]

Most audiologists are found in nonprofit community or university speech and hearing centers, public health departments, hospitals, special clinics or other rehabilitative settings.[474] Some are in private practice.[475] Some audiologists now dispense hearing aids on a nonprofit basis.[476] Some traditional hearing

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469 42 Fed. Reg. 9294-96 (1977). It should be noted that the National Hearing Aid Society includes prior medical clearance for all first-time hearing aid candidates in its four-point consumer protection plan, although there is some question as to whether this plan has been effectively implemented. Fortner, TR2873-79.

470 NHAS and many of its members argue that sellers are entitled to use the title "certified hearing aid audiologist." See Appendix F, Section IV.D, infra.

471 See Part Two, Section III.D, infra.

472 E.g., Cutler, SPXB/399; Ruben; R8/1189vv.

473 E.g., Gardner, TR10344; Delk, R10/7101; ASHA, R10/2586; B. Smith, TR273-74; Fargo, R5/677; NBS; R8/629; K. Johnson, R8/951; Consumers Union, R8/1044; Rompala, R10/5281; Marcus, TR5482.

474 RPAG, R8/2844.

475 Id.

476 E.g., Wilson, TR10034; Lentz, R8/7992; Green, R10/3130; ASHA, R13/2686.

aid dealers have graduate degrees in audiology and sell hearing aids for profit.[477]

- The American Speech and Hearing Association (ASHA) is a national, nonprofit organization composed of persons whose professional commitment is to disorders of human communication and to the scientific study of speech, hearing and language.[478] It is the only national body recognized by the Commission on Post-Secondary Education and by the United States Commissioner of Education for the accreditation of audiology master's degree programs in universities.[479] ASHA, with its 23,000 members,[480] was the designated group representative for audiologists in this proceeding.[481]

ASHA has established minimum professional standards for issuance of a Certificate of Clinical competence in audiology, ("CCC-A").[482] The educational requirements include a minimum pathology and audiology, and completion of a master's level (or equivalent) program in audiology, which includes a specified practicum experience.[483] A candidate must also engage in one year of supervised, paid professional experience under the supervision of a certified audiologist.[484] Finally, in order to obtain certification, the candidate must pass a national examination.[485] Approximately 3,000 ASHA members currently hold the CCC-A.[486] It should be noted that ASHA issues equivalency certificates to those individuals who do not wish to belong to the Association.[487]

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477 E.g., Zelnick, TR408-09; Stallons, TR7863, 7895-96.

478 ASHA, R8/1188wwwww.

479 E.g., K. Johnson, TR4317; Harford, TR111; ASHA, R10/2586.

480 K. Johnson, R10/1593.

481 P.O. Report, R9/D1ip4.

482 K. Johnson, R10/952.

483 E.g., ASHA, R8/1188FFFFF; NHAS, R3/3832.

484 E.g., Woodard, HX65/E5463; B. Smith, TR274; MPIRG, R8/1204; HEW Task Force Final Report, R8/3278-79; ASHA, R10/2587; RPAG, R8/2843.

485 ASHA, R10/1593.

486 ASHA, R10/2095.

487 E.g., K. Johnson, TR4271; Harford, TR110.

Members of ASHA are expected to uphold the Association's Code of Ethics which now allows audiologists to dispense hearing aids as long as they do not make a profit on such sales.[488]

Not all states license audiologists. Those that do may require individuals who wish to be licensed as audiologists to hold the ASHA CCC, or they may require only a master's degree in audiology.[489] Membership in ASHA does not necessarily mean certification as an audiologist, since certification is not a prerequisite for membership and since ASHA has members from other fields than audiology.[490]

D. Hearing Aid Retailers

Hearing aid sellers have over the years tested for hearing loss, as well as demonstrating, fitting and selling hearing aids. They also make earmold impressions, service hearing aids, provide post-fitting care, and help the hearing impaired adjust to hearing aids.[491] Sometimes, sellers clean, adjust and service hearing aids in their offices. In most cases, however, they are not equipped to make repairs, other than such minor ones as replacing earmold tubes, and must send aids in need of repair elsewhere--usually to the factory--for service.[492]

The retail hearing aid industry in the United States is comprised of approximately 5,600 hearing aid dealerships[493] which maintain fully staffed offices and employ approximately 10,000 to 17,000 sellers.[494] Of these sellers, approximately 3,600 are represented by the National Hearing Aid Society.[495] NHAS was the designated group representative for hearing aid

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488 ASHA, R10/1855-56. In May, 1978, ASHA's Executive Board passed a resolution calling for a change in ASHA's Code of Ethics to remove the present prohibition against ASHA members dispensing hearing aids for a profit.

489 Id., at 2587.

490 Id.

491 E.g., Rich, R8/990; Creech, TR5248; Oberhand, TR3035; NBS, R8/630; NHAS, R3/3522; Fargo, R3/677.

492 Belton, R13/221.

493 E.g., NHAS, R3/3521; ISPIRG, R8/1363, RPAG, R8/2612; Ginsberg, R10/437; Lybarger, R8/884; ASHA, R8/1188EE.

494 Fortner, TR2872.

495 Fortner, TR2840.

retailers in this proceeding.[496] Only 2,300 sellers have been certified by NHAS.[497] The 1,300 remaining members of NHAS, i.e., those who are not certified, are affiliate members by virtue of membership in state associations. These are people who have not met NHAS's requirements for certification.[498]

NHAS certification is granted to those applicants who reach and maintain NHAS's standards of experience, education, examination, ethics and endorsement, and who are approved by the NHAS National Board of Certification.[499] A detailed discussion of the training, experience and qualifications of hearing aid sellers--both certified and uncertified--is reserved for a later section of this Report.[500]

E. Hearing Aid Manufacturers

The hearing aid manufacturing industry consists of over 40 manufacturers[501] including: Beltone Electronics Corporation; Dahlberg Electronics, Inc.; Zenith Hearing Instrument Corporation; Qualitone, Division of Seeburg Industries; Maico Hearing Instruments; Radioear Corporation; Telex Communications, Inc.; Audiotone, Inc.; and Oticon Corporation.[502]

Hearing aids are sold by manufacturers directly to retail sellers, who in turn resell the hearing aids to consumers.[503] Manufacturers sell aids to dealers either in bulk or on demand.[504] Most manufacturers consider the retail sellers to be independent agents, not manufacturer franchisees or representatives, and deny any control over or involvement with retail purchase transactions, prices or policies.[505]

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496 P.O. Report, R9/Dlip4.

497 Fortner, TR2873.

498 Id.

499 E.g., Berger, R8/5117-18; Kenwood, TR9285; Waters, R8/4006; Fortner, TR2842.

500 See Part One, Section VIII, infra.

501 E.g., RPAG, R8/2665; ASHA, R8/1188EE.

502 E.g., RPAG, R8/2665; HAIC, R3/3858-59.

503 Beltone, R13/206.

504 Cutler, SPXB/391.

505 E.g., Beltone, R8/2674; Sonotone, HX78E.

The Hearing Aid Industry Conference ("HAIC") is the national trade association of manufacturers and distributors of hearing aids and components.[506] In 1977, its name was changed to the Hearing Industries Association.[507] There are approximately 32 members of HAIC including 21 hearing aid manufacturers or distributors.[508] The remaining members are manufacturers of components, manufacturers of batteries, and trade journals.[509] HAIC was the designated group representative for hearing aid manufacturers in this proceeding.[510]

Included in HAIC's purposes are public relations for hearing aid matters and an annual report of hearing aid sales. The report of sales volume is prepared by a public accountant who receives sales data from individual manufacturers. This data is kept confidential; the accountant reports to each manufacturer his percentage of hearing aid sales by model (style). HAIC then reports the total hearing aid sales by model to the public.[511]

F. Volume of Hearing Aid Sales

There were approximately 650,000 hearing aids sold in the United States in 1975,[512] at an estimated wholesale cost of $60 million.[513] Since the average hearing aid costs between $300 and $400,[514] total annual retail sales should be between $195 and $260 million.[515]

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506 E.g., Kojis, R8/1027; RPAG, R8/2781.

507 HAIC, R1/322.

508 Kojis, TR2061.

509 Berger, R8/5120.

510 P.O. Report, R9/D1ip4.

511 Berger, R8/5120.

512 E.g., Burris, TR2521; Plotkin, TR6026; Sullivan, R8/1188ww; ASHA, R8/1188EE; Hecker, R10/4817; HAIC, R3/3858-59.

513 HAIC, R3/3858-59. HAIC claims that its members sell 90 percent of the hearing aids, although no statistical data have been produced to substantiate this claim. See Kojis TR2069.

514 See Part One, Section III.J.1, supra.

515 E.g., Resnick, R8/1188wwwww; HAIC, R8/1189RRR. NHAS claims that its members supply 80 to 90% of all hearing aids sold in the United States. Kenwood, TR9285. No data have been produced to substantiate this claim, although such substantiation was requested during the hearings. Id. at 9304-05.

The hearing aid industry is alleged to be highly concentrated.[516] RPAG reported that eight companies controlled over 70 percent of the sales volume, leaving only 30 percent of the market to be divided among more than forty smaller companies.[517]

It is estimated that the average number of sales per hearing aid seller is between 60 and 100 per year.[518] Many sellers, however, sell considerably in excess of this amount.[519]

The report entitled "Annual Income for Hearing Aid Dealer Operations in Twelve Categories of Sales Volume," prepared by Anthony DiRocco of NHAS in August, 1972, showed net sales for hearing aid sellers ranged from $15,000 to $250,000. The undated chart failed to relate how many dealers are in each category and whether their sales are the result of part- or full-time salesmen,[520] and it is therefore unclear how accurate these figures are.

About one-half of the roughly 650,000 hearing aids sold annually are sold to existing users.[521] According to dealer and industry figures, home sales account for between 60 and 90 percent of all sales, depending on the rural or urban nature of the marketplace.[522] In addition, between 50 and 70 percent of hearing aids sales are to persons over 65 years of age.[523]

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516 RPAG, R8/2665.

517 Id.

518 RPAG, R8/2678.

519 See, e.g., Fortner, TR2860 (400 to 800); McCoy, R3/1520 (900 to 1000); Fennema, TR1760 (over 500 per year).

520 RPAG, R8/2679.

521 E.g., Campagna, TR2595; HAIC, R8/1189u.

522 E.g., Elliot, R10/3184 (90%); RPAG, R8/1188 (60-90%); Leale, TR11715 (70%); Bowen, TR1908 (60%); Beltone, R13/2034 (60-64%).

523 E.g., Kojis, TR2008; ASHA, R8/1188HH; Beltone, R13/2034; Barnow, TR1643; Hall, HX175. Over 85% of Beltone's sales are to people who are over 55. R13/2034.

VII. TESTING HEARING LOSS AND FITTING HEARING AIDS IN SUMMARY[524]

Hearing cannot be measured with the same accuracy and simplicity as vision.[525] More importantly, no hearing aid evaluation procedure even remotely approaches the efficiency or accuracy of analogous procedures for correcting visual defects.[526] While valid audiometric testing is clearly important and worthwhile,[527] hearing aid selection is currently a "vague effort to match gross frequency responses to the pure-tone audiometric threshold."[528]

Various types of equipment are used to test hearing and to evaluate and fit hearing aids. If accurate results are to be obtained, the equipment obviously must be properly set[529] and calibrated.[530]

Any hearing threshold testing should be carried out in as quiet an environment as possible. Noise in a test room will appear to indicate that the individual has a greater hearing loss because of the masking effects of the extraneous noise on the test ear.[531] Sound-treated rooms can be used to eliminate the background noise problem.[532] Many experts believe that hearing testing should only be conducted in a sound-treated

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524 For a more detailed discussion of this subject matter, see Appendix F. Section III, infra.

525 Caine, R8/1179.

526 Elpern, R13/2705; see, e.g., Dunlavy, TR3397-98; Glorig, R8/973, 3498.

527 Berger, R8/5132.

528 Id. at 5058.

529 Jerger, R8/4570.

530 E.g., P.O. Report, R9/Dlip81; Griesel, R10/6781-82. See generally Price, SPXD/200-02.

531 Price, SPXD/189; Harford, TR131; Fennema, TR1753.

532 For an explanation of what a sound booth is, see H. Davis & S.R. Silverman, Hearing and Deafness 204 (1970).

room.[533] All ASHA-accredited speech and hearing centers have sound-treated testing facilities.[534] Perhaps because they are so expensive,[535] few sellers have sound-treated rooms, however.[536] In the absence of a sound-treated room, the tester must do the best he can to eliminate background noise by selecting quieter rooms and quieter times of day, and by turning off noisy appliances,[537] or through the use of large around-the-ear ear-phones.[538]

Pure-tone air conduction and bone conduction testing is performed in order to determine the extent and nature (conductive, sensorineural, or mixed) of the hearing loss. Air conduction thresholds are derived when pure-tone signals of standard frequencies are provided by the audiometer through earphones, utilizing the normal conductive mechanism of the ear. Bone conduction thresholds are derived when pure-tone signals of standard frequencies are provided by the audiometer through a bone oscillator

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533 E.g., Franks, R10/6522; Alpiner, R8/5431; Oberhand, TR3074; Elia, TR7509. Contra, Stallons, TR7866 (traditional sound room not needed as long as ANSI standards for ambient noise are met): J. Williams, TR3762 (only a quiet environment is needed); Iliff, R10/3429; Vreeland, R10/3419; Berkove, TR11040-41; Curran, TR10850 (sound-treated room not needed for using master hearing aid at supra-threshold levels).

534 Resnick, R8/1188zzzzz; see Ryan, TR1530.

535 E.g., Jerger, R8/4570 ($10,000 for a sound room module); Kasten, R8/6982 ($13,000-14,000 for their sound-treated test room); L. Wilson TR10078 ($1,500-2,000 for a small sound booth; $6,000 for a double wall booth).

536 J. Williams, TR3762; see Hardick, R8/6847, 6849; NYPIRG, R8/1335; L. Wilson, TR10079. Some sellers do have and use sound-treated rooms, however. E.g., Brakebill, R8/5807; Leale, TR11729; Mynders, TR11572; Stallons, TR7875; see Giglia, TR2770; Wilber, TR1400; Berkove, TR110440: Hearing Instruments Survey, R10/6679 (9% of the respondents stated that they had sound-treated rooms); P.O. Report, R9/D1ip81.

537 See Scheurer, TR11453-56, 11459.

538 See H. Davis & S.R. Silverman, Hearing and Deafness 20506 (1970). Note that while the earphones used in air-conduction testing attenuate some of the background noise, this effect is relatively greater at the higher frequencies. NHAS Basic Course, R8/4271. Earphones are not appropriate for the test ear in bone-conduction testing. (E.g., Butts, TR4214; Staab, TR7072.) The masking problems of background noise cannot be obviated by the application of corrections derived from sound level meters. (See Glorig, R8/2000; Butts, TR4220.)

placed on the mastoid bone behind the ear or on the frontal bone of the forehead, bypassing the conductive mechanism in the outer and middle portions of the ear. Masking noise in the non-test ear is often needed[539] in order to prevent the ear not being tested from overhearing the test signal.[540]

Unaided speech discrimination testing provides an indication of the extent to which the test subject has the potential to understand speech. If the test signal is presented at the level at which normal conversation occurs, the tester obtains an indication of the test subject's potential ability to understand conversations without any hearing aid. If the test signal is amplified so that it is at the test subject's most comfortable loudness ("MCL") level, the tester obtains an indication of the test subjects maximum ability to understand.[541]

Various methods are used to select a hearing aid once the preliminary testing has been completed. The method of selecting and fitting hearing aids most frequently used by audiologists is the comparative hearing aid evaluation, sometimes known as the Carhart method.[542] Several hearing aids--generally from 3 to 6--are selected on the basis of the completed hearing evaluation, other input from the test subject, and the tester's knowledge of hearing aids.[543] The test subject's performance with each of the selected aids is measured in carefully controlled circumstances, so that valid comparisons can be made.[544]

The method of selecting hearing aids most frequently used by sellers is the master hearing aid procedure.[545] The test subject's responses to the various amplification possibilities

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539 NHAS Basic Course, R8/4267.

540 Id; AA00 Guide, R8/4101.

541 Berger, SPXD/225.

542 Alpiner, SPXB/147; Mynders, TR11548. Some sellers use this method as well. E.g., id. at 11590; Kuptz, TR5682.

543 Berger & Millin, SPXD/498-99.

544 Harford, TR132.

545 E.g., Barnow, TR1671-72; Hardick, R8/6847-48; Mynders, TR11548; Hearing instruments, R10/6679. Not all sellers use master hearing aids, however. E.g., Burney, R13/2596; Berger, SPXB/305-06; Delk, TR10925; Keyes, TR10693; Shuford, TR672; Alpiner, SPXB/166.

simulated by the master hearing aid are used as the basis for selecting the particular hearing aid(s) to be recommended.[546]

The methods of selecting and fitting hearing aids vary widely between audiologists and dealers, and even among members of each of those groups.[547] There is no general agreement as to which method, if any, is the best.[548]

Once a hearing aid has been selected for the individual, if the selector is not a seller the consumer will generally be given a written recommendation to purchase a hearing aid, which may be taken to the seller of the consumer's choice. If the selector is a seller, the individual will generally purchase the recommended hearing aid from the seller. In either event, in almost all instances the hearing aid will need to be ordered, and will generally not be delivered to the purchaser until 3-7 days later.[549]

After the hearing aid has been received by the seller, an evaluation of its electroacoustic characteristics will help insure that it is operating properly.[550] The hearing aid and custom earmold will be delivered to the purchaser. The seller

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546 See, e.g., Curran, TR10812, 10855-56; Delk, TR10925; Keyes, TR10703; Leale, TR11732.

547 See, e.g., Mynders, TR11548; NHAS, R8/1188VVVVVV; Curran, TR10809.

548 See, e.g., Pratt (ACO), TR3689-90; Rose, TR454; Sandlin, TR10126; Mynders, TR11548; Curran, TR10859. For example, Earl Harford, Ph.D., testified that audiologists generally use a formal, systematic approach while hearing aid sellers use an informal, trial and error approach. TR56-57. James Curran asserted that the master hearing aid approach utilized by sellers is superior to the comparative hearing aid evaluation used by most audiologists, however. TR10848-49. But see Appendix D for a discussion of Mr. Curran's incorrect assertion that research by Calvert and Reddell demonstrated the superiority of the master hearing aid.

549 See, e.g., Young, R5/539; Samole, TR6679-80; Luzi, TR7714; Kozelsky, R5/647; The Real Paper, R13/D6A; Butts, TR42134; Dunlavy, TR3430; Tate, R10/3135; Delk, TR993; AARP/NRTA, TR1432.

550 Sandlin, TR10130-32; see Appendix F, Section VI.C.3, infra.

will generally then instruct the purchase concerning adjustment to amplification and hearing aid use. Aural rehabilitation efforts in addition to a hearing aid may be needed and recommended.[551]

VIII. THE RECRUITMENT, TRAINING, SUPERVISION, COMPENSATION, AND TURNOVER OF HEARING AID SELLERS

A. Introduction

This section discusses the recruitment, training, supervision, compensation, and turnover of hearing aid sellers. Traditionally, few physician ear specialists and audiologists were hearing aid sellers. Thus, this section focuses primarily upon the more traditional hearing aid sellers. Recently, however, increasing numbers of physicians have begun to enter the hearing aid sales market by hiring employees to sell hearing aids. These employees usually are audiologists who dispense hearing aids on a nonprofit basis in accordance with the requirements established by ASHA.[552] In addition, increasing numbers of audiologists in private practice on their own are now selling hearing aids in the same manner. To the extent that the experiences of these audiologists are relevant, they are discussed in this section.

B. Recruitment of Hearing Aid Sellers

Some hearing aid sellers entered the business because of personal experiences with hearing loss, which generated an interest in helping others through the sale of hearing aids.[553] Some advertisements for new hearing aid sellers, however, give a much different--and rather frightening--view of what some sellers may be like. These advertisements stress the need for direct selling ability and lure the new seller with promises of big commissions. As far back as 1962 the Kefauver committee expressed concern about such advertisements;[554] yet, they continue to appear today. For example, recent Beltone ads

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551 E.g., Blood & Danhauer, R13/2601; NHAS Basic Course, R8/4258; Beiter, TR900; McLauchlin, R8/3455; ASHA, R10/2101; Alpiner, R8/5430; L. Wilson, TR10025-26, HX167; see Ruben, TR3999.

552 See note 488, supra, however.

553 E.g., Wallace, TR3457, 3463.

554 Senate Report (1962), R8/733. One Beltone ad asked readers whether they were "afraid of tackling a business where you can make as much money on two or three sales a week as the average sales position offers to a man who makes dozens of sales . . . ." Id.

emphasize the high earning potential of its salespersons and the need for direct sales experience.[555]

C. Training Needed and Training Provided

1. Training Need to Test Hearing

The record overwhelmingly demonstrates that hearing testing is often extremely complicated, and not at all the simple matter it may appear to be at first blush.[556] Some industry witnesses have asserted that, in a period of a few days, the novice can become competent in testing hearing for the purpose of fitting a hearing aid.[557] Some of these assertions, it appears, were

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555 Creech, TR5222-24, HX80. A July 4, 1975, ad reads in part: "HEARING AID CONSULTANT $18,000. Our business is hearing aids. Hearing Aid Consultants are among the highest paid commission salesmen in the country. . . . Must have late model car." HX80; see Durbin, R10/4829.

556 E.g., Jerger, R8/4569-71; Kasten, R10/70-71, R13/2090; Ruben, TR4020-21; Conkey, R10/6589; B. Smith, TR313; Glorig, R8/2001; Winston, R8/7388-89; Ventry, TR1709; Hardick, R8/6850; Rupp, R8/7116-17. Staff disagrees with the Presiding Officer's suggestion that pure-tone hearing tests are relatively simple to administer. R9/D1ip48. In addition, test results are predictive criteria which should not be relied upon naively, since frequent exceptions occur. Berger & Millin, SPXD/504; accord, Bode, SPXB/299-300; Matkin & Olsen, SPXD/324, 326, 327, 329, 334, 339, 356.

557 E.g., Teter, TR10249; Griffing, R8/1189z (2 days to 1 week of intensive training to learn to do an audiogram; but the audiogram is just the first step, with additional training and experience needed to be able to make the other judgments which must be made); Burris, TR2497 (2 or 3 days of intensive training); Scott, TR2316 (hearing testing is simple and can be taught in a very short period of time); Mettler, TR11392 ("[I]t's no big thing to teach somebody to test air and bone in a routine situation." Dr. Mettler conceded on cross-examination, however, that he has no idea whether those with such brief instruction are testing competently. Id. at 11393-94). Delk, TR10923-24 (Knowledge of how to conduct "the basic audiometric tests required to determine the nature and extent of hearing loss" "can be taught in hours-and learned from the literature by a well-motivated person of average intelligence."); A. Smith, TR8157 (no special training is required to do pure-tone air and bone testing). Wayne Staab testified that the ability to test to determine the nature and degree of hearing loss seem to be learned rather quickly. TR7035. He stated that it takes about 2 weeks to learn the basics, id. at 7104, including masking, id. at 7076; see Zelnick, TR4223/20-24/3.

the result of semantics. For example, Darrell Teter, Ph.D. testified that he might be able to teach a high school graduate of normal intelligence how to test hearing for the purpose of fitting hearing aids, and do it well, in 3 days.[558] Further testimony clarified the fact that in his view testing hearing for the purpose of fitting a hearing aid did not include, but should be preceded by, an assessment of the extent and nature of the hearing loss.[559] When asked about the effort necessary to become competent to assess the hearing loss, Dr. Teter responded that he would prefer that that be done by an audiologist.[560] His testimony echos the statements of many audiologists[561] and several otolaryngologists.[562]

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558 Teter, TR10249.

559 Id. at 10258, 10260-61, 10264-67, 10318. Robert Sandlin, Ph.D., drew a similar distinction, TR10120, although his estimate of the effort needed to become competent in hearing aid fitting greatly exceeded that of Dr. Teter, see id. at 10196-201. This distinction raises serious questions about the meaning of statements that differential audiology is not needed to fit hearing aids. It is unclear whether other witnesses also assumed that the dealer did not need to perform these assessment-type tests, but would instead be provided with an adequate hearing assessment by an audiologist. See Staab, R10/6454.

560 Teter, TR10259. Dr. Teter added:

> I think you may not have to assess all of the parameters of auditory function every time in order to fit a hearing aid, however. I do not know, because we are dealing with so many different kinds of people, what kinds of guidelines have to be set up to tell someone this or that or the other thing. I don't believe anyone knows that, sir.

Id. at 10259-60. But see Teter, TR10256/19-23 (apparently contradictory statement which, however, may also be due to semantics).

561 E.g., Sandlin, TR10120; Lankford, TR8009; Gerstman, R10/2657.

562 E.g., Ruben, TR3978-79 (either an audiologist or an otolaryngologist should perform the testing needed for a hearing assessment).

The experiences of audiologists who teach graduate audiology students emphasize the large amount of effort needed to become competent in hearing testing. Masking, which is often required for basic hearing testing,[563] is regarded as one of the most difficult concepts a graduate audiology student must master.[564] Only after several months of instruction and practice can the graduate audiology student begin to feel secure with his masking technique.[565] Intensive practical training, in which mistakes are identified and corrected by competent supervisors, is extremely important.[566]

Calibrating the test equipment for the type of test and the type of test signal, if done improperly, can introduce an error factor of up to 26 dB.[567] Both instruction and a good deal of supervised practice are needed for beginning audiology students to master this necessary task.[568] Similarly, development of the ability to present a consistent monitored live voice test signal takes many hours of instruction and supervised practical experience.[569]

The experience of audiology teachers has been shared by those in private practice who teach audiometric assistants. Michael Winston, Ph.D., estimated that it takes him an average of 1 year to train an audiometric assistant to be proficient with the average patient in standard audiometric testing.[570] He noted that a better than average graduate audiology student working for him still had not mastered masking after working

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563 NHAS Basic Course, R8/4267. Masking is needed in order to prevent the ear that is not being tested from overhearing the test signal. Id.

564 E.g., Lentz, R13/1959-60; Rupp, R8/7116; Hardick, R8/6850-51; see Kasten, R10/70.

565 Lentz, R13/1959-60; accord, Rupp, R8/7116; J. Sanders, R8/7597; Hardick, R8/6850-51; Kasten, R10/70.

566 See, e.g., Lentz, R13/1701; Rose, R10/88, TR499, 512; Kasten, TR799; M. Smith, R13/2083; Glorig, R8/2001.

567 Jerger, R8/4570.

568 Id. at 4569-70.

569 Rupp, R8/7116.

570 Winston, R8/7388; see Mastricola, TR8663.

half time for 4 months, having acquired 90 clock hours of actual test experience toward the ASHA practicum requirement.[571]

- Staff is persuaded that no "recipe" can be written to apprise the hearing tester of those situations when additional testing, beyond his capability, is required.[572] A broad background in subjects such as psychology is needed.[573] Training, experience, and judgment are also required of the hearing tester.[574]

Staff is unpersuaded that competency can automatically come from years of practical experience and the feedback one's customers provide, as some have alleged.[575] Competent supervision is essential to the development of competence in the trainee.[576] Both Paul Burris and Ron Scheurer, because they had been retail sellers, taught the subject of hearing aids themselves because no one else was qualified to teach it in the graduate audiology programs in which they were enrolled.[577] Yet Mr. Scheurer, a

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571 Winston, R8/7389.

572 E.g., Kasten, TR713-15; Jerger, R8/5335-56; Price, SPXD/196 (the audiologist must be cognizant of the fact that he may seldom see the typical patient); see Whitman, TR8569-70; Martinucci, TR8416/5-18; Matkin & Olsen, SPXD/342, 343 (lesions within the higher auditory system are difficult to detect); Madell, TR5917 ("[W]e don't know in advance which are going to be the difficult clients until we've had the experience that they've been difficult."); Jerger, R8/4571-73; Rose, TR535-36.

573 E.g., Jerger, R8/4573; Hall, R8/6135; Rainbolt, R13/3752; Luper, R13/3778; Goldstein, R13/3827.

574 See, e.g., B. Smith, TR319; Matkin & Olsen, SPXD/348; Hardick, R8/6851; AAOO, R8/4110; Jerger, R8/4572.

575 E.g., Staab, TR7036-37/8; Elia, TR7492; DiRocco (Senate Hearings, 1973), R8/1188BBBBBBB; Barnow, TR1692. But see MPIRG, R8/1246 ("years of experience without proper training equals only prolonged incompetence"); Delk, TR10944-45 (conceding that it is quite possible for someone to continue making the same mistake without supervision to spot the mistake and correct it).

576 E.g., Rupp, R8/7116; J. Sanders, R8/7597; ASHA Review of NHAS Basic Course (Doerfler, Jerger & Jordan), R8/3834; Kasten, R8/6988 (relating his 1968 evaluation of a dealer with 17 years of experience who incompetently performed threshold hearing tests and found a serious hearing loss, even though Kasten's hearing is normal); Ruben, TR4021.

577 Burris, TR2503-04; Scheurer, TR11511-12.

relatively knowledgeable and highly motivated seller with a master's degree in audiology used the wrong ANSI standards in the preparation of his two surveys of the ambient noise levels in dealers' offices and private homes in the Portland, Oregon area.[578] Mr. Burris demonstrated his lack of knowledge of fundamental matters in the field of audiology when he testified in these proceedings.[579] The point here is not to ridicule the errors of these individuals, but rather to point out the importance of competently supervised training. Neither of these individuals apparently had much practical experience under the supervision of someone who knew their job better than they did.[580]

2. Training Needed to Select and Fit Hearing Aids

Much like hearing testing the selection and fitting of hearing aids is not a simple matter.[581] James Delk, an HAIC witness, testified that an individual with a graduate degree in audiology should have an additional semester of work with hearing aids.[582] Taking an ear impression and making a good, comfortable earmold is a difficult task.[583]

3. Training Sellers Receive in Hearing Testing

The efforts by industry representatives to introduce evidence as to the adequacy of the training received by hearing aid sellers consisted almost exclusively of (1) conclusory remarks that sellers (or at least the sellers with whom they are familiar) are competent,[584] and (2) very brief generalizations on the subject of industry workshops, seminars, and convention programs.[585] In general,

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578 W. Wilson, R13/2011-12.

579 See Appendix D, infra, re Burris.

580 See Appendix D, infra, re Scheurer, Burris.

581 E.g., Berkove, TR7030; Kennedy, TR11168; Rainbolt, R13/3752-53; Luper, R13/3778; B. Goldstein, R13/3794; Rupp, R8/7117.

582 Delk, TR10983. Upon prompting from NHAS's counsel on redirect examination, Mr. Delk in effect repudiated his earlier remarks. Surprisingly, he did not mean to say that this extra training was needed in order to be competent in the selection and fitting of hearing aids. He only suggested that as an "ideal." TR1099595A.

583 Lybarger (Senate Hearings, 1968), R8/884.

584 See Appendix F, Section VI.D.1, infra.

585 See, e.g., Kenwood, TR9289-90; Kennedy, TR11126, 11140-42; Keyes, TR10691, 10709-10; Briskey, TR7238-39; Staab, TR7030,
(Continued)

and as more fully documented below, staff finds that the training received by sellers in hearing testing is wholly inadequate to assure a reasonable level of competence.

a. Industry education efforts

Unfortunately, the number of persons who take advantage of educational opportunities is not overly impressive. Out of approximately 10,000 to 12,000 hearing aid sellers, only 2300 individuals possessed NHAS certification at the time of the hearings.[586] NHAS, quite surprisingly[587] has no idea how many individuals have passed the Course but not become certified NHAS members.[588] Robert Sandlin, Ph.D., an NHAS witness, testified that while he was favorably impressed by recent efforts on the part of NHAS and state dealer groups regarding continuing education initiatives, he was "relatively unimpressed with the numbers going to those" sessions.[589] Dr. Sandlin's testimony is corroborated by a 1974 industry sponsored survey of retailers, as discussed below.

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585 (Continued)

7076-79; Delk, TR10921-22, 10976, 10984; Teter, TR10282, 10293-94, 10302/5-9; NHAS, R8/1188uuuuuu, R8/1188000; Giglia, R8/3441; Pigg, R8/3482; Krebs, R8/1189ii; Lybarger (Senate Hearings, 1968), R8/889, 907; Rich (Senate Hearings, 1968), R8/991. But see Scheurer, TR11420-22, 11427, 11435-36, 11456-57, 11491-92, R10/6678-94; Sandlin, R8/4862 (introduced by staff). Efforts to collect data on attendance at seminars, etc., were undertaken by the Florida Hearing Aid Society in its activities concerning the Proposed Rule. R8/2007. The results of that effort were not shared with the Commission.

586 Fortner, TR2872-73.

587 Raymond Rich, a past president of NHAS, testified that NHAS had such figures, and said they were once given as "some 4,000 or 5,000--4,000 something, if I am correct." TR2994.

588 Fortner, HX224/1.

589 Sandlin, TR10167 (emphasis added). Compare Bolstein, R8/4851 ("The program was excellent, the attendance just fair."), with Hearing Aid Journal, R8/4857 ("capacity attendances"). Both are describing the same 1975 3-day NHAS annual meeting. Mr. Bolstein is the Journal's publisher, and he signed his comments. The unsigned article seems to have been at least partially ghost written by those who put on the programs. Naturally, they would tend to describe their own activities in glowing terms.

In 1974, Hearing Instruments surveyed 1000 of its subscribers, approximately 200 of whom responded.[590] Only 78 percent of those who responded had attended at least one educational seminar, apparently over their entire careers.[591] This means that of the one-fifth of those surveyed who were disposed to tout their achievement to Hearing Instruments, fully 22 percent had never attended any educational seminars.[592] Among those who had attended any seminars, the 31 percent who were frequent attendees (five or more seminars) accounted for the clear majority of all seminar "participations."[593]

In a May 17, 1973, meeting with RPAG representatives, Robert Briskey (then with Zenith) furnished records which revealed that during the 13-year period from 1960-1972, only 1600 "participations" (not necessarily different participants) took place in the special educational workshops developed jointly by NHAS and HAIC.[594] Similarly, fewer than 600 sellers attended at least one of the 21 workshops sponsored in 1973 by NHAS in the exercise of its "dominant industry role in the propulsions of continuing education."[595] Wayne Staab, Ph.D., estimated that "[m]aybe a couple of hundred" hearing aid specialists are currently filtering through university audiology programs.[596] In 1975, the first year the Mt. Hood Community College three-credit

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590 R10/6678-79. Two respondents are characterized as composing 1% of the sample at R10/6678, col. 1, lines 41-42.

591 Id., col. 2, lines 1-5. The presentation of data does not suggest that any specific period was given in which the seminars were supposed to have taken place.

592 One can only speculate about the experiences of the vast majority who failed to respond.

593 Id., lines 6-12.

594 RPAG, R8/2782. Unfortunately, the figures quoted here and below may be counting the same individual each time he attends a different training session.

595 Kenwood, TR9289. Between 80 and 100 dealers attended Fidelity's 1975 Hawaiian celebration. Samole, TR6731. The Phoenix, Arizona seminars sponsored by Audiotone have been attended by over 550 dealers. Delk, TR10922.

596 Staab, TR7076-77. Dr. Staab asserted that in the past sellers were purposefully denied the opportunity to participate in such classes. Id. at 7032-33, 7062-63; cf. Kennedy, TR11141. The reason, legitimate or venal, given for that denial was that the sellers lacked the required prerequisites. Staab, TR7032-33; Voroba, R13/3775.

course in basic audiometric techniques was given, 35 persons attended each semiannual class.[597] The next year, this figure dropped off to 20-25 per course.[598] The proposed Mt. Hood 1-year certification program apparently had not yet been implemented as of the hearings[599] although it had been planned for implementation the year before.[600]

Creation of the Hearing Instruments Institute was announced in May of 1975 as part of the NHAS Four-Point Consumer Protection Plan.[601] Its creation may have been due in part to the conclusion of James Payne, NHAS's surveyor, that sellers need more formal education,[602] as well as bad publicity and investigations by government agencies.[603] The Hearing Instruments Institute appears to be making little progress.[604] Those few local sellers who have

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597 Scheurer, TR11421, 11427; Burford, R10/6680.

598 Scheurer, TR11421.

599 Id. at 11421-22. Mr. Scheurer testified that he was unfamiliar with similar programs around the country, but that he knew there were some. Id. at 11435.

600 Burford, R10/6680.

601 Pigg, R8/3482-83; Fortner, TR2873. Its programs are intended to bring the qualifications of those already selling "up to what the Board of Regents [of the Institute] feels would meet the qualification needs." Id. at 2878.

602 James Payne, R8/3481. Aram Glorig, M.D., Ph.D., testified that sellers' "training programs at the present time are not too good." R8/3497.

603 Fortner, TR2953; see Pigg, R3/275. Promises of improved education programs for sellers have been made many times in the past. E.g., Lybarger (Senate Hearings, 1968), R8/907 lines 18-25; Rich (Senate Hearings, 1968), R8/991 lines 27-29, 996 lines 3-8; Coleman (Senate Hearings, 1968), R8/962 lines 8-12. While staff sincerely applauds any efforts to upgrade the competence of sellers, it ignores the broken promises of the past.

604 See Fortner, TR2877-79; Griesel, TR9462-63. The ASHA rebuttal letters, R13/3729-4016, often report the absence of requests to develop a special curriculum for hearing aid sellers. E.g., Elliott, R13/3738; Brewer, R13/3741; Ansberry, R13/3758; Luper, R13/3780.

developed programs[605] did so independently of the Hearing Instruments Institute. In only one area has a curriculum been established to train newcomers, and the course had not begun as of the hearings.[606]

The relatively poor record of participation in dealer education programs[607] is not surprising since, until recently, attendance has infrequently been required by anyone. The highly motivated minority of sellers have no real way of forcing their reluctant brethren to participate in voluntary programs. Nor do many manufacturers seem to require specific training efforts by those who sell their hearing aids.[608] Moreover, as the latest review by the Hearing Aid Journal (September 1977 issue) demonstrates, only a minority of states had enacted continuing education requirements for licensed hearing aid sellers. Although twelve of the 42 states listed had continuing education requirements in effect or authorized, only six states had established what those requirements were.[609]

Nor is the educational value of seller education programs always what it might seem to be. Myron Samole conceded that Fidelity's 1975 Hawaiian celebration was "more sales motivated from our point of view than from the instructional point of

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605 See, e.g., Fortner, TR2879; Scheurer, TR11420-22, 11427, 11435-36, 11491-92, R10/6678-94; Giglia, R8/3441.

606 Fortner, TR2879.

607 See also Teter, TR10282/21-22; Rich (Senate Hearings, 1968), R8/991 lines 18-20; Coleman (Senate Hearings, 1968), R8/962 lines 4-7; RPAG, R8/2782-83; Kefauver Committee Report (1962), R8/732.

608 Staab, TR7077-78 (Telex); Sonotone, R10/1926; Kleiman, TR6938 (Telex). In 1969 Rolf Stutz, President of Audivox, told a group of audiology students that prospective Audivox dealers are screened only to see whether they have a good credit rating and any morals violations. Kasten, R10/66. An incentive to participate in a training program apparently was at one time used by one manufacturer, which allowed a certificate of participation to be redeemed toward the purchase of a hearing aid. Staab, TR7079 (Telex). Beltone offers a 3-day training session for salespersons hired by its dealers. Durbin, R10/4829. Some Beltone dealers require trainees to attend this session. Id.

609 Note that testifying in the summer of 1976, James Keyes asserted that "many" states have continuing education requirements. TR10709-10.

view, but the comment on the sales [aspects of the aids] was instructional."[610] Hubert Gerstman, Ed.D., an HAIC witness, wrote to Richard Dowling of ASHA in early 1973 that

> [a]ttempts by dealers to upgrade themselves should not be discouraged. In keeping with these feelings I have taught three courses as an introduction to audiometrics, auditory testing and hearing aids through our hospital under sponsorship of the Massachusetts Hearing Aid Society. Although many of these students in these courses have been experienced (up to 25 years) hearing aid dealers, the quality of the questions, the performance of the students and the standards of expections of the dealers convinces me that the commercial distribution system cannot be "professionalized" by these people. It is generally beyond their abilities and specifically beyond their aspirations.[611]

The quality of the educational programs provided by manufacturers may also be subject to question. For example, William Lentz, Ph.D., observed that Paul Burris' comments about how he would teach Dahlberg sellers to mask[612] were confusing and caused him to question the quality of Burris' instructions on the subject to Dahlberg sellers.[613]

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610 Samole, TR6730-31. Fidelity is not alone in making its educational efforts sales oriented. See, e.g., Kleiman, TR6909/18-19, 6923/22-24/3, 6926/9-12, 6939/10-16 (Telex regional salespersons provide "training" to acquaint the new Telex dealers with Telex aids, and then take their orders for Telex aids); Briskey, TR7238. Elma Griesel testified that she understood the orientations to the manufacturers' hearing aids, selling techniques, and general business matters. TR9411.

611 Gerstman, R10/265; see RPAG, R8/2643.

612 Burris, TR2535/10-38/21.

613 Lentz, R13/1960-61. The confidence Beltone has in its training Program is witnessed by the following passage in the Beltone Manual chapter on How to Sell Hearing Aids. After the salesperson has completed his assessment of the test findings on the prospect's hearing (which "should be accomplished silently") he is instructed to look up at the prospect and say:

> "Mr. Prospect, why haven't you done something about your hearing before now?" Regardless of the prospect's answer, continue by saying: "Mr. Prospect, you have a nerve (conductive, mixed) type hearing

(Continued)

b. The NHAS Basic Course

The staff report of the U.S. Senate Permanent Subcommittee on Investigations ("Percy Report")[614] included three analyses[615] of the NHAS Basic Course and its two textbooks, Audiology (1972) by Hayes Newby, Ph.D., and Hearing and Deafness (1970) by Hallowell Davis, M.D., and S. Richard Silverman, Ph.D.[616] Each of these three analyses seriously criticized the Basic Course. NHAS responded to the Percy Report in a November 18, 1975, letter to the Chairman of the Subcommittee.[617] The criticisms in these analyses, and NHAS's response thereto, are discussed below.

Three audiologists and three otolaryngologists served as special reviewers for the Veterans Administration ("VA") analysis of the NHAS Basis Course.[618] The primary concern expressed by the VA analysis was the Course's inadequate treatment

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613 (Continued)

> loss. Folks, let's look at the audiogram together." In making this statement, you would, of course, use the proper word to describe the type of hearing loss experienced by your prospect.

R8/1654 (emphasis in original). Beltone demonstrates a stunning lack of confidence in the training provided to its salespersons by feeling compelled to remind them to use the proper word to describe the prospect's hearing loss.

614 R8/D543.

615 The Veterans Administration, ACO and ASHA each produced analyses of the NHAS Basic Course. These analyses were conducted at the request of Senator Charles H. Percy, ranking minority member of the subcommittee. See R8/3828, 3831, 3832.

616 Roger Kasten, Ph.D., also provided his observations of the Course. R10/71.

617 R8/D558. NHAS' response to the criticism contained in the three analyses of its Basic Course appears on two pages of that letter. R8/4028-29.

618 They were Lloyd Bowling, Ed.D., A. G. DiBiaso, M.D., David N. F. Fairbanks, M.D., Harry W. McCurdy, M.D. (Executive Director of ACO), Hayes Newby, Ph.D., and Philip Rosenberg, Ph.D. The VA analysis was "a condensation of their joint opinions." Schultz, R8/3828.

of hearing problems needing medical attention.[619] For example, cholesteatoma is described in the NHAS Basic Course merely as "a tumor which may occur in the middle ear, sometimes perforates the eardrum and invades the external auditory canal. It is accompanied by a constant odorous discharge."[620] The VA reviewer objected to this characterization of "one of the most dangerous pathologic states of the temporal bone with potentially deadly complications" as merely a "tumor."[621] They criticized the Course's assurance that a cholesteatoma is always accompanied by a constant odorous discharge, difficult for anyone to miss, noting that a cholesteatoma need not produce any odorous discharge at all.[622] NHAS's response ignored the criticism that the Course incorrectly assured the student that he would be able to spot a cholesteatoma easily, and criticized the VA Reviewers for focusing on cholesteatomas, which "aren't that common" and which require a team of specialists to diagnose.[623] This criticism seems particularly unfair, in light of the fact that a cholesteatoma is the first of the diseases discussed in the course's lesson on conductive disorders of hearing.[624]

The VA Reviewers also criticized the NHAS Basic Course for failing to provide the instruction needed to determine the presence of any form of otitis media, thus rendering rather meaningless the Course's admonition not to fit a hearing aid in the presence of otitis media.[625] They further criticized the coverage of retrocochlear hearing loss[626] in the text of the lesson on sensorineural, central and non-organic hearing disorders, particularly the failure to mention the existence of acoustic tumors.[627]

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619 The VA reviewers said that the "description of ear pathology is inadequate and misleading." VA Review R8/3829. The entire analysis appears at R8/3829-31.

620 NHAS Basic Course, R8/4255.

621 VA Review, R8/3829.

622 Id.

623 NHAS, R8/4029, citing Glorig, (HEW Task Force Hearings), R8/3504. Austin Smith, M.D., an NHAS witness, testified that he sees many cholesteatomas, TR8164, 8166, as do all other otologists, id. at 8166.

624 NHAS Basic Course, R8/4255.

625 VA Review, R8/3830.

626 Retrocochlear hearing loss is caused by problems beyond the cochlea, i.e., central problems. H. Davis & S.R. Silverman, Hearing and Deafness 87 (1970).

627 VA Review, R8/3830.

On a more general level, the Course was criticized as being "quite superficial" in its treatment of the evaluation of hearing and interpretation of test results.[628] In the VA Reviewers' opinion, the "information presented in the lessons requires expansion, qualification, and interpretation by a competent and knowledgeable instructor who has had considerable clinical experience."[629] They concluded that the Course "does not equip the dealer to detect and analyze hearing disorders that may require medical attention."[630]

The VA Reviewers called the Course's list of references[631] "outdated," which it clearly is. Even the two audiology textbooks required for the Course are listed as prior editions to the copies provided by NHAS to the FTC staff in 1975. Audiological Assessment, edited by Darrell Rose, Ph.D., is listed as the 1968 edition, while the copy in the record as Staff Physical Exhibit D is the 1971 edition.

Three otolaryngologists reviewed the NHAS Basic Course for the ACO.[632] The ACO Hearing Committee Report opined that the course materials were

> far too technical and beyond the scope of the simple salesman to comprehend in any effective manner [since m]ost of the material has been written for professionals with college and post-graduate education.[633]

The Report noted that its authors were "unable to determine the adequacy and ability of the [NHAS] training program to equip their dealers as to the fitting and selling of hearing aids."[634]

The third organization that reviewed the NHAS Basic Course was ASHA. The two audiologists and one otolaryngologist who

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628 Id. Worse still, some of the text was felt to be "contrary to standard clinical procedure." Id.

629 Id.

630 Id.

631 NHAS Basic Course, R8/4229.

632 ACO, R8/3832. The subcommittee members were William Call, M.D., Thomas McDonald, M.D., who testified as one of the three ACO panel members, TR3686-3756, and Mansfield F.W. Smith, M.D.

633 ACO, R8/3832.

634 Id.

performed this review[635] reached conclusions similar to those of the VA Reviewers. The ASHA Reviewers found the Course to be "extremely superficial," not treating "any subject with the degree of detail and thoroughness that is desirable, indeed essential, for the adequate training of a person who fits and dispenses hearing aids."[636] The Course failed to provide its students with the "sound understanding of the practical techniques and methods used in modern-day fitting of hearing aids" that its foreword promises.[637] According to the Reviewers, the two reference textbooks[638] were "primarily intended to be introductory textbooks for audiology students" and "do not provide the extensive knowledge necessary for preparing a person competently to evaluate hearing loss, detect and analyze hearing disorders that may require medical attention, and make professional judgments on hearing loss and recommend corrective action."[639] Moreover, "most, if not all, [lesson] questions can be answered by reading only the basic course" without reference to these two texts.[640] The ASHA Reviewers also noted that the Course needs updating.[641]

The ASHA Reviewers expressed concern about the "crash review" courses given at annual NHAS conventions,[642] asking whether they

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635 ASHA Review, R8/3832. They were Leo G. Doerfler, Ph.D., James F. Jerger, Ph.D., and Raymond E. Jordan, M.D., past Executive Director of ACO.

636 Id. at 3833.

637 Id., quoting from NHAS Basic Course, R8/4227. In an interview with the staff, James Jerger, Ph.D., noted his view that if the dealer had fully mastered all of the material covered in the two textbooks used in the course, this would put him on a par with the masters level student in an audiology program after completing the first academic quarter of a 2-year program. Dr. Jerger noted, however, that the audiology student would not only read such materials but be lectured on them, and would have a chance to ask questions about the points made therein. R8/4569. See generally Jerger, R8/4569-70.

638 H. Davis & S.R. Silverman, Hearing and Deafness (1970); H. Newby, Audiology (1972).

639 ASHA Review, R8/3833.

640 Id.

641 Id.

642 See Hearing Instruments, R8/D553ipll; Griesel, R10/6777, TR9475; Hearing Aid Journal, R10/2747, R13/163-65.

are "a review of the course content or a review of the questions to be answered [on the Course's final exam]."[643] To staff's knowledge, this point has not been publicly addressed by any NHAS representative. The ASHA Reviewers also expressed interest in the pass-fail ratio of the final exam,[644] information which NHAS has never adequately disclosed.[645]

NHAS's general response to criticisms of its Basic Course by these groups was threefold. First, NHAS explicitly disavowed the promise in the Course's Foreword,[646] and asserted that the Course "was designed only to teach the FUNDAMENTALS."[647]

> It is ONLY INTRODUCTORY; hearing aid specialists are given innumerable opportunities and every encouragement to pursue advanced training through workshops, advanced courses, seminars, and conferences offered by [NHAS] and hearing aid manufacturers.[648]

NHAS went on to note that on-the-job training (2 years, under supervision) is also required for NHAS certification.[649] Secondly, NHAS pointed to allegedly contradictory statements by the three expert panels that reviewed the Course.[650] After reviewing these alleged contradictions, staff has concluded that they are

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643 ASHA Review, R8/3834.

644 Id.

645 See HX224.

646 "Completion of this course, will provide you with a sound understanding of the practical techniques and methods used in modern-day fitting of hearing aids." NHAS Basic Course, R8/4227.

647 NHAS, R8/4026. "Neither at its inception nor now is it regarded as a COMPLETE training program as the Senate staff study apparently suggested." Id. This contrasts sharply with the testimony given by then NHAS president Raymond Rich before a Senate Committee in 1968. Rich, (Senate Hearings, 1968), R8/991 line 7 ("comprehensive" course), 1089b line 17 ("extensive" course).

648 NHAS, R8/4026.

649 Id.

650 Id. at 4026, 4028.

more apparent than real and, in any event do not detract from the import of the criticisms of the NHAS Basic Course.[651]

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651 The ACO Review stated that the course materials were far too technical and beyond the scope of the simple salesman to comprehend in any effective manner [since m]ost of the material has been written for professionals with college and post-graduate education. ACO Review, R8/3832 (emphasis added). This assertion is not really in conflict with the ASHA Reviewer's view that the Course is "extremely superficial" because "[c]omplex topics are treated in an overly simplified manner without sufficient explanation" in the lesson text and because the two reference textbooks "are primarily intended to be introductory textbooks for audiology students." ASHA Review, R8/3833. When intended for use in the absence of the lectures and practicum which are an essential part of an academic education in audiology, it is quite possible for the Course to be both "extremely superficial" and "too technical and beyond the scope of the simple salesman to comprehend in any effective manner."

The VA Reviewers felt that "[m]uch of the specific information presented [in the first eight lessons] is incorrect." VA Review, R8/3829. The ASHA Reviewers said that "the information is generally accurate in content with no gross errors." ASHA Review, R8/3833. The conflict between these two assessments depends upon the meaning of the term "gross errors" as used by the ASHA Reviewers, and whether the amount of incorrect information observed by the VA Reviewers is compatible with the ASHA Reviewer's "generally accurate" characterization. It is quite possible that the ASHA Reviewers chose to deemphasize the importance of the factual inaccuracies or omissions of the Course in order better to emphasize their conclusion that the Course was attempting to accomplish something beyond the capabilities of a home study course. (The conclusion that the seller should not be dealing with consumers without the involvement of both the physician ear specialist and the audiologist appears twice in the ASHA Review. Id. at 3834, 3835). The ASHA Review points out a number of errors in the Course which appear to be just as important as those the VA Reviewers chose to emphasize. Compare VA Review, R8/3829 line 49 to 3830 line 19, with ASHA Review, R8/3834 line 44 to 3835 line 4. While staff is inclined to consider many of the errors noted by both the VA Reviewers and the ASHA Reviewers as "gross errors," the fact that the ASHA Reviewers did not use that terminology does not detract from the credibility of their review. Thus, it is entirely reasonable to conclude that the contradiction between the VA and ASHA assessments of the NHAS Basic Course is more apparent than real.

Lastly, NHAS, apparently in its zeal to repudiate the VA Review, misinterpreted the criticism that the list of references was outdated as being a criticism that the 1972 Newby book itself was outdated.[652] As a result they lambasted Dr. Newby for accepting the royalties that NHAS Basic Course students have paid without advising them of the book's deficiencies.[653] NHAS then asserted that a revised NHAS Basic Course was in preparation in November of 1975.[654] The RPAG Report, however, noted that the Course was "in a state" of revision" as of August 1973.[655] To staff's knowledge the revision has not yet been completed.

The NHAS references to the "innumerable opportunities and every encouragement to pursue advanced training" and the forthcoming revision of the NHAS Basic Course raised the expectation that NHAS (or HAIC) might have produced evidence concerning those educational efforts in testimony a full year after the Percy Report criticized seller training. Unfortunately, neither NHAS nor HAIC chose to come forth with any clear indication of the nature and extent of attendance at the "workshops, advanced courses, seminars, and conferences offered by [NHAS] and hearing aid manufacturers."[656] Nor was the revised NHAS Basic Course, in preparation since as early as August 1973, ever introduced before the record closed on October 22, 1976. Even completion of the final examination may have less meaning than would seem to be the case, since copies of the exam itself are apparently available to at least some examination candidates,[657] and since the integrity of the grading process has been shown to have been breached on at least one occasion.[658] The quality of the final exam is also less than would be expected. According to RPAG,

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652 NHAS, R8/4028.

653 Id.

654 Id.

655 RPAG, R8/2642; see Pigg, R8/1188000.

656 Responses from industry representatives to inquiries about the number of sellers who have not received this "advanced" training have been little more than obfuscations. See Pigg, R8/1188LLL line 46 to 1188MMM line 7.

657 Elma Griesel was shown a copy of the final examination for the NHAS Basic Course by a hearing aid dealer who told her copies were available to those who wanted them. Griesel, TR9478.

658 Elma Griesel was told of an incident in which the then president of a state chapter of NHAS mysteriously received

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> [t]he final examination of NHAS for dealer certification deals very lightly with medical questions. The dealer is given 11 causes of hearing loss and is told to indicate which are conductive and which are sensory neural. He is given 3 lines to describe the surgical procedures for fenestration, stapes mobilization and stapedectomy. He is given 3 conditions of hearing loss and asked whether or not he would fit an aid for such losses.[659]

Nor does the examination contain any practical testing of the candidate's skills,[660] as at least one NHAS witness believed.[661]

The 2 years of practical experience and the three endorsements required in addition to completion of the NHAS Basic Course before certification by NHAS[662] are yet one more "assurance" of quality which seems to be less than one might assume. John Kenwood virtually admitted that the three references were merely character references to certify that the individual actually has been in the hearing aid business[663] and that the physician endorsement means no more than that the certification candidate has found a physician who knows he was in the hearing aid business and who has not seen or heard anything which led him to believe that the candidate was not doing his work competently.[664] Nor is the two years of supervised experience necessarily competently supervised. Roger Kasten, Ph.D., administering the Indiana licensing exam to an apprentice of one of Indiana's more important hearing aid dealers, was shocked when he discovered that the apprentice did

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658 (Continued)

a perfect score on the final exam given by the state NHAS chapter. The person to whom Ms. Griesel spoke had graded the exam and given it a failing grade when the graders broke for dinner at the suggestion of the chapter president. When this individual returned to finish grading exams, the president's exam had been altered so that it now gave all of the correct answers. Id. at 9478-79.

659 RPAG, R8/2618.

660 Id. at 2642.

661 Oberhand, TR3075.

662 Waters, R8/4005-06.

663 TR9322-25.

664 Id.

not know what a bone oscillator[665] was.[666] Similarly, Elma Griesel testified to knowledge of situations in which the two-year "experience" requirement has been fulfilled by dealers' relatives, who worked in the office but did no testing.[667]

4. Training Audiologists Receive in Hearing Testing

The audiologist's training and experience with hearing testing, in contrast with that of most hearing aid sellers, is quite extensive. The demanding standards currently required by ASHA for certification in audiology ("CCC-A") are successful completion of a master's level (or equivalent) program in audiology with a minimum of 300 clock hours of practicum, a 9-month clinical fellowship year under the supervision of an ASHA certified audiologist, and success on a national examination in audiology administered by the Educational Testing Service of Princeton, N.J.[668] Staff believes that these activities are sufficient to assure a reasonable level of competence.

5. Training Provided in the Selection and Fitting of Hearing Aids

A significant portion of the record of this proceeding is devoted to discussion of the competence of hearing aid sellers and audiologists in the actual selection and fitting of hearing aids. The training received by audiologists in this area was criticized by numerous industry witnesses.[669] Wayne Staab, Ph.D., testified, for example, that "in most cases approximately one-half course is directly related to hearing aid fitting, selection and follow-up."[670] He criticized the 95-145 clock hours of

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665 A bone oscillator is the device that is used to vibrate the mastoid bond behind the ear in bone-conduction testing. See Appendix F, Section III.A, supra.

666 Kasten, R8/6980-81.

667 TR9410.

668 ASHA, R10/2088.

669 E.g., Staab, TR7027-30 (misquoting Studebaker, R13/D13; see Appendix D, infra, re Staab); Iliff, R10/3429; Zelnick, TR422; DiRocco, R8/1188bbbbbbb; Curran, TR10809, 10846; Kojis, TR1976; Dunlavy, R8/1611; Delk, TR10978, 10982; Kennedy, TR11127-36, 11145-47, 11151-52, 11155-61, 11166-67, 11174-76. Physicians, as a group, have no training in hearing aid application. Zenith, R2/12.

670 Staab, TR7027.

hearing aid experience required by ASHA for the practicum part of the audiologist's academic training[671] as amounting to no more than 2 to 3.5 weeks.[672] He further noted that non-accredited audiology programs would have only 48 hours of practical hearing aid experience.[673]

HAIC witness James Curran criticized "many" audiologists as religiously adhering to clinical rules of thumb,[674] only to concede on cross-examination that "many" meant "anything more than one."[675] With such semantics, the lack of competence demonstrated by a few of the industry witnesses who called themselves audiologists would adequately substantiate an assertion that "many" audiologists are incompetent. Staff has no idea how many industry witnesses used such inapposite logic to derive the basis for their criticisms of audiologists' training in hearing aids.

Consider also the extremely weak basis of Helen Kennedy, Ph.D., an NHAS witness, in her criticism of audiological training programs: She spoke to one graduate student who was working part-time for a hearing aid seller who felt "he was learning so much more in this apprenticeship than in courses" at the undisclosed school he attended.[676] She "talked to a Dr. Mannion at Los Angeles State College and her indication was that they were doing very little" hearing aid work.[677] She then noted that that school's speech and hearing clinic is "essentially" a speech clinic.[678] Her survey of the audiology programs in California schools was based primarily on a review of catalogs and whether they contained the term amplification in a way that related to individual wearable instruments.[679] Since her survey was conducted during the summer, she had difficulty contacting

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671 ASHA, R10/1616-17.

672 Staab, TR7027-28.

673 Id. (citing ASHA, R10/1617).

674 Curran, TR10808.

675 Id. at 10829.

676 Kennedy, TR11137-38.

677 Id. at 11161.

678 Id.

679 Id. at 11128-35, 11146.

those who might be able to provide information in addition to that contained in the catalog.[680] Her catalog search required her to search for the appropriate courses under confusing catalog indexes, apparently causing her to miss those programs listed under "medicine," for example.[681] She relied upon Edward Johnson, Ph.D., to advise her about the program at Los Angeles State College, even though he was not involved with that training program.[682]

The accuracy of these industry criticisms was vigorously challenged by ASHA, which introduced dozens of letters from teaching audiologists detailing the fairly extensive nature of the hearing aid experiences received by their audiology students.[683]

In addition, hearing aid training in audiologists' academic education has been greatly increased by the decisions of a relatively small[684] but growing number of universities to begin dispensing hearing aids.[685] It should not be forgotten, moreover, that the clinical fellowship year required for ASHA certification[686] provides an opportunity for professionally supervised practical experience with hearing aids.[687] Upon reviewing the evidence in the record on this matter, including consideration of the credibility of the witnesses,[688] staff has concluded that the industry criticism of audiologists on this point is greatly overstated and that audiologists are in fact given competent training in the selection and fitting of hearing aids.

Even if it were stipulated that audiology programs fall somewhat short in the area of hearing aid fitting, it is noteworthy that the majority of hearing aid sellers have no formal

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680 See id. at 11134-35, 11155-56.

681 See id. at 11158-59, 11176.

682 Id. at 11159.

683 See generally ASHA, R13/3729-4016.

684 Lentz, TR11266.

685 See Goldstein, HX180; Staab, TR7033/6-8.

686 ASHA, R13/3724-28.

687 See Kennedy, TR11135/12-14, 11147/4-12.

688 See generally Appendix D, infra.

academic experience in fitting hearing aids.[689] Their experience with hearing aids is derived from "home study courses, manufacturer programs, [and] educational seminars," and from "on-the-job training from a more experienced hearing aid specialist."[690] There is no assurance that this experience is always valuable, however. The VA Reviewers of the NHAS Basic Course thought the "paucity of information" in the six lessons on hearing aids was "astounding," especially for a course designed for hearing aid sellers.[691] RPAG reported that the final exam for the NHAS Basic Course:

> does not include any evaluation of the [student's] practical skills in testing and fitting or any evaluation of the [student's] ability to communicate and counsel with the hearing impaired.[692]

Similarly, manufacturer programs appear to be designed more to acquaint retailers with the manufacturer's line of hearing aids than to provide basic education.[693] As noted above, educational seminars are rarely attended by many sellers.

D. Supervision While in Trainee Status

Many, if not most, new entrants to the hearing aid sales field have little or no background in the area.[694] Relatively few receive much, if any, formal training, and the formal training they do

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689 Staab, TR7030. Alfred Berkove, M.D., testified that no undergraduate or junior college course for technicians exists which "specifically is designed to teach the rather complicated selection of hearing aids." TR11008-09. James Delk testified that "there is no textbook, per se, in which the audiologist or dealer can hang his hat on in learning how to fit a hearing aid, at the present time." TR10982; see Kennedy, TR11166-67.

690 Staab, TR7030.

691 VA Review, R8/3830. They called the Course's failure to define what was meant by the terms "quiet room" and "too much ambient noise" a "glaring omission." Id.

692 RPAG, R8/2642.

693 See, e.g., Samole, TR6730-31; Kleiman, TR6909/18-19, 6923/23-24/3, 6926/9-12, 6939/10-16.

694 E.g., Coleman (Senate Hearings, 1973), R8/1189aaaaaaa; S. Graham, R8/7468; see Davis, TR8536 (quoting a 1975 Beltone recruiting ad, which stated: "The only experience needed is a successful closing ratio.")

receive is usually inadequate.[695] Thus, on-the-job training is crucial. Unfortunately, many trainees receive little training before they are sent out on their own to sell hearing aids because the dealers for whom they work cannot afford to have them remain unproductive for very long.[696] The requirements of state licensing statutes do not seem to insure that trainees will be competent at the time they begin to sell hearing aids.[697] Edward Hardick, Ph.D., reported, for example, that some dealers have argued with him that the "supervision" required by Michigan's licensing statute means no more than being responsible for someone.[698]

Moreover, the on-the-job training provided is often quite minimal. For example, John Kuptz testified that when he worked for the dealer who was the Chairman of NHAS's Educational Committee, most salespersons were given only a few hours training with an audiometer and a master hearing aid before being sent out to sell hearing aids on their own.[699] Similarly, Fern Feder noted that a friend who was formerly a clothing salesman "became a hearing aid audiologist selling hearings aids on his own" after

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695 See Part One, Section VIII.C.3, supra.

696 S. Graham, R8/7468; see Krebs, TR11873-74; Barnow, TR1670; D. Smith, R10/4828; cf. Fortner, TR2881-82; Campagna, TR2685-86. Wayne Staab, Ph.D., asserted that the supervision received by the new hearing aid seller is the same as, and perhaps even better than, that received by master's level audiology students in ASHA-approved programs. TR7048. Upon further examination, he acknowledged that he was not involved in the supervision of the dealer or the trainee, id. at 7049, and that Telex had no control over the supervision its dealers provide their trainees, id. at 7050, but relied upon state licensure laws to cover that matter, id. at 7050-51. Qualitone similarly relies on state law to govern the supervision of trainees. Curran, TR10847-48. Nor would Mr. Curran, even with prompting from NHAS's counsel, come right out and say that no dealer would send salespersons out before they were fully prepared. Id. at 10895.

697 E.g., RPAG, R8/2644-45; Hardick, R8/6849; Creech, TR5224. Colorado, for example, requires only 40 hours of personal contact the first week and 4 hours per week thereafter, to satisfy the supervision requirements. Colorado Rules, R13/1117. See Appendix F, Section VIII.B.1.c for a more detailed discussion of this subject matter.

698 Hardick, R8/6849.

699 TR5646.

2 weeks of training with Beltone.[700] James Delk conceded that he had heard of dealers taking a novice off the street and sending him out to sell hearing aids after only 3 days of training, but insisted that this was not done by those with whom he was acquainted.[701] Duane Anderson, Ed.D., testified that the licensed audiologists administering the practical portion of the Oregon dealer registration exam to temporary hearing aid dealers have reported to him "year after year as to the astounding lack of capability and knowledge exhibited by temporary hearing aid dealers."[702] He further testified that "[w]hen questioned, many of the candidates taking the exam have stated that they learned mostly sales technique and how to close [the sale] from their supervising hearing aid dealer."[703] Dr. Anderson also noted "the impression of the consultants who have administered the practical exam that the crash course provided by the community college a few days before the examination is too short, limited in scope, and poorly taught."[704] The new sellers trained by Ron Scheurer receive all of their instructions orally. Nothing in writing is given to them to study.[705] On-the-job training would, of course, be worthless if the teacher is incompetent himself.[706] Indeed, Wayne Staab, Ph.D., disclosed that some sellers receive no form of on-the-job training at all.[707]

This educational approach contrasts sharply with the extensive, close personal supervision required for ASHA certification. The practical experience received by the graduate audiology student during the academic years[708] must be directly supervised by a certified individual.[709] The 9-month clinical fellowship year,

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700 TR8527.

701 TR10976-77.

702 TR11786.

703 Id.

704 Id.

705 Scheurer, TR11456-57.

706 See, e.g., Hardick, R8/6849; Zelnick, TR423/4-13; Dalton, TR3723.

707 Staab, TR7054/11-15.

708 Three hundred actual clock hours are currently required. ASHA, R10/2088.

709 Id. at 1857.

which occurs only after a graduate degree in audiology has been obtained, must include at least 36 occasions of monitoring activities at a minimum rate of 4 hours each month.[710]

E. Compensation of Sellers

Most sellers derive almost all of their income from the sale of hearing aids. The traditional seller "bundles" all charges together into the price of the hearing aid.[711] Typically, no separate income is derived from pre- or post-sale services. Thus, the sale of hearing aids is the seller's only significant source of income. Likewise, traditional salespersons are usually compensated solely on a commission basis.[712] Unless they make a sale, they receive no income from their efforts.[713] The exceptions are those who always charge for pre-sale services. They are ASHA-certified audiologists, who have in the past been forbidden from selling hearing aids except on a nonprofit basis,[714] and sellers like D.W. Schaefer and John Payne[715] who charge for the pre-sale hearing testing they perform.[716]

F. Turnover of Trainee Sellers

Trainee sellers frequently move on to another business before the deadline by which they have to pass the licensing exam.[717] This rapid turnover means that there is a continuing

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710 Id. at 3728.

711 In a 1975 survey of hearing aid sellers conducted by Hearing Instruments, only 11% of the respondents separated (unbundled) the cost of the hearing aid from fees for connected services. Frame, R10/516; see Harford, TR116-17.

712 E.g., Barnow, TR1659; Fortner, TR2910; Campagna, TR2691; S. Graham, R8/7540; see Fortner, TR2910-11. But see Dunlavy, TR3443, 3455-56; Hopmeier, TR3364-65.

713 See C. Burke, R13/1241; Campagna, TR2691.

714 K. Johnson, TR4276.

715 Schaefer, TR8264; John Payne, TR9209-12.

716 As noted in Part One, Section IX.B, infra, the offering of "free" hearing tests is one of the most popular lead solicitation devices used by sellers.

717 E.g., Krebs, TR11873-74 (California); Creech, TR5224 (Virginia). But see Zumbrunnen, TR11978 (California). Beltone engages in substantial efforts aimed at persuading

(Continued)

supply of unqualified sellers, even in states where licensing statutes have been passed. The extensions of trainee status permissible in the various states permit each of these individuals to operate for a year or more before having to demonstrate minimal qualifications or get out of the hearing aid business.[718] ASHA presented the results of a survey it conducted of states which licensed sellers.[719] Of the 23 states responding, the percentage of temporary permits that were converted to licenses in 1973, 1974, and 1975 was only 20.9%, 20.8%, and 23.2%, respectively.[720]

IX. SALES TECHNIQUES OF HEARING AID SELLERS

A. Introduction

Hearing aid sellers as a group tend to characterize themselves as dedicated and concerned members of the hearing health delivery system.[721] They emphasize, sometimes rather eloquently, the service that they render to the hearing impaired by ferreting out,

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its dealers to embark on a "manpower" program of using numerous salespersons to make house calls on prospects. Beltone I.D., R13/238, 210. See generally "Manpower Dealers--Why and How," a 1973 article by Beltone's Director of Marketing. D. Smith, R10/4828.

718 E.g., Hardick, R8/6849 (Michigan); Scheurer, TR11434 (Oregon); Colorado Rules, R13/1117; Morgan, TR9506 (California--2 years).

719 ASHA, R10/1667-68, 1983-2018.

720 Id. at 1987.

721 Wesley Hall, M.D., for example, testified:

> [I]f all professions, medicine, law, ministry, education, the entire spectrum, including government at all levels . . . possessed the sincerity, honesty, dedication, motivation, and integrity of the people I have had the privilege of meeting and knowing in the hearing aid field of endeavor, America could be approaching a plateau of excellence just next to Utopia. [TR11055-56]

See, e.g., Berkove, TR11001; Leale, TR11716.

and then assisting, those who suffer from a hearing loss.[722] The preceding section, on the other hand, has demonstrated that the traditional hearing aid seller[723] is recruited, trained, and compensated as a salesperson and that a primary motivation of such persons is the desire to make money through the sale of hearing aids.[724]

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722 See, e.g., Barnow, TR1632; Giglia, TR2708; Samole, TR6661; Elia, TR7479, 7506. Hubert Gerstman stated:

> We have a good many dealers in the field who are at the first point of entry to a health delivery system. They are the only people that can go beat the bushes, advertise, find people, can find people who may be in need of audiologic services, to say nothing of hearing aids. [TR2401]

See Kojis, TR1971; Burris, TR2506; Campagna, TR2653-54; Baesemann, TR7338.

723 The discussion that follows does not refer to audiologists, some of whom now dispense hearing aids at cost. See Part One, Section VI.C, supra. There is no evidence in the record that audiologists use the types of sales practices discussed in this section.

724 See Part One, Section VIII.E, supra. Indeed, the Dahlberg manual answers the question "Are all leads the same?" as follows:

> With one qualification, YES! If the person has a hearing loss (and that is the ONLY qualification) that lead is a prospective customer. Someday he will buy a hearing aid . . . from someone. Your job is to help him decide to buy it from you, today!
>
> . . .
>
> Your selling will improve when you realize that all ads produce the same kind of lead . . . an opportunity to talk to a person who admits he has a hearing loss. This person is a prospective customer. And as has been said before, if you handle him right--you can sell him.

Dahlberg, R13/1302 (ellipses and emphasis in original).

In this section, an examination of the lead generation techniques, home sales practices, and general sales tactics of hearing aid sellers will verify the conclusion that the recruitment, training, and compensation provided to such persons often produces nothing short of a high-pressure salesperson. Subsequent sections concerning seller representations[725] and failures to disclose material information[726] will further substantiate this conclusion, in addition to providing support for various sections of the Proposed Rule.

B. Lead Generation Techniques

The foundation of any successful selling enterprise is the generation of potential customers, or "leads." That the hearing aid industry--both manufacturers and sellers alike--has become highly proficient at this art is evidenced by the impressive array of lead generation techniques that are practiced upon hearing aid consumers. It is through one of the techniques discussed in this section that a great many consumers are first introduced to the "hard sell" approach of the hearing aid industry.

An important source of leads, and one that is stressed repeatedly in hearing aid sales manuals, is an individual's business and personal contacts. The Beltone Manual, for example, notes:

> Everyone of your customers is an excellent source of new prospects. After you deliver a Beltone you have sold, you will be contacting your customer regularly. Each time remember to ask, "By the way, Mrs. Customer, have you another friend with a hearing problem that I might help?"[727]

Both Dahlberg and Maico instruct salespersons that, while taking a "prospect's" case history, they should ask for the names of relatives and friends who have also experienced hearing problems.[728] Indeed, Maico points out that:

> each of the hard of hearing persons they refer to at this time, is also a NEW prospect for you. If, in asking for the names of these persons who are users, the person should

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725 See Appendix F, Section IV, infra.

726 See Appendix F, Section V, infra.

727 Beltone, R8/1641 (emphasis added); see Sonotone, R8/1631; Dahlberg, R8/2422.

728 Dahlberg, R8/1422; Maico, R13/899.

> ask why you want to know, say, "I would like to know if any of them are my users to correct any of the problems they are having of which I am not aware." Then list the names as they are given to you for later reference.[729]

Considerable attention is devoted to this task of soliciting "user referrals," particularly in light of the reluctance of some individuals to provide names. Beltone advises:

> Most of those whom you ask will answer you quickly and without much thought, "No one." This only means that no one comes to mind immediately. Suggest, still in a positive, friendly tone, "How about a relative? (pause) A neighbor? (pause) Someone in church?" Then add, "I will simply call to see if they wish any literature or would like a complimentary audiometer test . . . ."
>
> Help your customer to think of others by suggestion, "How about someone in your club? A niece or nephew?" Pursue the subject a bit and give her time to think. "You know, Mrs. Customer, for something like a hearing problem it is hard to deal with strangers. So often a person appreciates your recommending someone you know."[730]

Some sellers even pay a "bounty" to any user who turns in the name of another hearing-impaired person, if the individual ultimately purchases an aid from the seller.[731] And a Sonotone dealer who recognizes that users are often reluctant to supply the names of friends is quoted in that company's manual as follows:

> BUT if I take out of my coat pocket a bone-conduction Sonotone, ask them to put their fingers in their ears and press the oscillator against their nose or forehead, they are amazed. Now they are anxious to give

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729 Maico, R13/900. In other words, Maico sellers are instructed to lie, since the manual has just pointed out that each of the persons named will be a new prospect. See id.

730 Beltone, R8/1642 (emphasis in original).

731 See, e.g., Conlin, TR7770-71 ($10 bounty); Murray, R10/4425 ($39 discount on aid); Kelly, R10/5980-83 (account credited in unspecified amount).

> me a name . . . because they are hopeful that the hard-of-hearing acquaintance or loved one can be benefited with the miracle of bone conduction just demonstrated.[732]

It is unlikely, however, that this seller mentions that only a very small percentage of hearing-impaired persons can benefit from bone-conduction aids.[733]

Other personal and business contacts that can provide names are not overlooked. Sales manuals suggest asking milkmen, breadmen, laundrymen, meter readers, barbers, grocers, service station attendants--in short, anyone and everyone with whom the seller comes into contact.[734] Some even recommend that local clergymen be solicited for the names of hearing-impaired persons.[735] Indeed, Dahlberg instructs sellers who meet with resistance at the door of a prospect to say:

> I'm sorry to have caused you any inconvenience, Mrs. Wilson. But since no one in your house has a hearing loss, perhaps you have noticed someone in the neighborhood who has. It's possible that whoever sent us your name got mixed up. Do you know someone in the neighborhood I might call on while I'm here?[736]

A favorite technique of many hearing aid sellers and manufacturers is to advertise that something is being given away for

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732 Sonotone, R8/1632 (emphasis in original).

733 See Appendix F, Section II.B, infra.

734 See, e.g., Sonotone, R8/1631-33; Beltone, R8/1641; Dahlberg, R8/2422; Maico, R13/856-59.

735 See Beltone, R8/1642; Maico, R13/857. A Sonotone manual notes:

> It is a good thing to have clergymen know your Sonotone story. Convince them of your personal, friendly service to the hard of hearing, particularly to older folk and those who absent themselves from church because they can't hear well. They can be a source of prospect names.

Sonotone, R8/1633.

736 Dahlberg, R8/2422. Direct mail advertising from manufacturers sometimes contains space for the names of additional hard-of-hearing persons. E.g., Maico, R8/2443; Prestige, R8/3677.

"free."[737] Some offer free booklets about hearing loss offer or hearing aids.[738] Others offer free "listening devices," such as television and radio attachments or telephone ear pads.[739] Several ads actually offer a "free hearing aid."[740] One of the most popular tactics, however, is to offer a life-size replica of an all-in-the-ear hearing aid to those who answer the ad.[741] The following Beltone ad is typical, and is representative of this technique as utilized by other manufacturers as well:

> A free offer of special interest to those who hear but do not understand words has been announced by Beltone. A tiny, non-operating

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737 All sorts of items may be used. For example, an ad placed by one distributor in Hearing Instruments, a trade magazine, states that a "FREE TV ATTACHMENT has proven to be one of the best hearing aid lead getters in years." American Overseas Trading Ad, R8/D553ip31. Another ad in the same magazine recommends that hearing aid sales be promoted by giving away heirloom bibles:

> As a selling aid, the Heirloom Family Bible can help you get more leads, make appointments, close sales now and get larger down payments. It's the perfect good will gift your customer will always remember--and prospects can't pass it up.

Heirloom Bible Publishers Ad, R8/D553ip24; accord, ASHA, R10/2152 (citing 8 similar ads in Hearing Aid Journal between 1972 and 1976).

738 E.g., Vicon Ad, R8/2317; Maico Ad, R8/2357; Custom Aids of Houston Ad, R8/2394; Beltone Ad, R8/2576, 3065; PRESTIGE Ad, R8/3677; cf. Beltone Ad, R8/2557 ("free Government Report").

739 See, e.g., Jungheim, TR8875; Bill Wellman Hearing Aid Service Ad, R8/3075; Bennett Hearing Aid Center Ad, R8/3117; Empire Hearing Aid Service Ad, R8/8131. One recent ad for a "free hearing device" states: "Act NOW . . . GET YOUR FREE SPACE AGE INVENTION THAT PUTS YOUR HEARING BACK IN FOCUS!" Evanston North Shore Hearing Aid Center Ad, R13/1924.

740 See Texas State Audio Ad, R8/2415; Bill Wellman Hearing Aid Service Ad, R8/3056, 3078. In some instances, the ad invites the reader to send in a coupon to register for a free hearing aid. Maico Ad, R8/2357; Sonotone Ad, R8/3079

741 See, e.g., Oakland County Hearing Aid Service Ad, R8/6678 (Electone); Custom Ear Ad, R8/6703; Beltone Ad, R8/5284; Metro Hearing Aid Center Ad, R10/8415 (Audibel); Telex Ad, R13/1924.

> model of the smallest Beltone all-in-the-ear aid ever made will be given absolutely free to anyone answering this ad.
>
> Try it and see how it is worn in the privacy of your own home without cost or obligation of any kind. It's yours to keep free. It weighs less than a third of an ounce, and it's all at ear level in one unit. No wires lead from the body to head.
>
> These models are free, so we suggest you write for yours now. Again, we repeat, it is a non-operating model, there is no cost and no obligation.[742]

These advertisements mislead consumers in at least two ways. First, it is clear that, at least with respect to the "free model" ads, some consumers believe that they are going to be given an actual hearing aid.[743] Secondly, and more importantly, there is considerable evidence that respondents to these ads are very often rewarded with an unannounced home

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742 Beltone Ad, R8/1410.

743 See, e.g., Penalver, TR4965-66; Griesel, TR9471; AARP Letter, R10/1371; Barry, R10/6266; Deakyne, R10/6786; Wieckowski, R10/6787; Cox, R10/6788; Kleberg, HX62B. Leslie Dalton, Ph.D., testified concerning one individual who had sent in to Beltone for a free all-in-the-ear hearing aid:

> When he received it in the mail he inserted it in his left ear so that it would help him hear better. All of it did not come out. . . . [T]he patient was seen on April 23, 1976, complaining of some pain in the left ear. Serum had [sic cerumen] collected behind the insert and become impacted. As a result, the ear was quite inflamed and swollen.
>
> . . .
>
> Few of our residents of New Mexico speak English. All he knew it was a free hearing aid and he ordered it. [TR8732].

visit from a hearing aid seller.[744] John Kuptz, for example, testified that the dealer he once worked for "specializes in people who answered an ad in the paper for a device that a hard-of-hearing person would use on the television or on the phone which would be free."[745] The practice, he noted, was that "[t]he unsuspecting person would then have a salesperson call at the home for a free hearing test so that the proper device could be given him, and consequently a hearing aid pitch."[746] Similarly, D.W. Schaefer testified that the Wisconsin Hearing Aid Dealers' and Fitters' Examining Board sees:

> many complaints that the source of this complaint appears that the person would answer an advertisement, get something different than what they asked for. In other words, they asked for a free non-working model as an example, but what they got is a gorilla on the front door step with a black box and he's going to take care of their hearing problems for them. That's not what they asked for, they asked for a free non-working model.[747]

Examples of consumers who sent away for free booklets or replicas and were unexpectedly confronted by a hearing aid seller abound in the record.[748]

Another productive source of leads involves participation in local home shows and fairs. The Audivox manual advises:

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744 See Part One, Section III.E, supra. It is interesting to note the reaction of D.W. Schaefer, a hearing aid seller, to such ads:

> [W]hen you are offering something for nothing, the free bit does not exist, somebody is going to pay somewhere along the line. I would guess that I would view the free advertising as deceptive advertising because it's -- you don't get things for nothing. [TR8305].

745 Kuptz, TR5645.

746 Id. at 5646.

747 Schaefer, TR8267.

748 See, e.g., Penalver, TR4965-66; AARP Letter R10/1371; Barry, R10/6266; Hardick, R10/6663, 6753; Part One, Section III.E, supra.

"Home shows and fairs are excellent opportunities for 'find' activities. The offer of something 'free' (not necessarily a free hearing aid) is a powerful stimulus to register a hard of hearing relative or pal."[749] The Sonotone manual also encourages such activities:

> More should make use of this opportunity. If you haven't participated in a home, food show or county fair, you just wouldn't believe the hundreds of names that can be obtained (and qualified) by the program Sonotone makes available. Just ask the advertising department for the Sonotip on traveling displays.[750]

There is a predictable chain of events when this ploy is utilized. Visitors to the fair[751] are invited to register any hard-of-hearing person in a drawing for a free hearing aid.[752] As a result, the names and addresses of a large number of prospective customers are obtained.[753] These persons are then visited at their homes by a local hearing aid seller, who performs a hearing test and gives them a sales pitch.[754] In fact, in some cases not even the "winner" receives a free hearing aid; instead, he is also visited at home and sold an aid.[755]

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749 Audivox, R13/1142.

750 Sonotone, R8/1634.

751 The example of a state or county fair is merely illustrative. This approach is easily adaptable to home shows, see, e.g., Eichelberger, TR8679; Hardick, R8/6719; or to conventions, see Leber, R10/6510.

752 The record contains examples of such registration cards. E.g., Hardick, R8/6879; NCSC, R10/4658.

753 Judge Gordon Cooper, an NHAS witness, testified that most of the leads in Colorado are apparently obtained through the state fair. Cooper, TR10789; see Kojis (Senate Hearings, 1968), R8/901.

754 Kojis (Senate Hearings, 1968), R8/901 ("Through advertising and through State fair exhibits, the lead list is obtained. The calls are then made from this lead list at the home in many cases."). A number of consumers reported that, after registering for a drawing at a home show or fair, they were visited at home by a hearing aid seller. See, e.g., Hardick, R8/6719; NCSC Affidavits, R10/4673, 4709, 4722.

755 See Beltone Detroit Company, R10/6425.

Advertisements offering free hearing tests or free hearing aid adjustments are also a fruitful source of sales prospects.[756] Some sellers merely include a line in their Yellow Pages or other ads stating that free hearing tests are available.[757] Others, however, go much further. The record contains many ads that are essentially identical to the following:

> HEARING TESTS SET FOR SPRINGFIELD
>
> Free electronic hearing test will be given at the Holiday Inn South, 625 East St. Joseph Street in Springfield on Wednesday, March 3rd and Thursday, March 4th, 1976 from 12 to 7 p.m. A hearing aid specialist of Midstate Hearing Aid Services will perform the test.
>
> Anyone who has trouble hearing or understanding is welcome to have a test using modern electronic equipment to determine his or her particular loss.
>
> Everyone should have a hearing test at least once a year if there is any trouble at all hearing clearly. Even people wearing an aid or those who have been told nothing could be done for them should have a hearing test and find out about what's new in hearing help that can be provided.
>
> CHILDREN UNDER 15 NOT ELIGIBLE FOR TESTING[758]

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756 Leonard Finkel, Massachusetts counsel for Legal Research and Services for the Elderly, testified that nearly 50% of the affidavits submitted to that organization indicated that the consumer responded to the offer of a free hearing test. Finkel, TR4445.

757 See, e.g., Progressive Hearing Aid Center Ad, R8/2333; Associated Hearing Aid Center Ad, R8/2335; Acousticon of Orange County Ad, R8/2341; Texas State Audio Ad, R8/2344; Swope Hearing Service Ad, R8/2388; Audiotone Ad, R8/2427.

758 Midstate Hearing Aid Services Ad, R10/4904; see, e.g., Beltone Hearing Aid Center Ad, R8/5665, 5666; Mid-Atlantic Earphone Co. Ad, R8/7548. Some of these announcements are even captioned, "Hearing Tests Set For Senior Citizens." E.g., Beltone Hearing Aid Service Ad, R10/4914; see Beltone Hearing Aid Service Ad, R13/1569.

It is noteworthy that this ad, and others like it,[759] is presented in the form of a public service announcement and nowhere indicates that it is, in fact, an advertisement by a hearing aid seller. Indeed, although the record contains other similar ads that do indicate that they are ads, this "disclosure" is often made by placing the word "advertisement," in very small print, above or below the same type of "announcement."[760]

A related approach is to offer a "free hearing aid analysis" to current hearing aid users.[761] Such offers often come in the form of an invitation to a "free better-hearing consultation" at which there will be free gifts for all who attend.[762] A Beltone dealer in Michigan even offered a free chicken to all who attended his "Hard Times" workshop, and a second free chicken to anyone who brought along a hard-of-hearing friend.[763] Still other ads invite readers to attend the grand opening[764] or anniversary[765] of a hearing aid center, or to come to a showing of the new line of hearing aids.[766] Some simply offer a free gift to all who mail in a reply card[767] or redeem an enclosed

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759 See sources cited note 758, supra.

760 See, e.g., Beltone Hearing Aid Service Ad, R8/5664; L.A. Licensed Hearing Aid Center Ad, R8/6506; Beltone Hearing Aid Service Ad, R10/3094; Beltone Hearing Aid Service Ad, HX107.

761 See, e.g., Vicon Ads, R8/2323; Capitol Hearing Aid Center Ad, R8/7672.

762 See, e.g., Beltone Hearing Aid Service Ad, R8/5607; Tabor Ad, R8/6690 (free gifts, door prize); Posen Ad, R8/7658-59 (free gifts, "extra special gift" for those who send in reply card); Capitol Hearing Aid Center Ad, R8/7672 (free gift); Serig Ad, R8/7680 (free gift); Beltone Hearing Aid Service Ad, R8/7686 (free consultation, free electronic hearing test, free demonstration, free gifts, free service, free wind noise reducer).

763 Barden Ad, R8/4213; see Beltone Hearing Aid Service Ad, R8/4214 (free chicken, free refreshments).

764 Professional Hearing Aid Center Ad, R8/2383; A & M Hearing Aid Center Ad, R8/2386 (free gift, free refreshments).

765 Lucas Hearing Aid Service Ad, R8/2374 (free batteries); Toconita Hearing Aid Center Ad, R8/2377 (free gift).

766 Central Hearing Aid Center Ad, R8/2366-67 (free gift, $50 discount coupon toward purchase of new aid).

767 Wiley, R8/7678 (free "gift of hearing").

certificate at a local dealership.[768] A number of these ads also offer discount prices on batteries and repairs for a limited time period.[769] All of these gimmicks of course, are designed to get hearing-impaired persons into the seller's office in the hopes that another hearing aid sale may be generated.[770]

A few of the more imaginative techniques remain to be discussed. The record contains a number of ads indicating that one or another hearing aid is being "field-tested" and that "volunteers" are needed to participate in these tests. A Colorado dealer, for example, ran the following ad in the newspaper, under the caption "PUBLIC NOTICE TO HARD OF HEARING":

> Goldentone Division, Raco Electronics Cooperation [sic] of Minneapolis has chosen the Colorado Springs area to conduct field testing of a hearing aid featuring a custom circuit built to the patient's individual hearing loss that is worn entirely inside the ear cavity with no attachments. We wish to fit these hearing aids on a variety of age/occupation groups, both rural and urban.[771]

The ad later continues:

> Persons electing to participate will be required to have their hearing tested, necessary ear impressions taken and report their wearing experience over a two week period and may purchase the hearing aids at a reduced price at the end of that time.[772]

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768 Capitol Hearing Aid Center Ad, R8/7684-85.

769 E.g., Central Hearing Aid Center Ad, R8/2367 (discounts on batteries); Lucas Hearing Aid Service Ad, R8/2374 (25% discount on repairs, earmolds, and accessories); Beltone Hearing Aid Service Ad, R8/5607 (50% discount on batteries); Posen Ad, R8/7658 (discounts on batteries); Serig Ad, R8/7680 (50% discount on batteries and earmolds); Beltone Hearing Aid Service Ad, R8/7686 (same).

770 See generally Part One, Section III.E, supra.

771 Bob's Hearing Service Ad, R8/2015; accord, Custom Aids of Houston Ad, R8/2396.

772 Bob's Hearing Service Ad, R8/2015 (emphasis added).

Another dealer ran an ad, in the form of a news article, under the headline, "First Bionic Earmold Aid Field-tested by 90% Deaf Girl."[773] Similarly, Jerome Cohen, as President of "Hearing Unlimited, Inc.," sent letters to some of his customers stating that he "had been selected as one of 10 key dealers across the United States to implement a special field test on a new [Norelco] hearing aid."[774] Significantly, all of these ads fail to mention that the purpose of the ad is to bring in prospects for the sale of hearing aids.[775]

Finally, some sellers apparently use a telephone survey or cold canvassing type of approach.[776] The Sonotone manual, for example, declares that "[t]elephone canvassing is a fast and simple way to prospect."[777] After giving detailed instructions

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773 Custom Aids of Houston Ad, R8/4756. The ad reads in part:

> Houston, Tex.--Yvonne, age 17, is now the first to Field-Test a new type hearing system, built within the cavity of the ears but powerful enough to replace the "breast worn" aid she has used most of her life.
>
> HEARING AID TESTING CO. is now screening applicants to enter an extended test program for this new Bionic In-Ear Signal Transfer System.
>
> * * *
>
> Those selected will be required to submit reports on their progress and comparisons.
>
> <u>If results prove superior, purchase of the tested unit may be made at a reduced cost.</u>

<u>Id</u>. (emphasis added). Similar ads, run by the same company, appear at R8/4755, 4758, 5226.

774 Percy Letter, R8/277.

775 <u>See</u> Longley, TR11347-48; Jerger, R8/4963.

776 Advertisements frequently appear offering lists of senior citizens to dealers, presumably for such canvassing activities. <u>E.g.</u>, Senior Citizens Unlimited Ad, R8/D553ip36; <u>see</u> ASHA, R10/2150 (reporting 13 such ads between 1972 and early 1975).

777 Sonotone, R8/1634.

concerning who should make such calls, at what time of the day, and in what manner, this manual suggests the following conversation:

> We are making a study of the hard-of-hearing people in your neighborhood. Does anyone in your family (or office) have a hearing problem?
>
> If the answer is no, then ask:
> Do you know anyone who has trouble hearing?
> If the answers to these questions are yes, then ask for the names of the persons who are hard of hearing. If you are asked why you want the names, you can explain:
>
> We would like to send them some educational literature on hearing . . . .
>
> In response to the request for your name and company, explain that the literature is a service of the Educational Department of Sonotone Corporation and that your office is one of the more than 350 Sonotone offices throughout the U.S.[778]

A telephone survey manual provided to Dahlberg dealers is even more deceptive. It suggests that the interviewer state: "We are taking a health survey of . . . County to determine the number of people who are hard of hearing. Are you or any member of your family hard of hearing?"[779] The manual also provides:

> Do instruct solicitors that if they are asked who they are, that they should give their name. It is unnecessary and confusing to volunteer their name, and will reduce their income. If they are asked for whom they work, they should give your name and address--but ONLY if asked.[780]

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778 Id. at 1634-35. The Sonotone manual also instructs:

> Mail the literature the same day you collect the names. Then make a follow-up visit for a Personal Hearing Security Program presentation. It has been proven that most names gathered in this fashion are well qualified prospects--usually hard-of-hearing non-users or competitive users. [Id. at 1635.]

779 Dahlberg, R8/7072 (emphasis added).

780 Id. at 7093 (emphasis in original).

In a similar vein, the Sonotone manual recommends that dealers not "go directly to the name of the person they have, but first . . . make two or three inquiries in the neighborhood about the person in question. This not only qualifies the name but often results in additional names."[781] Numerous leads are apparently generated by such techniques.[782]

C. Home Sales

Most available sources indicate that the majority of hearing aid sales are made in the buyer's home. An Audivox manual, for example, informs dealers that 75 percent of their sales should be made in the home[783] and that more than half of these outside sales should be to new users.[784] Beltone sales figures[785] covering 1970 through the first 6 months of 1973 reveal a similar pattern. In 1970, 1971, and 1972 respectively, home sales accounted for 56.4 percent, 62.6 percent, and 64.0 percent of Beltone's total sales.[786] Moreover, in the first 6 months of 1973, the "Top 10" sellers for Beltone sold 75.9 percent of their aids at the buyer's home.[787]

The testimony of numerous industry members further supports the conclusion that home sales are an important factor in the hearing aid market. DuWayne Tremmel, a member of NHAS' Board of Governors, reported that 63.7 percent of his sales are consummated in the home,[788] while Leslie Leale, another NHAS witness, noted

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781 Sonotone, R8/1633. One consumer, in fact, reported such an experience. Halvorson, R10/5674-75.

782 See Sonotone, R8/1635; Part One, Section III.E, supra.

783 Audivox, R13/1145.

784 See id. at 1146. As the manual notes: "If you want to make new sales, you must go out, or someone else will make the sale." Id. (emphasis in original).

785 See Beltone, R13/D67A. These figures are based on guarantee registration cards that are mailed to Beltone after the sale of a hearing aid. See id.

786 Id. The 1970 figure may be deceptively low, since the place of sale was listed as "not indicated" in 8.5% of the cases. Beltone, R13/2036. In the years since 1970, the "not indicated" figure has never risen above 0.5%. Id.

787 Id. The incidence of home sales for all Beltone dealers during the first 6 months of 1973 was 62.8%.

788 Tremmel, TR8332; see Fennema, TR1753.

that home sales account for more than 70 percent of total hearing aid sales.[789] A 1968 industry-sponsored survey estimated home sales at more than 60 percent and noted that as many as 80 percent of some dealers' sales are made in the home.[790] One Beltone dealer even stated that approximately 90 percent of his sales occur at the buyer's home.[791] In short, the record fully supports staff's conclusion that most hearing aids are sold in the home of the buyer.[792]

Although not all home sales visits contain an element of surprise,[793] it is fair to state that in a great many cases the hearing aid seller appears unannounced at the buyer's door.[794] A number of individuals reported such surprise visits. For example, Mary Nevells testified that, without any solicitation on her part, a man came to her door and indicated that he was administering free hearing tests to senior citizens. She

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789 Leale, TR11715; see Tryba, R10/6746 (68.6%).

790 See Bowen, TR1908; RPAG, R8/2614-15.

791 Elliott, R10/3184.

792 A lower indication of the prevalence of home sales was given by Myron Samole, who testified that such sales represent at least a substantial portion, and perhaps a majority, of total hearing aid sales. Samole, TR6660; see Scheurer, TR11507 (50%). On the other hand, Luke Fortner, the President of NHAS, estimated that 35% of his sales occur in the home. Fortner, TR2870. While Ralph Campagna testified that home sales account for only 5% of RCI's total sales (Campagna, TR2621), RCI sells primarily through leased departments in Montgomery Ward stores and is therefore atypical, see Appendix D, infra (Campagna). See also Powers, R13/969, 1018.

793 Several witnesses indicated that prospective customers generally are called in advance or in some other way notified that a salesperson will call. See, e.g., Campagna, TR2601; Giglia, TR2753-54; Tremmel, TR8355; Borst, R8/1955.

794 See, e.g., Kady, R8/2933 (41%); Powers, R13/969 (21%). See also ASHA, R10/1631. The emphasis in hearing aid sales manuals on door-opening techniques further indicates that unannounced home sales visits are common. See Part One, Section IX.D.1, infra. These techniques would, of course, be unnecessary if advance appointments were made with potential consumers.

agreed to be tested, and then put down a $50 deposit on an aid that she did not need.[795] Arthur Peterson noted that a few days after he sent away for free literature about hearing aids, a salesman appeared at his door with the literature and some testing equipment.[796] Indeed, one irate consumer wrote to the President of Beltone Electronics:

> A year ago I answered a newspaper ad which indicated that I would be provided with a device "via the mails" which would test my hearing. Instead of receiving any literature or device, I was soon deluged with unwanted personal appearances and unsolicited phone calls.
>
> I highly resented the pressures being brought to bear on me and I absolutely refused the salesman entrance into my home. In fact, one evening I was having dinner guests--the doorbell rang and there stood a salesman for Beltone.[797]

There is much additional evidence that unannounced home visits are common in the hearing aid market.[798]

The element of surprise that characterizes these visits is important for a variety of reasons. Although virtually all home visits to nonusers are begun on the pretext of administering a "free" hearing test to the consumer,[799] a cursory review of

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795 Nevells, TR4428-29.

796 Peterson, R10/5286. Mr. Peterson stated that if he had known that a salesperson would deliver the literature, he would never have sent in the card. Id. Similarly, James Lankford, Ph.D., testified that in 1970 he sent away for some literature and that, about 3 weeks later, his wife was visited at home by a hearing aid salesman. The salesman left hurriedly after Mrs. Lankford informed him that her husband was an audiologist who taught at the nearby university. Lankford, TR8001-02.

797 NCSC Letter, R10/482.

798 See, e.g., Stroup, TR953; Mace, R8/2944; Ohio Div. C.P. Letters, R8/2978, 2991, 2997-98; Dunn, R8/7526; Koch, R8/8537.

799 While the consumer's name may be secured through a variety of techniques, see Part One, Section IX.B, supra, the seller generally begins a home sales presentation by offering to test the prospect's hearing without obligation. See, e.g., Beltone, R8/1647-48; Dahlberg, R8/7038-39; Maico, R13/865.

dealer sales manuals reveals that the various testing procedures are spread out over the course of the entire sales pitch.[800] As a result, by the time the consumer's hearing has been tested, the sale is all but consummated. Thus, the potential buyer--often caught in a disorderly or unsuspecting frame of mind[801] --may sign a sales agreement without fully realizing the nature of his commitment.[802]

Not only is the consumer unprepared to evaluate the highly sophisticated and carefully planned sales presentation with which he is suddenly confronted,[803] but he does not even have time to check the qualifications of the person who is at his door.[804] Nor is the individual given an opportunity to consult a physician or

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800 See, e.g., Beltone, R8/1646; Dahlberg, R8/7037.

801 See Jeffries, TR5629; McPherson, R5/432; Hanson, R5/454; ASHA, R10/1631. One consumer who sent in for a free hearing aid noted:

> The next thing I know is that a few days later this man knocks on my door and identified himself as a Beltone representative. He obviously had my name and address from the letter I had sent to the Chicago office of Beltone. He had not requested an appointment to visit my house . . . he just showed up. He came in and gave me a hearing test with a little machine that is full of devices. He concluded I needed a hearing aid. He knew we wanted a hearing aid from the letter I had sent to Chicago. But he never specifically stated that the sole reason he was giving me a hearing test was to sell me a hearing aid. At first I thought the test was related to the free offer I had read about in the newspaper.

NCSC Affidavit, R10/4532.

802 Hardick, R5/577; Nevells, R10/4593-95, 4635-36; see Drew & Eiler, TR182-83; Klein, TR7583; Hecker, R10/4639. Ralph Campagna testified on the basis of his experience that 1 out of every 4 home visits results in a hearing aid sale. Campagna, TR2651.

803 See, e.g., ASHA, R10/1631; see Jeffries, TR5629; Finkel, R10/4602.

804 Stroup, TR970-71.

audiologist concerning the need for, or desirability of, amplification.[805] In fact, potential buyers are never permitted to sit down and consider--out of the presence and influence of the seller--how serious a problem their hearing is for them and whether they should consult with other hearing health professionals before making a decision about available remediation techniques.[806]

There is little doubt that hearing aid consumers are vulnerable to a high-pressure sales presentation under these circumstances.[807] Industry representatives, of course, contend that hearing aid consumers are not particularly vulnerable when they are confronted with a home sales presentation.[808] These assertions, however, simply are not borne out by the record in this proceeding or by past Commission activities with respect to home sales practices.[809]

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805 Franks, R10/6521.

806 See Stroup, TR970-71; Adkins, TR6072. Significantly, in a recent survey of Utah hearing aid users, 70% of the respondents disagreed with the statement: "It is proper for hearing aid salesmen to make unannounced visits to people's homes." Powers, R13/969, 1006. David Barnow, who was Beltone's chief marketing officer, sees no need for a consumer to be given a chance to reflect, however. TR1649.

807 That the sales pitch is, in many cases, a high-pressure one will become apparent after a reading of the next subsection.

808 See, e.g., Campagna, TR2651-52; HAIC, R2/D4ip39.

809 The statement of Basis and Purpose for the Commission's Rule Imposing A Cooling-Off Period for Door-to-Door Sales noted:

> The high-pressure tactics used are not restricted to persistence and argumentativeness. Often subtle psychological techniques are used to instill in the consumer a desire for the product and to persuade him to purchase it. Moreover, the circumstances under which a door-to-door sale is made is another reason for the success of high-pressure tactics and accounts for the frequency of their use. Although he may not have previously considered the need for the merchandise or service, the consumer by admitting the salesman into his home has placed himself in a position of consenting to listen to

(Continued)

It has already been noted that hearing-impaired persons are very desirous of improving their hearing and, consequently, their communications abilities,[810] and are generally quite ignorant regarding the nature of hearing loss, the benefits and limitations of hearing aids, and the professional qualifications of the various members of the hearing health delivery system.[811] As a result, these consumers are in no position to evaluate the quality of the testing that is done or the benefit that is likely to be provided by the aid being sold. Moreover, the seller's presentation of himself as the "expert" in hearing health care[812] would seem quite plausible to such consumers--particularly to the elderly[813] and the prevocationally deaf.[814] All too often these on-the-spot, emotional purchases of hearing aids turn out to have been unwise decisions.[815]

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809 (Continued)

> a practiced, skilled, and almost hypnotic sales pitch which has been scientifically designed to create his desire for something he may not need, or cannot afford.

37 Fed. Reg. 22938 (1972) (footnotes omitted).

810 See Part One, Section II.G.4, supra.

811 See Part One, Section II.G.2, supra.

812 This tactic occurs quite frequently and is encouraged by sales manuals. See Part One, Section IX.D.2, infra.

813 See, e.g., Schein, TR200; Schreiber, TR4053; Tobin, TR4094; Pastalan, TR4704; Bennett, R8/8594.

814 See, e.g., Schein, TR200; Bowen, TR1909; Schreiber, TR4053; Silverman, R8/7333.

815 P.O. Report, R9/Dlip76. These factors might also induce a sale if the consumer simply visited the seller's place of business. At least three elements distinguish office visits from home sales, however. First, the consumer who visits a dealer's office may generally be aware that he is entering into purchase negotiations of one sort or another and that a sales pitch may be forthcoming. Secondly, in anticipation of an office visit, this individual is more likely to have sought information and advice regarding hearing health care than is the consumer who is approached at his home by a seller. Finally, if an individual who is at the seller's office finds himself confronted with high-pressure sales tactics he can simply leave, which certainly is much easier than convincing a persistent salesperson to leave one's home.

Industry representatives have responded with the assertion that a hearing aid consumer is not at a disadvantage during a home sales visit[816] and that the buyer "is much more relaxed and has no suspicion or worry . . . that he is going to get something he really does not need."[817] Yet, this is the very source of the consumer's disadvantage. Because he is at home and because his suspicions may be allayed by the seller's professed desire merely to discuss the problem or to administer a hearing test, the consumer will let the seller come in. This is particularly true of the elderly.[818] As Irene Bowen pointed out:

> [T]hey are lonely. If [a salesman] comes to the door, of course they will let the person in, especially if they are aggressive salesmen as most salesmen are.
>
> They will begin talking to the salesperson if the salesperson presents himself as being friendly and interested in a potential buyer's need.
>
> The potential buyer will let down his defenses, especially since the sales will take place in the home. The buyer will feel comfortable.[819]

Once the seller has gained entrance to the home and the unsuspecting attention of the buyer, a carefully planned sales pitch often ensues, with the result that a hearing aid purchase is rapidly consummated.[820] In fact, the consumer may purchase an

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816 E.g., Dunlavy, TR3448-49; HAIC, R2/D4ip39.

817 Campagna, TR2614.

818 See, e.g., Gunterman, TR9722; Lentz, R8/8002; Bennett, R8/8595; ASHA, R10/1634. As Vincent Giglia noted:

> [I]n many cases the isolation brought about by a retiree or a retired person living alone indicated that they did fall prey to any individual that would come in and spend some time with them and talk with them . . . . [TR2739].

819 Bowen, TR1908-09.

820 This sales pitch is discussed in great detail in the next subsection. Several witnesses indicated that the timing and speed of a home sales presentation are such that it is not really until the seller departs that the consumer suddenly may realize--and regret--that a sale has occurred. Stroup, TR950; Gunterman, TR9722; see Bowen, TR1909; Klein, TR7583.

aid even when he has not been lulled into a false sense of security by the seller. The elderly, in particular, will sometimes purchase a hearing aid just to get rid of the salesperson[821] or because they feel guilty about having taken up so much of the seller's time.[822]

D. Sales Tactics

As noted previously, industry representatives are fond of asserting that they are dedicated to the task of assisting the hearing impaired[823] and that home sales visits are undertaken in a spirit of public service.[824] These assertions are belied by every segment of the typical sales presentation. From the seller's attempt to get in the prospect's door, and right up through the close of the sale, every statement and movement of the salesperson is calculated to help convince the consumer that he has a hearing problem, that he must act immediately to remedy it, and that the particular aid being demonstrated by this seller is the only proper remedy.[825] These high-pressure presentations are often taken directly from hearing aid sales manuals that provide pat responses to every conceivable objection from the buyer and that leave almost nothing to chance or the seller's imagination.

1. Door-Opening Techniques

Hearing aid sales manuals are quite specific in instructing sellers how to gain entry to a prospect's home. For example, when the seller has arrived at the buyer's house with lead in hand, Beltone urges: "Prepare Yourself to Sell. Before you leave your car you must prepare for a successful call. That is--before you

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821 Bennett, R8/8595; see Schaie, R8/6241.

822 Gunterman, TR9665; Bennett, R8/8595; see Stroup, TR950. See also Hull & Traynor, R8/6811; Lentz & Willeford, R8/7984.

823 See, e.g., Campagna, TR2593-94, 2606; Fortner, 2845-46; Curran, TR100886-87; Berkove, TR11001-02; Kennedy, TR11141; Leale, TR11715, 11717.

824 See, e.g., Campagna, TR2601-02; Berkove, TR11001, 11004; Leale, TR11716.

825 As the Audivox sales manual notes: "[I]f you want to serve the reluctant hard of hearing public, you must be a salesman first, a psychologist second and an audiologist third, in that order and no other." Audivox, R13/1219.

sell the prospect, you must sell yourself!"[826] Before approaching the house, the seller is first required to take inventory of his personal appearance, equipment, and attitude.[827] Significantly, many manuals also instruct the seller to leave his equipment in the car,[828] presumably in order to allay any possible suspicion that he is selling something.

When the seller reaches the door, he will introduce himself with a simple statement, such as, "Good morning, Mr. Prospect, I'm (your name) with Beltone. May I come in?"[829] The Beltone manual, somewhat bolder than others, then exhorts:

> [A]ssume consent--act as if you expect to be invited into the prospect's home! After all, the prospect has asked for information and you are there to deliver it. However, in those cases where your prospect hesitates, you may add: "We received your request for information about our newest way to better hearing. Did you get the booklet?" Then, regardless of the reply, say: "Well, I know how anxious most people are to get this information, so I made a special trip out here to see if I could answer any questions for you. May I come in?"[830]

No matter what type of approach is used, objections apparently are encountered with some frequency at this juncture. This is

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826 Beltone, R8/1644 (emphasis added). Thus, from the very inception of the visit the seller's attention is focused on selling the prospect. Significantly, Beltone is the largest hearing aid manufacturer, with a market share of 18.8% if expressed in units and 20.7% if expressed in dollars. Beltone, R13/205.

827 Beltone, R8/1644; see Audivox, R13/1152. In discussing the subject of attitude, the Beltone manual states: "Recall your last successful sale. Think about it for a few moments--it will give you confidence." Id.

828 Id.; see Fowler, R8/1984; Maico, R13/877; Audivox, R13/1154.

829 Beltone, R8/1647 (emphasis in original); see Fowler, R8/1984.

830 Beltone, R8/1647 (first emphasis in original). Another manual notes: "No matter what objection, question, or general stalls they may use, answer it. Be nice, smile and then say again: Gee, it's awfully cold (hot) out here, may I come in? . . . Close your mind to everything but the quest of GAINING ENTRY." Fowler, R8/1984.

demonstrated by the incredible array of standard objections and foolproof responses that are reported in the sales manuals.[831] For example, a Dahlberg manual entitled "How to Get in the Door" reads as follows:

OBJECTION:

> "I NEVER WROTE YOUR FIRM. I HEAR FINE." You are a fortunate person, Mr. Jones. If you didn't send in this card, you have a relative or friend with such high regard for you he was concerned about your hearing. As long as I am here, would you take a few minutes to have your hearing tested? If it is o.k., I'll note it on your card so you won't be bothered again. But if it should be off--even just a little--wouldn't you rather know? There's no charge whatever, and we'll be finished in a matter of minutes.

OBJECTION:

> "ALL I WANTED WAS INFORMATION. I EXPECTED A FOLDER IN THE MAIL, NOT A SALESMAN." Did you want the information for yourself, or a member of your family, Mrs. Jones?

(answer)

> I didn't know who it was for, but I learned long ago that a booklet could cause a lot of unnecessary worry because the facts are not pinpointed. Could you spare a few minutes just to discuss your loss (or 's loss) with me? Then the booklet will be twice as valuable to you since you'll know exactly what you'll want to know!

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831 A Dahlberg manual informs sellers that, in order to get in the door, they must sell their "right to come in for the test and demo." The manual continues:

> It takes skill and the average salesman finds he becomes tremendously more successful when he masters the art. In a way, it is like jiu-jitsu: With proper leverage, you can use your opponent's thrust to help you gain your objective.

Dahlberg, R8/2420; see Beltone, R8/1648.

OBJECTION:

"I WROTE RIGHT ON THE CARD 'NO SALESMAN'!" I noted that, Mrs. Andrews, that is why I came myself--(Then proceed the same as with the preceeding objection).

OBJECTION:

"I HAD AN AID BEFORE AND ALL IT DID WAS IRRITATE ME! I DON'T KNOW WHY I SENT THAT CARD IN." I agree with you, Mr. Samuels, there are few things more irritating than an aid that isn't working right. Perhaps it is just out of adjustment . . . or the earmold isn't right. Could I come in to see what help I can be to you? The best endorsement we can get is a happy hearing aid user. I want to make you happy!

OBJECTION:

"I HAVE A BELTEX AID AND IT WORKS FINE!" I'm delighted to hear that, Mr. Peters. If your hearing aid is giving you the satisfaction you want, you know what a blessing it can be. And since you wrote in to ask about our Miracle-Ear, I know this fabulous tiny instrument will amaze you. May I come in so you will have the opportunity to look it over and evaluate it? I'd like your opinion as an experienced hearing aid user. While I'm here, I can also check your aid, earmold and tube to make certain they are 100%.

OBJECTION:

"I'M TOO BUSY TO TALK TO YOU RIGHT NOW." I know what you mean, Mrs. Jones. My appointment book is on a close schedule because most of the people I see are active, busy people like you. (Looking at your book). I have free time this evening at 7 or Thursday at 8:30. Which would be better for you? I know you'll want to be free and relaxed with no reason to feel rushed.

OBJECTION:

"YOU'RE WASTING YOUR TIME, I WANTED THE INFORMATION FOR A FRIEND." Mr. Brown, I love to waste time with a man as considerate as you because I know it would never be really wasted.

> May I come in for just a few minutes to explain how a person's hearing can be evaluated so we can determine well in advance if a hearing aid will even help your friend and how much. Then if I make sense to you, you might even call and make an appointment for me with your friend.
>
> OBJECTION:
>
> "I KNEW THERE WAS A CATCH. I JUST WROTE FOR THE FREE _____ THAT WAS OFFERED. AND NOW YOU COME RUNNING OUT TO TRY TO SELL ME SOMETHING." I'm not here to sell you a thing, Mrs. Smith. The _____ is a free gift exactly as the ad stated. But we have found there are so many unanswered questions when we just mail them, we now deliver them in person as an added service. It will only take a few minutes to explain this fully so the gift will be of genuine value to you. May I come in and answer all your questions.[832]

Maico takes a somewhat different tack. It instructs sellers only to set an appointment upon visiting the buyer's home.[833] Like Dahlberg, however, Maico lists possible objections to the appointment and recommends specific responses.[834] If the prospect claims that he is not hard of hearing, for example, the seller is instructed to respond:

> This is what makes me so mad. People are rude enough to send me out to see you when you don't even have a hearing problem. I am going to do an evaluation of your hearing so you and I can show them in black and white you don't have a hearing problem.[835]

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832 Id. (emphasis in original); accord, Dahlberg, R13/1323-26.

833 See Maico, R13/869.

834 Id. at 869-73. This manual urges sellers to use the objection raised at the door as the reason for the appointment, because "[a]n objection is the customer's way of telling you why he wants an appointment." Id. at 869 (emphasis in original).

835 Id. at 870.

On the other hand, if the prospect indicates that he is satisfied with his current hearing aid, the seller should state:

> That is sure good to hear. You deserve a badge of courage . . . do you know why? Because you are only 1 out of 6 hard of hearing persons who can get help for their hearing through a hearing aid, that has done something for their problem. Say, since you are happy with your hearing aid, I wonder if you would help me! I have a new piece of test equipment, the Precision Ear, on which I would like your opinion and to have you compare it with the equipment you were tested on when fitted with your hearing instrument.[836]

Such tactics are, in staff's view, deceptive and unfair to the prospective consumer. They lull the consumer into a false sense of security by suggesting that the purpose of the seller's visit is merely to provide information or to test hearing.[837] In point of fact, however, all of these door-opening techniques are designed to get the seller inside so that a sales presentation can be made.[838]

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836 Id. at 870-71.

837 Maico also instructs its sellers:

> Do not identify yourself or the company. Simply say, "Mr. Green (yes) I have been referred to you concerning your hearing problem." Then proceed as outlined above. If the Prospect asks where you are from then is [sic] a positive, but unraised voice say, "I am from Maico Hearing Service. Do you have any children (or grandchildren) in school? (Wait for the answer.) They probably have had their hearing tested on Maico hearing test equipment. . . . Now, the reason I am here is to set an appointment to do a hearing evaluation for you, etc."

Id. at 878 (emphasis in original). The seller is told not to identify himself because "if the Prospect knows who you are and how to get a hold of you, he can always call and cancel the appointment." Id.

838 "Our first contact with the prospect is for the specific purpose of gaining his confidence and arranging to make the presentation." Beltone, R8/1644.

2. Establishment of Seller Expertise

Once entry has been gained, one of the seller's most important tasks is to establish his "expertise." As the Audivox manual notes: "Somehow you must impress them as not merely another hearing aid peddler, but rather a thoroughly trained and qualified hearing consultant."[839] A variety of techniques are employed for this purpose.

There is considerable evidence, for example, that many sellers introduce themselves by using a professional or seemingly professional title.[840] Some introduce themselves as "doctors,"[841] others as "audiologists,"[842] and still others as "consultants."[843] More cautious hearing aid salesmen have simply told consumers of their association with the Mayo Clinic,[844] a nearby university,[845]

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839 Audivox, R13/1153. Similarly, the Beltone sales presentation is called "PAQ." Beltone, R8/1646. The three letters stand for Problem building, Awareness of the seriousness of the problem, and Qualifying as an expert. This "planned sales presentation" is "the system of selling taught by Beltone in field sales training schools and at the National Sales Training Center." Id. (emphasis in original).

840 P.O. Report, R9/Dlip80, 90.

841 E.g., Mastricola, TR8620; Hagel, R4/22; Fitzgerald, R8/8184; NCSC Affidavits, R10/4669, 4698, 4715, 4718; see Doucette, R10/4591 ("She told me she went to school and that she was like a doctor."). A number of individuals also reported that many consumers refer to the seller as "Doctor So and So." See, e.g., Loavenbruck, TR1547; S. Graham, R8/5278; Rassi, R8/5360; Capano, R8/6969; Willeford, R8/8000.

842 E.g., Filwett, TR6093; Person, TR9276-77; Bagley, R10/5911; see Pasiewicz, TR8944; Percy Letter, R8/71. See also Appendix F, Section IV.D, infra.

843 E.g., AARP Letters, R10/957, 1320, 1432; see Appenix F, Section IV.E, infra. A plethora of similar titles, including "specialist," "fitter," "dispenser," "certified hearing aid audiologist," "otometrist," and "master acoustician," is also available. See RPAG, R8/2633; Davis, R8/4452; Gianetto, R10/4865. See also Appendix F, Sections IV.B-IV.E, infra.

844 Flake, R13/1419.

845 Lentz, R8/8177-78; Cox, R13/3979.

or a local physician who is respected by the prospect.[846] One seller even obtained the names of local hearing-impaired children and, upon visiting their homes, convinced the parents that he was associated with the school audiologist.[847]

The record also contains reports of sellers who wear white laboratory coats[848] or carry a black doctors' bag[849] to the homes of prospective customers. Maico salesmen are instructed to adopt a more subtle, but equally effective, technique. Although their first visit to the buyer's home is for the purpose of making an appointment,[850] they are urged to state before leaving: "By the way, Mr. Chandler, do you have a card table, a clean towel and a bar of soap, as I will want to wash my hands before I begin the evaluation."[851] In a similar vein, some sellers inform consumers

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846 See Hardick, R8/6758; Cox, R13/3979. One consumer reported:

> [The seller] sold me an aid for $429.00 for my left ear. During the conversation he inferred he worked with Dr. Earl Rice, who is a hearing doctor that is very good and a personal friend. I thought this man was reputable so I gave him the money. But the aid was never satisfactory.

NCSC Affidavit, R10/4739.

847 ISPIRG, R8/1376-77.

848 E.g., Gunterman, TR9665; NCSC Affidavits, R10/4698, 4715, 4718, 4739; see Stroup, TR969.

849 E.g., NCSC Affidavit, R10/4718. DuWayne Tremmel a member of NHAS's Board of Governors, testified his sales personnel carry black bags with them. Tremmel, TR8340.

850 See Maico, R13/869.

851 Id. at 876 (emphasis added). Beltone salespersons are instructed to explain the audiometer as follows: "'Mr. Prospect, this is a piece of electronic equipment called an audiometer. It is used for testing your hearing. You will see this equipment in many clinics, hospitals, doctor's offices and schools.'" Beltone, R8/1649. Further, they are told to explain an audiogram by stating: "'Mr. Prospect, this form is called an audiogram. It is the form that is approved by the American Medical Association for the recording of hearing losses.'" Id. Similarly, a Beltone dealer in California suggests that salespersons assure prospects that their answers to questions

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that they are "ear specialists;"[852] if the buyer suggests the need for a doctor's visit before purchasing an aid, these sellers may respond with the assertion that they know more about hearing and hearing aids than doctors.[853]

Nor are efforts to create an aura of professional expertise limited to home sales visits. There is evidence that those who go to the seller's place of business often find themselves in a sterile, laboratory-like setting.[854] Here both receptionist[855] and dealer[856] may be dressed in the white uniform of a nurse or physician. Here, too, occur such tactics as having office employees

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851 (Continued)

about their hearing "will be handled in a confidential manner." Morgan, HX158/2. The same dealer urges sellers to state:

> [W]hen I get through here today I am going to tell you exactly what is wrong with your hearing with no holds barred and no punches pulled. If I have to tell you that we can't help you, I don't want you to be mad at me personally, fair enough? It will just have to be something you will have to learn to live with.

Id. All of these assertions seem calculated to suggest a medical or quasimedical status.

852 E.g., Walters, R13/1633; see Owens, R8/6487.

853 E.g., Fitzgerald, R8/8184; Walters, R13/1633; see Wilber, TR1351; Kelly, TR7523-24.

854 E.g., Belt, R8/2633; Hill, R8/7830; see Consumers Union (Senate Hearings, 1973), R8/1045. Dorothy Shannon, Ph.D., testified that a seller in the Baltimore area rents office space in a building called the "Medical Arts Building" and calls his business the "Medical Arts Hearing and Speech Center." Shannon, TR1861.

855 E.g., Hardick, R8/6726 (in 10 of 22 local sales offices, the receptionist wore a white nurse's uniform); Hill, R8/7830.

856 E.g., Kelly, TR7524; Gunterman, TR9654; Hill, R8/7830; B. Graham & T. McGee, R10/5336; see K. Johnson (Senate Hearings, 1968), R8/957; Hardick, R8/6726 (in 3 of 22 local sales offices, the seller wore a white physician's coat).

refer to the seller as a "Doctor"[857] and to the consumer as a "patient."[858] Indeed, one individual reported the following experience:

> I was asked to fill out a question form--the first line of which said--NAME OF PATIENT. It asked for health insurance information. I was curious so I asked the receptionist if I were dealing with a Doctor. If not, why the "patient's" name. She replied, "Oh, that is a standard form used by the tenants in this building, so we find it convenient to use it too." (The building housed Drs. almost exclusively.) Then when I met the dealer in a white interns coat, the illusion was completed![859]

Even when these more blatant forms of deception are eschewed, subtler forces may convince consumers that they are dealing with an expert in hearing disorders. Professional-appearing office layouts and sophisticated electronic equipment[860] could easily lead

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857 NCSC Affidavit, R10/4526; see Fennema, TR1752; Kelly, TR7524.

> A dealer RPAG interviewed said it was quite common for older customers to call dealers doctor or "doc." He also suggested that they are rarely corrected because the customer will have more confidence in the dealer if he thinks he is a doctor!

RPAG, R8/2632; see Shannon, TR1860-61; Harmon, R10/7290; cf. Kenwood, HX96.

858 Mather, R8/3681.

859 Mrizek, R4/103.

860 The Audivox manual explicitly recognizes the effect that such equipment can have on consumers. In discussing testing and demonstration procedures, it notes:

> [T]he time has come where you must "unveil" your Computor. All those dials, lights and controls are quite a sight--nobody could fail to be impressed even if they cannot appreciate what a wonderful audiometric tool it is. [R13/1185].

consumers to attribute quasi-medical status to the seller.[861] Moreover, this image is often fed by the strategic placement of large, elaborately engraved certificates proclaiming the seller to be a "Certified Hearing Aid Audiologist"[862] --a title that conjures up medical, or at least professional, connotations in the minds of many consumers.[863] There is even evidence that sellers who occasionally attend brief, industry-sponsored workshops are rewarded with additional--and equally impressive--"diplomas" and certificates, suitable for framing.[864] For example, during 1975,

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861 MPIRG, R8/1241; see Shannon, TR1861-62. Dr. Donald Belt of the Stanford University Division of Speech and Hearing has stated:

> Many of the hearing aid dealers' offices are decorated in such a way as to imply a medical or professional setting, using the display of white laboratory coats, supplies for otoscopic examinations, alcohol, etc. Many hearing aid dealers have elaborate diagnostic audiometric instrumentation, which serves to imply a professional competency well beyond that for which the hearing aid dispenser has been trained or is qualified. [R8/2633].

862 See MPIRG, R8/1241. A copy of this impressive certificate, which measures approximately 16-1/2 by 18-1/2 inches, is contained in the record at R8/1727-30. It is not likely that many consumers would fail to see it.

863 See Butts, TR4166; MPIRG, R8/1245; Silverman, R8/7337; P.O. Report, R9/D1ip45. One consumer who had purchased two Beltone aids for $780 noted:

> I assumed at the time of my interview and hearing test by Ms. Lovorn that she was a qualified Audiologist because she did have a framed certificate hanging on the wall of the testing room stating that she was a "Certified Hearing Aid Audiologist" which she did call to my attention. [Cain, R13/818.]

864 A brochure distributed by Fidelity Electronics, Ltd., reads in part, for example:

> When Fidelity appoints a hearing aid dealer, you, the user, may feel secure

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several members of the Kentucky Board for Licensing Hearing Aid Dealers were enjoined from operating the recently formed "National College of Otometry."[865] Although this action prevented this unaccredited institution from formally initiating its program and awarding "Doctor of Otometry" degrees,[866] a weekend seminar program was held under its auspices and participants were awarded a certificate as a "Certified Otometrist" for attending.[867] Similarly, the Hearing Instruments Division of Siemens invited "qualifying dealers" to "a fantastic business and pleasure week in Germany," at "the world's only hearing aid college."[868] Although the business portion of this free trip was comprised of only a 2-day seminar, the Siemens advertisement noted:

> When you get home, you'll receive a diploma certifying your completion of the course, to display in your office. We'll also see that your hometown newspapers are kept posted on your travels and attendance at the only hearing aid college in the world. This can mean valuable public relations for your business.[869]

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864 (Continued)

> in that you are dealing with a specialist in the field of hearing prosthetics, a professional who most likely has graduated from the School of Audio-otometry, and has a certificate as a dispensing Audio-Otometrist. [R8/2432.]

865 Byrne, R8/6472.

866 Byrne, TR1072.

867 Maurice Byrne, Jr., former Assistant Attorney General of Kentucky, testified that approximately 60 people attended this 3-day seminar and, after taking a test, received a document stating that they were "certified otometrists." Id. at 1073. One "graduate" of this conference immediately advertised herself in the yellow pages as a certified otometrist. Id. See Nation College of Otometry, R10/3343.

868 Siemens Ad, R10/2380. This offer appeared in the March 1973 issue of the Hearing Aid Journal.

869 Id. Indeed, as long ago as 1959, a dealer who had attended a HAIC workshop at Stanford University used the following advertising line "Otarion's Stanford University trained

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The Foreword to the "Maico Sales and Technical Training Course" states:

> Congratulations to you for your interest in improving your sales and technical skills to effectively sell and better fit Maico hearing instruments. When you have completed studying each of the eighteen lessons in this course and have satisfactorily completed the short quiz that comes with each one, you will receive a very attractive certificate suitable for framing.[870]

As one witness put it:

> I have gone in offices where you see all the diplomas on the wall, and they are just like spaghetti. They have got from this company and that company, and people are not that discriminating. They took a two-week course or twenty-week course. . . . It is possible the very average consumer might walk in and be over-awed by that . . . .[871]

There is little doubt that consumers are suitably impressed with these constant efforts to emphasize seller expertise. Certainly they are misled by any seller who falsely represents that he is a doctor or has had medical training. Similarly, the evidence demonstrates that consumers who have purchased hearing aids from sellers in white coats have relied, to their detriment, on the medical image thus conveyed.[872] Nor is it surprising that the hearing impaired are, as one witness suggested, "understandably

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869 (Continued)

hearing consultants are now able to help nerve loss cases who had abandoned hope previously. . . ." Otarion of Fresno Ad, R10/1923. The ad was removed after a complaint by Hayes Newby, Ph.D., then Director of Speech Pathology and Audiology at the Stanford Medical Center. See Newby, R10/1922, 1924.

870 Maico, R13/852 (emphasis added). This "Certificate of Competence," as the manual calls it, is "beautiful and very suitable for framing to be displayed in your Maico Office as testimony of your accomplishments." Id. at 853.

871 Paschell, TR875.

872 See Bowen, TR1943; sources cited notes 848, 856, supra.

confused by a miasma of professional titles and claims . . . ."[873] The elderly, in fact, often are likely to view anyone who is providing rehabilitative help as a health care professional.[874] As a result, even in the absence of the more blatant forms of deception, their assessment of the manner in which a hearing aid seller carries himself may lead them to conclude that he is an expert in hearing problems.[875] When this occurs, the seller is unjustifiably rewarded with the total confidence and trust of the consumer.[876]

3. Testing and Demonstrations

a. Use of a third person as a selling influence

The sales presentation itself offers numerous opportunities for the use of improper sales tactics. It is a common practice in home sales visits, for example, to require that a third person--particularly a family member--be present during the presentation.[877]

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873 E.g., Noffsinger, TR7637. As one consumer noted:

> He sounded very intelligent and his walls were full of diplomas. Besides, he kept talking about all the lectures he gave at different colleges and universities. We were impressed by Mr. Balin and eventually bought a new hearing aid from him.

Schwartz, R10/4804.

874 Beiter, TR9035.

875 Hull, R8/6811. This is also true of the early deafened. Irene Bowen pointed out that even if the seller is not an expert, "it is a fact they are in the hearing world and . . . that reinforces the feeling of inferiority the hearing-impaired person may feel." Bowen, TR1943. Moreover,

> [b]ecause of the problem of understanding words, the deaf person has to rely on other stimuli. They are aware of detail. For example, if they were at a place with people in white coats, and these machines around, I think they would be more impressed by that than would other people.

Id. at 1947; see Schein, TR199-200.

876 E.g., Hull, R8/6811.

877 See, e.g., Campagna, TR2614; Fortner, TR2939-40; Scheurer, TR11424.

This practice, on its face, seems perfectly innocuous and, in fact, industry members contend that its purpose is merely to make the potential buyer feel comfortable.[878] These assertions, however, are belied by hearing aid sales manuals. For example, the Beltone manual states that, in setting appointments, the seller should

> [a]lways try to make a presentation in the presence of a third party, preferably someone with influence on the prospect. If the prospect lives alone it is a good idea to have him invite a close friend to the presentation . . . "so you can be tested in ordinary, everyday circumstances as when you hear your friend."[879]

Similarly, step four in the Audivox sales presentation is entitled: "Obtain Independent Support."[880] After explaining the well-known technique of advertising through the testimonials of famous people, the manual continues:

> You have a wonderful opportunity of obtaining precisely this sort of unbiased support. It is always available, costs nothing, and it is guaranteed to "clinch" any sale which hangs in the balance. We're talking about the family of the prospect, preferably a member of the family with the authority to make decisions.[881]

Maico even instructs its sellers to elicit certain information from the person who accompanies the prospect.[882] According to the manual, these questions serve three purposes:

1. To control the third person from interfering with the other parts of the Case History . . . .

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878 Ron Scheurer, for example, testified that because people are more relaxed in the presence of family members, he has "always recommended the presence of another party there other than the person being tested, generally another member of the family." Scheurer, TR11424; accord, Campagna, TR2614.

879 Beltone, R8/1648 (ellipsis in original) (emphasis added); see Dahlberg, R8/7038.

880 Audivox, R13/1160.

881 Id. (emphasis added).

882 Maico, R13/897.

2. To point up to the hard-of-hearing person how much his loss affects others.

3. To find out if the third person will be a help or a hindrance at the time of the closing. Based on the results from these questions, you will decide if you can use the third person in your closing pattern.[883]

Beltone calls this person the "buying influence" and recommends that the seller carefully arrange the seating of both this person and the prospect in order to make optimum use of both.[884]

In short, despite industry assertions to the contrary, the evidence clearly indicates the manipulative design of sellers in requiring the presence of a third party at hearing aid sales presentations.

b. The case history as a sales tool

Another important element in the typical hearing aid sale is the subtle use of case history questions in an effort to put the consumer in an emotional state about his hearing loss. The Maico manual serves as a perfect illustration. It emphasizes that the case history is "The most important part of the hearing aid sale."[885] Its purpose, according to the manual, is to identify "the prospect's three 'Hot Buttons'": (1) the hot button of need;[886] (2) the hot button of resistance;[887] and (3) the hot

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883 Id.; cf. Morgan, HX158/6. One of the questions that Maico recommends asking is the following:

> "Has Mr. _____ voice become more high-pitched or feminine since his hearing loss." This is often the case for certain types of losses, and is quite a shock to the hard of hearing person to hear the third person say it.

Maico, R13/897 (emphasis in original); see Morgan, HX158/4.

884 Beltone, R8/1649.

885 Maico, R13/886 (emphasis in original).

886 Id. ("What is it that he wants to hear again that he no longer can hear?").

887 Id. ("If he has this need or desire to hear, what has prevented him from solving his problem?").

button of commitment.[888] Indeed, the manual goes on to point out that "[a] hearing aid is sold to the non-user through emotional appeals; it is NEVER sold through reason or logic."[889]

Although a complete listing of case history questions that serve this emotion-charging purpose is not possible, the following are representative:[890]

-- Do you have grandchildren? Do you see them often? Do they avoid you or make fun of you because of your not hearing them correctly?

-- In what way does your hearing problem cause you difficulties at work? At home?

-- When was the last time you were embarrassed by failing to hear correctly?

-- What have you given up socially since your hearing loss?[891]

-- What would you like to hear again that you cannot hear because of your hearing loss?

-- Do you avoid conversations in public?

-- Have you ever failed to hear a warning signal?[892]

That the case history is primarily designed to serve sales, rather than evaluative, purposes is further demonstrated by reference to other manuals. A case history form supplied to sellers by Fidelity includes the question: "Have you ever feared

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888 Id. ("If we can satisfy his NEED and eliminate or reduce his RESISTANCE, does he want HELP from YOU TODAY?").

889 Id. (emphasis in original); cf. Audivox, R13/1154. The same statement is made with respect to current hearing aid users. Id.

890 All of these questions are taken from the Maico manual. Id. at 889-96. The sequence in which the questions are asked is also important, since artful questioning can whip the prospect into a highly emotional state. See id. at 896 (Question 10). In other words, there really is no substitute for a reading of the entire case history form.

891 See Dahlberg, R8/7030.

892 See id.

that you might lose your hearing completely?"[893] This question is obviously calculated to scare the consumer into a purchase decision, since no hearing aid can halt or retard the progression of a hearing loss.[894] Another manual suggests asking the prospect whether he has difficulty hearing in church and whether people have to repeat things often.[895] The same manual instructs sellers to ask the prospect's spouse whether he or she can see that such constant repetition would tend to annoy others.[896] These questions seem designed plainly and simply to upset the prospect and to embarrass him about the difficulties generated by his hearing loss.

Lastly, as the Beltone manual notes, a key purpose of the case history is to "determine what possible objections may be brought up later [so as] to slant the balance of [the] presentation to overcome them before they arise."[897] For example, Maico points out that the length of time a person has suffered from a hearing impairment "is important and can be used very effectively in answering the 'I want to think it over' objection at the close."[898] The same manual instructs sellers to pursue in-depth answers to such questions as the following:[899]

> -- Have you ever had your hearing evaluated? Where? What recommendations were made?
>
> -- Do you use a hearing aid? Make and style?

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893 Fidelity, R8/4471.

894 See Appendix F, Section IV.H, infra.

895 Morgan, HX158/4; accord, Dahlberg, R8/7030.

896 Morgan, HX158/4. The manual notes:

> You might add at this point. Mr. Prospect bad hearing is like bad breath. Maybe you remember that television commercial that they had a few years ago that said "even your best friend won't tell you." They do not enjoy having to raise their voices to speak to you. Of course they will never tell you this because they don't want to offend you. [Id.]

897 Beltone, R8/1653. In the Maico sales presentation this is called finding the "hot button of resistance." See Maico, R13/886; cf. Audivox, R13/1185.

898 Maico, R13/892.

899 Id. at 892-93, 898-99; see Dahlberg, R8/7030.

-- What do you like about it? What do you dislike about it?

-- Do any of your friends wear a hearing aid? Do they like it? Have you ever listened through a hearing aid? What were your impressions?

These questions, of course, enable the seller to draw out any unfavorable experiences the consumer may have had and to gear his presentation accordingly. As the manual puts it:

> Remember, all the feelings and thoughts expressed in answering [these questions] will be stated at some time during your consultation. If they are not stated here, where they are non-controversial, they will be stated later, at the close, in the form of an objection.[900]

c. Hearing testing and hearing aid demonstrations

This segment of a sales presentation also provides numerous opportunities for sellers to pressure their prospects. It is at this point that many of the misleading representations forbidden by the Proposed Rule occur.[901] It is also at this point that the seller may utilize such techniques as turning his back to the consumer while administering a word test[902] or testing for hearing loss in a room with poor acoustics and then shifting to a different room in demonstrating the benefits of the hearing aid.[903] There is evidence that some sellers will speak softly while administering a hearing test and then raise their voices while demonstrating the

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900 Maico, R13/893.

901 See generally Appendix F, Section IV, infra.

902 Mather, R8/3678; Morgan, HX158/6; see Burt, TR4421. One manual instructs seller to look "serious" and "worried" when encountering a hearing loss, and to ask, "Are you sure you don't hear this?" Mather, R8/3678 (emphasis in original). It also suggests that the seller shake his head when a word is missed. Id.; see Burt, TR4421.

903 See Loavenbruck, TR1598-99; ASHA, R10/1635. This effect can be achieved in other ways. For example, some manuals recommend that home testing be done in the prospect's kitchen, e.g., Beltone, R8/1648, which usually has poor room acoustics, see Loavenbruck, TR1598-99. If the subject's aided performance is then measured on a master hearing aid that is equipped with earphones, the listening environment has effectively been switched from a poor one to a relatively good one.

individual's aided performance.[904] The most subtle of these techniques, however, involves the use of bifrequency word lists, which can easily deceive consumers with sensorineural hearing losses.[905] The seller simply uses a high frequency word list to test the individual's unaided hearing[906] and a low frequency word list to test the consumer's performance with amplification.[907] The effect, of course, is that a dramatic improvement in the buyer's hearing ability with an aid is artificially produced.[908]

Probably the most deceptive practice utilized in demonstrating hearing aids is the misleading use of "master hearing aids." It should be noted in this regard that staff does not dispute the claim that master hearing aids serve a legitimate evaluative function in assisting the seller to select an aid that is appropriate for the individual's hearing loss.[909] Nor does staff argue that the use of a master hearing aid inherently deceives consumers with respect to the performance that can be expected from a hearing aid.[910] Staff does believe, however, that master hearing aids have been used by many sellers in a manner that indicates to consumers that the way they hear over the master hearing aid is the way they will hear with the aid that they are purchasing. This occurs despite widespread agreement, even among

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904 E.g., Miller, TR4779; Longley, TR11293.

905 E.g., ASHA, R10/1635-36.

906 Persons with sensorineural hearing losses would have difficulty hearing and understanding high frequency words. Some representative examples include: "Do you like iced tea?" "Do you like sliced cheese?" "Do you like baked ham?"

907 Those with sensorineural hearing impairments would find it easier to hear and understand low frequency words. Some representative examples include: "How old are you?" "What did you have for breakfast this morning?"

908 A blatant example of this testing technique is contained in a sales manual of Beltone Hearing Aid Service, HX158/6. See Mather, R8/3680 (use of low frequency words to test aided performance).

909 See, e.g., Campagna, TR2615; Briskey, TR7253; Curran, TR10855; Krebs, TR11862-63; HAIC, R3/4025.

910 See ASHA, R10/1761.

industry witnesses,[911] that no master hearing aid currently on the market can simulate the performance that a consumer should expect from any particular hearing aid.[912]

For example, Michael Stahl, Director of Clinical Services for a Hearing and Speech Center in Grand Rapids, Michigan, noted that many of his clients report that sellers represented to them that their hearing aid's performance would be similar to what they experienced with a master hearing aid.[913] Similarly, Frederick Tyszka, Ph.D., reported that some of his clients have been told that the performance of a master hearing aid during the fitting process was identical or similar to what they could expect from the actual aid.[914] DuWayne Tremmel, an NHAS Governor, even testified that he assures consumers "that they will have the same discrimination with the instrumentation as we get with the test equipment, or better."[915]

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911 E.g., Barnow, TR1644; Burris, TR2559; Campagna, TR2615; Sandlin, TR10140-41; Curran, TR10855; Delk, TR10948. As Donald Krebs, Ph.D., stated:

> [W]hat he heard in the lab or in the test room may be as much as six dB away from what he ultimately gets, which says all right, testing with hearing aids, which are basically a master hearing aid that you are using in the clinic, ain't no way to evaluate what hearing aid a person needs. . . . The master hearing aid can tell you as a tester what this person probably can do best with and tells the individual a little bit about the way he is going to hear, but not exactly. It can be way off, or it can be fairly close. So, I would not use a master hearing aid as an ultimate device to make a decision with. [TR11863].

For a more comprehensive discussion of the limitations of master hearing aids, see Appendix F, Section VI.D.2, infra.

912 See, e.g., Norris, TR6839; Rassi, R8/5362; S. Graham, R8/7540; ASHA, R10/1763; Berger, SPXB/318-20.

913 Stahl, TR5539.

914 Tyszka, R8/5657.

915 Tremmel, TR8344-45.

Even when no such explicit representations are made, however, consumers may still be deceived. John Brennen testified that he was "astounded" with the reception he got when a seller demonstrated a hearing aid to him through a master hearing aid.[916] When he later received the actual hearing aid he was sadly disappointed.[917] He reported:

> I felt that the hearing aid that I purchased would give me the same results I experienced when I was hooked up to Mr. Cederloff's testing machine during the demonstration. I believe that such demonstrations that give illusory hopes of corrected hearing are wrong.[918]

Another consumer reported that "while listening on their machine I could hear pretty good and so I bought it . . . ."[919] Still another individual related that her husband "could hear fine on the machine" and "could hardly wait for [the hearing aid] to come . . . ." When the aid arrived, however, her husband found it impossible to use.[920] Similar examples abound.[921]

That consumers may be thus misled by their exposure to a master hearing aid is not surprising when industry advertising and sales manuals are examined. For example, an ad for Fidelity's master hearing aid claims that it "actually simulates the electro-acoustical results of a wide variety of Fidelity Hearing Instruments and other aids"[922] Similarly, Audiotone advertises that its

> Auricon evaluation will accurately determine the acoustic requirements necessary to overcome your individual hearing impairment. No guesses, no trial and error . . . you will actually be hearing the world of sound through the Auricon as you want to hear . . . as you should hear.[923]

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916 Brennen, TR251-52.

917 See id. at 245-46.

918 Id. at 247.

919 AARP Letter, R10/988 (emphasis added).

920 Chapman, R4/434.

921 See, e.g., Varga, TR6368, 6380-81; Percy Letter, R8/440; Pownell, R8/4480; AARP Letter, R10/1404.

922 Fidelity Ad, R10/2240.

923 Auditone Ad, R8/2428 (ellipses in original).

Hearing aid sales manuals are equally deceptive in their suggested demonstration techniques. Dahlberg instructs sellers to use their master hearing aid to "show the customer just how much help he can expect from a hearing aid."[924] Not only is this suggestion nowhere qualified, but the seller is also told to point out that the earmold used during the demonstration is "a standard tip, not custom fitted for him, as his personal earmold will be."[925] The consumer presented with this demonstration, then, would naturally assume that even better hearing will be provided by the actual hearing aid. Beltone's demonstration technique is similar. The seller is instructed to explain the "Selectometer"[926] by stating: "Now we want to determine the one best Beltone fitting for your particular hearing loss. This is really a master hearing aid containing all of the many possible Beltone fitting combinations." After turning on the Selectometer and letting the prospect hear through it, the seller asks: "Wouldn't it be wonderful to hear this way again?"[927] This statement would clearly lead consumers to believe that if they purchase the hearing aid, they will indeed hear "this way;" i.e., just as they did with the master hearing aid. Even industry witnesses felt compelled to concede that, under the circumstances, such a statement might be misleading.[928]

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924 Dahlberg, R8/7052.

925 Id.

926 This is the name given by Beltone to its master hearing aid. Beltone, R8/1658.

927 Id. (emphasis in original). See also Beltone Hearing Aid Service, HX158/7, whose manual suggests asking "How would you like to hear like this for the rest of your life wouldn't it be wonderful." [sic].

928 See, e.g., Krebs, TR11896 (somewhat misleading). James Delk conceded that the statement suggested by the Beltone manual "could be" misleading to consumers. Delk, TR10949. Nevertheless, he added:

> Most people, for the most part, do not want that first hearing aid. They need to have some kind of an impetus that helps them to make the decision and if, by making such a statement, you get one to make the decision that he does want to do something about it, I think that there is nothing wrong with that particular statement. [Id.].

4. Overcoming Objections

Perhaps the most highly practiced art in the hearing aid business is the art of overcoming the buyer's objections to the purchase of a hearing aid.[929] It has already been noted that sellers sometimes attempt to pinpoint potential objections at the outset in order to overcome them during the body of the sales presentation.[930] In many instances, however, the seller's attempt to close the sale following his presentation is thwarted by objections suddenly raised by the buyer. Standardized responses, designed to overcome the most common of these objections, are provided by hearing aid sales manuals.[931] The following are representative examples:

(1) I still think I hear well enough to get along without an aid.

You're 100% right Mr. Samuels, you're not deaf. I'm not blind either (or anyone else in the room) but I wear glasses to help correct my vision just as you should wear an aid to correct your hearing. The big difference is this--the longer you wait with a hearing loss, the worse it becomes AND THE HARDER IT WILL BE FOR YOU TO GET THE KIND OF HELP YOU WILL NEED.[932]

(2) I want to talk it over with my doctor first.

Mrs. Peters, you've waited long enough. The time for talk is past. Now is the time for action. Let's call your doctor right now while everything is fresh

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929 Although staff has not had access to all sales manuals currently in use, virtually every available manual discussed this topic at length. See Beltone, R8/1660-66; Dahlberg, R8/2423; Mather, R8/3682-88; Dahlberg, R8/7054-57; Audivox, R13/1162-63.

930 See notes 897-900 supra and accompanying text.

931 The techniques and responses suggested by the sales manuals are comparable to those utilized by sellers in gaining entrance to the prospect's home. See Part One, Section IX. D.1, supra.

932 Dahlberg, R8/2423; see Dahlberg, R8/7056.

in your mind, and while I'm here to answer any technical questions he might have. But before we do, tell me--do you have a doubt in your mind? Have I failed to answer any questions

you might have about how much your hearing can be helped?

(Use this same technique if the person named is a doctor, as in this example, or a son, mother, brother, etc., etc . . . .)[933]

(3) I can't afford to buy a hearing aid.

Convey the understanding that this prospect's problem is indeed different--unique. This man is not totally deaf--he has lost his ability to understand the spoken word. If he were totally deaf he couldn't be helped--not for any money. He is fortunate. . . . "Imagine, Mr. Prospect, that you had completely lost your hearing. How much would you be willing to pay for what you now can get with just a few hundred dollars?"[934]

(4) I want a trial period before I buy.

John, our company would love to give try-outs and trials on hearing aids, and some time ago, we did use this practice. However, the Federal Trade Commission has stepped in with a legal standing on this question of home trials with hearing aids. They have made it an illegal practice, as many types of communicable ear diseases are passed through the using of hearing aid [sic] which have been used by another person. In fact, there is a large company at this time who is being taken to court over this practice.[935]

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933 Dahlberg, R8/2423 (emphasis in original); accord, Dahlberg, R8/7055-56; see Mather, R8/3683-84.

934 Beltone, R8/1664; see Dahlberg, R8/2423; Mather, R8/3682-83.

935 Mather, R8/3685-86. Other manuals also actively discourage trial periods, see, e.g., Beltone, R8/1661.

(5) My condition isn't bad enough yet.

> I think one of the wisest things that you ever did was to send in this card while as you say, "your condition is not bad enough yet." Actually John, there are only two things that you can look forward to. The first one is with the purchase of this hearing aid, a life of wonderful hearing and a purchase more valuable than the aid itself, an insurance policy against going deaf, because really, this is what a hearing aid is.
>
> The second thing you have to look forward to is, if you do not purchase a hearing aid, and that is, John, to go deaf, because it is a medical fact that hearing losses do not get better--they get worse. I think after talking with you that you are a very sensible and sincere man and that, needless to say, you would be wise enough to choose the first decision.[936]

A lengthy discussion of the many objections and responses that are noted in the record does not seem necessary. Two important conclusions, however, can be drawn from the foregoing examples. First, a number of the standardized responses are blatantly misleading to consumers.[937] And secondly, the amount of attention devoted to this tactic by sales manuals, as well as the language of some of the responses themselves, highlights once again the seller's determination to secure a purchase decision regardless of any well-founded apprehensions that the consumer may have.

5. The Close

The final step in any sales presentation is the close; i.e., the stage at which the buyer signs the contract and pays at least a deposit on the goods. In the hearing aid business, closing

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936 Mather, R8/3684; see Beltone, R8/1664, 1665.

937 Example (1) plainly suggests that a hearing impairment, like a visual impairment, can be "corrected" with a hearing aid. This is false. See Appendix F, Sections IV.G & IV.N, infra. Examples (1) and (5) convey the impression that a hearing aid can halt progression of hearing loss, which is also false. See Appendix F, Section IV.H, infra. In addition, there is absolutely no basis for the statement in example (4) that the FTC has made hearing aid trial periods illegal.

techniques vary somewhat from seller to seller. All such techniques, however, share one common purpose: they are designed to secure the customer's agreement to purchase without ever permitting him to stop and seriously consider this difficult decision. As the Beltone manual points out

> [I]f you conduct the presentation properly most of your closings will be automatic. There should be no one point at which you decide to "close." . . . Your sale is a series of "closes" as your prospect gives you a series of "yesses." Making one big decision --whether to buy or not to buy--is hard. It is hard for all of us when it involves money in substantial sums. But it isn't a bit difficult to say that we do have a problem that we do want to solve and that yes, it does seem that Beltone is the answer.[938]

The "earmold close" serves as a perfect illustration of how this tactic works.[939] After the master hearing aid has been turned on, the prospect is permitted to listen for a few moments. At this point, the Beltone manual instructs:

> If he is like the vast majority of hard of hearing persons he is truly impressed by the dramatic improvement in his ability to hear. It's only logical that you ask him this question, "Wouldn't it be wonderful to hear this way again?"
>
> There can be only one honest answer to this question. However, your prospect may be so fascinated by his new found ability to hear that he will not answer immediately. If this should happen simply assume his affirmative answer and continue by saying: "All we need to complete your fitting is an impression of your ears. Mrs. Prospect, will you get me a towel (this much water in a glass). Mr. Prospect, you move right over here."[940]

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938 Beltone, R8/1665; see Audivox, R13/1161.

939 The Beltone manual states that this technique "is the one used by the majority of Beltone Dealers and Consultants." Beltone, R8/1662-63.

940 Id. at 1658.

The effectiveness of this technique is described by Beltone as follows:

> When the lady of the house goes after the towel or the glass of water she has signalled her approval of the purchase . . . . When the prospect moves to the chair you have indicated he also signals his decision to continue with the sale.[941]

In other words, "there is no need for specific words to indicate that the sale has been closed."[942]

Another useful tactic involves presenting the prospect with a "choice" at the end of the presentation without giving him a real opportunity to refuse to purchase the hearing aid. Audivox describes this technique as follows:

> Here also you have to take the prospect's intent for granted, but you give him an opportunity to reaffirm this in his own mind. Offer him a simple choice, like "Do you want to pay cash or shall I arrange for an installment plan?" or "Wouldn't you like to have a new front to go with your beautiful new eyeglass hearing aid?" or "Would you like the silver trim on your glasses, or do you think the plain color looks better?"[943]

Although there are other closing techniques available,[944] only one additional type will be noted. Here, again, the buyer never really decides to purchase the hearing aid. Instead, after performing a demonstration on the master hearing aid, the seller excitedly declares:

> Thank God we got to you in time. I wouldn't have believed from your audiogram, but it looks like we can. How would you like to hear like this for the rest of your life wouldn't it be wonderful? [sic][945]

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941 Id. at 1659; see Audivox, R13/1161 ("Closing by Assumption").

942 Beltone, R8/1663.

943 Audivox, R13/1162; See Beltone, R8/1659.

944 E.g., Beltone, R8/1663 ("The Circle Test Close," and "Closing with the Certified Hearing Service Plan").

945 Beltone Hearing Aid Service, HX158/7.

After securing the inevitable "Yes," the seller continues:

> Mr. Prospect, I'll take your case and guarantee you that you will hear properly, but you must do three things.
>
> A. I am going to recommend that you wear a custom fitted hearing instrument for at least 2 hours a day.
>
> B. I am going to recommend that you work with this little set of hearing excersises [sic] at least 5 minutes a day. Every time your nerve center in the inner ear hears one of these sounds, it acts just like giving it Calistantics [sic] or exercises [sic] . . . .
>
> C. Most important of all, it is imperative that we get started on this program immediately. Because a hearing loss is no different than any other body ailment, it won't get better by itself. In fact, if you don't take care of this there is only one place it [sic] going to go.[946]

On this omnious (and misleading) note, the seller quickly orchestrates the taking of an ear impression. While the impression material is hardening, he is instructed to "be very assumptive," pull out a contract, and begin getting the necessary information from the prospect's spouse.[947]

E. Conclusion

There is little doubt that many hearing aid sellers are honest and concerned individuals who strive to sells the proper amplification only to those who want and need it. Nevertheless, this section has demonstrated that--from the lead generation process right up through the close of sale--the techniques that are recommended to hearing aid sellers are misleading and unfair to consumers. When these techniques are actually utilized, which is all too often the case, it is the innocent hearing-impaired consumer who pays the price.

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946 Id.

947 Id.

X. REPRESENTATIONS MADE BY HEARING AID MANUFACTURERS AND RETAILERS IN SUMMARY[948]

It is plain that the sales techniques utilized in the hearing aid industry mislead consumers in a variety of ways. This section will further demonstrate that both advertising claims and direct seller-to-consumer representations deceive the hearing-impaired public with respect to three matters: (1) the qualifications and profitmaking interests of hearing aid sellers; (2) the attributes of particular hearing aids; and (3) the benefits that can be derived from hearing aids. Moreover, because hearing-impaired persons typically are uninformed about these matters, it is unlikely that they would hesitate to accept such representations as true.

A. The Qualifications and Profitmaking Interests of Hearing Aid Sellers

The record in this proceeding demonstrates that many hearing aid sellers will use almost any tactic imaginable in an effort to conceal the fact that they are salespersons.[949] This objective can be achieved in a variety of ways. For example, the "public service announcement" type ads offering a free hearing test to area residents do not indicate that those performing the test are hearing aid sellers.[950] The same can be said of "ads" that announce that "volunteers" are needed to "field test" a new hearing aid concept.[951]

The use of professional sounding business names is another tactic common to the industry. For example, many sellers refer to their business establishments as "hearing clinics," "hearing institutes," "hearing centers," or "speech and hearing centers." Although the use of these and other titles has been considered misleading since at least 1965,[952] the record contains examples of

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948 For a more detailed analysis of these issues, see Appendix F, Section V, infra.

949 As the Presiding Officer noted at P.O. Report, R9/Dlipl29,

> There is substantial evidence that sellers, through their approach, titles, business names, advertisements, and office manners do often attempt to be recognized by the public as hearing care professionals, rather than as hearing aid sellers.

950 See notes 756-60 supra and accompanying text.

951 See notes 771-75 supra and accompanying text.

952 Rule 10, Trade Practice Rules for the Hearing Aid Industry, 16 C.F.R. § 214.10 (1977).

such business names as the "Medicare Hearing Service," the "Dane County Hearing and Speech Center," "Ennis Hearing Aid Institute," "Professional Hearing Aid Labs," The Hartford Clinic," "Oak Ridge Hearing Conservation Service," and the "Medical Arts Hearing and Speech Center." These practices continue despite widespread agreement that the use of such titles deceives the hearing-impaired public.[953]

Hearing aid sellers also foster an aura of expertise by referring to themselves as something other than sellers. As one source noted: "Attempts to find a more professional name than 'salesman' or 'dealer' have lead to the use of various titles such as consulttant, hearing specialist, fitter, dispenser, certified hearing aid audiologist, and even audio-prosthologist."[954] One seller refers to himself as the "Resident Otometrist" of his establishment, while another strenuously insists that his business be referred to as a "private practice." Worse still, the record contains numerous instances of sellers calling themselves "Doctor So and So," and encouraging their employees to refer to them in this way. These professional sounding names clearly are not missed by the vulnerable hearing-impaired.[955] Yet, the training and qualifications of the typical hearing aid seller does not begin to approach that of an ASHA-certified audiologist, to say nothing of a doctor of medicine.[956]

That industry members shy away from their status as sellers is not surprising when the influence of sales manuals is considered. The standard door-opening technique in home sales, for example, is to offer a free hearing test without stating or implying that one is a seller. Some manuals even suggest that sellers affirmatively deny their status. Others recommend that telephone solicitors be instructed to say that they are conducting a "health survey" when people ask why they are being questioned about their hearing. Once again, the record contains numerous examples of consumers who were misled by a seller's failure to identify himself or herself as a seller.[957]

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953 The various titles utilized by retail hearing aid establishments are discussed in Appendix F, Section IV.C, infra.

954 RPAG, R8/2633.

955 The plethora of titles adopted by hearing aid sellers is catalogued in Appendix F, Section IV.D, infra.

956 See generally Appendix F, Section III.B.2, infra.

957 See Appendix F, Section IV.B, infra.

Finally, many individuals have pointed out the tendency of hearing-impaired persons to assume that anyone delivering hearing help is a doctor or other health care professional.[958] Even putting aside the titles and business names that directly foster these beliefs, certainly none of the representations alluded to in this section would dispel such erroneous impressions.

B. The Attributes of Particular Hearing Aids

The record in this proceeding literally bulges with false and misleading claims about the attributes of particular hearing aids. Many consumers have complained, for example, that they bought used or reconditioned hearing aids that they believed were new. In some instances they were affirmatively misled about the new status of the aids, while in others the seller simply failed to inform them that they were purchasing a used hearing aid.[959] Similarly, hearing aid buyers have been told, both in advertising and orally, that their hearing aids will operate without batteries, although there is absolutely no truth to this claim.[960]

These deceptions should perhaps be deemed mild in comparison with others in the record, for those others prey more callously on the hopes of the hearing-impaired. For example, the hearing aid consumer is characterized by a seemingly insatiable desire to find a better hearing aid.[961] Industry ads and oral claims often take advantage of this trait by referring to particular aids as "unique," or "revolutionary," or "a breakthrough." Yet, the advertised aid is generally no more unique that a host of other hearing aids on the market, often including the consumer's current model. Because of their fundamental ignorance about hearing aids, however, consumers are rarely able to determine this fact without buying the "unique" aid.[962] The same can be said of ads that compare one hearing aid to another. These ads often simply state that a particular hearing aid is "better," without ever indicating what it is better than. Moreover, even when the comparison is completed, the claim is often unsubstantiated. For example, one

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958 See, e.g., Shannon, TR1860; Splansky, TR9012; Beiter, TR9035; Harford, R5/856; S. Graham, R8/5284; Rassi, R8/5360; Hull, R8/6138; Willeford, R8/8000.

959 See Appendix F, Section IV.F, infra.

960 See Appendix F, Section IV.R, infra.

961 E.g., Rose, TR508; Kasten, TR745; Lesko, TR1227; Stein, TR8977-79; Jerger & Hayes, R8/4962-63; see Sandstrom, TR3122; Plotkin, TR5987; Rupp, R8/7120.

962 These uniqueness claims are discussed in Appendix F, Section IV.K, infra.

ad claimed that a hearing aid was "600% more efficient" because of its "unbelieveable battery life." Yet, the company's own product literature, as well as other evidence in the record, belies the claim.[963] Such representations are misleading to hearing-impaired persons, who are highly attuned to promised improvements in hearing aids.

Closely related to uniqueness and comparative claims are representations concerning the newness of various hearing aid features. Because of the attraction that the hearing impaired have for "new" and "better" aids, the market is overrun with such claims. Manufacturers constantly advertise that their hearing aids are "new" or contain "innovative features." Yet, as one witness noted, these claims typically are based on the fact that "a new name [has been] applied to an old instrument that received little change."[964] In other cases, manufacturers have simply advertised the same hearing aid or feature as new for a period of several years. In addition to reading such ads, hearing aid sellers are encouraged by sales manuals to emphasize the newness of their products to consumers. Indeed, one sales manual points out that consumers "have been reflex-conditioned to consider the word 'new'. . . as synonymous with 'good.' You can write 'good' itself until you are blue in the face and no one will take notice, but 'new'--that's another matter."[965]

In light of these influences, it is not surprising that hearing aid retailers bombard consumers with claims that their hearing aids are new products with new features. The record contains numerrous examples of such claims, and many consumers and members of the hearing health delivery system have reported the tactic. Moreover, the evidence shows that many individuals rely on these claims in purchasing their "new" aids, but find them to be no better than their "old" aids.[966]

Lastly, consumers are often cajoled into the purchase of a hearing aid by representations concerning its size or inconspicuousness. Because many hearing-impaired persons are reluctant to "advertise" their disability, they search for an aid that is as

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963 For a thorough treatment of comparative claims, see Appendix F, Section IV.L, infra.

964 Kasten, TR720; see Wilbur, TR1398. Dr. Kasten discussed a number of these ads in his testimony and convincingly demonstrated the truth of his assertion.

965 Audivox Manual, R13/1135. The manual lists a dozen "sure-fire" words that should be used in advertising. Among them are "new" and "discovery."

966 See generally Appendix F, Section IV.K, infra.

tiny and as cosmetically desirable as possible.[967] As a result, much hearing aid advertising focuses on the size of the product and refers to the featured aid as "tiny," "inconspicuous," "ultra-miniature," "so small it will fit through your wedding band," and even "small enough to be encapsulated for internal medicine research." Neither the ads nor the identical oral representations by sellers make clear to consumers, however, that there are invariably performance tradeoffs involved in the use of a small hearing aid. Moreover, the evidence indicates that consumers generally believe that a small aid can provide as much hearing help as a large one. While this may be true for a very limited number of hearing losses, most consumers are shocked to discover that the tiny little hearing aid that cost them several hundred dollars provides them with precious little assistance.[968]

In the same vein are ads and oral representations that claim that hearing aids are "invisible," or "cordless," or require "nothing in the ear." Claims that hearing aids are invisible, or at least cannot be seen by others, are widespread in the record. Yet, no hearing aid is invisible, and almost all of them require a tube, wire, or earmold that is plainly visible to others. "Cordless," "no button," and "no tube" claims are similar. The claims themselves are often false. Moreover, even when an ad truthfully states that no button is needed, for example, it may fail to disclose that the featured aid does require the use of a cord or tube. Thus, the consumer is misled concerning the inconspicuousness of the advertised aid. "Nothing in the ear" claims, which also play upon the desire for invisibility, are even more deceptive. These claims are reserved for ads about bone conduction hearing aids. Because such aids are worn behind the wearer's ear, the claim that there is nothing <u>in</u> the ear, is literally true. However, the ads invariably fail to disclose that the featured aid is a bone conduction model. More importantly, it is never disclosed that only about five percent of the hearing-impaired population might be able to benefit from bone conduction aids. In short, consumers are often misled about the inconspicuousness and desirability of hearing aids.[969]

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967 <u>See, e.g.</u>, Fechheimer, TR6970; Kasten, R5/1439; MPIRG, R8/1219; Silverman, R8/7329; ASHA, R10/1824.

968 <u>See generally</u> Appendix F, Section IV.M, <u>infra</u>.

969 For a detailed consideration of "invisible," "cordless," "no button," "no tube," and "nothing in the ear" claims, <u>see</u> Appendix F, Section IV.P, <u>infra</u>.

C. The Benefits That Can Be Derived From Hearing Aids

In a great variety of ways, hearing-impaired persons are also deceived about the benefits that can be derived from their hearing aids. Perhaps the most pernicious of these deceptions comes in the form of the oft-made claim that a hearing aid will provide the wearer with "normal" hearing. This representation is made in several ways. First, a number of ads either state or rather plainly imply that if a consumer buys the advertised aid and wears it for a short period of time, his or her hearing will return to normal; i.e., the disability will be cured. There is evidence that this claim is also made orally by some sellers. Such a miraculous occurrence is, or course, impossible. Yet, many hearing-impaired persons believe that somewhere there is a hearing aid that can indeed return their lost hearing to them. Moreover, even those who realize that their hearing is permanently damaged may believe that a hearing aid can provide them with the ability to hear the way they did before they lost their hearing. This erroneous belief is fostered, and capitalized upon, by advertising and oral claims that various hearing aids can "correct" hearing loss or enable the wearer to hear normally again. There are many such ads in the record, along with accounts of similar oral representations by hearing aid sellers. All of these claims mislead consumers, who readily believe that they are true.[970]

Quite similar claims are made in ads that refer to their hearing aids as "prescription" aids. The record is replete with such ads, all of which suggest that hearing aids can be prescribed--and that hearing can be prosthetically corrected--just the way eyeglasses are prescribed. Yet, there is widespread agreement that these claims are false and that truly "prescription" hearing aids are merely a hope of the somewhat distant future. Unfortunately, the typical consumer, who is unaware of this fact, may readily make the intended association and purchase a "prescription hearing aid."[971]

Representations that the hearing aid wearer will be able to "hear out of a deaf ear" are equally misleading. This claim often appears in ads for CROS or BICROS amplification. These aids are sometimes used by people who have a very serious loss in one ear and little or no hearing loss in the other. The aids require the placement of a microphone in or around the wearer's "deaf" ear. However, this microphone merely transmits sound, through a wire

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970 See Appendix F, Section IV.G, infra.

971 See Appendix F, Section IV.N, infra.

placed around the wearer's head, to a second received in the better ear.[972] While this binaural arrangement may produce benefits for the purchaser, he certainly will not "hear out of a deaf ear."[973]

A variety of other deceptive performance claims appear in the record. For example, several ads state that the featured aid is "always perfect for understanding" or that it lets users "hear what they want to hear." All such representations are false, since no hearing aid can provide these benefits to consumers.[974] Similarly, a large number of ads claim that the featured aids will eliminate or greatly reduce background noise problems for the wearer. These ads play upon a problem of great importance to consumers, since the most significant disadvantage of hearing aids is that they amplify background sounds along with the sounds that the wearer is attempting to hear. The evidence shows that hearing aid consumers become eager listeners when sellers promise that a new aid can solve their background noise problems. Not surprisingly, ads and oral sales presentations capitalize on this eagerness and encourage the expenditure of large sums to achieve the desired result. Judging by the consumer accounts in the record, the money is spent in vain in a great many cases.[975]

One additional deception merits attention. It is a common practice in the industry to state, or at least suggest, that the use of a hearing aid will halt or retard the progression of a hearing loss. Even industry members agree that no hearing aid is capable of such a feat and that the claim is blatantly false. Yet, the record contains numerous accounts of sellers telling consumers that a hearing aid will "stimulate" their nerve endings and prevent further deterioration of their hearing. Sales manuals often encourage this sort of tactic. Some instruct the seller to test the prospect's hearing and then state, in an elated tone, "Thank God we got to you in time!" Others tell sellers to convince reluctant prospects by telling them that their hearing will only get worse if they do not buy an aid soon. Similar examples abound in

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972 For a more complete description of CROS and BICROS hearing aids, see Appendix F, Section II.B.6, infra. There are, however, a few wireless CROS and BICROS hearing aids. Id.

973 These representations are treated in Appendix F, Section IV.O, infra.

974 See generally Appendix F, Section IV.J, infra.

975 See Appendix F, Section IV.Q, infra.

the record, and many consumers heed these dire warnings. Too late, they discover that a hearing aid is not "an insurance policy against going deaf."[976]

XI. FAILURES TO DISCLOSE MATERIAL PRODUCT INFORMATION BY HEARING AID MANUFACTURERS AND RETAILERS IN SUMMARY[977]

One of the most important factors in determining whether a particular hearing aid fitting will be successful is the attitude of the hearing-impaired person. In particular, it is important that the prospective user not expect too much from the hearing aid.[978] Unfortunately, industry advertising and sales presentations often generate extremely unrealistic expectations among hearing aid purchasers. Aside from the more blatant deceptions noted above, these expectations are largely created by unqualified assettions about the benefits provided by hearing aids.

For example, ads in the record claim that Maico has "fine quality aids for every type of hearing loss and every wearing preference," and that "If hearing is your problem, Beltone is your answer."[979] Yet, a substantial portion of those who are thought to have a hearing loss cannot benefit from any type of amplification.[980] Ads for binaural hearing aids are similar. Moreover, the record contains many accounts by consumers who were told, apparently without qualification, that binaural fittings would improve their hearing.[981] These representations continue despite the fact that a very sizeable portion of the hearing-impaired population cannot benefit from binaural aids.[982]

Consumers may also be misled by ads for specific types of hearing aids. For example, ads for "all-in-the-ear" aids generally promise, either explicitly or implicitly, that all wearers can benefit from such aids. None of the ads discloses that, in fact, a large number of consumers cannot wear an in-the-ear hearing aid because of the severity of their hearing loss or for other reasons. Similarly, ads for bone conduction aids

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976 See Appendix F, Section IV.H, infra.

977 For a more detailed analysis of these issues, see Appendix F, Section VI, infra.

978 See Appendix F, Section VI.E, infra.

979 See Appendix F, Section V.B.1, infra.

980 See generally Part One, Section V.B, supra.

981 See Appendix F, Section V.B.3, infra.

982 See generally Part One, Section V.B, supra.

never suggest to the reader that less than five percent of the hearing-impaired can benefit from the use of such an aid.[983] Nor do any ads in the record point out that the sound heard through a hearing aid will not be natural, but rather may sound tinny or otherwise artificial.[984] Indeed, many ads claim that the featured aid actually provide "natural," or even "high fidelity" sound.[985]

Finally, ads for "telephone options" generally fail to disclose the problems associated with such options. Because the voices heard over the telephone may be drowned out by background noise at the listener's end of the conversation, many hearing aids are equipped with telephone options. When the option is in use, the hearing aid microphone is shut off, and the hearing aid picks up only the electromagnetic signals coming in over the telephone wire. Thus, the telephone option can be of great benefit to hearing aid wearers. The ads for hearing aids with telephone options never point out that approximately 25 percent of the telephones in the country are incompatible with the standard telephone option. Nor do they disclose that fully 80 percent of the geographical area of the country is served by companies whose standard telephones are incompatible with telephone options. These options may be a strong selling point for hearing aid sellers. Yet, the record contains a number of accounts by consumers who were never informed of the compatibility problem. Instead, they were left to discover, perhaps at a time of emergency, the "acute anguish" and the sense of being "completely lost" that overtakes the hearing-impaired person who suddenly finds himself or herself unable to understand a single word of a telephone conversation.[986]

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983 See Appendix F, Section V.B.2, infra.

984 See Appendix F, Section II.C.1, infra.

985 See Appendix F, Section IV.G.2, V.B.5, infra.

986 See generally Appendix F, Section V.C, infra.

XII. THE RISK OF RECEIVING NO SIGNIFICANT BENEFIT OR ADDITIONAL BENEFIT FROM THE PURCHASED HEARING AID(S) IN SUMMARY.[987]

A. IN GENERAL

Every purchase of every hearing aid carries with it the risk that the consumer will not receive any significant benefit or additional benefit[988] that makes the purchase of the selected aid worthwhile to him. Testing can not eliminate this risk.[989] Only trial use of the selected aid in an adequate variety of actual use

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987 See Appendix F, Section VI, infra, for a more detailed discussion of this subject matter.

988 As used herein, the term "additional benefit refers to the improvement in performance when a hearing aid user "moves up" to a "better" hearing aid or hearing aid arrangement. If a buyer does not hear better with an "improved" hearing aid than he did with his old hearing aid, he is not receiving any additional benefit from the new aid. Similarly, if a buyer does no better with a binaural arrangement than with his old, monaural, hearing aid, he is not receiving any additional benefit from the binaural arrangement.

989 See, e.g., Harford, R8/4548 (even with experienced users); Lentz, TR11237; Pratt, TR3745; Schmitz, R8/7262; Corso, TR1237-38; Resnick, TR5431; Myers, TR375; B. Smith, TR329; Epstein, R10/424; Rassi, TR5761-63; Kasten, TR709, R8/6979; Silverman, R8/7324-25; J. Sanders, R8/7593; Tobin, TR4113; Ginsberg, TR4625; Winston, R8/7389; S. Graham, R8/7464; Rose, R8/4173; Norris, TR6871; Loavenbruck, TR1598; LeBlanc R3/2800. Contra, Hardick, R8/4328, 6843; B. Graham, TR7446. In some portions of the record, it is not immediately clear what meaning the speaker intended in stating that testing can show whether someone can (or will) "benefit" from amplification. A careful inspection of the testimony of several witnesses demonstrates that what they meant was that testing can show the potential for benefit, and not that it can ascertain beforehand whether the prospective wearer will in fact benefit when the aid is worn in his own unique listening environment. See, e.g., Eichelberger, TR8717-18; Stroup, TR982, 996-97; L. Wilson, TR10105-08; Ruben, TR3985; Moneka, TR6193; B. Smith, TR293; Noffsinger, TR7659, 7687.

situations can do that.[990] Testing can merely demonstrate someone's potential for benefiting from amplification.[991] A multitude of risk factors affect the likelihood that an individual will receive no benefit from a purchased hearing aid.[992] It is impossible to predict with certainty just how the interaction of the factors present in each situation will affect someone's total experience with amplification.[993] Darrell Rose, Ph.D., noted, for example, that "there are many intricate things which we simply can measure which go into making a successful hearing aid wearer."[994]

One excellent indication of the risk involved in every hearing aid acquisition is the surprise experienced when very promising hearing aid candidates fail with amplification or when doubtful candidates do very well with amplification. Many witnesses and

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990 See, e.g., Winston, R8/7389; S. Graham, R8/7464; Harford, R8/4548 (even for experienced users); Ruben, R8/1189VV; Silverman, R8/7324-25 J. Sanders, R8/7593; Kasten, TR709, R8/6979; Tobin, TR4113-14; Rassi, TR5761-62; Epstein, R10/424; Lentz, TR11237; Pratt, TR3745; Myers, TR375; Resnick, TR5431; Corso, TR1237; Capano, R8/6966; Stroup, TR982; Corliss, R8/2743; Rose, R8/4173. Ralph E. Hoover, a seller who is chairman of the West Virginia Board of Hearing Aid Dealers, has written that because individuals vary so widely in their life styles; the way they use sound; their physical, mental, and emotional characteristics and limitations; their willingness to accept compromises; and their individual expectations, they cannot determine the value of an aid without wearing it in a variety of situations. R6/181.

991 See, e.g., AA00 Guide, R8/4107 ("Use of the Speech Audiometer in Testing Potential usefulness of Hearing Aids" [emphasis added]); Iliff, R10/3429 (predicting a person's benefit potential; this point was omitted from his testimony); Zelnick, TR418-19; Ventry; TR1718; Sullivan, R8/910, Berger & Millin, SPXD/503 (rules of thumb about whether someone is a good hearing aid candidate); J. Stewart (Senate Hearings, 1968), R8/833; Briskey, TR7237, 7242-43; Rassi, TR5754, 5784; Krebs, TR11877; Lentz, TR11282; B. Smith, TR293; J. Williams, TR3759. Corso, R10/196; Rassi, TR5763-64.

992 These risk factors are discussed in in Appendix F, Section VI.C, infra.

993 E.g., Rassi, TR5735.

994 Rose, TR466; see Giglia, TR2759-60; Brakebill, TR1284; Lankford, TR8036.

commenters reported such experiences.[995] Hearing aid selection and fitting is almost universally described by industry members and supporters as being an art[996] rather than a science[997] and has been described as a trial and error procedure.[998] Thus, a hearing aid can be technically in working order and still not perform its intended function.[999] And the fact that someone does not adjust to amplification does not necessarily mean that he was fitted improperly.[1000]

B. Avoidable Factors That Increase the Risk of Receiving No Significant Benefit or Additional Benefit

Clearly, the risks of not receiving benefit are aggravated when the tester,[1001] test equipment,[1002] test environment,[1003] or the testing performed[1004] are less than adequate to serve as the

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995 E.g., B. Graham & T. McGee, R10/5334; L. Wilson, TR10105; Millin, SPXB/141; Lentz, R8/7992; Willeford, R8/7974; S. Graham, R8/7464; Winston, R8/7389-90; Harford, R8/4549, 7550, TR60; Teter, TR10230; Curran, TR10883; Rose, R10/89, TR502-03; Fennema, R10/18; Tucker, HX52/ 304; Rassi, TR5754; B. Smith, TR325; Noffsinger, TR7656; Brakebill, TR1292; Burris, TR2564; Fortner, TR2961; Hardick, R8/6846; Loavenbruck, TR1598.

996 E.g., LeBlanc, R3/2800; Warberg, R3/3248.

997 E.g., Krebs, R8/1189II Kojis (Senate Hearings, 1968), R8/882, TR1979; Elia, TR7492; Sandlin, TR10122 (because judgment must be rendered in an area where effective utilization of a hearing aid is difficult to predict), 10150 (science is the ability to predict what the patient can do and we are not there yet); Huffman, R10/6915; Burris, TR2554; Fortner, TR8889; Hoover, R6/181; P.O. Report, R9/Dlipl90.

998 E.g. HEW Task Force Final Report, R8/3395; RPAG, R10/6820.

999 Ginsburg, TR4650. A hearing aid is unique in this respect. Trying it on once provides no assurance that it will perform as the purchaser expects. Id at 4686.

1000 See, e.g., Kojis, TR2003

1001 E.g., Harford, TR57-58, 131; Rose, TR496, R8/4176; Hardick, R8/6849.

1002 E.g., Lentz, R8/7995; Rose, R/4176; O'Connell, R13/489; P.O. Report R9/Dlipl37.

1003 P.O. Report, R9/lipl37.

1004 E.g., Harford, TR57-58; Zelnick, TR419-20.

basis for recommending the selected hearing aid, or when the consumer is led to expect too much from a purchased hearing aid, pressured into buying it, improperly counseled concerning hearing aid use, or subjected to various selling abuses by the hearing aid seller.

1. Incompetence

Despite assertions that sellers are competent to perform the various tasks that they undertake,[1005] the record documents a wide variety of incompetently rendered hearing aid recommendations and fittings. Perhaps the most amazing of these examples was presented by Stephen Kasden, an audiologist in private practice with an otologist in Providence, Rhode Island.[1006] He reviewed the case histories of 2,369 individuals who had otosclerosis, a disease that causes a conductive hearing loss that can be surgically remedied. These individuals would have the significant air-bone gap that no one denies to be one of the "red flags" which signal cases which should be referred to a physician.[1007] Yet of the 1500 (63.32%)

1005 E.g., Radioear, R2/25-26; Teter, TR10281, 10293, 10302, 10322, 10312; Gardner, TR10350, 10400; West, TR10413, 10417; Mettler, TR11369, 11371, 11384; Iliff, R10/3429; Ince, R8/3419; Scheurer, TR11423, 11437-38; ZumBrunnen, TR11980; Vick, TR11563-64; Keyes, TR10691, 10708; Curran, TR10884-87; A. Smith, TR8156; Kleiman, TR6950; Elia, TR7477, 7485-86, 7491-92, 7502-03, 7510; Carter, TR3649; Stallons, TR7866. However, Richard Oberhand, M.D., a NHAS witness, testified that he does not think that the hearing aid seller's training is sufficient to warrant bypassing the audiologist. While there are some sellers who are more capable of doing testing than audiologists, by and large the variation in seller competence is great enough to require the services of an audiologist. TR3089.

1006 Kasden, R5/1281-82.

1007 FDA, 42 Fed. Reg. 9295 (1977); Kasten, R8/6981.

individuals who had been seen by a hearing aid seller before coming to the otologist, fully 98.86% had been sold hearing aids without being told about the existence of a possible medical solution.[1008]

Hearing aids have been fitted or recommended to those with other problems needing medical attention, such as impacted earwax,[1009] draining ears,[1010] acoustic tumors,[1011] and equilibrium problems.[1012] The record contains numerous reports of sales and recommendations for hearing aids on dead ears,[1013] ears with discrimination

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1008 Kasden, R5/1282. See also RPAG, R8/2616-17; Kasten, R8/6980-81; Epstein, TR4600; Butts, TR4179; Anderson, R13/405; Kramer, R13/1619. This kind of situation suggests that these sales were knowing abuses, if one believes the industry assertions that sellers will know when to refer to physicans. E.g., HAIC, (Senate Hearings, 1973) R8/1189rrr; Giglia, R8/3448. Such an intentional fraud, of course, is even worst than incompetence.

1009 E.g., M. Black, R8/7529; NCSC Affidavit, R10/4737; Dolowitz, R5/1607 (two cases with impacted earwax were seen, out of 70 audiometric examinations given in the month of July 1975), 1608, 1611 (this rate is not unusual); Person, TR9270; Hill, R8/7831; Abramowitz, R8/4216; ASHA, R10/1720 (quoting Shambaugh); Anderson, R13/405.

1010 E.g., Hardick, R8/6840 (inaural Beltones); Lentz, R8/8200; Menzel, R10/4451.

1011 E.g., Malphurs (Senate Hearigs, 1973), R8/1189ddddddd.

1012 Frazier, R8/7845 (The M.D. said her equilibrium problem would have been aggravated by the use of the binaural hearing aids she bought).

1013 E.g., Kasten, 8/6986, TR800; Kasden, R5/60; Lankford, TR8026; MPIRG, R8/1260 even though the volunteer insisted to the dealer during the testing that he was hearing with his better (non-test) ear); Mowry, R13/1122; Anderson, R13/405; Morgan, HX158/5, 8; Stahl, TR5575; Rose, TR465, R10/88; Rubin, TR4014; Byrne, TR1037, 1039 (three dead ear fittings among the 75 complaints he submitted). But see Delk, TR10973 (had never heard of a dead ear fitting by a retailer); Curran, TR10892.

ability,[1014] ears with normal hearing[1015] and the wrong ear.[1016] Hearing aids have been sold which did not help much in quiet and which substantially decreased discrimination ability in noise below the ability when no aid was worn.[1017] Binaural aids have been sold to the parents of children who did better with the monaural aids they already had.[1018] One man purchased nine hearing aids, none of which helped his daughter, although a CROS fitting, which the sellers never suggested, may have helped her high frequency hearing loss.[1019] Hearing aids with much too much power have been fitted.[1020] Some sellers have been unable to provide a reasonably comfortable earmold, even after repeated attempts,[1021] or to make an earmold that will hold the hearing aid in place satisfactorily.[1022]

The record also contains numerous examples of retailers engaging in grossly incompetent testing procedures. Sharon Graham reported about a "grandfathered" dealer who fit aids for 6 years--while licensed by the State of Arkansas--without testing hearing, possessing a functioning audiometer, or knowing how to use it.[1023] William Lentz, Ph.D., when administering the first Colorado dealer licensing exam, reported that eight of the ten candidates he examined allowed him, as the test subject, to see the audiometer while he was being tested, and that many asked "do you hear

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1014 E.g., Rose et al., R5/707.

1015 E.g., Lentz, R8/6535-36; Rose, R5/705; Willeford, R8/8163; Butts, TR4180; Green (Senate Hearings, 1975), R8/3843.

1016 E.g., S. Graham, R8/747; Byrne, TR1037; Winston, R8/7466; Lentz,

1017 E.g., Billger, R8/8233-35; see Jerger, R8/4574, 4581; cf. Lentz, R8/8168-69 (patient purchased two new aids; one was inoperable and the other reduced discrimination ability from 78% to 28%).

1018 E.g. Lentz, R8/8220-30 (seller was a certified NHAS member); Kasten, R8/6987.

1019 Kasten, R8/6987.

1020 E.g., Mowry, R13/1122-23; Kasten, R8/6985; Scott, TR2328.

1021 E.g., Ohio Div. C.P., R8/2998, 2946-47, 2940.

1022 Id. at 2971; cf. Pownell & Diaz, R8/4465.

1023 S. Graham, R8/7075. This seller's license was not terminated until 1976.

that" when administering the test signal.[1024] They did this even though the brief set of instructions supplied to candidates by the state board stressed the importance of not giving any cues to the test subject in the forthcoming practical exam.[1025] Various "shoppers surveys" of hearing aid sellers have produced amazingly erratic variations in the results obtained and recommendations made by the sellers visited.[1026]

All of these incidents dramatically demonstrate the way the risks of not receiving benefit increase if the tester lacks the competence to do the jobs attempted. The record contains numerous allegations about the competency shortcomings of retailers,[1027]

1024 Lentz, TR11247. Pure-tone test results are invalidated if the subject gets any cues fro the tester. E.g., Dahlberg Manual R8/7047 (even facial expressions and head or eye movements); Deman, R13/2489 (even though the subject uses the cues unintentionally).

1025 Lentz, R13/1700, 1705. Only one of the ten candidates seem to understand masking. Id. at 1701. Most were exceedingly confused and readily admitted that fact to Dr. Lentz. Id. Some candidates confused the speech reception threshold with the speech discrimination score. Id. at 1702. Half said they used only 10 to 15 words for discrimination testing, even though the literature urges 25-50 words. Id. None of the candidates who used supra-aural domes to mask out background noise were aware of the need to apply corrections to thresholds for pure tones below 2000 Hz. Id. Nor was NHAS's President, Marvin Pigg, apparently aware of this. R8/1188ppppp. Dr. Lentz' observations were confirmed by the other examiners. Id. at 1703; Willeford R13/1709. For more masking snafus, see, e.g., MPIRG, R8/1258-59; NYPIRG, R8/1335d; Surkis, R8/7163.

1026 E.g., RPAG, R8/2605-06; Klein (MPIRG), TR7574-75; Munger, TR4499; NCSC, R10/461, R8/3887 Lieberman, R8/6848; ISPIRG, R8/1357-58.

1027 "[D]ealer incompetence is rampant." Millin, quoted by RPAG, R8/2645; accord, Rose, TR534; Elpern (Senate Hearings, 1973), R8/1189bbbb; Costello, R8/4749; Hattler, R8/4728; Harford, R8/4546; Alpiner, R8/5430; Wilber, R8/5330; Hardick, R8/4328, 6846; Norris, R8/4336, 4341; Yantis, R8/4399; Wallenberg, R8/4397; Olsen, R8/4436; RPAG, R8/2645-46; Rupp, R8/7117; K. Johnson, TR4260; Ruben, TR4016; Anderson, TR11787-88.

audiologists,[1028] and physicians.[1029] Virtually all of these allegations are based in large part on the shortcomings in training discussed in this Report.[1030]

All of these considerations strongly support the conclusion that an unknown but quite substantial number of those making hearing aid recommendations provide incompetent advice at least part of the time.[1031]

2. Inadequacy of Testing Equipment Utilized

Without properly calibrated test equipment, one cannot select a hearing aid which will be worn successfully.[1032] Yet, test equipment is delicate[1033] and many things can cause it to be out of calibration. Obviously, calibration problems are much more likely to arise when audiometers are transported in all kinds of weather to the prospective buyer's home,[1034] as is the case with many, if not most, hearing aid sales.[1035] Many states apparently do not

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1028 Curran, TR10820-21, 10826, 10832-34, 10846, 10888 (but he has never heard of any retailer fitting a dead ear, TR10892); J. Williams, TR3769-70; Sandlin, TR10125-26 (in the hearing aid evaluation process); Cooper, TR10787-88; Delk, TR10926; Berkove, TR11001.

1029 The many physicans who advise patients with sensori-neural hearing losses that they cannot be helped by hearing aids because they have "nerve deafness" are almost legendary. See, e.g., Mosley, TR7736. Physicians, in general, are less qualified to recommend a specific hearing aid than competent hearing aid dealers. Kasten, R8/6983; see Rupp, R8/7114. Although physicians rarely bother with recommending specific hearing aids, Warren, R8/5307, it has been stated that dealers will blindly follow any recommendations made by physicians, Kasten, R8/6986. Some witnesses have told of the problems they had because of a physician's lack of knowledge about hearing aids. E.g., I. Payne, TR3599-3603, R4/417-18.

1030 See generally Appendix F, Section III.C.3-C.5, supra.

1031 Accord, P.O. Report, 9/Dlip95.

1032 Giglia, TR2740; see Bess, TR6274.

1033 Bess, TR6273.

1034 Lentz, R8/7995; Bess, TR6231.

1035 See Part One, Section VI.F, supra.

require the calibration of test equipment on a regular basis.[1036] Many of those states that do have such a requirement lack the capability of validating or enforcing the required calibration checks[1037] and lack a system of insuring the competence of the test equipment calibrating that is actually performed.[1038] The record strongly supports the conclusion that, in the absence of government imposed calibration requirements, many sellers will not have their test equipment calibrated frequently enough to insure accurate readings,[1039] obviously increasing the risk of an erroneous fitting.

Even if test equipment is properly calibrated, its limitations can reduce the effectiveness of the testing. For example, masking is often needed during testing,[1040] and some types of masking noise are better than others.[1041] Yet Jay Sanders, Ph.D., told staff that until a few years ago, portable audiometers came with only complex noise,[1042] and that complex noise is not adequate in the middle and higher frequencies, where it may provide little masking effect.[1043] He also noted that many portable audiometers

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1036 HEW Task Force Final Report, R8/3218; Griesel, R10/6781; Percy Report, R/3819, 3823. It is important to note that NHAS discussed, but did not dispute, the accuracy of this assertion in its reply to the Percy Report. NHAS, R8/4034.

1037 S. Graham, R8/7468 (Arkansas); Gray, R8/8526 (Florida); Percy Report, R8/3819; see Byrne, R8/6446.

1038 S. Graham, R8/3856, 5283 (Arkansas); Percy Report, R8/3819, 3871.

1039 E.g., Rupp, R8/7119; Ogeltree, R8/8273; Loe, R8/8266; Weeks, R8/8261; Lentz, R8/7995; Lundy, R8/8237; Rogers, R8/8256; see Price, SPXD/201; Bess, TR6231. John Kuptz, a Chicago seller who had previously sold and serviced audiometric equipment, noted, for example, that some sellers had old audiometers and never had them checked until they "went out. "TR5705. Mr. Kuptz found about half of the audiometers of the Chicago area dealers he serviced to be out of calibration. Id. at 5707.

1040 See Appendix F, Section III.B.2, infra.

1041 See Appendix F, Section III.A.1, infra.

1042 J. Sanders, 8/7596; accord, Bess, TR6274. John Kuptz opined that "most Chicago area dealers wouldn't know what a narrow band [masking noise] is." TR5707-08.

1043 J. Sanders, R8/7596.

with wide band noise lack the power needed to mask adequately for certain test subjects.[1044]

Many sellers also lack the ability to test with speech signals. John Kuptz testified that only around 15 percent of the sellers in the Chicago area have equipment to perform speech tests.[1045] Most sellers also lack the equipment needed to compare the test subject's discrimination potential (using high fidelity amplifiers and loudspeakers) with that actually achieved with the selected hearing aid.[1046] To the extent that such equipment deficiencies exist, they clearly increase the risk of receiving no significant benefit or additional benefit from the aids selected by such sellers.

The physical limitations of master hearing aids prevent the tester in most instances from keeping his voice from drifting over to the test subject while testing,[1047] potentially invalidating the test results, and while it has been suggested that the trend is for sellers to test from separate rooms,[1048] this could almost never be the case for in-home testing. More important criticisms of master hearing aids have been made. Kenneth Berger, Ph.D., has written that "there is [no] good data to support the assumption that patient performance, as determined with [a master hearing aid], can be used predictively in choosing a wearable hearing aid."[1049] He concluded that

> [u]nless the readings obtained, by the hearing aid dealer or audiologist, from the master hearing aid can be shown to be applicable to the typical standard brands and models of hearing aids on the market,the instrument will not serve a useful purpose in clinical testing. Unless the reliability and validity

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1044 Id.

1045 TR5706; see Bess, T6232; Hardick, R8/6848; NHAS Basic Course, R8/4273; Scheurer, TR11440. Wayne Staab, Ph.D., an HAIC witness, conceded that fully 10% of sellers lack even the capability to do speech testing. TR7068.

1046 E.g., Rupp, R8/7115-16; Bess, TR623; Kasten, R8/6982; Noffsinger, R8/5399-5400; Rassi, R8/5353-54. But see Staab, TR7068.

1047 E.g., Hardick, R8/6848, see Part One, Section VIII.B.7, supra.

1048 Staab, TR7070.

1049 Berger, SPXB/305.

> of hearing aid fitting with the master hearing aid can be improved to the point where data resulting from [it] can be shown to be closely related to hearing aid needs, it will be but a gimmick to give an aura of the scientific method in hearing aid sales.[1050]

Even if the needed test equipment is possessed and in calibration, the seller increases the risk of no significant benefit or additional benefit unless the selected hearing aids are individually evaluated to insure that they are performing as they should.[1051] Unfortunately, most manufacturers do not provide test data for each individual hearing aid.[1052] Moreover, few sellers, audiologists and physicians possess the necessary equipment to evaluate the hearing aid's performance on their own.[1053] Those who cannot do so risk fitting hearing aids that are malfunctioning, to a greater or lesser degree.

In conclusion, the record strongly supports the Presiding Officer's finding that sellers often lack the equipment needed for accurate hearing testing and hearing aid.[1054] Obviously, this markedly increases the risk that consumers will be sold hearing aids which they do not need or which are not appropriate for their particular losses.

1050 Id. at 320. The frequency responses of master hearing aids may not represent the frequency responses typically found in the contemporary hearing aid models of the master hearing aid's manufacturer. Id. at 318; see Curran, TR10852-55 (Qualitone hearing aids and master hearing aids do not always have identical components); P.O. Report, R9/Dlip84.

1051 See Appendix F, Section VI.C.3, infra, for discussion of quality control problems with hearing aids. See also Simmons, R13/810.

1052 Pollack, SPXB/73. Telex does, however. Kleiman, TR6908; Teder, R13/2213.

1053 See Appendix F, Section II,A.6, infra.

1054 P.O. Report, R9/Dlip95.

3. Inadequacy of the Test Environment

Despite assertions that private homes and sales offices are quiet enough for testing hearing,[1055] the record contains a variety of rather amazing experiences involving excessive ambient noise during testing. Betty Hamburger testified, for example, that a seller tested her with the windows open, and even refused to stop testing when she protested that the fire engines racing by were distracting her.[1056] One MPIRG volunteer was tested by a Beltone salesperson while six jackhammers were in use in the street below.[1057] Another MPIRG volunteer complained to the Maico salesperson that she could hear typewriters and noise from a drill during the testing only to be told that she would have to get use to those sounds and she should just pretend they were not there.[1058] An NYPIRG volunteer complained that "half the time I didn't know whether I was hearing tones or telephones" because the phone was ringing constantly during the testing.[1059] In addition, the testing continued despite the interruption of frequent questions shouted to the tester from another room and the answers shouted back by the tester.[1060]

Testing environments such as those described above are obviously not conducive to obtaining valid test results. Testing situations need not be that outrageous to cause problems, however. Staff is convinced, despite many industry assertions to the contrary, that testing in people's homes adds a significant risk that the test results will be incorrect, and the hearing aid subsequently recommended improper.[1061] Likewise, Hubert Gerstman, Ph.D., an HAIC witness, testified that a home does not satisfy the needs of a quiet test environment.[1062] Robert Oberhand,

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1055 This topic is discussed at Appendix F, Section VI.D.3, infra.

1056 TR5354.

1057 MPIRG, R8/1253. Another volunteer at this Beltone office could hear traffic noise and several people talking. Id.

1058 Id. at 1252.

1059 NYPIRG, R8/1335.

1060 Id. at 1335j-35k.

1061 For a detailed discussion of this point both pro and con, see Appendix F, Section VI.D.3, infra.

1062 TR2476.

M.D., a NHAS witness, also testified that "everybody is aware of the fact that [in-home] tests are not reliable; they are a screening device."[1063] He noted that such tests should not be relied upon unless the consumer cannot be moved to a better testing environment.[1064] Likewise, an audiologist who is a hearing aid seller and a NHAS member, Ernest Zelnick, Ph.D., testified that valid in-home test results are difficult to obtain and that such testing should be avoided whenever possible.[1065] The advice by Drs. Oberhand and Zelnick to avoid in-home testing obviously has gone unheeded, for most available sources indicate that the majority of hearing aid sales are consummated in the home,[1066] necessarily in reliance upon in-home testing.

4. Inadequacy of the Input Relied Upon to Make a Hearing Aid Recommendation

Some sellers recommend hearing aids without doing any testing at all.[1067] Others use no equipment, instead speaking words such as "Can you hear me?" from varying distances.[1068] Some sellers conduct tests so brief that no meaningful data could possibly be collected.[1069] Many sellers fail to do any bone-conduct testing[1070] or to use masking.[1071] Many do no speech

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1063 Oberhand, TR3073.

1064 Id. at 390.

1065 TR425-26

1066 See Appendix F, Section IV.C, infra.

1067 E.g., Pownell & Diaz, R8/4465; NCSC Affidavit, R10/4483; Huberman, R10/5699; cf. B. Smith, TR284-85 (seller recommended a certain model because it was popular, without even looking at the audiogram of Ms. Smith's father, which she had brought with her).

1068 E.g., Feder, TR8511,8524-25; NCSC Affidavit, R10/4553; Murry, R10/4426; Pownell & Diaz, R8/4466; McGurk, R8/8563; Varga, TR6380; cf. RPAG, R8/2605.

1069 E.g., Dahlin Affiavit, R10/5667; Sauve Affidavit, R10/5668; Hassler affiavit, R10/5671; Corbett, TR173.

1070 E.g., Griesel, R10/6762; MPIRG R8/1254; Pownell & Diaz, R8/4464; NYPIRG, R8/1335L; Lieberman, R10/6424; see Pa. Attorney General, R13/1367, 1385, 1393, 1403, 1408-09; Hardick, R8/6725, 6848.

1071 See Appendix F, Section VI.D.1, infra; Mowry, R13/1123; Klein, TR 7579.

testing before the sale,[1072] while many others do not perform discrimination testing after the aid has been fitted.[1073] Although it is widely recognized that live voice testing should not be done with the tester and the test subject in the same room,[1074] the record strongly indicates that this is done by many if not most sellers, especially for in-home testing.[1075]

All of these factors, among others,[1076] by markedly affecting the quality of the input received and utilized by the hearing aid seller, greatly increase the risk of inappropriate recommendations.

5. When the Consumer Expects Too Much from the Hearing Aid

Consumers often expect too much from their hearing aid,[1077] due to varying combinations of ignorance about hearing loss and hearing aids,[1078] wishful thinking about the help they would

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1072 E.g., Griesel, R10/6762; NYPIRG, R8/1335L; MPIRG, R8/1254, 1257, 1262; Kasten, R8/6983; Powers, HX218/23; see Pa. Attorney General, R13/1367, 1385, 1393, 1403, 1408-09; McShane, TR8099-8100; Wiley, R8/7634; Delk, TR10946-47. No one can fit a hearing aid properly solely the basis of pure-tone test results. E.g., Kasten, R8/6983; Kojis (Senate Hearings, 1968), R8/882, see AAOO, R8/4106; NHAS Basic Course, R8/4273; Curran, TR10812-13; Dahlberg Manual, R8/7048-50; Briskey, TR7241, 7307-08.

1073 Dahlberg Manual, R8/7069; see Part One, Section VIII.C.1.c, supra.

1074 NHAS Basic Course, 8/4274; see Appendix F, Section III.B.7, infra; S. Graham, R8/7465.

1075 The Beltone Sales Manual desribes live voice testing being performed in front of the test subject, advising the tester to hold the the audiogram form "in front of your lips to keep the prospect from lip reading." Beltone Manual, R8/1657. The Audiovox manual also has the seller performing live voice testing in the same room as the test subject, R13/1199, as does the Dahlberg Manual, R8/7650. In addition when Ronald Scheurer defended the validity of live voice testing done in the same room as the test subject, he certainly suggested that the practice is common. Scheurer, TR11498; Feder, TR8524-25.

1076 See Appendix F, Section VI.D.4, infra.

1077 E.g., L. Wilson, TR10023-24; J. Sanders, R8/7597; Schmitz, R8/7267.

1078 See Part One, Section II.G.2, supra.

like to receive,[1079] advertisements they see,[1080] and the sales presentations they receive.[1081] Whenever excessive expectations occur, they greatly increase the risk that the consumer will not succeed with the selected hearing aid.[1082]

Even if the consumer's initial expectations are not unduly high, they are often raised to unrealistic levels during the testing and fitting process. For example, the tester grossly overstates the benefits to be expected from amplification when he asks a prospect listening to him through a master hearing aid, "Wouldn't it be wonderful to hear this way again?"[1083] Yet, this practice is standard procedure for many sellers.[1084] Some sellers have even rigged the tests they provide, in order to make the "before" and "after" experiences of the consumer more dramatic than realistic.[1085] Obviously, such factors whether self or seller-generated, markedly increase the risk that the consumer will have an unsatisfactory experience with a purchased hearing aid.

6. Pressuring Consumers to Buy When They Are Not Psychologically Ready to Accept Hearing Aids

Since consumers are often reluctant to acknowledge their hearing problem and seek assistance,[1086] sellers consider it to be an integral part of the execution of their mission to "provide" the motivation that the consumer lacks.[1087] Being "stuck" for the purchase price of a hearing aid is unlikely to provide a consumer with motivation which is otherwise lacking, and such an individual

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1079 See Part One, Section II.G.4, supra.

1080 See Appendix F, Sections IV and V, infra; J. Sanders, R8/7597.

1081 See Part One, Section IX.D.3, supra.

1082 E.g., Corso, 8/8975; Shore, R8/1164; Whitman, TR8558; J. Sanders, R8/7597; ASHA, R10/1787-88; RPAG, R8/2627; Shuford, TR647.

1083 E.g., Leale, TR11733-35. Moreover, almost anyone can make the poorest fitting sound great in a quiet setting. Kasten, TR717-23, R8/6981-82.

1084 See Part One, Section IX.D.3, supra.

1085 Id.

1086 See Part One, Section II.G.1, supra.

1087 See, e.g., Part One, Section III.F, supra, and Appendix F, Sections IV.D and VI.F, infra; Barnow, TR1664; Audivox Manual, R13/1219.

is unlikely to succeed as a hearing aid wearer, however.[1088] The use of pressure sales tactics clearly increases the risk of consumer failure with hearing aids.

7. The Inherent Conflict of Interest Involved in Being Both the Seller and the One Who Recommends Amplification

The question whether sellers have a conflict of interest in being both the one to recommend and the one to provide what is recommended has been hotly disputed. In fact, the record makes clear that a wide variety of pressures can operate to lead the seller to act against the consumer's interest. It is obvious that the more sales a seller makes, the greater will be his income.[1089] Quantity discounts offered by many manufacturers[1090] certainly encourage more sales of their brands, as do the tempting business-pleasure trips offered by manufacturers.[1091]

8. Willingness to Make a Sale Whenever Possible

As noted earlier, a substantial percentage of those with perceived hearing losses will not benefit from amplification, with most estimates ranging between 30 and 50 percent.[1092] Yet numerous industry statements clearly assert that those hearing problems which cannot be helped by medical treatment or hearing aids are quite rare.[1093]

As also noted previously, the available evidence indicates that a substantial number of those who can benefit from monaural amplification will not receive additional benefit from binaural aids.[1094] Nevertheless, many sellers seem willing to recommend binaural amplification in far more cases than is warranted. Kenneth Berger, Ph.D., has written that

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1088 See Appendix F, Section VI.C.13, infra.

1089 E.g., ASHA, R10/1596-97; K. Johnson, TR4315; Resnick, TR5391; Bess, TR6232.

1090 See, e.g., Siemens, R10/2153; Fidelity, R10/2405; RCI, R8/3122-23; see ASHA, R10/1642; Barwell, TR5172-73.

1091 See, e.g., Fidelity, R10/2348; Siemens, R10/2380; Maico, R10/2154; RCI, R8/3129.

1092 See Part One, Section V.B, supra.

1093 See, e.g., Freshley, R3/3018; Harper, R3/2954; Sams R3/3090; Ince, R8/3422-23; HAIC/NHAS Fact Sheet, R10/2773; Barnow, TR1662.

1094 See Part One, Section V.B.2, supra.

> it is rare to find a hearing aid dealer who cannot consistently and readily "prove" with a master hearing aid that virtually every client so tested performs significantly better under the binaural mode, whereas it is well known that differences between monaural and binaural amplification under highly controlled and objective test conditions are often extremely difficult to determine.[1095]

Where sellers, in their zeal to make sales, engage in such practices, it becomes quite likely that the consumer will purchase an unbeneficial hearing aid.

9. Unwillingness to Allow Reflection

A closely related risk occurs due to the unwillingness of many hearing aid sellers to allow the consumer to reflect before completing the purchase. Whenever seller complete a sale without allowing the prospect to reflect on the wisdom of purchasing an aid, the risk of receiving no significant benefit is clearly increased.[1096] Yet, it appears that many hearing aid sellers are unwilling to permit reflection by consumers.[1097]

10. Limited Selection of Aids from Which to Choose

To the extent that the seller or audiologist has only a limited number of aids to work with, he may end up recommending a less than appropriate hearing aid, significantly increasing the risks of the fitting. Industry representatives have criticized audiologists for not having a complete selection of hearing aids from which to choose when performing a comparative hearing aid evaluation.[1098]

1095 Berger, SPXB/318; see ASHA, R10/1644-45; Part One, Section V.B.2, supra.

1096 See Appendix F, Sections VI.C.12 and VI.C.13, infra.

1097 See Barnow, TR1649; Campagna, TR2642-43. See also R. Rosenthal, The Hearing Loss Handbook 120 (1975), cited in ASHA, R10/1629.

1098 E.g., Shuford, R10/65; DiRocco, R8/1188bbbbbbb.

Similarly, the master hearing aids produced by a number of hearing aid manufacturers seem to foster a single-brand attitude.[1099]

11. Inadequate Counseling and Lack of Other Aural Rehabilitative Services

Counseling about what to expect from a hearing aid and how to use it is critical to successful hearing aid use.[1100] Unfortunately, adequate counseling is often not provided,[1101] nor are hearing aid sellers really trained to be counselors.[1102] Lack of adequate information and instruction on how to use the hearing can result in the failure of even a well-fitted aid.[1103]

C. Conclusions

This report discusses the multitude of factors bearing upon hearing aid fittings, making them risky purchases situations. Because of these factors, hearing aid purchases are quite different from virtually all other consumer purchase decisions.[1104] A substantial portion of those who think they have a hearing problem will not benefit from amplification. The consumer is generally ignorant about both the problem (hearing loss) and the product (hearing aids) offered to remedy that problem. Although consumers are also unaware of the qualifications of the various members of the hearing health delivery system, the risk of receiving no significant benefit or additional benefit from the selected aid exists no

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1099 See, e.g., Berger, SPXB/306, 318; Norris, R10/6497.

1100 E.g., Kojis, TR1972; Blood & Danhauer, R13/2601; Capano, R8/6966; Schmitz, R8/7263; Corso, R8/8968; Giglia, TR2750; Alpiner, R8/5420; Zink & Alpiner, R8/5485-86; see Winston, R8/7386.

1101 See, E.g., Payne & Payne Report, R8/1448; Powers, R13/970. See also Rassi, R8/5367.

1102 See Part Two, Section III.G., infra.

1103 E.g., Giglia, TR2750; Corso, R8/8975; see Capano, R8/6966.

1104 Compare Ginsburg, TR4629, with Mynders, TR11562-64, R13/2223-32; McGann, R13/2249-50. The analysis of Eleanor May and Anthony McGann, Ph.D., fail to recognize the important distinctions between health-related devices such as hearing aids and luxury items such as televisions, and between hearing aid customers and consumers in general. The reader of this Report, however, should be well aware of those differences.

matter how outstanding the qualifications of the tester and the testing performed. A vast multi-dimensional matrix of factors affect the risk of not receiving benefit, factors which are aggravated the inadequacies of the tester and of the testing performed the creation of or failure to correct excessively high consumer expectations, the pressuring of unwilling consumers, the seller's conflict-of-interest, the seller's unwillingness to allow the consumer to reflect before making a purchase, limitations on the selection of aids from which the seller can choose, and the inadequacy of counseling and other aural rehabilitative services provided to the consumer.

XIII. QUESTIONS OF PREVALENCE IN SUMMARY[1105]

One of the major questions addressed throughout these proceedings is that of the prevalence of consumer abuse in the sale of hearing aids. Representatives of the hearing aid industry have alleged that there is a 90 percent or higher rate of consumer satisfaction. Yet, the record is replete with examples, drawn from dozens of sources, of misrepresentations by sellers to customers or potential customers, and of consumers who derive no benefit from one or more hearing aids they have purchased at considerable expense.

Conclusive statistical evidence of the frequency of consumer abuse in the selling of hearing aids has never been obtained. Prevalence can be measured only by the cumlative examples of consumer complaints of misrepresentation and hearing aids which provide them with no benefit, as well as the numerous case histories of abuse reported by audiologists, medical specialists and consumer advocates. While this evidence does not prove, nor does staff contend, that a majority of hearing aid consumers are dissatisfied or have been taken advantage of, or that a majority of hearing aid sellers engage in unfair or deceptive practices, it does clearly demonstrate that abuses in this industry are not isolated instances but rather a recurring pattern.

There is much evidence in the record that hearing-impaired people, the vast majority of whom are elderly, are reluctant to make consumer complaints and often do not know how or where to register a complaint or seek redress of grievance. Gerontologists are nearly unanimous in the conclusion that the elderly often are unlikely consumer complainants for a variety of reasons: reduced energy levels declining physical mobility, lack of self-confidence, health problems, isolation, a growing feeling of incompetence or lack of control over one's own life, lack of

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1105 For a more detailed discussion of this subject matter, see Appendix F, Section VII. Since the following analysis is an extremely summary one of a complicated subject matter, footnotes have been omitted.

information about governmental processes, fear of reprisal or involvement in lengthy legal proceedings, communications problems, and embarrassment about having a hearing handicap.

Because of the nature of the hearing-impaired consumer and the resulting reluctance or inability of these consumers to register consumer complaints, looking to the records of consumer protection agencies for a measure of the level of consumer abuse within this industry provides a totally inadequate and inaccurate picture of industry practices. Responses to an ASHA inquiry addressed to state and local consumer protection agencies throughout the country indicate both that the elderly are less likely to lodge consumer complaints than other groups of consumers and that a low volume of complaints formally lodged against a particular industry is no indication of lack of consumer abuse within that industry.

In support of its argument that there are relatively few consumer problems in the hearing health care delivery system, NHAS submitted the results of a survey of state consumer protection agencies and hearing aid dealer licensing boards. NHAS concluded that the hearing aid industry complaint/sales ratio for 1975 was a low 0.2 percent. However, given the fact that only slightly more than half of the state agencies canvassed were able to provide the requested data, and that the NHAS survey excluded the numerous local consumer affairs offices, the NHAS survey cannot be regarded as a valid indicator of the extent problems within the hearing aid industry. Moreover, the NHAS survey assumes that a substantial portion of consumer abuses in the hearing aid field will be reported to governmental agencies, while the overwhelming preponderance of evidence in this record establishes that hearing aid consumers are not likely to pursue formal channels of consumer complaint.

A survey conducted by the Department of Health, Education and Welfare in 1967 is also cited by the hearing aid industry for the proposition that hearing aid consumers are more than 90 percent satisfied with their hearing aids. However, the HEW report has been consistently miscited. While it did report 93 percent satisfaction among persons <u>currently</u> and <u>constantly</u> using a hearing aid, the rate of satisfaction among all persons with a hearing loss who have ever used a hearing aid was only about 60 percent. Thus, the high rate of satisfaction was obtained only by excluding the most unhappy consumers, i.e., those who have given up wearing their hearing aids. A survey conducted by Market Facts, Inc., also cited by the industry for its contention that hearing aid consumers are overwhelmingly satisfied, is vulnerable to similar criticism. A high rate of satisfaction is obtained by surveying only those who regularly wear their hearing aids, not by sampling the entire hearing aid consumer population including those who have stopped wearing the aid. Moreover, the Market Facts survey showed that only 71 percent of those who did wear an aid were satisfied with their ability to hear.

The industry has relied most heavily on a survey entitled "A National Survey of the Hearing Aid Delivery System in the United States" (hereafter Payne & Payne survey), prepared in 1974 for NHAS. After interviewing hearing aid sellers, hearing aid users, medical specialists and audiologists, the researchers concluded that sellers are not engaging in unethical or abusive practices, and that consumers are not purchasing aids from which they derive no benefit. The Payne & Payne survey was heavily criticized in testimony offered by Dr. Harold Kassarjian, professor of marketing at the Graduate School of Management at UCLA. He stated that the survey was invalid and its conclusions unreliable because of inadequate sampling techniques. The interviewees were not representative samples of the populations of hearing aid sellers, hearing aid users, medical specialists, or audiologists. For example, the hearing aid sellers contacted were exclusively NHAS members and were not randomly drawn even from that population. The hearing aid wearers interviewed were drawn solely from the files of the sellers who were interviewed. Moreover, a substantial portion of the interviews with hearing aid users (37 percent) were not completed for varying reasons,[1106] such as inability of the hearing impaired respondent to talk on the telephone for a lengthy interview. In rebuttal to the Kassarjian testimony, the author of the Payne & Payne Report conceded that the survey results were not projectable to the population as a whole.

In contrast to the studies submitted by the industry to demonstrate consumer satisfaction with the hearing health care delivery system, surveys and studies submitted by various consumer groups and consumer advocates show consumer unhappiness and an all-too-frequent pattern of misrepresentation and other abusive sales practices. For example, a survey of hearing aid consumers in Utah, conducted by Patricia Powers of the Utah State University Department of Sociology and Social Work showed a much higher rate of consumer dissatisfaction among those who had consulted only with the hearing aid seller before purchasing a hearing aid than among those who had also consulted with a medical specialist or speech and hearing clinic before making the purchase. More than 20 percent of those surveyed in the Powers study stated that they would have exercised a buyer's right to cancel had one been available.

Studies of the hearing aid industry were also submitted by the Retired Professional Action Group (RPAG) (now merged with the Gray Panthers), the Public Interest Research Groups (PIRG) of Minnesota, Michigan, Iowa, and New York, The National Council of Senior Citizens, and the Consumer Affairs Department of Long

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1106 Mr. Payne in fact acknowledged on cross-examintion that the interviewees tossed out of his study computations all "were people who would have extremely severe problems adjusting to a hearing aid." TR2173.

Beach, California. The PIRG reports were attacked by industry opponents as lacking in statistical validity. However, none of these studies purported to be scientific in method or to have achieved results projectable to the entire population. The primary research techniques used by the PIRG groups were the collection of case histories of victimized consumers and the sending of selected volunteer subjects (pre-tested by audiologists and/or medical specialists) to randomly chosen hearing aid sellers to report on their experiences and to compare seller recommendations with professional diagnoses. What the reports demonstrate is a recurring pattern of consumer abuse: inaccurate evaluations by hearing aid sellers, the fitting of aids to people who cannot benefit from them or whose conditions require medical treatment, and false and misleading statements to potential hearing aid purchasers. Remarkably similar patterns of abuse emerged in widely varying communities across the country: Baltimore, Washington, D. C., New York City, Minneapolis and St. Cloud, Minnesota, Detroit and Lansing, Michigan, Davenport, Iowa, and Long Beach, California.

The PIRG studies illustrate repeated instances of fitting of a hearing aid, or recommendation of a hearing aid, for people with conditions which cannot benefit from amplification, for people with nearly normal hearing, and for people with conditions that are medically treatable or correctable. Another common occurrence reported in the PIRG reports was the fitting, or recommendation, of binaural aids for a person who could benefit from only one, if any, hearing aid. The reports also documented examples of misrepresentations included telling the consumer that hearing progressively deteriorate without a hearing aid, that a hearing aid would stop a hearing loss from progressing further, that a hearing aid would restore normal hearing, and that the ear needed the "stimulation" of a hearing aid. Moreover, inadequate hearing test procedures were common occurrences in the PIRG studies.

Further indication of the prevalence of consumer problems with the hearing aid industry comes from other submissions to the record. These include: letters to the National Retired Teachers Association and the American Association of Retired persons from 497 hearing aid consumers; affidavits from dissatisfied hearing aid consumers in South Florida and Massachusetts, submitted by the National Council of Senior Citizens; examples from the Mayo Clinic's "bad fit" file, submitted by Dr. Darrell Rose, head of the Clinic's audiology staff; affidavits submitted by the Minnesota Attorney General's office; consumer letters to the Commission; and the comments of various witnesses, such as Arthur Flemming, former Secretary of the Department of Health, Education and Welfare and Commissioner of the HEW Administration on aging. Thus, while staff acknowledges that there are many satisfied consumers and many competent and ethical hearing aid sellers, it is also abundantly clear that a huge number of consumers throughout the country have been and are being sold hearing aids when they do not need them, have been and are being sold improperly fitted hearing aids that do them little or no good, and have been

and are being sold these aids based upon a wide variety of selling abuses designed to take advantage of their vulnerability and the ease with which they can be scared concerning hearing loss.

XIV. EXISTING CONSUMER PROTECTION FRAMEWORK IN SUMMARY[1107]

A. Introduction

Various consumer protection measures currently affect the hearing aid delivery system. To the extent that the existing measures do not serve to protect the consumer, strong action by this agency might be indicated. This report has discussed serious abusive sales practices, misfittings, and the inherent risk that attends any hearing aid purchase. It is clear that countless numbers of consumers have been sold hearing aids that do them little or no good, countless numbers have been lied to or misled about the efficacy of hearing aids or the person with whom they are dealing, countless numbers have not been told the material information necessary to make a reasoned purchase decision. The continued existence of such consequences convinces staff that the existing regulatory framework has not proven adequate to protect consumers. In a summary fashion this section of the Report will briefly discuss that framework, and why it has proven inadequate.

B. State Regulation

Fourty-two states license hearing aid sellers.[1108] Four states and the District of Columbia have hearing aid seller registration laws, and in Vermont hearing aid sellers are governed by state health regulations. There are no statutes or state regulations in Illinois, Alaska and Utah. No state has an educational requirement beyond high school. Thirty-one states have no minimum experience requirement for licensing. All of the 42 licensing statutes provide for a temporary permit or "trainee" license, prior to the passing of a qualifying examination, which is frequently renewable if the applicant does not pass the examination. Very few states restrict or prohibit direct selling of hearing aids by trainees. Only 12 states have any requirement for continuing education after licensing. In four of those states the specifics of the requirement are not yet established, and in the remaining eight states the requirements are minimal. Medical clearance and/or audiological evaluation is required by only six states and the District of Columbia before a hearing aid can be fitted and sold to an adult.

1107 For a more detailed discussion of this subject matter, see Appendix F, Section VIII, infra.

1108 The information in this section regarding existing state laws and regulations was compiled from a review of state hearing aid seller licensing laws published by the Hearing Aid Journal in September, 1977, supplemented by staff examination of state codes.

It is quite clear that the various state laws do not insure seller competency. For one thing, in most states existing hearing aid sellers have been "grandfathered" into licensure without having to take and pass a competency examination.[1109] The "competency examinations" taken by those sellers who are required to take one have proven to be far from adequate in actually measuring or assuring competency.[1110]

Even the minimal assurance of competency that such efforts allows has no applicability to the trainee seller. All of the states with licensing regulations allow the issuance of temporary permits or "trainee" licenses, which in most cases enable the licensee to fit and sell hearing aids before taking and passing the qualifying examination. In general, the temporary license can be renewed if the licensee does not pass the exam. Temporary licenses are available to anyone meeting the minimum age and educational (high school or the equivalent) requirements, and no knowledge of hearing aids is necessary. Many trainees exhibit a total lack of competence,[1111] and yet are permitted to sell hearing aids for lengthy periods without in any way proving they are qualified for the activity they are engaged in.[1112] The supervision required to be administered by the established seller over the trainee is minimal,[1113] and it is often questionable as to whether this minimum amount is actually performed.[1114]

Clearly, the existing consumer protection framework has not insured seller competence. Nevertheless, state actions might serve to indirectly insure competence and preclude abusive sales practices if such activities vigorously penalize those who are incompetent or abusive. Unfortunately this has not been the case. State licensure and registration statutes have been criticized as affording greater protection to the hearing aid seller than to the hearing aid consumer.[1115] Most of these statutes simply

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1109 E.g., Percy Report, R8/3816; Longley, TR11294; Byrne, TR1067; MPIRG, R8/D231ip26-29.

1110 See, e.g., Anderson, TR11785; Pelson, R13/1713-14; Bartels, TR6327-31; Butts, TR4163-64, 4179-80; Lentz, TR11246-50; R13/053A; Willeford, R13/1709-10.

1111 See, e.g., Anderson, TR11786; Kasten, R8/6980-81.

1112 In Oregon, for example, a temporary license may operate for 16 months without passing even Oregon's minimal "low-fence" qualifying examination. Anderson, TR11785.

1113 See, e.g., Creech, TR5224; Morgan, TR9506; Colorado Rules, R13/1117.

1114 See, e.g., Morgan, TR9506; Ehritt, R5/1142.

1115 See, e.g., RPAG, R8/2650 et seq.

do not deal with the kinds of selling abuses revealed in these proceedings. Few states have adopted any measures to protect consumers against selling abuses, and few have provided any effective remedy for the aggrieved customer.

Statutory provisions to deal with seller incompetence or abuses have tended to be weak,[1116] with no established criteria or guidelines for their enforcement.[1117] Many have commented that state hearing aid seller licensing boards have been more concerned with protecting local hearing aid sellers from competition and consumer problems than with stopping consumer abuses or providing consumer protection.[1118] Perhaps the most telling indictment of the state statutes is the fact that abuses in the sale of hearing aids have continued long after the enactment and implementation of these laws.

In addition, various witnesses have testified that state licensing boards are inadequately staffed and funded to handle consumer complaints[1119] and that, because of the composition of these boards, they are sometimes unwilling to resolve complaints.[1120] When a complaint has been filed, in most cases the approach of the boards has been to ask the seller involved to try to come to a settlement with the complainant, rather than take any independent action to determine if disciplinary action against the seller is warranted.[1121] Where complaints are actually pursued by state boards the process can take an inordinately long time, and even if the offending seller is disciplined, the aggrieved customer may receive no satisfaction.[1122]

In addition to problems of funding, staffing, delay, and informal complaint resolution, the composition of state licensing boards and the attitudes reflected by those boards create

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1116 See, e.g., the state laws submitted by NCSC at R10/D.

1117 See, e.g., Morgan, TR9507.

1118 See, e.g., Jeffries, TR5593-94; Longley, TR11354-55.

1119 See, e.g., Perry, R8/5314-15; Brakebill, TR1326-27; Jeffries, TR5631; Longley, TR11354; Munger, TR4504.

1120 See, e.g., Graham, R8/7480, 7489. This, of course assumes that consumers are aware of state licensing boards and their complaint procedures, which the record makes abundantly clear that they are not. See Appendix F, Section VIII.B.4, infra.

1121 See, e.g., Munger, TR4504.

1122 See, e.g., PIRGIM, R8/D231ip33-34.

additional difficulties. In at least 25 states hearing aid sellers comprise a majority of the members of the licensing board, and in many cases the seller members are selected from among the nominees of a trade association.[1123] In some cases sellers who are the subject of numerous complaints or who have engaged in questionable practices are themselves members of state hearing aid licensing boards.[1124]

In addition to state hearing aid seller licensing boards, the offices of some state attorneys general have consumer protection divisions, with the authority to litigate cases involving misrepresentation to consumers and deceptive advertising practices. Although some of these offices have aggressively dealt with consumer abuse by hearing aid sellers, this has not, in many cases, proved adequate to deal with the multitude of problems in this field. For one thing, the state consumer protection offices receive thousands of consumer complaints on many subjects a year,[1125] making it difficult for all to be pursued vigorously. Finally, the offices of the state attorneys general clearly lack the resources to handle all consumer problems. Litigation by the already overworked and understaffed offices of state attorneys general does not appear to provide sufficient consumer protection to insure that consumers are not subject to abusive practices or sold hearing aids that afford no benefit.

C. Federal Involvement in the Hearing Aid Field

In February, 1977, the Food and Drug Administration established uniform professional and patient labeling requirements and conditions for the sale of hearing aids.[1126] The FDA regulation mandates certain labeling disclosures,[1127] and requires that each hearing aid be accompanied by a "User Instructional Brochure" which provides the purchaser with certain information concerning hearing aids, and the operation and maintenance of the particular hearing aid, and a "warning statement" about medical contraindications to hearing aid use.[1128] Most importantly, the regulation also requires that a medical evaluation be made to eliminate the possibility of medical contraindications to

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1123 See, e.g., Munger, TR4502, Fennema, TR1751.

1124 See, e.g., Graham, R8/7469; Byrne, TR1021-22.

1125 See, e.g., Byrne, TR1034.

1126 42 Fed. Reg. 9286 (1977).

1127 Id., 9294, 9295.

1128 Id. at 9295. For more details, see Appendix F, Section VIII.C.1, infra.

hearing aid use, although individuals over 18 years of age are permitted to waive this requirement.[1129] The FDA rule, while providing important information to consumers and, at least for those consumers who do not waive it, assuring that there are no medical contraindications, does not protect consumers against sales abuses or the risk inherent in any hearing aid purchase. In fact, in its Statement of Basis and Purpose accompanying its rule, the FDA stated its belief that the FTC's proposed rule and activities complement the FDA's regulation.[1130]

Other governmental activities, including those of the Veterans Administration, Medicaid, Handicapped Children's programs, and Vocational Rehabilitation, while serving to protect the individual constituencies to whom they relate, do nothing to protect most consumers of hearing aids.[1131]

Since 1934 the Federal Trade Commission has also involved itself in the regulation of the hearing aid industry in matters of consumer protection. This regulation has taken the form of three major guides and a variety of individual cases, consent orders, and stipulations. The Commission's Cooling-Off Rule also applies to all purchases over $25.00 from door-to-door sellers, including hearing aid sellers. Unfortunately, these activities have not been any more effective than those of the states in preventing consumer abuses in the hearing aid field.[1132]

D. Self-Regulatory Activities

NHAS and HAIC have adopted a uniform code of ethics which represents a voluntary effort of the industry to regulate the conduct of its members.[1133] The code set forth various sorts of conduct which are considered to be unethical. There are, however, many problems with reliance on industry self-regulation to eliminate or remedy consumer abuses, not the least of which is the fact that self-policing efforts affect only a minority of industry members.[1134] While various witnesses for the industry have testified that

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1129 Id. at 9295-96.

1130 42 Fed. Reg. 9286 (Feb. 15, 1977).

1131 See Appendix F, Section VIII.C.2,3, infra, for a more detailed discussion of these programs.

1132 See Appendix F, Section VIII.C.4, infra, for a more detailed discussion of FTC activities.

1133 See R10/1863-76.

1134 See Appendix F, Section VIII.D.1, infra.

industry self-regulation, and in particular NHAS policies, provide effective and adequate consumer protection, many other persons disagree.[1135]

Perhaps the most important criticism to be made of industry self-regulation is that it has not been effective in eliminating consumer abuses or affording consumers an adequate remedy when abuses have occurred. The NHAS code was first adopted in 1960; yet, most of the abuses documented in the record of these proceedings have occurred since that date. Moreover, examination of the record reveals numerous complaints against certified members of NHAS, as well as examples of advertising by certified members which is clearly in violation of code principles.[1136]

The NHAS Certification Program also has been cited as significant evidence of the competence of industry members. However, only 2,300 of some 10,000-15,000 hearing aid sellers in the country have successfully completed the Certification Program. Clearly any program which reaches only one-fifth of the sellers cannot be regarded as evidence of competency throughout the industry. Moreover, the Certification Program has not stopped selling abuses or insured that hearing aids will be properly fitted. The record is replete with examples of complaints against, and abuses perpetrated by, certified hearing aid audiologists as well as sellers who do not bear this title. Finally, staff's careful analysis of the Certification Program has demonstrated that it simply does not provide assurance of seller competency.[1137]

In May, 1975 NHAS announced the adoption of a consumer protection program consisting of four elements: (1) medical clearance for all first-time hearing aid purchasers; (2) a 30-day trial rental period for those customers who request it; (3) new local and regional consumer grievance handling procedures, including toll-free telephone "hotlines"; and (4) an accredited training and continuing education program for prospective and practicing hearing aid sellers.[1138] NHAS asserts that the requirements for medical clearance and a 30-day trial period are mandatory for its members.[1139] Since NHAS does not represent the majority of hearing aid sellers in this country, even if its consumer protection plan were effectively implemented and its requirements for medical clearance and

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1135 Id.

1136 Id.

1137 See Part One, Section VIII.C.3, supra.

1138 See R8/1613-16, R10/6857-59.

1139 Fortner, R13/1081, TR2856.

a trial period actually carried out by all NHAS members, the plan would not afford adequate consumer protection for all hearing aid consumers. Moreover, the record indicates that the plan has not been effectively implemented.[1140] Furthermore, it must be emphasized that the trial rental period is made available only to customers who request it; sellers are not required to advertise the availability of the option, nor are they required to inform their customers verbally about the plan.[1141] The NHAS "Consumer Protection Program" does not, in staff's opinion adequately serve to protect hearing aid consumers.

Although the hearing aid manufacturers that are HAIC members have subscribed to the NHAS code of ethics, the record demonstrates that manufacturers in fact claim very little control over seller practices.[1142] Thus, the activities of hearing aid manufacturers with respect to the retail sellers of their products in no way insure that such sellers are either competent or ethical. There is little evidence in the record to indicate that state and local hearing aid dealer organizations have engaged in self-regulatory activities that have been any more effective than those implemented by the national organizations. In sum, it is the conclusion of staff that hearing aid industry self-regulatory activity has been wholly inadequate to meet the serious consumer protection problems in the hearing health care delivery system.

E. Availability of Trials

Since staff believes that the offer of a trial-type plan by a hearing aid seller can provide significant consumer protection, a discussion of both the general availability of trials and the willingness of sellers to provide them is meaningful.[1143] Many sellers do in fact offer "trials" to their customers.[1144] In May, 1975, NHAS announced its "Four Point Consumer Protection Plan," one component of which consisted of making available a "minimum 30-day trial rental period with purchase option."[1145] The record makes clear, however, that many consumers still are not able to obtain their hearing aids on a trial basis, even with the aid of a professional.

1140 See Appendix F, Section VIII.D.3, infra.

1141 Fortner, TR2874.

1142 See Appendix F, Section VIII.D.4, infra.

1143 See Appendix F, Section VIII.E, infra, for a detailed discussion of this subject.

1144 Id.

1145 R8/D247 (emphasis added).

Hearing aid manufacturers have traditionally opposed trials.[1146] In sharp contrast to the reluctance of many hearing aid manufacturers to consider ever granting a trial, let alone granting it to a sizable portion of their hearing aid purchasers, Zenith Hearing Instruments Corporation introduced a 10-day money-back guarantee for all hearing aid customers in the mid-1940's, shortly after it entered the hearing aid field.[1147] On March 18, 1975, Zenith introduced a policy change which allowed the ultimate consumers of its hearing aids a 30-day money-back guarantee, with the consumer entitled to the refund of the full purchase price minus the cost of any custom-made earmold and dispensing fee.[1148] By 1974, several sellers (as opposed to the ultimate consumer) had some sort of a trial plan, which gave those sellers who wished to do so the opportunity to provide a hearing aid on trial to the consumer for a minimal cost.[1149] In April, 1976, Ralph Campagna, HAIC's president, testified that some sort of rental or evaluation or money-back guarantee was "presently available from every manufacturing member of HAIC."[1150] It soon became clear, however, that this generalized statement required important qualifications, for various companies, including Mr. Campagna's, only offered its sellers trials on certain of its models,[1151] and Beltone, one of the largest hearing aid manufacturers in this country, does not offer its sellers any sort of return privilege for aids put out on trial.[1152] While there obviously has been movement on the part of hearing aid manufacturers with respect to trial-type plans, this has not provided adequate consumer protection. Several facts lead to this result.

For one thing, since many consumers know nothing about hearing loss and hearing aids,[1153] it certainly cannot be expected that a hearing-impaired consumer would know about and understand the various risk factors that make trial plans an important factor in assuring that consumers will end up with a beneficial hearing aid.

1146 See Appendix F, Section VIII.E, infra, for a discussion of the attitude of hearing aid manufacturers toward trials.

1147 R8/1953. See also J. Johnson, TR2299.

1148 R8/1949. In approximately 1960, Audiotone began offering a return privilege to its sellers. Keyes, TR10748.

1149 See Austin (Starkey), R13/1108; Siemens, R8/1958, 1969; Keller (Radioear), R8/1970.

1150 TR2641.

1151 See Campagna, TR2656; Kojis (Maico), TR2023, 2093.

1152 Baesemann, TR7390.

1153 See Part One, Section II.G.2, supra.

In addition, the marketplace has clearly not provided the consumer with sufficient information to know of the importance of obtaining a hearing aid on trial. For example, under the NHAS Four Point Consumer Protection Plan, its members have not been required to advertise the availability of the plan or even to inform consumers orally of its availability.[1154] Nor do the hearing aid manufacturers that offer some sort of return privilege to their sellers generally make this availability known to their consumers.[1155] Various retail sellers indicated that they preferred not to disclose the availability of whatever return privilege they offer to their customers.[1156] While other sellers do inform their customers about their trial plans,[1157] it is clear that many consumers are not provided with this information.

Even if a consumer knows that a trial period is desirable, and is informed that trials are available, he may still be unable to obtain a trial. It is quite clear that even among those sellers who make available a trial, they will not do so for all of their customers who might desire one, with the people who are the most risky candidates (and therefore most in need of a trial) being denied a return privilege.[1158] Sellers have used many excuses as to why a consumer should not get a trial. One consumer reported, for example:

> In one instance when I asked if I could be allowed a trial period I was told when I was fitted it would be the right one. When I objected and said they could not possibly tell me how it would sound in a hall or Church or even in my home, I was

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1154 Fortner, TR2874.

1155 See, e.g., Burris (Dahlberg) TR4580-81; Curran (Qualitone), TR10860; Keyes (Audiotone), TR10712; Campagna (Montgomery Wards-RCI), TR2657. Even Zenith no longer clearly discloses the availability of its plan. See, e.g., R13/1805, 1806, 1808, 1810-12.

1156 See, e.g., Delk, TR10927; Kenwood, TR9298-9300; Stallons, TR7871.

1157 See, e.g., Hopmeier, TR3370; Dunlavy, TR3415; Sears, R8/3115, R13/2362.

1158 See, e.g., Leale, TR11720-22; Dunlavy, TR3410; Vreeland, TR3835; see also Kenwood, TR9299.

> told they couldn't take them back because of fear of cancer or psoriasis.[1159]

The sales manuals supplied to hearing aid sellers by manufacturers suggest various ways in which a seller can "overcome" the objection raised when the consumer asks for a hearing aid on a trial basis.[1160] Many consumers have in fact reported their inability to obtain a trial,[1161] which is not surprising in view of the above discussion. Staff does not suggest that consumers are never able to obtain trials. There are quite a number of examples in this record of consumers who in fact obtained trials, and greatly benefited from them.[1162] Nevertheless, there can be little doubt that all too often when consumers have wanted to obtain a hearing aid on a trial basis they have been unable to do so. Even if a consumer knows enough and is able to buy a hearing aid on a trial basis, that does not mean that the consumer's problems have ended. Consumers have reported that the trial rights they have been granted are not honored.[1163] Also, when the consumer comes in before the end of the trial period, the seller may act in such a way as to delay the cancellation so that the consumer ends up losing his return right.[1164] Finally, an attempt to return a hearing aid after a period of trial usage may be made extremely unpleasant by the hearing aid seller.[1165] Furthermore, despite many industry assertions that in the event a hearing aid fitting did not work for the consumer, any reputable seller would refund the consumer's money even though no "trial" had officially been given,[1166] the record makes it quite clear that consumers may not have a great

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1159 Asquith, R4/502. The "cancer" representation was similar to a representation contained in one industry sales manual that was in fact the subject of FTC litigation. Mather, R8/3685-86.

1160 See, e.g., Beltone, R8/1661; Maico, R13/872; Audivox, R13/1163.

1161 See, e.g., R10/960, R10/914, R10/953, R10/1436, R10/1021.

1162 E.g., AARP letters, R10/970, 982, 1015, 1113, 1327, 1341, 1504, 3949.

1163 See, e.g., R10/1274, R10/1441. See Part One, Section III.I, supra, for other examples. See also Kirwin, R13/4207; Kelly, TR7527.

1164 See, e.g., R10/1241; Gunterman, TR9655; R10/1424.

1165 See, e.g., Ohio Div. C.P. Letter, R8/297.

1166 See, e.g., Kleiman, TR6911; Fortner, TR2960-61; Samole, TR6680, 6697-98, Kenwood, TR9300; Delk, TR10954; Keyes, TR10694; Harris, TR10429.

deal of success with this sort of de facto trial. Examples of unsatisfactory fittings after which the seller refused to make a refund abound in this record.[1167]

In summary, staff does not believe that the current hearing aid delivery system has provided adequate and reliable consumer protection in the form of trial options given to the consumer.

F. Private Remedies and Other Controls

When a consumer purchases a hearing aid that does not prove to be beneficial, relying upon the expertise of the seller, this almost certainly gives rise to a right of action under the Uniform Commercial Code's warranty of fitness for a particular purpose.[1168] The expenses involved in initiating a lawsuit and retaining an attorney are usually significant enough to discourage many consumers from pursuing their legal remedies in court, however. Such a lawsuit also may not be financially worthwhile for an attorney, since the average price of a hearing aid is usually between $350 and $450. In addition, it is difficult and expensive to retain an expert witness to prove that the hearing aid sold did not in fact serve the buyer's particular needs. Thus, although warranties under the U.C.C. are currently available to consumers, they are very rarely invoked by consumers despite numerous reports of dissatisfaction. Staff therefore concludes that these remedies, while legally available through the Code, are not accessible to the vast majority of consumers.

In addition to lawsuits under the Uniform Commercial Code, 42 state laws similar to the Federal Trade Commission Act authorize private actions by consumers in an effort to prevent deceptive and unfair trade practices. These state laws can be used to protect consumers against fraudulent and deceptive sales practices by hearing aid sellers. Many burdens and frustrations are in store for hearing-impaired consumers who attempt to litigate their rights under current laws. The factors which tend to prevent the filing of claims under the U.C.C. would of course, be relevant to the prosecution of claims under the state "little FTC acts." In staff's view, the evidence on this record makes clear that the legal remedies currently available to consumers who make unbeneficial hearing aid sales have proven to be insufficient to compensate consumers for their losses or correct the marketing abuses that occur in this industry.

1167 See Part One, Section III.I, supra for discussion of this problem.

1168 For a more thorough discussion of this subject area, see Appendix F, Section VIII.F.1, infra.

Industry witnesses have contended, however, that the pressures of the marketplace are themselves sufficient to force sellers to deal honestly with hearing-impaired consumers. It is contended that the sellers of hearing aids have an interest in maintaining good business reputations in their communities because of the importance of repeat business. There is, in fact, some indication that up to one-half of all hearing aid sales may be made to prior users.[1169] The importance of a seller's reputation in the community is, however, diminished to the extent that the lack of communication among hearing aid purchasers in that community prevents dissemination of such information. That consumers do not stop purchasing aids from sellers who have utilized deceptive sales practices or made incompetent fittings is illustrated in this record by numerous consumer experiences.[1170] In short, there does not appear to be a large scale communication grapevine among hearing aid purchasers.[1171] Without such an effective communication network, hearing-impaired consumers simply do not know which sellers to go to and which to avoid.

Consumer complaints must also be discounted as a potential source of marketplace regulation because many consumers may feel too intimidated by the industry to make their complaints known publicly.[1172] The record contains considerable evidence of harassment visited upon hearing aid complainants who have dared to voice their complaints publicly.[1173] Record evidence further indicates that hearing-impaired consumers tend not to complain publicly because they believe sellers can hurt them economically, as well as physically and emotionally.[1174]

In summary, staff concludes that marketplace mechanisms, which in other industries may operate to weed out unscrupulous or abusive sellers, simply do not operate effectively in the hearing aid industry.

1169 See Campagna, TR2595; Beltone, R13/2036; Audivox, R13/1145.

1170 E.g., Moneka, TR6146-48; Corbett, TR174. Helen Kelly testified, for example, about the continued existence in business of one Minnesota seller as to whom the state had had numerous complaints over at least a 15-year period. TR7532-35.

1171 E.g., Kelly, TR7563.

1172 E.g., Kelly, TR7537-48.

1173 See, e.g., Fox, R8/7249-50; Liversidge, TR1083-84; Hodges, R13/841. See also Klein, TR7630; Kelly, TR7538; Frink, R8/3517; NCSC, R10/D79.

1174 See, e.g., Madell, TR5868; S. Graham, R8/7502.

G. Conclusions

This section has dealt with the existing consumer protection framework in the hearing aid field. Staff firmly believes that before additional regulation of an industry is proposed it must be shown that existing regulations and other corrective mechanisms have proven ineffectual in remedying the problems addressed by the new proposal. Staff fully believes that that is the case with respect to the hearing aid industry.

Over the years few industries have been subject to as many congressional hearings, exposes, government enforcement actions, and other regulatory activities as has the hearing aid industry. Various state government investigations and prosecutions have occurred. Almost all states have hearing aid sellers' licensing programs. The federal government, including this agency, has been extensively involved in matters relating to the hearing aid delivery system. The industry has adopted codes of ethics which allegedly guide its members. Various private rights of action are available to hearing aid purchasers. The Commission has been told that, because a hearing aid seller's reputation is said to be important to his continued business, the marketplace will insure honesty and competence. Finally, various hearing aid sellers have made some sort of trial plan available to some consumers.

Despite all of this activity, the record of consumer protection in the hearing aid industry has remained poor. Consumers continue to be sold hearing aids that do them no good, often through the use of high pressure or otherwise manipulative sales tactics. The types of representation that have been prohibited in the FTC Guides and in various cases and Assurances of Voluntary Compliance continue to be seen. Great numbers of consumers continue to be told, for example, either through oral sales presentations or in advertisements, that the purchase of a hearing aid will restore their hearing to normal or stop the progression of their hearing loss. As a result, consumers have come to lack confidence in the industry's product due, in large part, to the various activities discussed previously. This is unfortunate, since a hearing aid can be tremendously beneficial to a person who is an appropriate candidate and who has been well fitted.

Staff believes that strong regulatory activity is needed, and that such activity will considerably increase consumer confidence in hearing aids. Staff's recommendations are discussed in the following part of this Report.

PART TWO--CONCLUSIONS AND RECOMMENDATIONS AS TO FINAL TRADE REGULATION RULE

I. INTRODUCTION

Part One of the Staff Report is a discussion of the facts relevant to the Proposed Rule. Part Two is primarily a policy discussion of the application of these facts to the specific provisions of the Proposed Rule. The following sections discuss the evidence on this record regarding specific rule provisions and concerning specific issues, with appropriate references to the facts relevant to each provision.

Staff is recommending various changes to the Rule as originally proposed. While there are a great number of similarities between the Proposed Rule and the Recommended Rule, staff suggests that certain provisions be either changed or deleted. In addition, the format of the Rule has been changed to make for easier understanding.

II. PLAIN ENGLISH FORMAT

The Proposed Rule was written in the traditionally complex style of legal writing which required a careful reading to be understood. There were many comments and other indications that the Proposed Rule could be greatly improved by being simplified.

For example, in the February 1978 issue of Hearing Aid Journal, NHAS said that, short of hiring an advertising agency, few hearing aid advertisers would be able to cope with the Proposed Rules on advertising contained in 13 inches of the fine print in the Federal Register, noting that it took 3-1/2 inches just to tell what a "clear and conspicuous disclosure" was and that those 3-1/2 inches were full of doublespeak and fine detail.[1175]

While some persons considered the separate consumer notice as originally proposed to be adequate,[1176] many others have criticized it as being too difficult for many hearing-impaired consumers to comprehend easily.[1177] The notice performed quite poorly in a test conducted by the New York League for the Hard of Hearing, utilizing

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1175 Hearing Aid Journal, February, 1978, at 18.

1176 E.g., Harford, et al., R5/852; Kasten, R5/1434; Franks, R10/6518; Beiter, R10/5266; Ohio Div. C.P., R8/2927.

1177 E.g., Liversidge, TR1085; James Payne, TR2143; Bowen, TR1906-08, 1919, 1938-39; Jefferies, TR5590; Tobin, TR4091-93; Woodard, TR4141.

50 volunteers from the League's Old Timers Club.[1178] Irene Bowen of the NCLD introduced a simplified version of the notice with her testimony.[1179] Henry Tobin, Ph.D., testified that he thought Ms. Bowen's version was clearer than that originally proposed by the Commission.[1180] Ms. Bowen urged that long sentences had to be shortened, long words and technical words replaced.[1181] Dr. Tobin stressed the need for "enough built-in redundancy . . . so that the deaf will be able to understand what it is that is being said."[1182]

Staff has worked with Rudolf Flesch, Ph.D., a noted language expert, to rewrite the rule in a "plain English" version capable of being easily understood by both hearing aid sellers and the purchasers of hearing aids.

On August 22, 1977, staff sent to all designated group representatives a copy of a draft plain English version of the Proposed Rule for their comment.[1183] Favoring the plain English version, NCSC[1184] said that the redraft makes the notice comprehensible to elderly hearing aid buyers who may not otherwise be aware of their prerogatives under the Rule. It also replied that the plain English version enhanced the likelihood of compliance with the Rule by hearing aid dealers by enabling them to comprehend the strictures placed on them without having to consult a lawyer. In addition, NCSC pointed out that the press will be more likely to disseminate an accurate summary of new consumer protection provisions if they are written in lay terms.

NCLD[1185] supported the redraft, noting that they believed the Rule and notice should be adopted in a form utilizing simplified

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1178 Madell, R10/5583, 5587-89; Sullivan, et al. R13/2513-14; Sullivan, R8/8569-70; R13/2513-14. The net result was that, although the sample group considered the remedy provided to be "good," their mean score on content comprehension was only 30%. Madell, R10/5583.

1179 HX36.

1180 Tobin, TR4091-92; see Schreiber, TR4045.

1181 Bowen, TR1919; see NCLD, R7/685-86.

1182 Tobin, TR4093; see Schreiber, TR4046-47. It will be recalled that the average reading level of deaf individuals educated in residential training programs was the fifth grade level. Schein, TR229.

1183 Staff memorandum dated Aug. 22, 1977.

1184 Marlin letter dated Sept. 30, 1977, at 1.

1185 Marker-Goldberg letter dated Sept. 1, 1977, at 1.

language to enable deaf persons, whose reading skills are often at a sixth grade level or lower, to be able to understand the consumer notice. It added that it was also important that deaf people be able to understand the Rule itself if, for example, a hearing aid dealer tries to justify an action by claiming that a "government rule says it is OK."

On behalf of ACO, Harry McCurdy, M.D., wrote[1186] that the redraft was a vast improvement over the original version.

While supporting "the principle of simpler, better written government regulations,"[1187] ASHA replied that "extensive rewriting of the rule [at this stage] will encourage delay"[1188] of the proceeding. ASHA also raised the concern that the industry would "attempt to use the redraft to justify further delay . . . and to promote [its] efforts to cloud the clear intent of the proceeding,"[1189] possibly jeopardizing the Rule. ASHA said that it does not find the Commission's version particularly difficult to read and understand, and that it is satisfied that participants in the Rulemaking understood it. ASHA added that it might have endorsed a plain English version at the outset of the proceeding, and would be pleased to consider the prospect of the development of a plain English supplement to the final regulation. It did, however, urge the usage of plain English notice statements in the final Rule.

In its response NHAS said that, although it endorses the concept of a Rule which is succinct and understandable, greater emphasis had to be placed on legal clarity than on readability.[1190] It registered strong reservations over the redraft, noting that in its view with the plain English version definitional and other problems might arise in the enforcement of the Rule.[1191]

HAIC opposed promulgation of any final Rule utilizing a plain English format.[1192] It believed that the plain English redraft "sacrifices the precision essential in federal regulations."[1193]

1186 McCurdy letter dated Sept. 2, 1977.

1187 Dowling letter dated Sept. 22, 1977, at 1.

1188 Id.

1189 Id.

1190 Waters letter dated Nov. 2, 1977, at 1-2.

1191 Id.

1192 Vakerics letter dated Nov. 14, 1977.

1193 Id. at 1.

According to HAIC the redrafted version "presents vague and ill-drafted standards [which it contended] provide virtually no notice to a party to be regulated as to when he may be engaged in conduct which is violative of the regulation."[1194] HAIC also said that simplification and clarification "should be done within the confines of traditional language"[1195] which has some established meaning and has been subject to interpretation in the courts.

Staff has reviewed the comments received and concluded that a plain English version of the Rule is essential for two basic reasons. First, the industry is made up of many small sellers who cannot or will not hire attorneys. Staff does not want such industry members to be subject to penalties up to $10,000 per violation based on their failures to understand legal terminology. Secondly, it is essential that a right given to a consumer be intelligible to the consumer in order to fully protect the consumer.

Staff has not been convinced by the arguments advanced by industry for not implementing a plain English version of the Rule. It is superficially appealing to say that if the organization representing sellers wants the regulation to be promulgated in "legalese," why should the Commission do otherwise. There are in fact very good reasons for adopting a plain English format. For one thing, NHAS represents only about 1/4 to 1/3 of those persons selling hearing aids, so there is no assurance that the "translations" it might provide its members would reach other hearing aid sellers who were not connected with NHAS. In addition, staff does not believe that it makes any sense to leave the Rule in its more complicated original form, since a hearing aid seller might therefore feel the need to consult with a lawyer about a multitude of transactions, at some expense. Finally, not only hearing aid sellers represented by their trade association or by counsel will have a need to read and understand the Rule--hearing aid consumers, the press, and others without legal training or counsel readily available will have occasion to delve into the Rule, and the responsibilities it places upon hearing aid sellers.

Accordingly, staff recommends the plain English version of the Rule found in Appendix A of this Report. This version differs somewhat in form from the August version since, as noted, staff has attempted to take into consideration the comments made by the designated group representatives on the prior plain English version, and since certain substantive changes are being recommended, as discussed, <u>infra</u>.

1194 <u>Id</u>.

1195 <u>Id</u>. at 2.

III. SECTION-BY-SECTION DISCUSSION

A. Introductory Materials

1. Preamble

The Preamble to the Rule serves as a jurisdictional statement. It recites that the failure of a hearing aid seller to comply with the Rule is a violation of sections 5 and 12 of the FTC Act. Section 5 declares unlawful unfair methods of competition and unfair or deceptive acts or practices, in or affecting commerce.[1196] Section 12 makes it unlawful to disseminate, or to cause to be disseminated any false advertisement for the purpose of inducing the purchase of drugs, devices, or cosmetics.[1197]

With the exception of the last 13 words in the Proposed Rule and the last 11 words in the Recommended Rule, the wording of the Preamble has remained unchanged. These changes were made to make the Rule more readable. The Recommended Rule is found in Appendix A, *infra*, and the Proposed Rule in Appendix B, *infra*.

2. Who Is Covered

In the Recommended Rule, section 440.2 takes the place of the definitions in sections 440.2(a), (b) and (c) of the Proposed Rule. The first sentence of section 440.2 of the Recommended Rule defines hearing aids as "portable instruments worn to help one's impaired hearing." This definition is substantively the same as that in section 440.2(a) of the Proposed Rule.

Jane Madell, Ph.D., and Edward Hardick, Ph.D., asked that the word "wearable" be deleted from the definition contained in the Proposed Rule to make clear that auditory training units were included.[1198] Wayne Staab, Ph.D., testifying on behalf of HAIC, thought that auditory trainers fell under the definition of hearing aid even though he claimed they were not sold in the way that personal instruments were, and suggested that the Rule make clear that they should not

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1196 15 U.S.C. § 45.

1197 15 U.S.C. § 52.

1198 Madell, TR5857; Hardick, R10/6400. An auditory training unit is an amplification device generally used by hearing-impaired children in school settings. It is worn by the child just as a hearing aid is worn. The major difference between the two is that the microphone of the auditory training unit is generally centrally located and picks up sounds which are then transmitted to various children. Some auditory training units can also function as conventional hearing aids.

be included in the definition.[1199] Warren Gardner, Ph.D., said that he wanted anything that is held to the ear to be covered.[1200] It is staff's view that to the extent auditory training units are wearable portable instruments that assist one's impaired hearing, they have always been included in the Proposed Rule. Hence, there is no need to specifically include them in the definition of hearing aid. Staff likewise believes that such units fall within the ambit of the definition of "hearing aid" found in section 440.2 of the Recommended Rule, and that the Recommended Rule is therefore applicable to sellers of auditory training units.[1201] Staff has not been convinced that the Proposed Rule's definition of hearing aid should be either broadened or made more narrow.

In discussing section 440.2(b), of the Proposed Rule, "Sale" or "Purchase," several persons supported its inclusion of leases or rentals as a means of preventing the use of long-term rentals to evade the buyer's right to cancel.[1202] Recommended Rule section 440.2, however, covers those who rent as well as those who sell hearing aids, avoiding the need to define a rental as a "sale" for purposes of the Rule.

Recommended Rule section 440.2 lists all those covered by the Rule. This listing replaces section 440.2(c) of the Proposed Rule, which defined "seller." In order to avoid any possibility of confusion, staff has added "distributors," "physicians," and "audiologists" to the list, although, in our view, any of these individuals who sold hearing aids was covered by the Proposed Rule.

1199 R10/6456-57. Dr. Staab also commented about telephone amplifiers and TV attachments. Id. These are clearly distinguishable, however, the former not being worn and the latter not being portable.

1200 R5/252.

1201 Note that the buyer's right to cancel portion of the Recommended Rule is not applicable to auditory training units when they are not sold for the benefit of a specific individual. See Part Two, Section III.GG.3.d.i, infra.

1202 E.g., ASHA, R10/1739; Seltz, R5/1352; Johnson, R5/348.

The main issue raised by the comments on the definition of "seller" was the inclusion of manufacturers as sellers for all purposes of the Proposed Rule.[1203] Hearing aid manufacturers urged that it be made clear that they did not have to give a buyer's right to cancel to their customers. The buyer's right to cancel sections of the Recommended Rule make it clear that their provisions apply only to transactions with consumers.[1204] Thus, any legitimate concern by manufacturers that the right to cancel might be extended to other than consumer purchasers has been addressed. In all other instances, it is appropriate that the requirements of the Rule apply to manufacturers, wholesalers, and retailers of hearing aids.

3. Illegal Acts and Practices

Section 440.3 of the Recommended Rule tells when the Rule applies. This section lists the various types of activities covered by the Recommended Rule.[1205] By stating "you must follow [the regulations] whenever you prepare, approve, place or pay for ads," it makes clear that manufacturers are responsible for the ads which they fund. Various comments in the Record discussed manufacturers' responsibility or lack thereof, for retailers' advertising. HAIC questioned whether a manufacturer, who is also a "seller," should be liable for advertising over which he has no direct control.[1206] HAIC added that under the Proposed Rule "a manufacturer may be in violation . . . if a dealer utilizing promotional allowances independently prepares advertisements which fail to comply with the proposed rule,[1207] noting that "the manufacturer is prohibited under the antitrust laws from exercising any direct control over the content of

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1203 HAIC, R3/3858, R2/44; NHAS, R3/3542; ASHA, R10/1700-01; Zenith, R3/3393-94; Campagna, TR2605-06; Bowen, HX35; Massachusetts Eye and Ear Infirmary, R5/1163; Saad, R3/2184; Staab, TR1037; Stultz, R8/836-37.

1204 See Recommended Rule §§ 440.36 and 440.46.

1205 To the extent that any definition of "advertisement" is found in the Recommended Rule, it is in this section. The specific definition of advertisement found in § 440.2(g) of the Proposed Rule has been eliminated. See the discussion at Part Two, Section III.LL., infra.

1206 R2/44.

1207 Id.

dealer advertising."[1208] Ansel Kleiman, President of Telex, also argued that manufacturers should not be held responsible for the final action of a dealer in placing an advertisement.[1209] Paul Burris, of Dahlberg, testified that the only control the manufacturer has is over "whatever materials were produced by the company for advertising."[1210] John Kojis, President of Maico, added that the proposal, potentially making manufacturers or distributors responsible for dealer advertising supported by co-op funds, was impossible to live with since "[n]o one with any sense of responsibility is going to put himself in the position of being responsible for somebody else's action and yet not have any control."[1211]

HAIC's own witnesses, however, dispute this "helplessness" argument. Ralph Campagna, President of both HAIC and Ralph Campagna, Inc., testified that in order for the dealer to collect from the manufacturer on co-op advertising, the ad "has to be sent to the manufacturer and approved before the money is allowed or credited to his account."[1212] John Kojis explained that "our policy in this area is that there will be no changes in the mats that we make, otherwise the dealer is taking the entire responsibility for whatever he does."[1213] Since manufacturers who help fund dealer ads on a co-op basis clearly have the ability to review and approve any ads the dealer has run before they actually pay for them, staff believes that the Recommended Rule therefore fairly holds manufacturers responsible for such ads.

B. "Clearly and Conspicuously"

At various places in the Proposed Rule[1214] and the Recommended Rule,[1215] explanations are required to be made "clearly and conspicuously."

1208 Id. at R2/67.

1209 TR6955.

1210 TR2562.

1211 TR1985.

1212 TR2666.

1213 TR2044.

1214 See Proposed Rule §§ 440.4(a), 440.4(b), 440.5(b), 440.7(b), 440.7(c), 440.7(d), 440.8(a), 440.9(e), 440.9(f), 440.9(g), 440.9(k), 440.9(l), 440.10(a) - (d), 440.11(a), 440.11(b).

1215 See Recommended Rule §§ 440.5, 440.6, 440.15, 440.16, 440.17, 440.18, 440.23, 440.25, 440.26, 440.28, 440.29, 440.30, 440.33, 440.34, 440.36, 440.40, 440.46.

The Proposed Rule both defined "clearly and conspicuously"[1216] and imposed certain specific requirements as to the form and manner of making required disclosures in television, radio, and print advertisements.[1217] In essence, these sections imposed the following requirements:

- that the disclosure can be easily understood by the casual listener or observer (section 440.2 (i)(1));

- that, with one limited exception, the disclosure be made each time and in immediate proximity to the statement which it is intended to modify (section 440.2(i)(2));

- that the disclosure be made in the same language as that principally used to communicate with the persons to whom the disclosure is directed (section 440.2(i)(3));

- that for television ads, (1) the disclosure be made at least as clearly and conspicuously as the statement it is intended to modify and be in the same portion (audio or video) of the advertisement; (2) that the video portion of any disclosure be in letters of a color that contrasts readily with the background, of sufficient size to be easily seen and read on any size television, and of such duration to allow it to be completely read; (3) that the background for video disclosures be of only one color; (4) and that no other sounds, including music, occur during the audio portion of the disclosure (sections 440.2(i)(4) and 440.3(a));

- that for radio ads, the disclosure be made at least as clearly and conspicuously as the statement it is intended to modify, without interference from any other sounds (sections 440.2(i)(5) and 440.3(b)); and

- that for print ads the disclosure be made at least as clearly and conspicuously as the statement it is intended to modify (sections 440.2(i)(6) and 440.3(c)).

1216 Proposed Rule § 440.2(i).

1217 Id., § 440.3.

These particular requirements were derived from the Commission's "Statement of Enforcement Policy" on clear and conspicuous disclosures[1218] and from the Commission's "Requirements concerning clear and conspicuous disclosures in foreign language advertising and sales materials."[1219]

The premise behind the requirement that disclosures be made in a clear and conspicuous manner, often found in Commission orders and rules, rests on the Commission's view that unless such a requirement is met the claim that the disclosure qualifies or modifies would be misleading.[1220] In the Statement of Enforcement Policy on Clear and Conspicuous Disclosure, the Commission noted with respect to TV advertising:

> Television advertisers should also consider the audience to whom the disclosure is directed in order to assure that such persons (such as children) can understand the full meaning of the disclosure. If securing this understanding is impractical, then the advertisements containing such representations should not be used on television.[1221]

Obviously, advertisers do not have a right to advertise something in such a manner as to be false or misleading. The Commission has often chosen to require the clear and conspicuous disclosure of material facts concerning the initial representation as a remedy, as opposed to an outright ban of the representation. It has done so in those instances where it believed that a proper qualification could be made to remedy otherwise false or misleading advertising.

Reaction to the definition of "clearly and conspicuously disclose" and to the "form of making disclosures" requirements set forth in the Proposed Rule was varied. NHAS called this requirement "an eyeful of enough 'doublespeak,' and fine detail, and ambiguity

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1218 October 20, 1971; this is reported in the CCH 1971 Transfer Binder at Par. 7569. This policy statement related to television advertising.

1219 16 C.F.R. Part 14.9.

1220 See J.B. Williams, 68 F.T.C. 547, n.9 (1965).

1221 CCH 1971 Transfer Binder at Par. 7569.

to strike fear into the heart of anyone who even considers advertising hearing aids . . . ."[1222] HAIC stated:

> The definition of clear and conspicuous disclosure . . . is unduly vague and impractical and could not be successfully implemented in hearing aid advertising without hampering the ability of such advertising to provide important consumer information.[1223]

Zenith similarly asserted that the definition

> imposes the requirement of interpreting vague standards in presenting hearing aid advertising. As a small industry advertising is limited in space size, frequency and media used. Excessive restrictions will burden the already limited advertising resources of the industry, depriving the hearing impaired consumer [of] an important education link with the hearing health community. The term casual observer, listener or reader is a vague and imprecise description . . . . Disclosures are important to those who have specific interests and, therefore, they should be easily understood by the interested observer, listener, or reader.[1224]

Richard Fechheimer, Beltone's advertising expert, testified that the terms "clear and conspicuous disclosure" had only been loosely defined and depended upon subjective judgments, thereby possibly causing trouble for an advertiser who in good faith believed that "he had made himself understood."[1225] On the other hand, the American Council of Otolaryngology thought that the proposed definition of "clear and conspicuous" was satisfactory,[1226] as did others.[1227]

1222 Hearing Aid Journal, February, 1978, at 18.

1223 R3/3949.

1224 R3/3396-97.

1225 TR6969.

1226 R5/1744.

1227 E.g., Kasten, R5/1440; NCLD, R7/674.

Staff does not believe that the arguments made in opposition to the clear and conspicuous disclosure definition are persuasive. First, and probably most significant, staff believes that the negative arguments omitted one critical policy consideration--it has long been established that if an advertisement cannot be made in a non-deceptive manner, it should not be made at all.[1228] Furthermore, staff does not believe that the requirement for clear and conspicuous disclosure of material product information would prevent effective advertising. The argument that the definition was too vague to be followed is totally specious. The requirements were in fact quite specific.

NHAS commented that the requirements concerning the "form and manner of making disclosures were neither technically nor economically feasible."[1229] HAIC argued that these requirements, "specifying strict standards for required disclosures in television, radio and print advertisements, will impose heavy and costly burdens upon the industry in its effort to provide valuable product information to consumers."[1230] ACO thought that this provision was satisfactory, however,[1231] as did AARP.[1232]

NCLD went further, suggesting various modifications to strengthen the provision. It suggested that a television disclosure a) should be made in both the audio and video portions of the ad to insure that the person with impaired hearing actually understands the disclosure;[1233] b) should be in as loud a volume as the representation which it is modifying;[1234] and c) should be preceded by the word "warning," "caution," or "notice."[1235]

1228 See, e.g., Resort Car Rental System, Inc., 83 F.T.C. 234, 297-300 (1973), and cases cited therein; FTC v. Algoma Lumber Co., 291 U.S. 67 (1934).

1229 R3/3557.

1230 R3/3949. Leslie Leale commented that this provision would make the cost of TV advertising prohibitively expensive. R3/1614.

1231 R5/1744.

1232 R7/458.

1233 R7/676-78.

1234 R7/678-79.

1235 R7/679.

With respect to radio ads, NCLD proposed that the disclosure be of sufficient duration to enable it to be easily heard and understood, and be preceded by "warning," "caution," or "notice.[1236] Finally, with respect to print advertisements, NCLD recommended that the word "notice," "warning," or "caution" be included, and that the disclosure be in a type size as large as that used for the modified representation, in a contrasting color, and on a background of one shade only.[1237] All of these proposals were intended by NCLD as means of increasing the probability of comprehension of the disclosure message.

While staff believes that the disclosure requirements of the Proposed Rule are both technically and economically feasible, it nevertheless is recommending changes which it believes will help hearing aid sellers comply with the Rule. Section 440.4 of the Recommended Rule defines "clearly and conspicuously" in the plain English format previously discussed. As a result, it is quite brief in comparison to its predecessor. The Recommended Rule provides that for a disclosure to be conspicuous it must attract as much attention as the statement it is modifying, and for it to be clear, it must be easily understood. For example, a disclosure in five-point type at the bottom of an ad, buried in other text, clearly would not be conspicuous when compared to the 14-point type heading it was intended to modify.[1238] Similarly, a disclosure utilizing extremely complex technical jargon would not be clear to an average consumer. Staff has chosen not to recommend specific disclosure formats as it had originally done, in view of the comments which seem to indicate that such provisions would be confusing to hearing aid sellers.

1236 Id.

1237 R7/680-81.

1238 The importance of the "conspicuous" requirement is made clear by the testimony of Ruth Lesko, an advertising agency executive who handles Radioear's advertising and who testified on behalf of HAIC. She stated at TR7202 that:

> People do not read ads the way they do technical reports. They kind of glance at a headline. Something like 80 percent of the people who look at your ad will look at nothing but the headline.

The requirements in the Recommended Rule accomplish the same end and should be much easier for the average hearing aid seller to understand.[1239] Staff has thus eliminated the specifics previously found in the "clear and conspicuous" definition, and no longer recommends a section specifically mandating the "form of making disclosures." It nevertheless remains the responsibility of all persons covered by this Rule to make sure that their disclosures are in fact "clear and conspicuous."

C. "Say or imply" and "explain"

In the Recommended Rule section 440.5, "Say or Imply," replaces the definition of "represent" or "representation" in section 440.2(f) of the Proposed Rule. The Recommended Rule section is a plain English version, but substantively the provisions are the same.

NHAS contended that section 440.2(f) of the Proposed Rule was:

> so broad as to cover any and every statement whether or not related to hearing aids and is effectively unenforceable as to oral statements. The definition exceeds any alleged purpose for the proposed rule.[1240]

As advertisers have always been responsible for the reasonable implications of their advertisements,[1241] staff does not feel this is a valid argument. NHAS' criticism that the provision applied to non-hearing aid statements is baseless since the section merely defined terms, and in every instance where the concept was in fact applicable, it clearly related to hearing aids.

1239 Staff appreciates very much the thought which NCLD put into its recommendations to strengthen these portions of the Proposed Rule. They were good suggestions, and very likely would have been recommended had staff adopted a "code" type format. Since staff has chosen not to recommend a code approach, however, it is not including those specific proposals. Staff has no doubt, however, that an advertiser would probably meet its "clear and conspicuous" disclosure burden were it to follow the NCLD proposals.

1240 NHAS, R3/3544.

1241 See, e.g., Murray Space Shoe Corp. v. FTC, 304 F.2d 270, (2d Cir. 1962).

The purpose of this section is to make it absolutely clear that hearing aid sellers are responsible for both the direct and the implied meanings of their ads. Thus, if a statement or representation is capable of more than one reasonable interpretation. It has long been held that advertisements which are capable of two or more meanings, one of which is deceptive, are false and misleading.[1242]

Section 440.5 of the Recommended Rule also makes it clear that when a person is required to explain something pursuant to the Rule, this must be done clearly and conspicuously. Such an explanation can either be oral or written, however.

D. Say You Are A Seller

In Part One, it was demonstrated that hearing aid sellers have utilized a variety of tactics to conceal the fact that they are sellers.[1243] These tactics extend to the ways in which such salespersons characterize themselves, their business establishments and the nature of the transaction the consumer is entering into.[1244] Such tactics have the tendency and capacity to mislead consumers into believing that hearing aid sellers are something other than what they in fact are, which is clearly deceptive and unfair within the meaning of section 5 of the FTC Act.

Section 440.8(a) of the Proposed Rule addressed the problems posed by such misrepresentations of status. It required that all hearing aid sellers clearly and conspicuously disclose to consumers that they were sellers of hearing aids. This requirement could be satisfied, however, by a statement of the name of the seller's business, if that name included the words "hearing aid center" or other words which clearly identified the establishment and the individual as a seller of hearing aids.

1242 See, e.g., Rhodes Pharmacal Co. v. FTC, 208 F.2d 382, 387 (7th Cir. 1953), modified in part, 348 U.S. 940 (1955) (per curiam).

1243 See Part One, Section IX.B, supra, and Appendix F, Sectior IV.B & C, infra, for a discussion of these tactics.

1244 Id.

Industry witnesses contested the need for such a provision, arguing that consumers were generally aware of the commercial purposes of the hearing aid sellers with whom they were dealing.[1245] Industry also argued that the provision was vaguely worded and overly broad, and contended that it would require each and every statement made by a hearing aid seller to be preceded by a clear and conspicuous statement of his status as a seller of hearing aids.[1246] Obviously, such a disclosure was and is only intended to be required when a seller is addressing a prospective purchaser and, in that context, it is clearly necessary in order to put the purchaser on notice.

Proponents of this section of the Proposed Rule strongly argued that it was a vitally important provision because it required sellers to represent themselves accurately in order that the consumer might know with whom he was dealing.[1247]

Section 440.6 of the Recommended Rule has a thrust similar to that of the Proposed Rule, applying to all sellers, including physicians and audiologists if they sell hearing aids. Its language is narrower and much more tightly drawn than that of the Proposed Rule, however, in order to make it clear that the Rule's requirements apply only to communications between sellers and persons viewed as potential customers. Hearing aid sellers are required to disclose their status as a seller[1248] in two specific contexts: (1) in all ads and other written materials; and (2) on all signs. In all situations in which the seller is speaking with potential customers, he must make sure they understand that he sells hearing aids.[1249]

1245 See, e.g. Keyes, TR10717-18; Burris, TR2550; Campagna, TR2602, 2613, 2617-18; Curran, TR10819-20, 10846-47, 10860.

1246 HAIC, R3/3958-59; NHAS, R3/3604.

1247 E.g. Noffsinger, TR7636-37; Fennema, TR1752; Carney, R7/102; Vertes, R5/346; cf. Feakes, R5/1234; Mastricola, R5/861; Paul, R5/912; Platt, TR6462. See also Rose, R5/712; Siegenthaler, R5/176.

1248 Staff believes that use of words like "dispense" or "dispensor" would not satisfy the Rule's disclosure requirement.

1249 It is obvious from the language of the Recommended Rule provision that the disclosure requirement would not apply to situations where no potential sales are contemplated. The example proffered by HAIC of the hearing aid manufacturer's executive addressing his local Chamber of Commerce on a subject unrelated to the sale of hearing aids would clearly fall outside the scope of the Recommended Rule provision.

(Continued)

The Proposed Rule provided that the disclosure of one's firm name constituted a clear disclosure of one's status as a seller, if the name included the words "Hearing Aid Center."[1250] The Recommended Rule does not contain that provision because staff questions whether such a disclosure would in fact clearly apprise potential customers of one's seller status, at least where consumers who are new to the hearing aid market are concerned. Staff believes that the words "Hearing Aid Center" should be all that section 440.6 requires in signs, ads, and other written materials since consumers have an opportunity to reflect upon the meaning of those words in that context. Staff questions, however, whether a seller's oral reference to his affiliation with "Doe's Hearing Aid Center" will always serve to apprise consumers about the seller's status. Accordingly, the Recommended Rule requires the seller to "make sure" the potential customer is aware that he is a seller. Since the seller is in immediate personal contact with the potential customer at this time, this requirement imposes no unreasonable burden. In fact, merely mentioning the seller's name or firm name will clearly disclose the seller's status in those instances where it is absolutely clear that the potential customer knows that the seller or his firm is in the business of selling hearing aids.

1249 (Continued)

The limitation of the disclosure requirement to situations involving "potential customers" forces sellers to evaluate the context within which they are speaking, and to disclose their status as sellers if they find that they are dealing with individuals as potential customers. An example of when an individual might become a "potential customer" would be if the consumer walked into the seller's office and started to discuss a hearing problem. The seller under these circumstances make sure that the consumer understands that he is in the business of selling hearing aids.

Another example of when such a disclosure might be required would be when a consumer requests comparative product information on different kinds of hearing aids from a seller outside the typical business context of a seller's office or shop. In these circumstances, the seller should disclose his status even though he may not feel that he is actively trying to sell a product, because the consumer's questions would lead a reasonable person to conclude that this consumer might be interested in making a purchase. The operative judgment which triggers the disclosure requirement is whether this individual is acting like a potential customer.

1250 Proposed Rule § 440.8(a).

With respect to the contention that no real need exists for the adoption of this provision, staff believes that the record makes clear that such a provision is needed.[1251] Too many examples have been presented in the record of consumers who were misled by a hearing aid seller's failure to identify himself as a seller. The Presiding Officer concluded that consumers were indeed confused and misled by hearing aid sellers into believing that these sellers were representatives of something other than retail sales outlets.[1252] The Presiding Officer thus concluded that the affirmative disclosures required by this section of the Proposed Rule should help to eliminate some of these problems by alerting consumers to the fact that the individuals with whom they were dealing were hearing aid sellers, while at the same time creating little hardship for the seller.[1253]

On the basis of the record evidence and after consideration of all of the arguments presented, staff recommends that section 440.6 of the Recommended Rule be adopted. Staff is convinced that there is a distinct need for this provision, and that the language utilized in the Recommended Rule will satisfy this need. Staff believes that section 440.6 is precisely written and that it will cover only those situations where misrepresentations of status are likely to occur.

E. Your Firm's Name

There is substantial evidence that hearing-impaired persons are misled by many of the "business names" adopted by hearing aid sellers.[1254] The Presiding Officer found this to be the case and concluded that section 440.8(b) of the Proposed Rule was an appropriate remedy for such deceptive practices.[1255] Indeed, industry

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1251 See Appendix F, Section IV.B, infra, for examples of how consumers have been confused by titles used by hearing aid sellers.

1252 P.O. Report, R9/D1ip129.

1253 Id. at 129-30.

1254 See Appendix F, Section IV.C, infra.

1255 P.O Report, R9/D1ip132.

has not seriously challenged the propriety of this provision,[1256] which is quite similar to rule 10 of the 1965 Trade Practice Rules for the Hearing Aid Industry.[1257]

Despite the absence of significant objections to this section, further reflection has convinced staff of the need for certain changes. Section 440.7 of the Recommended Rule reflects staff's desire to specify, as clearly as possible, the circumstances under which use of the quoted terms would be deceptive.[1258] For example, staff believes that the word "institute" inherently suggests an

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1256 Many hearing aid sellers commented that this section of the Proposed Rule was appropriate. See, e.g., Simms, R3/128; Skadegard, R3/177; Fennema, R3/213; Schnitzer, R3/725; Mattingly, R3/744; Warberg, R3/1468; Hampton, R3/1491; Hoover, R6/34; Shaw, R6/395; Willett, R6/399.

NHAS objected to Proposed Rule §§ 440.8(b), (c), and (e) in the following manner:

> Use by hearing aid specialists of such terms as "hearing aid clinic," "counselor," "consultant" and others is not inherently misleading. Data do not establish that consumers are deceived when hearing aid specialists use such terms. To the contrary, hearing aid specialists have traditionally provided fitting and counseling services and therefore should be entitled to use such terms as they are commonly defined and understood.

R3/3604 (footnote omitted). The flat assertion that use of the word "clinic" by hearing aid sellers does not mislead consumers is refuted by the evidence in the record. See Gerstman, R5/119; Mabie, R6/171; Appendix F, Section IV.C, infra. Discussion of the terms "counselor" and "consultant" is reserved for Part Two, Section III.G, infra.

1257 16 C.F.R. § 240.10 (1977).

1258 The specificity of these provisions is not intended to limit the general coverage of the first sentence. Thus, although the word "laboratory" is nowhere mentioned in this section, its misuse by a hearing aid seller would clearly violate § 440.7.

organization with an educational or research orientation. Similarly, the term "bureau" is deceptive unless it is used to refer to a government agency.

The last two sentences of section 440.7 of the Recommended Rule demonstrate staff's decision to conform the Rule to state law requirements and currently accepted practices. Thus, sentence five of the section recognizes that certain states--most notably, California[1259] --require physicians who form medical corporations to identify their offices as "clinics." Under these circumstances, staff is unwilling to recommend a prohibition of the use of this term, even if the physician himself or someone in his office is selling hearing aids. The requirements that such a clinic provide medical services regularly and under the supervision of a physician should prevent unscrupulous sellers from attempting to circumvent the provision.[1260]

Similarly, the last sentence of this section of the Recommended Rule is designed to permit the continued use by physicians and audiologists[1261] of designations such as "speech and hearing center." The listed names have been used for many years and are presently being used by many audiologists, both in private practice and in hospital and university settings.[1262] As a result, to the extent that audiological services have become associated with particular terms in the minds of consumers, the terms listed in this sentence are those that most readily evoke this association. Staff is therefore persuaded that an organization which regularly provides hearing services[1263] under the supervision of a physician or audiologist,

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1259 See M. Smith, R8/7718-19.

1260 It is important to recall that § 440.6 of the Recommended Rule requires any physician who is a seller and any hearing aid seller associated with him to disclose their status as sellers. Cf. Sauls, R3/1684.

1261 The term "audiologist" is defined in § 440.8 of the Recommended Rule.

1262 See ASHA, R10/1772-73.

1263 Hearing services means services other than those normally rendered in connection with the selection and fitting of hearing aids. For example, aural rehabilitation and speech-reading services, which are regularly provided by most audiologists, would be considered hearing services for purposes of this section.

as well as selling hearing aids, should be permitted to use the designations listed in section 440.7.

Finally, it is noteworthy that the term "hearing aid center" can be used by any seller under the Rule. Although several individuals expressed the view that this term might be misleading when used by anyone other than a physician or an audiologist,[1264] there is virtually no additional evidence to support this conclusion. Moreover, this is the designation most widely employed by retail hearing aid establishments and was specifically approved by the Commission in the 1965 Trade Practice Rules for the Hearing Aid Industry.[1265] In light of these factors, staff recommends that use of this terminology by any hearing aid seller not be prohibited by section 440.7.[1266]

F. Your Title; Professional Advice

Sections 440.8(c) and (d) of the Proposed Rule stated:

> No seller shall represent that it or any of its employees, agents, salespersons and/or representatives is a physician or an audiologist unless such is the fact. One example of a violation of § 440.8(c) is the use of the term "audiologist" to describe one who is not an audiologist as defined in § 440.2(h); and
>
> No seller shall represent that the service or advice or [sic] a physician or an audiologist will be used or made available in the selection, adjustment, maintenance or repair of a hearing aid, unless such is the fact.

Staff has found no objections with respect to the propriety and desirability of these two provisions. Considerable criticism, on the other hand, was directed toward the Proposed Rule's definition

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1264 Schreiber, TR4048; Tobin, TR4093-94.

1265 16 C.F.R. § 240.10 (1977).

1266 Indeed, the continued use by hearing aid sellers of the term "hearing aid center" may serve to clarify in the public's mind the fact that such establishments are engaged in the retailing of hearing aids.

of the term "audiologist." Section 440.2(h) provided:

> "Audiologist." A person who:
>
> (1) Possesses the Certificate of Clinical Competence in audiology granted by the American Speech and Hearing Association (ASHA); or
>
> (2) Meets the educational and experience requirements for ASHA certification in audiology and has successfully completed the examination required for ASHA certification in audiology; or
>
> (3) Meets the requirements of any applicable state law which defines the term "audiologist."

Predictably, most audiologists generally supported this definition[1267] and most hearing aid sellers generally opposed it.[1268] There were a number of specific arguments proferred against the provision.

First, some industry members asserted that the term "audiologist" was first utilized by hearing aid sellers, who consequently have a prior right to the designation.[1269] Although the etymology of the word is in dispute,[1270] staff believes that the issue is a moot one. Regardless of who first used the term, it has come to signify a highly skilled professional with considerable academic

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1267 E.g., B. Smith, TR281; Ventry, TR1727-28; Beiter, TR9073-74; ASHA, R10/1702-09; see Kozelsky, R5/648; Sweitzer, R5/661; Fargo, R5/675; Noon, R5/689; Flaherty, R5/1379; Orr, R5/1391; Lloyd, R5/1478. A number of sellers also supported this provision. Simms, R3/128; Fennema, R3/213; Caprara, R3/247; Willett, R3/818; Hampton, R3/1491.

1268 E.g., Fortner, TR2861-62; Schaefer, R3/239, TR8251; Kenwood, TR9343-44; Mitsdarffer, R3/56; Thompson, R3/269; Truitt, R3/928; Warberg, R3/1468; Klopp, R3/2243; Durkin, R3/3111; Nelson, R6/387.

1269 E.g., NHAS, R3/3550-51; HAIC, R3/3950; Freshley, R10/6637.

1270 See Newby, R10/2157-58.

training in hearing disorders.[1271] Moreover, the record clearly indicates that this is the meaning attached to the term by hearing aid consumers.[1272] As a result, any use of the designation "audiologist" by a hearing aid seller who does not have at least a master's degree in audiology deceives consumers with respect to that individual's qualifications.

Second, a number of industry members asserted that the definition discriminates against those who do not wish to join ASHA.[1273] Even the most casual reader of the Proposed Rule will recognize the inaccuracy of this argument. Membership in ASHA and possession of its certificate was only one of the three ways in which a person could qualify as an audiologist under the Rule. Anyone who met the standards set by ASHA, regardless of membership in the organization, also qualified as an audiologist under the Proposed Rule.[1274] In fact, ASHA has a program under which non-members can apply for equivalency certification.[1275]

1271 Even Zenith, in its criticism of the definition of "audiologist" contained in the Proposed Rule, suggested a definition limiting use of the term to those with "advanced academic work in audiology." Zenith, R3/3396. In fact, virtually all industry members and representatives traditionally have used the term "audiologist" to describe precisely that group of persons defined by § 440.2(h) of the Proposed Rule, as distinct from traditional hearing aid retail salespersons. E.g., J. Lucke (Senate Hearings, 1968), R8/1116; Lybarger (Senate Hearings, 1968), R8/886-87, 889, 894; Hearing Dealer (1967 editorial), R8/1126; Caine (Senate Hearings, 1968), R8/1179; Mynders, R8/3452; Samole, R8/3530; Market Facts Report, R8/668,679; James Payne, R8/3474-75, 3479-81; Giglia, R8/3442, 3445; Ince, R8/3419; DiRocco (Senate Hearings, 1973), R8/1188BBBBBBB, 1188CCCCCCC; Minnesota Hearing Aid Society (Senate Hearings, 1973), R8/1188QQQQQQ, 1188TTTTTT.

1272 See Appendix F, Section IV.D, infra.

1273 E.g., HAIC, R2/45; Maico, R2/127; Zenith, R3/3395-96; NHAS, R3/3547.

1274 The same is true of anyone who met any requirements provided by state law. See text accompanying notes 1274-78, infra.

1275 ASHA, R10/1594; Lentz, R13/1785.

Third, it was suggested that via subsection (3) of the Proposed Rule's definition, the requisites for qualification as an audiologist could vary considerably from state to state.[1276] Staff finds this argument generally persuasive. It would certainly be unfortunate, however, if a loophole in the Rule permitted continued deception of consumers in some states with respect to the qualifications of audiologists and hearing aid sellers. As a result, the Recommended Rule states in its third definition that no individual can be called an audiologist unless he holds "a graduate degree in audiology and is qualified as an audiologist under state law."[1277] The required master's degree in audiology provides, in staff's view, the absolute minimum of education and training necessary in this area. Indeed, it is significant that of the 29 states that licensed audiologists as of September, 1977, 28 required a master's degree or its equivalent.[1278]

Fourth, the possibility exists that a few highly trained and experienced persons, who could at one time have met the requirements for ASHA certification but chose not to apply for certification, do not meet the more stringent standards currently set by ASHA. These individuals would have been prohibited by the Proposed Rule from calling themselves audiologists. Staff believes that it would be unfair to deprive persons, who earlier in their careers met ASHA's certification requirements, of the right to call themselves audiologists. As a result, the Recommended Rule permits persons to use the designation "audiologist" if they "at one time met" the educational, experience, and testing requirements for ASHA certification.[1279]

1276 E.g., NHAS, R3/3547; ASHA, R10/1708.

1277 See § 440.8 Recommended Rule.

1278 See Hearing Aid Journal 50 (September 1972). The Recommended Rule would not, of course, affect any state law requirements that are more stringent than those contained in § 440.8. See Recommended Rule § 440.50(c)(1).

1279 Under this provision, those audiologists who terminated their membership in ASHA in order to sell hearing aids for a profit will also bse able to call themselves "audiologists."

Fifth, a number of individuals have questioned whether the Proposed Rule would, or should, prohibit the use by sellers of the term "certified hearing aid audiologist." On the one hand, many individuals stated that the Proposed Rule did not make clear that this title was prohibited,[1280] and suggested that the provision be clarified to reflect such a prohibition.[1281] On the other hand, NHAS, the organization that confers this title upon sellers, argued that it:

> has a Collective Service Mark (Certified Hearing Aid Audiologist) duly registered with the United States Patent Office which provides the Society with a legal foundation for authorizing the use of the title . . . by hearing aid specialists found to meet the standards of the National Hearing Aids Society's Certification Program.[1282]

The suggestion that use of the term "certified hearing aid audiologist" by sellers should be more clearly prohibited was considered in drafting the Recommended Rule. Prohibition of this practice is, in fact, intended, and the last sentence of section 440.8 plainly reflects this intent.[1283] NHAS's contention that the

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1280 See, e.g., Galleher, R5/43; Windham, R5/399; Borden, R5/491; Gannaway, R5/558; Paxton, R5/833; Knapp, R5/825; Suty, R5/1256; Miller, R5/1326-27.

1281 See, e.g., Shannon, R5/668; Fargo, R5/676; Shinner, R5/748; Helfer, R5/774; Schweitzer, R5/1078; Koperski, R5/1177; Wright, R5/1196; Berkowitz, R5/1767; AARP, R10/869.

1282 NHAS, R2/98-99.

1283 The sentence states: "Do not use the word 'audiologist,' even with other words, in describing anyone who does not meet one of these three definitions." (Emphasis added). The provision thus prohibits not only the designation "certified hearing aid audiologist," but also such phrases as "consulting audiologist" and "certified audiologist." In short, the word itself cannot be used--whether alone or in conjunction with other words--by those who do not meet one of the definitions contained in Recommended Rule § 440.8.

Commission lacks authority to override NHAS's Collective Service Mark,[1284] however, is incorrect. There is ample authority for such a prohibition in cases involving bans on the use of deceptive trade names.[1285] The rule that emerges from those cases is that a deceptive trade name can be prohibited if its deceptive effect cannot be eliminated by the addition of qualifying language.[1286] Since the evidence demonstrates that consumers are misled concerning the qualifications of "certified hearing aid audiologists,"[1287] and since qualifying language will not remedy this deception,[1288] the prohibition recommended by staff rests on a firm precedential foundation.

Finally, NHAS argued that it is an unlawful delegation of legislative power for the Commission to base its definition of "audiologist" on standards set by a private organization such as ASHA.[1289] Staff believes this argument to be without merit. ASHA's requirements are recognized by several federal government regulations,[1290] including the following regulation under the Medicare program:

> Speech pathologist or audiologist (qualified consultant). A person who is licensed if applicable by the State in which practicing, and

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1284 NHAS, R2/99.

1285 See, e.g., FTC v. Algoma Lumber Co., 291 U.S. 67 (1934); Continental Wax Corp. v. FTC, 330 F.2d 475 (2d Cir. 1964); Waltham Watch Co. v. FTC, 318 F.2d 28 (7th Cir. 1963); Carter Products, Inc. v. FTC, 268 F.2d 461 (9th Cir. 1958).

1286 Resort Car Rental System, Inc., 83 F.T.C. 234, 298 (1973); see Beneficial Corp. v. FTC, 542 F.2d 611 (3d Cir. 1976), cert. denied, 430 U.S. 983 (1977).

1287 See Appendix F, Section IV.D, infra.

1288 Only a contradiction would properly qualify the misleading language. As the Commission opinion in In re Resort Car Rental System noted:

> Where qualifying language amounts to a contradiction in terms, however, it would have the effect of completely confusing the consuming public and will not be considered as an alternative to excision. 83 F.T.C. at 298.

1289 NHAS, R2/98; see NHAS, R3/3547-48.

1290 See, e.g., Harrington, R8/3173 (standard applied by the Maternal and Child Health and Crippled Children Service); Medicare Regulation, 45 C.F.R. § 249.10(b)(11)(iii) (1977).

(1) Is eligible for a certificate of clinical competence in the appropriate area (speech pathology or audiology) granted by the American Speech and Hearing Association under its requirements in effect on the publication of this provision; or

(2) Meets the educational requirements for certification and is in the process of accumulating the supervised experience required for certification.[1291]

ASHA accredits college and university programs offering master's degrees in audiology, and its accreditation program is recognized by both the Council on Postsecondary Education and the Commissioner of the United States Office of Education.[1292] Moreover, at least 28 states currently license audiologists under standards that are equivalent to those contained in the Recommended Rule and that recognize the requirements set by ASHA.[1293] Thus, the Recommended Rule merely recognizes the widely accepted fact that ASHA is currently the national standards-setting organization for audiologists.[1294] As the Presiding Officer concluded, proposed sections 440.8(c) and (d)

> will do much to remedy . . . problems, particularly by confining the use of the term "audiologist" or any combination thereof to those individuals who meet the criteria established in proposed section 440.2(h), which reflects the generally recognized definition of a professional "audiologist."[1295]

G. "Counselor" and "Consultant"

It is clear from the record that hearing aid industry advertisements and sales presentations often refer to retail sellers

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1291 20 C.F.R. § 406.1101(t) (1977).

1292 ASHA, R10/1593.

1293 See id. at 1703; Hearing Aid Journal 50 (September 1977).

1294 Of course, if ASHA were to upgrade its requirements at some point in the future, those new standards would apply only prospectively. All those who were previously qualified as audiologists would continue to be qualified under the "at one time met" language of the Recommended Rule.

1295 P.O. Report, R9/D1ip146.

as either "counselors" or "consultants," and that such representations are made on a nationwide basis.[1296] Section 440.8(e) of the Proposed Rule prohibited hearing aid sellers from using these terms to describe themselves. In opposing the adoption of that provision, various industry representatives argued that the terms "counselor" and "consultant" are not inherently misleading to consumers, because hearing aid sellers actually do provide a variety of counseling services.[1297] HAIC introduced definitions of "counselor"[1298] and "consultant[1299] which allegedly established that hearing aid sellers could refer to themselves in such a fashion merely because they "advise" their customers about "problems relating to hearing aid use."[1300] HAIC cited the Payne and Payne survey for the propositions that hearing aid

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1296 See generally Appendix F, Section IV.E, infra.

1297 See NHAS, R2/119; Freshley, R10/6644, 6655; Campagna, TR2606; Oberhand, TR3045; West, TR10523; Heisse, TR3289. Donald Krebs, Ph.D., testified that he believed that sellers are competent enough to be characterized as counselors or consultants, but suggested that at least 1 year of experience would be required to justify the characterization. Krebs, TR11382. Dr. Krebs admitted on cross-examination that sellers who had not passed some sort of licensing examination should not be so characterized. Id. at 11856. John Payne, a hearing aid dealer, suggested that one or one and one-half years of experience would be required before one of his employees would be competent to counsel hearing aid users.

1298 "Adviser," HAIC, R3/3961.

1299 "One who gives advice," id. The source of these definitions was not identified. The American Heritage Dictionary confirms the former definition, but defines a "consultant" as "A person who gives expert or professional advice." American Heritage Dictionary (College Edition, 1976). A second HAIC document similarly defined "consultant" as a person who gives expert advice, HAIC, R2/66, while a Zenith submission defined a "consultant" as "one who consults." Zenith, R3/3409, quoting the Oxford University Dictionary. See also HAIC, R3/4029-30, citing Irving Shore, M.A., in the Handbook of Clinical Audiology, who defines a "hearing aid consultation" as a session in which a client receives information about hearing aids.

1300 HAIC, R3/3961.

sellers invest a "tremendous amount" of time in "counseling,"[1301] and that the seller should be encouraged to "counsel" his customers.[1302] In short, HAIC argued that since hearing aid sellers spend a great deal of time advising their customers, they consequently should be allowed to use terms such as "counselor" and "consultant" to describe themselves and their activities.

Staff agrees that sellers should be encouraged to spend as much time as is necessary advising their customers.[1303] However, staff has concluded that the use of these or similar terms by hearing aid sellers is clearly deceptive and consequently violates the FTC Act. While the terms "counselor" and "consultant" may be the equivalent of "advisor" in one sense, the record establishes that such terms give hearing-impaired consumers the incorrect impression that the persons so described will provide advice which is both expert and unbiased.[1304] The terms

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1301 Id. See also NHAS, R2/119.

1302 HAIC, R3/3962.

1303 For a discussion of the problems which result when sellers do not spend enough time advising their customers, see Appendix F, Section VI.K, infra.

1304 E.g., Rose, R8/4187; ASHA, R10/1783; Alpiner, R8/5434; Kolman, TR1888-89. See generally Ohio Div. C.P., R8/2929. The widespread belief among consumers that "consultants" and "counselors" provide unbiased (financially disinterested) advice is, in itself, enough to justify adoption of § 440.10 of the Recommended Rule. However, the record also contains evidence that consumers are likely to believe that sellers who refer to themselves as "consultants" or "counselors" are experts in the field. In some instances this belief may be justified. However, in many instances it is not justified, and evidence to that effect provides additional support for the Recommended Rule. Frank Butts, M. Ed., commented that:

> Many consumers have told me that they felt that they were getting professional counseling about their hearing loss that was inclusive in its scope and recommendation when in fact these professionals were salesmen operating on temporary permits, trained only in the sale and fitting of hearing aids. [TR4166]

See AARP/NRTA, TR1435; Shannon, TR1878; Franks, R10/6523; Beiter, TR9074; Powers, R13/970. Frank Bowe, Ph.D., a hearing-impaired consumer, believes that the word "consultant"

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"consultant" and "counselor" are normally used by persons who market only their professional skills.[1305] When a "consultant" or "counselor" provides advice concerning the purchase of products or services, he does not provide that product or services.[1306] For this reason, he presumably has no financial interest that would lead him to provide anything but the most unbiased advice about whether the product or service should be purchased.[1307] Consequently consumers expect that the counselor or consultant can be depended upon to provide unbiased advice. Hearing aid sellers cannot fairly be called "counselors" or "consultants" with respect to hearing aids because they have a financial interest in selling as many hearing aids as possible.[1308] The Federal Trade Commission recognized this potential for deception in another context when it considered a request for an advisory opinion submitted by the "Moving Consultants Institute." The "Institute" proposed that participating "estimators" be allowed to hold themselves out to the public as . . . "certified moving

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1304 (Continued)

refers to an "outside expert" who keeps other people up to date with the latest developments in a particular field. Bowe, R8/6953. This evidence suggests that the terms "consultant" and "counselor" misrepresent the expertise of many of the sellers who use them. See Part One, Section VIII, supra.

1305 ISHA, R10/4897.

1306 Consider the consultant brought in to evaluate the desirability of elective surgery and the consultant who evaluates the value of a house for the prospective purchaser.

1307 Any person whom the government intends to retain as a "consultant" must sign a "conflict of interest" statement which will allow the agency, a sophisticated purchaser, to determine whether anything disqualifies the individual from serving as "consultant."

1308 Whitman, TR8593-94. This is no special slur on hearing aid sellers, however. It merely reflects basic human nature. George Bernard Shaw, in his 1911 "Preface on Doctors" to "The Doctor's Dilemma," addressed the conflict-of-interest involved when the one advising about the desirability of the purchase of certain services also provides those services. He wrote:

> That any sane nation, having observed that you could provide for the supply of bread by giving bakers a pecuniary interest in baking for you, should

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consultants." In denying the request, the FTC noted that the "estimators" were in fact salesmen

> employed by moving companies to deal with, and provide price estimates to, prospective

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1308 (Continued)

> go on to give a surgeon a pecuniary interest in cutting off your leg, is enough to make one dispare of political humanity. But that is precisely what we have done. And the more appalling the mutilation, the more the mutilator is paid.
>
> Scandalized voices murmur that these operations are necessary. They may be. It may also be necessary to hang a man or pull down a house. But we take good care not to make the hangman and the housebreaker the judges of that. If we did, no man's neck would be safe and no man's house stable. But we do make the doctor the judge, and fine him anything from sixpence to several hundred guineas if he decides in our favor. I cannot knock my shins severely without forcing on some surgeon the difficult question, "Could I not make a better use of a pocketful of guineas than this man is making of his legs? Could he not write as well--or even better--on one leg than on two? And the guineas would make all the difference in the world to me just now. My wife--my pretty ones--leg may mortify--it is always safer to operate--he will be well in a fortnight--artificial legs are now so well made that they are really better than natural ones--evolution is towards motors and leglessness, etc.

> customers . . . . When employees who essentially operate as salesmen (such as do moving estimators) are designated as "consultants," deception may result.[1309]

If a seller calls himself a "consultant" or "counselor," a consumer might logically conclude, in view of the "financial independence" connotation of the terms, that the seller has no personal financial interest at stake, and consequently can be depended upon to provide objective, unbiased advice as to whether a hearing aid should be purchased. A number of comments have indicated that consumers are in fact likely to receive this impression.[1310] Mike Pasiewicz, a hearing-impaired consumer, agreed with this evaluation:

> I have always assumed that a consultant or counselor was a person who advised in a social manner for a fee. The use of the word "consultant" and/or "counselor," representing a salesman is very deceiving, especially in the hearing aid field. People who seek advice of what to do with their hearing loss are victimized by salesmen who use these titles.[1311]

1309 89 F.T.C 668, 668-670 (1970) (Advisory Opinion). Cf. Guide 7(b) for Private Vocational and Home Study Schools, 16 C.F.R § 254.7(b)(1977).

1310 Silverman, R8/7336; Bartels, R10/5621; ASHA, R10/1783. See also Hardick, R8/6855. Robert Beiter, Ph.D, testified that he believed that consumers would not know that sellers who identify themselves as counselors and consultants are actually sellers. Beiter, TR9074. This belief was corroborated by the results of a study conducted by Patricia Powers, of Utah State University. In response to the question "What does the title 'hearing counselor' mean to you?," only 26 of 139 respondents associated the title with persons who sell hearing aids or are hearing aid dealers. Fifty-six of the respondents associated the title with people who test hearing (16), prescribe hearing aids (14), are college-trained hearing professionals (19), or are ear doctors (7). Fifty-seven of the respondents answered "I don't know." Powers, R13/987. These findings suggest that few consumers realize that the seller who calls himself a "counselor" is in fact merely a sales representative.

1311 Pasiewicz, TR8911.

Arthur Peterson, another consumer, concurred:

> Hearing aid salesmen should identify themselves as sales representatives. They should not cover up with a title like "counselor."[1312]

The record evidence establishes that hearing-impaired consumers believe that people who are called "counselors" or "consultants" provide unbiased advice. It is true that section 440.5 of the Recommended Rule provides that hearing aid sellers must disclose in their advertising and sales presentations that they are in fact sellers. However, staff believes that hearing aid sellers should not be permitted to contradict such disclosures by deceptively referring to themselves as "counselors" or "consultants."[1313] The disclosure that one is a seller at the outset of a sales relationship is not enough to counteract the deceptive impression which the seller conveys each time he refers to himself as a "counselor" or "consultant." This is especially true when the name of the seller's organization (e.g., "hearing aid center") is used to make the disclosure of seller status.[1314]

Analysis of the evidence in the record leads staff to conclude, on balance, that the terms "counselor" and "consultant" are deceptive within the meaning of the Federal Trade Commission Act. Accordingly, staff recommends that hearing aid sellers be prohibited from using these terms, in advertising, sales presentations, or firm names, to refer to anyone in their organizations.[1315] In addition, staff recommends that sellers be prohibited from using

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1312 R10/5290. Mr. Peterson purchased a hearing aid from a salesperson who came to his home. The salesperson insisted that he was a "counselor," rather than a seller, and Mr. Peterson did not realize that he was in fact a seller until he "began to talk about my buying a hearing aid from him." Peterson, R10/5286-87.

1313 See Alpiner, R8/5434; ISHA, R10/4897. See also Morgan, TR9536; Beiter, TR9074.

1314 See Part Two, Section III.C, supra.

1315 The Presiding Officer agreed that hearing aid sellers should not be permitted to call themselves "counselors" or "consultants," because such terms misleadingly suggest that such persons are "expertly trained medical personnel." R9/Dlip174. Recommended Rule § 440.10.

similar terms that say or imply that anyone in their organizations can provide financially disinterested advice.[1316] In practice, staff believes that the latter provision will probably preclude the use of the term "consult" or any of its derivatives by hearing aid sellers, because it is difficult to think of a context in which any of the derivatives could be used without implying that financial disinterested advice is available. Staff does not believe that the latter provision will preclude the use of the term "counsel" and its derivatives in all contexts, however.[1317] For example, the following use of the term "counsel" is not intended to be prohibited: "If you have any difficulty adjusting to the aid, I will be glad to counsel you more about its use." On the other hand, the following example contains what staff believes to be a deceptive use of the term and would be prohibited: "John Smith, licensed by the state of Arizona, will be in Tuscon this week to counsel Arizona citizens in the Tuscon area about their hearing problems." The important consideration is whether the term is likely to convey the impression that the person who uses it or is described by it is capable of providing financial disinterested advice.

H. "Normal" or "Natural" Hearing

As previously demonstrated, no hearing aid on the market today can help people get their normal hearing back, help them hear as well as someone with normal hearing, or provide sounds that sound natural.[1318] Nevertheless, as the discussion in Part One has shown, ads for hearing aids frequently represent that the sounds heard through their product will be natural, or that their aid will help users hear as well as people with normal hearing.[1319] These claims are patently false and are therefore deceptive within the meaning of the FTC Act.

1316 Recommended Rule § 440.10.

1317 The Recommended Rule does, however, completely preclude use of the derivative "counselor" by any hearing aid seller.

1318 See Appendix F, Section IV.G, infra.

1319 See id.

Even worse are the claims that a hearing aid will restore or help restore normal hearing. As previously explained, hearing aids are amplifiers of sound and, as such, have no effect whatever on the restoration of hearing.[1320] Despite their obvious falsity, such claims are frequently found in ads and door-to-door sales pitches.[1321]

"Normal" or "natural" claims are all the more insidious due to their high probability of success in getting the consumer to buy an aid. As the Presiding Officer explained, very few hearing-impaired persons understand hearing aids and their limitations.[1322] Furthermore, such persons often find the fact of their hearing loss difficult to accept, and this makes them fairly easy prey for sellers who make exaggerated promises.[1323] However, we are not within sight of any remediation of any problem as complex as sensorineural hearing loss. Only regeneration of nerve tissue holds such a promise. There is no evidence in the record either of devices that produce normal or natural hearing or of research that is at all likely to produce such devices.

For all the above reasons, the need to regulate this type of claim is manifest. In response, the Proposed Rule included section 440.9(a), which prohibited representations that a hearing aid would "enable or help enable wearers to hear sounds normally or naturally," and section 440.9(b), which prohibited representations that a hearing aid would "reverse . . . the progression of hearing loss."[1324] These sections elicited a substantial number of comments, both favorable and unfavorable.

1320 See Appendix F, Section II.C.3, infra.

1321 See id., Section IV.G, infra.

1322 See P.O. Report, R9/Dlip151-152.

1323 See Part One, Sections II.G.1 and II.G.2, supra. Some hearing aids have been advertised as being "bionic." See, e.g., R8/4749. Indeed, the "bionic" super-heroes of several popular television shows suggest that it actually may be possible to provide hearing-impaired persons with normal or natural hearing.

1324 Proposed Rule §§ 440.9(a) & (b).

Claims that hearing aids will reverse the progression of hearing loss are so far from the truth that no comments, written or oral, are to be found in their defense. Two of the Rule's principal opponents, HAIC and NHAS, made no comment about Proposed Rule section 440.9(b), which also included a prohibition of claims that the aid will "halt" or "retard" hearing loss. Of course, the Proposed Rule provision had various supporters.[1325] Clearly, it requires no further argument to demonstrate that this restriction should remain in the Rule.

Equally devoid of support during the hearing and comment period were claims that hearing aids will enable users to hear naturally. The Proposed Rule provision prohibiting such claims had numerous advocates.[1326] HAIC "[did] not dispute that hearing aids will not restore normal or natural hearing,"[1327] and NHAS was silent on the point.

The only objection to sections 440.9(a) or 9(b) of the Proposed Rule concerned the ban in section 440.9(a) of statements that hearing aids will "help enable wearers to hear sounds normally or naturally." The argument against this subsection was that "the very purpose and key function of a hearing aid is to assist wearers to the fullest extent possible to hear sounds as normally and naturally as their hearing condition will permit."[1328] Industry members therefore contended that the Proposed Rule "would constitute a prohibition against truthful and accurate advertising representations."[1329]

The central weakness in industry's argument is that it ignores the ambiguity of the word "help." The 1976 American Heritage dictionary definition of "help" includes the following meanings: 1.a. "To give assistance to, to aid; . . . 4. To alleviate or cure. 6. To be able to prevent, change or rectify."[1330]

1325 E.g., Suty, R5/1257; Mastricola, R5/861; McCoy, R5/488; Zachman, R5/1804; Whitman, R5/1758; Brown, R6/300-301.

1326 E.g., ASHA, R10/1786-1787; Kasten, R10/67; Oberhand, R10/3414; RPAG, R8/2779.

1327 HAIC, R3/3963.

1328 Id.

1329 Id.; see Maico, R2/131; NHAS, R2/120; Zenith, R2/14; Radioear, R2/30.

1330 The American Heritage Dictionary of the English Language 613 (1976).

Even assuming that all advertisements for hearing aids are read by people who are completely unemotional in dealing with their hearing losses, the "rational hearing-impaired person," when confronted with an ad that states that a hearing aid will help restore normal hearing, may accurately read the ad to mean that the aid will give him all the assistance he needs, or that it will cure the impairment that prevents him from hearing normally, or that it will rectify his problem. There is no guarantee that the consumer will understand the claim in the restrictive sense suggested by industry members, i.e., that the hearing aid will help a little, but not necessarily much at all. In fact, it is likely that the word "help" will go completely unnoticed. It has already been demonstrated that the hearing impaired are not completely unmoved by their hearing loss. They are, on the whole, understandably upset and are searching for help.[1331] For this reason, they are very unlikely to examine the representations under discussion in the skeptical manner industry takes for granted.

Most important of all, anyone proposing a regulation in this area must reckon with the ingenuity of unscrupulous sellers. For example, RPAG volunteers encountered several sellers who represented that hearing aids would make their hearing "almost normal."[1332] Given today's technology, such a statement is a gross lie. Yet if the rule were to be written with the words "or help" stricken, a loophole permitting such representations would be created. Because these misrepresentations are extremely common, sound judgment dictates that such conduct be explicitly prohibited. The Presiding Officer's Report also favored the Proposed Rule provision.[1333]

For the above reasons, section 440.11 of the Recommended Rule includes all of the prohibitions contained in the Proposed Rule. Changes are only those of form or wording. The part of Proposed Rule section 440.9(b) that covered "restoration" of hearing is now part of section 440.11 of the Recommended Rule.

I. "Act Now"

The evidence in the record clearly establishes that no hearing aid is capable of arresting or retarding the progression of hearing loss.[1334] Nevertheless, numerous industry sales presentations and advertisements nationwide make such representations,[1335]

1331 See Part One, Section II.G.4, supra.

1332 RPAG, R8/2608.

1333 P.O. Report, R9/Dlip157.

1334 See Appendix F, Section IV.H, infra.

1335 See generally id.

and are consequently deceptive within the meaning of the FTC Act.[1336] Section 440.9(b) of the Proposed Rule dealt with this issue by prohibiting representations that hearing aids could reverse, halt or retard the progression of hearing loss. Industry representatives did not oppose the adoption of the prohibition, although a Radioear submission questioned whether it was "medically accurate."[1337] Consequently, section 440.12 of the Recommended Rule prohibits sellers from representing that any hearing aid can arrest or retard the progression of hearing loss.[1338] Unqualified representations such as "Act now before it's too late," "Delay may be harmful," and "I caught your loss just in time," are specifically listed in the Recomended Rule as examples of expressions which make the prohibited representation.

Section 440.9(b) of the Proposed Rule also provided that sellers could make properly qualified representations that consumers might have trouble adjusting to hearing aids if they got out of practice using their hearing. Roger Kasten, Ph.D., expressed the concern that in practice this "exemption" would permit sellers to scare prospective consumers into purchasing amplification immediately by warning them that unless they did so, they would "get out of practice."[1339] Staff has concluded that the Proposed Rule "proviso" should not be retained since staff believes this danger is a real one. Any seller who makes any representations that can reasonably be construed as falling within Section 440.12 of the Recommended Rule does so at his peril.[1340]

1336 The Presiding Officer also made such a finding. R9/Dlip160-61.

1337 Radioear, R2/31. No contra medical evidence was submitted, however.

1338 The Presiding Officer concluded that a prohibition of this sort "should go far toward preventing such [deceptive] representations." R9/Dlip160-61.

1339 Kasten, R10/66-67; see Silverman, R8/7338.

1340 In addition, Section 440.19 of the Recommended Rule requires sellers to possess and rely upon reliable proof in making certain representations. See Part Two, Section III.P, infra. This requirement should adequately cover the types of representations that some sellers might consider making in order to talk a prospect into buying an aid sooner rather than later.

J. Background Noise

It is clear from the record that no hearing aid can eliminate all unwanted background noise,[1341] although hearing aids equipped with telephone options can reduce airborne background noises when used with compatible telephones.[1342] Numerous advertisements and sales presentations nevertheless represent that the featured aids can eliminate unwanted background noise.[1343] Such representations are deceptive within the meaning of the FTC Act.

Section 440.9(m) of the Proposed Rule dealt with this issue by prohibiting representations that a hearing aid would eliminate all unwanted noise, and allowing valid claims that hearing aids equipped with telephone options can reduce background noise when used with compatible telephones.[1344] In opposing this provision, HAIC argued that "many hearing aids are capable of eliminating various forms of extraneous sounds or 'unwanted noise.'"[1345] Neither HAIC nor any other industry representative presented any evidence to support this proposition, however. HAIC argued further that some hearing aids can contribute to the elimination of unwanted background noise in noisy environments.[1346] HAIC suggested finally that if sellers were not permitted to advertise that hearing aids have this latter capability, they would be discouraged from developing and refining hearing aids with that sort of capability.[1347]

Since no hearing aid is capable of eliminating unwanted background noise, the first HAIC argument is not valid. The remainder of the HAIC arguments miss the point, because both the Proposed and Recommended Rule provisions (which are substantively

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1341 See P.O. Report R9/D1ip202. See generally Appendix F, Section IV.Q, infra.

1342 See generally Appendix F, Section V.C, infra; Pollack, SPXD/31.

1343 See generally Appendix F, Section IV.Q, infra. The Presiding Officer concluded that hearing aid advertisements often include such claims in order to "bait" consumers into making inquiries. R9/D1ip205.

1344 The Presiding Officer supported a prohibition of this type as a way of effectively prohibiting false and misleading advertising concerning noise-reducing capabilities. R9/D1ip205.

1345 HAIC, R2/73.

1346 Id. HAIC argued that directional microphones were particularly helpful in this regard.

1347 Id.

identical) would merely prohibit representations that particular hearing aids can eliminate unwanted background noise.[1348] Section 440.13 of the Recommended Rule would not prohibit properly supported and qualified representations that particular hearing aids can reduce unwanted background noise in some situations. This provision should encourage rather than discourage technological innovation. Hearing aids with better noise reduction capabilities will stand out in the crowd, because a "clutter" of deceptive claims in this area will not be present to distract consumer attention from legitimate representations.

K. "Features"

Section 440.9(e) of the Proposed Rule required that a variety of disclosures[1349] be made whenever a hearing aid seller represented that a hearing aid "possesses any general or specific feature or characteristic or embodies any concept or principle (hereinafter referred to as a "characteristic") . . . ." Although most comments were directed toward other aspects of section 440.9(e), NHAS argued that this definition of a "characteristic" is "obviously so broad that nothing about a hearing aid is excluded."[1350] This concern by NHAS was, of course, colored by its perception of the impossibility of substantiating representations about many characteristics under the stringent standards contained in the Proposed Rule.[1351] Changes incorporated into the substantiation requirements of the Rule

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1348 Cf. Proposed Rule § 440.9(m) with Recommended Rule § 440.13.

1349 Discussion of the required disclosures themselves, and of the substantiation needed to support the representations that trigger those disclosures, is reserved for the next five subsections of the Report.

1350 NHAS, R3/3615 (emphasis in original).

1351 That this is so is revealed by a reference to NHAS' argument concerning the definition of the term "characteristic":

> [D]rawn to its logical end, the word "hearing-aid" itself might describe a "characteristic" under the proposed rule. A seller may not represent that an item is a "hearing-aid" unless he possesses competent and reliable scientific or medical evidence which fully establishes that the item will significantly aid the hearing of a significant number of buyers.

Id. at 3615-16 (emphasis in original).

should mitigate these concerns to a large extent.[1352] Staff has concluded that the original definition of a "characteristic," which included physical characteristics such as color, was too all-encompassing. The Recommended Rule, in an effort to clarify the types of representations covered, refers to "features,"[1353] and specifically excludes from the disclosure and substantiation requirements of the rule any representations concerning "physical characteristics," such as the color and size of a hearing aid. Staff believes that the definitions contained in the Recommended Rule are now both clear and unobjectionable.[1354]

L. Explanation of Features

Section 440.9(e) of the Proposed Rule required that when a seller made a representation about any hearing aid characteristic:

(1) the characteristic be clearly and conspicuously disclosed;

(2) the characteristic provide "some significant benefit" to hearing aid wearers;

(3) the benefits to be derived be clearly and conspicuously disclosed;

(4) the conditions under which the benefits could be derived, or the types of hearing-impaired persons who could derive the benefits, be clearly and conspicuously disclosed; and

(5) there be adequate substantiation that a significant number of wearers would receive the significant benefits under the described conditions.[1355]

1352 See Part Two, Section III.P, infra.

1353 See Recommended Rule § 440.14.

1354 Because the record displays a broad spectrum of advertising representations that demand qualification, the scope of the definition is still broad. For example, the statement that a hearing aid is "custom fitted" is a representation concerning a hearing aid feature. However, compliance with the disclosure requirements of § 440.15 and the substantiation requirements § 440.19 will not be burdensome, and will provide valuable information to consumers.

1355 See Proposed Rule § 440.9(e)(1)-(5). The substantiation requirement will not be discussed further in this section. See Part Two, Section III.P, infra.

The evidence clearly indicates that hearing aid consumers have frequently been misled by unqualified representations concerning hearing aid features.[1356] As the Presiding Officer found:

> Advertising statements often note specific features or general characteristics of a brand-name product, . . . without disclosing the fact that the product may not be suitable for all types of hearing impairment or for one reason or another for all hearing-impaired individuals. Deception may be expected to occur in this area when consumers' ignorance is coupled with consumers' eager belief that the hearing aid with the characteristics they want is an instrument that will benefit all persons with hearing losses. . . .[1357]

Several criticisms were leveled at this section of the Rule. Aside from objections to the definition of "clear and conspicuous"[1358] and to the substantiation requirements,[1359] however, industry comments focused exclusively on the requirement that an advertised characteristic provide significant benefits to a significant number of consumers.[1360] In general, it was noted that the term "significant benefit" is "inherently ambiguous"[1361] because the benefits provided by amplification devices "cannot be quantified."[1362] While staff believes that such benefits can, indeed, be sufficiently quantified to satisfy a Commission rule, it has nevertheless concluded that the "significant benefit" requirement should be deleted from this section of the Rule.[1363] A requirement that sellers secure and maintain substantiation showing that each and every hearing aid feature about which a representation is made provides significant benefits to a significant number of consumers is

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1356 See Appendix F, Sections IV.J.& V.B.2, infra.

1357 P.O. Report, R9/Dlip75.

1358 See Part Two, Section III.B, supra.

1359 See Part Two, Section III.P, infra.

1360 See Zenith, R3/3389-90, 3412-14; NHAS, R3/3617-18; HAIC, R3/3965; Godown, R7/561-64.

1361 NHAS, R3/3617; see Zenith, R3/3414; HAIC, R3/3966.

1362 Zenith, R3/3389.

1363 The requirement has also been deleted from §§ 440.16 (comparative claims) and 440.17 (uniqueness claims) of the Recommended Rule.

unnecessary, in staff's view, to protect the hearing aid consumer,[1364] while proving to be burdensome to industry, in view of the requirements that are found in section 440.15 of the Recommended Rule. For similar reasons, staff further recommends deletion of the requirement that there be a disclosure of the conditions under which the described significant benefits can be attained.[1365]

In lieu of the disclosure provisions of section 440.9(e) of the Proposed Rule, the Recommended Rule requires that when representations are made concerning hearing aid capabilities or features, there must be a clear and conspicuous explanation of "what each capability or feature is and what good it will do for customers."[1366] These requirements are not burdensome, as evidenced by several ads in the record which substantially comply with the Recommended Rule.[1367] Moreover, the required disclosures will provide consumers with sufficient information to judge whether the advertised hearing aids have features that interest them. With respect to particular features, staff believes that the recommended disclosures are sufficient to apprise consumers

1364 Thus, staff disagrees with the Presiding Officer's conclusion regarding Proposed Rule § 440.9(e)(1)-(5). See P.O. Report, R9/D1ip176.

1365 It is important to note that, despite the claims of burdensomeness, staff believes that hearing aid advertisers could comply with the original requirements should the Commission choose to impose them.

1366 Recommended Rule § 440.15.

1367 For example, an ad for the Norelco 8275 states:

> FOR PATIENTS WITH MODERATE TO SEVERE HEARING LOSS COMBINED WITH PRONOUNCED RECRUITMENT. AN AID WITH--multi-adjustment compression with output control that now makes it possible for the patient to adjust the amplifier according to his comfort and tolerance needs.

Norelco Ad, R8/3973. Similarly, an ad for the Unitron B-500 states that its

> continuously adjustable directional microphone allows the user to hear better in a noisy environment. The user can change microphone focus to suit the situation. He or she can reduce background sounds and accept sounds from only one area.

Unitron Ad, HX15; see Danavox Ad, R10/2332 ("For conductive, mixed or perceptive hearing loss without recruitment up to 65 dB.").

of the fact that many hearing aids, and many features, will not be of benefit to them.[1368]

M. Comparisons

Section 440.9(e)(6) of the Proposed Rule provided that whenever a hearing aid characteristic was compared with a characteristic possessed by another hearing aid:

(1) there be a clear and conspicuous disclosure of the hearing aids being compared;

(2) there be a clear and conspicuous disclosure of the characteristics being compared;

(3) each characteristic being compared provide a "significantly greater benefit" than the characteristic of the brand or model with which it is compared; and

(4) there be adequate substantiation that the compared characteristic would provide the described significantly greater benefits.[1369]

The record demonstrates that consumers are misled by "dangling comparisons" and by claims that fail to provide sufficient information to enable consumers to evaluate the relevance and truthfulness of the comparisons being made.[1370] The Presiding Officer found that the consumer may, as a result

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1368 For example, a hearing aid consumer who does not have difficulty with loud sounds will know from an ad featuring a hearing aid's "superior ability to control uncomfortably loud noises" that the feature will not benefit him. The quoted language provides needed information to consumers and complies with the Rule's requirement that the ad disclose what good the feature will do for consumers.

1369 See Proposed Rule § 440.9(e)(6). The substantiation requirement will not be discussed further in this section. See Part Two, Section III.P, infra.

1370 See Appendix F, Section IV.L, infra.

> accept or be forced to accept the advertisement he sees and hears at face value or on faith, and accordingly he may also end up with a hearing aid that is no better than its competitors; no better even than the hearing aid he may already have been wearing; and possibly not even appropriate to his type of hearing loss.[1371]

Only two objections that are relevant here[1372] were raised with respect to this section. First, NHAS argued that any descriptive adjective applied to a hearing aid could be construed as a comparison.[1373] As an example, NHAS suggested that the term "small," when applied to a hearing aid, could be construed to mean smaller than others.[1374] Staff believes that this construction of the scope of the Rule is strained. The provision is clearly directed toward claims that actually make comparisons or fail to complete comparisons.[1375] Moreover, since the size of a hearing aid is not a "feature" under the Recommended Rule,[1376] the mere statement that a hearing aid is "small" raises no disclosure duties for advertisers.

The second objection, which was raised by several parties, concerned the "significantly greater benefit" requirement of the Proposed Rule.[1377] For the reasons already discussed with respect to the "explanation of features" section, staff has decided to delete this requirement from the section on comparative representations. Section 440.16 of the Recommended Rule requires only a clear statement of which features and hearing aids are being

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1371 P.O. Report, R9/D1ip180.

1372 Once again, objections to the "clear and conspicuous" definition and to the substantiation requirements were raised here. They are discussed elsewhere.

1373 NHAS, R3/3619.

1374 See id.

1375 This conclusion is not contradicted by inclusion in both the Proposed and Recommended Rules of the word "new" as an example of a comparison. The claim that a hearing aid is new is always, in staff's view, a claim that it is better than older aids.

1376 See Recommended Rule § 440.14.

1377 See Zenith, R3/3412-13; NHAS, R3/3620.

compared, and an explanation of what the compared feature enables one hearing aid to do that another cannot do.[1378] This disclosure is not unduly burdensome, but will enable consumers to determine whether the compared feature is one that could provide them with desired benefits.

N. "Unique," "Special" or "Revolutionary"

The record fully supports the Presiding Officer's conclusion that

> [h]earing instruments are advertised as . . . "unique," "special," or "revolutionary" even though they may have already been on the market for a substantial period of time and even though their . . . "unique" features may be shared by most or all of the other competing brands of hearing aids available.[1379]

The Presiding Officer further found that

> the consumer is apt to interpret these adjectives in true layman's terms, i.e., that the hearing aid is really something brand new--absolutely the latest "word" in very recent technological breakthroughs and, as such, is superior in its features to all other hearing aids then on the market . . . .[1380]

He believed that these factual findings justified adoption of section 440.9(f) of the Proposed Rule,[1381] which provided in part:

> [A] general or unqualified representation that a hearing aid is unique, revolutionary or

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1378 See Recommended Rule § 440.16.

1379 P.O. Report, R9/D1ip167; see Appendix F, Section IV.K, infra.

1380 P.O. Report, R9/D1ip168.

1381 Id.

> special will be deemed to be a comparison to all other hearing aid brands and models . . . .[1382]

Since the section on comparisons is incorporated by reference in this provision, objections to the former section would be relevant here. These objections, however, have already been considered, and appropriate changes have been made in the comparisons section of the Recommended Rule.[1383] The only additional criticism of the uniqueness provision is represented in the following comment by Zenith:

> Assuming substantiation of the claims of performance, the imposition of restrictions on freely advertising unique characteristics would prevent dissemination of information to the buyer. It is unlikely that the seller would have information on all hearing aids on the market to make comparisons. Of more importance the consumer would have little opportunity of access to all hearing aids

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1382 Proposed Rule § 440.9(f). The Proposed Rule also stated that

> a representation that a hearing aid is revolutionary or special will not be deemed to be a comparison to all other hearing aid brands and models if it is clearly and conspicuously disclosed that the comparison being made is to less than all other hearing aid brands and models.

Id. Staff has found no criticisms concerning this particular provision of the Rule, although objections were raised with respect to the section on comparisons. These latter comments have already been discussed. In any event, staff has broadened this proviso somewhat in the Recommended Rule by permitting limited uniqueness comparisons (e.g., "unique among bone-conduction aids"), if they are in compliance with the section on comparisons. See Recommended Rule § 440.17.

1383 See Part Two, Section III. M, supra.

> on the market. This discriminatory requirement will be an effective deterrent to advertising efficacious technical developments.[1384]

Staff believes that these contentions are without merit. The claim that the rule imposes restrictions on "freely advertising unique characteristics" is simply incorrect. The Recommended Rule merely requires that such claims be true. Since the statement that a hearing aid feature is "unique" conveys the meaning that it is different from all others,[1385] the Rule properly requires that such claims -- unless otherwise qualified [1386] -- be treated as comparisons with all other hearing aids and be substantiated as such. Likewise, the suggestion that consumers have "little opportunity of access to all hearing aids on the market" does not aid the argument. Indeed, it is precisely because of this fact that the Rule attempts to insure that only those hearing aid features which truly are alone in their class be advertised as "unique." Finally, the contention that it is "unlikely that the seller would have information on all hearing aids on the market to make comparisons" is specious. No seller should claim that a hearing aid is unique unless material provided by the manufacturer indicates that this is so. Since retail sellers can reasonably rely on such claims by a manufacturer,[1387] and since a manufacturer is--or should be--in a position to determine whether the advertised feature is unique on the market, the Rule does not impose unreasonable burdens upon industry members.

O. "Smaller"

The evidence in the record establishes that smaller hearing aids often have poorer performance capabilities than their larger counterparts.[1388] There is often a direct correlation between the size of an aid and its power, in part because smaller aids are more susceptible to feedback than larger aids.[1389] Moreover,

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1384 Zenith, R3/3413 (emphasis in original); see HAIC, R2/70-71.

1385 See, e.g., Schmitt, R4/447; McCargill, R5/51; Rezen, R5/170; Hanson, R5/457; Zerbe, R5/1110; Webster's New International Dictionary 2500 (3d ed. 1966)("unique").

1386 See note 1382, supra.

1387 See Recommended Rule § 440.19.

1388 See Appendix F, Section IV.M, infra

1389 Pollack, SPXB/33.

larger aids can generally provide better sound quality than smaller aids, because they can provide greater amplification at lower volume settings, and consequently avoid the sound distortion which usually develops when an aid must be operated at or near its maximum volume setting.[1390] In addition, larger hearing aids can reproduce larger segments of the frequency spectrum, and consequently can provide better sound fidelity than smaller aids.[1391]

The evidence in the record establishes that many hearing-impaired consumers are extremely interested in representations that particular hearing aids are smaller than others.[1392] The evidence also establishes that many hearing-impaired consumers assume or are led to believe that smaller aids will perform as well as their larger counterparts.[1393] In some instances, however, the featured aids provide substantially less power and/or poorer quality sound than the larger aids with which they are compared.[1394] It is important that consumers be informed of performance trade-offs of this magnitude, so that they will not unknowingly be led to purchase hearing aids which do not provide both adequate power and acceptable sound quality.[1395] Unfortunately, the hearing aid industry has generally failed to provide such information voluntarily. Numerous industry sales presentations and advertisements have represented that the featured aids are smaller than some or all other aids without mentioning the substantial performance trade-offs which may be involved.[1396] Such unqualified representations are deceptive within the meaning of the FTC Act.

1390 Id., at 51-52; see Teter, R13/2045.

1391 Sandlin & Krebs, R13/915-16; RPAG, R8/1188UUUU, 2828; Alpiner, SPXB/163. The Presiding Officer also found that "smaller" hearing aids sometimes provide poorer sound quality and less output over a more limited frequency range than the "larger" aids with which they are compared. R9/D1ip188-89.

1392 See Appendix F, Section IV.M, infra.

1393 See id.

1394 See id.

1395 See P. O. Report, R9/D1ip188-89.

1396 In view of the performance limitations of most smaller, hearing aids, it is inconceivable that none of the aids featured as "smaller" aids involve substantial performance trade-offs. See also Teter, R13/2045.

Section 440.9(g) of the Proposed Rule dealt with this issue by prohibiting comparisons based on size unless a) the quality and range of sounds produced by representative samples of the featured aids were substantially the same as the quality and range of sounds produced by representative samples of the aids with which the featured aids were being compared, or b) the sellers of the featured aids clearly and conspicuously disclosed that such was not the case.[1397] In opposing the adoption of this provision, industry representatives argued that it would effectively prohibit or seriously curtail representations that certain hearing aids are smaller than others,[1398] and consequently would eliminate a source of important information for potential purchasers.[1399] As a corollary to this argument, it was argued that if consumers are interested in obtaining unobtrusive hearing aids, sellers should not be "deterred" from mentioning the size of the aids they sell,[1400] and references to size should not be "cluttered with additional disclosures."[1401] These arguments are not supported by the record. Section 440.18 of the Recommended Rule would prohibit sellers from representing that particular hearing aids are smaller than others unless a) the featured aids provide about the same power and quality of sound as the aids with which they are compared, or b) the sellers reveal that such is not the case. Staff does not believe that the section would curtail the making of valid size comparisons, sinces performance disclosures would <u>only</u> be required <u>if</u> the power and/or sound quality provided by

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1397 The Presiding Officer expressed concern that the Proposed Rule provision only required disclosures concerning "trade-offs" of sound quality and range, but none concerning power trade-offs. R9/Dlip188-89. Section 440.18 of the Recommended Rule clarifies this ambiguity by requiring that appropriate disclosures concerning sound quality and power tradeoffs be made.

1398 HAIC, R2/71-72; Zenith, R3/3413; <u>see</u> Radioear, R2/31. <u>See generally</u> HAIC, R3/3968.

1399 HAIC, R2/71-72; Zenith, R2/15.

1400 HAIC, R2/71-72.

1401 Zenith, R3/3413.

the featured aids were significantly inferior to the power and/or sound quality provided by the aids with which they were compared. Consequently, sellers who have proof for their claims that the featured aids are not significantly inferior would not be limited at all regarding such comparisons,[1402] and consumers would not be deprived of whatever information they convey. While it is true that in some instances references to size would have to disclose performance limitations, without such disclosures the representations are deceptive.

HAIC argued that the potential buyer, upon responding to an advertisement, has the opportunity to "experience" wearing various hearing aids, and consequently to determine whether and to what extent differences in sound quality exist.[1403] Zenith argued that since, under the Proposed Rule, hearing aid buyers would have 30 days within which to evaluate the performance characteristics of purchased aids, unqualified representations concerning size would not injure them.[1404] HAIC's argument is not persuasive because the evidence establishes that under the present system consumers are often fitted by means of master hearing aids, rather than by trying a number of aids, and consequently do not even have a chance to try the aids they purchase until after they have paid for them.[1405] Moreover, even when a consumer is allowed to try several aids, it is unlikely that he will be able to determine that a particular aid is appropriate before he has a chance to test it under real-life conditions.[1406] While it is true that consumers would be entitled to return hearing aids within 30 days of purchase under the Recommended Rule, whenever a consumer made such a return, he would be compelled to forfeit substantial cancellation charges. Moreover, the evidence establishes that advertisements for smaller aids are sometimes used to "bait" potential customers into sellers' stores, where the sellers then "switch" them to more powerful aids.[1407] If size comparisons in advertising are qualified when necessary,

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1402 See Recommended Rule § 440.19; Part Two, Section III.P, infra.

1403 HAIC, R1/71-72.

1404 Zenith, R2/15.

1405 See Appendix F, Section III.C.1, infra.

1406 See Appendix F, Sections VI.B and VI.C, infra.

1407 Miller, R8/5824.

as the Recommended Rule section would require, it is unlikely that "bait and switch" tactics of this sort could be carried out successfully.

Section 440.18 of the Recommended Rule is designed to insure that size comparisons are properly qualified. Such qualifications may be required in a variety of circumstances. For example, if a particular hearing aid is smaller than another aid to which it is being compared, but cannot provide about as much power as the other aid, the seller of the featured aid would be prohibited from representing that the aid is smaller without also revealing that it is substantially less powerful. Similarly, an aid which produces substantially more distortion than the aid or aids with which it is compared could not be touted as "smaller" without disclosing the distortion trade-off. Required disclosures could be made by appropriately limiting the intended audience of the representation involved. For example, a size comparison addressed only to people with mild hearing losses would not violate section 440.18, as long as the featured aid were actually capable of providing amplification of about the same power and quality as that provided by all hearing aids designed to accommodate mild hearing losses. The important consideration is whether consumers will receive a correct impression of the performance limitations of the featured aids.

P. Proof for Claims

Several provisions of the Proposed Rule imposed substantiation requirements with respect to the claims discussed in the preceding four subsections of this Report. For example, with respect to all representations concerning hearing aid characteristics, the Proposed Rule required that the seller possess and rely upon "competent and reliable scientific or medical evidence which fully establishes that each benefit is significant and will be received by a significant number of buyers under the condition(s) disclosed. . . ."[1408] With respect to comparisons and uniqueness claims, the Proposed Rule required reliance upon similar evidence fully establishing "that each compared characteristic provides a significantly greater benefit than the benefit provided by the comparable hearing aid brand(s) and/or model(s). . . ."[1409] In the case of smallness claims, the

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1408 Proposed Rule § 440.9(e)(5).

1409 Id. § 440.9(e)(6)(iv).

Rule required reliance on the same type of evidence fully establishing "the relative quality and range of sounds produced by [the] hearing aids. . . ."[1410] Each of these substantiation requirements, however, contained the following proviso:

> [I]f a seller who is not a manufacturer determines prior to making a representation that the representation is contained in materials which he has received from the manufacturer, such seller shall not be liable for failure to possess and rely upon such evidence if such seller can establish that he neither knew nor had reason to know, nor upon reasonable inquiry could have known:
>
> (i) That the manufacturer did not possess such evidence; or
>
> (ii) That the representation could not be substantiated by such evidence; or
>
> (iii) That the representation was false.[1411]

Various portions of this Report have fully documented that false and unsubstantiated claims are often made concerning hearing aids.[1412] Thus, the need for a substantiation requirement is plain.[1413] Nevertheless, several arguments were raised against the provisions of the Proposed Rule. First, it was contended that the significance of the benefits provided by hearing aids

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1410 Id. § 440.9(g)(1). Staff's research has unearthed no criticism directed toward the substantiation requirement imposed by this section. As a result, the Recommended Rule provides: "You must have reliable proof that you trusted whenever you . . . say or imply that a hearing aid is smaller than others but provides about the same power and quality of sound." Recommended Rule § 440.19. This provision will not be discussed further.

1411 E.g., Proposed Rule § 440.9(e)(5). Staff found no comments directed toward this proviso. As a result, it has been carried forward in the Recommended Rule without substantive change.

1412 See generally Part One, Section III.F, supra, and Appendix F, Section IV.F-R & V.B, infra.

1413 Indeed, both Richard Fechheimer, who handles Beltone advertising, and Ruth Lesko, who handles ads for Radioear, testified that an advertiser should have a reasonable basis for every claim before it is made. Fechheimer, TR6993; Lesko, TR7199-7200.

cannot be measured or established by scientific or medical evidence.[1414] Changes in the Rule, which have already been discussed, render this point moot. Secondly, NHAS pointed out that some hearing aid features, such as the size or color of an aid, are not readily verifiable by scientific testing.[1415] The exception in section 440.14 of the Recommended Rule for "physical characteristics," however, should obviate any difficulties in this area.[1416] NHAS further argued, however, that representations concerning such matters as the "comfortableness" or "attractiveness" of a hearing aid cannot be proved by scientific or medical evidence.[1417] Staff has considered this contention in redrafting the rule. As a result, the Recommended Rule now requires that, when a seller makes claims concerning hearing aids, he "have reliable proof that [he] trusted" in making the claim.[1418] Of course, this provision will still require that scientific or medical claims be substantiated by scientific or medical evidence,[1419] in accordance with current Commission law.[1420] In other cases, however, this less explicit standard will properly permit manufacturer and seller reliance upon other types of proof in support of their advertising representations.[1421]

Finally, NHAS complained that "[t]he ad substantiation standards require sellers to undertake a tremendous financial burden in order to make any claim about a hearing aid."[1422]

1414 E.g., NHAS, R3/3622; HAIC, R3/3933-34; see Zenith, R3/3412-13.

1415 NHAS, R3/3614.

1416 Recommended Rule § 440.14.

1417 NHAS, R3/3614, 3622-23.

1418 Recommended Rule § 440.19.

1419 Both Richard Fechheimer and Ruth Lesko testified forcefully that they always require such substantiation for scientific or medical claims. Fechheimer, TR6993; Lesko, TR7200.

1420 See, e.g., In re National Dynamics Corp., 82 F.T.C. 488 (1973); In re Pfizer, Inc., 81 F.T.C. 23 (1972); cf. NHAS, R3/3613; HAIC, R3/3934.

1421 Such proof might consist of medical, scientific or technical literature, engineering data, and so on. See HAIC, R3/3935.

1422 NHAS, R3/3712; see HAIC, R3/3933.

Staff believes that this argument, raised the context of the "significant benefit" standard and themore burdensome substantiation requirements of the Proposed Rule, is no longer relevant. Under the Recommended Rule, only "reliable proof" of what an advertised feature "does for consumers" is necessary.[1423] Compliance with this provision will not be unduly burdensome. Further, the substantiation requirements contained in the Recommended Rule constitute the absolute minimum standards needed to assure truthful advertising in the hearing aid market.

Q. New Models or Features

The record convincingly demonstrates that hearing aid manufacturers and retailers claim that their products are "new" long after the products were placed on the market.[1424] It is also clear that consumers interpret the word "new" to mean "better"[1425] and that they often purchase hearing aids in reliance on "newness" representations.[1426] In an attempt to remedy such consumer deception, section 440.9(c) of the Proposed Rule stated:

> No seller shall represent that a hearing aid model or feature is new for a period greater than one year from the date on which it was first marketed in the United States.[1427]

1423 Recommended Rule § 440.19.

1424 See Appendix F, Section IV.I, infra.

1425 See, e.g., Lloyd Hearing Aid Corp., R3/140; Stahl, R3/3228; Moyer, R4/181; Stroup, R5/59; Shannon, R5/670; Michaelis, R5/945; Brown, R6/214.

1426 See Appendix F, Section IV.I, infra.

1427 Section 440.9(d) of the Proposed Rule provided:

> A seller shall maintain an adequate system for insuring that all advertising it prepares, approves, funds or disseminates is in compliance with § 440.9(c).

Since staff found no comments directed toward this provision, it has been included without change in the Recommended Rule and will not be discussed further.

Further, section 440.9(e)(6) of the Proposed Rule, which concerned comparative claims, made clear the fact that newness representations were inherently comparisons and must be substantiated as such.[1428] For the reasons discussed in this section of the Report, these provisions have been retained without substantive change in the Recommended Rule.[1429]

Most of the criticism leveled at section 440.9(c) of the Proposed Rule concerned the 1-year time limit on newness claims.[1430] In general, industry's contention that this time limit was too short[1431] was raised in two closely related ways. First, it was suggested that the Rule should recognize that new hearing aids may be introduced locally, regionally, and nationally at different times.[1432] Second, it was argued that the Rule should allow for a period of test marketing, which sometimes consumes several months, before the 1-year time limit begins to run.[1433] Neither of these arguments is persuasive.

Recognition of the fact that hearing aids may be introduced locally, regionally, and nationally at different times would sanction newness claims as long as the product is new to the particular marketing area. This suggestion was specifically considered and

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1428 See Proposed Rule § 440.9(e)(6). Arguments raised with respect to the provision on comparisons have already been considered. See Part Two, Section III.M, supra.

1429 Recommended Rule §§ 440.20, 440.16.

1430 NHAS correctly noted that the Proposed Rule contained no definition of the term "new" and that the Commission's Advisory Opinion No. 120, 71 F.T.C. 1729 (1967), defined the word to mean "either entirely new or . . . changed in a functionally significant and substantial respect." NHAS, R3/3605-06. Claiming that even such revolutionary developments as the transistor and integrated circuitry were introduced only gradually into hearing aids, NHAS argued that this definition is too stringent for the industry. Id. Staff disagrees with the assertion that the Commission's definition of what constitutes a "new" product cannot fairly be applied to the hearing aid industry. In any event, staff is clearly bound by Commission law on this matter.

1431 See e.g., Zenith, R3/3411; NHAS, R3/3605-10; HAIC, R3/3963-64. But see Lloyd Hearing Aid Corp., R3/140 (1 year "seems reasonable").

1432 Maico, R2/131; HAIC, R3/3964.

1433 Zenith, R3/3411 ("a few weeks to several months"); NHAS, R3/3609 ("three to six months").

rejected by the Commission in In re Mather Hearing Aid Distributors, Inc.[1434] Characterizing such a construction of the concept of newness as "strained,"[1435] the Commission concluded:

> In advertising "newness" the implication is that the product is new, i.e., "recently invented, discovered or developed," not that it is new to the marketing area. This latter construction is wholly unfounded and an order reflecting this construction retards full market disclosure of new products, thereby denying some consumers the prompt benefits of innovations.[1436]

The contention that there should be a test marketing period in addition to the 1-year time period provided by the Rule is equally unappealing. In Advisory Opinion No. 120, the Commission took the position that a product could be advertised as "new" for no longer than 6 months "unless exceptional circumstances warranting a period either shorter or longer than 6 months were shown to exist."[1437] In Advisory Opinion No. 146, the Commission announced that this 6-month time limit would not apply to a bona fide test marketing program, as long as the program covered no more than fifteen percent of the population and lasted no more than 6 months.[1438] This implicit recognition of 1 year as the outer limit for newness representations was reaffirmed in the Mather opinion. There, the Commission specifically stated that the hearing examiner's generalized 1-year limitation on newness claims was in conformity with both of its previous Advisory Opinions.[1439] Thus, section 440.20 of the Recommended Rule, which implicitly permits a test marketing program of up to 6 months in duration, grants needed flexibility to advertisers and is clearly in accordance with Commission law in this area. Moreover, numerous individuals commented that the time limit contained in the Proposed Rule was appropriate.[1440]

1434 78 F.T.C. 709 (1971).

1435 Id. at 736.

1436 Id. This also disposes of the contentions that a hearing aid can be called "new" as long as it is new to some customers, see Zenith, R3/3412, or until it is replaced by a later model, Mattingly, R3/739.

1437 71 F.T.C. 1729, 1730 (1967).

1438 72 F.T.C. 1049 (1967).

1439 78 F.T.C. at 735-36.

1440 E.g., Lloyd Hearing Aid Corp., R3/140; Selger, R5/815; Lovering, R5/1055; Wright, R5/1197; Suty, R5/1257; Kasten, R5/1439; Wooding, R5/1756.

Indeed, Richard Fechheimer, who is primarily responsible for Beltone's advertising program, testified that Beltone advertises hearing aid features as "new" for only 6 months to a year,[1441] and that it instructs its dealers not to use the word for more than 6 months.[1442] Staff has therefore concluded that the time limitation contained in the Recommended Rule is appropriate.[1443]

Finally, staff does not share the Presiding Officer's concern that the Rule may not assist consumers in understanding newness claims.[1444] Current Commission law, as already noted, prohibits the use of this term unless the product is at least "changed in a functionally significant and substantial respect."[1445] The Rule requires that such products be advertised as "new" for no more than 1 year. In addition, since the Rule further provides that newness claims are always deemed to be comparisons,[1446] any representation that a feature is "new" must also contain a disclosure of what this feature enables the advertised hearing aid to do that others cannot do. Staff believes that, through the interaction of these provisions, consumers will be significantly assisted in their efforts to understand and evaluate newness representations.

R. "Prescribe" and "Prescription"

The evidence in the record establishes that hearing aids cannot be prescribed as eyeglasses and drugs are prescribed.[1447] Many consumers nevertheless believe that hearing aids

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1441 Fechheimer, TR6996.

1442 Id. at 6996-97.

1443 Staff disagrees with Zenith's suggestion that a 1-year limit on newness representations "will deprive a large number of hearing aid users opportunities to be apprised of [technical developments]." Zenith, R3/3411-12. These developments can still be advertised; they simply cannot be described as "new." Cf. Fechheimer, TR6996/17.

1444 See P.O. Report, R9/Dlipl69.

1445 Advisory Opinion No. 120, 71 F.T.C. 1729 (1967).

1446 Recommended Rule § 440.16; see Part Two, Section III.M, supra.

1447 See Appendix F, Section IV.N, infra.

can be "prescribed" to virtually correct impaired hearing, just as eyeglasses can be prescribed to virtually correct defective vision.[1448] That belief is created or reinforced, of course, when hearing aid sellers represent that the aids they sell are "prescribed" and/or are "prescription hearing aids."[1449] Such representations have nevertheless been made in numerous industry advertisements and sales presentations,[1450] and are clearly deceptive within the meaning of the FTC Act.

Section 440.9(h) of the Proposed Rule dealt with this issue by prohibiting hearing aid sellers from using "prescribe," "prescription," or any other words or expressions of similar import. Numerous individuals from a variety of occupations supported the prohibition.[1451] In opposing the provision, industry representatives argued that flatly prohibiting sellers from using the "common" words "prescribe" and "prescription" would violate their first amendment right to freedom of speech.[1452] In addition, industry argued that the provision would prohibit sellers from, truthfully advising consumers that hearing aids could not be prescribed.[1453] Section 440.21 of the Recommended Rule avoids this problem by prohibiting sellers from saying or implying that a hearing aid is "prescribed" or is a "prescription hearing aid." Such representations, being deceptive, are not protected by the first amendment. In addition, section 440.21, would not prohibit the use of "prescribe" and "prescription" in nondeceptive contexts. Consequently, for example, hearing aid sellers would be permitted to tell their customers that hearing aids cannot be prescribed.

1448 See id.

1449 See id.

1450 See id.

1451 E.g., E. Steiner et al., R7/393; Heard, R7/375; Sandel, R6/178; Sherman, R6/174A; Zachman, R5/1805; L. Owen, R6/53; Pownell, R6/192; McSweeney, R6/261; Ahrens, R6/271; Samec, R6/269; Pippert, R7/377; Dorothy Brown, R7/183-84; Pies, R4/100B. Roy Brakebill and John Kenwood, two hearing aid dealers from Texas and Illinois, respectively, indicated that they did not believe that the term "prescription" should be used with respect to hearing aid fittings. Brakebill, R3/1618; Kenwood, TR9334-35.

1452 HAIC, R2/72, R3/3968; Zenith, R3/3414.

1453 HAIC, R3/3968; NHAS, R3/3630.

Zenith argued that the reference to "word(s) or expression(s) of similar import" made section 440.9(h) vague and imprecise.[1454] Section 440.21 of the Recommended Rule has eliminated that language, partially in response to this concern, although hearing aid sellers will still be prohibited from implying that their hearing aids are "prescription" hearing aids or can be "prescribed." In practice, staff believes that section 440.21 will effectively prohibit sellers from using the term "prescribed" or any of its derivatives to suggest that hearing aids are prescription devices. In some contexts, the section may also prohibit the use of other terms which convey the same impression.[1455]

After his review of the evidence, the Presiding Officer concluded that

> a hearing aid "prescription" today is not closely analogous to the more precise and usually highly effective medical prescription . . . [r]eferences to "prescribing" and "prescriptions" may mislead consumers into believing that a hearing aid can be fitted to precisely fit recommended specifications and that such an instrument can be expected to alleviate his particular handicap.[1456]

However, he expressed concern that at some time in the future it might be possible to make more precise recommendations with respect to the fitting of hearing aids, and that consequently the prohibition contained in section 440.9(h) of the Proposed Rule might be too "drastic" a step to take.[1457] If at some future time it becomes possible to fit hearing aids with sufficient precision to justify describing them as "prescription" instruments, interested parties could then petition the Commission for appropriate modification of section 440.21. Since hearing

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1454 Zenith, R3/3414.

1455 Some such statements would probably also violate § 440.11 of the Recommended Rule, which, in part, would prohibit sellers from implying that any hearing aid can enable anyone to hear as well as people with normal hearing. See Part Two, Section III.H, supra.

1456 P.O. Report, R9/D1ip194.

1457 Id. NHAS argued similarly that the term "prescription" should not be prohibited without qualification, because of the possibility that at some future time "prescription" fittings might become feasible. NHAS, R3/3630.

aids cannot presently be prescribed, and since hearing-impaired consumers are presently deceived by representations which suggest that hearing aids are prescription devices, staff believes that representations to that effect should be prohibited.[1458]

S. "CROS" Hearing Aids

As discussed in Appendix F,[1459] CROS and BICROS fittings basically involve the collection of sound by a microphone positioned near the poorer ear. The signal is then transmitted to the better ear by means of a wire (either in or on an eyeglass frame or carried behind the head through the hair) or by radiowave. The record contains evidence[1460] that representations about CROS aids promise consumers that such aids will enable them to hear out of ears that are almost totally deaf or have no usable hearing. Such representations are clearly deceptive.

Section 440.9(i) of the Proposed Rule prohibited representations that a CROS hearing aid enables the wearer to hear out of the ear from which the signal is being routed. Only one person commented about this provision. Barry Waas,[1461] a staff audiologist at a Veterans Hospital, asked that the section be amended by adding ". . . although a sense of sound orientation, direction, or localization from the ear (side) from which the signal being routed may be experienced." Such a claim would not be prohibited by the Proposed Rule or Section 440.22 of the Recommended Rule.[1462]

The Recommended Rule prohibits claims that any hearing aid allows persons to hear with or through the ear from which sound is routed. This is substantively identical to the Proposed Rule, but is rewritten in plain English format.

T. Bone-Conduction Hearing Aids

It is important to many hearing-impaired people that the hearing aids they wear be as inconspicuous as possible.[1463]

1458 Cf. Part Two, Section III.H, supra.

1459 See Appendix F, Section II.B.6, infra.

1460 See Appendix F, Section IV.O, infra.

1461 Waas, R5/697.

1462 Such a claim would still be covered by §§ 440.15 and 440.19 of the Recommended Rule, however.

1463 See generally Appendix F, Section IV.P, infra.

Since a bone-conduction aid does not require placing anything in either of the ears of its wearer,[1464] representations concerning bone-conduction aids are likely to be of considerable interest to the hearing impaired.[1465] Unfortunately, such aids are only appropriate for a very small percentage of the hearing-impaired population.[1466] The record establishes that some hearing aid industry advertisements and sales presentations for bone-conduction aids have nevertheless touted the featured aids without revealing that their use is inappropriate in the vast majority of cases.[1467] Such unqualified representations for a product of extremely limited usefulness are deceptive within the meaning of section 5 of the FTC Act.

Section 440.9(e)(4) of the Proposed Rule would have prohibited hearing aid sellers from making benefit claims concerning any hearing aid, such as a bone-conduction hearing aid, without clearly and conspicuously disclosing the "category or categories of hearing aid wearers by which each such disclosed benefit will be received." Industry comments concerning the provisions of section 440.9(e) have already been discussed,[1468] and consequently need not be restated here. Staff is unaware of anyone who opposed applying section 440.9(e) to representations concerning bone-conduction aids. While staff has determined not to make the provisions of Proposed Rule section 440.9(e)(4) applicable to all hearing aids,[1469] the record is nevertheless clear that such a requirement is necessary to prevent deception concerning bone-conduction hearing aids.[1470] Accordingly, section 440.23 of the Recommended Rule prohibits hearing aid sellers from saying or implying that bone condition hearing aids can help people without disclosing that very few people can benefit from them. All advertisements and sales presentations for bone-conduction aids should therefore include this disclosure.

1464 See id. at Section IV.P.4, infra.

1465 Id.

1466 Id. Representations touting bone-conduction aids often "bait" people into hearing aid sellers' offices, where they may be either fitted with an inappropriate bone-conduction aid or "switched" to another type of fitting. See id.

1467 See id.

1468 See generally Part Two, Sections III.K and III.L, supra.

1469 See the discussion found in Part Two, Section III.L, supra.

1470 See generally Appendix F, Section IV.P.4, infra.

U. "Invisible"

As demonstrated in Appendix F, no hearing aid is completely invisible or incapable of being detected.[1471] Nevertheless, advertisements for aids that cannot be noticed abound.[1472] It requires no argument to demonstrate that such representations are deceptive within the meaning of the FTC Act and are often unfair to consumers. As previously discussed in some detail, it is often difficult for the hard of hearing to adjust psychologically to wearing a hearing aid, and promises about using an aid that cannot be fulfilled can make the adjustment even more difficult.[1473] Such claims play upon the desire of many hearing-impaired persons to hide their hearing losses.[1474] Invisibility claims can also be the first step in a "bait-and-switch" operation.[1475] Therefore, the need for a regulatory provision directed at this practice is apparent.

In response to this need, the Proposed Rule prohibited representations that any hearing aid or part thereof was hidden or could not be seen, unless this was true, and then provided eleven examples of ways of making that representation.[1476] A similar provision was part of the 1953 and 1965 Trade Practice Rules.[1477] The prohibition can also be found in consent decrees.[1478] The Proposed Rule provision regarding invisibility received no unfavorable comment during either the hearings or the written comment period. HAIC, for example, did not even mention this provision in its written comments, although it criticized almost all other provisions of the Proposed Rule.[1479] In fact, a similar, though

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1471 See Appendix F, Section IV.P.2, infra. Bone-conduction aids incorporated into eyeglass temples are visible but not generally recognizable as hearing aids. Id.

1472 See id.

1473 See id. at Section IV.P.1, infra.

1474 See id.

1475 See id.

1476 See Proposed Rule at § 440.9(j).

1477 See R8/492, rule 7(a) and R8/479, rule 7(a), respectively.

1478 See, e.g., Sonotone Corporation, 56 F.T.C. 1101, 1104 (1960).

1479 HAIC, R3/3839-3996.

weaker, provision is part of both HAIC's and NHAS's Codes of Ethics.[1480] The logic of including this or a similar provision in the final Rule is compelling.

For the above reasons, staff continues to support a prohibition of false representations that a hearing aid cannot be seen. Accordingly, the Recommended Rule provision differs only in form from the Proposed Rule provision.[1481]

V. "Cordless"

As shown, in Appendix F, many ads for hearing aids have contained representations that no cords or wires are attached.[1482] Like the assertions that a hearing aid is "invisible," these claims appeal mainly to the desire of hearing-impaired persons to conceal their hearing losses.[1483] Unfortunately, most hearing aids so advertised contain tubes extending from the ear,[1484] and such tubes are noticeable, just as are wires or cords. "In-the-ear" aids contain no cords or wires, but the aids themselves are quite visible.[1485] Only bone-conduction aids are made without visible wires or tubes, but they are only useful for a small percentage of the hearing-impaired population.[1486] Ads that make "cordless" claims without disclosing the visibility of their other paraphernalia are obviously deceptive within the meaning of the FTC Act. There is a clear need for a regulatory provision directed at this practice.

In response to this need, the Proposed Rule prohibited false representations that hearing aids are cordless or wireless, as well as similar claims which are literally true but fail to disclose that plastic tubes or similar devices are visible.[1487]

1480 HAIC, R10/1868; NHAS, R10/1875.

1481 See Recommended Rule at § 440.24. The Presiding Officer similarly believed that a requirement such as that contained in Recommended Rule § 440.24 was necessary. R9/Dlip201-202.

1482 See Appendix F, Section IV.P.3, infra.

1483 See id.

1484 See id.

1485 See id.

1486 See discussion of bone-conduction aids at Appendix F, Sections II.B. & IV.P.4, infra, and at Part Two, Section III.T, supra.

1487 See § 440.9(k) of the Proposed Rule.

Similar provisions have appeared in the 1953 and 1965 Trade Practice Guides,[1488] and in consent decrees.[1489] This provision, like the one concerning invisibility, received several favorable comments[1490] and no unfavorable comments during either the hearings or the written comment period.[1491]

Accordingly, staff continues to support a prohibition of false or misleading representations that hearing aids contain no cords or wires. The Recommended Rule provision differs only in form from the Proposed Rule provision.[1492]

W. "No Button"

As discussed in Appendix F, claims that a hearing aid has no buttons appeal primarily to people who wish to hide their hearing disabilities.[1493] Advertising a hearing aid which has an earmold or plastic tip as having "no buttons" is clearly deceptive because the latter can be as visible as a button. Although such advertisements are seldom seen today, careful draftsmanship demands that they be prohibited along with the more usual "nothing-in-either-ear" ads, which in fact describe hearing aids that work through bone conduction and are suitable for only a small minority of hearing aid wearers.[1494] The need for a provision directed at flagrant advertising abuses of this type remains.

In response to this need, the Proposed Rule prohibited representations that hearing aids had "no buttons" if such representations were false or if the advertiser failed to disclose that use of the aids required an earmold or plastic tip to be placed in the ear.[1495] A similar provision was part of the 1953 and

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1488 See R8/492, rule 7(b), and R8/479-480, rule 7(b), respectively.

1489 See, e.g., Sonotone Corp., 56 F.T.C. 1101, 1104 (1960).

1490 Harford, R3/4718; ASHA, R10/1830-32; ISHA, R10/4903. See also Senate Report, 1962, R8/743-744; MPIRG, R8/1220.

1491 A possible exception is HAIC's general objection to clear and conspicuous disclosures, covered in Part Two, Section III.B, supra.

1492 See Recommended Rule at § 440.25. The Presiding Officer similarly believes that a requirement such as that contained in Recommended Rule § 440.25 was necessary. R9/Dlip201-202.

1493 See Appendix F, Section IV.P.4, infra.

1494 Ads for bone-conduction aids are regulated in Recommended Rule § 440.23. See Part Two, Section III.T, supra.

1495 See Proposed Rule § 440.9(1).

1965 Trade Practice Rules.[1496] Like the provisions concerning "invisible" and "cordless" hearing aids, it has appeared in consent decrees.[1497] There was practically no comment, favorable or unfavorable, directed at this section as written.[1498] In fact, the Proposed Rule provision was not discussed specifically in the Presiding Officer's Report, although it was generally recommended along with sections 440.9(j) and 9(k).[1499]

For the reasons set forth above, staff continues to recommend a prohibition of deceptive representations that a hearing aid has "No Buttons." Accordingly, the Recommended Rule provision differs only in form from the Proposed Rule provision.[1500]

X. "No Batteries"

As Appendix F reveals, batteries of one sort or another are the power source of all wearable hearing aids.[1501] However, the record contains a number of accounts of instances in which "no batteries" representations were made and a variety of advertisements which make "no batteries" claims.[1502]

In the Proposed Rule, "no batteries" representations were prohibited "unless the power source for such a hearing aid could be recharged from a household electric outlet."[1503] Comments about this provision suggested, however, that such an exemption was misleading.[1504] HAIC commented: "The fact is that whether a battery or any portable source for a hearing aid is rechargeable or not, it is still a battery. As a result, this provision of the

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1496 See R8/492 and R8/480, respectively.

1497 See, e.g., Sonotone Corp., 56 F.T.C. 1101, 1104 (1960).

1498 See HAIC's general objection to the "Clear and Conspicuous Disclosures" requirements, R3/3920-3933, discussed in Part Two, Section III.B, supra.

1499 R9/Dlip195-202.

1500 See Recommended Rule § 440.26.

1501 See Appendix F, Section IV.R, infra.

1502 Id.

1503 See Proposed Rule § 440.9(n).

1504 E.g., Shultz, R5/1305; Dolowitz, R5/1616; Rezen, R5/170; Lovering, R5/1055; Berger, R5/174; Graham, R8/7542; Sanders, R3/184-85; J. Brown, R6/214; Studebaker, R5/464; ISHA (Lankford), R10/4904.

Proposed Rule would actually endorse a deceptive representation."[1505] ASHA said "that the exemption granted in proposed section 440.9(n) with respect to rechargeable batteries is inappropriate. A rechargeable battery is still a 'battery' . . . . By allowing a 'no batteries' representation, the consumer may still be misled about the need to recharge the batteries. We recommend that the prohibition be applied uniformly unless the hearing aid does in fact operate without batteries."[1506]

Lloyd Hearing Aid Corporation commented that most consumers are not aware that those are really rechargeable batteries in "no battery" aids and that they must be recharged each night. They assume this aid is something new--no batteries to replace.[1507] Zenith commented that "within the normal terminology used in the field, rechargeable power sources are classified as batteries, and accordingly a hearing aid which operates without direct connection to an electrical outlet, operates with a battery."[1508] Donald Willett said, "A rechargeable cell is still a battery and should be called that. The discharge and recharge cycles should be spelled out."[1509] The Presiding Officer[1510] similarly regarded the Proposed Rule wording as opening a loophole for misrepresentations of hearing aids operable on rechargeable batteries. Therefore, the Recommended Rule prohibits <u>all</u> "no batteries" claims. In all other ways except for form, the Recommended Rule remains the same as the Proposed Rule.[1511]

Y. <u>Telephone Options</u>

As discussed in Appendix F, Section VI.D, many hearing aid wearers have difficulty using telephones because of the incompatability between many telephones operating in this country and hearing aids equipped with telephone options. Industry advertising featuring the telephone option seldom, if ever, provides information on the incompatability problem. Likewise, sellers

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1505 R3/3969.

1506 R10/1835.

1507 Lloyd, R3/140.

1508 Zenith, R2/15-16.

1509 Willett, R4/819.

1510 P.O. Report, R9/Dlip202.

1511 It should be noted that if a true "no battery" hearing aid is ever developed, the developer should petition the Commission in order that the particular device be allowed to be advertised as being "without batteries."

have similarly failed to discuss the incompatability problem with their customers. Clearly, the failure to disclose this material information in such circumstances is a violation of the FTC Act.

Section 440.11 of the Proposed Rule attempted to deal with this problem by prohibiting sellers from advertising that a hearing aid has a telephone option unless it was disclosed that the telephone option would not work with all telephones. The section also required the seller 1) to orally inform the consumer of the limitations in using the telephone option, including the fact that the option would not work with all telephones; and 2) to indicate to the consumer whether or not the telephone option would work with telephones in his area. If it would work on some, but not all, of the telephones in his trade area, the seller was required to indicate the types of telephones on which it would work. Under section 440.11(c) of the Proposed Rule, the seller would also have been required to inform the consumer of whether the percentage of telephones in the seller's trade area on which the telephone option will work was increasing, decreasing, or remaining about the same.

Several comments discussed the proposal in general. David Saks, President of the Organization for Use of the Telephone, voiced his support for the provisions: "We . . . feel that they address matters of vital importance to hearing aid consumers, matters that have not heretofore received adequate attention."[1512] Cyril Brickfield said, "Our Associations [AARP/NRTA] are in full support of this section."[1513] Betty Hamburger, on behalf of NCSC,[1514] ACO,[1515] Roger Kasten, Ph.D.,[1516] NCLD,[1517] and Judith Rassi[1518] also voiced their support for the proposal. Bud Freeman, a hearing aid seller, stated that the disclosure requirements of section 440.11 would be easy for him to comply with and should be made to the buyer.[1519] Wayne Staab, Ph.D., testifying on behalf of

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1512 Saks, R7/559.

1513 Brickfield, R7/463.

1514 Hamburger, R6/404.

1515 ACO, R5/1746.

1516 Kasten, R5/1440.

1517 NCLD, TR1912.

1518 Rassi, R8/5362.

1519 B. Freeman, R8/4048.

HAIC, said that he thought the proposed section was unnecessary, however.[1520]

HAIC commented that the disclosure that a hearing aid telephone option will not work on all phones "would be inaccurate as there are telephone options which work on all telephones. By requiring advertisements of telephone options to contain this affirmative disclosure the Proposed Rule would require an advertiser to convey to the consumer incorrect information."[1521] Donald Krebs, Ph.D., also stated that the required disclosure would not be correct in all cases. He said, "There is now a telephone option which is available to the hearing aid industry . . . that will work on all telephones."[1522] Neither HAIC nor Dr. Krebs offered any evidence in support of their claims, however, nor was evidence offered as to whether hearing aid manufacturers have been using the new coil.

Zenith said that any hearing aid will enable consumers to hear over the telephone, and that the disclosure is false and misleading because it suggests that only a telephone option will enable the hearing impaired to do so.[1523] Staff feels that Zenith's argument is facetious since the Rule never suggested this.

NCLD supported the disclosures, but urged the FTC to require them to be written as well as oral.[1524] David Saks and Cyril Brickfield also suggested that a written disclosure be made.[1525] Lloyd Hearing Aid Corporation commented that a ". . . seller should have on his fact sheet for each model with a telephone switch the information that this will not work with all telephones," adding that in ". . . the 30-day trial period, the consumer quickly finds out if it works on his."[1526]

Various comments were made suggesting that section 440.11(c) be deleted from the Rule. HAIC commented that such requirements

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1520 Staab, TR7041.

1521 HAIC, R3/3969.

1522 Krebs, TR11833. Zenith also mentions the "Near Field Telephone Apparatus for Hearing Aid Systems," a new technical development which provides special non-acoustic pickup in all telephones. R3/3420.

1523 Zenith, R3/3419-20.

1524 NCLD, R7/706.

1525 Saks, TR355; Brickfield, R7/1463.

1526 Lloyd, R3/141.

> would impose upon the seller the burden of obtaining statistical information which may not even be in the possession of the telephone company, and if it is, may be considered proprietary and not readily available to the seller. In imposing the burden of obtaining this information, the proposed rule will unnecessarily and unreasonably increase the cost to the seller of advertising telephone options. It must be seriously questioned whether the costs to the seller . . . are justified by the benefit that such detailed statistical information could possibly provide to the consumer.[1527]

NHAS added that "much of the information required . . . is not available from the telephone company."[1528] Others also expressed concern over the difficulty in obtaining the telephone company's cooperation due to rapid modifications of equipment among other reasons and varying telephone jurisdictions.[1529] Acknowledging that sellers will find it difficult to obtain the necessary information in some cases, Mr. Saks suggested that there "should be some mechanism by which the dealer can show good faith effort and make it possible for appropriate measures to be taken to obtain this information from the source."[1530]

Staff has considered all of these comments and recommended that the following provision be included as section 440.28 of the Recommended Rule:

> If your product has a phone option that does not work on all phones, do not advertise the option without clearly and conspicuously explaining that fact.
>
> Before a customer pays or signs up for a phone option that does not work on all phones, clearly and conspicuously explain the following two things:

1527 HAIC, R3/3870-71; accord, Zenith, R3/3421.

1528 NHAS, R3/3651. See also Fortner, TR2933; HAIC, R2/77.

1529 Nygren, R8/4941. Zenith said that the oral disclosure requirement "brings the seller under severe pressure and expense to make such disclosures a matter of record." Zenith, R3/3420.

1530 R7/559.

- whether the option will work on phones in your selling area

- which types of phones the option will work on.

The requirement contained in section 440.11(c)(3) of the Proposed Rule was not included in the Recommended Rule because sellers may have difficulty obtaining the needed information from the telephone company. It should be noted, however, that sellers may feel the need to keep reasonably well-informed about the incompatibility situation in their own selling areas, in order to be able to supply intelligent answers to the questions many consumers will voice once they are informed that some phones are incompatible.

Z. Soliciting Leads

The evidence discussed in Part One of this Report demonstrates that many hearing-impaired persons are subjected to an endless stream of advertisements and other lead generation techniques offering such things as free information on hearing, free hearing devices or hearing aid replicas, and free hearing tests.[1531] The record also shows that, too often, consumers are given no indication that a response to one of these ads will bring a hearing aid seller to their door unannounced.[1532]

Although no section of the Proposed Rule dealt directly with the concept of lead solicitation disclosures,[1533] Commission Question (w), published with the Proposed Rule, sought public comment on the need for such a provision.[1534] Several factors have now convinced staff of the need for a section requiring lead solicitation disclosures. First, it is clear that some hearing-impaired persons would not respond to hearing aid advertisements if they knew that a seller would later appear at their door or contact them for a sales visit appointment.[1535] In the absence of a "salesperson will call" type of disclosure, however, consumers do not have sufficient information to decide whether they wish to respond to an advertisement and thereby initiate contact with a hearing aid seller. Second, a large number of individuals who commented on the Proposed Rule stated that, in addition to requiring prior written consent to home sales visits,[1536] the Commission

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1531 See Part One, Sections III.E & IX.B, supra.

1532 See Part One, Sections IX.B & IX.C, supra.

1533 Section 440.8(a) of the Proposed Rule required all sellers to disclose their status as sellers when making any representations to the consuming public. This requirement, which has been retained in § 440.6 of the Recommended Rule, will only insure that consumers realize that they are dealing with a hearing aid seller. It will not, however, inform them that they will be contacted by the seller if they respond to an ad. For example, if an advertisement offers free information on hearing loss to those who respond, the § 440.6 requirement would be satisfied by the clear and conspicuous appearance of a title such as "Zenith Hearing Aid Sales Co."

1534 42 Fed. Reg. 26,653 (1975).

1535 See Part One, Sections IX.B & IX.C, supra. See also id. at Section IX.D. for a description of some of the tactics a hearing impaired person might be subjected to.

1536 See Proposed Rule § 440.7(b).

should also require advertisements to disclose that those who respond may be visited by a hearing aid seller.[1537] Since the requirement of prior written consent to home sales visits has been substantially limited in the Recommended Rule,[1538] staff believes that these comments suggesting a lead solicitation disclosure provision are entitled to great weight.[1539] Finally, even NHAS concedes that a lead solicitation disclosure requirement would "provide an adequate remedy for the problem of consumer unpreparedness."[1540]

In light of these factors, staff has added a new section to the Recommended Rule. Section 440.29 requires any seller who solicits the names or addresses of potential customers[1541] to disclose that a salesperson may contact such customers for an appointment.[1542] The Rule also provides that this disclosure need not be made if persons who respond to any advertisement will not be

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1537 See, e.g., Hardick, R5/577; Rose, R5/712; Harford, R5/856; Stephens, R5/1105; Wright, R5/1195; Egan, R5/1221; Beiter, R5/1453; Wehr, R6/340; Sullivan, R6/375; Chasen, R7/524.

1538 See Recommended Rule §§ 440.30, 440.31; Part Two, Sections III.AA & III.BB, infra.

1539 In addition, modification of the prior written consent requirement has thrown into doubt the validity of those relatively few comments suggesting that the requirement obviated the need for a lead solicitation disclosure. See, e.g., Shulman, R5/373; Compton, R5/408; Kinker, R5/484; Selger, R5/814; Zerbe, R5/1108.

1540 NHAS, R3/3590. NHAS suggests that this remedy, in conjunction with the 3-day "cooling-off" period, adequately solves the consumer unpreparedness problem, and that no additional remedies are needed in this area. Id. at 3589-90. As the next two subsections of this Report will make clear, staff disagrees with the NHAS analysis.

1541 This section would apply whether the seller solicits the names or addresses of potential customers through advertisements or through contact with friends, relatives, or ministers of the customers. For a discussion of such lead generation techniques, see Part One, Section IX.B, supra.

1542 The disclosure that the seller may contact potential customers for an appointment is designed to mesh with Recommended Rule § 440.30, which prohibits home sales visits without an appointment.

contacted by a seller.[1543] Staff believes that, in conjunction with sections 440.30 and 440.31 of the Recommended Rule,[1544] this provision will serve to protect consumers from unwanted sales encounters without disrupting the current delivery and service system of the hearing aid industry.

AA. Sales Visits

The record indicates that a large percentage of hearing aid sales are made in the consumer's home.[1545] It is also apparent that too many of these sales have occurred after a hearing aid seller appeared unannounced at the buyer's door and rapidly consummated a high-pressure sales transaction.[1546] Although some have suggested that the Commission ban in-home hearing aid sales altogether,[1547] the Proposed Rule merely sought to insure that consumers would be mentally and emotionally prepared for such sales presentations. Section 440.7(b) of the Proposed Rule stated:

> No seller shall visit the home or place of business of a potential buyer for the purpose of inducing a sale without having obtained, prior to any such visit, the express written consent of such potential buyer to such a visit. Such consent shall clearly and conspicuously state that such potential buyer is aware that the seller may attempt to sell a hearing aid during such a visit.

Comments concerning this provision were varied. The Presiding Officer lent his support to section 440.7(b) and noted:

> [I]f the consumer is aware that a hearing aid salesman will be calling at a specific time, it will allow him to be mentally prepared

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1543 Id. § 440.29. The Rule requires, however, that sellers maintain a system to insure that the names and addresses generated by such advertisements will not, in fact, be used to contact the respondents. Id.

1544 These provisions, which govern sales and services of hearing aids in the home, are considered in the next two subsections of the Report.

1545 See Part One, Section IX.C, supra.

1546 See Part One, Section IX.C, supra. See also Part One, Section IX.D, supra.

1547 See, e.g., Gannaway, R5/558; Hull, R5/1398; Hamburger, R6/403-05; NCLD, R7/698.

> to better evaluate what the salesman has to tell him and to make more reasoned decisions than he might ordinarily make on the spot, following an unexpected high-pressure sales presentation.[1548]

In addition, a very large number of individuals expressed strong support for the provision.[1549] Indeed, more than a few hearing aid sellers favored this section.[1550] Staff therefore believes that the principle underlying the Rule, as expressed by the Presiding Officer, has been thoroughly substantiated by the record in this proceeding. Nevertheless, a review of criticisms directed toward section 440.7(b) has persuaded staff that its scope was less than clear and that its requirement of written consent was unduly burdensome.

Although a large number of individuals expressed general opposition to this section of the Proposed Rule,[1551] relatively few offered specific criticisms or suggestions. Some contended that a written consent requirement would be burdensome for the elderly hearing impaired, many of whom have difficulty writing.[1552] It was further pointed out that even a consumer who called a seller and informed him of a desire to purchase an aid would be required to send in a written consent to a home sales visit.[1553] Although staff believes that such persons would be likely to send in a written consent form, the requirement seems unnecessary in these

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1548 P.O. Report, R9/D1ip78.

1549 See, e.g., Shannon, R5/667-68; Rose, R5/712; Harford, R5/856; Ruben, R5/1253; Kasten, R5/1437; ACO, R5/1793; Brown, R6/298; Sullivan, R6/1437; Skevington, R7/387; Brickfield, R7/461.

1550 See, e.g., Colongo, R3/204; Fennema, R3/213; Schaefer, R3/238; Donnelly, R3/266; Patrick, R3/1097; Brakebill, R3/1618; Roland, R4/551; B. Freeman, R8/4047.

1551 See, e.g., Singer, R3/129; Snuffer, R3/207; Rabinowitz, R3/224; Caprara, R3/247; Knapp, R3/258; Durbin, R3/1649; Kahmann, R3/2044; Kojis, R3/2170; Uffman, R6/58; Herrick, R6/151. It is fair to note, however, that many of those who opposed this provision were under the erroneous impression that the Rule would prohibit any in-home hearing aid sales. See, e.g., Jones, R3/1401; Moorecroft, R3/1462; Goebel, R3/1589; Kirshner, R3/1603; Perna, R3/2207.

1552 See, e.g., Saad, R3/2186; LeBlanc, R3/2802; Campbell, R3/2990; Amann, R3/3252; L. Anthony, R5/1371; Levy, R6/22.

1553 E.g., Knox, R3/1448; Levy, R6/22; see T. Sanders, R3/184; HAIC, R3/3939.

cases. Obviously, anyone who orally requests a hearing aid seller to visit him in his home realizes that a sales presentation will be forthcoming. In light of these comments, staff has concluded that it is unnecessary and may be undesirable to require that consents to home sales visits be in writing. Section 440.30 of the Recommended Rule reflects this conclusion.

Staff has not, however, abandoned the requirement that there be a consent to a home sales visit and that such consent occur prior to the visit. It was suggested by some that "[b]ecause of the psychology of the hard of hearing, [the Proposed Rule] would eliminate nearly all in-home sales of hearing aids."[1554] This gloomy prediction is simply inaccurate in light of the fact that oral consent is permitted by the Recommended Rule. Section 440.30 merely requires that the seller have an appointment in advance of any sales visit to the home.[1555] This requirement, which fully satisfies the need to apprise consumers of impending sales visits, places the most miniscule of burdens upon hearing aid sellers.[1556] Indeed, there is evidence that the practice of securing appointments in advance of any home sales visits is already being followed by many hearing aid sellers.[1557]

1554 Better Hearing Institute, R7/490; accord, Norvell, R3/1326-27; West, R5/338; McClory, R6/206; Cato, R6/412.

1555 The distinction between a sales visit and a service call is discussed in the next subsection of this Report.

1556 Many sellers pointed out that they regularly travel great distances to hold "service centers" for all customers in a given locale. Customers who go to the location of the service center often ask the sellers to call on friends or relatives who have hearing problems. See, e.g., Bishop, R3/278; Pulliam, R3/879; Helton, R3/2827; Dunn, R3/3221; cf. Singer, R3/129; Harper, R3/1209; Lentz, R5/1286. Under the Recommended Rule, a mere phone call to the hearing-impaired person, suggesting a sales visit either that same day or during the seller's next service trip to the area, would be permissible.

1557 See, e.g., Campagna, TR2601; Giglia, TR2753-54; Tremmel, TR8355; Lucenay, R3/1389; Willett, R6/399; Borst, R8/1955. The record also contains several lead solicitation forms that invite consumers to mail in a card asking for a sales visit appointment. See, e.g., Kojis, R8/D364; Beltone Hearing Aid Service, PX3.

A number of objections were raised with respect to who should be able to consent to a home sales visit. Some individuals contended that only the prospective hearing aid wearer's consent should be permitted.[1558] Relatedly, it was suggested that nursing home administrators and others in similar positions should not be permitted to consent to home sales visits to elderly persons who are in their care.[1559] Industry members, on the other hand, have argued that a hearing aid seller should be permitted to call on "consumers about whom the seller has received a good faith, reliable 'lead' from a concerned friend, relative or neighbor."[1560] In an effort to permit flexibility while preventing abuse, staff recommends a position that falls between these extremes. Thus, section 440.30 permits appointments to be made with the "potential buyer," the "consumer," or someone who lives with the consumer.[1561] Potential buyers are included because the person who actually pays for a hearing aid is not always the ultimate wearer. For example, if a son wishes to purchase a hearing aid for his father, the purpose of the Rule is fully satisfied if the son himself makes an appointment for a hearing aid seller to visit his father.[1562] It is also obvious that the need for advance warning of a sales visit is met if the

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1558 E.g., Reilly, R5/1269. But see Nelson, R6/381 (suggesting that consent by a member of the immediate family should be permitted).

1559 See, e.g., Traynor, R5/867; Paschell, R7/445.

1560 NHAS, R3/3587; see, e.g., Harper, R3/1209; LeBlanc, R3/2802; Brewster, R3/3130; Beltone, R3/3440.

1561 Recommended Rule § 440.30. The Rule also requires an appointment for any sales visit to the customer's place of business.

1562 See Fishbein, R3/1715; Beltone, R3/3440. This provision would also permit sales visit appointments to be made for nursing home residents by nursing home administrators who are responsible for the expenses of such residents.

consumer himself--the person to whom a sales presentation may be made--agrees to an appointment. Section 440.30, however, further permits someone who lives with the consumer to make an appointment for a sales visit. This clause is designed to provide the flexibility sought by industry. Staff recognizes that some hearing-impaired persons who might benefit from a properly fitted aid are reluctant to take the necessary first step of initiating contact with a seller.[1563] In such cases, it seems appropriate for a family member who lives in the consumer's home to initiate such contact with a seller.[1564] These persons would clearly have the legal authority to invite a hearing aid seller or anyone else into their homes. Moreover, because of their close relationship with the consumer, these persons are most likely to recognize the existence of the consumer's hearing impairment and the need for some type of remedial action. Staff has therefore concluded that such persons should be permitted to make appointments for sales visits to their own homes on behalf of potential consumers who live with them.[1565]

Finally, a number of individuals contended that there was no need for section 440.7(b) of the Proposed Rule in light of other remedies currently available to the Commission[1566] or contained in the Proposed Rule.[1567] In all, five different remedies have been

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1563 See Part One, Section II.G.1, supra.

1564 It is important to note, however, that the Recommended Rule requires sellers to keep a record indicating the name and address of the person who agreed to the appointment, the date the seller spoke with that person, and the date of the appointment. These records should substantially ease enforcement of the Rule.

1565 Thus, despite industry protestations, the Recommended Rule will not permit sellers to make unannounced home sales visits based solely on the request of a neighbor or friend of the hearing-impaired person. Although such requests are undoubtedly well-intentioned, it is unlikely that the consumer will be notified in advance that a hearing aid seller intends to call on him.

1566 The currently available remedies which some have suggested would obviate the need for § 440.30 are a lead solicitation disclosure requirement, see NHAS, R3/3589-90; Newby, R5/428-29; and the 3-day Cooling-Off Rule, see, e.g., Schevtzow, R3/1294; Glasgow, R3/1392; Beltone, R3/3438; NHAS, R3/3589; HAIC, R3/3936; O'Brecht, R7/548-49.

1567 These proposed remedies include the required disclosure of seller status, see Benedict, R6/311; Takei, R6/317; and the 30-day right to cancel, see, e.g., Sauls, R3/1684; Harmon, R3/2930; Wood, R3/2945; Metcalfe, R3/3002; Sandel, R6/178; Delaney, R6/215.

discussed in these comments: (1) the requirement of a lead solicitation disclosure;[1568] (2) the requirement that hearing aid sellers disclose their status as sellers;[1569] (3) the requirement of prior consent to a sales visit;[1570] (4) the refund requirement imposed by the Commission's 3-day "cooling-off" rule;[1571] and (5) the 30-day right to cancel provision.[1572]

Staff believes that each of these remedies performs a separate and distinct consumer protection function. The lead solicitation disclosure merely informs consumers that their response to an advertisement will initiate contact with a seller. It thus permits consumers to make an informed decision that they wish to initiate such contact, rather than inadvertently making the decision by responding to an ad that does not contain such a disclosure. The requirement that sellers disclose their status as sellers only serves to prevent consumer deception concerning the commercial interests of sellers. It ensures that an individual who responds to an ad or discusses his hearing problem with a seller will know that he is dealing with someone who will benefit financially from the sale of a hearing aid.

The requirement that sellers have appointments for home sales visits is quite different. As a result of this provision, consumers will be informed of the fact that a sales visit is impending and of its approximate timing. Section 440.30 is thus designed to ensure that in-home purchasers, rather than being surprised by unannounced sales visits, will have time to prepare themselves mentally and emotionally for a hearing aid sales presentation.

Lastly, the Cooling-Off Rule and the right to cancel are distinct, after-the-fact remedies. The Cooling-Off Rule provides in-home purchases with an absolute right to rescind a hearing aid sale within 3 business days of the sale. This provision remains applicable under the Recommended Rule and will undoubtedly be utilized by some consumers.[1573] It does not, however, in any way

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1568 Recommended Rule § 440.29.

1569 Id. § 440.7.

1570 Id. § 440.30.

1571 16 C.F.R. Part 429 (1977).

1572 Recommended Rule § 440.36; see id. §§ 440.37-.47.

1573 See id. § 440.51(d); Part Two, Section III.KK.1, infra.

prevent surprise sales visits to the homes of hearing-impaired persons.[1574] Nor does the 30-day right to cancel obviate the need for appointments for home sales. Consumers who cancel will forfeit a significant sum of money in the form of cancellation charges. Such a forfeiture is unjustified in instances where the consumer would have chosen at the outset not to allow a home sales visit, if that choice had clearly been made available.

For all of the foregoing reasons, staff has concluded that section 440.30 of the Recommended Rule should be adopted.

BB. Service Calls

Section 440.7(b) of the Proposed Rule required a seller to obtain the prior consent of a potential buyer whenever the seller visited the buyer's home or place of business "for the purpose of inducing a sale."[1575] Although this provision was never intended to impede bona fide service calls to the homes of current customers, a great many consumers[1576] and sellers[1577]

1574 In fact, the great deference that is typically accorded to hearing aid sellers by consumers, see Part One, Sections II.F & II.G.3, supra, coupled with the reluctance of such consumers to complain when they have been treated unfairly, see Part One, Section III.F, supra, and Appendix F, Section VII.B, infra, make it unlikely that many hearing aid purchasers would exercise the cooling-off right. Thus, even if the Cooling-Off Rule were designed to serve the same purpose as the prior consent provision, staff believes that the special attributes of the hearing-impaired population would render it an ineffective remedy in many cases.

1575 Proposed Rule § 440.7(b).

1576 Section 11 of the record contains numerous letters from consumers who were obviously fearful that in-home service visits by sellers would not be permissible under the Proposed Rule. The fears expressed in these letters, however, were clearly stimulated by industry scare tactics. See Appendix F, Section VII.I.5, infra.

1577 See, e.g., McCray, R3/772; Amann, R3/3252; NHAS, R3/3586; West, R5/338; Lentz, R5/1286; McClory, R6/206.

apparently felt that it would have that effect. Concern was particularly expressed by sellers, who noted that ordinary service calls often result in the sale of a replacement hearing aid.[1578] Some sellers were under the erroneous impression that the requirement of prior consent to a sales visit would apply in such cases.[1579]

Despite staff's belief that the scope of the Proposed Rule was reasonably clear, the Recommended Rule contains a separate provision designed to put to rest any fears that service calls will be subject to the prior consent requirement. Section 440.31 of the Recommended Rule explicitly sanctions service calls to the home or place of business of a "current customer" without an appointment. The Rule however, provides that "if you plan to sell the customer a hearing aid, it is a sales visit and you must follow the rule on sales visits."[1580] The section is thus designed to permit sellers to make service visits to the homes of customers with whom they have an ongoing relationship, as long as the visit is a bona fide service call. For example, if a seller regularly visits the home of a certain customer to deliver batteries and check the customer's aid, the visit can be made without satisfying the prior consent requirement.[1581] This would be true even if, on a given visit, the seller discovers that the customer's aid is not repairable and the purchase of a new aid is recommended. On the other hand, if a seller regularly calls on customers whose aids are 2 years old in an effort to determine whether purchase of a new aid is desired, the seller must have an appointment for the visit. Similarly, if a seller wishes to visit one or more of his current customers to demonstrate the benefits of a new model, an appointment must be made. In these latter two cases, the consumer has no notice that either a visit or a sales presentation is impending. Since the seller knows, in both cases, that the ultimate purpose of his visit is "to sell the customer a hearing aid," an appointment is properly required.

1578 E.g., NHAS, R3/3586; HAIC, R3/3937-38.

1579 See, e.g., T. Sanders, R3/184; Jones, R3/873; Zenith, R3/3407-08.

1580 Recommended Rule § 440.31.

1581 If the customer called the seller and asked him to make a service call, the seller would also be exempt from the prior appointment provision.

Staff believes that section 440.31 of the Recommended Rule embodies a carefully tailored exception to section 440.30. These two provisions, along with the lead solicitation disclosure required by section 440.29, secure ample protection for consumers in the area of home sales practices. At the same time, they sanction the flexible hearing aid delivery and service system desired by consumers and sellers alike. Staff therefore recommends the adoption of all three sections of the Recommended Rule.

CC. Testing Devices and Demonstrations

It was demonstrated in Part One that hearing aid sellers have often misled consumers with respect to the performance they should expect from hearing aids which they purchase.[1582] Either through explicit representations or through failure to correct a false impression, many sellers permit consumers to believe that the aids they purchase will provide hearing benefits identical or similar to those the consumers experience using a "master" hearing aid.[1583] Since wearable hearing aids cannot and do not duplicate the performance of a master aid, especially when used in the real world as compared to the relatively quiet testing situation,[1584] these explicit or implicit representations are deceptive within the meaning of section 5 of the FTC Act.[1585]

The Proposed Rule contained a prohibition against the use of devices "to demonstrate the performance which a consumer can expect from a hearing aid, when the performance of [that] device differs" materially from the performance of a hearing aid.[1586] Opponents of this provision roundly interpreted it as

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1582 See Part One, Section IX.D.3.c, supra.

1583 See notes 913-921 supra and the accompanying text for examples of how sellers of hearing aids have explicitly or implicitly misrepresented their performance on the basis of master hearing aid performance.

1584 See Appendix F, Sections VI.E, & VI.D.2.b, infra; Briskey, TR7288-89; Noffsinger, R8/5408, for a discussion of why master hearing aids duplicate sounds in a very different way from the way that sound is duplicated by hearing aids in general.

1585 It should be noted that the Commission regards as deceptive the undisclosed use of materials, props, tests, or experiments which help to create an impression of a product which does not reflect the actual benefits and/or limitations of the product. This Commission position was endorsed by the Supreme Court in FTC v. Colgate-Palmolive Co., 380 U.S. 374 (1965).

1586 Proposed Rule § 440.7(a) (emphasis added).

a broad prohibition against the use of master hearing aids.[1587] They contended that master hearing aids were not utilized by sellers to demonstrate the performance level that could be expected from regular aids, but were used, instead, to determine the capability of a consumer to improve his hearing through electronic amplification.[1588] They argued, therefore, that the section 440.7(a) prohibition was unreasonable and unnecessary.[1589]

To support its argument that section 440.7(a) was unreasonable and unnecessary NHAS took the position that the facts failed to demonstrate that unfair or deceptive practices had occurred as a result of utilization of master hearing aids.[1590] Based on its perception of the facts, NHAS argued that no reasonable relationship existed between the section 440.7(a) prohibition and alleged unfair or deceptive practices in the use of master hearing aids. NHAS did qualify this absolute position later in its comments by stating that "the proper use" of a testing device would not have the effect of misleading consumers.[1591] Presumably then, in NHAS's opinion, "the improper use" of testing devices could have the effect of misleading consumers.

Although HAIC, Beltone, and Zenith did not take the position that the facts failed to demonstrate that unfair or deceptive practices had occurred with respect to the use of master hearing aids, they did argue that section 440.7(a) was not an appropriate vehicle to address the Commission's concern that misrepresentations with respect to master hearing aids should not occur.[1592] While all three of these opponents of section 440.7(a) recognized that the Commission's legitimate concern was with misrepresentations,

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1587 See, e.g., HAIC, R3/3957; NHAS, R3/3584; Beltone, R3/3451; Zenith, R3/3407.

1588 HAIC, R3/3957; NHAS, R3/3584; cf. Beltone, R3/3451; Zenith, R3/3407.

1589 Id.

1590 R3/3583-84.

1591 Id. at 3584.

1592 See HAIC, R3/3957; Beltone, R3/3451; Zenith, R3/3407. HAIC and Zenith concluded that section 440.7(a) should be deleted because it was unreasonably broad. Beltone suggested a prohibition against misrepresentations in connection with the use of master hearing aids, if the record supported such a prohibition. None of these comments conceded that section 440.7(a) embodied this prohibition without embodying as well a much broader prohibition against use of master hearing aids.

they refused to accord section 440.7(a) its clear intent as a prohibition of misleading demonstrations. Instead they construed it as a broad prohibition on the use of master hearing aids.[1593]

Section 440.32 of the Recommended Rule embodies the prohibition against misrepresentations and deceptive practices in the use of testing devices that was intended by section 440.7(a). This section of the Recommended Rule very clearly prohibits sellers from stating or implying that a hearing aid will provide the same kind of performance as a testing device, if there are material differences in performance between the two performances, and in no sense can be construed as a prohibition against the use of master hearing aids. The Recommended Rule merely requires that sellers refrain from saying or implying through the use of testing devices that purchased hearing aids used under ordinary circumstances will provide results that differ noticeably from what they in fact will provide. With respect to the objection raised by NHAS that the facts fail to show that unfair or deceptive practices have occurred in the use of master hearing aids, staff believes the record fully documents the misuse of testing devices by some hearing aid sellers.[1594]

Proponents of section 440.7(a) of the Proposed Rule contended that it will provide a necessary protection for consumers against the deceptive use of testing devices.[1595] Interestingly enough, these proponents did not interpret this provision as a blanket prohibition against the use of master hearing aids.[1596] Rather, they recognized its focus on the method and/or manner of use of such devices as the significant concern. Since the Recommended Rule provision very explicitly focuses on the manner of use of these testing devices, it accomplishes precisely those goals endorsed by proponents of the Proposed Rule.

It should be recognized that virtually any testing device can be used to create inaccurate expectations in potential buyers.

1593 Id.

1594 See Part One, Section IX.D.3.c, supra.

1595 ASHA, R10/1760; cf. Lankford, R10/4892; Tyszka, R8/5657.

1596 For example, ASHA specifically pointed out that adoption of this provision "will not prevent sellers from using such devices in selecting appropriate hearing aids . . ." ASHA, R10/1760. Dr. Lankford commented that testing devices should not be used to demonstrate "the performance a consumer could expect from a hearing aid" unless there was scientific evidence to show that the personal aid would perform in the same way as the master aid. Lankford, R10/4892 (emphasis supplied). These comments clearly indicate an overriding concern with manner of use, as opposed to use per se, of testing devices.

A master hearing aid is just one such device. It is possible, for example, to use a speech audiometer to mislead consumers about how well they will hear with the recommended aids. In fact, if the seller has reason to believe that consumers are under the misimpression that the way they are hearing when being tested is showing them how well they will hear with the recommended aid(s), then failure to disabuse the consumer of that misimpression would violate section 440.32 by tacitly implying that the consumer's misimpression was correct. For example, assume the consumer were to remark, "I can really hear clearly now. I can't wait to get a hearing aid so I can hear this well when all my relatives come over next weekend." The seller clearly has reason to know that the consumer is laboring under a misimpression as to what to expect from a hearing aid in group situations, when noise is a problem. For the seller to say nothing to disabuse this misimpression is a tacit implication that the misimpression is in fact accurate.

After evaluating the comments on this proposed provision, staff is convinced that section 440.32 of the Recommended Rule should be adopted. It strongly believes that the foundation for the objections raised in connection with the Proposed Rule provision has been eliminated by the Recommended Rule, if it in fact ever existed. Staff concurs with the proponents of this provision who suggest that there is a strong need to protect potential buyers from misleading demonstrations of what a wearable hearing aid will do for them.[1597] Staff, therefore, recommends adoption of section 440.32 of the Recommended Rule.

1597 The Presiding Officer concluded that the record demonstrated that in many instances master hearing aids were used by sellers to equate the performance of master aids with the performance which could be expected from personal hearing aids. P.O. Report, R9/Dlip85. He found that representations implying similar performances between master aids and personal aids, and/or the failure to disclose the performance differences between these devices, were misleading and unfair to consumers. Id. He concluded that requiring disclosure of the discrepancy between the performance of a master hearing aid and a personal hearing aid in instances where silence by the seller implies the absence of such a discrepancy will go far in solving some of the consumer's problems in purchasing hearing aids. Id. at 96.

DD. Used Hearing Aids

Representing that a used or reconditioned hearing aid is a new product violates section 5 of the FTC Act.[1598] The failure to disclose that a used or reconditioned hearing aid is being sold instead of a new one also violates the FTC Act.[1599] Yet, numerous consumer complaints referenced in Part One of this report indicated that some hearing aid sellers sell used or reconditioned aids without disclosing this information to their purchasers.[1600]

Section 440.7(c) of the Proposed Rule and section 440.33 of the Recommended Rule are identical in substance. They address this problem by prohibiting sellers from selling used hearing aids without clearly and conspicuously disclosing to consumers that the aids are used or reconditioned. They require that the disclosure appear in any advertisement for the hearing aid, on the outside of the container or package holding the hearing aid, and on any tags attached to the hearing aid.[1601] They further require that the seller inform his customer verbally that the aid is used before the customer signs any document accompanying the aid or pays for the aid.

Section 440.33 of the Recommended Rule defines a hearing aid as "used" if it has been worn for "any length of time." New hearing aids which have been purchased and then worn for only a short period of time before being returned are considered "used" for purposes of resale. Hearing aids which have only been "tried on" in the presence of a salesperson or professional, however, are considered "new" for selling purposes. This distinction between a "new" and a "used" hearing aid is consistent with the distinction adopted by the Food and Drug Administration.[1602]

1598 See the Commission's Enforcement Policy Statement "With Respect to Merchandise Which Has Been Subjected to Previous Use on a Trial Basis and Subsequently Resold as New," Dec. 31, 1968. R8/D215.

1599 Id.

1600 See Appendix F, Section IV.F, infra, for reports of used or reconditioned aids being sold as new to unsuspecting consumers.

1601 The Food and Drug Administration also has adopted labeling requirements for hearing aids which require packages containing, and tags physically attached to, used or reconditioned hearing aids to disclose this information. 21 C.F.R. § 801.420(c)(5)(1977).

1602 See 21 C.F.R. § 801.420(a)(6)(1977) for the definition of a "used hearing aid" which has been adopted by the Food and Drug Administration.

Section 440.33 of the Recommended Rule allows words like "demonstrator," "loaned," "refurbished" or "rebuilt" to be used to describe used hearing aids. In much the same way that "demonstrator" cars are advertised and sold to the public, "demonstrator" hearing aids may be advertised and sold at a slight discount. As long as the term chosen by the hearing aid seller accurately describes the condition of his product, its use will be permitted under the Recommended Rule.

It was argued that the Proposed Rule would create tremendous financial hardship for the industry.[1603] Industry contended that there was an extremely limited market for used hearing aids[1604] and that adoption of the buyer's right to cancel provision would bring many more hearing aids back to sellers who were already experiencing great difficulty in reselling properly labeled used or reconditioned aids.[1605] Consequently, it was contended that adoption of the Proposed Rule would result in many sellers being unable to sell the slightly used "trial period" aids and being forced to absorb the costs of purchasing those aids.[1606] Industry, therefore, suggested that a more relaxed definition of "used hearing aids" be adopted so that aids returned within the 30-day trial period would be considered "new" aids for purposes of resale.[1607] Several audiologists made similar suggestions.[1608]

Industry fears concerning the marketability of used aids appear to be unwarranted or overstated, however. A consumer survey conducted by an industry organization in fact confirmed the strength of the used market. Forty percent of the individuals polled by the Minnesota Hearing Aid Society indicated that they

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1603 See, e.g., HAIC, R3/3982-83; Vreeland, R10/3420-21; Anthony, TR8453; Samole, TR6663-64.

1604 E.g., HAIC, R3/3983; NHAS R3/3555.

1605 E.g., NHAS, R3/3555-56.

1606 NHAS, R3/3555-56; cf. HAIC, R3/46-47; Joseph, TR4238-39.

1607 Zenith, R3/3398; NHAS, R3/99-100; HAIC, R3/46-47; see Commission question (u), 40 Fed. Reg. 26653 (1975).

1608 Kolins, R5/742; Miller, R5/1325; Sekine, R5/1312; Hartman, R5/367. Several qualifications were proffered by these audiologists in defining returned hearing aids as new. They first required that all used aids be refurbished at the factory before resale. They also required that each of these aids be provided with a full warranty before resale.

would consider buying a used hearing aid if the aid were reconditioned and sold at a discounted price.[1609] In addition, evidence presented in the record and discussed in detail elsewhere[1610] indicates that adoption of a buyer's right to cancel should not produce an inordinate number of canceled hearing aids.[1611]

After evaluating these arguments, staff has concluded that industry's concerns underlying its desire for a more lenient approach to the definition of "used" and "new" hearing aids are unwarranted. It does not believe that adherence to strict definitions of "used" and "new" will result in sellers being forced to absorb the cost of many slightly used hearing aids which they are unable to sell. Staff believes that permitting hearing aids returned within the 30-day trial period to be labeled as "demonstrators" or "30-day trial aids" should be sufficient to counteract fears that consumers will reject all "used" aids as unwanted, brokendown, worn-out devices. Marketing experience with other products such as automobiles provides strong evidence that slightly used products sold at a discount can be highly marketable. An additional factor strongly supports the Commission's adoption of Recommended Rule section 440.33. Acceptance of a broader definition of "new" would provide explicit Commission approval for consumer deception.[1612]

1609 Minnesota Hearing Aid Society, R8/1307, 1310. This survey also undercuts industry suggestions that a hearing aid is much too personal an item to be accepted on a second-hand basis. NHAS, R3/3555, 3599; Mynders, TR11598.

1610 See Part Two, Section III.GG.5.a.vi, infra.

1611 See, e.g., Lentz, R13/1972; Harford, R8/4550. Drs. Lentz and Harford reported that there definitely is a market for used hearing aids. Dr. Lentz stated that when he worked as an audiologist between 1967 and 1969 in Denver, Colorado, the number of requests for used hearing aids continually exceeded the number of used aids available. R13/1972. Dr. Harford believed that sellers hesitated to make used aids available because they did not want their customers to demand the less expensive used aids. R8/4550.

1612 In this connection, it should be noted that the Presiding Officer recognized that a seller's failure to disclose to a potential purchaser that a used hearing aid was not "new" had the tendency to mislead that consumer. P.O. Report, R9/Dlip86. The Presiding Officer, therefore, concluded that the evidence presented warranted the Commission's adoption of the Proposed Rule's definition of a "used hearing aid," which would not permit sellers to sell even slightly used aids as "new." Id. at 87.

EE. Testing Programs

The evidence demonstrates that some hearing aid sellers have pretended to solicit volunteers to participate in testing programs which give the appearance of being designed to evaluate "newly developed" hearing aid products.[1613] Volunteers are encouraged to participate by the prospect of being able to purchase the tested products at a reduced price.[1614] Since most consumers do not realize that these offers are merely selling techniques designed to sell them the very aids they are supposedly evaluating for the seller, and are unrelated to field testing of newly developed products, it is clear that this form of advertising is deceptive within the meaning of section 5 of the FTC Act.

Section 440.7(d) of the Proposed Rule addressed the problem produced by advertisements of this kind. It required that hearing aid sellers clearly and conspicuously disclose to product testing program participants the main purpose of the tests when that purpose was to sell the very hearing aids being evaluated.

The one argument which was raised against adoption of this section was that the prohibition contained therein would eliminate worthwhile demonstrations which inform the public of the benefits of hearing aids, even when no sales pitch was offered with the hearing aids demonstrated.[1615] This argument is clearly without foundation. The arguments proffered in support of this provision of the Proposed Rule focus on the misleading nature of these advertisements.[1616] Proponents of this section contended that the required disclosure of the business purpose underlying these tests was necessary to insure consumer awareness of the primary purpose of the tests.[1617]

1613 E.g., Custom Aids of Houston Ads, R8/5224, R8/4756, R8/4760; Hearing Unlimited, Inc. letter, R8/277; Bob's Hearing Service Ad, R8/2015. See notes 771-75 and the accompanying text in Part One, Section IX.B, supra, for a discussion of some of the record examples of this practice.

1614 Custom Aids of Houston Ads, R8/2396, R8/4756, R8/5224, R8/5225, R8/4760.

1615 Shuford, R3/326.

1616 See Gaenslen, R13/749-50; accord, Lankford, R10/4893-94. The Presiding Officer also concluded that ads involving field tests were misleading to consumers because consumers tended to disassociate the business purpose of the ad from the test offered. See P.O. Report, R9/Dlip74-75.

1617 See Lankford, R10/4893/94.

Adoption of section 440.34 of the Recommended Rule would prevent such fraudulent schemes from taking place. Staff, therefore, suggests that Recommended Rule section 440.34 be adopted.

FF. Ads That Do Not Look Like Ads

The record clearly indicates that some hearing aid advertisements look like public service announcements or newspaper editorial copy rather than advertisements.[1618] Since consumers may respond to these ads without realizing the primary commercial objective of the advertiser,[1619] it is clear that such ads are deceptive or unfair within the meaning of section 5 of the FTC Act. Section 440.7(e) of the Proposed Rule attempted to address the problem posed by this kind of advertising. It prohibited hearing aid sellers from preparing, approving, financing, or disseminating any advertisement which was designed to sell, or to create an interest in the sale of hearing aids unless the commercial purpose of the advertisement could be easily discerned by consumers.[1620]

Opponents of section 440.7(e) contended that its language was extremely vague and ambiguous and that the provision was virtually impossible to implement.[1621] In addition to these objections, it was further argued that section 440.7(e) would prevent hearing aid sellers from disseminating educational materials about hearing or hearing aids unless those materials used a "sales pitch" format.[1622] It was asserted that such a restrictive format would be a disservice to consumers because a wider dissemination of practical information about the hearing process, problems of hearing, and use and care of hearing aids would be discouraged.[1623]

Those who supported this provision of the Proposed Rule contended that advertisements which were presented as public service announcements or news articles were misleading to consumers and should, therefore, be clearly designated or recognizable as advertisements. They argued that consumers with an interest in discovering how to contend with their hearing difficulties were lured

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1618 See Part One, Section IX.B, for a discussion of how such ads attract clients for hearing aid sellers.

1619 ASHA, R10/1770; Morgan, R5/7335.

1620 See Proposed Rule § 440.7(e).

1621 HAIC, R3/3957; NHAS, R3/3603; Beltone, R3/3451; Payne, HX39/13.

1622 Payne, HX39/13; cf. NHAS, R3/3603.

1623 Payne, HX39/25; HAIC, R3/3958; cf. Clinkscales, TR10625.

into sellers' offices under the false pretense of receiving information about their problem,[1624] and then were forced to contend with hearing aid sellers who want to sell their products. Since these consumers might never have responded to these advertisements if they had known the purpose of the ad, proponents of the section contended that the prohibitions contained therein were required to prevent sellers from attracting customers under misleading pretenses.[1625]

The plain English format for Recommended Rule section 440.35 is much clearer than the Proposed Rule section it supersedes on exactly what it is prohibiting, in answer to the charges of vagueness. Staff is unconvinced that adoption of section 440.35 would discourage the wide dissemination of practical educational information about the hearing process, hearing problems, and the use and care of hearing aids, however. Educational materials could still be disseminated under this provision, as long as they do not contain a commercial objective. If, however, as is often the case,[1626] a commercial objective underlies the distribution of these materials, the information cannot be placed in news item or public service announcement form and it must be clear to consumers that it is a commercial advertisement.

Staff is also unconvinced that placing the word "advertisement" above or below these disguised ads is sufficient to alert the public to the fact that the ads are designed to sell products.[1627] The small type usually used in printing the word "advertisement"

1624 See Lankford, R10/4886; ASHA, R10/1770-71. It should be noted that, although the Presiding Officer did not comment specifically on the language of § 440.7(c) of the Proposed Rule, he did comment on the misleading nature of advertisements that are presented in a public service announcement or news article form. See P.O. Report, R9/D1ip75.

1625 See Lankford, R10/4886; Lentz, R8/7982; ASHA, R10/1770-71; cf. Morgan, TR9513, R8/7333.

1626 See Part One, Section IX.B, supra.

1627 See, e.g., ASHA, R10/1771; Lankford, R10/4886.

does not stand out.[1628] Such a disclosure is really a contradiction, not a qualification, of the status implication of the news article and public announcement format. Finally, staff rejects the argument proffered by Beltone that adoption of stricter disclosure requirements for hearing aid sellers, as mandated by section 440.8(a) of the Proposed Rule, will correct any potential abuses resulting from disguised advertising.[1629] Although the strict disclosure policy embodied in section 440.8(a) of the Proposed Rule would help to make consumers more aware of the business nature of hearing aid testing and sales establishments, such a disclosure again would be no more than a contradiction of the clear import of the deceptive advertising format.

For all of these reasons, recommends that section 440.35 of the Recommended Rule be adopted to prohibit these marketing practices.

1628 The Beltone Hearing Aid Center Ad, R8/6506, and the Beltone Hearing Aid Service Ad, R10/3094 provide good examples of how the word "advertisement" has been used in conjunction with profit-motivated "public service" type advertisements. It is interesting to note that these disclosures are made in very small print. In his testimony, Richard Fechheimer, a top advertising consultant to Beltone, indicated that the newspapers added this label to advertisements which were submitted by Beltone. TR6999. Mr. Fechheimer was surprisingly at a loss to explain why the media felt constrained to use this label on his ads. TR6999-7000. This attitude strongly evidences the need for the kind of prohibition embodied in § 440.35 of the Recommended Rule.

1629 Beltone argued that § 440.7(e) of the Proposed Rule reflected a bias against hearing aid dealers. It contended that since § 440.8(a) of the Proposed Rule prohibits misrepresentation of the commercial nature of a hearing aid seller or establishment, there is no need for a specific section prohibiting disguised advertising. See Beltone, R3/3451-52. Beltone fails to recognize, however, that while § 440.8(a) of the Proposed Rule requires disclosure of the commercial nature of hearing aid establishments, it does not deal with the specific problems raised by commercial advertisements which have been presented in a "public service announcement" or news article format. Since many of these advertisements already contain information identifying the hearing aid seller, but, nonetheless, are still misleading to consumers, it is clear that the prohibitions contained in § 440.8 of the Proposed Rule will not solve the special problems addressed by § 440.35 of the Recommended Rule.

GG. Buyer's Right to Cancel

1. Why the Buyer's Right to Cancel Is Needed

The buyer's right to cancel is justified on two independent grounds. First, a trial is needed to insure that the selected hearing aid is beneficial. Second, the buyer's right to cancel is needed to provide effective consumer protection from the wide variety of selling abuses to which many consumers are subjected. These two grounds are discussed in the following two subsections.

Although most industry comments opposed the concept of a mandated buyer's right to cancel,[1630] staff considers it to be essential. There was widespread agreement with staff's view from almost all groups concerned with hearing problems,[1631] including a wide variety of government consumer protection organizations,[1632] governmental and non-governmental agencies concerned

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1630 E.g., NHAS, R2/100-12, R8/4017; HAIC, R2/38, 51-52; Radioear, R2/29; Zenith, R2/10; Scheurer, TR11423; Holmes, TR9582; Mynders, TR11545; Leale, TR11714; Freshley, R10/6638; Campagna, TR2602; Giglia, TR2706; Barnow, TR1686. A number of individual physicians testified as industry witnesses against the concept of a mandatory buyer's right to cancel. E.g., Oberhand, TR3046; Carter, TR3649; Elia, TR7479; Martinucci, TR8384; Anthony, TR8454; Hall, TR11062; Berkove, TR11002. Some audiologists who also testified as industry witnesses did too. E.g., Krebs, TR11835; Sandlin, TR10122; Harris, TR11414. Numerous Better Business Bureaus ("BBBs"), Chambers of Commerce ("C of C's"), and other business organizations joined the industry on this issue. E.g., U.S.C. of C, R7/D143; Greater Manchester C of C, R7/D131; Illinois State C of C, R7/D47; Illinois Manufacturers Association, R7/D53; BBB of South Florida, R7/D129; BBB of the Granite State, R7/D67; New Port Richey, R7/D69; Jacksonville area C of C, R7/D70; Greater Madison C of C, R7/D106; S.W. Conn. BBB, R7/D118; Baton Rouge BBB, R7/D119; Southern Wayne County C of C, R7/D130; Direct Selling Assn., R7/D140; Norfolk C of C, R6/D40.

1631 The major exception was the responses from the boards that license hearing aid sellers. See, e.g., Tennessee, R6/D10; Georgia, R6/08; Nevada, R6/D13; Virginia, R6/D25; Louisiana, R6/D59; North Carolina, R6/D81 (see Appendix D, infra, re Cato, however).

1632 E.g., FDA, 42 Fed. Reg. 9289 (1977); HEW Task Force (Link), TR1108-09; Kentucky Attorney General (Byrne), TR1009; Wisconsin Attorney General (Jeffries), R6/D71, TR5590; Bureau of Consumer Protection, Allegheny County, Pennsylvania (Fox), R8/4730; Legal Counsel, Consumer Advocate's Office, (Continued)

with the elderly,[1633] organizations concerned with the problems of deafness,[1634] hearing and speech societies,[1635] legal services organizations,[1636] private consumer organizations,[1637] physicians

1632 (Continued)

Office of the Governor of Illinois (Platt), TR6463, 6495; Ohio Div. C.P. (Leber), R10/6505; Georgia Office of Consumer Affairs, R6/2; South Dakota Dept. of Commerce & Consumer Affairs, R6/D11, D28; Maine Bureau of Consumer Protection, R6/D18; Orange County Office of Consumer Affairs, R6/D21; City of Syracuse Consumer Affairs Center, R6/D29; Wisconsin Bureau of Consumer Protection, R6/D37; Pennsylvania Attorney General, Bureau of Consumer Protection, R6/D46, D101; Massachusetts Office of Consumer Affairs, R6/D47; Michigan Consumers Council, R6/D50; New York City Dept. of Consumer Affairs, R6/D54; Missouri Division of Professional Registration, R6/D17; Ohio Attorney General, R6/D72; Virginia Knauer, R6/D82; California Hearing Aid Dispensers Examining Committee, TR11923-24.

1633 E.g., NCSC (Munger), TR4500, R7/D79; AARP/NRTA (Brickfield), TR1429; HEW's Administration on Aging (Flemming), TR607; Federal Council on Aging (Adkins), R10/5317; Montgomery County Area Agency on Aging, R6/D31; Utah Division of Health, Dept. of Social Services, R6/9; California Department of Aging (Levy & Tuttle), TR11653-54; Chicago Area Council of Senior Citizens (Shanta), TR8854; Louisiana Center for the Public Interest, R7/D133.

1634 E.g., NCLD, R7/681, TR1903-04 (Bowen; International Assn. of Parents of the Deaf (Woodard), TR4141; Alexander Graham Bell Association for the Deaf, R7/D115; Parents Association for Deaf and Hard of Hearing Children, R7/D6; Council for Exceptional Children (Stein), TR8975; Illinois Association of the Deaf (J. Davis), TR8535; National Association of the Deaf (Schreiber), TR4044; Washington Area Group for the Hard of Hearing (Paschell), TR853-54; New York League for the Hard of Hearing (Madell), TR5858, R10/5583.

1635 E.g., Hearing Society for the Bay Area, R7/D101; Meridian Speech & Hearing Center, R5/D57; Albemarle Regional Speech and Hearing Center, R5/D59; Chattanooga-Hamilton County Speech & Hearing Center, R5/D80; Eugene Hearing and Speech Center, R5/D222; Muskegon Hearing & Speech Center, R5/D250.

1636 E.g., Legal Aid Foundation of Long Beach, R7/D16; Arapahoe County Legal Aid, R7/D52; Cape Alantic Legal Services, (Sypniewski), R7/D43.

1637 E.g., Consumers Union (Chasen), R7/521-22; RPAG, R8/2881; (Griesel), R10/6022, TR9380; MPIRG (Klein), United Auto

(Continued)

and their organizations,[1638] audiologists and their organizations,[1639] and other organizations of various types.[1640] Some hearing aid sellers also expressed the view that the buyer's right to cancel should be mandated.[1641] In fact, only one consumer group,[1642] one consumer protection official,[1643] and one

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1637 (Continued)

United Auto Workers, Consumer Affairs Dept. (Drew & Eiler), TR7140, 7172; MoPIRG, R7/263; NYPIRG, R7/D71; PIRGIM, R7/106; MassPIRG, R7/D104; Northeastern Minnesota Consumers League, R7/D62.

1638 E.g., ACO (McCurdy), R8/4400, 4404, Pratt, TR3697; Committee on Hearing and Equilibrium of the American Academy of Ophthalmology and Otolaryngology (Catlin & Alford), R5/D341; Ruben, TR3975-76; Stone, R8/1593; Marcus, TR5479; Campbell, R5/D16; Spector, R5/D18; Ormond, R5/D317; Foote, R5/D338.

1639 E.g., ASHA (K. Johnson), R10/1730, TR4264, 4312; Connecticut Speech and Hearing Assn. (Eichelberger), TR8673; Texas Speech and Hearing Assn. (Longley), TR11294; Georgia Speech and Hearing Assn. (Bess), R10/4869; North Carolina Speech and Hearing Assn. (McCabe et al.), R10/5623-24; Illinois Speech and Hearing Assn. (Lankford), TR8010; Society of Medical Audiology (L. Wilson), TR10035; Kasten, TR708; Franks, TR9760; Butts, TR4202; see Morgan (Audiology Task Force, California Speech and Hearing Assn.), TR9504.

1640 E.g., SE Arizona Governments Org., R7/D87; M. Sieben, Member, Minnesota House of Representatives, R6/5; Central Wisconsin Community Action Council, R6/D24; American Foundation for the Blind (McGarry), TR1268; Consumers' Advisory Council, Kentucky, R8/6454. But see Better Hearing Institute, R7/D140.

1641 E.g., Fennema, TR1745-46; Brakebill, TR1296; see Palmquist, R8/3509-10, TR6556-57; Lorch, R3/3014.

1642 National Alliance of Senior Citizens (Clinkscales), TR10623; see Appendix D, infra, re Clinkscales. All Attorney General offices commenting supported the concept of a mandatory buyer's right to cancel. F. Burns Vick, an employee of a Dallas legal services agency who testified on behalf of NHAS, specifically stated that he did not intend his testimony to be cited for the proposition that the proposed regulations were unnecessary or unwise. TR10578-79. He went on to state that he was not "here to draw any conclusions or to make recommendations on policy." TR10580.

1643 Gunter, TR8205-06 (Director of the Consumer Protection Agency in the Office of the Governor of Alabama). Note that the (Continued)

representative of a speech and hearing society[1644] testified against the buyer's right to cancel.

a. Scientific basis

Every hearing aid purchase carries with it the risk that the consumer will not receive any significant benefit or additional benefit from the purchased hearing aid or hearing aids.[1645] This risk exists no matter how outstanding the qualifications of the tester or the testing performed.[1646] A multitude of factors affect the likelihood that any particular individual will benefit from a particular hearing aid.[1647] Furthermore, the fact that many hearing aid sellers lack the requisite training and skills[1648] obviously increases this risk, as does the fact that many sellers have inadequate test equipment,[1649] inadequate testing environments,[1650] rely upon an inadequate amount and variety of tests in making their hearing aid recommendations,[1651] and other inadequacies.[1652] As a result, the only way to insure that the purchaser will in fact benefit is through trial use of the selected hearing aid in a representative variety of actual use situations.[1653]

1643 (Continued)

Alabama Attorney General's Office believed that the buyer's right to cancel was necessary to remedy the many hearing aid complaints which the Office received.

1644 E.g., Plotkin (Chicago Hearing Society), TR6005-07. Note that Dr. Plotkin, in a written comment submitted to the Commission prior to his testimony, stated that he believed a 30-day moneyback program was an excellent step forward. R7/487.

1645 See Appendix F, Section VI, infra. Subsequent references to this concept will merely use the term "benefit" and the singular "hearing aid" or "aid."

1646 See id. at Section VI.B, infra.

1647 See id. at Section VI.C, infra.

1648 See id. at Section VI.D.1, infra.

1649 See id. at Section VI.D.2, infra.

1650 See id. at Section VI.D.3, infra.

1651 See id. at Section VI.D.4, infra.

1652 See id. at Section VI.D.5, infra.

1653 See id. at Section VI.B, infra.

Unfortunately, many hearing aid sellers do not offer trials.[1654] Even where trails are available, they are sometimes given only to those consumers who ask for them.[1655] Most consumers, however, are unaware of the existence of trial periods or of their crucial importance in any hearing aid purchase.[1656] Moreover, some of those sellers who do offer them to those who need them most fail to honor them when the consumer seeks to return the hearing aid.[1657] Thus, the record demonstrates that although only trial use can remove the risk that no benefit will be received from a hearing aid, marketplace mechanisms have failed to assure this essential protection to consumers.

Two general objections to the buyer's right to cancel merit discussion here. NHAS has argued that defects in the aids themselves cannot serve as any justification for the buyer's right to cancel because such defects are adequately addressed by the manufacturers' warranties.[1658] Staff acknowledges that when a hearing aid does not work at all, the consumer will be protected by the manufacturer's warranty. However, the causes of unbeneficial fittings are rarely this clear. No consumers[1659] and few retailers[1660] are equipped to ascertain whether the problems being experienced are due to defects in the aids or to other[1661] causes. Thus, NHAS's argument is unpersuasive.

In addition, it has been suggested that the failure to adjust to the selected hearing aid is often the consumer's fault,[1662] making the consumer undeserving of a refund. Staff disputes the argument that failure to adjust, even when the

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1654 See Appendix F, Section VIII.E, infra.

1655 See Appendix F, Sections VIII.E.4 & D.3, infra.

1656 This is because many sales are made in the home to consumers who probably have not shopped around to find out what is available in the marketplace. See Part One, Sections II.G, C & D, & IX.C & D.2-5, supra, and Appendix F, Sections VI.F, VI.I, & VIII.E.3, infra.

1657 See id.

1658 NHAS, R2/112.

1659 See Part One, Section II.G.2, supra.

1660 See Appendix F, Section VI.D.2.b, infra.

1661 See id. at Sections VI.C-K, infra.

1662 See, e.g., Kojis, TR2074; Dunlavy, TR3434.

cause seems to be vanity[1663] or a lack of motivation,[1664] makes the consumer undeserving of a refund. Our society is based in large part on the recognition of the individual's right to make his or her own value judgments, at least to the extent that the individual's activities do not infringe upon rights of others. Clearly many hearing-impaired individuals are reluctant to disclose the existence of their hearing loss by wearing hearing aids.[1665] However, the wise observer will not ignore the reluctance of another to wear a hearing aid. Vanity and lack of motivation are usually quite obvious to the fitter at the outset of the relationship with the consumer, or become apparent during the testing and evaluation process.[1666] There is no justification for pressuring a reluctant consumer into buying a hearing aid--especially when this reluctance makes the purchase a very risky one[1667] --and then denying that consumer the protection of a trial which is enjoyed by other purchasers. Being "stuck" for the entire purchase price is extremely unlikely to supply the motivation otherwise lacking or to obviate the effects of vanity.[1668] Those who insist on making a sale to such consumers knowingly take the risk of ultimate consumer dissatisfaction.

b. Sales abuse basis

Hearing aid consumers have often been subjected to a wide variety of selling abuses.[1669] Many commented that the buyer's right to cancel, with cancellation charges in the range provided in the Proposed Rule, would cut down on selling abuses.[1670] This would occur because the seller will know that the buyer can cancel

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1663 See generally Appendix F, Section VI.C.16, infra.

1664 See generally id. at Section VI.C.13, infra.

1665 See Part One, Section II.G.2, supra.

1666 See Appendix F, Sections VI.C.13 & C.16, infra.

1667 See id.

1668 See id.

1669 See Part One, Sections III & IX, supra, and Appendix F, Sections IV, V, and VII, infra.

1670 E.g., P. Ginsburg, R10/431; Harford, R8/4551; Lankford (ISHA), R10/4888; Ohio Div. C.P., R8/2929; Rose, R8/4182; see Gitles, R8/4219; P.O. Report, R9/Dlip263-64; ASHA, R13/3647. But see Ehritt, R8/4800; Tootelian, R8/4781; Baesemann, TR7413-14, Hopmeier, TR3347-49, 3368-69, 3377-80; J. Williams, TR3766.

- if too much is promised,[1671]
- if sold an unneeded aid,[1672]
- if the aid is incompetently fitted,[1673]
- if inadequate counseling is provided,[1674]
- if the seller's only purpose is "to sell" hearing aids,[1675]
- if the seller has been unethical,[1676] or
- if an aid is sold when the buyer is pressured into accepting an aid against his will, by others such as his children.[1677]

NHAS argued to the contrary, asserting that the buyer's right to cancel bears no reasonable relationship to sales abuses.[1678] Staff does not believe that this is true at all, for the risk of no benefit (and hence cancellation) obviously increases with the presence of seller incompetence and abusive sales tactics.[1679] For example, if seller incompetence results in the sale of an unneeded aid, the risk of cancellation is great because no benefit

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1671 E.g., K. Berger, R5/172; Whitman, TR8558, 8573; Murphy, R13/2072-73; Whitman, TR8573; Jerger, R8/5338; Capano, R8/6969-70; Eichelberger, TR8673-74. Indeed, Richard Fechheimer, an HAIC witness, testified that it was "obvious" that the buyer's right to cancel is a corollary of the use of advertising to get people to buy hearing aids. TR6990/16-23. Under the repeated efforts of HAIC's counsel to get him to retreat from his support of the buyer's right to cancel, Mr. Fechheimer "stuck to his guns," TR7006/15-20, 7007/14-19.

1672 E.g., Nygren, R8/4939; Murphy, R13/2072-73; Jerger, R8/5338; P.O. Report, R9/Dlip269, 272, 274.

1673 E.g., Nygren, R8/4939; Kasten, R5/1434, 1438; Fennema, TR1749-50; Murphy, R13/2072-73; Jerger, R8/5338; P.O. Report, R9/Dlip 269, 272; see Ginsberg, R13/4255.

1674 See, e.g., Lentz, TR11243-5; P.O. Report, R9/Dlip269; ASHA, R13/3628-29, 3633; M. Ross, R8/4725.

1675 See Patrick, R3/1610.

1676 E.g., Kasten, R5/1434, 1438.

1677 E.g., Jerger, R8/5338; P.O. Report, R9/Dlip269; Lentz, R10/6533, 6535.

1678 NHAS, R2/109, R3/3565.

1679 See Appendix F, Sections VI.D-K, infra.

at all is being received.[1680] Similarly, if the seller promises too much, the consumer will be unnecessarily disappointed by the lesser benefits that are in fact received, increasing the risk of cancellation.[1681]

NHAS further asserted that the buyer's right to cancel is duplicative as far as sales abuses are concerned, for they were covered adequately by sections 440.7 through 440.10 of the Proposed Rule.[1682] There are two responses to this assertion.

First, there are a variety of selling abuses that are only addressed by the buyer's right to cancel, including the sale of inappropriate aids,[1683] gross incompetence,[1684] and sales to those who are being pushed into the transaction against their will.[1685] Secondly, the buyer's right to cancel is the most effective remedy for those sales abuses which are also prohibited by other provisions of the Recommended Rule, when the buyer has relied to his detriment on the prohibited conduct and purchased a hearing aid. For example, if a seller, through the misleading use of a master hearing aid, misrepresents the benefits to be expected from a hearing aid, section 440.32 of the Recommended Rule is violated. FTC enforcement of section 440.32 is unlikely to provide individual consumers with any remedy; the purchase price of an unbeneficial hearing aid will still have been lost. In such circumstances, an unbeneficial hearing aid buyer's right to cancel enables the deceived consumer himself to recoup most of his investment.

c. Buyer's right to cancel is not limited to first-time users

Some industry comments asserted that if there is to be a right to cancel, it should be required only for first time users.[1686] Others believed that all consumers should have the right to cancel.[1687] Those cited earlier for the proposition that trial

1680 See Appendix F, Section VI.D.1, infra.

1681 See id. at Section VI.E, infra.

1682 NHAS, R2/112.

1683 See Part One, Sections III.B & C, supra, and Appendix F, Sections VI.H & VII, infra.

1684 See Appendix F, Sections VI.D.1 & VIII.B.1, infra.

1685 See Appendix F, Sections VI.C.13 & VI.H, infra.

1686 E.g., HAIC, R2/54-55; NHAS, R2/117; Maico, R2/127; Zenith, R2/12; Mynders, TR11593.

1687 E.g., Mowry, R13/1122; Rassi, TR5733-34; Fennema, TR1796; Syfert, TR5214.

use is needed in order to remove the risk that no benefit will be received from the selected aid[1688] made no exception for experienced users. As Judith Rassi noted:

> A past hearing aid user who purchases a new aid, even if it is a model identical to his previous instrument, must go through an adjustment period of some sort since a new amplifying system is being coupled to his ear.
>
> In fact, a period of trial time may be critically important for him to compare [the] performance of a new aid to that of his old aid in order to determine whether or not the purchase of a new instrument is warranted.[1689]

She further noted that in the study her clinic conducted in the mid-1960's, one-third of those who had problems adjusting to their new aids were experienced users.[1690] Ms. Rassi added that "it is virtually impossible to know in advance who will have adjustment problems and who will not."[1691] John Kojis, an HAIC witness, testified that because of the different controls and adjustments on the new aid "the dealer will spend as much time working with a previous user of the aid [as with a new user,] just refining the adjustments and making certain that the fellow is optimizing his benefit from the aid."[1692] In addition, even experienced users can fall prey to selling abuses for which the buyer's right to cancel is an appropriate remedy.[1693] In light of these considerations, staff recommends that the buyer's right to cancel be received by all buyers and not merely by first-time users.

2. <u>What the Buyer's Right to Cancel Is</u>

Both the Proposed Rule[1694] and the Recommended Rule[1695] require the seller to give the buyer the right to cancel any hearing aid

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1688 <u>See</u> Appendix F, Section VI.B, <u>infra</u>.

1689 Rassi, TR5733.

1690 <u>Id</u>. at 5734.

1691 <u>Id</u>.

1692 Kojis, TR2073-74.

1693 <u>See</u> Part One, Section II.G.4, <u>supra</u>.

1694 Proposed Rule § 440.4.

1695 Recommended Rule §§ 440.36-.45.

purchase[1696] any time within 30 days of delivery and receive a refund of most of the payments made toward the purchase price.[1697]

1696 The Proposed Rule (§ 440.2(b)) considered a hearing aid rental for over 30 days to be a sale or purchase which required the buyer's right to cancel. HAIC disputed "that there is any factual basis to define a sale to be any transaction other than a situation where a title passes from the seller to the buyer," and asserted that the Proposed Rule's definition of "sale" "purports to have the effect of passing title in the hearing aid in situations where a hearing-impaired consumer has elected only to lease or rent an aid." HAIC, R2/43. The purpose for defining "sale" to include leases of over 30 days was to enable the remaining provisions of the Proposed Rule to be simplified by not having to add the words "or leases or rentals for periods of over 30 days" whenever the words "sale" or "sell" were used. Indeed, the introductory language to § 440.2 of the Proposed Rule read "[f]or the purposes of this Part the following definitions shall apply." (Emphasis added). In any event, HAIC's concerns have been obviated by the plain English format of the Recommended Rule which eschews the use of definitions whenever possible. For example, the buyer's right to cancel is described as applying when "a customer buys a hearing aid or rents it for more then 30 days." Recommended Rule §§ 440.36-.38.

1697 Note that Section 440.4(d) of the Proposed Rule provided:

> A seller shall not include in any contract or receipt any confession of judgment or any waiver of any of the rights to which the buyer is entitled under this Part, including but not limited to the buyer's right to cancel the sale in accordance with the provisions of § 440.4.

A virtually identical provision is contained in the FTC's Cooling-Off Rule, 16 C.F.R. § 429.1(d). In enacting a buyer's right to cancel similar to that in the Proposed Rule, the Kentucky legislature included a provision which nullified any waiver of that right. Byrne, R10/3272; see id. at 3279-81. The only comments on § 440.4(d) were made by NCLD, which strongly endorsed the provision. NCLD, R7/690-91; Bowen, HX35/10. Staff has therefore incorporated this provision into § 440.47 of the Recommended Rule. NCLD also urged the Commission to prevent the consumers from losing their rights because of the holder-in-due course doctrine. NCLD, R7/691-92; Bowen, HX35/10/11. The Commission's Holder-in-Due Course Rule, 16 C.F.R. Part 433 (1977) should obviate NCLD's concerns.

The buyer's right to cancel is a self-executing remedy; all the consumer need do to exercise the right is to apprise the seller in writing that the purchase is cancelled. This self-executing feature makes feasible the consumer's exercise of a legal right which often is already possessed,[1698] but which is of little real value because of the consumer's lack of knowledge and assertiveness,[1699] the cost of legal counsel,[1700] the need for an expert witness[1701] to counter the seller's assertion that the fault lies with the buyer,[1702] and the delays inherent in the litigation process.[1703] Essentially, the buyer's right to cancel allows the consumer up to 30 days to experience the aid in a representative variety of actual use situations in order to determine whether the benefits received justify the purchase price.

NHAS objected to the focus of the buyer's right to cancel-on whether the consumer perceived that he or she was receiving sufficient benefit to justify the purchase.[1704] NHAS asserted:

> While the objective determination of whether an individual can benefit from the selected aid can invariably be made prior to purchase, the subjective determination of whether that individual will be "satisfied" cannot be made prior to use. This is true of the initial purchase of practically all consumer goods and services.[1705]

1698 See Appendix F, Section VIII.F.1, infra.

1699 See, e.g., Part One, Section II.G, supra; Rose, TR492, 501, R8/4181; Lentz, R8/8002; ASHA, R10/1668; Flemming, TR617-18.

1700 See, e.g., Poorman & South, R10/6037; J. Anderson, R10/6179. See also Appendix F, Section VIII.F.1, infra.

1701 Darrell Rose, Ph.D., has provided the needed expert testimony for several local consumers, R8/4181, TR492, 501, but such free services are extraordinary. In addition, Dr. Rose testified that he has been criticized about his involvement in small claims court, TR492.

1702 See, e.g., Freshley, R10/6648; Jeffries, TR5611-12.

1703 Cf., Brennan, TR247.

1704 NHAS, R3/3563.

1705 Id. at 3563-64.

Arguing that it is erroneous to equate satisfaction with benefit,[1706] NHAS likened the buyer's right to cancel to requiring the sporting goods dealer to make a refund on skis with which the buyer is dissatisfied because he is unwilling or unable to learn to ski, or had a bad experience while skiing.[1707] NHAS' ski analogy is unpersuasive. Unlike skis, hearing aids are health-related devices, necessities which promise to provide a link to the world of hearing to those isolated by their hearing impairment. Hearing aids are often sold to low income persons. In addition, hearing aid purchasers are often credulous buyers poorly equipped to protect themselves. Skis, by contrast, are luxury items, sold primarily to affluent consumers who are much better able to protect themselves than hearing aid consumers.

It has been suggested that the consumer's right to cancel should be based on some reasonable standard of hearing aid acceptability[1708] or on a certification by a physician that the aid is not appropriate.[1709] There are several reasons why staff has concluded that the use of such external standards would be unwise and that it is reasonable to rely on the consumer not to forfeit the cancellation charges except for good reason. The primary reason is that the ultimate judge of the significance of the benefits received, and hence of the propriety of cancelling, can only be the consumer.[1710] An objective, definitive measure of benefit is years away,[1711] and no easy matter to develop.[1712] An additional reason is the extra burden placed on the consumer by requiring that a physician certify that the aid is inappropriate. The cost of such a certification would not be insubstantial. Furthermore, physicians competent to make such a judgment may not be reasonably available to many consumers.[1713] The great benefits which beneficial hearing aids do provide[1714] are more than adequate assurance that those benefits

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1706 Id. at 3568.

1707 Id.

1708 E.g., Sandlin, TR10123; Holmes, TR9584; see NHAS, R2/108.

1709 E.g., HAIC, R2/57.

1710 See HAIC, R3/3878; Appendix F, Section VI.A, infra.

1711 Sandlin, TR10155.

1712 Id. at 10152-55. Cf. Morgan, TR9562; Delk, TR10924-25.

1713 See, e.g., Stockler, R10/3196; Zenith, R2/12.

1714 See Appendix F, Section VI.A, infra.

will infrequently be forfeited along with the cancellation charges allowed.[1715]

As noted above, the buyer's right to cancel does not require the buyer to prove, or even state, to the seller the reasons for the cancellation. Concern has been expressed that sellers, especially in light of section 440.4(f) of the Proposed Rule,[1716] would not be able to obtain any feedback from those consumers with whom they had been unsuccessful.[1717] No such result is intended or caused by either the Proposed Rule or the Recommended Rule. It is clearly permissible for the seller to ask the buyer why he cancelled, as long as it is clear that the buyer is not required to satisfy the seller that those reasons justify the cancellation, or even required to give any reasons at all. Staff expects that cancelling buyers usually will be more than willing to explain their reasons to sellers. If the seller wishes to suggest that the buyer can be satisfied by trying longer with the recommended aid, trying the aid once it has been adjusted, or trying a substitute aid, he is free to do so as long as he provides for a mutually agreeable extension of the cancellation period.[1718]

The Proposed Rule provided for a 30-day period after delivery, during which the buyer could cancel the purchase.[1719] The record strongly indicates the presence of a general consensus among those from varied backgrounds that 30 days after delivery is a necessary[1720] and adequate[1721] period of time in which to expect the majority of hearing aid consumers to decide whether to cancel the purchase. Although many have suggested a longer period of

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1715 See Part Two, Section III.GG.5.a.iii, infra.

1716 See Part Two, Section III.GG.3.a.ii, infra.

1717 See Waters, R8/3994.

1718 See Part Two, Section III.GG.3.a.ii, infra.

1719 Proposed Rule § 440.4(b).

1720 E.g., Rose, R8/4182; Olsen, R8/4436; Tobin, TR4115; Sullivan (Senate Hearings, 1968), R8/911.

1721 E.g., Brewer, TR3915; Epstein, TR4615; Rose, TR493; Rassi, TR5787; Butz, TR6622; Eichelberger, TR8673; Krebs, TR11838; Mastricola, TR8649; Lentz, R10/6535; L. Wilson, TR10024; L. Stein, TR6982; Keyes, TR10711; Jerger, R8/4568; Kasten, R5/1434, R8/6989; Bowe, R8/6952; Hull, R8/6137; Traynor, R8/6807; S. Graham, R8/5276; Harvey, R8/5332; Harford et al., R5/852; Whitman, TR8587; Freeman, R8/4046; K. Clark, R3/2807. But see Fowler, R8/1983.

time,[1722] especially when the consumer is a child,[1723] an older person[1724] or a borderline hearing aid candidate,[1725] 30 days is the most common trial period in use by those who offer trials[1726] or demand them for their patients.[1727] This widespread use of a 30-day period strongly indicates that the time frame contained in the Recommended Rule is considered appropriate in the marketplace.

It should be noted that the 30-day period begins only after delivery of the aid,[1728] rather than on the date of purchase, because hearing aids are often delivered a number of days after they are purchased.[1729]

1722 E.g., Pasiewicz, TR8907, 8916-17, 8964; Powers, TR9844, 9846-47; Schwartz, TR4885.

1723 E.g., Bowen, TR1904-06; Schrieber, TR4047; Woodard, TR4151; Tobin, TR4093, 4115; Vleck, TR892-95.

1724 E.g., Hayes, R8/4952; Traynor, R8/6807.

1725 E.g., K. Clark, R3/2807; Vreeland, TR3834; Campagna, TR2658; Keyes, TR10711; Rassi, R8/5359, 5368; Kojis (Senate Hearings, 1968), R8/899; Jerger, R8/4568.

1726 E.g., L. Wilson, TR10024; Alpiner, SPXB/172; Ruben (Senate Hearings, 1973), R8/1189ww.

1727 See HEW Task Force Final Report, R8/3183; Model Licensing Bill developed by RPAG and GPHAG, R8/3554.

1728 The question was raised whether delivery of a hearing aid which was not ready to be worn by the consumer would, or should, start the 30-day period. See, e.g., Vleck, TR908-09; ASHA, R10/1734-37, 1739. Clearly, the 30-day period should not start if the consumer has received an aid without its custom earmold or which is in some other manner unusable. The Recommended Rule makes this requirement clear by stating that the 30-day period begins to run when the hearing aid is delivered "in usable condition." Recommended Rule § 440.38(c)(1).

1729 E.g., Delk, TR10993; Dunlavy, TR3430; Butts, TR4213; see, e.g., Hearing Instruments Survey, R10/6679 (May 1975 issue; 16% of dealers reporting make their own earmold; the others must send out to have them prepared); ASHA (citing Nunley), R10/1762; L. Wilson, TR10065; Tate, R10/3135.

3. How the Buyer's Right to Cancel Works

a. - What the consumer is told

The Proposed Rule required the seller to provide information about the buyer's right to cancel in two ways: First, he was to apprise the buyer of the existence of the buyer's right to cancel both orally[1730] and in writing.[1731] Second, he was to provide a "Notice of Buyer's Right to Cancel," which would give all the details the consumer needed to know in order to exercise the right effectively.[1732] The Recommended Rule imposes the same requirements.[1733]

The Proposed Rule required this information to be given "at the time [the] buyer assumes any financial obligation with respect to the purchase."[1734] The Recommended Rule requires that the oral notice be given "[a]t the time a consumer buys a hearing aid or rents it for more than 30 days"[1735] and requires that the separate consumer notice be given "[a]t the time the buyer(s) pay(s) or promise(s) to pay."[1736] This information notification

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1730 Proposed Rule § 440.46(e).

1731 Id. § 440.4(a).

1732 Id. § 440.4(b).

1733 Recommended Rule §§ 440.36-.38.

1734 Proposed Rule § 440.4(b) & (e). The written apprisal of the existence of the buyer's right to cancel was required "in every receipt or contract pertaining to a sale, in immediate proximity to the space reserved for the signature of the buyer, or on the first page if there is no space reserved for the signature of the buyer." Id. § 440.4(a).

1735 Recommended Rule § 440.36.

1736 Id. § 440.38. Section 440.37 requires the written apprisal of the existence of the buyer's right to cancel to be "in each sale or rental (of over 30 days) contract or receipt" "right next to the space for the buyer's signature. If there is no signature space on a receipt, the notice must be on the front page." Id. § 440.37. A comment from Marvin Palmquist of Lloyd Hearing Aid Corp. raised the question of when Lloyd would have to provide this information. R3/137. Mr. Palmquist noted that the Lloyd customer "has never entered into a purchase agreement in the beginning. He gets a 30-day FREE TRIAL of our aid--no money down--and then he decides at the end of the 30 days whether he will keep the aid or not." Id. He added that "[y]ou obviously

(Continued)

system is designed to provide the buyer with the minimum amount of information necessary to an effective utilization of the right to cancel, while at the same time interfering as little as possible with the seller's positive presentation of the potential benefits of amplification. It is not necessary for the separate notice to be read by the buyer at the time of the sale.[1737] It is anticipated that the separate notice will not be studied carefully unless the selected aid does not perform satisfactorily. At that time, the notice can be used as a step-by-step guide in exercising the right to cancel.[1738]

1736 (Continued)

cannot send a 'Right to Cancel' for something never entered into." Id. It is unclear from Mr. Palmquist's comment just when the Lloyd's customer becomes contractually bound to purchase the aid. It is probable that the buyer accepts a unilateral contract offer by retaining the aid past the end of the 30-day free trial. If so, then the notices would technically be required at that time. It would seem reasonable, however, for the disclosures to be given at the outset of the 30-day free trial. The language of th separate consumer notices required by §§ 440.37 and 440.38 should be compatible with Lloyd's method of doing business. The brief notice required by § 440.37 could be included in the transmittal letter accompanying the hearing aid, while the separate consumer notice required by § 440.38 could be shipped along with the hearing aid itself. Thus the cancellation deadline would pass at the end of the 30-day free trial, with the basic economics of Lloyd's business unaffected.

1737 It has been suggested that the full amount of any cancellation charges should be disclosed to the buyer at the time of the sale. Brickfield, TR1431. This would presumably enable the prospective buyer to evaluate the wisdom of the proposed purchase in light of the amount he stood to lose. The Recommended Rule has set maximum limits for the cancellation charges, in an effort to insure that such charges are reasonable. The amount of such charges must be specified in the separate consumer notice, and the seller may, of course, choose to emphasize the limited nature of the consumer's ultimate financial risk as a positive selling point. In any event, there is no need to require the seller to interrupt the sales presentation to disclose the amount of cancellation charges for which the prospective purchaser will be liable. See Part Two, Section III.GG.3.h, infra.

1738 Accordingly, no provision has been made for the buyer to verify in writing that he has read and understood the buyer's right to cancel notices, as was suggested by one comment. Tootelian, R8/4782.

i. Seller must apprise the buyer of the existence of the buyer's right to cancel

The Recommended Rule, like the Proposed Rule, requires the seller to apprise the buyer of the existence of the right to cancel both orally and in writing.[1739]

HAIC has asserted that, in light of the written notices required, there is no rational or factual basis for requiring the seller to orally apprise the buyer of the existence of the buyer's right to cancel.[1740] Staff is, however, well aware of the value of drawing a consumer's attention to important rights to assure that they are not overlooked in the mass of detail often included in or with purchase contracts or receipts.[1741] Staff therefore finds HAIC's assertion singularly unpersuasive. On the other hand, it has been suggested that the seller should not only apprise the buyer orally of the existence of the right, but also should explain the right to the consumer.[1742] Staff has considered this suggestion and concluded that such an oral explanation, while certainly the seller's right to give and the buyer's right to request, is not a necessary part of the Recommended Rule. The purpose of both the oral disclosure and the brief notice on the contract or receipt is merely to make consumers aware of the existence of the right. As noted above, it is anticipated that consumers will need to study the separate notice in detail only if they are not receiving sufficient benefit from the selected hearing aid.

An additional objection to the oral disclosure requirement imposed by section 440.36 was that it would unfairly subject the seller to severe penalties at the whim of a buyer who asserts that the oral disclosure was not in fact made.[1743] It has also

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1739 Proposed Rule §§ 440.4(b) & .4(e); Recommended Rule §§ 440.36 & .37. As noted in Part Two, Section III.HH, infra, the Recommended Rule excuses sellers from the oral disclosure requirement whenever it would be physically impossible for them to do so.

1740 HAIC, R2/55.

1741 See Stroup, R10/139.

1742 Sypniewski, R10/113, TR1613.

1743 E.g., HAIC, R2/55-56; Zenith, R3/3403. The same argument has been raised with respect to the oral disclosures required in connection with short rentals, HAIC, R2/62, R3/3956; Zenith, R3/3406; and telephone options, Zenith, R3/3420.

been suggested, however, that a hearing-impaired consumer might be faced with a seller's assertion that the consumer was told of the buyer's right to cancel even though the disclosure was not heard well enough to be understood.[1744] Staff recognizes these proof burdens, but believes that misconduct worthy of enforcement action will both require and provide a sufficient number of alleged instances of failure to make the disclosure to insure that the proof does not rest merely on the word of one or two consumers. Any seller concerned about protecting himself can, of course, obtain a signed acknowledgment from the consumer that the required oral disclosures were in fact made.

Concern was expressed that the notice required by section 440.4(a) of the Proposed Rule[1745] "cannot in all instances be placed in immediate proximity to the space reserved for the signature in light of other state and federal regulations."[1746] The only specific comment along these lines asserted that this disclosure was prohibited by Regulation Z because it would distract attention from the Regulation Z disclosure and because Regulation Z required all other disclosures to be separate and apart from the Regulation Z disclosure.[1747] This is not so for several reasons. The Regulation Z disclosure can be set forth either on the contract or on a separate sheet of paper.[1748] In addition, the Regulation Z prohibition of other disclosures applies only to disclosures of inconsistent information or information which is placed so as to mislead or confuse the customer.[1749] Since the notice required by section 440.37 of the Recommended Rule is not related to the cost of credit, it would not fall within this prohibition.[1750]

1744 Tootelian, R8/4781.

1745 Section 440.36 of the Recommended Rule requires that the notice appear right next to the space for the buyer's signature."

1746 NHAS, R2/114.

1747 Knox, R3/1443.

1748 12 C.F.R. § 226.8(a) (1978).

1749 12 C.F.R. § 226.6 (1978).

1750 The disclosure of the existence of the buyer's right to cancel is similar to disclosures permitted by Federal Reserve Board interpretations. 12 C.F.R. § 226.604 (1978).

The Proposed Rule required the notice in the contract or receipt to be "in all capital letters of no less than twelve point boldface type."[1751] The Recommended Rule requires the use of precisely 12-point type, not all capitals, with boldface only in the heading.[1752] The notice should be more readable in this format:[1753]

ii. No negating

The Proposed Rule provided:

> A seller shall not misrepresent in any manner the buyer's right to cancel; nor shall the seller make any representation or perform any act or practice which in anyway negates, contradicts, detracts from or is inconsistent with a full understanding or a proper exercise of such right to cancel.[1754]

Some individuals feared that this provision would prevent sellers from doing anything to encourage buyers to come by for counseling before giving up and asking for a refund.[1755] Staff has considered this concern and concluded that it is unrealistic. Both the Proposed Rule and the Recommended Rule permit sellers to grant buyers greater rights, and the Recommended Rule even mentions extensions of the 30-day period as one of those greater rights.[1756] In addition, sellers should feel free to offer any appropriate services to those having difficulty during the 30-day period, as long as they do not encourage dissatisfied consumers to keep trying past the cancellation deadline without making provision for a mutually agreeable extension of the cancellation right. Certainly it would not be a violation of the Rule to "extend the trial period at no cost or obligation to the individual," as David McPherson, Ph.D., suggested he would do whenever someone was still having

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1751 Proposed Rule § 440.4(a).

1752 Recommended Rule § 440.37.

1753 See Part Two, Section III.GG.3.a.iii(a), infra, for the reasoning behind the choice of precisely 12-point type, with boldface only in the heading.

1754 Proposed Rule § 440.4(f). § 440.36 of the Recommended Rule admonishes "Do not do, say, or imply anything that may mislead the buyer about this right, or keep him from exercising it fully and freely."

1755 E.g., Mynders, TR11589; Vakerics, TR5130-33, 6259-60; see HAIC, R2/56.

1756 Proposed Rule § 440.6; Recommended Rule § 440.45.

adjustment problems as the end of the trial period approached.[1757] However, if a dissatisfied consumer comes in toward the end of the trial period, it would be a violation for the seller to urge the consumer to "try for a few more weeks" without providing for a mutually agreeable extension of the trial period.

iii. Separate consumer notice

In addition to apprising the consumer of the existence of the buyer's right to cancel, the seller is required to provide the buyer with two copies of a notice entitled "You Have 30 Days to Change Your Mind." This separate notice contains all the details the buyer needs to know in order to exercise the buyer's right to cancel. The seller must also provide each buyer with two copies of an "I've changed my mind" form, which the buyer can use to notify the seller of a cancellation.[1758]

The separate notice provides the buyer with a legal contract right which can be enforced in court if necessary.[1759] The mere existence of the form will add immeasurably to the likelihood that the seller will comply with the Rule's requirement, for the seller will know that the buyer knows what his rights are.[1760] Similarly, the detailed instructions to buyers about their responsibilities should help to insure that they act properly in canceling. The form advises the buyer precisely what to do and when to do it, and makes clear the amount of money that the seller can keep, in the event of a cancellation.

The separate consumer notice has a number of blanks that the seller is required to fill in before it is delivered to the buyer.[1761] In completing this notice, the seller is required to

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1757 McPherson, TR5131. Similarly, it would be a violation for a seller to send an aid off to the factory to be adjusted during the trial period without providing such an extension. See Munger, TR4550.

1758 Proposed Rule § 440.4(b); Recommended Rule § 440.38. Two copies are required so that the buyer can use one copy as his cancellation notice and keep the other from his records.

1759 Since it is referenced in the contract or receipt, Recommended Rule § 440.37, and is delivered to the buyer at the time he pays or promises to pay, id. § 440.38, the buyer's right to cancel clearly becomes part of the "basis of the bargain."

1760 See Flemming, TR607.

1761 Proposed Rule §§ 440.4(b) & (c); Recommended Rule § 440.38(c).

estimate the probable delivery date if the actual delivery date is unknown at the time of the sale.[1762] The seller is also required to make sure that the cancellation deadline is at least 30 days after the probable delivery date.[1763] HAIC questioned whether "there is any factual basis on which a seller can make such estimates," and criticized the Proposed Rule for subjecting sellers to civil penalties for incorrect guesses concerning factors outside their knowledge and beyond their control.[1764] Staff feels confident that sellers have a more than adequate basis for estimating the probable delivery date.[1765] Furthermore, a good faith estimate of the probable delivery date is all that the Rule requires.[1766]

(A) Is the notice clear?

While many persons considered the separate consumer notice as originally proposed to be both clear and adequate,[1767] others criticized it as being too difficult for many hearing-impaired consumers to comprehend.[1768] The notice performed poorly in

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1762 Recommended Rule § 440.36(c)(3).

1763 Id. § 440.36(c)(1).

1764 HAIC, R2/60.

1765 It is the very essence of a hearing aid seller's business to order, receive, and fit hearing aids. Every sale that is made provides him with the experience upon which he can easily base an estimate of the probable delivery date.

1766 It has been suggested that allowing the seller to estimate the probable delivery date may potentially endanger the effectiveness of the buyer's right to cancel. B. Sullivan, R6/372. In practice, however, a seller with a pattern of abusing this discretion in estimating probable delivery dates would clearly be subject to civil penalties, and a seller would clearly have to revise his estimates in the face of a pattern of late deliveries.

1767 E.g., Harford et al., R5/852; Kasten, R5/1434; Franks, R10/6518; Beiter, R10/5266; Ohio Div. C.P., R8/2927.

1768 E.g., Liversidge, TR1085; James Payne, TR2143; Bowen, TR1906-08, 1919, 1938-39; Jeffries, TR5590; Tobin, TR4091-93; Woodard, TR4141; NHAS, R2/115.

a test conducted by the New York League for the Hard of Hearing, utilizing 50 volunteers from the League's Old Timers Club.[1769] Irene Bowen introduced a simplified version of the notice with her testimony,[1770] urging that long sentences be shortened and that long words and technical words be replaced.[1771] Henry Tobin, Ph.D., testified that he thought Ms. Bowen's version was clearer than that originally proposed by the Commission,[1772] and also stressed the need for "enough built-in redundancy . . . so that the deaf will be able to understand what it is that is being said."[1773]

As with the rest of the Recommended Rule, the separate consumer notice has been rewritten in the "plain English" format. As a result, it should be much more understandable to consumers than the "Notice of Buyer's Right to Cancel" found in the Proposed Rule.

The Proposed Rule required the "Notice of Buyer's Right to Cancel" to be in no less than 10-point type, with a 12-point boldface heading.[1774] One comment objected that such a requirement was unnecessary and would make forms already in use obsolete.[1775]

1769 Madell, TR5858-59, R10/5583, 5587-89; Sullivan et al., R13/2513-14; Sullivan, R8/8569-70.

1770 HX36.

1771 Bowen, TR1919; see NCLD, R7/685-86; Bowen, HX35/3.

1772 Tobin, TR4091-92; see Schreiber, TR4045.

1773 Tobin, TR4093; see Schreiber, TR4046-47. Barbara McGarry of the American Foundation for the Blind testified that no special provision would be needed to ensure that blind consumers would be fully informed about the buyer's right to cancel, because "the blind person or visually handicapped person usually has a family member or a professional person, who is more than willing to evaluate anything of a technical nature to this blind person." McGarry, TR1278-79.

As with the rest of the Recommended Rule, the separate consumer notice has been rewritten in the "plain English" format. As a result, it should be much more understandable to consumers than the "Notice of Buyer's Right to Cancel" found in the Proposed Rule.

1774 Proposed Rule, §§ 440.4(a) & (b).

1775 Sinclair, R3/2050.

On the other hand, Ruth Lesko, an HAIC witness who heads Radioear's advertising agency, testified:

> We feel very strongly--by "we" I mean the agency--feels very strongly, especially when you are communicating to older people, you use as large a size of type as you can get in. I never use anything--not never--almost never use anything smaller than an 8 or 10-point type because very often people with hearing problems also don't see so well either.[1776]

The most legible type size for persons of normal vision is 10-point type, with 12-point type being almost as good.[1777] However, hearing-impaired persons often are older persons, who may not have perfect vision. Therefore, the Rule should err, if at all, on the side of requiring larger typeface. Staff has learned that boldface should be used "sparingly," because it "tires the eye easily."[1778] Using boldface for emphasis in headings is thus appropriate, although using it throughout the text is not. Because many hearing-impaired persons may have normal or near-normal vision, staff has determined that 14-point type is inappropriate for any lengthy disclosure. In addition it is probably wise to make the heading the same size as the text in order not to discourage the reading of "fine print." Accordingly, the Recommended Rule requires the use of 12-point type for the required written notices,[1779] with boldface permitted only for the heading.[1780]

(B) Is the notice unnecessarily negative?

Some witnesses expressed a great deal of concern with the terminology used in the consumer notices required by the Proposed Rule. The term "trial" was strongly criticized as possessing

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1776 Lesko, TR7217 (emphasis supplied).

1777 Tinker, Legibility of Print 71 (1969); Rehe, Typography: How to Make It Legible 27 (1976).

1778 Rehe, Typography: How to Make It Legible 31 (1976).

1779 These include the brief notice in the contract or receipt and the separate consumer notice.

1780 Recommended Rule §§ 440.37 & .38.

an undesirable negative connotation.[1781] It is difficult to take this concern seriously, however, since many sellers use the word "trial" to describe the return options they offer to their customers,[1782] and especially since the word "trial" appeared only once in the Proposed Rule and did not appear at all in any of the required consumer notices.[1783] One witness objected to the terminology "right to cancel" but not to "right to return" or "trial privilege."[1784] Another found "right to cancel" negative while "rental option" was not.[1785] Some witnesses preferred the term "evaluation period."[1786] In any event, the consumer notices in the Recommended Rule do not contain the words "trial" or "cancel."

Various industry members criticized the separate consumer notice as being totally negative.[1787] They complained that it implies "that there is a high probability that the hearing aid will not be satisfactory"[1788] and that the seller is a shady person indeed.[1789] Several persons stressed that this language would weaken the resolve of the consumer to keep the aid through

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1781 See, e.g., Fechheimer, TR7007; Keyes, TR10711, 10714, 10760; Tremmel, TR8371; Kerbs, TR11845; ASHA, R10/1713; John Payne, TR9209. On the other hand, NHAS President Fortner noted his preference for the word "trial." Fortner, TR2856.

1782 See, e.g., Kenwood, TR9298; Fennema, TR1750; Yellow Pages Ads, R10/2701, 2713, R13/1828, 1830-31, 1835, 1844, 1849, 1845, 1859, 1862-64, 1874. See also ZumBrunnen, TR11923/24.

1783 See Proposed Rule § 440.4(i)(1). Mr. Keyes apparently believed that the Proposed Rule required the seller to use the word "trial," Keyes, TR10760.

1784 Scott, TR2375. He, too, insisted that "language is extremely important." Id. Jan Williams, an NHAS witness, objected to "mandatory right to cancel versus lease purchase option." TR3816.

1785 Oberhand, TR3088-89.

1786 E.g., Keyes, TR10712; Krebs, TR11845.

1787 Staab, TR7038; see Stallons, TR7864-65; Curran, TR10894.

1788 Staab, TR7038; see, e.g., John Payne, TR9232; HAIC, R3/3977; Zenith R2/10.

1789 E.g., Krebs, TR11831, 11855; James Payne, TR2143; Fennema, TR1773, 1781; see Leale, R3/1614; Dahl, R3/2792; Beltone, R3/3439; Zenith, R2/10.

the adjustment period,[1790] or even cause him to reject the aid outright as soon as the notice is read.[1791] It was urged that the notice be more positive in its presentation,[1792] so as not to discourage the consumer from trying an aid and then trying hard to benefit from it.[1793] The Washington Area Group for the Hard of Hearing took a different approach, suggesting that the separate consumer notice highlight the fact that the buyer's right to cancel is provided by federal law, and "not simply as a favor by the seller."[1794] Similarly, Betty Hamburger wrote that the notice should emphasize that consumers have the right to sue and that complaints should be sent to the FTC.[1795]

Staff agrees that consumers need to know of the FTC's interest in hearing aid matters. The separate consumer notice in both the Proposed and Recommended[1796] Rules end with statements suggesting that consumers contact to the Federal Trade Commission if the seller fails to fulfill his responsibilities under the buyer's right to cancel. Staff considers this an important part of the consumer notice, especially in light of the cogent record evidence that many consumers do not know where to complain beyond the seller and their family and friends.[1797] Nevertheless, staff sees no need to present this information in a negative and accusatory fashion, and has drafted the separate notice with this view in mind.

1790 James Payne, TR2143-44; see Beltone, R3/3443.

1791 Krebs, TR11836, 11838, 11854-55; see, e.g., Staab, TR7038; HAIC, R2/57. But see, e.g., Freeman, R8/4046; Link, TR114-45.

1792 E.g., Krebs, TR11855; John Payne, TR9232; see Zenith, R3/3399.

1793 Krebs, TR11855.

1794 Paschell, R10/245; Vleck, TR901-02.

1795 Hamburger, R6/403.

1796 See Proposed Rule § 440.4(b) and Recommended Rule § 440.38 respectively.

1797 See Appendix F, Sections VII.B & VIII.B.4, infra; cf. Fortner, R13/1064.

Elinor Guggenheimer, Commissioner of the New York City Department of Consumer Affairs, urged that the separate notice make it clear to consumers that the buyer's right to cancel is not the buyer's only remedy in the event that a defective aid is sold.[1798] The Proposed Rule required the following statement at the end of the "Notice of Buyers Right to Cancel:"

> The granting of this right to cancel does not deprive you of any of the other rights given to buyers under the law. Nor does it limit any rights you have concerning warranties made by the seller or provided by law.[1799]

The separate notice required by the Recommended Rule makes no reference at all to the existence of other consumer rights. It simply states:

> If we don't pay your refund or live up to our other obligations, you should report this to the Federal Trade Commission, Washington, D.C. 20580. You should also get in touch with a lawyer.[1800]

There are two good reasons for this omission. First, any adequate explanation of the buyer's right to reject the goods[1801] or revoke acceptance[1802] under the U.C.C. is probably impossible in this context. The best that can be done is to advise consumers to see a lawyer. Second, it is reasonable to expect that many sellers will accept responsibility for any defective aids sold and will be willing to make arrangements for extensions of the buyer's right to cancel to make up for trial time lost because of the defect.

b. Buyer's responsibilities if he wants to cancel

i. What is a proper cancellation?

The separate consumer notice spells out what the buyer must do in order to effect a proper cancellation.[1803] First, he must

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1798 Guggenheimer, R6/230.

1799 Proposed Rule § 440.4(b).

1800 Recommended Rule § 440.38.

1801 U.C.C. § 2-601, 2-602.

1802 Id. § 2-608.

1803 Recommended Rule § 440.38.

give the seller written notice of his decision to cancel. The buyer can use the cancellation form provided on the separate consumer notice or can write his own cancellation notice. The cancellation notice must be personally delivered or postmarked by the deadline noted on the separate notice. If the aid was delivered to the buyer's home and the buyer wants the seller to pick it up, then the buyer must say so in the cancellation notice. The separate notice advises the buyer either to get a receipt for the cancellation notice if he personally delivers it, or to mail it "return receipt requested."

The buyer must then return the canceled aid to the seller. Unless the buyer elected to have the aid picked up in his home, it must be personally returned to the seller or postmarked within 7 days of the date of the buyer's notice of cancellation. If the seller is to pick up the aid at the buyer's home, then the buyer must make it available to him.[1804]

Some comments agreed with the premise behind the Proposed Rule that the act of cancellation should be by a writing in order to avoid any misunderstanding about whether the purchase has been cancelled.[1805] A writing clearly provides evidence of the fact of cancellation and should protect both buyers and sellers from disputes about what occurred.[1806] It will also provide a record helpful to those enforcing the Rule. Others suggested that there would be no misunderstanding if the buyer returned the aid and obtained from the seller a receipt for the aid, thus acknowledging the cancellation.[1807] The suggestion was made that the use of a writing might be impossible,[1808] especially by a consumer who could not read the language in which the notice was written.[1809] On balance, staff has concluded

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1804 As noted infra, there is no deadline by which the seller must pick up the aid. See text accompanying notes 1844-47, infra.

1805 E.g., Dolowitz, R8/1615; Wright, R5/1197; Moyer, R4/181. But see Palmquist, R3/138; Frohne, R5/D26.

1806 E.g, Kasten, R5/1439; Selger, R5/815; Ainsworth, R5/753; see Freeman, R8/4046.

1807 E.g., Fennema, R3/215; ASHA, R10/1736; Lovering, R5/1054.

1808 Galleher, R5/43.

1809 E.g., Stroup, R5/59; Madell, TR5866-67.

that a written cancellation notice should be required.[1810] Those who cannot read the language in the cancellation form will be unlikely to appreciate the right well enough to perform an adequate cancellation unless they have assistance in reading the separate consumer notice. They can similarly be expected to rely upon such assistance in executing the cancellation notice.

ii. Returned aid must not have been damaged by the consumer

Concern was expressed that the Proposed Rule would force a seller to accept a cancelled aid that had been abused by the buyer.[1811] This is clearly not the case, for both the Proposed and the Recommended Rules expressly provide that the seller is not required to accept the aid if the buyer has damaged it, normal wear and tear excepted.[1812] In addition, the refund of monies paid on the canceled aid is not required until after the seller has received the aid and had an opportunity to evaluate it.[1813] Although some comments have suggested that clear procedures be established to resolve differences of opinion about whether the buyer has mistreated the canceled aid,[1814] staff does not believe that such specificity is necessary or desirable.[1815] Beyond this, however, it has been argued that the proposed separate consumer notice is in error when it describes normal wear

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1810 See McCargill, R5/51. The buyer will be provided with a cancellation form by the seller.

1811 E.g., J. Williams, TR3780; Samole, TR6682, 6696-97; Carter, TR3661-62; Gillies, R4/84; West, TR10483.

1812 Proposed Rule § 440.4(b); Recommended Rule § 440.41.

1813 The seller has 30 days from the date the buyer's cancellation notice was personally delivered or postmarked in which to make this refund, Recommended Rule § 440.40, while the buyer must return the cancelled aid within 7 days of that date, id. § 440.38. Twenty-three days is surely sufficient time for the seller to return the aid to the factory for any evaluation which he is not equipped to perform. Thus Myron Samole's prediction that the dealer would be forced to accept a damaged aid, when the damage was not externally visible, is more apparent than real. Samole, TR6682, 6696-97.

1814 E.g., Goodwin, R5/165-66; see Z. Saunders, R5/1355-56; Walden, R5/1152; Menzel, R5/1415; Hamburger, R6/403; Zenith, R2/11.

1815 The local court system is available to perform this function.

and tear as including scratches on the casing.[1816] Zenith asserted that the "only way scratches can occur is through physical abuse. . . ."[1817] Staff is unpersuaded by this argument.

It was suggested that the buyer be required to insure the canceled hearing aid if it is mailed, in order to prevent controversy if the aid is damaged[1818] or lost[1819] in the mails. In response to this concern the separate notice in the Recommended Rule advises the buyer to insure the aid if it is mailed. If he fails to do so, the buyer will be responsible for any damage to the aid which occurs in transit. The seller cannot, however, reject a cancellation merely because the buyer sent the canceled aid by uninsured mail.[1820]

The Proposed Rule provided that if the buyer canceled but failed to fulfill his responsibilities,[1821] the seller would be entitled to recover "the fair market value of the canceled hearing aid(s) and the services [the buyer had] in fact received."[1822] Objection was taken to this provision on the ground that it would not permit the seller to recover the full contract price.[1823] If the seller were permitted to recover the full contract price, however, the buyer would be required to pay for post-sale services that were never received. The percentage of the selling price attributable to those services is no doubt substantial. The

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1816 Zenith, R3/3401; see F. Warren, R3/3235.

1817 Zenith, R3/3401 (emphasis in original).

1818 Knox, R3/1445.

1819 See Staab, TR7040, 7128.

1820 Recommended Rule §§ 440.39 & .41; see Part Two, Section III.GG. 3.b.ii, infra, for a discussion of damage to the cancelled aid.

1821 For example, by not returning the aid, or not returning it in satisfactory condition, a buyer would have failed to fulfill his responsibilities.

1822 This provision is set forth in the "Notice of Buyer's Right to Cancel" required by § 440.4(b).

1823 E.g., Knox, R3/1447. Mr. Knox' comment asserted that the "extent of the buyer's liability would not be the fair market value of the hearing aid, but the contract price." Id. This suggests that the buyer should pay the contract price even if it far exceeded the fair market value of the hearing aid and services provided under the contract. Staff disagrees.

justification for the enormous markup of retail prices over cost has been that the price includes the many services rendered or made available to the purchaser.[1824] It is not at all inequitable, then, for a buyer who fails to fulfill his responsibilities to pay only for those services which actually have been received.[1825] Accordingly, the Recommended Rule requires the incorporation of the following sentence into the separate consumer notice: "We can sue you for the fair market value of the hearing aid and the services we have already given, if you don't return the hearing aid."[1826]

c. Seller's responsibilities if the buyer cancels

If the buyer effectuates a "proper cancellation,"[1827] the seller must (1) return any traded-in aids; (2) receive (or pick up) the canceled aid; (3) refund all payments made toward the purchase price less any cancellation charges specified in the separate notice; (4) cancel any security interests possessed as a result of the canceled sale; and (5) attach the cancellation notice to the purchase contract.[1828] The Proposed Rule required the seller to perform all but one of these functions within 15 calendar days of the date of the buyer's cancellation notice.[1829] If the buyer elected to have the aid picked up at his home, the seller was required to do so within 20 days. Under the Proposed Rule, if the seller failed to claim the aid within the 20-day period, it was forfeited.[1830]

It was suggested that the period of time during which the seller must perform his responsibilities should begin on the date the cancellation notice was personally delivered or mailed, rather than the date assigned to it by the buyer.[1831] Staff considers this suggestion to be a good one since the buyer might fill in the wrong date, and has included the suggested modification in

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1824 See RPAG Report, R8/2681-82.

1825 Quantum meruit recovery is a well-established principle of contract law.

1826 Recommended Rule § 440.38.

1827 Recommended Rule § 440.39.

1828 Recommended Rule §§ 440.40, .42, & .43.

1829 Proposed Rule § 440.4(g).

1830 This provision was contained only in the "Notice of Buyer's Right to Cancel" required by § 440.4(b) of the Proposed Rule.

1831 Knox, 3/1445.

the Recommended Rule.[1832] It was also suggested that the proposed 15-day period within which the seller was required to perform his responsibilities was too short if the hearing aid is returned by mail[1833] or if the hearing aid must be picked up by the seller in the buyer's home.[1834] This was said to be especially true in rural areas where sellers "ride circuit."[1835] This objection is valid, and the time period has been extended to 30 days in the Recommended Rule.[1836]

As mentioned above, if the seller delivered or mailed the aid to the buyer's home, the buyer has the option of requiring the seller to pick it up there.[1837] Objection has been voiced about this requirement,[1838] particularly in light of the availability of the mails to certain purchasers.[1839] Staff has considered these comments and concluded that the home pickup requirement should be a part of the Recommended Rule. Thus, those buyers who are unable to leave home, even for the purpose of going to the Post Office to mail back a hearing aid, will be able to exercise their rights to cancel. The requirement exists, however, only if the aid was delivered to the buyer's home. The Recommended Rule will not require sellers who work only at their offices to establish a home visit mechanism. In addition, concern has been expressed that a buyer might not make himself available at a specified time.[1840] The Recommended Rule cannot and does not attempt to specify the precise manner of execution for all steps in the cancellation process. It does, however, require the buyer

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1832 Recommended Rule §§ 440.38 & .39.

1833 Knox, R3/1444-45 (should be 30 days); Zenith, R3/3402; see ASHA, R10/1738; NHAS, R2/114; HAIC, R2/59. But see Freeman, R8/4046.

1834 Knox, R3/1445 (should be 30 days).

1835 Id.; see McGargill, R5/51. But see Fennema, R3/215; Palmquist, R3/138; Cull, R5/1089; Kasten, R5/1438; Barrager, R5/1269; Wright, R5/2296; Dolowitz, R8/1615; Lovering, R5/1054; Hanson, R5/457; Michaelis, R5/944.

1836 Recommended Rule §§ 440.40 & .43. Section 440.42, however, requires traded-in aids to be returned as soon as possible, see text accompanying notes 1853-55, infra.

1837 This requirement is contained only in the separate consumer notice, id. § 440.38.

1838 Bowling, R5/77.

1839 Pippin, R3/2035.

1840 Delvin, R8/5319.

to make the aid available to the seller in a reasonable manner.[1841] If the buyer fails to do so there is not a "proper cancellation."[1842] Lastly, the home pickup requirement will be feasible even for mail order sellers, for UPS will perform the pickup for a nominal charge.[1843]

Under the Proposed Rule a seller who failed to pick up any cancelled aids within 20 days waived his right to possess them.[1844] This requirement was criticized as an unnecessary[1845] and unreasonable[1846] provision which would tempt buyers to try to avoid the seller during the 20-day period in order to get to keep the aid.[1847] Staff has considered these arguments and decided not to include any such forfeiture requirement in the Recommended Rule. The burden on the consumer of storing the canceled aid until the seller picks it up is minimal. In addition, it is clearly in the seller's interest to pick up the canceled aid as soon as possible, so that he can have it evaluated for damage before making the refund required by the Rule.

The "Notice of Buyer's Right to Cancel" required by the Proposed Rule suggested that the buyer obtain a receipt for the canceled aid when it was personally delivered to the seller.[1848] The Recommended Rule's separate consumer notice advises the buyer to ask for a receipt for the cancellation notice and the cancelled aid if either is personally delivered to the seller.[1849] NCLD recommended that the seller be required to give the buyer a receipt for the return hearing aid.[1850] Staff has considered

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1841 Recommended Rule § 440.38.

1842 Id. § 440.39.

1843 Butt, R8/2923-24.

1844 Proposed Rule § 440.4(b).

1845 NHAS, R3/3583.

1846 Stover, R5/329; Pippin, R3/2035; Knox, R3/1446; Alio, R5/919; Zenith, R3/3401; NHAS, R2/114; Tryba, R10/6746.

1847 Freeman, R8/4046.

1848 Proposed Rule § 440.4(b). "Certified Mail, Return Receipt Requested" was recommended whenever the cancelled aid was mailed to the seller. Id.

1849 Recommended Rule § 440.38. "Certified Mail, Return Receipt Requested" is recommended whenever the cancellation notice and cancelled aid are mailed to the seller. Id.

1850 NCLD, R7/685, 688.

this recommendation and concluded that such a requirement is unnecessary. The Recommended Rule already prohibits sellers from doing anything that would keep the consumer from exercising the right to cancel fully and freely.[1851] If the buyer refused to leave the cancelled aid with the seller because the seller refused to give the buyer a receipt, the seller's refusal would clearly be in violation of the Recommended Rule. Unless such a refusal seriously interfered with the buyer's exercise of the cancellation right, however, it would seem inappropriate for the Rule to require a receipt. The absence of a receipt should not seriously affect the buyer's ability to prove a proper cancellation.[1852]

Concern was expressed that under the Proposed Rule the buyer might be without any hearing aid for as much as 8 days.[1853] The buyer was required to return the cancelled aid within 7 days of the date of the cancellation notice while the seller had 15 days to return any trade-ins.[1854] This is clearly a great and unnecessary inconvenience, and the Recommended Rule requires the seller to return the traded-in aid as soon as possible after he receives the cancelled aid.[1855] Thus, if the cancelled aid is personally delivered to the seller, the consumer usually will get the traded-in aid back immediately. The traded-in aid is very important to the buyer at this time, and of relatively little value to the seller. The deadline for the seller's refund of payments made on the canceled aid, however, remains later than the deadline for the return of the cancelled aid. This timing provision will enable the seller to evaluate the returned aid for damage.

Some comments asserted that requiring the seller to retain traded-in aids until the end of the cancellation period imposed an unreasonable burden on the seller.[1856] It was suggested that a more fair procedure would be to allow a value to be placed

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1851 Recommended Rule § 440.36. The predecessor to this provision was § 440.4(f) of the Proposed Rule.

1852 Indeed, it is clearly in the seller's interest to provide a receipt noting that the return of the cancelled aid was tardy. In the absence of such a receipt, the return might well be presumed to have been timely.

1853 E.g., Harford, TR64-65, 109-10; Harford et al., R5/855; Bowen, TR1930.

1854 Proposed Rule §§ 440.4(b) & (g)(2).

1855 Recommended Rule § 440.42.

1856 E.g., Brill, R5/973; Zenith, R3/3400; Kasten, R5/1439.

on the trade-in at the time of the sale, so that the dealer could have the option of either returning the trade-in or refunding this value in cash.[1857] Others have asserted that the value to the buyer of a traded-in hearing aid in the event of a cancellation usually far exceeds its value to anyone else.[1858] The record contains examples of dissatisfied consumers who were unable to get their old hearing aids back[1859] because the seller could not locate them,[1860] or no longer possessed them,[1861] or had dismantled them.[1862] Staff has considered these arguments and concluded that the additional burden placed on the seller is far outweighed by the value of enabling buyers who cancel to be provided with the hearing aid, and hence the hearing ability, they possessed prior to the purchase.[1863]

The Proposed Rule required the seller, upon cancellation, to

> Take all action necessary or appropriate to terminate:
>
> (i) All financial obligations assumed by the buyer as part of this transaction to cover the purchase of the cancelled hearing aid(s); and
>
> (ii) All security interests created in connection with this transaction to cover the purchase of the cancelled hearing aid(s).[1864]

1857 E.g., Brill, R5/973; see B. Sullivan, R6/373.

1858 E.g., ASHA, R10/1749-50; Shannon, R5/669; Noon, R5/692; McGargill, R5/51; Fariss, R5/320; Zerbe, R5/1109; Lovering, R5/1054; Selger, R5/815; see Layson, R4/89; Fennema, TR1796, R3/215.

1859 E.g., Gunterman, TR9656.

1860 E.g., Mills, R10/5950; Kelly, R10/5731.

1861 E.g., Mastricola, TR8617; NCSC affidavit, R10/4694; id. at 4703; Jeffries letters, R10/5422, 5464, 5466.

1862 E.g., Gunterman, TR9661, HX212.

1863 See Willett, R3/818 ("no burden" on seller to do this); McPherson, R5/632; Cull, R5/1089; Galleher, R5/43; Noon, R5/692; Madell, R5/1691; Kearns, R5/909.

1864 Proposed Rule, § 440.4(g)(3). This requirement was reflected in the "Notice of Buyer's Right to cancel." See id. § 440.4(b).

NHAS protested that the seller cannot cancel all financial obligations that the buyer assumes when going to a "third party financial institution to obtain a loan for the purchase of the hearing aid."[1865] The Recommended Rule avoids this problem, for it provides for a more narrowly drafted responsibility: the seller must "cancel and return any security interest that [he] got from the buyer for the purchase of the returned hearing aid(s)."[1866] Objection was also voiced about the burden of refunding finance charges that would be forfeited to the lending institution upon cancellation.[1867] Any finance charges that would be forfeited to a third party, however, would not be reflected in payments made to the seller. Thus the Recommended Rule would not require any refund of such charges.[1868]

d. Who has the right to cancel?

Under both the Proposed Rule and the Recommended Rule[1869] the right to cancel resides in the person who pays for the aid. A variety of possible problems have been suggested, particularly in light of the fact that the buyer of a hearing aid is not always the wearer. All of these problems have been resolved, however, or are not considered significant, as reflected in this subsection of the Report.

i. When the consumer is not the buyer

The definition of "buyer" in the Proposed Rule did not specifically include government agencies.[1870] This ommission was criticized as unjustified.[1871] Staff agrees.

1865 NHAS, R2/114; see Zenith, R3/3400-01, 3404.

1866 Recommended Rule § 440.43. The separate consumer notice assures the consumer that "within 30 days of the date you delivered or mailed your notice, we'll give up all our rights from this sale or rental." Id. § 440.38.

1867 E.g., NHAS, R2/97, R3/3543-44; Zenith, R3/3395.

1868 See Recommended Rule § 440.40.

1869 See Proposed Rule §§ 440.2(d) and 4(b) and Recommended Rule § 440.38, respectively.

1870 Proposed Rule § 440.2(d).

1871 Brakebill, R3/721, TR1280-81, 1333. But see Staab, TR7041.

The Recommended Rule requires the separate consumer notice to be given to the one who pays,[1872] and contains no definition of "buyer" which restricts this requirement. In some situations, of course, the seller may see the consumer but not the buyer. This would be the case, for example, when a veteran is authorized to purchase an aid from a local seller of his choise.[1873] In that instance the seller is free to make the required oral disclosure[1874] to either the consumer or the buyer. The separate notice[1875] would be sent to the buyer rather than given to the consumer. Presumably, the contract would also be sent to the buyer, to obtain payment. In any event, the separate notice must be mailed at the time the buyer pays or promises to pay for the aid.

1872 Recommended Rule § 440.38. On the other hand, the Proposed Rule was criticized as defining "buyer" in an overly broad fashion, so that lending institutions arguably would have to be given copies of the consumer notice and vested with the right to cancel. HAIC, R2/45, R3/3944-45; Zenith, R3/3394; NHAS, R2/96, 114, R3/3543. Staff disagrees, since it is clearly the consumer who was "buying" the aid, with money borrowed from the lending institution.

1873 There is one exception to this principle, however. When the VA buys hearing aids in bulk, without having a particular veteran in mind as the potential user, the buyer's right to cancel would be meaningless because the 30 days would probably lapse while the aids were in the VA inventory, awaiting selection for use in comparative hearing aid evaluations. In addition, if the sale is a bulk one, the seller does not have the opportunity to do what he can to minimize the risk of cancellation. In an individual sale the seller can evaluate the wearer and work with him to increase the likelihood of a successful fitting. The seller can also refuse to sell the particular aid(s) recommended by someone else, or attempt to have that recommendation modified whenever appropriate. Staff has concluded that the buyer's right to cancel should not be required for bulk sales in which the seller does not deal with the consumer. The same logic would apply whenever an auditory trainer was purchased by a school for general use by its students. Section 440.36 of the Recommended Rule therefore requires sellers to provide rights to cancel only in sales or rentals to consumers.

1874 Recommended Rule § 440.36.

1875 Recommended Rule § 440.38.

Finally, NHAS asserted that none of "the alleged grounds for the mandatory return provision are applicable to one who is not the actual wearer of the hearing aid."[1876] Staff believes, however, that the person who pays should be entitled to cancel if, in his view, the wearer is not deriving benefit from the aid. In addition, there clearly are situations where the wearer is obviously not capable of exercising the right, necessitating someone else to act in his stead.[1877]

ii. When there is more than one buyer

Virtually all comments received on the subject endorsed the requirement that the consumer notice be provided to each buyer whenever more than one person was paying for the aid(s).[1878] The Recommended Rule continues this requirement.[1879] The suggestion was also made that copies should be given to the user, who should also have the right to cancel, even if someone else was the buyer.[1880] Staff has not accepted this recommendation. Since only the party who pays will be injured economically if an unsatisfactory aid cannot be returned, he is the proper one to be given copies of the required notices.

1876 NHAS, R2/96, R3/3543.

1877 For example, a child or a mentally or legally incompetent person cannot be expected to make the decision regarding whether to cancel.

1878 E.g., Kasten, R5/1438; Wright, R5/1196; Zerbe, R5/1109; Lovering, R5/1054.

1879 Recommended Rule § 440.38.

1880 E.g., Dolwitz, R5/1615, B. Sullivan, R6/372; ASHA, R10/1736. Zenith asserted that the "buyer, regardless of the financial involvement is clearly one who takes title to and uses the hearing aid." Zenith, R3/3394. The alternative definition of "buyer" proposed by Zenith recognizes the right to a refund by a third-party purchaser, but remains silent as to who has authority to exercise the cancellation right. Id. at 3394-95. William Paschell expressed concern that in nursing homes, which have control over their residents' finances, the users might have to depend upon the nursing home administrations to act on their behalf. Lack of interest or an actual conflict of interest could result in those consumers being unprotected if they did not receive both the right and notice. Paschell, TR858-60. The evidence indicates that situations in which someone other than the user pays for the aid are not infrequent. Powers, R13/1012.

e. Extensions

As noted previously,[1881] a period of time longer than 30 days from delivery may be needed before the decision whether to cancel can properly be made.[1882] Proposed Rule section 440.6 provided for this, and the record evidence suggests that it is reasonable to expect that sellers and buyers will make mutually agreeable extensions of the cancellation period when a good faith effort by both has failed to provide an adequate opportunity to decide whether sufficient benefit is being derived from the aid.[1883] Section 440.45 of the Recommended Rule therefore also makes it clear that the seller may extend the 30-day cancellation period. In order to prevent excessive charges for extensions, section 440.45 does, however, limit the charge for any extension to $1 per day. This is the same rate provided by the $30 charge permitted for the 30-day period, and reflects the fair value of such an extension as recognized in the marketplace.[1884] For equally obvious reasons, section 440.35 provides that notwithstanding any extension of the 30-day period, the seller must "allow the buyer to cancel within the first 30 days and pay the cancellation charges listed [in the original consumer notice]."[1885]

f. Replacements

In order to prevent sellers from stringing consumers along with substitute aids until the dedline for cancelling has passed,[1886] the Proposed Rule required the granting of a new 30-day period wheneven the seller substituted hearing aids during the initial 30 days.[1887] No cancellation charges were permitted

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1881 See text accompanying notes 1720-25, supra.

1882 See, e.g., Drew & Eiler, R10/5194; J. Anthony, TR8452; NHAS, R2/108, R3/3567, 3590; Fortner TR2857; McPherson, TR5130-31; Stallons, TR7865 (for a "few users"); Fowler, R8/1983.

1883 E.g., Freeman, R8/4046; Rose, R8/4182; Kasten, R8/6989; ASHA, R10/1738; Jerger, R8/4568; Hayes, R8/4952; Hull, R8/6137; Harvey, R8/5332; see Brakebill, R8/4333; John Payne, TR9210; McPherson, TR5130-31.

1884 See Part Two, Section III.GG.3.h.iv & v, infra.

1885 Recommended Rule § 440.45.

1886 Consumer experiences demonstrate that this sometimes occurs. See Part One, Section III.I, supra.

1887 Proposed Rule § 440.4(h).

at the time of the substitution. If the substitute aid was canceled, the cancellation charges were not to exceed the cancellation charges specified for the initial aid.[1888] However, the buyer could be required to pay any difference in the price of the aids at the time of the substitution.[1889] This provision comports with the practice of reputable sellers when they find that a substitution for the initially recommended aid is necessary.[1890] The evidence indicates that replacements within the trial period are not uncommon.[1891] James Johnson testified that about three quarters of the aids returned under Zenith's various trial periods were exchanged for replacement aids.[1892] Donnell Ehritt reported that nine percent of her patients purchase hearing aids which have been substituted for the aids initially recommended and tried.[1893] Elmer Owens reported that, in one sample of consumers, substitutions were twice as common as cancellations during the 30-day trial.[1894]

NHAS asserted that this substitution provision was unfair because it "encourages multiple extensions of the cancellation period and permits the buyer to have the use of a hearing aid for prolonged periods at substantially less than the real cost of a hearing aid and services."[1895] NHAS's argument ignores two very important points. First, the fact that one aid is substituted for another during the trial period suggests that the original aid was inappropriate.[1896] Second, substitutions are

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1888 Id.

1889 Id. § 440.4(b).

1890 E.g., John Payne, TR9212-13; Brakebill, R8/4333; E. Owens, R8/6485-86.

1891 But see Burris, TR2555-56.

1892 J. Johnson, TR2299-2300.

1893 Ehritt, R8/4799 (90% of the initial recommendations are purchased, and 1% result in no purchase of any aid); see Rassi, TR5736; Fortner, TR2889; Barnow, TR1675.

1894 E. Owens, R8/6485. Out of 241, 14 received substitute aids, whereas 7 cancelled during the trial period.

1895 NHAS, R2/115; R3/3582-83.

1896 See Rose, R8/4187.

made at the seller's discretion. Without this substitution provision, buyers would lose the protection of the right to cancel when it was needed most.[1897] For all of these reasons, staff has retained the substitution provision without substantive changes in the Recommended Rule.[1898]

g. Short rentals

The Proposed Rule contained a special provision for hearing aid rentals of 30 days or less.[1899] It first required that the seller orally disclose the rental charges before the buyer agreed to the rental.[1900] In addition, the seller was required to provide, again prior to the rental, a written disclosure of his name and address, the dates on which the rental period began and ended, and the amount of all rental charges.[1901]

In order to prevent the circumvention of the limits on cancellation charges for sales or longer rentals through the device of the short rental,[1902] the Proposed Rule also set a limit on the permissible charges for rentals of up to 30 days.[1903] HAIC objected to this provision on the grounds that it was price fixing beyond the Commission's authority,[1904] and termed it a "dramatic illustration of the undesirable effects" of becoming "involved in the imbroglio" of setting maximum cancellation charges.[1905] HAIC pointed to a memorandum from Dennis Murphy, Ph.D., Assistant to the Director, Bureau of Economics,[1906] as

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1897 Rose, R8/4187; see ASHA, R10/1750-51.

1898 Recommended Rule § 440.44.

1899 Proposed Rule § 440.5.

1900 Proposed Rule § 440.5(b)i. See text accompanying notes 1743-44 for a discussion of proof issues raised concerning oral disclosures.

1901 Proposed Rule § 440.5(c).

1902 See 40 Fed. Reg. 26653 (1975), Commission Question (v).

1903 Proposed Rule § 440.5(a).

1904 HAIC, R3/3951-55.

1905 Id. at 3952.

1906 This memorandum, dated April 28, 1975, was addressed to the Commission and accompanied the staff memorandum recommending issuance of the Proposed Rule.

cautioning that "extreme care must be taken to avoid the distortion and rigidities so frequently spawned by government economic regulation."[1907] Noting Dr. Murphy's concern that any maximum will become the standard charge because retailers "will seize upon this government suggested maximum retail price as a convenient means of discouraging price cutting,"[1908] HAIC complained that the Proposed Rule was "exposing retail hearing aid sellers who comply with any maximum charge regulations to the potential liability of antitrust prosecution for price fixing."[1909] Such hyperbole is clearly inapposite and deserves no detailed rebuttal. Staff recognizes that government maximums may become the "standard charges" and that this is a potential adverse consequence of setting maximum cancellation charges. Nonetheless, evidence in the record strongly supports the need for and benefit provided by maximum cancellation charges in general,[1910] and of maximums for short rentals in particular.[1911] Accordingly, the Recommended Rule provides that charges made for rentals of 30 days or less cannot exceed the cancellation charges allowed under the Recommended Rule.[1912]

Several additional comments were received concerning the short rental section of the Proposed Rule. One individual recommended that the seller be required to apply any rental charges toward the purchase price if the rental instrument was purchased.[1913]

1907 HAIC, R3/3953, quoting Murphy Memorandum at 2.

1908 Id., quoting Murphy Memorandum at 3.

1909 HAIC, R3/3953-55.

1910 See Part Two, Section III.GG.3.h.i, infra.

1911 Numerous comments recognized the need for maximums for short rental charges to prevent sellers from using short rentals to circumvent the limits on cancellation charges provided for the buyer's right to cancel. E.g., Rose et al., R5/712; Harford et al., R5/856; Ohio Div. C.P., R8/2928; Brickfield (AARP), TR1433; ASHA, R10/1756; Pratt (ACO), R5/1745. Some persons reported instances in which sellers were able to obtain excessive rental fees. E.g., Rose et al., R5/712 ($60 per month plus the price of the earmolds).

1912 Recommended Rule § 440.46. ASHA recommended that the Proposed Rule be amended to make it clear that "leases" up to and including 30 days be considered short rentals. ASHA, R10/1757-58. Section 440.46 of the Recommended Rule incorporates this change.

1913 Zerbe, R5/1108.

Another urged that the Rule require the seller to disclose whether the rental charges would be applied to the purchase price if the consumer subsequently decided to buy.[1914] It was also suggested that the seller not be allowed to retain upon cancellation any charges for prior rentals if the charges had been applied to the purchase price.[1915] Staff has considered these recommendations and concluded that none of them should be adopted. The purpose of the short rentals provision is to enable the buyer to extricate himself from an undesirable short rental transaction with as much ease and with as little financial loss as those who buy hearing aids outright. If after a short rental, the buyer decides to buy a hearing aid, it is reasonable to conclude that he has bought and paid for a service which he felt was worth the price. Added protection seems unnecessary in such situations.

Lastly, ASHA recommended that a written contract be required for all leases of greater length than 30 days, and that the written contract disclose what the total charges will be per year.[1916] ASHA reasoned that a charge of "$1 per day might not appear too expensive to a given buyer even though it amounts to an annual payment of $365."[1917] ASHA's concerns have largely been met by the "Consumer Leasing Act of 1976," which requires certain disclosures for leases to individuals of more than 4 months duration, among them the "number, amount, and due dates or periods of payments under the lease and the total amount of such periodic payments . . . ."[1918]

1914 Drew and Eiler, R10/5194.

1915 Id.

1916 ASHA, R10/1756.

1917 Id. (emphasis in original) ASHA noted that "[g]iven the life expectancy of most hearing aids, . . . the buyer could end up paying four or five times that amount by renting instead of buying the instrument." Id.

1918 15 U.S.C. § 1667 et seq. (Supp. VI, 1977).

h. Cancellation charges

i. Necessity of maximum limits

Many comments were received urging that the Rule set maximum limits on the cancellation charges sellers are permitted to retain.[1919] Most industry members objected to the setting of maximums,[1920] however, usually following the language used in a July 1975 NHAS guide to the Proposed Rule.[1921] Industry asserted that fair and reasonable cancellation charges would result solely on the basis of competition among sellers in the free market.[1922] However, cogent evidence in the record suggests

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1919 E.g., Pratt, (ACO), R5/1748; Gertsman, R5/1188; Stroup, R5/55; T. Carter, R7/256-57; Paschell, R7/444; Siegel, R7/319; Schmitt, R6/445; Jeffries, R6/288; Conlin, TR7776; J. Brown, R6/212; Shimanoff, R6/113; Newby, R5/426; Menzel, R5/11; Graunlie, R5/473; Hanson, R5/452; Eckel, R5/521; Hattler, R5/383; Harford et al., R5/853; Rose, R8/418; Rose et al., R5/710-11; Kasten, R5/1434; Winston, R5/1694, R8/7395; Ruben, R5/1252; Dolowitz, R5/1609; Ehritt, R5/1142; Ediger, R5/1073; Abrams, R5/1094; J. Stephens, R5/1104; Lentz, R5/1291; Chaiklin, R5/1592, R8/3647; Shannon, R5/666; Hardick et al., R5/574; Schrieber, R4/82; ASHA, R10/1738-39; Griesel, R10/6768; Franks, R10/6519; Yamashiro, R8/3707. But see Hecker, R10/4840.

1920 E.g., McCook, R3/971; Durbin, R3/2088; Hampton, R3/1394; Cato, R3/1750-51; McCoy, R3/1542-43; Gidley, R3/1745; West, R3/1701; J. Jones, R3/1401; Eldon Johnson, R3/1412; Booth, R3/1414; Irwin, R3/1454; Goebel, R3/1589; M. Freshley, R10/6638; cf. Murdock, R3/882; Skadegard, R3/176. But see Maico, R2/129; Willett, R3/817, R6/398; Azar, R6/100; Fennema, R3/211, TR1759; Brakebill, R3/1618; see Samole, R3/828. The model bill developed jointly by RPAG and GPHAG included a provision for the state to set a maximum cancellation charge. RPAG and GPHAG, R8/3554. Roy ZumBrunnen, an NHAS witness and Chairman of the California Hearing Aid Dispensers Examining Committee, testified that that Committee "agrees that a 30-day trial period should be available," TR11923, and that the Committee intended to set maximums for charges permissible if the aid was returned, TR11924, 11994.

1921 R3/1723, 1725. NHAS asserted that setting maximum cancellation charges was price fixing in violation of FTC's own rules and beyond its power. Id. at 1723, 1725. But see Staab, TR7038; Skadegard, R3/177.

1922 HAIC, R2/60-61; Maico, R2/129; NHAS, R2/113; see Zelnick, TR439-40; Bowling, R5/77; Korb, R3/99.

that far too often this will not be the case. For example, Sharon Graham reported that one Arkansas consumer was charged $200 for trial use of the aid she returned.[1923] Edna McKnight of Michigan wrote the Commission that she lost $130 trying a hearing aid which was unsatisfactory.[1924] MPIRG reported that a Minnesota consumer was charged $140 for a 30-day trial of a $400 hearing aid.[1925] NCSC introduced the complaint of a Maryland consumer who was promised a refund if unsatisfied, only to find out later[1926] that the seller would retain charges totaling $103 for each of the two (binaural) hearing aids she purchased.[1927] The experience related by Bessie Rhodes of Vermont demonstrates how easy it would be for unscrupulous sellers to set almost any cancellation charge they wished, if left to their own devices. A Beltone salesman offered her an absolutely free "test trial" for 10 days and persuaded her to sign a contract for $399 by assuring her that her signature was only for the purpose of verifying her willingness to take the aid on a trial test. After she signed the contract, he folded it and placed it with the Beltone literature she was given. A few days later she read it and discovered that she had been deceived.[1928]

Staff has considered all of these matters and concluded that the Recommended Rule must set maximum limits on permissible cancellation charges. Without maximum limits, cancellation charges could very well be set so high as to vitiate the buyer's right to cancel.

1923 S. Graham, R8/5277; see Winston, R8/7395.

1924 McKnight, R4/804.

1925 MPIRG, R8/1258.

1926 The Beltone seller asserted that these charges were disclosed at the outset.

1927 NCSC, R10/446, 469-71; Munger, TR4507.

1928 Rhodes, R10/6238-39; see Stroup, R5/55; Brewer, TR3964-65. Other consumer experiences in the record demonstrate the need for this provision of the Recommended Rule. For example, a Pennsylvania consumer was offered a "free 1-day trial" by an unsolicited Beltone salesman. Only after the trial was had and the aid was rejected did the salesman reveal that he "had" to charge $25 for the custom earmold. AARP letter, R10/1436.

ii. Problems with setting maximum limits

Concern has been expressed that the setting of maximum cancellation charges will cause those sellers now charging less than those maximums to raise their charges, making the maximums the standard.[1929] After carefully considering the matter, staff has concluded that this risk is far outweighed by the anticipated advantages to consumers from setting maximum limits for cancellation charges.[1930] In doing so, staff notes that the competitive advantage which is achieved by those sellers who currently offer trials will remain available to those whose cancellation charges are less than the maximums in the Recommended Rule.

Many have asserted that a single formula for maximum cancellation charges, for all sellers throughout the country, does not recognize and take into account the varying costs of doing business in differing locations[1931] and among different sizes and types of retail operations.[1932] Since the primary purpose of the cancellation charges is not to compensate sellers, but rather to motivate consumers adequately,[1933] this argument is irrelevant, however[1934] Moreover, while some have firmly argued that

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1929 E.g., ASHA, R10/1743; D. Johnson, R5/354; see HAIC, R3/3953 (citing a memorandum by Dennis Murphy, Ph.D., Assistant to the Director, Bureau of Economics, FTC).

1930 See D. Johnson, R5/354.

1931 E.g., Zenith, R3/3403; Campagna, TR2620; Schneider, R3/2964; J. Johnson, TR2304; NHAS, R2/113; Joseph, TR4236; NHAS, R3/3582; see Joyner, R5/501; Holmes, TR9595-96.

1932 E.g., Fortner, TR2857-58, 2951-52; NHAS, R3/3582. Staff questioned whether the size of a dealer's operation results in different per sale costs. Vincent Giglia, GPHAG's President, testified that the cost of doing business is about the same for the 86 dealers in the Philadelphia metropolitan area. TR2784.

1933 See Part Two, Section III.GG.3.h.iii, infra.

1934 The frequent similarity of cancellation charges made by different sizes and types of retail operations, and in different parts of the country, strongly suggests that the marketplace has not found the varying costs of doing business to be a significant factor in setting cancellation charges. See Part Two, Section III.GG.3.h.iv, infra.

the costs of those who operate in big cities are higher than the costs of those serving rural areas,[1935] others are just as adamant that the reverse is true.[1936]

iii. Purpose of cancellation charges

Any logical decision as to what maximum should be set for cancellation charges must be based on an initial decision about the purpose of the cancellation charges. Many have stressed that the purpose of the charges should be to compensate the seller completely.[1937] Others have pointed out that none of the cancellation charges currently being made by sellers provide them with adequate compensation for time expended, costs incurred and profits lost.[1938] Indeed, if the seller is to be fully compensated, the cancellation charges would of necessity constitute virtually the entire purchase price.[1939] Staff finds more persuasive the comments of those who view cancellation charges primarily as a vehicle for motivating consumers to make a good faith effort to adjust to the selected aid,[1940] and for discouraging them from trying aids from different sellers in a poorly

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1935 E.g., J. Johnson, TR2304.

1936 E.g., Fortner, TR2951-52.

1937 E.g., Zenith, R3/3403; HAIC, R3/3955; NHAS, R2/112, R3/3601, 2121, 3690; Freshley, R10/6640, 6651-52; Schaefer, R10/6473; Kojis, TR2088; Joseph, TR4236; Staab, TR7038-39; Holmes, TR9583; Green, R5/1367. Other comments suggested that the seller should be adequately compensated without making the charges too high for buyers, without discussing how this could be achieved. See, e.g., Link, TR1150-52; Ginsberg, TR4632; West, TR10478. Marylene Freshley provided a list of the services for which she believed the seller deserved to be compensated, and included in this list all pre-sale services. R10/6651-52. Her argument fails to recognize, however, that the seller is not compensated for these services when the "close" is not made, for these services are customarily offered without charge or obligation by the traditional seller. See Part One, Section IX.B, supra. See also Fullerton, R3/2602; NHAS, R2/113.

1938 E.g., Fennema, TR1760, 1774, 1782; Butz, R10/5203; NHAS, R3/3581; Fortner, TR2856; see Hoover, R6/184; Willett, R6/398.

1939 See, e.g., Baesemann, TR7318, 7321, 7339; Samole, TR6663; NHAS, R3/3690.

1940 E.g., Rose, R8/4184; Rassi, R8/5359; Kasten, R8/6978, 6989, R10/71; Brickfield (AARP), TR1431; see Rupp, R8/7120; Pratt, TR3699, 3712-16.

motivated and potentially unending search for an aid which will satisfy their unrealistic expectations.[1941] Thus, compensation of the seller is only an incidental benefit of the charges.[1942] This is not to say that such incidental compensation is inadequate, however. In fact both the comments in the record[1943] and the cancellation charges currently being made by those who offer trials[1944] suggest that the nominal amounts needed to motivate consumers are "adequate" compensation to sellers, when viewed in the broad context of hearing aid selling.[1945]

iv. Reasonableness of the cancellation charges permitted under the Proposed Rule

With two exceptions,[1946] the cancellation charges provided by the Proposed Rule are about the same as those currently being charged by reputable sellers who offer trials.[1947] Most trial

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1941 E.g., Harford et al., R5/853; see Delk, TR10917, 10957-58; Krebs, TR11845-50.

1942 E.g., Rose et al., R5/710-11; Rassi, R8/5359. Other comments suggested this conclusion, when viewed in the context of the amounts of cancellation charges stated to be reasonable. See, e.g., Krebs, TR11839-40; Brickfield (AARP), TR1431, 1469-70; ASHA, R10/1746-47; Kasten, R5/1434, R8/6989, R10/71; Pratt, TR3699, 3712-16; Newby, R5/427; Windham, R5/396; P.O. Report, R9/Dlip122-23.

1943 See, e.g., Giglia, TR2790-91.

1944 The amounts usually being charged are discussed in Part Two, Section III.GG.3.h.iv, infra.

1945 This broad context would include the ability to make more sales, with the profits those extra sales would bring. This topic is discussed in greater detail in Part Two, Section III.GG.5.a.iv, infra.

1946 The two types of charges which some reputable sellers retain, for which the Proposed Rule made no provision, were: (1) a charge for imbedding CROS wiring into the frames of eyeglasses; and (2) a charge for services rendered before the sale. See Part Two, Sections III.GG.3.h. vii & viii, infra.

1947 See P.O. Report, R9/Dlip122. A surprising number of NHAS witnesses have criticized the Proposed Rule for requiring the seller to make a full refund to buyers who cancel. (E.g., Oberhand, TR3041; Baird, TR3637; Carter 3654, 3664-66; see A. Smith, TR8169-71.) The Proposed Rule, of course, clearly permitted cancellation charges totalling around $50.

periods are available at a cost of one dollar a day or $30 for a month[1948] plus a charge for any custom earmold,[1949] although some sellers charge less[1950] or more.[1951] Some sellers also charge

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1948 E.g., ASHA, R10/1747; Harford, R8/4549, TR145-46; Wallenberg, R8/4397; Winston, R5/1695; Norris, R8/4341; Hardick, R8/4328; Hardick et al., R5/576; Consumers Union, R10/2542; Campagna, TR2660; Holmes, TR9614/3; Giglia, TR2749; Dale ad, R13/1925a; Joyner, R5/501; Brewer, TR3918; Fennema, TR1746, 1767; Conlin, R7/107; Urban, TR1810; S. Graham, R8/5279; Freeman, R8/4049; Butz, R10/5203; Kasten, R5/1435; L. Wilson, TR10045-46 (or nothing at all); Kuptz, TR5719. See, e.g., Hattler, R8/4728; Dahlberg, R8/1975; Yantis, R8/4399; Gerstman, TR2422; Hoover, R6/184; Knox, R3/24; ZumBrunnen, TR11992 (MediCal formula); Holmes, TR9614.

1949 E.g., Campagna, TR2660; Giglia, TR2749; J. Williams, TR3810 ($15); Vreeland, TR3849 ($15); Brewer, TR3918; Consumers Union, R10/2542 ($10-$15); Fennema, TR1746, 1768 ($12.50 to $17.50); RPAG, R8/2847; Teter, TR10229, 10272; Urban, TR1810; Owens, R8/6485 ($12.50); Greene, R8/4742; S. Graham, R8/7462 ($15); Kasten, R5/1435; Freeman, R8/4045 ($15.00, on a cost of $5 to $7.40), 4049; Tremmel, TR8335 ($20); Butz, R10/5203; Holmes, TR9614 ($15); Yantis, R5/1394 ($10); Kuptz, TR5719 ($12); see Dahlberg, R8/1975; Zenith, R8/1944; ZumBrunnen, TR11992-93 (MediCal price is $9 for regular mold, $13.50 for ring-type mold; his costs are $5.75-$6.75 and $7.75-$9.75 respectively).

1950 E.g., Kasten, R8/6978 (50¢-75¢ per day); Alpiner, R8/5429 ($25-$50); Teter, TR10229 ($15), 10272; Tremmel, TR8335 (5% of the price of the aid plus a $10 evaluation charge); Loavenbruck, TR1574 ($15-$45); Madell, TR5910 ($25); cf. Schaefer, TR8264 ($10/month rental for 30 months); Cade, R7/225 (should be a maximum of $30 including custom earmold).

1951 E.g., Mastricola, TR8633 ($30-$45); Loavenbruck, TR1574 ($15-$45); Chaney, R8/5344; Alpiner, R8/5429 ($25-$50); J. Williams, TR3810 ($30-$35); Vreeland, TR3849 ($35); Rassi, R8/5359 (most charge $30, but some charge $50); Yantis, R5/1394 ($35); Patrick, R3/1435 ($50). But see Fowler, R8/1983 (90 day trial, 70% refunded); Azar, R6/100 (should be $50 dispensing fee plus earmolds, batteries, etc.); McGargill, R5/47 (should be $50 plus earmolds and batteries).

for batteries provided or used during the trial period.[1952] Some sellers make a single charge of around $50[1953] to cover testing, the trial period, earmold, and batteries. On the other hand, many sellers offer "free trials."[1954]

v. 30-day rental cancellation charge formula

Four possible alternative formulas for determining the maximum 30-day rental cancellation charges served as vehicles for focusing public comment. They were:

(1) the total of $15 plus 5 percent of the purchase price (excluding any "cancellation charges" for any custom earmold or batteries);[1955]

(2) the sum of $30 per cancelled hearing aid or 10 percent of the purchase price (excluding any "cancellation charges" for any custom earmold or batteries) whichever was the lesser. This $30 maximum was to be adjusted annually after

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1952 E.g., Urban, TR1810; Greene, R8/4742; Freeman, R8/4045 (about $2.50 for a 1-month supply, on a cost of $1.70), 4049; Giglia, TR2749; L. Wilson, TR10030, 10074 (average of $3.50 for a six pack); Butz, R10/5203; ZumBrunnen, TR11992 (MediCal formula); Holmes, TR9614. But see Cooper, R7/299 (no extra or unspecified charge for a full 30-day supply of batteries should be allowed).

1953 E.g., Brakebill, R8/4333, TR1341-42 ($50 for testing, trial period, earmold, and batteries, with no additional charge for binaural); Willett, R3/817, R6/398 ($50 for testing, trial period, earmold, batteries, and four weekly checkups); Kenwood, TR9299 ($50 for everything), 9334; see Norris, R8/4336, TR6884. But see Fortner TR2894 ($65 charged); Mastricola, TR8654 ($45 charged).

1954 E.g., Tinder-Krauss-Tinder, R10/3099; Chin Ad, HX172 (100% refund); Palmquist, TR6588; Hearola Ad, R10/2352; Hamel Ad, R13/1849; Almquist Ads, R13/1830-31; Hopmeier, TR3375 (charge made for earmold & any other custom accessory); Green, R13/1874, R8/4742 (charge made for earmold); Owens, R8/6485 ($12.50 charged for earmold); Nygren, R8/4938 (charge is made for earmold, batteries, and, rarely, custom wiring for eyeglass CROS aids); Hester, R8/3063 (charge made for custom earmold); Kasten, R8/6978; Giglia, TR2749 (when the manufacturer accepts the returned aid back from the retailer); Horne, R10/2488; Yellow Pages Ads, R10/2701, 2713.

1955 Proposed Rule, § 440.4(g)(1)(i)(A).

the Rule's effective date to account for the annual percentage adjustment in the United States City Average All Items Consumer Price Index (1967=100) published by the Bureau of Labor Statistics of the United States Department of Labor.[1956]

(3) 10 percent of the purchase price (excluding any "cancellation charges" for any custom earmold or batteries);[1957]

(4) $30, adjusted annually in accordance with the Consumer Price Index.[1958]

Numerous witnesses and others suggested that the formulas adopted for computing the maximum cancellation charges should be as simple as possible.[1959] Significantly, many comments pointed to the annual CPI adjustment as an example of needless complexity.[1960] Staff was surprised by this reaction, for a simple call or visit to one's local public library can ascertain the CPI for any given month. Computing the CPI-adjusted maximum involves only one division and one multiplication. The formula provided in the Proposed Rule spelled out this simple arithmetic computation in complete detail.

1956 Id. § 440.4(g)(1)(i)(B).

1957 This alternative was suggested in Commission Question (q), 40 Fed. Reg. 26653 (1975).

1958 Id.

1959 E.g., Brickfield (AARP), R7/458, TR1431; Skeen, R6/6; Fennema, TR1780-81; Kozelsky, R5/647; O'Brecht, R8/3876-77; see Jeffries, R10/5364; Sypniewski, R10/113.

1960 E.g., Kojis, R3/2169-70; Chial, R5/1250; O'Brecht, R8/3876-77; ASHA, R10/1747; Gould, R5/1278. Others felt the CPI adjustment to be a good idea. E.g., Kasten, R5/1435; Simms, R3/127; Kozelsky, R5/647; Hardick et al., R5/575-76; Hahn, R5/763; Young, R5/538; Goodwin, R5/28; Feakes, R5/123; Gerstman, R5/1189; E. Owens, R5/1042; Knapp, R5/823; Traynor, R5/866; Harford et al., R5/853; Graunlie, R5/473; Wehr, R6/340.

Some persons preferred a fixed dollar amount for the 30-day cancellation charge, but without the CPI adjustments.[1961] Others noted, however, that a maximum dollar amount for the 30-day rental cancellation charge ignored inflation.[1962] The CPI adjustment incorporated into "alternative 2"[1963] was designed to reflect the effects of inflation on the ability of $30 to constitute a financial inducement sufficient to insure a good faith effort to adjust to the selected hearing aid.[1964] Actual practice in the marketplace suggests that, over the last decade, inflation has not been much of a factor in either the cancellation charges being made[1965] or the selling price of hearing aids, however.[1966]

A number of retailers opposed the Rule and preferred a flat ten[1967] or twenty[1968] percent formula for the 30-day rental

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1961 E.g., LeGwin, R4/133; McPherson, R5/630; Gannaway, R5/557.

1962 E.g., Chial, R5/1250; Deschamps, R6/225; cf. Jeffries, TR5591.

1963 Proposed Rule § 440.4(g)(l)(i)(B).

1964 It was reasoned that the CPI would most accurately reflect the effects of inflation on the value to consumers of $30. Some comments recommended the use of a formula based on the purchase price of the selected aid for the same reason. E.g., Wiess, R4/186; Regan, R5/180; Paschell, R7/444.

1965 Excluding sellers who offered free trials, the average trial rental for the Chicago area in 1968 was a little less than one dollar per day. Rassi, R8/5368. Michael Winston, Ph.D., reported satisfactory use by sellers in his area of the same $30 trial rental fee for over 10 years. Winston, R5/1695.

1966 Ince, R8/1189x. This low rate of inflation which occurred throughout the electronics industry is due in large part to rapid technological progress and price stability in supply industries. D. Murphy, R8/4462.

1967 E.g., Durkin, R3/3111; Schnitzer, R3/724; Samole, R3/829; T. Sanders, R3/186.

1968 E.g., T. Sanders, R3/186 (20% for custom aids); Sauls, R3/1683 (20%).

cancellation charge.[1969] Some comments favored a formula based on a percentage of the selling price because of concern that a maximum dollar amount would reduce the styles of aids available to consumers by discouraging sellers from fitting more expensive models.[1970] Staff has considered this possibility and concluded that it is not likely to occur.[1971]

1969 A few preferred a specified dollar amount, adjusted by the CPI. E.g., Simms, R3/127 ($30); Knox, R3/25 (same); Cologno, R3/203 ($50). Most sellers opposed to the Rule wanted no maximums at all, preferring to let the market set the fees. E.g., Skadegard, R3/177; Willett, R3/817; Truitt, R3/927. A few audiologists concurred. E.g., Pollard, R5/680; Hecker, R5/788.

1970 E.g., Franks, R10/6519; see, e.g., Kojis, R3/2132, 2169; Chial, R5/1250; O'Brecht, R8/3876. Others were against the percentage formula because they felt it would encourage sellers to fit more expensive models when less expensive models would suffice. E.g., Kozelsky, R5/647.

1971 Two reasons support this conclusion. First, if a more expensive model is the more appropriate choice, it will be in the seller's interest to fit it, for the risk of cancellation will be least when the most appropriate fitting is made. Second, the net proceeds of hearing aid sales will be due almost entirely to the sales prices of the aids sold. Cancellations experienced by reputable sellers should occur only in about 4.5% of all fittings. See Part Two, Section III.GG.5.a.iii, supra. Within this small minority of transactions, the effect of the cancellation charges on net proceeds will be quite small. For example, a seller who sells 100 aids at an average price of $350 will have a gross revenue of $35,000 before cancellations. If the 30-day rental cancellation charge was ten percent of the purchase price, and if five percent of the buyers cancelled, proceeds for all 30-day rental cancellation charges would be $175 (5 x $35). If the same number cancelled, but the 30-day rental cancellation charge was limited to $30, the proceeds from all cancellation charges would be $150 (5 x $30). The difference in total proceeds from all 30-day rental cancellation charges is only $25, less than 1/1000 of the $35,000 gross sales. Clearly the seller would have little economic incentive to sell less appropriate, lower priced aids merely because the 30-day rental cancellation charge was limited to $30, for 100 aids sold for $300 would produce gross revenue of only $30,000, fully $5,000 less than if the more appropriate, higher priced aids had been fitted.

On the other hand, a number of individuals suggested that tying the maximum 30-day rental cancellation charge to a certain percentage of the purchase price would penalize those sellers whose prices were much lower than the industry average,[1972] and would encourage sellers to establish or maintain high prices.[1973] Staff finds this last argument persuasive and has concluded that the maximum cancellation charge for a 30-day rental should be $30. This formula is simple and reflects the customary charge now being made by those offering trials.

The Proposed Rule provided that two 30-day rental cancellation charges could be retained if binaural aids were sold and then cancelled.[1974] The Initial Notice, however, asked whether the Rule should be changed to permit only one 30-day rental cancellation charge, based on the purchase price of one hearing aid, "in order to discourage the sale of two hearing aids (one for each ear) when only one (or even none) is appropriate.[1975] Many comments recommended that this change be made,[1976] although many others felt such a change to be unjustified[1977] or unwise.[1978]

1972 E.g., Nygren, R8/4939; Kasten, R/6989; ASHA, R10/1747-48; Fennema, R3/216; Pollard, R5/679; Harford et al., R5/853.

1973 E.g., ASHA, R10/1747-48; Hardick et al., R5/575; Davis, R5/566; DeVoe, R5/293; Gerstman, R5/1169; E. Owens, R5/1042; Cabeza, R5/497; Joyner, R5/501; Graunlie, R5/473; Menzel, R5/12; Ivey, R5/938; see Shinner, R5/747. But see Syfert, R10/818.

1974 Proposed Rule, § 440.4(b) and (g)(1)(ii).

1975 40 Fed. Reg. 26652-53 (1975). See Part One, Section V.B.2, supra.

1976 E.g., Butts, R10/80; Bowen (NCLD), HX35/5; Rose, R8/4183; Rose et al., R5/711; Kasten, R5/1435, R8/6986, TR716; Palmquist, R3/135; Harford, R8/4549; Harford et al., R5/853; Ohio Div. C.P., R8/2928; Eichelberger, TR8674; ASHA, R10/1744-45; Simms, R3/127; Radicchi, R3/264; Schnitzer, R3/724; McPherson, R5/630; Lentz, R5/1292; Winston, R5/1695; Newby, R5/427. The Presiding Officer also reached this conclusion. P.O. Report, R9/D1ip123-26.

1977 E.g., HAIC, R2/55; Vreeland, R10/3422-23; Freshley, R10/6652-53; Thompson, R3/268; Rabinowitz, R3/223; Knox, R3/24-25; Truitt, R3/54; Plessman, R3/1068; Fennema, R3/211; Mattingly, R3/743; Schreiber, R4/82; Gerstman, R5/1169; Menzel, R5/11-12; Vertes, R5/346.

1978 E.g., HAIC, R2/55; Zelnick, TR441; Hopmeier, TR3355; Freshley, R10/6652-53; L. Wood, R3/2946; Meci, R3/1227; Samole, R3/829; Durkin, R3/3111; Chaiklin, R5/1592-93; Pratt (ACO), R5/1749.

Some felt that the charge for the second aid should be one-half of that for the first.[1979] Any decision on this matter is complicated by the fact that there is currently a disagreement about whether to try new binaural aids at the same time or to add the second aid only after the user has adapted to the first aid.[1980] One view is that it is preferable to start out with both aids (although each should be worn monaurally for comparison purposes during the trial or adjustment period) because the consumer will be able to experience the benefits of the binaural arrangement from the outset.[1981] The other view is that adjusting to two aids is much harder than adjusting to one aid, and the consequently increased risk of the consumer rejecting amplification altogether should be avoided.[1982] Roger Kasten, Ph.D., asserted that it is the accepted practice among audiologists to fit binaural aids one at a time in all but the most atypical situations.[1983] In addition, Darrell Rose, Ph.D., reported that it is extremely rare for someone to be able to benefit from binaural aids when they could not benefit from a monaural fitting.[1984] Thus, it is quite unlikely that fitting binaural aids one aid at a time could result in a person who could benefit from a binaural fitting ending up without any hearing help because the initial fitting was monaural rather than binaural. Finally, Earl Harford, Ph.D., noted that the time the seller spends on a binaural fitting is about the same as that spent on a monaural fitting.[1985]

1979 E.g., Skadegard (Oticon), R3/177; Franks, R10/6520; Hardick et al., R5/575; Brickfield, R7/459-60. Others suggested that the 30-day rental cancellation charge should be less for the second aid than for the first, but did not suggest what the difference should be. E.g., Willett, R3/817; Hahn, R5/763.

1980 See Appendix F, Section VI.C.23.f, infra.

1981 Id.

1982 Id.

1983 Kasten, R8/4550.

1984 Rose, R8/4183; see Harford et al., R5/853.

1985 Harford, R8/4549.

Staff has considered this matter and nevertheless concluded that limiting binaural fittings to a single 30-day rental cancellation charge should not be recommended at this time. Staff is hopeful that the Recommended Rule will provide an adequate incentive to sellers to refrain from unnecessary binaural fittings. If the seller's experience is that the risk of an unsuccessful fitting is sometimes increased by fitting binaural aids at the same time, it will be in the seller's own economic interest to fit binaural aids one at a time.[1986] If future experience demonstrates the need for a change, however, the Commission can take action at that time.

vi. Cancellation charge formulas for any custom earmold and a 30-day supply of batteries

The Proposed Rule set the maximum cancellation charge for any custom earmold and a 30-day supply of batteries at the lesser of the seller's regular selling price or twice his actual cost.[1987] Despite the reluctance of some industry witnesses to disclose the markup of these items,[1988] staff has attempted to discover whether the "twice the actual cost" formula would result in a cancellation charge of substantially less than the current regular selling prices of earmolds and batteries. Staff's inquiries have revealed that the markup of some sellers for earmolds[1989] (but not batteries)[1990] exceeds the 100% maximum contemplated by the Proposed Rule. Presumably this fact is the basis for assertions that a maximum of twice the seller's actual cost of the earmold is inadequate.[1991] John Fennema suggested an earmold maximum of three times actual cost, and warned that any maximum limit on earmold profit would inevitably lower the quality of earmolds.[1992] On the other hand, several individuals stated that 100% is an adequate markup of these items.[1993] NCLD argued that while the proposed formula

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1986 See also Menzel, R5/11-12.

1987 Proposed Rule § 440.4(g)(1)(ii).

1988 E.g., Hopmeier, TR3375.

1989 E.g., Vreeland ($4.35-$6.35 plus postage is his cost, marked up to $15); Freeman, ($5-$7.50 cost, marked up to $15); Nygren, R8/4939 (up to $8 cost, marked up to $15). But see S. Graham, R8/7462 ($7.50 to $8.00 cost, marked up to $15.00).

1990 Nygren, R8/4939 (42% markup on batteries).

1991 E.g., Fennema, R3/216; Zenith, R3/3404; NHAS, R2/113.

1992 E.g., Fennema, R3/216. Staff finds this argument unpersuasive. See note 1971, supra.

1993 E.g., Rose, R8/4187; K. Johnson, R10/1749.

for batteries was reasonable, the proposed formula for the earmold cancellation charge was excessive.[1994] NCLD felt the earmold charge should be the seller's cost, rather than his regular selling price.[1995] Wathina Hill, Ed.D., asserted that twice the actual cost seemed excessive for both batteries and earmolds.[1996] The Ohio Division of Consumer Protection expressed the concern that some sellers would attempt to increase the total cancellation charges permitted by inflating the selling prices of custom earmolds and batteries.[1997]

Staff has considered all of these arguments and concluded that the Recommended Rule's formula for maximum earmold and battery cancellation charges should be the same as that in the Proposed Rule. In light of the relatively few numbers of cancellations which will occur,[1998] the dollar difference between that formula and the actual practice of reputable sellers is insignificant.[1999]

vii. No cancellation charge for imbedding CROS wiring in eyeglass frames

A number of comments urged that a separate cancellation charge be permitted for the necessary costs of imbedding wiring into eyeglass frames for CROS fittings in eyeglass aids.[2000]

1994 Bowen, HX35/5.

1995 Id.

1996 W. Hill, R5/1237.

1997 Ohio Div. C.P., R8/2928.

1998 See Part Two, Section III.GG.5.a.iii, infra.

1999 Concern was expressed that sellers should not be allowed to charge for an excessively large supply of batteries. The cancellation charge allowed is for a 30-day supply of batteries, and any seller who attempted to charge for an unreasonably large supply of batteries would be violating the Rule. ASHA, R10/1749; Mastricola, R5/860. One Colorado seller, for example, noted that he urged his customers to buy a 6 month supply at a time. Lundy, R8/8239.

2000 E.g., Freshley, R10/6653-54; Franks, R10/6520; Staab, TR7039; Swain, R5/360-61; Menzel, R5/12; Thompson, R3/268; Rabinowitz, R3/224; Korb, R3/100; Skadegard, R3/177; Knox, R3/25 (plus 100% markup), Caprari, R3/245; Willett, R3/817; Samole, R3/829-30; LeGwin, R4/133; Ciell, R5/594; Shannon, R5/667; Shinner, R5/747-48; Lentz, R5/1292; Stephens, R5/1104; Ruben, R5/1253; Gerstman, R5/1183; Stroup, R5/56; K. Berger, R5/172; Winston, R5/1695; E. Owens, R5/1043; Cabeza, R5/497; Studebaker, R5/465; Newby,

(Continued)

A non-returnable charge is sometimes made for this custom wiring,[2001] and it was suggested that the failure to provide for such a cancellation charge might discourage appropriate and beneficial CROS fittings. The charges to the consumer for such wiring efforts range from around $20 to $50 or more.[2002] While some retailers may perform this wiring on their own,[2003] many have it performed by manufacturers at an average cost of from $15 to $30.[2004] Recent developments, however, appear to render this expensive procedure obsolete. Most eyeglass aids come with a fitting for CROS wiring,[2005] into which can be plugged a thin black wire that is easily cemented to and removed from the eyeglasses. This feature obviates the need for imbedding wiring into eyeglass frames.[2006] The availability of this inexpensive alternative to imbedding CROS wiring in eyeglasses suggests that the absence of an additional cancellation charge for such fittings will not significantly discourage the selection of such fittings when appropriate.[2007] If the extra expense of imbedding the wire were determined to be necessary, it could always be performed after the expiration of the cancellation period, when the risk of a cancellation has passed.[2008] To allow for a separate cancellation charge, however, would needlessly raise the charges consumers would have to pay.[2009]

2000 (Continued)

R5/427; Pratt (ACO), R5/179; see T. Sanders, R3/186. But see Sauls, R3/1623; Simms, R3/127.

2001 E.g., Freeman, R8/4045 ($20), 4049; Nygren, R8/4938-39; Butz, R10/5203.

2002 E.g., Freeman, R8/4046; Fennema, R3/212; Colongo, R3/712.

2003 E.g., Freeman, R8/4046.

2004 Nygren, R8/4939. But see Freeman, R8/4046 (some factories charge as much as $50).

2005 E.g., Danavox Ad, R10/2337.

2006 E.g., Nygren, R8/4938-39; Kasten, R8/6989; Harford, et al., R5/854-55; ASHA, 1748-49; see McPherson, R5/630; Lovering, R5/1052; Atkins, R5/477; Eckel, R5/521. Bud Freeman reported that Telex sells a wireless CROS aid. R8/4046. Such a development obviously obviates the need for any wiring.

2007 See, e.g., Harford et al., R5/854-55; cf. Rose et al.

2008 See, e.g., ASHA R10/1748; Rose et al., R5/711.

2009 See Harford et al., R5/855; Kasten, R5/1435; ASHA, R10/1749; Patrick, R3/1610, 1435; Loovis, R5/343.

Accordingly, the Recommended Rule does not include a separate cancellation charge for the cost of imbedding CROS wiring in eyeglass frames.[2010]

viii. Cancellation charge for pre-sale services

The Proposed Rule required the seller, upon a proper cancellation, to refund

> all payments made toward the purchase price of the cancelled hearing aid(s), less any lease or rental charges applied as payments toward the purchase price of the cancelled hearing aid(s) and only those "cancellation charges" which are properly set forth in the "Notice of Buyer's Right to Cancel"....[2011]

"Purchase price" was defined to exclude any charges for services unless (1) such charges were separately stated in the contract for sale; (2) the "buyer" was given the option of not purchasing such services; and (3) such services were rendered prior to the date of the buyer's exercise of the right to cancel.[2012] In effect, this definition meant that the seller was required to refund any charges for services rendered before cancellation unless such charges were both optional and separately stated in the contract. The purpose of this provision was to prevent sellers from making cancellation charges for pre-sale services which were given for free to those who chose not to buy when the "close" was attempted. The problem with permitting charges for services only when they were optional was that a reputable, competent seller could not in good faith sell an aid without the appropriate pre-sale testing having been completed.[2013]

2010 See note 1971, supra, for an analysis of why the absence of such a cancellation charge should not prevent the seller from fitting the most appropriate aid.

2011 Proposed Rule § 440.4(g)(1).

2012 Id. § 440.2(e).

2013 See Carmel, R5/1306.

A variety of problems thus arose with respect to this provision. Some traditional sellers currently offering trials require the buyer to pay for pre-sale testing whether or not a hearing aid is sold,[2014] and these amounts are not refunded upon cancellation.[2015] Likewise, audiologists who dispense hearing aids under ASHA's guidelines customarily do not refund fees charged for all of the services rendered in connection with the sale, if the buyer cancels.[2016] Although the Proposed Rule would have required dispensing audiologists as well as the more traditional sellers to refund payments for any non-optional services rendered in connection with a sale, in the event of a cancellation[2017] few audiologists objected to this.[2018]

NHAS and other industry members objected to requiring a refund of fees for services rendered in connection with a sale.[2019] Hildred Drew and Andy Eiler of the UAW, on the other hand, expressed concern that the Proposed Rule failed "to specify when the consumer is to be given the option of not purchasing the services" that are excluded from the Proposed Rule's definition of "purchase price."[2020] They asked whether a seller who performed pre-sale services without either offering them as "free" or making any statement that the services were not free could call such services

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2014 See, e.g., Schaefer, TR8264; John Payne, TR9209-12, 9216; Holmes, TR9614.

2015 E.g., Schaefer, TR8264.

2016 Michael Winston, Ph.D, reported that his clinic does not refund the $25 medical evaluation fee and the $25 hearing evaluation fee. Winston, R8/7387, 7398; see, e.g., Stephens, R5/1104; Manel, R5/436; Lentz, TR11235-37. Of course, audiologists who do not sell hearing aids make no refund in the event a client cancels the purchase of an aid recommended by them but purchased from someone else. E.g., L. Wilson, TR10047; see Staab, TR7039. But see Kasten, TR776 (he would refund all fees if client was dissatisfied with the service provided).

2017 Cf. Proposed Rule § 440.2(e) with § 440.4(g)(1).

2018 Jane Madell, Ph.D., felt that the Proposed Rule imposed an unreasonable burden by requiring a refund of part of the dispensing fee of an audiologist who is dispensing the aid at cost. Madell, R10/5584. Loretta Manel echoed this view, and noted that batteries and earmolds are also dispensed at cost by ASHA-certified audiologists. Manel, R5/437.

2019 NHAS, R2/97, R3/3543-44, 3581; Staab, TR7039.

2020 Drew & Eiler, R10/5191.

"optional" and make no refund upon cancellation.[2021] They also expressed concern that sellers could advertise some free services, such as a free hearing test, but separately charge for other services, such as selecting and fitting the hearing aid, without apprising the consumer of the difference.[2022] Finally, they were concerned that the Proposed Rule failed to require that consumers be clearly informed that these charges were not refundable upon cancellation.[2023]

Staff has considered these arguments and decided to recommend a provision that will allow sellers to retain a cancellation charge for services rendered prior to the sale. The Recommended Rule provides:

> You can also deduct charges for any services you performed before the sale, as long as you charge everyone who gets those services the same amount. However, you can do this only if you clearly and conspicuously explain the following two things to the buyer before the services are performed:
>
> - the amount charged for each service
> - the fact that these charges are not refundable upon cancellation.[2024]

This addition will bring the cancellation charges provided by the Recommended Rule in line with the standard practices of many reputable sellers now providing trials on their own initiative.[2025] It will also, incidentally, minimize any competitive burden which the refund provisions would otherwise have placed on traditional sellers (who bundle their prices) vis-a-vis sellers who sell hearing aids on referral from financially independent audiologists (whose fees would not be refunded upon cancellation because they were not sellers).

2021 Id. at 5191-92.

2022 Id. at 5192.

2023 Id.

2024 Recommended Rule § 440.40.

2025 One industry member commented that the proposed cancellation charges would be fair if testing charges could be broken out and billed separately. Knox, R3/25.

Staff recognizes that some risk to consumers is involved in allowing sellers to set the amount of the cancellation charge for pre-sale services. Accordingly, the Recommended Rule establishes several safeguards to insure that the charges actually made will be reasonable. First, before the service is performed, the seller must clearly and conspicuously disclose both the amount that will be charged and the fact that this charge will not be refunded if the buyer subsequently exercises the buyer's right to cancel.[2026] Second, the seller must charge all customers who receive those services, whether or not they decide to purchase a hearing aid after receiving them.[2027] Finally, the seller must charge all customers who receive those services at the same rate.[2028]

2026 This would require the seller to broach the subject of the buyer's right to cancel, if he had not already done so.

2027 Thus, the seller cannot offer to waive the fees charged for pre-sale services if the buyer keeps the aid beyond the trial period (i.e., does not cancel). Such activity would, in any event, violate § 440.36 of the Proposed Rule.

2028 Thus, a seller cannot charge some customers for a "hearing aid selection and fitting" service at a flat rate and charge others on a per hour basis for the same service. If the seller offers a service at a flat rate in a package deal, no matter how much or how little effort is needed, all customers must be charged the flat rate. Similarly, if a seller charges for a service on a per hour basis, all customers who get that service must be charged on a per hour basis. The reasoning behind this provision is simple. Without this requirement, the seller could use a fee computation method which would produce higher fees in charging those consumers who seemed likely not to realize that the fees specified were unreasonable; more knowledgeable consumers, on the other hand, who were less in need of protection, would be quoted the lesser fee. An obvious exception to this requirement would be the bona fide "charity case" in which the seller may perform the service for free (or much less than his normal rate) for indigents who would otherwise be denied any assistance. The Rule is clearly not intended to prohibit such "good works" by sellers.

In addition, the protection provided by cooling-off rules[2029] would discourage sellers from charging exhorbitant fees for pre-sale services, for once the buyer "cooled off," the fact of such exorbitant fees would encourage the buyer to cancel the entire sale.

2029 An example is the FTC's Cooling-Off Rule, 16 C.F.R. Part 429 (1978).

4. Proposed Exceptions Not Recommended

The Proposed Rule exempted hearing aid sellers from providing the buyer's right to cancel to consumers in two situations. These involved (1) the recommendation by a financially independent physician or audiologist of a specific hearing aid by serial number or by model, and (2) the purchase of an identical replacement aid by the consumer.[2030] For the reasons discussed below, staff does not believe that either exemption should be adopted by the Commission, and has not included them in the Recommended Rule.

a. Physician/audiologist recommendations

Section 440.4(i)(1) of the Proposed Rule provided that the requirement that a buyer's right to cancel be given would not apply to a sale made

> pursuant to a written recommendation of a specific hearing aid, by serial number or by model, made by a physician or an audiologist who receives no direct or indirect financial compensation from the seller for such recommendation; Provided, however, That 440.4(i)(1) shall not be construed to prevent any physician or audiologist from requesting or requiring as a condition of his referral to a seller that a patient be offered a trial period prior to a purchase . . . .[2031]

The Commission noted in its Statement of Reason for the Proposed Rule that perhaps hearing aid buyers might "be able to determine whether they will in fact obtain a significant benefit . . . from the selected hearing aid without being able to wear that aid in a representative variety of actual use situations" when a physician or an audiologist "performs services which, in the expert's professional opinion, are adequate to determine which patients will in fact obtain a significant benefit . . . from a specific hearing aid . . . ."[2032] In addition, some months prior to publication of the Proposed Rule NHAS had suggested that it would be inequitable to require hearing aid sellers to bear the economic consequences of

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2030 See Proposed Rule, § 440.4(i)(1) & (2).

2031 See id. § 440.4(i)(1).

2032 40 Fed. Reg. 26651 (1975).

a returned hearing aid which had been "prescribed" by a physician or audiologist.[2033]

Comments on this section of the Proposed Rule were quite varied, with a large number of persons appearing to misunderstand its requirements. A number of industry members believed that the exception gave favored treatment to physicians and audiologists,[2034] even to the point where some thought that it would not apply to physicians and audiologists who sold hearing aids.[2035] Various hearing aid sellers sent in identical analyses, which stated that the Proposed Rule represented

> favoritism toward a select group of clinical audiologists who are members of the American Speech and Hearing Association . . . . In section 440.4(i)(1) . . . competence is . . . falsely assumed. At the same time, though, a hearing aid specialist is made financially liable for the decisions of physicians or clinical audiologists.[2036]

Other individuals saw the section as providing implicit authority for the physician or audiologist to "prescribe" the hearing aid.[2037] Finally, others believed that the provision assumed that the practices of traditional hearing aid sellers were suspect, while those of physicians and audiologists were beyond reproach.[2038] These various comments missed the point of the proposal. Section 440.4 clearly applied to all sellers, whether they were traditional dealers, audiologists, or physicians.[2039] The Initial Notice made no statement about whether or not a hearing aid should or should

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2033 Waters, R8/3995-96 (Dec. 23, 1974, letter to FTC Staff).

2034 See, e.g., Dahlberg, R3/3376; E. Fishbein, R3/1713.

2035 E.g., Miragliotta, R3/1056; Pitts, R3/192. Curt Clinkscales III testified that it was discriminatory in his view to apply the Rule to hearing aid specialists but not to audiologists who do not have a medical degree. TR10624. Mr. Clinkscales' only objection seemed to be that he felt audiologists were exempted, not that he considered physicians to be.

2036 E.g., Pfau, R3/1725; A. Smith, R3/2121; Mazer, R3/1759.

2037 See, e.g., Roland, R4/550-51; Snuffer, R3/206. E. Fishbein commented that it was arbitrary, unreasonable and unjustifiable to make doctors and audiologists the ultimate authorities, as she felt this provision would do. R3/1713.

2038 E.g., James Payne, TR2142; Zenith, R3/3405; Korb, R3/99.

2039 See Proposed Rule § 440.2(c).

not be "prescribed," preferring instead to leave such matters to the Food and Drug Administration.

Staff has been able to discover very few comments which supported the provision on the grounds set forth in the Statement of Reason.[2040] Some suggested that it be retained for equitable reasons, as discussed, infra. Even many of those who generally opposed the Rule took exception to what they believed was the factual basis behind this exemption. NHAS commented, for example, that

> if the Commission is relying on the inherent nature of hearing loss and/or hearing aids, there can be no exceptions for the consumer's right to a 30-day trial.[2041]

It noted that if the exception was premised upon the assumption that a hearing aid could be "prescribed," this rationale was "demonstrably false."[2042] It also stated that the exemption was arbitrary,[2043] and that it deprived the seller of the flexibility needed in fitting a hearing aid.[2044] HAIC disputed the assumption, attributed to staff,

> that a physician or audiologist is better qualified to determine whether a hearing-impaired person should be fitted with a hearing aid and that it is feasible or desirable to "prescribe" a specific hearing aid . . . .[2045]

Zenith commented that to "completely exclude the buyer who receives professional direction from the Right to Cancel is discrimination,"[2046] noting that physicians and audiologists do not possess unique capabilities to choose just the right aid.[2047] Jack Glasgow, twice president of the Colorado Hearing Aid Society, added that

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2040 See, e.g., Jerger, R8/5338; Hardick et al., R5/573.

2041 R3/3473; accord, NHAS, R3/3577.

2042 R3/3577.

2043 R3/3578.

2044 R2/116.

2045 R2/53.

2046 R3/3405.

2047 Id.

> a recommendation for a specific model of a hearing aid from a physician or an audiologist is not magic and is not always correct. This should not be a consideration in the exemption.[2048]

Sears, Roebuck and Co., commented that

> if the rule is adopted, the protection of the Rule should be given to all customers whether the hearing aid they purchased is recommended by a physician or audiologist or any other person . . . .[2049]

Various other individuals and organizations expressed their view that the exemption was a terrible idea, and that the protection of the buyer's right to cancel should be given to all purchasers. Among the groups indicating their strong opposition to the provision were the American Association of Retired Persons,[2050] the National Center for Law and the Deaf,[2051] the National Council of Senior Citizens,[2052] the Council for Exceptional Children,[2053] the International Association of Parents of the Deaf,[2054] the Illinois Department of Health,[2055] Consumers Union,[2056] the Wisconsin Attorney General's Office,[2057] the Connecticut Speech and Hearing Association,[2058] and the Gray Panthers.[2059] Opposition

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2048 R3/1391.

2049 Knox, R3/1447.

2050 Brickfield, TR1432; R10/878.

2051 HX35/5-6; R7/695.

2052 Munger, TR4551.

2053 Stein, TR8977, 8980.

2054 Woodard, TR4141.

2055 Shattuck, TR6777.

2056 R7/522.

2057 Jeffries, TR5590.

2058 Eichelberger, TR8673-74.

2059 Kuhn, R5/761.

to the exemption was also expressed by hearing aid sellers,[2060] by physicians,[2061] and by audiologists, both those who sell hearing aids[2062] and those who do not.[2063]

Cogent evidence suggests that physicians and audiologists are not so expert and knowledgeable about hearing aids that there is no need for those persons who get a recommendation for a specific hearing aid from them to get a trial.[2064] According to Harry McCurdy, M.D., Executive Director of the American Council on Otolaryngology, even

> under the best of conditions, when both an otologist and an audiologist have been consulted, the kind of protection given by the buyer's right to cancel is still needed.[2065]

The reasons for this were clearly stated by Nancy Eichelberger, on behalf of the Connecticut Speech and Hearing Association:

> Audiologists are highly trained and skilled in hearing aid selection . . . . Our recommendations for hearing aids are based upon precise information . . . . However, we are well aware, through research and clinical experience, of the limitations of our information and the relationship of test data to real life experience.[2066]

Roy Brakebill, a Texas hearing aid seller, testified that a hearing aid "does not always do what you think it is going to do" for the customer,[2067] while John Kojis, President of Maico, indicated

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2060 E.g., Nygren, R8/4940; Willett, R3/816; Fennema, TR1795-96; Brakebill, TR1283.

2061 E.g., Gardner, R5/1564; Ruben, TR3976; Epstein, TR4593.

2062 E.g., Barwell, TR5168-69; Lentz, R5/1291; Loavenbruck, TR1552-53.

2063 E.g., Harford, TR65; Shannon, TR1863; Brewer, R10/271; Lankford, TR8010; Gerstman, R5/1187.

2064 See the discussion of the various risk factors involved in a hearing aid recommendation, a good many of which exist even when the best professional advice is sought and obtained, in Appendix F, Section VI, infra.

2065 R8/4400, 4404.

2066 TR8673.

2067 TR1292.

that hearing aids cannot be "prescribed" with the accuracy of an eyeglasses prescription.[2068] Various persons noted that audiologists and physicians were capable of making mistakes, just as hearing aid sellers were.[2069] ASHA asserted that all consumers should have the right to cancel their hearing aid purchases "because the ultimate determination of benefit must rest with the hearing aid user."[2070] Staff has been convinced by these comments[2071] and has concluded that many of the same reasons that indicate the general need for a trial apply when a physician or audiologist has recommended that the consumer purchase a specific hearing aid.[2072]

This conclusion, however, does not fully resolve the question whether the proposed physician/audiologist exception should be retained. In the Initial Notice of this rulemaking the Commission posed the following question:

> Is it reasonable to expect that physicians and audiologists who recommend the purchase of specific hearing aids, by serial number or by model, will look out for the best interests of their patients and protect them from

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2068 TR2116. See also the discussion of "prescriptions" for hearing aids at Appendix F, Section IV.N, infra.

2069 E.g., Plessman, R3/1067; Kasten, R8/6982-83. Various consumers have reported that the hearing aids they purchased based upon the recommendation of an audiologist or physician performed no better than those purchased without such recommendations. See, e.g., Rodgers, R4/592; Baird, TR3610-11.

2070 R10/1730. ASHA was, however, slightly inconsistent concerning this matter, since its Executive Secretary testified that the proceeding would not have been necessary if hearing-impaired persons saw both a physician and an audiologist. K. Johnson, TR4261.

2071 See also Harford et al., R5/851-52; Silverman, R8/7326; Woodard, TR4141; Manel, R3/13.

2072 Note that when James Jerger, Ph.D., a very highly respected audiologist in this country (see Appendix D, infra), assessed the performance of a very sophisticated hearing aid evaluation methodology (R8/5227-68), 12.8% of the individuals tested still considered the hearing aids they had purchased to be unsatisfactory. (R8/5242). See Appendix F, Section VI.C, infra, for a discussion of the risk factors which are always present even with the most competent tester and the best test equipment and test environment.

> sales abuses, as long as such physicians and audiologists are financially independent from the sellers to whom they refer their patients?[2073]

If in fact individuals who see a physician or audiologist are able to obtain the protection provided by the Rule, it might not be necessary to require that sellers provide a trial to individuals so referred. The following analysis demonstrates that it would be inappropriate for the Rule to rely on physicians and audiologists to protect the interests of those hearing-impaired individuals whom they see, however.

It is clear from the previous discussion that physicians and audiologists cannot guarantee that their patients will be satisfied with the hearing aids recommended unless a trial is obtained.[2074] Physicians and audiologists cannot even guarantee that the sellers to whom they refer patients will give those patients a trial. For example, David Vreeland, an NHAS witness, noted that his office normally offers a rental option but may not do so if the particular hearing aid has been recommended by a third party.[2075] Under NHAS's Four Point Consumer Protection Plan "the availability of the rental/purchase option is not required" when the aid has been recommended by a physician or audiologist.[2076] In discussing whether or not a trial is needed, NHAS emphasized that relatively few clients of audiologists receive trials.[2077]

Another factor disputes the wisdom of relying on physicians and audiologists to insure that their patients are not sold hearing aids which they do not want or which do not work well for them. NHAS suggested that the proposed exemption might "encourage various unlawful schemes in order to obtain the benefit of continuing referrals."[2078] It added that the requirement concerning "specific make and model" found in the proposed exemption might also encourage various schemes between manufacturers and physicians or audiologists so that the latter would recommend the specific hearing aids manufactured by the former.[2079] Various

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2073 40 Fed. Reg. 26652 (1975).

2074 See, e.g., Harford et al., R5/852; Rose, R8/4180.

2075 R10/3419.

2076 NHAS, R3/3540.

2077 R3/3562. It introduced one survey which indicated that only 35.8% of audiologists' clients had had a trial, while 49.1% had not. R13/2603.

2078 R3/3578.

2079 R3/3578-79.

persons commenting on this exemption expressed a similar concern that kickbacks and similar schemes would occur.[2080] There is in fact evidence that various compensation schemes have existed between certain physicians and hearing aid sellers,[2081] and several audiologists noted that they had been offered kickbacks.[2082] Physicians and audiologists have been offered free European trips,[2083] and physicians have had expensive testing equipment placed in their offices without charge.[2084] There is no reason to believe that physicians and audiologists are less subject to greed than other human beings.[2085] For these various reasons, staff does not believe that the Rule should rely solely upon the physician or audiologist to insure that consumers are not sold inappropriate hearing aids or hearing aids which they do not wish to purchase.

There remains the essentially equitable question of whether hearing aid sellers should be required to take back hearing aids that someone else recommended. As noted previously, even before the Proposed Rule was published NHAS asserted the inequity of requiring hearing aid sellers to bear the risk of cancellation when hearing aids are sold pursuant to the "prescription" of a physician or audiologist.[2086] In fact, when Kentucky enacted a buyers right to cancel for hearing aid sales it included a physician/audiologist exemption[2087] which had been specifically requested on equitable grounds by local hearing aid sellers.[2088] Various persons in this proceeding likewise suggested that it would not be fair for the hearing aid seller to absorb the loss occasioned by a cancellation of a hearing aid which someone other than the seller had recommended.[2089] Anthony McGann, Ph.D., an HAIC affiant, put the equitable argument this way:

2080 E.g., Brakebill, R8/4438; Palmquist, R8/3513; Samole, TR6709; Capari, R3/243.

2081 E.g., Estes, R8/6501; Rose, R5/709; RPAG, R8/2655.

2082 Hull, R8/6136; Tobin, TR4083-86. See also RPAG, R8/2635.

2083 RPAG, R8/2636.

2084 E.g., Kuptz, TR5649; RPAG, R8/2636.

2085 See Ruben, TR4028-29.

2086 Waters, R8/3995-96 (Dec. 23, 1974, letter to FTC staff).

2087 R8/6430.

2088 Byrne, TR1026-27.

2089 E.g., Berger, R5/172; Krebs, TR11837; Pratt, TR3744; Pfeiffer, R5/1675; Herrink, R6/150; Truitt, R3/53; Meci, R3/1239; Simms, R3/126.

> By requiring an unconditional warranty of "consumer satisfaction" as the performance standard for the industry, the "selector" has been relieved and the industry unfairly burdened with the consumer dissatisfaction caused by inappropriate selection of devices by clinical audiologists.[2090]

These comments seem to be based upon the intellectual premise that it is not fair to make the seller suffer because the physician or audiologist makes him do something.[2091]

Staff believes that such a premise is extremely faulty. No evidence has been introduced that hearing aid sellers are required to sell a particular hearing aid to a particular customer merely because it is recommended by a physician or audiologist.[2092] The regulations promulgated by FDA provide for medical clearance before an individual obtains a hearing aid, and specifically do not accord hearing aids "prescription" status.[2093] It was asserted that at least 90% of all hearing aid sellers in fact recheck the work of the audiologist before making a hearing aid fitting.[2094] Luke Fortner, President of NHAS, testified that if he was going to gamble his money on a trial fitting, he would do his own testing, and not just rely upon that of the audiologist.[2095] Roy Brakebill, a member of the Texas hearing aid dealers board, pointed out that Texas sellers are required to perform their own evaluation of the consumer.[2096]

Even when the seller does not perform his own evaluation, there does not seem to be any unwillingness to rely upon the work of the physician or audiologist. John Fennema testified:

2090 R13/2232.

2091 See Pratt, TR3744.

2092 During the proceeding the Presiding Officer asked if anyone knew of a law that requires a dealer to sell a hearing aid based upon an audiologist's recommendation if he did not in good faith think that it was the best hearing aid for the consumer. TR153-54. No one knew of such a law and counsel for NHAS responded by stating that he "would be more than happy to try to respond in writing if you would like." Id. No such response was in fact ever made.

2093 42 Fed. Reg. 9294-96 (1977).

2094 Kojis, TR2089.

2095 TR2896.

2096 TR1284-85.

> I don't hesitate to put my money on the line with a hearing aid they recommend because when you get one and four-tenths of them back, it really is no problem. The number is so small there is no concern.[2097]

The spectre of the hearing aid seller being forced to sell a hearing aid that he considers inappropriate does not appear to accord with the reality of the marketplace. Numerous sellers[2098] and audiologists[2099] made it clear that when an audiologist makes a recommendation with which the seller disagrees, the two work together to determine what is best for the individual. There may be a very few instances in which an audiologist would not be willing to work with a seller who balked at selling an aid he felt was inappropriate.[2100] In these instances, however, no one forces the seller to sell the aid.[2101]

The most important fallacy of the industry's equitable argument lies in the fact that the seller, not the recommender, receives the profits from successful sales. As one audiologist put it:

> Why should a seller who is making a high markup on a transaction be exempted from the risks involved in any business operation because he has enjoyed the collaboration of a disinterested professional?[2102]

2097 TR1765.

2098 E.g., Delk, TR10928; Hopmeier, TR3388-89; Dunlavy, TR3407; Brakebill, TR1286.

2099 E.g., Krebs, TR11867; Sandlin, TR10208-09; Lentz, TR11245; Rupp, R8/7119; Winston, R8/7391; Kasten, R8/6987; Hull, R8/6136. See also Scott, TR2328; Harford, TR153. Lindsay Pratt, M.D., also made the same point. TR3717.

2100 Some audiologists appear to be somewhat less willing to accept input from the seller. See, e.g., Harford, TR106, 142-43. However, the tenor of his answers may have been influenced in part by how the questions were posed.

2101 Darrell Rose, Ph.D., pointed out that no seller to his knowledge was required to sell an aid that he believed to be based upon an incorrect recommendation. R8/4180. Accord, Madell, TR5859; Wilbur, TR1364-65.

2102 McPherson, R5/265.

Roger Kasten, Ph.D., similarly testified that it is fair for the seller to bear the economic loss of the returned aid since only the seller stands to gain a profit if the hearing aid sale goes through.[2103]

The undesirable consequences of adopting the physician/audiologist exception would be dramatic. As Phil Shattuck of the Illinois Department of Health testified, this would serve to "penalize those buyers who seek the professional services of a physician and an audiologist."[2104] The absence of a trial for those persons fit on the basis of an audiological or otological recommendation could in fact be used as a selling point by hearing aid sellers to get consumers to avoid such evaluations.[2105] It is obvious to staff that a proposal that would discourage hearing-impaired persons from seeking unbiased professional evaluations[2106] and discourage audiologists and physicians from making relatively specific recommendations for hearing aids[2107] is not in the public interest.

One other equitable argument bears mention. A number of members of the hearing aid industry have suggested that audiologists or physicians who recommend specific hearing aids that are later returned by a consumer also should refund a part of their professional fees.[2108] Anthony McGann, Ph.D., an HAIC affiant, wrote:

> To the extent the "professional" . . . inappropriately selects and recommends a hearing aid, he should assume the responsibility for the costs of the selection.[2109]

In contrast, others noted that the physician or audiologist sells a service, rather than a product.[2110] Furthermore, as noted above, it is the hearing aid seller who makes the profits from the many successful hearing aid sales which are made, not the physician or

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2103 TR774-75.

2104 TR6777.

2105 E.g., Dalton, TR8724; Shannon, TR1863; Mark Ross, R8/3178.

2106 See, e.g., Colongo, R3/203; Menzel, R8/4201.

2107 See, e.g., Nygren, R8/4940.

2108 Skadegard (Oticon), R3/176; Shuford, HX202/5-6; HAIC, R2/53. See also NHAS, R3/3575-76.

2109 R13/2232.

2110 TR1927-28.

audiologist who recommends that particular hearing aids be purchased. It is therefore not inequitable to require only the seller to make a refund. In any event, the argument is rendered moot by the fact that under the Recommended Rule hearing aid sellers will be permitted to retain a cancellation charge for pre-sale services charged all customers as long as the customer is told in advance of the amount of such charges and of their non-refundable nature.[2111] Thus, charges for pre-sale services can be retained by all persons, be they hearing aid sellers, physicians, or audiologists.

Based upon all of these considerations, staff has determined that it would not be in the public interest to exempt from application of the buyer's right to cancel hearing aid sales made pursuant to the recommendation of a physician or an audiologist.[2112] Accordingly, this exemption has not been included in the Recommended Rule. Since the concern was raised that the Proposed Rule could be interpreted to require hearing aid sellers to follow the recommendations of the physician or audiologist,[2113] it is appropriate to state staff's belief that nothing in the Proposed Rule or Recommended Rule requires hearing aid sellers to follow the recommendations of referring physicians or audiologists.

b. Identical replacements

Section 440.4(i)(2) of the Proposed Rule provided that the buyer's right to cancel requirement would not apply to a sale "[m]ade to replace a damaged or worn out hearing aid when the replacement hearing aid which is sold is identical to such damaged or worn out hearing aid."

Very few individuals supported the exemption as written.[2114] Various industry members suggested that the exception in fact be

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2111 See Part Two, Section III.GG.3.h.viii, supra.

2112 The Presiding Officer agreed that the physician/audiologist exemption was not justifiable. R9/Dlip118.

2113 E.g., Brakebill, TR1284, who specifically requested that § 440.4(1)(i) of the Proposed Rule be amended by adding:

> Nor shall 440.4(1)(i) be construed to require any seller to accept the recommendation of such a specific aid by a physician or audiologist.

2114 Marylene Freshley, an NHAS "Governor," suggested that when an identical aid is sold a trial "would serve no purpose" R10/6650, and Donald Krebs, Ph.D. who supported the exception, suggested that the Commission would have difficulty establishing when two aids were in fact identical. TR11837.

broadened to include purchases of all replacement aids.[2115] This would, of course, have limited applicability of the buyer's right to cancel to first-time users only, a step which staff does not believe would be in the public interest.[2116]

NHAS pointed out that the exception in section 440.4(i)(2)

> fails to account for changes in hearing aid technology. Inasmuch as hearing aid models change to reflect improvements, fitting a person with an "identical" model will often be impossible. The exception also will deter persons from recommending improved models, to the detriment of the hearing impaired.[2117]

NHAS also noted that to the extent that the buyer's right to cancel is premised on the inherent nature of hearing loss and hearing aids, no exceptions were appropriate.[2118] Paul Shuford, representing the Virginia Hearing Aid Society, stated:

> As to the second exemption -- i.e., replacement of a worn out aid with an identical aid -- I can think of nothing more conducive to poor fitting. Regardless of changes in the user's hearing, and regardless of new developments and improvements in hearing aid models, the dealer would be financially tempted . . . simply to avoid the iniquitous 30-day cancellation privilege . . . to replace the old outmoded aid with one exactly like it.[2119]

2115 See Zenith, R3/3406; NHAS, R2/117. Radioear suggested that the exception be extended to include at least up-dates of the same model, R2/30.

2116 See Part Two, Section III.GG.1.c, supra.

2117 R3/3580. NHAS also argued that the exception incorrectly assumed that a person who has previously worn an aid and therefore determined the significance of amplification to himself would not make the appropriate decision in selecting a new (i.e. different) model. Id.

2118 R3/3577.

2119 R10/6 (ellipses in original.)

Among those who commented on this proposed exemption, relatively widespread opposition was expressed by organizations,[2120] traditional hearing aid sellers,[2121] physicians,[2122] and audiologists, both those who sell hearing aids[2123] and those who do not.[2124] Many persons noted that due to quality control and other product variance factors, a so-called "identical" hearing aid may be quite different from the hearing aid which it is bought to replace.[2125] These variances can occur as a result of a change of components by the manufacturer,[2126] general tolerances allowed in manufacturing,[2127] or damage that might occur during shipping.[2128] As Laura Wilbur, Ph.D., pointed out:

> [I]t has been our experience that it is not possible to be certain that a hearing aid

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2120 NCLD, HX35/5; International Association of Parents of the Deaf (Woodard), TR4142; ASHA, R10/1754; Connecticut Speech & Hearing Assoc. (Eichelberger), TR8674; Illinois Department of Health (Shattuck), TR6777; Ohio Div.C.P., R8/2927; Georgia Speech & Hearing Assoc. (Bess), TR6230.

2121 E.g., Fennema, TR1796. See also Butz, who gives trials to some of his clients who purchase replacement aids, TR6637.

2122 See Robert Ruben, M.D., TR3976, who pointed out that this exemption was neither consistent nor fair to the patient.

2123 E.g., Barwell, TR5168-69; S. Graham, R8/5275-76.

2124 E.g., Rose et al., R5/709; Harford et al., R5/844; Kasten, R5/306; Urban, TR1814; Shannon, TR1864; Wilbur, TR1347; Rassi, TR5733.

2125 E.g., Harford et al., R5/844; Warren, R8/5313; Kasten, R8/6987, TR712, R5/306; S. Graham, R8/5276; Eichelberger, TR8674; Wilbur, TR1347, 1362; Shattuck, TR6778; ASHA, R10/1754. See also the discussion of quality control matters at Appendix F, Section VI.C.3, infra.

2126 E.g., ASHA, R10/1755; NHAS, R3/3580.

2127 E.g., Kasten, TR712, R8/6987; Eichelberger, TR8674.

2128 E.g., S. Graham, R8/5276.

> of the same make and model is identical to another hearing aid of the same make and model.[2129]

Perhaps the most important reason why the identical replacement exception should not be adopted related to the fact that the hearing-impaired person's hearing may have changed between the time the old aid was purchased and the time that the replacement aid was sought,[2130] with an identical replacement therefore not being an appropriate fitting.[2131] It has been suggested that hearing aid sellers might utilize such an exception to get around the right to cancel by selling customers identical replacement hearing aids, even though the seller knows that this is not the most appropriate fitting.[2132]

For all of the reasons discussed above, staff does not believe that it would be in the public interest to exempt the sale of identical replacement hearing aids from the application of the buyer's right to cancel.[2133]

5. Impact of the Buyer's Right to Cancel

a. Impact on Industry

i. Introduction

Within days of the publication of the Proposed Rule, Hal Fishbein, as Legislative Chairman of the Massachusetts Hearing Aid Society, sent telegrams to President Gerald R. Ford[2134]

2129 TR1347. She added that:

> We have found patients who purchased or rented a hearing aid which was of the same make and model recommended by our clinic which did not function as well as the model in our clinic. TR1350.

2130 E.g., Ruben, TR3977; Wilbur, TR1349; Warren, R8/5313; S. Graham, R8/5275; Shuford, TR649-50; Shattuck, TR6778; Franks, R10/6518.

2131 E.g., S. Graham, R8/5275; Shuford, TR649-50; Shattuck, TR6778.

2132 E.g., Shannon, TR1864; Shattuck, TR6778-79.

2133 The Presiding Officer agreed with this conclusion, finding that there was no justification for this exception. P.O. Report, R9/Dlip118.

2134 H. Fishbein, R2/42; see Appendix D re Fishbein, infra.

and Representatives Silvio O. Conte,[2135] James A. Burke,[2136] and Margaret Heckler[2137] saying that the Society was convinced that the Proposed Rule, if promulgated, would force the majority of hearing aid retailers out of business. He subsequently wrote the same message to Senators Edward M. Kennedy[2138] and Edward W. Brooke[2139] and Representative Torbert H. MacDonald.[2140] Yet a number of industry members commented that the buyer's right to cancel would not have any adverse effect on reputable sellers.[2141] Others have echoed this sentiment.[2142] Both Earl Harford, Ph.D.,[2143] and Judith Rassi[2144] noted that when Northwestern first started

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2135 Id. at 33.

2136 Id. at 94.

2137 Id. at 95.

2138 Id. at 1710.

2139 Id. at 2188.

2140 Id. at 1732.

2141 E.g., Nygren, R8/4939; Brakebill, R8/4333, TR1282-83 (based on knowledge of his own and other dealers' experiences with trials); Patrick, R3/1610; Gitles, R8/4219; Freeman, R8/4045. See Kasten, TR776; Giglia, R8/3440, 3554; Griesel, R10/6768; Rassi, TR5787; cf. Keyes, TR10711; Electone, ad, R10/2193; Pigg, R3/275.

2142 E.g., P.O. Report, R9/Dlip269, 274; Kasten, R5/1433, 1438; R8/6990; Jerger, R8/5340; Hattler, R8/4728; Harford, R8/4551; HEW Task Force Final Report (analysis of comments of "most educational centers"), R8/3388; Ohio Div. C.P., R8/2929; Schmitz, R8/7267; Urban, TR1809, 1814; B. Smith, TR336-37; Rose, TR458; Franks, R10/6524; E. Johnson, R8/4492; ASHA, R10/1696; see Billings, R8/6789; K. Johnson, TR4265.

2143 Harford, TR62, R10/143-44.

2144 Rassi, TR5738-39, R8/5361; Lentz, R10/6534. A similar history was noted by Kenneth Berger, Ph.D.:

> In 1959 Oregon became the first state to pass a law to regulate (technically not license) the sale and fitting of hearing aids. This law took effect on Jan. 15, 1960. Some gloomily predicted that the law would mean the end of hearing aid retailing in Oregon and that the advertising restrictions would

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recommending trials for patients the dealers complained loudly, only to concede later that trials were beneficial to business.[2145] In addition, Dennis Murphy, Ph.D., an FTC economist, concluded that "it is unlikely that the proposed right to cancel will adversely affect the industry's operating costs or competitive structure."[2146]

ii. Impact on Consumers' Efforts to Adapt to the Selected Aids

The record overwhelmingly supports the conclusion that the amount of cancellation charges permitted by the Rule as originally proposed will adequately motivate consumers to make a good faith effort to adapt to the selected hearing aids.[2147] In addition, the charges are sufficiently large to adequately discourage consumers from repeatedly trying different aids in a poorly motivated and potentially unending search for one that will satisfy their unrealistic expectations.[2148] The Rule thus minimizes the risk of cancellations in those situations in which the consumer is receiving significant benefit from the selected

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2144 (Continued)

> prevent those needing a hearing aid from being serviced. There were acrimonious debates and strong feelings (Bennett 1962). But the law, after well over a decade, has not seemed to hurt any but the unethical dealer. [R8/5127].

See also Scheurer, TR11472, 11485.

2145 Douglas Noffsinger, Ph.D., believes the same will be true of the buyer's right to cancel. Noffsinger, R8/5407.

2146 Murphy, R13/2068.

2147 E.g., Bowen, HX35/5; Krebs, TR11839-40; Kasten, R5/1435; Rose, TR510-11; Schmitz, R8/7267; Munger, TR4511; see Keyes, TR10713/13-15; Harford, R8/4550; Gerstman, TR2473-74; Mastricola, TR8633-34; Stein, TR8987; Newby, R5/427; Alpiner, R8/5434; Kemker, R8/6936; Urban, TR1851-52. But see HAIC, R3/3911; A. Smith, TR8154; Samole, TR6662-63; J. Johnson, TR2301; Kojis, TR1986; Barnow, TR1637; Gerstman, TR2402; Richenberg, TR3512-13; Krebs, TR11831; Delk, TR10927.

2148 E.g., Bragg, R5/1160; Studebaker, R5/465; see Delk, TR10958-59; McShane, R5/1753; Regan, R5/180; Rose, R8/4183; but see Samole, TR6692-94; Krebs, TR11848, 11870-72; Shuford, TR693.

aid.[2149] This is not to say that unjustified cancellations will never occur under the buyer's right to cancel,[2150] but merely that they will be infrequent and will not pose significant problems.[2151] Qualified fitters should be able to identify those most likely to cancel for unjustified reasons,[2152] for their motivation usually will be noticeably absent or obviously imposed by friends, relatives, or even the seller's missionary zeal.[2153] This position

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2149 E.g., Bowen, TR1928, HX35/5; Jerger, R8/5339; Rassi, R8/5359; Moneka, R8/5391; Noffsinger, R8/5405; ASHA, R10/1742-44; Schreiber, TR4051, 4054-55; Urban, TR1810; Franks, R10/6519; Lankford, R10/4891; K. Berger, R5/172; Harford, R8/4551; but see Beltone, R3/3437; HAIC, R3/3977, 4038 (quoting Menzel,1966); NHAS R2/112, R3/3602; O'Brecht, R8/3876; Richenberg, TR3513-14; Kojis, TR2024-25; Vreeland, TR3835, 3879; Staab, TR7039; Samole, TR6664, 6687, 6692.

2150 See, e.g., Mastricola, TR8625-26; Harford, TR78-79, 141-42; Rose, TR473; Brewer, TR3944; Link, TR1148; Galleher, R5/43; NHAS, R3/3686; Alpiner, R8/5434; Krebs, TR11845-46; Teter, TR10238, 10273; Butts, TR4204-05; Paschell, TR866.

2151 See, e.g., Mastricola, TR8625; Schein, TR224-25; Brewer, TR3944, 3962-64; Rose, R8/4183; Pastalan, TR4735-36; Morgan, TR9562; Butts, TR4204-05; P.O. Report, R9/Dlip 122-23; Leber, R10/6509; contra, Samole, TR6694, 6701; McGann, R13/2250. Donald Krebs, Ph.D., a witness who appeared at the request of HAIC, testified that perhaps 20% of those he sees are "shoppers." TR11871. This astounding figure may, however, refer to those who refuse to accept his advice to purchase the recommended hearing aid rather than those who will cancel trial rental after trial rental. See TR11847-48. If not, then Dr. Krebs' experience would seem to be virtually unique in light of the cancellation rates experienced by others. See Part Two, Section III.GG.5.a.iii, infra.

2152 See, e.g., Gerstman, TR2474-75; Brewer, TR3962; Appendix F, Section VI.C.13, infra.

2153 See Appendix F, Sections VI.C.13 & VI.F-I, infra. An exchange between NHAS counsel and James Delk, an HAIC witness, TR10973/24-74/5, strongly suggested that the Proposed Rule would unfairly place at a disadvantage a seller who wanted to sell an aid to someone he knew had been going from dealer to dealer cancelling purchases. Staff questions whether any sale would be appropriate in those circumstances. Certainly a seller who chose to "make a sale" in such circumstances should not be heard to complain when the virtually inevitable cancellation occurs. Similar concerns were raised by the testimony of other industry members. E.g., Fortner, TR2936/24-37/21, 2943/23-44/18; 2958/25-59/7; Barnow, TR1686/13-87/7; Leale,TR11770.

is strongly corroborated by the experience Zenith had over a matter of several decades in offering and promoting a 10-day free trial, although a non-refundable charge was made for any custom earmold. Only about four percent of Zenith's hearing aid purchasers returned their aids for refunds.[2154] Moreover, this return rate remained the same after Zenith extended the length of the trial and provided for cancellation charges similar to those in the Proposed Rule.[2155]

It is clearly desirable for the consumer to make a good faith effort to benefit from the selected aid and not give up prematurely, after only a week or so of trying it.[2156] The Recommended Rule, by eschewing daily cancellation charges,[2157] recognizes this and avoids rushing the decision to return the aid.[2158] The refund is the same whether an aid is returned early or late in the cancellation period. Thus, the consumer has nothing to lose and much to gain by trying hard for the full 30 days.

HAIC argued that "sometimes just the slightest suggestion that an aid might not be useful is all it takes to change a client's mind about purchasing one."[2159] Robert Sandlin, Ph.D., an NHAS witness, testified that he "feel[s] it is inappropriate to tell [his patients] that a trial period is indicated because

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2154 Borst, R8/1953. Such low return rates have been reported by other sellers offering similar trials. E.g., Nygren, R8/4938 (under 5%); Greene, R8/4742 (4 or 5%); Kuptz, TR5719 (2%).

2155 J. Johnson, TR2299.

2156 See, e.g., Butts, TR4223-24; Consumers Union, R8/1189qqqq; Alpiner, SPXB/169.

2157 A daily cancellation charge was recommended by some individuals. E.g., Shanon, R5/666-67; Rose et al., R5/710; Rose, R8/4184; Sandel, R6/177; Fennema, R3/215-16, TR1773-77, 1781-83; Zerbe, R5/1108; Worcester City H & S Cen., R5/1202; see Lucker, R5/606-07; W. Brown, R6/295-96.

2158 See NHAS, R3/3512 note 43; Jerger, R8/5340. But see Rose, R8/4184.

2159 HAIC, R3/4030 (quoting Shore, "Hearing Aid Consultation" in Handbook of Clinical Audiology, ch. 34). James Delk testified: "While I will provide a refund to the dissatisfied user, I do not advise the user at the time of purchase that he has a trial period and the right to return the aid for a refund because I am concerned that this would encourage him not to make a realistic attempt to adjust to the hearing aid." TR10927-28.

it suggests that you don't know."[2160] James Jerger, Ph.D., told staff that he does not apprise patients that they have a right to cancel (unless they ask whether they do) because he fears that a small percentage of them will use any excuse to fail with an aid.[2161] He conceded, however, that they are reassured when told of the existence of their trial rights and that the potential adverse effects of consumer awareness of a right to cancel should not be serious.[2162] Lee Wilson, on the other hand, noted that the availability of trials helps him encourage someone who lacks motivation to change his attitude to a positive one of giving amplification a try.[2163] Even James Curran, An HAIC witness, conceded that a seller can use the availability of a trial as an inducement to try amplification for those who have many doubts.[2164] A number of individuals testified that a trial helps the seller secure the customer's confidence.[2165]

Some witnesses have strongly argued that there is a substantial difference between a mandatory right to cancel and a rent/purchase option, voluntarily granted by the seller, which provides the buyer with virtually identical rights.[2166] Although the precise nature of this difference is not clear,[2167] HAIC has argued that the existence of a federally mandated right to cancel "would cause serious anxiety and unjustified suspicions in the mind of the purchaser".[2168] HAIC further argued that the fact that a "right to cancel" has been mandated by a federal agency

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2160 Sandlin, TR10187. This attitude seems incongruous with the fact that he only recommends a trial "if I have doubt as to the advantages" of the recommended aid. Id. See also id. at 10184-86, 10188-89.

2161 Jerger, R8/4577; see E. Johnson, R8/4490.

2162 Jerger, R8/4577-78.

2163 L. Wilson, TR10072-73; see, e.g., Alpiner R8/5434; Winston, R8/7387; Schein, TR205; Rassi, TR5740; Butts, TR4207; P.O. Report, R9/Dlip118.

2164 Curran, TR10863-64.

2165 E.g., Kasten, TR710, R8/6990; Fennema, TR1800; K. Johnson, TR4369; see J. Johnson, TR2266; Link, TR1144-45.

2166 E.g., Tremmel, TR8370; Fortner, TR2856; West, TR10526.

2167 See Perrill, TR11619; Martinucci, TR8400; J. Williams, R10/3441; Tremmel, TR8370; Samole, TR6681, 6692-94, 6701-02.

2168 HAIC, R3/3909, 3977; see NHAS, R3/3688; Curran, TR10862-63; West, TR10526-27; Keyes, TR10713-15.

which is widely believed to have the best interests of the consumer in mind may be viewed as a warning to the hearing impaired against purchasing any hearing aid at all.[2169] Ronald Scheurer, an NHAS witness, testified that "the absolute right to cancel for all sales is extremely negative, implying that hearing aid specialists are incompetent and dishonest,"[2170] adding that it would "discourage the hearing impaired from obtaining needed help through amplification. It puts unnecessary doubt in the person's mind, when he has too much doubt already."[2171] He later testified that in his view there was no way that a seller could make a mandatory right to cancel positive.[2172] The record contains cogent evidence to the contrary, however, that consumers protected by the buyer's right to cancel will be encouraged to try amplification because they need no longer fear losing the entire purchase price if they experience any of the disappointments with hearing aids which they or their friends may have suffered.[2173]

NHAS argued that with the buyer's right to cancel "the purchaser is aware that his right to cancel must be exercised by a date certain and his adjustment is geared to that deadline if he is to 'recover' the purchase price."[2174] NHAS contended that this would "undermine the willingness of individuals to take post-fitting counseling for more than 30 days."[2175] NHAS further asserted that

> the availability of an absolute right to cancel will actually foster indecision, encourage

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2169 HAIC, R3/3977.

2170 Scheurer, TR11423; see Keyes, TR10693-94, 10711.

2171 Scheurer, TR11423-24.

2172 Id. at 11518.

2173 See text accompanying notes 2273-75, infra. The Presiding Officer was not persuaded that a mandatory buyer's right to cancel would have a different psychological impact than that of the trials now offered by some sellers. P.O. Report, R9/D1ip114.

2174 NHAS, R3/3591, 3693 ("the right to cancel will inevitably cause undue emphasis to be placed on the 30 day cancellation period" (emphasis in original), 3512. In contrast, according to NHAS, a voluntary rental program can be postponed indefinitely. Id.

2175 Id. at 3687. NHAS President Luke Fortner testified that the buyer's right to cancel "will encourage people to give up within an arbitrary period of 30 days." TR2857.

> persons who could benefit from the amplification to take an "easy out" and forego rehabilitation efforts, and motivate hearing-impaired persons to lapse back into the familiar but false "comfort" of their disability.[2176]

Staff considers these arguments to be unpersuasive. The Recommended Rule and the Proposed Rule[2177] both clearly allow the seller to give the buyer greater rights, including extensions of the 30-day period. As long as the buyer and seller have confidence in each other, there is every reason to expect that mutually agreeable extensions of the buyer's right to cancel will take place whenever necessary.[2178]

It has been suggested that a voluntary trial rental program similar to that adopted by NHAS would be more positive than the buyer's right to cancel. Mr. Fortner testified that "a [voluntary] trial period is a positive approach" whereas "a right to cancel places emphasis on the satisfactory function of the product, and the services provided.[2179] He added:

> Since candidates for hearing aids frequently lack motivation, a right to cancel will encourage these people to find fault with the product or service and will not improve their motivation. A trial period, however, places emphasis on the person's motivation where it belongs.[2180]

Staff fails to see how any of Mr. Fortner's characterizations are necessarily more appropriate for voluntary trial periods than for the buyer's right to cancel.

2176 NHAS, R3/3687; see Fortner, TR2857.

2177 See Recommended Rule § 440.45, and Proposed Rule § 440.6, respectively.

2178 See Part Two, Section III.GG.3.e, supra.

2179 Fortner, TR2856.

2180 Id. A similar logic was presented by Robert Oberhand, M.D., an NHAS witness. TR3088-89, 3107. On the other hand, another NHAS witness, James Anthony, M.D., testified that he saw little or no difference in the consumer's attitude flowing from the return privilege being voluntary, rather than mandatory, notwithstanding helpful prodding from HAIC's counsel. TR8496-97.

NHAS has alleged that the Proposed Rule "provides no incentive for the buyer to make an earnest effort to adjust to the aid, to seek counseling from the hearing aid specialist, or to explain to the seller, to the extent possible, the problem in adjusting to the aid."[2181] Mr. Fortner noted that he requires buyers to agree to come in for appointments spread over the trial period.[2182] As noted above, the Rule would permit sellers to encourage their customers to come in for help if problems develop, but would not permit them to require this.[2183] This limitation should not seriously interfere with sellers' efforts to get consumers to seek assistance with problems before cancelling, however. John Fennema testified that he always encourages his customers "to come back to us if [they have] any problems or any questions" and noted that "they are invariably in touch with us."[2184] William Lentz, Ph.D., reported similar experiences.[2185] Al Dunlavy, a hearing aid seller with over 40 years of experience who testified as an NHAS witness, said that he could not recall a situation where someone having an adjustment problem did not come in for help.[2186] These experiences are not surprising, for it is clearly in the interest of those having adjustment problems to seek help. This result should prevail even if the buyer's right to cancel is mandated, for it will continue to be in the buyer's interest to seek help with any adjustment problems that may be experienced. Failure with the aid will mean forfeiture of the cancellation charges and, much more importantly, abandonment (at least temporarily) of the hope of improving one's hearing ability.

2181 NHAS, R2/112; see NHAS, R3/3565.

2182 Fortner, TR2945. He comes to them if the aid was delivered to their home. Id. Other sellers schedule similar visits. E.g., Morris, HX118; Keyes, TR10751-52.

2183 NHAS's counsel suggested a way in which the seller could provide an additional incentive for the buyer to come in if problems develop; i.e., that the seller waive any cancellation charges if the buyer came in for a specified number of visits. Waters, TR11244/22-45/2. This procedure would be perfectly acceptable under the Recommended Rule, as long as the consumer who failed to come in for the scheduled visits did not forfeit his right to cancel. The only thing the seller could make such a consumer forfeit would be the opportunity to cancel without any cancellation charges.

2184 Fennema, TR1179-80.

2185 Lentz, TR11242-43.

2186 Dunlavy, TR3447.

Finally, some concern was expressed that the buyer's right to cancel will encourage some consumers to cancel merely because they could get the same aid, or a similar aid, elsewhere at a lower cost.[2187] This seems unlikely to occur except when tremendous, and therefore questionable, price disparities exist. The consumer will forfeit around $50 in cancellation charges plus whatever was paid for presale services.[2188] No evidence in the record suggests that that problem has developed with the voluntary trials now offered by many sellers.

iii. Anticipated cancellation rates

The Presiding Officer noted a median return rate of 4.5 percent based on the rates experienced or reported by witnesses at the hearings.[2189] While he was reluctant to predict a precise cancellation rate for the buyer's right to cancel, he did conclude that "it does not appear that [it] would result in any increase in 'casual or frivolous' cancellations" above the return rates reported by those witnesses.[2190] Staff agrees with this latter conclusion, but believes that experiences with trials similar to the buyer's right to cancel do provide a valid basis for predicting the cancellation rates to be expected by reputable sellers under the Recommended Rule.[2191] The median return rate of 4.5 percent noted by the Presiding Officer seems to be in the vicinity of what can be expected, for the majority of experiences reported hovered around

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2187 E.g., Harker, TR1148.

2188 See Recommended Rule § 440.40.

2189 P.O. Report, R9/D1ip263. Anthony McGann, an HAIC affiant, concluded that the average return rate was 5%, McGann, R13/2249.

2190 P.O. Report, R9/D1ip12.

2191 Of course, if retailers choose to abuse cancellation privileges offered by manufacturers, the cancellation rate could be high until the manufacturers caught on and cut them off. Myron Samole testified that some of Fidelity's dealers did just that, buying a number of hearing aids in 1 month and at the end of the month returning them, only to buy a new set a few days later. TR6755. Fidelity's response to this was to discontinue its restocking privilege. Id. An equally effective alternative would be to make a modest restocking charge, on the order of the $25 charge made by Dahlberg. See Dahlberg, R8/1975. In any event, such activities by miscreant retailers are easy for manufacturers to identify and remedy.

that mark,[2192] although some return rates were lower[2193] or higher.[2194]

iv. Impact on prices

One of the industry's recurrent arguments is that the imposition of the buyer's right to cancel will result in increases in consumer prices.[2195] NHAS has asserted that "[e]very seller will, per force, raise prices as a protective buffer against a risk of unknown magnitude.[2196] Anthony McGann, Ph.D., an HAIC affiant, asserted that the increase in prices would result from an increasing return rate and the burden of administering the right.[2197] HAIC asserted that the "required use of such an extensive form will

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2192 E.g., Borst (Zenith), R8/1953 (4%); Winston, R8/7387 (4%); Fortner, TR2896 (4%); Stroup, TR962 (5 of 120); Lankford, TR8041 (1 in 20 or 1 in 30); Greene, R8/4742 (4 or 5%); Nygren, R8/4938 (under 5%); Patrick, R3/1610 (5%); Mastricola, TR8655 (5%); Zelnick, TR428 (5%); B. Smith, TR422-24 (5%); M. Smith, R13/2080 (6%); Madell, HX138 (6.4%, corrected figure); Griesel, TR9391 (2% GPHAG consensus), R10/6769 (2-10%); Harford, TR84 (probably 5%); Rassi, TR5739 (under 10%), 5779-80 (under 10%), R8/5359 (5%); Noffsinger, TR7657 (5-10%); Harford et al., R5/853 (5%).

2193 E.g., Hull, R8/6137 (none in last 3 years); Campagna, TR2663 (virtually none); Brakebill, R8/4333 (not one in a hundred); Wallenberg, R8/4397 (less than 1%); Dieterich, R8/1969 (under 0.5% including returns due to causes other than customer dissatisfaction); Fennema, TR1749 (1.4% in 1974, 1.8% in 1975); Schaefer, TR8301 (very small, extremely small); Kuptz, TR5719 (2%); Butz, TR6622 (2%); Billings, R8/6789(2-3%).

2194 E.g., Harvey, R8/6891 (just under 8%); L. Wilson, TR10030 (about 9%); E. Owens, R8/6485 (22 of 241); Keyes, TR10756 (under 10%, "so it is a small amount that do come back"); PIRGIM, R8/232 (less than 10%); Urban TR1810, R13/4226 (10%); Wilber, R8/5330 (10%); Rose TR473-74 (10%); Holmes, TR9596-97 (10%, maybe 15%); M. Miller, R8/5824 (at most 15%); Alpiner, R8/5430 (15%).

2195 E.g., Vreeland, TR3835; Byrne, R8/6564-65; NHAS, R2/113-14, R3/3688, 3691, 3694; Fortner, TR2856, 2859, 2864 (as much as 15%); Kleiman, TR6911; Barnow, TR1694; Colongo, R3/203; HAIC, R2/41, R3/3978; McGann, R13/2250; Shuford, TR692; Beltone (cited in HEW Task Force Final Report), R8/3394; Samole, TR6657, 6663; Zenith, R2/11; Gunter, TR8203; Tremmel, TR8320; West, TR10478. See also Radioear, R2/25.

2196 NHAS, R3/3688.

2197 McGann, R13/2250.

unnecessarily increase the cost of doing business and, as a result, the cost of hearing aids to consumers.[2198]

Much persuasive evidence in the record suggests that higher prices should not result from the buyer's right to cancel.[2199] For example, the prices charged by sellers who offer trials are not higher[2200]--and are sometimes lower[2201]--than those of sellers who do not offer trials. Similarly, the prices charged the dealers by manufacturers for aids they will take back after trial use without charge seem to be about the same as the prices for aids on which a return charge is made.[2202] Some industry representatives argued that if all sellers were required to offer a trail period, the competitive advantage now accruing to those sellers who presently offer trials would disappear, and the prices charged by those sellers would consequently rise.[2203] This argument is not persuasive. The adoption of the Rule should improve the presently poor[2204] market penetration of the industry, and many hearing-impaired persons who are presently reluctant to try hearing aids because of their

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2198 HAIC, R2/57.

2199 E.g., Ross, R8/4726; Schmitz, R8/7267; ASHA R10/1742-43; Nygren, R8/4939; Brakebill, R8/4333; Goldstein, R8/4718; Chaiklin, R8/4724; see Fortner, TR2896. Those whose cancellation rates would be higher than those of reputable sellers because of the presence of sales abuse or incompetence may, of course, attempt to raise their prices as an alternative to changing their selling practices and improving their competence. Staff is hopeful, however that the economics of the buyer's right to cancel will militate against such an effort. To the extent that sales abuses continue, they can and will be addressed by FTC Rule enforcement activities.

2200 E.g., Ross, R8/4726; Byrne, R8/6454-55, TR1020; Kasten, R10/66.

2201 E.g., Nygren, R8/4939; Kasten, R8/6978; see Freeman, R8/4044.

2202 Brakebill, TR1306. Industry counsel have stressed through their cross-examination that some of the dealers who offer trials for around a dollar per day often have the advantage of a manufacturer who is willing to accept the cancelled aid from the dealer at no charge, or a minimal charge. E.g., Fennema, TR1762; Brakebill, TR1305-08.

2203 See Keyes, TR10751; Samole, TR6755.

2204 E.g., NHAS, R3/3686; Dahlberg, R8/1977 (10%-15%); HEW Task Force Final Report, R8/3203 (citing industry estimates); P.O. Report, R9/D1ip263.

fear of losing the entire purchase price [2205] should become willing to try amplification once the buyer's right to cancel becomes available. Indeed, many persons have commented that the availability of trials has greatly increased the willingness of potential consumers to try amplification,[2206] with success in the vast majority of cases.[2207] Increases in sales volume engendered by the universal availability of trials should minimize or obviate price increases.

Staff has considered these arguments and the evidence and concluded that the adoption of the buyer's right to cancel probably will not cause reputable sellers to raise their prices. Any price rise which does occur will be slight.[2208]

v. Impact on pricing structure: bundling vs. unbundling.

NHAS argued that the buyer's right to cancel will cause many sellers to unbundle their prices, charging separately for services rendered,[2209] and that "[s]eparate charges for such services, priced at their full value, will result in a higher cost to the consumer."[2210] Staff is not persuaded by NHAS's logic. Indeed, some have suggested that unbundling would ultimately lead to lowering the total cost

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2205 E.g., Schmitz, R8/7267; Loavenbruck, TR1594; Fennema, TR1746-47; Shaefer, TR8264; Jerger, R8/5340; M. Miller, R8/5824; Bowe, R8/6955; Kasten, R8/6990; Kemker, R8/6935; Butts, TR4206; Corbett, R10/14.

2206 E.g., Brakebill, R8/4333; Rose, TR455; Fennema, TR1747-48 (35% increase in sales in the first year after he lowered prices and started offering trials; in the subsequent 2 years sales continued to increase); Schaefer, TR8264; B. Smith, TR330-31; see P.O. Report, R9/Dlip263; Dahlberg, R8/1974-75; Kasten, R8/6991; Loavenbruck, TR1594; Nygren, R8/4939; Jerger, R8/5340; Brewer, TR3918; Zenith, R8/1944; Fennema, TR1746. But see HAIC, R3/3976-78.

2207 E.g., Brakebill, R8/4333; Rose et al., R5/710; Fennema, TR1748-49; Schaefer, TR8264. See Nygren, R8/4938; Butz TR6621-22.

2208 Otto Menzel, Ph.D., estimated that the buyer's right to cancel would cause a price increase of about $6 per aid. R8/4205. The Presiding Officer concluded that the prices for hearing aids and related services can be expected to rise slightly as a result of mandating the buyer's right to cancel. P.O. Report, R9/Dlip270, 275.

2209 NHAS, R3/3691-92.

2210 Id. at 3692.

to consumers, because unneeded services would not be paid for,[2211] and those that were needed would be paid for at a reasonable rate.[2212]

vi. Uses of canceled aids

The record indicates that the number of "used" aids generated by the buyer's right to cancel should not pose any significant problems for reputable sellers. Luke Fortner, NHAS's President, testified:

> With the small number [i.e., four percent[2213]] that is returned when I have the option of offering the rental or not offering the rental, I am able to absorb those into my loaner stock or market them occasionally as a used hearing aid.[2214]

Similarly, James Keyes, an HAIC witness, testified:

> Better than 90 percent of our instruments that go out on this [30-day] evaluation turn into sales so it is a relatively small amount that do come back. The ones that do come back we use as loaner instruments. We sell them to our dealers at a reduced price and mark them as loaners. The balance of them are put into clinics on consignment.[2215]

2211 E.g., HEW Task Force Final Report, R8/3238-39; RPAG, R8/2683-84.

2212 See RPAG, R8/2681-83.

2213 Fortner, TR2896.

2214 Id. at 2962. Since Mr. Fortner provides trials whenever either he or the customer is not sure about amplification, (TR2936), and apparently would not sell an aid to someone who was not properly motivated (TR2958-59), it seems clear that the cancellation rates of reputable sellers should not be much worse than his. Mr. Fortner testified that he did not believe that those who buy from him without the rental option would be less likely to buy if they had the rental option. Id. at 2965/22-66/10. Therefore, Mr. Fortner's testimony clearly supports a conclusion that the expected magnitude of returned aids can be absorbed by reputable sellers even without support from manufacturers, because sellers will be able to put almost all of them to worthwhile use as loaners and will only occasionally need to dispose of them by selling them as "used" aids.

Since these cancellation rates are close to those to be expected by reputable sellers under the buyer's right to cancel,[2216] they indicate that there will be no glut of slightly used hearing aids.

Reputable sellers should be able to sell the relatively few returned aids as used, if they choose to do so. Notwithstanding industry assertions to the contrary,[2217] the survey results obtained by the Minnesota Hearing Aid Society and published in its Answer to the MPIRG Report[2218] clearly demonstrate the existence of a market for returned aids. Fully 27 percent of the respondents were interested in the concept of used hearing aids and another 13 percent responded that their interest would depend on other factors,[2219] presumably such factors as warranty and price. Numerous comments have corroborated these survey results by noting that many persons with limited incomes would indeed be interested in the savings from buying trial aids.[2220] While sellers would not be able to make as much profit on the sale of returned aids as they would on the sale of new aids,[2221] the dealer will certainly be able to recoup his out-of-pocket expenses even if the manufacturer does not grant a return privilege. James Johnson commented that he believed that a 20 percent discount from the new product price was the general practice with respect to aids returned under Zenith's 10-day money back guarantee.[2222] William Fowler noted that the average decrease in the value of a returned trial aid is 25

2215 Keyes, TR10756-57.

2216 See Part Two, Section III.GG.5.a.iii, supra.

2217 NHAS, R8/4106, R3/3689; Waters, R8/3990; Fortner, TR2856, 2859; Beltone, R3/3347.

2218 Minnesota Hearing Aid Society, R8/1310. The existence of this data (placed on the record over 6 months prior to NHAS's comment) refutes NHAS's assertion that "[n]o market survey data as to the general acceptability of used hearing aids has been presented." NHAS, R3/3689.

2219 Minnesota Hearing Aid Society, R8/1310.

2220 E.g., Noon, R5/687; Urban, TR1809-10.

2221 Luke Fortner testified that "[i]f a person insists on all the warranties, services and stipulations of a new aid, the small cost difference between a new and used aid is not great enough to buy the used aid. For the price difference they would rather have a new hearing aid." TR2859.

2222 Johnson, R8/1983.

percent.[2223] Even if HAIC's prediction that the processing of returned aids for resale as "used" would be more than the manufacturer's initial production cost[2224] is accepted as totally accurate, there is still ample margin to recover costs, in light of the fact that traditional retailers sell new aids for three or more times what they pay the manufacturer.[2225]

vii. Impact on counseling provided

NHAS argued that the buyer's right to cancel

> will act as a disincentive to dealers who do not charge separately for counselling services to continue to provide unlimited counselling. In order to reduce the risk of loss from patients who exhibit adjustment difficulties, dealers will limit their investment of time with such patients.[2226]

Staff believes that logic requires precisely the opposite conclusion. The risk of a cancellation is increased if the seller fails to provide the needed counseling,[2227] and the risk of cancellation under the best of circumstances can be borne by the reputable seller.[2228]

viii. Impact on small retailers

Frequent assertions have been made by industry witnesses that the adverse effects of the Proposed Rule will fall hardest on the small retailers.[2229] Robert Baesemann, Ph.D., an HAIC economist witness, assumed that cancellation rates would fluctuate randomly and predicted that this would create insurmountable cash flow

2223 Fowler, R8/1983.

2224 HAIC, R3/3986-87.

2225 See RPAG, R8/2662.

2226 NHAS, R3/3692.

2227 See Appendix F, Section VI.E, infra. Accord, P.O. Report, R9/D1ip269.

2228 See Part Two, Section III.GG.5a.iv, supra.

2229 E.g., Fortner, TR1858; Basemann, TR7318; see Beltone, R3/3447; contra Hattler, R8/4729; Loavenbruck, TR1552. NHAS has asserted that the experiences with trials of those dealers who have the advantage of a continuing high sales volume resulting from referral from audiology clinics cannot be considered proper bases for predicting the effect of the buyer's right to cancel on the entire retail industry. See NHAS, R3/3581-82, 3689.

problems for the small retailer.[2230] Luke Fortner, NHAS's president, testified that small retailers will charge considerably more than their larger competitors, in order to recover the cost of returns, thereby pricing themselves out of the market.[2231] These arguments ignore several critical factors. Firstly, smaller retailers have inexpensive storefront operations with very low overhead costs, while the large manpower operations have very high overhead costs.[2232] Secondly, the frequency of cancellations which can be expected when the tester and the services performed are the best is quite low,[2233] and has been handled by numerous retailers without difficulty.[2234] There is no reason to expect that small retailers will experience disproportionately high cancellation rates.[2235]

Dr. Baesemann asserted that small firms will reduce output in an attempt to protect themselves against random fluctuations in return rates.[2236] Dennis Murphy, Ph.D., an FTC economist, reviewed Dr. Baesemann's testimony and reported that this assertion is not supported by basic economic theory. Noting that Dr. Baesemann "has rather cavalierly attempted to transplant [certain] hypotheses concerning the risk behavior of consumers to the far more complex and unsettled arena of optimal producer behavior,"[2237] Dr. Murphy added that occasionally high cancellation rates will be balanced by low cancellation rates.[2238] Thus, the cutbacks in production hypothesized by Dr. Baesemann would not really be in the seller's interest, for their net effect "may very well reduce the firm's longer term earnings base."[2239]

2230 Basemann, TR7318.

2231 Fortner, TR2858.

2232 E.g., Fortner, TR2857; NHAS, R3/3690 (citing a survey by the Michigan State Auditor), which showed an average cost of $80 per aid for dealers who sold less than 125 aids each year, as opposed to $119 for those selling 125-300 aids.

2233 See Part Two, Section III.GG.5.a.iii, supra.

2234 See Part Two, Section III.GG.5.a.iv, supra.

2235 Ross, R8/4726.

2236 Baesemann, TR7333.

2237 Murphy, R13/2063. See generally id. at 2061-66.

2238 Id. at 2063.

2239 Id.

By far the greatest risks of cancellation will come from the presence of any or all of the avoidable factors discussed earlier in this Report.[2240] The presence of these factors is, of course, by no means random, and is certainly within the control and responsibility of each seller.

Lastly, competition among manufacturers for retailers' business can be expected to produce arrangements by which the manufacturers will bear some of the burden of cancelled hearing aids, as has increasingly become the case in recent years.[2241] Manufacturers who already offer return rights to retailers include Audiotone,[2242] Starkey,[2243] Zenith,[2244] Dahlberg,[2245] Electone,[2246] Master Craft,[2247] Vanco,[2248] C. M. Clark,[2249] Oticon,[2250] Siemens,[2251] and Fidelity.[2252]

A related concern was that the buyer's right to cancel would force sellers to defer financing the transaction with a lending

2240 See Appendix F, Sections VI.D-K, infra.

2241 E.g, Giglia, R10/2923; Baesemann, TR7320; Starkey Ad, R8/4374; see Rose, TR469; P.O. Report, R9/Dlip274; Electone Ad, R10/2193; Samole, TR6711. Retailers are much more knowledgeable buyers than consumers, and seldom make purchase decisions in the hurried context experienced by many hearing aid consumers. Therefore, competition can be relied upon in this instance to make manufacturers offer return rights to retailers. Ralph Campagna, HAIC's president, testified that virtually all manufacturers were offering return rights to retailers on the sale of their new custom earmold in-the-ear aids (TR2658), and that every manufacturer who was a member of HAIC offers at least some return rights to retailers (TR2641); see, e.g., Dahlberg Ad, R10/2326; Hearola Ad, R10/2352; Starkey Ad, R10/2381.

2242 Peterson, R8/3952 (no charge); Griesel, R10/6766.

2243 Starkey Ad, R8/4374.

2244 Zenith, R8/1942-50; Griesel, R10/6765.

2245 Dahlberg, R8/1973-77.

2246 Electone Ad, R8/4900.

2247 Master Craft Ad, R8/4921.

2248 Van Schenck, R13/1917.

2249 Clark, R10/2352.

2250 Griesel, R10/6765.

2251 Id.

2252 Fidelity Ad, R13/96.

institution until after the expiration of the cancellation period,[2253] and perhaps even cause lending institutions simply to refuse hearing aid consumer paper.[2254] The resultant diminution in cash flow was predicted to be the cause of some sellers going out of business.[2255] Staff has considered this argument and concluded that the buyer's right to cancel is unlikely to bring about these consequences. No evidence was introduced to show that these problems have developed when trials have been offered on a voluntary basis. In addition, as noted above, manufacturers are likely to continue, or even expand, their offer of return rights to retailers, thereby alleviating the primary source of the retailer's need to finance his accounts receivable to pay for his inventory of aids out on trials.

ix. Impact on smaller manufacturers and new entrants

Dr. Baesemann predicted that smaller manufacturers and new entrants will find it more difficult to get retailers to carry their products as a result of the buyer's right to cancel.[2256] This result would occur because of "costly and complicated return procedures unique to each dealer/manufacturer relationship," making the "maintenance of multiple-lines difficult, if not impossible."[2257] Dr. Murphy concluded, however, that the

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2253 Beltone, R3/3446; Zenith, R2/11; see HAIC, R2/43. Dennis Tootelian commented that the buyer's right to cancel would prevent sellers from factoring their accounts, which could cause serious cash flow problems. Tootelian, R8/4782. None of those who currently offer trials have reported any such problems, however.

2254 Beltone, R3/3446-47. An additional argument made by Beltone was that the buyer, unable to obtain financing through the seller, would either "be unable to obtain financing or be forced to obtain it from more costly consumer finance sources." Id. at 3447. Staff admits to a total lack of information about the interest paid by those who finance hearing aid purchases through the seller as opposed to the rates paid by consumers who borrow from banks on their own initiative. If the experience of consumers of automobile financing is indicative, however, the interest paid is less when one deals directly with a bank, avoiding the expensive convenience of the auto dealer's easy financing.

2255 Beltone, R3/3447.

2256 Baesemann, TR7331-33. But see P.O. Report, R9/Dlip274.

2257 Baesemann, TR7331.

administrative burden of processing canceled aids is unlikely to be a serious obstacle to multiline dealers, especially in light of the relatively small number of aids sold by each retail seller.[2258] Staff agrees.

b. Impact on consumers

The Presiding Officer concluded:

> The economic effect of the Proposed Rule on consumers will be generally favorable. It is probable that the prices consumers pay for hearing aids, examinations, and other services associated with the fitting of devices will be increased to some undeterminable but slight extent. However, any such increases will be more than offset by the benefits that will be received by those who formerly would have purchased hearing aids from which they derived no significant benefits and who will, by virtue of the Rule, be in a position in the future to recoup a large part of the purchase price. Because the rule drastically reduces the cost to a consumer if he tries an aid for the first time, or if he tries another aid, many who were previously reluctant to risk a large financial loss will now be willing to try a hearing aid for the first time, or to try a second or newer aid. Certainly, this will stimulate sales. Secondly, all consumers will be economically benefited by the more careful examination and fitting techniques that dealers will be forced to adopt in an effort to reduce the number of sale cancellations.[2259]

Staff is in agreement with this conclusion, with the exception that it is questionable whether the buyer's right to cancel will force any reputable seller to raise prices even slightly.[2260]

2258 Murphy, R13/2064; see P.O. Report, R9/Dlip273.

2259 P.O. Report, R9/Dlip275.

2260 See Part Two, Section GG.5.a.iv, supra.

i. The buyer's right to cancel as consumer insurance

The buyer's right to cancel has been described as a form of insurance whereby all buyers share the cost of the cancellations that occur.[2261] Some have suggested that it is not fair for successful users to subsidize unsuccessful users.[2262] Fairness, however, is a normative characteristic, derived by comparison with accepted practices in the same and related areas. In this instance, it is relevant to note that most hearing aid sellers have traditionally priced their products in ways which charge all purchasers for the presale services rendered to potential customers, whether they purchase aids or not. Lead solicitation and other prospect identification and sales efforts produce no income except that derived from hearing aid sales. Presale testing and evaluation usually cost the consumer nothing but his time, if he can successfully say "no" when the salesperson attempts to "close" the sale, for most sellers offer this "free" testing as an integral part of their sales efforts.[2263] Similarly, most traditional sellers have "bundled" their charges for the aid and the services connected with it, so that all purchasers pay for all postsale services to which they are entitled, whether they use them or not.[2264] Each of these practices has arguments in its favor. If potential consumers had to pay for presale testing, they might be more reluctant to seek help for their hearing problems. If purchasers had to pay for each of the postsale services offered by the sellers, some would be reluctant to obtain them, thereby increasing the risk of an unsuccessful hearing aid fitting and lowering the benefits actually obtained from their aids.[2265] Staff need not decide whether these arguments are justified.[2266] It is enough here to point out that such forms of cost sharing are an important part of the hearing aid delivery system as it exists today.

2261 Baeseman, TR7320.

2262 Willett, R3/817, R6/398; McGann, R13/2253.

2263 See Part One, Sections VIII.E & IX.B, supra. The same situation obtains with the other lead generation techniques commonly in use in the industry. See generally Part One, Section IX.B, supra.

2264 See Part One, Section VIII.E, supra; Rich, R8/1089B.

2265 See NHAS R3/3514.

2266 See Link, TR1149-50.

It is appropriate to note that the literature on consumer risk behavior relied upon by Robert Baesemann, Ph.D., an HAIC economist witness, actually supports the value to consumers of the "insurance protection" provided by the buyer's right to cancel:[2267]

> According to Professors Arrow and Pratt, the more risk averse a consumer is the more insurance he will buy. A related theorem holds that the poorer a consumer is, the more risk averse he will be, from which it follows that poor consumers will want more insurance coverage in relation to prospective losses than will higher income consumers. . . . Since most hearing-impaired Americans are over sixty years of age, it is reasonable to assume that significant numbers of potential hearing aid buyers are living on fixed retirement incomes. Such individuals would regard a $450 outlay for a hearing aid as a very major investment, particularly at a time when inflation may be reducing their real income by over seven percent a year.
>
> These considerations suggest that if the hearing handicapped were more aware of the high risks involved in buying an aid without the protection of return privileges, there would be a far stronger demand for such insurance coverage than we currently observe. The Rule attempts to compensate for this missing consumer knowledge and other market imperfections by mandating trial periods. Should this raise the price of aids, the Rule will in effect impose insurance premiums on all hearing aid buyers, regardless of whether they want the added protection. Nonetheless, any increase in costs which might ensue would represent a socially desirable redistribution of income, since the "insurance costs" would be shared by all buyers while the principal benefits would accrue to poorer consumers who most desire the protection of a home trial. Moreover, the Rule also deserves high marks on economic efficiency grounds.

2267 Murphy, R13/2071.

> It would now be in the self interest of producers and dealers to avoid sales to consumers who cannot be helped by hearing amplification, to see that those who might benefit from an aid will receive instruments suited to their individual needs, and to redraft promotional material to foster among consumers a more realistic expectation of the benefits that can be obtained from hearing aids.[2268]

Similarly, the Presiding Officer noted that among the Proposed Rule's provisions, "the buyer's right to cancel provision has perhaps the greatest potential of providing consumers with a significant economic benefit."[2269] He concluded that "it is reasonable to assume that consumers have spent many millions of dollars for hearing aids that did them no good and for which they could not get purchase price refunds.[2270] In his view, the potential savings to consumers from the buyer's right to cancel "are so great that they overwhelmingly outweigh the possible losses to consumers resulting from increases in the price of hearing aids and accompanying services."[2271]

ii. Additional benefits of the buyer's right to cancel

Numerous additional benefits can be expected to flow from the buyer's right to cancel. These include the following:

- Those recommending hearing aids will be more willing to recommend them than they would be in the absence of the type of consumer protection the buyer's right to cancel provides.[2272]

- Consumers will be more willing to try amplification.[2273]

2268 Id. at 2071-73.

2269 P.O. Report, R9/Dlip270.

2270 Id. at 271.

2271 Id. at 271-72.

2272 E.g., P.O. Report, R9/Dlip118; Noffsinger, TR7657; Lentz, R8/7792; Willeford, R8/7974; Tweed, R8/7630; Kasten, TR711; Rassi, R8/5361, TR5738, 5779; Jerger, R8/4573; see Teter, TR10230.

2273 E.g., Epstein, R10/425; Kasten, R8/6990-91; Mynders, TR11582-83; Rassi, R8/5360-61; Penalver, TR4971-72; Griesel, TR9381, 9391-92; Rose, TR455-56; Schaefer, TR8264; Lankford (ISHA),

(Continued)

- Those who fail with the first aid they try will be more willing to try again if, through their first failure, they have not forfeited a sum as large as the average hearing aid purchase price.[2274]

- The presence of the buyer's right to cancel will make the fitter try harder to make the fitting properly, in order to keep the aid from coming back.[2275]

- Similarly, the buyer's right to cancel will encourage better dealer counseling during the trial period.[2276]

iii. Other potential effects of the buyer's right to cancel

NHAS asserted that the buyer's right to cancel will force sellers to "refrain from selling to persons who could benefit from using an aid but who, for any reason, present a risk of returning an aid."[2277] To the extent that this means that sellers would refrain from selling an aid to those who are pushed into the purchase against their will, that effect is intended and will be beneficial to consumers.[2278] To the extent that NHAS's assertion means that the risks of fitting borderline candidates are too high if they have the buyer's right to cancel, it is

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2273 (Continued)

R10/4888; Alpiner, R8/5434; Schmitz, R8/7267; Kemker, R8/6935; M. Miller, R8/5824; L. Wilson, TR10072-73; Stroup, TR961-62; Dunlavy, TR3434; Jerger, R8/5430; see HEW Task Force Final Report, R8/3232; Dahlberg, R8/1974, 1977; Fennema, TR1800; Murphy, R13/2071-72; Schaie, R8/ 6237-38. On the other hand, David Barnow testified that he doubted whether any fear of losing the purchase price if unsuccessful is much of a factor in consumers' decisions not to try amplication. He added that consumers lack "the inititative to get help" and "have got to be persuaded that they can be helped." TR1664. See also D. Harris, TR10446.

2274 E.g., Barwell, R10/840; see Brennen, TR268.

2275 E.g., Brakebill, TR1296; P.O. Report, R9/Dlip269.

2276 E.g., Lentz, TR11243-45; P.O. Report, R9/Dlip269; ASHA, R13/3628-29, 3633; see M. Ross, R8/4725.

2277 NHAS, R2/114; see NHAS, R3/3692.

2278 See Appendix F, Sections VI.C.13, VI.F & VI.H, infra. Cf. Richenberg, TR3513.

disproven by the experiences of audiologists who have found that the availability of trials enabled them to recommend amplification more frequently to borderline candidates, with excellent success.[2279]

Concern has been expressed about the situation in which the seller requires the buyer to pay the entire purchase price before delivery,[2280] since many consumers cannot afford to do so.[2281] The primary reason for the up-front payment is to avoid situations in which the seller remains unpaid even though the aid is never returned.[2282] Staff believes that the matter of downpayment requirements should be left to the discretion of the seller.[2283] The experience reported by Michael Winston, Ph.D., suggests that sellers will be encouraged to ease the burden of down payment requirements whenever possible. When his clinic first began dispensing hearing aids, the buyer was required to make a financial commitment for the entire purchase price. Later, this up-front payment was not required. No buyers absconded with unpaid-for aids, and the new procedure resulted in an almost threefold increase in the willingness of their clients to try amplification. The refund provisions of the 30-day trial offered all buyers were clearly disclosed and remained unchanged throughout.[2284]

6. Is the Buyer's Right to Cancel a Warranty Beyond the Authority of the FTC to Establish?

HAIC argued that the buyer's right to cancel required by section 440.4 of the Proposed Rule constituted a "Commission mandated warranty"[2285] which exceeded the Commission's rulemaking power. Specifically, HAIC urged that the legislative history

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2279 See text accompanying note 2273, supra.

2280 E.g., Sullivan (Senate Hearings, 1968), R8/911; Lentz, TR11227-33; Rose, R8/4183; see Luzi, TR7714-15.

2281 E.g., Lentz, TR11228, 11232; Rose, R8/4183; J. Williams, TR3781; Schaefer, TR8300; see Part One, Sections II.D.2 & II.E.2, supra.

2282 See, e.g., Rose et al., R5/711; Rassi, R8/5359; J. Williams, TR3780; Mynders, TR11575.

2283 See Lentz, TR11232-33. Somewhat surprisingly, NHAS complained that the Proposed Rule "fail[ed] to provide that the cancellation fee must be paid as a deposit before the consumer can take the aid out for use." R3/3582. This is clearly not the case, for the seller can require payment of part or all of the purchase price before delivery.

2284 Winston, R8/7387.

2285 HAIC, R3/3916-19.

of the Magnuson-Moss Act,[2286] combined with the definition of warranty in secion 101(6)[2287] and the flat prohibition on Commission-mandated warranties in section 102(b)(2),[2288] demonstrated a clear congressional intent that federal authority not be exercised to require consumer product warranties. HAIC did not argue, however, that this combination rose to the level of an express violation of the Magnuson-Moss Act.

The weakness of HAIC's argument is pointed up by the clarity of the relevant Magnuson-Moss provision. Section 102(b)(2), which appears in Title I of the Act, reads:

> Nothing in this title . . . shall be deemed to authorize the Commission . . . to require that the consumer product or any of its components be warranted.[2289]

Of course, the Rule is not being promulgated procedurally under Title I, but rather, would come substantively under section 5 of the FTC Act, and procedurally under Title II of Magnuson-Moss.

Moreover, section 111 (a)(1) of Title I states:

> Nothing contained in this title shall be construed to repeal, invalidate, or supersede the Federal Trade Commission Act (15 U.S.C. 41 et seq.) . . . .[2290]

Subdivision (d) of the same section states:

> This title . . . shall be inapplicable to any written warranty the making or content of which is otherwise governed by Federal Law.[2291]

Certainly the Recommended Rule, if and when it is approved, will have the force and effect of federal law under the authority of statutory provisions other than Title I of the Magnuson-Moss Act.

2286 H. Rep. No. 93-1107, 93d Cong. 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News at 7702, 7706.

2287 15 U.S.C. § 2301(6).

2288 Id. § 2302(b)(2).

2289 Id. § 2301(b) (emphasis added).

2290 Id. § 2311(a)(1) (emphasis added).

2291 Id. § 2311(d).

Thus the HAIC argument is without statutory foundation. There are no ambiguities in the text of Magnuson-Moss giving rise to limitations on the Commission's authority to mandate conditions for sale under Title II of the Act (procedurally) and section 5 of the FTC Act (substantively).

Indeed, the Senate Commerce Committee Report stated, in reference to the text of section 102(b)(2):

> While it is the intent of the Committee that the Commission under authority of title I of this bill may not prescribe the substance of written warranties . . . this limitation is to be read in conjunction with the savings provision in section (111) which states, "Nothing contained in this title shall be constructed to repeal, invalidate or supersede the Federal Trade Commission Act (15 U.S.C. 41 et seq.) . . . ."[2292]

It was thus acknowledged that the Commission could mandate the substance of conditions of sale under section 5 and, further, that Title I of Magnuson-Moss did not affect the scope of this authority. Staff therefore concludes that section 440.36-.47 of the Recommended Rule do not require a consumer product warranty prohibited by the Magnuson-Moss Act.

HH. When Oral Disclosures are Not Required

The Proposed Rule contained various requirements for oral disclosures, i.e. the telephone option disclosure (section 440.11(b)); the oral disclosure of the Buyer's Right to Cancel (section 440.4(e)); and disclosures concerning rental charges (section 440.5(b)).

Staff's analysis has caused it to realize that the Rule as originally proposed would have indirectly prohibited mail order sales since such sellers would obviously be unable to make oral disclosures. Such a prohibition was not staff's intention. It should be noted that no one provided any evidence that mail order sellers were not living up to the trials which they offered. Furthermore, the record does not justify a de facto ban on mail order sales to achieve the other remedial purposes of the Rule.

For these reasons, the Proposed Rule has been modified to excuse sellers from oral disclosure requirements whenever compliance with such requirements would be physically impossible.[2293] However, mail order sellers are prohibited from misleading the consumer about

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2292 S. Rep. No. 93-151, 93d Cong., 1st Sess. 16 (1973).

2293 Recommended Rule § 440.48.

the buyer's right to cancel.[2294] Such sellers are also still required to clearly and conspiciously make the required disclosures concerning telephone options as well.[2295] Any attempt to hide the buyer's right to cancel notices, or the disclosures about telephone options, in a mass of irrelevant papers would clearly subject the mail order seller to liability.

II. Requirements Concerning Employees

Section 440.12 of the Proposed Rule did two different things: it required sellers to distribute copies of the Rule to all of their employees, agents, salespersons and/or representatives (hereinafter referred to as "employees"), and it required the establishment and maintenance of a disciplinary system. Comments about section 440.12 can be grouped into two categories which correspond to the two different actions the Proposed Rule required.

In opposing the distribution requirement, industry representatives argued that requiring compliance with respect to people other than their own sales and advertising personnel would lead unnecessarily to increased costs for sellers and higher prices for consumers.[2296] Staff has considered this argument and decided to limit the scope of the distribution requirement. Section 440.49 of the Recommended Rule would require sellers to provide copies of the Rule to, and obtain receipts from, only those employees who deal with their customers or prepare their advertisements. The objective of the section is to insure that all employees who deal with the general public are properly apprised of the existence of the provisions of the Recommended Rule. Consequently, sellers would not be required to provide copies of the rule to employees such as bookkeepers or janitors who do not deal with customers or prepare ads, and therefore are not in a position to purvey deceptive information. In addition, manufacturers would be required to give copies of the rule to employees of company-owned or controlled retail outlets, but not to independent dealers.

State law governs the extent to which employers are liable for the actions of their employees. In practice, sellers will in all likelihood be responsible for virtually all violations of the Rule which their employees commit. Therefore, section 440.49 of the Recommended Rule also includes a sentence to remind sellers that if their employees violate the rule, both they and their employees may be subject to heavy fines.

2294 Id. § 440.36.

2295 Id. § 440.28.

2296 NHAS, R2/123, R3/3652; see HAIC, R3/3971-72; J. Joseph, TR4240-41; O'Brecht, R7/551.

Section 440.12 of the Proposed Rule also would have required sellers to fine, suspend, or dismiss employees for willful or repeated violations by the employees of the Rule. The receipt which sellers were to obtain under section 440.12(b) acknowledged that the employee was aware of this disciplinary system. In opposing the adoption of these requirements, industry representatives first argued that the FTC did not have the authority to compel sellers to discipline their employees for violations of the provisions of the Proposed Rule without establishing that a seller's failure to discipline an employee in that manner was a violation of section 5 of the FTC Act.[2297] Numerous hearing aid sellers argued that sellers should not be required to carry out the law enforcement functions of the FTC with respect to their employees.[2298] Several persons attacked the provision because they believed that in some instances sellers might be liable not only for the rule violations committed by their employees, but also for failing to appropriately discipline them when violations occurred.[2299] Industry also argued that requiring sellers to use particular disciplinary methods would prevent them from using more flexible remedies, such as informal discussions with the employees involved, or their transfer to company divisions unassociated with sales or advertising.[2300] Finally, Zenith contended that the disciplinary provisions raised "significant substantive and procedural questions under state laws and union contracts," but failed to explain what those questions might be.[2301]

Staff has decided not to include the provisions of subsection (c) in the Recommended Rule, even though it believes that many of the arguments raised in opposition to the subsection

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2297 HAIC, R3/3942.

2298 E.g., Kojis, R3/2171-72; Durbin, R3/1649; M. Kelly, R3/1456; Du Haime, R3/1457; Persiano, R3/1476; Hampton, R3/1492; A. Mayes, R3/3334; Moorcroft, R3/2260. Several sellers expressed the concern that if an employee contested a particular disciplinary measure, the seller would not be entitled to the immunity from civil suit normally accorded government agencies in such situations. E.g., Radichi, R3/2648; Moorcraft, R3/2260; McCooh, R3/972; A. Mays, R3/ 3334; M. Kelly, R3/1456; Canary, R3/3078. It is interesting to note that with the exception of the letter submitted by Mr. Kojis, the language used in the letters in which these comments appear varies little from one letter to the next, suggesting a common origin.

2299 E.g., Kojis, R3/2171; O'Brecht, R8/3878; J. Joseph, TR 4240; HAIC, R3/3941.

2300 HAIC, R2/78-79, R3/3942; Kojis, R3/2171-72; O'Brecht, R7/551; J. Joseph, TR 4240; J. Johnson, Tr 2270.

2301 Zenith, R3/3652.

are totally specious. Staff believes that the Commission has the authority to require such a disciplinary system under its general authority to fashion such remedies as are necessary to insure compliance with Commission rules and orders. However, in this instance staff has chosen not to recommend such a step. Employers will have a strong independent incentive to insure that their employees comply with the rule. Sellers will be liable for virtually any reasonably conceivable Rule violation by their employees.

The Presiding Officer concluded that adoption of section 440.12 of the Proposed Rule would probably result in increased costs for sellers, but that the increases would not be very significant.[2302] Since the Recommended Rule does not include the employee discipline requirements of the Proposed Rule, and does not cover all employees of hearing aid sellers, compliance with its provisions should not cause any significant cost increases.

JJ. Recordkeeping Requirements

Section 440.13 of the Proposed Rule would have required hearing aid sellers to maintain (and retain for a 3-year period) accurate records of:

(a) All hearing aid sales, including:

(1) Copies of all contracts of sale;

(2) Copies of all "Notices of Buyer's Right to Cancel" provided to buyers; and

(3) Copies of all cancellation notices received from buyers;

(b) All hearing aid leases or rentals;

(c) All home sales visits (the prior express written approval required for each home sales visit);

(d) Substantiation of representations;[2303] and

(e) All steps taken in accordance with the employee discipline section of the Proposed Rule.

2302 P.O. Report, R9/Dlip257-58.

2303 In the case of the substantiation records required by § 440.13(d), the 3-year period began each time a representation supported by the records was made.

Section 440.13 also required sellers to make these records available to FTC staff for inspection upon reasonable notice.

Section 440.50 of the Recommended Rule is substantially the same. It would require sellers to keep the following records:

- copies of all sale or rental contracts
- copies of all "You have 30 Days to Change Your Mind" notices given to buyers
- all "I've Changed My Mind" forms or other cancellation notices returned by buyers
- all written consents to sales visits, as required by section 440.30
- a record of all oral consents to sales visits, as required by section 440.30
- all documents showing the proof the seller relied on in making claims, as required by sections 440.15 through 440.19, and
- the receipts required by section 440.49.

As in the Proposed Rule, sellers would be required to keep these records for 3 years, and FTC staff would be entitled to check them after giving reasonable notice.

Four principal objections to section 440.13 of the Proposed Rule were raised. First, Zenith complained that the language of the section was vague and imprecise, because it suggested at several points that the records it required were "not limited to" those specified.[2304] In response to this objection, section 440.50 of the Recommended Rule requires only that the records <u>specified</u> be kept.

Second, several industry comments suggested that compliance with the provisions of Proposed Rule section 440.13 would be both administratively burdensome and costly,[2305] and consequently would generate higher retail prices.[2306] Staff does not agree that preparing and keeping the records required would require significant administrative effort. The copies of sale and rental contracts,

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2304 Zenith, R3/3422.

2305 HAIC, R3/3972, R2/79; NHAS, R3/3653; Baer, R3/2667; Bruner, R3/2717; Kuhl, R3/2823.

2306 NHAS, R3/3653, R2/123; Baer, R3/2667; Kuhl, R3/2823.

and the "You Have 30 Days to Change Your Mind" notices could readily be retained at the time that consumers enter into sale or rental agreements. The "I've Changed My Mind" forms and the written consents to sales visits would be delivered to sellers by consumers. Records of oral consents to sales visits would merely require a log of the names and addresses of the persons spoken to, the dates on which the appointments were made, and the dates of the appointments themselves. Since under existing law no seller should make a claim without possessing and relying upon adequate substantiation, the substantiation documents which must be retained are merely those the seller is already required to possess.[2307] The required employee receipts for copies of the Rule would need to include only the signatures of the employees involved and the dates on which they signed. Staff believes, in short, that collection of the foregoing records would require little effort beyond that required to comply with the substantive provisions of the Rule. The Presiding Officer noted that

> It does not appear that [Section 440.13] is unreasonable or that these costs will be significant in the light of the record-keeping requirements for retail business generally. The relatively small number of sales of hearing aids by the average dealer is also a significant factor in minimizing these costs.[2308]

Because the costs of complying with the section would be insignificant, there is no reason to believe that promulgation of the section would lead to higher retail prices.

Third, a number of persons expressed the concern, many in almost identical language, that section 440.13 of the Proposed Rule would give the FTC the right to "invade" the privacy of the hearing impaired by permitting Commission staff to examine "confidential" records kept by hearing aid sellers.[2309] Staff believes that this is a false issue. Communications between hearing aid sellers and their customers have never been entitled to privilege.[2310]

2307 E.g., Pfizer, Inc., 81 F.T.C. 23, 56-74 (1972); Firestone, 81 F.T.C. 398, 451-52 (1972).

2308 P.O. Report, R9/Dlip257-58.

2309 E.g., Bruner, R3/2717; Wess, R3/1416; A. Mayes, R3/3335; R. Wall, R3/3126; Canary, R3/3078; N. Campbell, R3/1220; J. Jones, R3/2142; Hampton, R3/1394; Clinkscales, TR10626.

2310 The records required by Recommended Rule § 440.50 would not be protected by the physician-patient privilege if the seller was a physician. That privilege has not applied to (Continued)

Moreover, the FTC has traditionally maintained a high level of concern for the privacy of complainants, and that concern will be maintained in all Rule enforcement activities.

Fourth, HAIC argued that because section 440.2(c) of the Proposed Rule defined a "seller" as an entity which engaged in the sale, rental, or lease of hearing aids, whether to buyers or to other sellers, manufacturers would have to keep the records required by section 440.13 even when they were selling hearing aids to other sellers, such as independent dealers. HAIC contended that as a consequence, manufacturers and dealers would have to maintain duplicate sets of records.[2311] Staff does not believe that the Proposed Rule yielded this result, or that section 440.50 of the Recommended Rule will have this consequence. Section 440.50 is based upon the underlying substantive provisions of the Rule. Those provisions which concern hearing aid sales transactions--sections 440.36 and 440.46 of the Recommended Rule--clearly apply only to retail sales transactions between retail sellers and consumers. Consequently, manufacturers would not be required to keep right to cancel documents, except to the extent that they engaged in retail sales.[2312] The section 440.50 requirement that such documents be kept only applies to sellers who make sales to consumers. All sellers would, of course, be required to keep the other types of records required by section 440.50 of the Recommended Rule.

KK. Other Rules and Orders on Hearing Aids, and the Preemption of Certain State Law Provisions

Section 440.51 of the Recommended Rule provides that the Rule would effect certain changes in other rules and orders of the FTC, and would also modify certain provisions of some state laws and local ordinances. These effects are discussed in the following pages of this section.

2310 (Continued)

business records whose maintenance is required by law. A number of governmental units, including the Drug Enforcement Administration (with respect to physician dispensation of controlled substances) and the Department of Health, Education, and Welfare (with respect to physician treatment of Medicare patients), presently require physicians to make relevant business records available for inspection.

2311 HAIC, R3/3972.

2312 If, for example, manufacturer X sells a hearing aid to retailer Y, who in turn sells the aid to consumer Z, only Y would be required to maintain the records arising from the retail sale of the aid.

1. Reinstatement of the Cooling-Off Rule With Respect to Door-to-Door Sales of Hearing Aids

Section 440.14(a) of the Proposed Rule would have exempted hearing aid sellers who complied with the Hearing Aid Rule from the operation of the FTC's Cooling-Off Rule.[2313] The Cooling-Off Rule provides the buyer in a door-to-door sale[2314] with the right to cancel the contract for any reason prior to midnight of the third business day after the date of the transaction.[2315]

Several individuals expressed support for exempting hearing aid sellers who complied with the Proposed Rule from coverage by the Cooling-Off Rule.[2316] They argued that because the Proposed Rule and the Cooling-Off Rule differed with respect to time periods and refund provisions, permitting them to operate simultaneously might create a confusing situation for consumers. Others forcefully argued that the Cooling-Off Rule should continue to apply to door-to-door hearing aid sales.[2317] Staff has considered these arguments, and has decided that the Recommended Rule should not exempt hearing aid sellers from coverage by the FTC's Cooling-Off Rule. It is possible that some consumers will become somewhat confused by the interaction of the two Rules. However, staff believes that the possible cost in confusion is far outweighed by the value of continuing to apply the Cooling-Off Rule to hearing aid sales. The reason for retaining the Cooling-Off Rule is that it will enable hearing aid consumers to do what all other in-home buyers can do: get out of a high pressure sale without any financial loss.[2318]

2313 16 C.F.R. § 429.1 (1978).

2314 The Cooling-Off Rule defines "door-to-door sales" as those in which a seller or his representative sells, leases or rents consumer goods or services with a purchase price of $25 or more to a buyer at a place other than the seller's place of business, with six narrow exceptions not relevant here. 16 C.F.R. § 429.1, Note 1(a).

2315 16 C.F.R. § 429.1(a)-(c), (e).

2316 Harford, R5/855; Rose, R8/4184.

2317 E.g., Jeffries, TR5591; Kasten, R5/1436; ASHA, R10/1716, 1840; Krebs, TR11840; AARP/NRTA, TR1432. When Kentucky adopted a statute similar to the Recommended Rule, KRS Chapter 334, it did not exempt hearing aid sellers from the coverage of the Kentucky Cooling-Off Rule. Byrne, R10/3272.

2318 The Recommended Rule's cancellation charges should average around $50, which is a lot of money for those on low incomes to forfeit to high pressure salespersons, particularly when the aids involved have not even been delivered.

James Jeffries, an Assistant Attorney General for the State of Wisconsin, explained that the 3-day cancellation right provided by the Cooling-Off Rule:

> is designed to permit the customer to overcome the high pressure sales situation that is created by the home solicitation selling techniques of door-to-door salesmen.[2319]

The record clearly supports the need for protection from such tactics in the hearing aid industry.[2320] It is unlikely that the cancellation period for the Cooling-Off Rule (which starts on the date of the sale) and that for the Hearing Aid Rule (which starts on the date of delivery) would overlap. It usually takes at least 3 days for the selected hearing aid to be delivered to the buyer.[2321] In addition, it is standard practice for all door-to-door sellers not to ship the goods until after the expiration of the FTC Cooling-Off Rule's 3-day cancellation period.

The inclusion in the Recommended Rule of cancellation charges for pre-sale services[2322] adds another justification for retaining the FTC's Cooling-Off Rule. Exorbitant charges for pre-sale services rendered in an in-home sale can be escaped by canceling the entire sale within the 3-day cancellation period. In addition, the reduction of the restrictions on home sales visits from the Proposed Rule to the Recommended Rule[2323] adds to the need for the protections of the Cooling-Off Rule, for under the Recommended Rule it may be easier for the high pressure seller to gain access to the consumer's home since prior express written consent is no longer required.

2319 Jeffries, TR5591; see Kasten, R5/1436; AARP/NRTA, TR1432; ASHA, R10/1716. The right to cancel provided by the Recommended Rule is designed to give the hearing-impaired consumer time to determine whether the hearing aid he purchases provides enough benefit to justify its purchase, as well as to provide a remedy for abusive sales practices. See generally Part Two, Section III.GG, supra.

2320 See Part One, Section IX.D, supra, and Appendix F, Sections VI.F-VI.I, infra.

2321 See, e.g., Young, R5/539; Samole, TR6679-80; Luzi, TR7714; Kozelsky, R5/647; The Real Paper, R13/D6A; Butts, TR4213; Dunlavy, TR3430; Tate, R10/3135; Delk, TR993; AARP/NRTA, TR1432.

2322 See Part Two, Section III.GG, supra.

2323 Compare Proposed Rule § 440.7(b) with Recommended Rule, §§ 440.29 to .31. See Part Two, Section III.Z-III.BB, supra.

Staff believes that it will be relatively easy for hearing aid sellers to comply with both Rules simultaneously. The Cooling-Off Rule has been in effect since 1974, so sellers are presumably well-acquainted with its provisions. It should not be difficult to add the notices and forms which the Recommended Rule requires. It is true that the two Rules contain different provisions with respect to relevant time periods and refund amounts. In practice, however, these differences should not be difficult to deal with. In the unlikely event that both cancellation rights do exist simultaneously, staff is sure that consumers would choose to cancel pursuant to the "Cooling-Off Rule," which entitles them to a complete refund. Once the cooling-off period has expired, the consumer will only be permitted to cancel pursuant to the Recommended Rule. However, because delivery is unlikely to occur until after the cooling-off period, the seller will not have to deal with the different refund provisions simultaneously.

Staff believes that it is important that hearing-impaired consumers continue to be accorded the protection which the Cooling-Off Rule provides. Consequently, staff has eliminated from the Recommended Rule the exemption set forth in section 440.14(a) of the Proposed Rule.

2. Supersession of Certain Trade Practice Rules

Section 440.14(b) of the Proposed Rule provided that certain portions of the FTC's 1965 Trade Practice Rules for the Hearing Aid Industry ("1965 Guides")[2324] were to be superseded. Staff has not found any evidence in the record that anyone opposed the adoption of section 440.14(b), and still believes that the provision makes good sense. Consequently, section 440.51(a) of the Recommended Rule is nearly identical in substance to section 440.14(b) of the Proposed Rule.[2325] The Recommended Rule would supersede parts or all of those sections of the 1965 Guides which deal with:

> (1) misrepresentations that hearing aids are new, unused, or rebuilt, and required disclosures that hearing aids are used or contain used parts;[2326]

2324 16 C.F.R. Part 214 (1978).

2325 The only substantive difference is that Section 440.51(a) of the Recommended Rule contains an additional supersession: § 440.23 would replace rule 7(d) [16 C.F.R. § 214.7(d)(1978)].

2326 16 C.F.R. § 214.14(a) and (b)(1978). Section 214.14(c), which makes misrepresenting the identity of the rebuilder of an industry product an unfair trade practice, would be retained.

(2) misrepresentations that a commercial hearing aid establishment is a governmental or public agency, or is a nonprofit medical, educational, or research institution;[2327]

(3) misrepresentations that the services or advice of a physician have been used in the design or manufacture of industry products, or will be used with respect to the selection, fitting, adjustment or testing of industry products;[2328]

(4) misrepresentations that a hearing aid is "prescribed" or is a "prescription" device;[2329]

(5) misrepresentations that a hearing aid or any part of it is hidden or cannot be seen;[2330]

(6) misrepresentations that a hearing aid is cordless or can be worn without any visible wire, and certain required disclosures with respect to truthful representations to this effect;[2331]

(7) misrepresentations that a hearing aid can be worn without a button or receiver in the ear;[2332] and

(8) required disclosures with respect to advertisements and sales presentations which feature bone-conduction aids.[2333]

Staff believes that the relevant provisions of the Recommended Rule are sufficient to prevent these sorts of misrepresentations.

2327 Id. § 214.10 (1978).

2328 Id. § 214.6(a) (1978).

2329 Id. § 214.6(c) (1978).

2330 Id. § 214.7(a) (1978).

2331 Id. § 214.7(b) (1978).

2332 Id. § 214.7(c) (1978).

2333 Id. § 214.7(d) (1978).

The Commission is presently considering whether the 1965 Guides, and forty other FTC Trade Practice Rules, should be discarded.[2334] Section 440.51(a) of the Recommended Rule should be deleted if the 1965 Guides are discarded by the Commission.

3. Effects Upon Outstanding Federal Trade Commission Cease and Desist Orders.

Section 440.14(c) of the Proposed Rule provided that the Rule did not supersede outstanding FTC cease and desist orders. Inconsistencies between the Rule and any such orders were to be resolved by petitioning the Commission to amend the relevant provisions of the orders. Section 440.51(b) of the Recommended Rule provides, however, that it is not to be construed to supersede any outstanding cease and desist orders, unless the orders themselves state otherwise.[2335] It also provides that companies subject to orders which do not contain automatic supersession clauses may petition the Commission to amend the orders.

4. The Preemption of State Laws and Local Regulations

Section 440.14(d) of the Proposed Rule provided that the Rule would supersede provisions of state laws and local ordinances to the extent that they did not give consumers rights equal to or greater than those provided by the Proposed Rule. Section 440.14(d) also provided that if a state law or local ordinance granted buyers a right which was the same as a right granted by the Rule, the language, form, and manner of notice of that right had to be identical to the language, form and manner of notice required by the Rule. Section 440.14(e) of the Proposed Rule made clear that state or local provisions which limited the terminology that hearing aid sellers could use to refer to themselves more strictly than the Proposed Rule were not to be superseded.

In opposing the adoption of sections 440.14(d) and (e), industry representatives made three basic arguments. First, a number of comments expressed the concern that the Proposed Rule

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2334 42 Fed. Reg. 31,457 (1977).

2335 This change was in recognition of the fact that six outstanding cease and desist orders contain automatic supersession clauses with respect to some of their provisions. See In re Qualitone, 88 F.T.C. 287 (1976); In re Maico, 88 F.T.C. 298 (1976); In re Radioear, 88 F.T.C. 308 (1976); In re Dahlberg, 88 F.T.C. 319 (1976); In re Beltone, 88 F.T.C. 336 (1976); and In re Sonotone, 88 F.T.C. 368 (1976). Radioear's comments suggested that these provisions be reflected in the Rule. R2/33. Note that the automatic supersession clauses of the six orders apply to some but not all of the substantive provisions of the orders.

would violate the right of states to establish their own standards for regulating internal commerce by superseding state laws in the hearing aid area.[2336] This concern is not justified. In the first place, the regulation of hearing aid sales is not strictly an "internal" commercial matter. The jurisdiction of the Federal Trade Commission extends to matters "in or affecting commerce,"[2337] and there can be no doubt that hearing aid sellers and sales practices "affect commerce" so as to satisfy the statutory requirements. Moreover, as the preceding analysis demonstrates, neither the Proposed Rule nor the Recommended Rule is intended to replace state and local regulations governing hearing aids which grant consumers equal or greater rights than does the Recommended Rule. Staff recognizes the important role that the states can play in providing consumer protection for their hearing-impaired citizens. It is nevertheless essential that the Recommended Rule establish minimum standards for hearing aid sales.

Second, several industry representatives argued that the preemption provisions of section 440.14(d) and (e) of the proposed Rule would create "uncertainty and confusion as to persons subject to the FTC Rule," and would "exacerbate unnecessary and duplicative federal and state regulations and disclosure requirements."[2338] The Recommended Rule would not have this effect. With respect to most state regulations a quick analysis would make clear whether equal or better rights were being granted. Where it might not be so clear on the face of the regulation, the Commission will provide prompt advice to the concerned party. Staff believes that the cost of whatever slight confusion Recommended Rule section 440.51(c) might create is both speculative and by far outweighed by the importance of permitting states and localities to tailor their laws and rules to their own problems, if they believe that stricter measures are necessary.

Finally, HAIC suggested that the "additional overlay of regulation" which the Proposed Rule would create would

> cause insurmountable difficulties for the hearing aid industry . . . as the Federal Trade Commission does not have the authority to preempt state or local laws or regulations.[2339]

2336 E.g., Maico, R8/6888; South Carolina Hearing Aid Society, R8/3954; Texas Hearing Aid Association, R8/4329.

2337 See 15 U.S.C. § 45.

2338 NHAS, R3/3654, R2/123; see HAIC, R3/3972-73.

2339 HAIC, R3/3972.

The latter allegation is totally without foundation. The authority of the FTC to preempt state and local laws and regulations in order to prohibit unfair or deceptive trade practices is clear.[2340]

After considering the evidence in the record, the Presiding Officer concluded that

> In its present form, the proposed rule would have minimal effects on the laws and regulations of the states and local jurisdictions. A few of the states have adopted, in a variety of forms, provisions requiring the sellers of a hearing aid to accord the buyer the right to cancel the sale, and to receive a refund of a portion of the purchase price. The proposed rule would require changes in the forms of notice given the buyer respecting the right to cancel in these jurisdictions, and probably would require changes in the computation of the amount

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2340 Although no federal court has yet interpreted the effect of a Commission trade regulation rule on state law, decisions concerning regulations of other departments and agencies, e.g., Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963) (Department of Agriculture); Free v. Bland, 369 U.S. 663 (1962) (Department of the Treasury); and Public Utilities Commission of California v. United States, 355 U.S. 534 (1958) (Armed Services Procurement Regulations) (as well as the implications of Royal Oil Corp. v. FTC, 262 F.2d 741 (4th Cir. 1959), which involved a Commission order), support the conclusion that a Commission rule would supersede conflicting state law. Furthermore, as the court in Brown v. Bales, 316 F. Supp. 897, 902 (N.D. Ohio 1973) has noted:

> It has long been held that a regulation by a department of the government addressed to and adapted to the enforcement of an act of Congress, the administration of which is confined to such department, has the force and effect of law. Further, one of the pillars of our republican form of government, built upon the Supremacy Clause of the United States Constitution and first enunciated by the United States Supreme Court in McCulloch v. Maryland, 4 Wheat. 316, 4 L. Ed. 579 (1819), is that when state and federal law conflict the state law must fall. [Citations omitted.]

> a seller might retain if the sale was cancelled by the buyer . . . .[2341]

> Based on analysis of the material contained in the record respecting the effect of the proposed rule on existing state and local actions or regulatory schemes respecting the sale of hearing aids, it must be concluded that adoption of the proposed rule would not interfere with the attainment of any important policy goals of those jurisdictions.[2342]

Staff agrees with this assessment. It is important to preserve the rights of state and local jurisdictions to devise their own solutions to particular problems, such as those from which hearing-impaired consumers presently suffer. Consequently, the Recommended Rule is intended to replace only those portions of state laws and local ordinances which deal with hearing aid sales and which do not provide hearing-impaired consumers with equal or greater rights than those the Recommended Rule provides. The Presiding Officer commented that one

> factor which tended to minimize objections from state and local officials to the proposed rule was the inclusion in 440.14(d) and (e) of the proposed rule of a detailed statement regarding the extent to which the rule would be interpreted to preempt or supersede state laws or local ordinances. This statement indicates that the rule will be interpreted to preempt state and local actions only to the extent that they may be inconsistent with the rule provisions.[2343]

Staff has studied all of the evidence and taken into account the many comments discussed. It has not been convinced that any fundamental changes in the preemption clause should be made. Accordingly, the essential elements of section 440.14(d) and (e) of the Proposed Rule are retained in section 440.51(c) of the Recommended Rule.[2344] Section 440.51(c)(1) provides that parts of state laws and local regulations which give consumers equal or greater rights than they have under the Rule are to remain in force. Section 440.51(c)(2) provides that state laws and

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2341 P.O. Report, R9/Dlip.

2342 Id. at 253.

2343 Id. at 247.

2344 A plain English format has been used, however.

local regulations which do not provide at least equal rights for consumers are to be replaced. The following examples illustrate how the Rule might work in application: If a state law provides that consumers are entitled to only 15 days within which to cancel their purchases of hearing aids, that provision would be replaced by Recommended Rule section 440.38 which provides that consumers are entitled to 30 days from the date of delivery within which to cancel their purchases. If, however, the same state law provided that consumers, upon proper cancellation, were entitled to a full refund of all payments they had made under their purchase agreements, that provision would remain in effect, because it provides greater rights to consumers than the refund provisions of Recommended Rule section 440.38.

Section 440.51(c)(1) also provides that parts of state laws and local regulations which impose fines and duties for violations of the Recommended Rule are to remain in effect. If, for example, a state had adopted a right to cancel provision which had not been superseded, it could continue to impose its own fines and duties for violations of that provision.

Finally, section 440.51(c)(1) provides that parts of state laws and local regulations which more strictly limit the use of certain terms by sellers to refer to themselves are to remain in effect. Some states presently permit hearing aid sellers who are not audiologists to nevertheless refer to themselves as "hearing aid audiologists."[2345] Under section 440.51(c)(2) of the Recommended Rule, such state law provisions would be superseded, because they do not limit the use of the term "audiologist" as strictly as does section 440.8 of the Recommended Rule. However, if a state law prohibited the use of the term "hearing aid specialist," that law would remain in effect.

The Recommended Rule does not, of course, address all facets of hearing aid sales. Section 440.51(c)(3) is designed to insure that parts of state laws and local regulations which address subjects not covered by the Rule remain in effect. For example, the Recommended Rule does not establish standards of competency and experience for those allowed to sell hearing aids. Consequently, if a state law provides that hearing aids cannot be sold unless the seller has passed a competency examination, the Recommended Rule would not replace such a provision. Similarly, if a state law prohibited certain sales practices not addressed by the Rule, such as "bait and switch" selling, these provisions of state law would remain in effect, together with all enforcement machinery.

2345 P.O. Report, /Dlip249.

Section 440.51(c)(4) of the Recommended Rule is designed to insure that hearing-impaired consumers are given notice of their hearing aid cancellation rights in a standardized, easy-to-read format. As noted previously, the consumer notices have been redrafted to insure easy readability. Consequently, section 440.51(c)(4) provides that the cancellation notices required by the Rule must be used in all hearing aid sales and rentals. However, if a state law or local regulation grants greater rights to buyers than does the Recommended Rule, this section allows the notice to be changed to reflect those greater rights. Staff is both hopeful and confident that any state modifications of the consumer notices will recognize the value of the "plain English" format.

LL. Proposed Affirmative Disclosures

Staff believes that the Record convincingly demonstrates that hearing aids often cannot provide the benefits many potential consumers expect (and are led to expect) from them.[2346] Many of those who think they have a hearing impairment in fact do not, and cannot benefit from amplification. Even among those who do have significant hearing impairments there are many who cannot benefit from amplification. Many of those who can benefit from one aid cannot benefit from two.[2347] Many who can benefit from hearing aids will still have difficulty understanding conversation in noisy or group situations.[2348] Because many hearing-impaired persons know little about hearing aids and their limitations,[2349] ads without disclosures of such limitations are misleading because they address the reader (or listener) without disclosing that the promised benefit may not be received.

In response to the need to get accurate information to the consumer, section 440.10 of the Proposed Rule mandated four affirmative disclosures concerning these limitations. Section 440.10 received a substantial amount of critical comment. Some critics disputed the assertion that many will not gain additional benefit from a binaural fitting.[2350] Some thought that the disclosure directed at hearing in group or noisy environments was of dubious

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2346 See the examples of consumer dissatisfaction discussed in Part One, Section III, supra.

2347 See Part One, Section V.B, supra. See also Part One, Section III.B, supra.

2348 See Appendix F, Section II.C.2, infra. See also Part One, Section III.D, supra.

2349 See Part One, Section II.G.2, supra.

2350 See, e.g., M. Freshley, R10/6645; Zelnick, TR450; Harris TR10416; Keyes, TR10695.

relevance, because many people with normal hearing have difficulty hearing in such circumstances.[2351] Still others thought that "many" was the wrong word to use in describing those who could not benefit from any hearing aid, some because they contended that in fact "many" persons do benefit from hearing aids,[2352] and some because they believed that "many" meant a majority, which they felt was inaccurate.[2353]

Other critics pointed out that it might be poor policy to require disclosures that might discourage potential consumers from purchasing hearing aids,[2354] given the fact that hearing-impaired persons often are reluctant to acknowledge their loss and to purchase aids in the first place.[2355] The Presiding Officer agreed that the affirmative disclosures were accurate, but questioned whether requiring such "negative" disclosures would provide the "best benefit" to the consumer.[2356]

Although staff is not thoroughly convinced that the disadvantages of complete disclosures outweigh the advantages, it has decided not to include any of these four affirmative disclosures in the Recommended Rule.[2357] This decision has been based primarily on the expectation that the buyer's right to cancel and the remaining advertising provisions of the Recommended Rule will go a long way toward encouraging advertisers to correctly inform consumers about the benefits they may gain from hearing aids, and the fact that the buyer's right to cancel will allow consumers subsequently to pull out of the transaction if the information provided is not

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2351 See, e.g., Zenith R3/3417; HAIC, R3/3927; NHAS, R3/3638-39.

2352 See, e.g., Fortner, TR2847; Oberhand, TR3039: Rassi, TR5812-13; Keyes, TR10694. There is, of course, nothing inconsistent about saying that many can and many cannot benefit from a hearing aid.

2353 See, e.g., Campagna, TR2639.

2354 See, e.g., Sandlin, TR10123-29; Payne, TR3604; Moneka, TR 6196; HAIC, R2/75-76; Lankford, TR8003; Burris, TR2508-09; Campagna, TR2604.

2355 See Part One, Section II.G.1, supra.

2356 P.O. Report, R9/Dlip206-25.

2357 The FTC's authority to require affirmative disclosures s not in dispute, however. See, e.g., Haskelite Mfg. Corp. v. FTC, 127 F.2d 765 (7th Cir. 1952).

accurate. If this expectation is disappointed, the Commission staff can seek to add the affirmative disclosures to the Rule at a later date.[2358]

MM. Other Problems Not Directly Addressed by the Rule

During the course of this rulemaking proceeding, many comments were submitted on problems which have not been directly addressed by the Recommended Rule. The major problems were the high prices charged for hearing aids,[2359] the difficulties in obtaining competent and reasonably-priced repairs,[2360] and the need for buyers to become aware of the existence and value of physician ear specialists and audiologists before hearing aids are purchased.[2361]

1. High Prices

Although the problem of high prices is not directly addressed by the Recommended Rule, its adoption hopefully will produce changes in the way hearing aids are advertised and sold, which in turn should result in increased sales and increased competition in the industry. This in turn may result in lower prices to consumers.

The high cost of hearing aids has resulted, in part, because the cost of servicing the purchase has been tied in to the purchase price of the hearing aid itself. Pre-fitting and post-fitting services have traditionally been "bundled" with the cost

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2358 The decision not to include these affirmative disclosures in the Recommended Rule obviates the need for the definition of "advertisement" contained in Proposed Rule § 440.2(g). The sole purpose of that provision was to describe those occasions when the § 440.10 disclosures were required, thereby reducing the need to describe those occasions in detail in § 440.10. Thus, the "advertisements" where the § 440.10 disclosures were required did not include signs (§ 440.2(g)(1)) and brief yellow pages listings (§ 440.2(g)(2)) because the burden of the disclosures in such media outweighed their benefit. Similarly, the disclosures were unnecessary in representations directed solely to physicians or audiologists (§ 440.2(g)(3)) because they are presumably well aware of the limitations of hearing aids.

2359 See Part One, Section III.J.1, supra.

2360 See Part One, Section III.J.2, supra.

2361 See, e.g., ASHA, R10/1836, 2100, 1629; AARP/NRTA, TR1435-36; Beiter, TR9034; Simon, TR9162; Smith, TR280-81; Harford, R5/857; Kasten, R5/1438.

of the aid itself, the purchase price even if purchasers fail to utilize these services. It has been recommended that these costs should be separated and that a "fee-for-service" marketing system be developed to permit consumers to pay only for those services that they actually need.[2362] Since consumers would pay only for those services which they used, the total price of hearing health care would be reduced for those who do not take advantage of all of the services offered.[2363] The industry argued against unbundling on the grounds that it would discourage consumers from pursuing necessary post-fitting or hearing aid repair services.[2364] In addition, NHAS argued that unbundling will not necessarily reduce the ultimate cost of the hearing aid because the final cost will be a total of all the separate costs which would include the service fees as well as the hearing aid purchase price,[2365] and may be higher than the bundled price.[2366]

The Recommended Rule may favor unbundling to a limited degree. Section 440.40 authorizes the seller to deduct from the amount he must refund for a returned hearing aid all charges for pre-sale services as long as he clearly and conspicuously discloses the amount of each service fee and the fact that the fee is not refundable upon cancellation and such charges were made for all customers.[2367] Since the non-refundability of these fees will be triggered only if all customers are charged separately for pre-sale services, section 440.40 of the Recommended Rule provides an inducement to sellers to separate pre-sale service fees from the hearing aid price.

2362 HEW Task Force Report, R8/3238-39.

2363 Separation of costs of service from the cost of the aid does not necessarily mean that the total price of the hearing aid will be reduced. The ultimate price will be broken down to include the cost of testing, evaluation, and other services. If post-fitting services are not required, however, the total price under a "fee-for-service" system should represent a reduction over the total price under a total package marketing system.

2364 HAIC/NHAS Fact Sheet, R3/2783.

2365 NHAS, R3/3529, Note 62 (quoting Harrington).

2366 Id. at 3691-92.

2367 See Part Two, Section III.GG.3.viii, supra.

2. Repairs

Although the record contains many examples of consumers who have experienced difficulty in obtaining competent, reasonably-priced repairs,[2368] the Recommended Rule does not directly address this issue. The need for high quality, reasonably-priced repairs cannot be disputed, and this specific problem was not addressed only because it was beyond the scope of this rulemaking proceeding.

3. Disclosure of the Existence of Physicians and Audiologists

A third issue which is not directly addressed by the Recommended Rule, but which did provoke comment, was whether sellers should be required to inform prospective hearing aid purchasers of the existence of physicians specializing in diseases of the ear and of audiologists.[2369] Many proponents of the Proposed Rule supported such a requirement,[2370] and some even suggested that professional preclearance be required for the sale of a hearing aid.[2371] The reasoning proffered in support of these requirements was that many hearing-impaired individuals are elderly and have a limited ability to make self-initiated comparative judgments about hearing aids.[2372] A professional recommendation or even the more limited disclosure requirement would, it was argued, provide these consumers with greater protection than they currently enjoyed.[2373]

In disputing the need for such a disclosure requirement, hearing aid sellers argued that the public was well aware of the existence of these medical ear specialists and nothing further needed to be done to highlight this information.[2374] Dealers also argued that their practical experience in servicing the hearing-impaired public made them more qualified than members of the

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2368 See Part One, Section III.J.2, supra.

2369 Commission question (ab), at 40 Fed. Reg. 26653 (1975), in fact inquired about whether such a disclosure should be mandated.

2370 See, e.g., ASHA R10/2100, 1629, 1836; AARP/NRTA, TR1435-36; Beiter, TR9034; Harford, R5/857; Kasten, R5/1438; B. Smith, TR280-81.

2371 See, e.g., Beiter, TR9034; B. Smith, TR280.

2372 See Beiter, TR9034.

2373 Id.

2374 See, e.g., Freshly, R10/6655.

medical profession to meet the needs of this public.[2375] Finally, dealers argued that they can and do spend more time with hearing-impaired individuals than audiologists or medical doctors in post-fitting servicing, counseling, and other problem-solving work.[2376] The clear implication of these arguments was that the dealer-sellers were just as qualified, if not more qualified, than audiologists and physicians to assist hearing-impaired individuals in making their hearing aid purchasing decisions.

While staff questions the validity of the industry's arguments,[2377] the issues they raised need not be decided by the FTC. Staff is not prepared to recommend any professional preclearance requirement at this time. The buyer's right to cancel should provide a strong incentive to incompetents, whatever their line of work, to either become competent or get out of the hearing aid area.[2378] FDA has addressed the questions of professional preclearance and notification of the existence of physicians and audiologists in two ways.[2379] First, FDA has required the determination of a physician that a hearing aid is not contraindicated within 6 months prior to the purchase date.[2380] This provides the opportunity for the physician to recommend a physician ear specialist or an audiologist to the consumer. Second, in the event the consumer chooses to waive the FDA physician preclearance requirement,[2381] the seller is required to review the contents of the User Instructional Brochure[2382] with the consumer, and give the consumer a chance to read it before signing the waiver.[2383] The "Important Notice for Prospective Hearing Aid

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2375 See HEW Task Force Final Report, R8/3358-59; cf. James Payne, R8/1500.

2376 HEW Task Force Final Report, R8/3359; James Payne, R8/1500; cf. Waters, R8/3992.

2377 See Part One, Sections VIII.C.3 & 5, D & F, supra, and Appendix F, Sections VI.D & VI.K, infra.

2378 See Part Two, Section III.GG.5.b.ii, supra.

2379 21 C.F.R. § 801(1978). See Appendix F, Section VIII.C.1, infra, for a discussion of the FDA requirements.

2380 16 C.F.R. § 801.421(a)(1). See Appendix F, Section VIII.C.1, infra.

2381 Id. at § 801.421(a)(2).

2382 Id. at § 801.420(c)(3).

2383 Id. at § 801.421(b).

Users" in the Brochure urges the consumer to consult a physician ear specialist before buying a hearing aid. It notes that if the physician considers the consumer to be a candidate for a hearing aid, the consumer will be referred to an audiologist or a hearing aid dispenser. The notice also contains a section headed CHILDREN WITH HEARING LOSS. It reads:

> In addition to seeing a physician for a medical evaluation, a child with a hearing loss should be directed to an audiologist for evaluation and rehabilitation since hearing loss may cause problems in language development and the educational and social growth of a child. An audiologist is qualified by training and experience to assist in the evaluation and rehabilitation of a child with a hearing loss.[2384]

This notice accomplishes the essence of the notification envisioned by Commission question (ab) in the initial notice of the Proposed Rule.[2385]

NN. Severability

Staff has included a severability provision in the Recommended Rule--section 440.52. This section provides that if any part of the Rule is held invalid in any way, the rest of it will stay in force.

IV. CONSEQUENCES OF RULE ADOPTION

A. Effects on Consumers and Industry, Including Small Business

The effects of the Rule on industry and consumers are often so interrelated that a separate discussion would require needless redundancy. Therefore, these effects will be discussed in one section. Detailed analyses of the anticipated effects of various parts of the Recommended Rule have been discussed previously, and only the conclusions will be recapitulated here.[2386]

2384 Id. at § 801.420(c)(3).

2385 40 Fed. Reg. 26653 (1975).

2386 Note that most of those industry witnesses who predicted adverse economic consequences from the Proposed Rule, were unwilling to provide additional background data on their own businesses when requested. Thus, staff finds itself at somewhat of a disadvantage in attempting

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Many industry comments asserted that the overall impact of the Proposed Rule would be undesirable.[2387] For the reasons set forth below and previously in this Report, staff strongly disagrees, believing that the changes incorporated into the Recommended Rule obviate the legitimate causes for concern with the provisions of the Proposed Rule. Each of these provisions will be discussed in turn.

The requirement that sellers disclose their status as sellers[2388] imposes no unfair burden on sellers, and provides consumers with important information to consider in weighing the advice sellers give them.

The prohibitions against sellers misrepresenting themselves[2389] or their organizations[2390] impose no unfair burdens and prevent the use of names which mislead consumers. Similarly, the prohibitions of false representations concerning hearing aids[2391] impose no unfair burden on sellers, and prevent the use of claims which mislead consumers.

The requirements for a clear explanation of what is meant in claims made about hearing aids[2392] will, of course, require those making the claims to be complete and forthright when describing the aids they sell. This will clearly provide consumers with valuable information with which to evaluate various hearing aid performance claims. The requirement that sellers possess

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2386 (Continued)

to analyze the basis for these witnesses' testimony as it reflects on the economic effects to be anticipated from the Recommended Rule. E.g., Hopmeier, TR3360-62, 3381; Barnow, TR1638-39, 1642-43; Kojis, TR2007-09; J. Johnson, TR2293-95; Scott, TR2336-37; Burris, TR2542-44; Campagna, TR2621-22; Fortner, TR2868-69; Rich, TR2989-90.

2387 E.g., NHAS, R3/3470, 3474, 3703; HAIC, R3/3981, 3985; Zenith, R3/3423; Dahlberg, R3/3366, 3369; Beltone, R3/3454.

2388 Recommended Rule § 440.6; see Part Two, Section III.D, supra.

2389 Recommended Rule §§ 440.8-.10; see Part Two, Sections III.F & III.G, supra.

2390 Recommended Rule § 440.7; see Part Two, Section III.E, supra.

2391 Recommended Rule §§ 440.11-.13, .21, .22, .24-.27; see Part Two, Sections III.R,.S,&.U-.X, supra.

2392 Recommended Rule §§ 440.14-.18, .23; see Part Two, Sections III.K-.O & .T, supra.

and rely upon proof for the claims they make[2393] is fair and provides consumers with some assurance that such claims are backed up by good evidence.

The limitation on newness claims[2394] enables consumers to rely on the truthfulness of such claims. The administrative burden imposed on sellers to avoid making such claims beyond the 1-year deadline is miniscule, and certainly is fair. Similarly, the disclosure requirements for used hearing aids[2395] merely require the disclosure of information that consumers have a right to know. Any burden imposed there is clearly appropriate.

The Recommended Rule provision concerning telephone options[2396] does not require the seller to disclose data which the telephone company might have been unwilling to release concerning the percent of incompatible phones in the area and whether that percent is increasing or decreasing.[2397] The Recommended Rule still requires sellers to inform consumers about the incompatibility problem, however, so the shocks and disappointments experienced as a result of the incompatibility problem in past years[2398] should cease once the Rule takes effect.

The Recommended Rule has avoided the problems raised with respect to the Proposed Rule's requirement of prior express written consent to home sales visits.[2399] The Recommended Rule permits service calls to customers without any appointment,[2400] and with respect to sales visits, merely requires the oral consent of either the potential buyer, the consumer, or someone who lives with the consumer.[2401] Thus, there is no need for delay pending the receipt of a writing

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2393 Recommended Rule § 440.19; see Part Two, Section III.P, supra.

2394 Recommended Rule § 440.20; see Part Two, Section III.Q, supra.

2395 Recommended Rule § 440.33; see Part Two, Section III.DD, supra.

2396 Recommended Rule § 440.28.

2397 See Proposed Rule § 440.11(b)(3); Part Two, Section III.Y, supra.

2398 See Appendix F, Section V.C, infra.

2399 Proposed Rule § 440.7(b). See generally Part Two, Sections III. Z-III.BB, supra.

2400 Recommended Rule § 440.31; see Part Two, Section III.BB, supra.

2401 Recommended Rule § 440.30; see Part Two, Section III.AA, supra.

containing the consent[2402] and no burden on those who have difficulty writing.[2403] The choice of those who can make the appointment is reasonable and should not expose consumers unnecessarily to surprise sales visits.[2404] The addition of a lead solicitation disclosure requirement[2405] should not disrupt the operations of reputable sellers[2406] and certainly will not eliminate legitimate in home sales.[2407]

The prohibition of misleading demonstrations with hearing testing devices[2408] will not prevent any proper use of any of the variety of hearing testing devices[2409] being used today.[2410] Consumers will certainly be better able to assess the value of the proffered hearing aids when they are not being subjected to such misleading demonstrations. Similarly, efforts to sell hearing aids under the subterfuge of running a program in which potential consumers will help to evaluate "new" products are inexcusable, and are prohibited[2411] without any burden to reputable sellers. The same can be said for the prohibition against making ads look like something else, such as news items or public service announcements.[2412]

The buyer's right to cancel required by the Recommended Rule[2413] provides effective consumer protection against the risks that exist with every sale[2414] as well as against the problems of

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2402 See text accompanying note 1553, supra.

2403 See text accompanying note 1552, supra.

2404 See text accompanying notes 1552-65, supra.

2405 Recommended Rule § 440.29.

2406 See Part Two, Section III.Z, supra.

2407 See text accompanying notes 1554-57, supra.

2408 Recommended Rule § 440.32.

2409 See generally Appendix F, Sections III.A & III.C, infra.

2410 See Part Two, Section III.CC, supra.

2411 Recommended Rule § 440.34.

2412 Id. § 440.35.

2413 Id. § 440.36-.47.

2414 See Part Two, Sections III.GG.1.a & GG.5.b.i, supra.

incompetence[2415] and a wide variety of sales abuses.[2416] It should increase total hearing aid sales by increasing consumers' willingness to try aids[2417] and the willingness of professionals to recommend them.[2418] It will also encourage better fitting.[2419] At least with respect to reputable sellers, staff believes that the buyer's right to cancel can do all of this without any significant adverse effects on consumers' efforts to adjust to amplification,[2420] prices to consumers,[2421] counseling provided to consumers,[2422] small retailers,[2423] small manufacturers and new entrants to the hearing aid manufacturing market,[2424] or any of the other adverse effects suggested by some.[2425]

The employee discipline requirements of the Proposed Rule[2426] have not been included in the Recommended Rule, which instead merely requires the distribution of copies of the Rule to employees and reminds sellers of their probable liability for Rule violations by their employees.[2427] This avoids all of the problems that were raised about the Proposed Rule's discipline requirements.[2428] The Recommended Rule also limits the Rule distribution requirement to those employees who deal with the seller's customers or prepare his ads, eliminating any cause for concern about the unnecessary costs of distribution to other categories of employees.[2429] With

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2415 See Part Two, Section III.GG.1.a, supra.

2416 See id.

2417 See Part Two, Section III.GG.5.b.ii, supra.

2418 See id.

2419 See id.

2420 See Part Two, Section III.GG.5.a.ii, supra.

2421 See Part Two, Section III.GG.5.a.iv, supra.

2422 See Part Two, Section III.GG.5.a.vii, supra.

2423 See Part Two, Section III.GG.5.a.viii, supra.

2424 See Part Two, Section III.GG.5.a.ix, supra.

2425 See Part Two, Section III.GG.5.b.iii, supra.

2426 Proposed Rule § 440.12(b) & (c).

2427 Recommended Rule § 440.49.

2428 See text accompanying notes 2297-2301, supra.

2429 See text accompanying note 2296, supra.

this limited scope of distribution, and in light of the easy readability of the Recommended Rule, such a distribution requirement is certainly cost-beneficial.

The recordkeeping requirements of the Recommended Rule[2430] are necessary for effective law enforcement and should not impose significant burdens on sellers.[2431]

The affirmative disclosures required by the Proposed Rule[2432] are not included in the Recommended Rule. This should remove any of the negative impact predicted by some.[2433]

In sum, staff believes that the Recommended Rule will neither impose significant burdens on industry members nor disrupt the current hearing aid delivery system. On the other hand, the Rule will provide many benefits to consumers. It will ensure that they are treated fairly and dealt with truthfully in the marketplace, and that they have an opportunity to judge for themselves the benefits provided by a hearing aid.

B. Effect of the Rule Upon Government Programs

Several federal government programs presently deal with hearing aid sales in one way or another. In 1977, the FDA promulgated regulations directed primarily toward the medical aspects of hearing aid sales.[2434] In staff's opinion, the provisions of the Recommended Rule are consistent with the FDA regulations and complement their operation.[2435] The remarks of the Commissioner

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2430 Recommended Rule § 440.50.

2431 See Part Two, Section III.JJ, supra.

2432 Proposed Rule § 440.10.

2433 See Part Two, Section III.LL, supra.

2434 See 211 C.F.R. § 801.420-421 (1978), 42 Fed. Reg. 9294-96. For a more extended discussion of these regulations, see Appendix F, Section VIII.C.1, infra.

2435 The several minor differences between the two provisions on subjects common to both do not cast any doubt upon this observation. For example, both the Recommended Rule and the FDA regulations include virtually identical definitions of used hearing aids, and require that such hearing aids be so identified. See § 440.33 of the Recommended Rule; 21 C.F.R. §§ 801.420(a)(6) and (c)(5). The Recommended Rule specifically permits hearing aid sellers to refer to used hearing aids as "demonstrators," "loaned," "reconditioned,"

(Continued)

of Food and Drugs which accompanied the announcement of FDA's rule confirm this opinion:

> The Food and Drug Administration has long been aware of the FTC activities in the regulation of hearing aids that led to the FTC proposed rule and the Commissioner believes these activities complement, rather than conflict with, this FDA regulation relating to labeling and conditions of sale of hearing aids. The Commissioner generally supports the FTC proposed rule and believes that the matters addressed therein are particularly within the FTC statutory mandate and expertise.[2436]

2435 (Continued)

"refurbished" or "rebuilt," if such references are accurate, while the FDA rule is silent on this subject. Staff believes that the descriptions allowed in the Recommended Rule are fully consistent with the FDA requirements, however.

The Recommended Rule and the FDA regulations define "audiologist" differently, with the FDA having chosen a more general definition of the term. Compare § 440.8 with 21 C.F.R. § 801.420(a)(4). However, the FDA definition is for the purposes of the FDA regulations only, 21 C.F.R. § 801.420(a), and consequently is not applicable to the provisions of the Recommended Rule. The Recommended Rule provisions likewise have no effect on FDA's formulation. The definition contained in the Recommended Rule prohibits hearing aid sellers from referring to themselves as "audiologists" unless certain educational and other standards have been met. See § 440.8. It is clear that this definition conforms to the meaning of the term as used throughout FDA's Statement of Basis and Purpose, however, i.e., as referring to a professional group that is distinct from traditional hearing aid sellers. See 42 Fed. Reg. 9286-88 (Feb. 15, 1977).

There are also some minor language differences between the FDA regulations and the Recommended Rule with respect to their definitions of "hearing aid" and "hearing aid dispenser or seller," due to the plain English format of the Recommended Rule. Compare 21 C.F.R. §§ 801.420(a)(1) & (3) with § 440.2. The meanings of the definitions, however, are essentially identical.

2436 42 Fed. Reg. 9286.

In particular, the Commissioner expressed support for the buyer's right to cancel provision contained in the Proposed Rule, by noting that

> Because of the difficulty of determining in advance whether an individual will benefit from a hearing aid, FDA supports the requirement of a trial-rental or purchase-option plan embodied in the FTC proposed rule, which will afford every prospective hearing aid user the opportunity to wear the selected hearing aid in a variety of uses during which the hearing-impaired user can make an informed judgment on whether a benefit is obtained from the use of amplification.[2437]

The FDA rule includes a provision stating that the "User Instructional Brochure" it requires cannot contain any "statements or illustrations" which are "prohibited by this chapter [the FDA rule] or by regulations of the Federal Trade Commission."[2438] FDA noted, however, that this statement was not intended to incorporate FTC regulations by reference.[2439] FDA added that situations involving statements which do not violate FDA regulations but do violate FTC regulations will be referred to the FTC for enforcement purposes, and that statements which violate the regulations of both agencies would be subject to action by both.[2440]

As noted previously, a number of state and federal programs either provide funds for the purchase of hearing aids by people who qualify for assistance, or purchase aids themselves for distribution to such individuals. For example, veterans whose hearing losses are service-connected or who are patients in Veterans Administration (VA) hospitals can obtain free diagnostic services, hearing aids and accessories through the VA.[2441] Similarly, people who qualify for assistance from state Medicaid programs, the Federal Maternal and Child Health Service, or the Federal Rehabilitative Services Administration[2442] may be able to obtain

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2437 Id. at 9289.

2438 21 C.F.R § 801.420(c)(6)(ii).

2439 42 Fed. Reg. 9292.

2440 Id.

2441 See generally Appendix F, Section VIII.C.2, infra.

2442 See generally id., Section VIII.C.3, infra. Twenty-six programs presently provide funds for hearing aid purchases in some circumstances.

free hearing aids through the auspices of those agencies. The provisions of the Recommended Rule do not conflict with, and in fact augment, the standards set by and requirements of these programs. Thus, these various funding agencies, as the buyers of hearing aids, would be entitled to a 30-day cancellation right under the Recommended Rule.[2443] In addition, these agencies, along with all buyers, will be able to obtain additional contract rights in some circumstances.[2444] The Recommended Rule places no limitation upon the standards these funding agencies may set concerning hearing aid procurement.

The Recommended Rule is intended to regulate all persons or organizations which sell or rent hearing aids.[2445] Consequently, agencies such as the VA, which distribute aids at no cost to the distributees, would not have to comply with the provisions of the Rule. However, governmental entities which in fact sell or rent hearing aids would be sellers subject to the provisions of the Recommended Rule.

C. Effect on State Laws

The Recommended Rule is intended to supersede only those provisions of state laws and local regulations which do not provide consumers with equal or greater rights than the Rule provides.[2446] Consequently, the rule will not interfere with efforts by state and local officials to enact and enforce other or more stringent regulations in the general subject area covered by the Rule, including the development of licensing standards for hearing aid sellers.[2447] In short, the Recommended Rule will modify state laws and local regulations only to the extent necessary to insure at least a minimum level of protection for hearing aid consumers.

2443 See Part Two, Section III.GG.3.d.i, supra. The only exceptions to this principle would be institutions, such as the Veterans Administration, to the extent they purchase hearing aids in bulk and not on behalf of particular identified consumers. Id.

2444 See § 440.45 of the Recommended Rule.

2445 See § 440.2 of the Recommended Rule.

2446 See generally Part Two, Section III.KK.4, supra.

2447 Id.

APPENDIX A

Rule Recommended by Staff for Final Adoption

§ 440.1 Preamble.

This Regulation deals with the advertising, promotion, offering for sale, sale, marketing, or distribution of hearing aids in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act. If you are covered by this Regulation and break one of its rules, it is an unfair and deceptive act or practice and an unfair method of competition within the meaning of sections 5 and 12 of the FTC Act.

§ 440.2 Who is covered.

Hearing aids are portable instruments worn to help one's impaired hearing. This Regulation applies to you if you rent or sell them, or if you offer to do so, whether for profit or not. It applies to all of the following:

- manufacturers
- wholesalers
- retailers
- owners
- partners
- corporations
- associations
- employees
- salespersons
- agents
- representatives
- physicians
- audiologists

§ 440.3 Illegal acts and practices.

You must follow these rules whenever you:

- promote
- sell
- offer to sell
- rent
- offer to rent
- market, or
- distribute

hearing aids. You must follow them whenever you prepare, approve, place, or pay for ads. You can be fined heavily each time you break one of these rules.

§ 440.4 "Clearly and conspicuously."

The words "clearly and conspicuously" are used often in these rules. They describe the way you must explain additional information whenever you say or imply certain things. These words are important. Be careful to see that explanations really are both clear and conspicuous. An explanation is clear if people will easily understand its meaning. An explanation is conspicuous if it catches the eye or ear and attracts as much attention as the statement that it relates to.

A disclosure is not clear and conspicuous unless it is in the same language as the rest of the statement.

§ 440.5 "Say or imply" and "explain."

When one of these rules says that you cannot "say or imply" something, it means that you cannot do so in ads, written materials, or conversations covered by these rules. When a rule says not to "imply" something, it means not to let people get that idea from anything you say or do.

When one of these rules says that you must "explain" something, it means that you must tell consumers about it either orally or in writing. Explanations must always be clear and conspicuous.

§ 440.6 Say you are a seller.

In all signs, ads, and other written materials, clearly and conspicuously explain that you sell hearing aids. If your firm's name clearly refers to hearing aid sales, using its name will serve this purpose. Also, when you start to talk to potential customers, make sure they understand that you sell hearing aids.

§ 440.7 Your firm's name.

Do not use a name that says or implies that your firm is something it is not. If you are in business for profit, your name must not say or imply that you are a nonprofit group or service, or a government or educational agency, or that you do public service or research. Do not call your firm an "institute" unless it regularly does research or teaching. Do not call it a "bureau" if it is not a government agency. Do not call it a "clinic" if it does not regularly offer medical services supervised by a physician. Do not call it a "hearing and speech center," "speech and hearing center," "speech and hearing aid center," or any similar name if it does not regularly offer hearing services supervised by a physician or audiologist.

§ 440.8 Your title.

Do not say or imply that you or anyone in your firm is a physician or an audiologist unless it is true. An audiologist is someone who:

- has been certified as an audiologist by the American Speech and Hearing Association (ASHA)

or

- currently meets, or at one time met, all of the educational, experience and testing requirements for an ASHA certificate

or

- has a graduate degree in audiology and is qualified as an audiologist under state law.

Do not use the word "audiologist", even with other words, in describing anyone who does not meet one of these three definitions.

§ 440.9 Professional advice.

Do not say or imply that a physician or an audiologist helps or advises you unless it is true.

§ 440.10 "Counselor" and "consultant."

Do not call yourself or anyone in your firm a "counselor" or a "consultant." Do not use any similar terms that say or imply that anyone in your firm will give financially disinterested advice.

§ 440.11 "Normal" or "natural" hearing.

Do not say or imply any of the following:

- that any hearing aid will help people get their normal hearing back
- that any hearing aid will make or help people hear as well as someone with normal hearing
- that the sounds heard through a hearing aid will sound natural.

§ 440.12 "Act now."

Do not say or imply that any hearing aid will stop a hearing loss or slow it down. For example, do not say any of the following:

- "Act now before it's too late."
- "Delay may be harmful."
- "I caught your loss just in time."

§ 440.13 Background noise.

Do not say or imply that any hearing aid can shut out all unwanted background noise. You can explain that a hearing aid with a telephone option can reduce background noise while the wearer is using the telephone, but only if this is true.

§ 440.14 "Features."

In this Regulation, a "feature" is something that a hearing aid has or can do. For example, if a hearing aid is custom fitted or has a directional microphone, that is a feature. It is also a feature if a hearing aid can reduce background noise in some circumstances.

Physical characteristics like the color and size of a hearing aid are not considered features.

§ 440.15 Explanation of features.

If you say or imply anything about any feature of a hearing aid, clearly and conspicuously explain what the feature is and what good it will do for consumers.

There is one exception to this rule. If you merely list the types of hearing aids that you carry, such as in-the-ear or body aids, you need not list their features or explain what good they will do for consumers.

§ 440.16 Comparisons.

If you compare a feature of a hearing aid to one of other brands or models, clearly and conspicuously explain which ones you are comparing it to. For example, do not say that a hearing aid is "better" without explaining what it is better than. You need not name specific brands as long as it is clear to consumers which other hearing aids you mean. For example, you can compare your directional hearing aid to "all other directional aids," but not just to "other directional aids."

When you make comparisons, clearly and conspicuously explain exactly what the compared features enable your hearing aid to do that others cannot do. For example, if you say that a hearing aid has a new feature, explain what this feature does that other hearing aids cannot do.

§ 440.17 "Unique," "special," or "revolutionary."

Do not say or imply that a hearing aid is "unique," or "special," or "revolutionary" without clearly and conspicuously explaining

exactly how it differs from all other hearing aids on the market and what good this difference will do for consumers.

There is one exception to this rule. You can say that a hearing aid is unique, special, or revolutionary if you make it clear that you are comparing it only to certain other brands or models. However, when you do this, you must follow the rule on comparisons. For example, if you say that a hearing aid is "unique among bone conduction aids," it is a comparison with all other bone conduction hearing aids.

§ 440.18 "Smaller."

Do not say or imply that a hearing aid is smaller than other models unless:

- it provides about as much power and produces sounds of about the same quality as those other models

or

- you explain clearly and conspicuously that it does not do so.

If you do say that a hearing aid is smaller than other models, clearly and conspicuously explain which models you are comparing it to. You need not name specific brands as long as it is clear which other models you mean.

§ 440.19 Proof for claims.

You must have reliable proof that you trusted whenever you do any of the following:

- explain what good a feature of a hearing aid will do for consumers
- explain how your hearing aid is different from others
- say or imply that a hearing aid is smaller than others but provides about the same power and quality of sound.

If you are not a manufacturer, you can rely on the manufacturer's material unless:

- you know or should know that the manufacturer's claims are false or are not backed up by good evidence

or

- you could check the claims yourself quickly and easily.

§ 440.20 New models or features.

Do not say or imply that a hearing aid model or feature is new if it was first marketed in the United States over a year ago. Keep a record of when all models and features were first marketed in the United States. Make sure that if you prepare, approve, place, or pay for ads dealing with new models or features, the ads will be changed or withdrawn after one year.

§ 440.21 "Prescribe" and "prescription."

Do not say or imply that a hearing aid is "prescribed" or is a "prescription hearing aid."

§ 440.22 "CROS" hearing aids.

Do not say or imply that a hearing aid that routes sound from one ear to the other lets people hear with or through the ear the sound is routed from.

§ 440.23 Bone conduction hearing aids.

Do not say or imply that a bone conduction hearing aid can help people unless you clearly and conspicuously explain that very few people can benefit from bone conduction aids.

§ 440.24 "Invisible."

Do not say or imply that a hearing aid or any part of it is hidden or cannot be seen unless it is true.

§ 440.25 "Cordless."

Do not say or imply that a hearing aid is "cordless" or can be worn without any visible cord or wire unless it is true. You can use the word "cordless" or similar expressions if a plastic tube or similar device runs from the instrument to the ear, but only if you explain that clearly and conspicuously.

§ 440.26 "No button."

Do not say or imply that a hearing aid has "no button" or that it can be worn without a button or receiver in the ear, unless it is true. You can use "no button" or similar expressions if an earmold or plastic tip is put into the ear, but only if you explain that clearly and conspicuously.

§ 440.27 "No batteries."

Do not say or imply that a hearing aid works without batteries.

§ 440.28 Phone options.

If your product has a phone option that does not work on all phones, do not advertise the option without clearly and conspicuously explaining that fact.

Before a customer pays or signs up for a phone option that does not work on all phones, clearly and conspicuously explain the following two things:

- whether the option will work on phones in your selling area
- which types of phones the option will work on.

§ 440.29 Soliciting leads.

Do not solicit the names or addresses of potential customers without clearly and conspicuously explaining that a salesperson may phone or write for an appointment to see them.

You need not explain this if there is no plan to set up appointments with the people whose names and addresses you get. However, you must have a system to make sure that these names and addresses are never actually used to contact the people for an appointment.

§ 440.30 Sales visits.

Do not make hearing aid sales visits to people's homes or places of business without an appointment. You can make the appointment with the potential buyer or with the consumer. If you want to visit the consumer's home, you can also make the appointment with someone who lives with him. You can make the appointment orally or in writing. When you make appointments, clearly and conspicuously explain when you will be coming and that you may want to sell a hearing aid.

If you make an appointment orally, keep a record of these three things:

- the name and address of the person you spoke to
- the date you spoke to the person
- the date of the appointment.

Also, if someone sends you a written consent to a sales visit, keep it on file.

§ 440.31 Service calls.

You can make a service call to the home or place of business of a current customer without an appointment. However, if you plan to sell the customer a hearing aid, it is a sales visit and you must follow the rule on sales visits.

§ 440.32 Testing devices.

Do not say or imply that a consumer's experience with a testing device demonstrates the way he or she can expect to hear with a hearing aid, if those two experiences differ noticeably.

§ 440.33 Used hearing aids.

Do not sell used hearing aids as new. A hearing aid is used if it has been worn for any length of time. This includes new hearing aids that have been returned. However, if a hearing aid was only tried on in front of a salesperson or professional, it is still new.

If a hearing aid is used, you must clearly and conspicuously explain this four times:

- in any ad for the hearing aid
- on the outside of the container or package
- on a tag attached to the hearing aid itself
- orally, before the customer pays or signs.

Instead of the word "used" you can use words like "demonstrator," "loaned," "reconditioned," "refurbished," or "rebuilt." The word you choose must accurately describe the hearing aid.

§ 440.34 Testing programs.

If the main purpose of a hearing aid market testing or evaluation program is to sell people the hearing aids they will be trying out, you must clearly and conspicuously explain that to them.

§ 440.35 Ads that do not look like ads.

Make sure that your ads do not lo ike something else, such as news items or public service a ncements.

§ 440.36 Buyer's right to cancel.

At the time a consumer buys a hearing aid or rents it for more than 30 days, orally explain in a clear and conspicuous manner that he has 30 days to cancel the sale or rental, return the hearing aid and get a refund. Do not do, say, or imply anything that may mislead the buyer about this right, or keep him from exercising it fully and freely.

§ 440.37 Notice on contract or receipt.

Include the following notice in each contract or receipt for a sale or rental of over 30 days:

You have 30 Days to Change Your Mind

If you change your mind about this sale or rental, you have 30 days from the date when you got the hearing aid to let us know you want a refund. The attached notice tells you how.

The notice must be printed in medium weight 12-point roman type, in an easily readable style, not all capitals, not condensed, and on a contrasting background. The heading must be printed in 12-point boldface.

The notice must be boxed in lines at least 2 points thick. It must be next to the space for the buyer's signature. If there is no signature space on a receipt, the notice must be on the front page.

§ 440.38 Separate notice.

(a) At the time the buyer(s) pay(s) or promise(s) to pay, give him (each of them) two copies of the following notice. If someone other than the user pays or promises to pay, give the notice to the one(s) who pay(s). Keep a third copy for yourself.

You Have 30 Days to Change Your Mind

If you change your mind about this sale or rental, you have 30 days from the date when you got the hearing aid to let us know you want a refund. Simply take the attached "I've Changed My Mind" form, put in the date, check the proper boxes and sign it. If you can't find the "I've Changed My Mind" form, send a written notice of your own. Just say you want to return the hearing aid and get a refund. If the hearing aid was sent to your home, tell us whether you want us to pick it up there.

Take the notice to our office or have it postmarked by _____ .

Ask for a receipt if you bring us the notice yourself. If you mail us the notice, send it "certified mail, return receipt requested." Be sure you get to the Post Office before closing time on the last day of the 30-day period.

Returns. You have 7 days from the date you delivered or mailed your notice to return the hearing aid.

Again, if you bring the hearing aid to our office, ask for a receipt. If you mail it to us, insure it. Be sure you mail it before closing time on the last day of the 7-day period.

If you bought or rented two hearing aids, you can return one or both.

If we delivered or mailed the hearing aid to your home, you can ask us in your notice to pick it up there. Then you must make it available to us in a reasonable manner. Ask for a receipt when we pick it up.

When you return the hearing aid, it must be in about the same condition as when you got it. We don't have to take it back if you damage it. But marks of normal wear and tear like scratches on the casing are OK. Defects that were in it when you got it are not your responsibility.

If you don't return the hearing aid or make it available to us in a reasonable manner, or if you damaged the hearing aid, we can sue you for the fair market value of the hearing aid and the services already given.

Refunds. Within 30 days of the date you delivered or mailed your notice, we'll give up all our rights from this sale or rental and refund what you paid. We can keep $ _____ . This covers $ _____ for testing, $ _____ for each hearing aid returned, $ _____ for each custom earmold and $ _____ for batteries. (Don't return the earmolds or batteries.) We can also keep any money you may owe us for earlier rentals. There'll be no other charges.

As soon as we get the hearing aid from you, we'll return your old hearing aid or anything else you traded in.

Replacements. You don't have to accept a replacement instead of a refund. If you do, we'll give you another notice like this one. You'll have another 30 days from the day you got the replacement to change your mind and let us know you want a refund. If the replacement is more expensive than the first hearing aid, you'll have to pay the difference.

If you return the replacement aid, we can deduct the charges listed earlier in this notice. But there'll be no charge for the hearing aid you returned the first time.

Your other rights. If we don't pay your refund or live up to our other obligations, you should report this to the Federal Trade Commission, Washington, D.C. 20580. You should also get in touch with a lawyer.

_____

(Seller's Signature)

_____

_____

(Seller's Address)

I've Changed My Mind

(Please fill in the date and check the proper boxes.)

Date _____

To _____
(Name and Address of Seller)

I've changed my mind about the hearing aid(s) I got around

_____ . I want to return:
(Estimated Delivery Date)

☐ the hearing aid for my left ear.

☐ the hearing aid for my right ear.

☐ both hearing aids.

Please send me my refund.

☐ I am returning the hearing aid(s) along with this notice.

☐ I will return the hearing aid(s) within 7 days.

☐ You delivered the hearing aid(s) to my home. Please pick it (them) up there.

(Buyer's Signature) X _____

(Buyer's Address) _____

_____

(b) The text of this notice must be printed in medium weight 12-point roman type, in an easily readable style, not all capitals, not condensed, and on a contrasting background. The two headings and four subheadings must be printed in 12-point extra boldface.

(c) Before you give the buyer the notice, fill in the copies like this:

(1) Fill in the date after the words "have it postmarked by." If you do not know exactly when the consumer will get the hearing aid(s) in usable condition, make sure the date is at least 30 days after the probable delivery date.

(2) Fill in the cancellation charges. They are listed in section 440.40.

(3) Sign the form and fill in your address.

(4) On the form headed "I've Changed My Mind," fill in the date after the words "I got around." If you do not know when the consumer will get the hearing aid(s) in usable condition, make sure the date is not earlier than the probably delivery date.

§ 440.39 "Proper cancellation."

The words "proper cancellation" are used in sections 440.40 and 440.43. There has been a proper cancellation when these two things happen:

- a buyer's "I've Changed My Mind" form is personally delivered or postmarked in time
- the canceled hearing aid is returned in time or made available to you in a reasonable manner.

§ 440.40 Refunds.

If there has been a proper cancellation, you must make a refund. You have 30 days from the date the "I've Changed

My Mind" form was personally delivered or postmarked to refund all payments made for the returned hearing aid(s), including finance charges and taxes. You can deduct cancellation charges of up to $30 for each hearing aid returned. You can also deduct any open charges for earlier rentals.

In addition to the cancellation charge for the hearing aid itself, you can deduct charges for custom earmolds and a 30-day supply of batteries, if the buyer got these things too. You can charge up to twice what the earmolds and batteries actually cost you, but no more than what you charge all buyers for them. In figuring your actual cost, deduct all rebates, discounts, and similar allowances.

You can also deduct charges for any services you performed before the sale, as long as you charge everyone who gets those services the same amount. However, you can do this only if you clearly and conspicuously explain the following two things to the buyer before the services are performed:

- the amount charged for each service
- the fact that these charges are not refundable upon cancellation.

§ 440.41 Damaged hearing aids.

You need not refund any money to the buyer if he or she is responsible for any damage to the canceled hearing aid. However, the buyer is not responsible for marks of normal wear and tear, like scratches on the casing. Nor is the buyer responsible for defects that were in the aid(s) when he or she first got it (them).

§ 440.42 Trade-ins.

As soon as possible after you get the canceled hearing aid(s), return any hearing aid or other item that was traded in for it (them). Any item you return must be in the same condition it was in when you got it.

§ 440.43 Papers to be returned.

Within 30 days of a proper cancellation, cancel and return any security interest that you got from the buyer for the purchase of the returned hearing aid(s). Also, take the cancellation notice that you got and attach it to your copy of the buyer's contract or receipt.

§ 440.44 Replacements.

If the consumer agrees to accept a replacement hearing aid within the 30-day period of the right to cancel, you cannot collect the cancellation charges from the original sale or rental. Instead, you must treat the replacement sale or rental like the original one. Give the buyer a new notice and another 30 days from the date of delivery to cancel the replacement sale or rental. The cancellation charges filled in must be the same as those in the first notice. If the replacement hearing aid is more expensive than the one being returned, you can charge for the difference in price. However, you cannot charge anything else for the replacement.

§ 440.45 Reduced charges, extra rights, and extensions.

You can reduce the cancellation charges or give extra rights. If you do so, make the proper changes in all of the documents.

You can also extend, but not shorten, the 30-day cancellation period. However, if you do this, you cannot charge more than $1 for each extra day. Even if you do extend the 30-day cancellation period, you must allow the buyer to cancel within the first 30 days and pay the cancellation charges listed in section 440.40. Make sure the buyer understands this.

§ 440.46 Short rentals.

In rentals for 30 days or less, do not charge more than the total cancellation charges allowed under section 440.40. Clearly and conspicuously explain to the buyer exactly what these charges will be. Do not let the buyer pay or sign before you have done this.

At the time the buyer pays or signs, give the buyer a form or contract that contains these three items:

- your full name and address
- the dates when the rental period begins and ends
- all rental charges.

§ 440.47 No waivers.

Do not include in any contract or receipt a waiver of any right granted to the buyer by this Regulation. Also, do not

include any waiver of notice, hearing, or trial.

§ 440.48 When oral disclosures are not required.

You need not make the oral disclosures required by sections 440.33 and 440.36 of this Regulation if it is physically impossible for you to do so.

§ 440.49 Requirements concerning employees.

Give a copy of this Regulation to all employees, agents, salespersons, and representatives who deal with your customers or prepare your ads. Get a signed, dated receipt. If one of them breaks a rule, both of you may have to pay heavy fines.

§ 440.50 Recordkeeping.

Keep the following records:

- copies of all sale or rental contracts
- copies of all "You Have 30 Days to Change Your Mind" notices given to buyers
- all "I've Changed My Mind" forms or other cancellation notices returned by buyers
- all written consents to sales visits, as required by section 440.30
- a record of all oral consents to sales visits, as required by section 440.30
- all documents showing the proof you relied on in making claims, as required by sections 440.15 through 440.19
- the receipts required by section 440.49.

Keep these records for at least three years. For the documents showing proof for claims, the three years will begin again each time you make the claim.

Federal Trade Commission staff members can check these records at any time, but they must give you reasonable notice first.

§ 440.51 Other rules and orders on hearing aids.

(a) These rules do not replace the Trade Practice Rules for the Hearing Aid Industry, published July 20, 1965, by the Federal Trade Commission (16 C.F.R. Part 214). However, note the following exceptions:

- Section 440.7 replaces Rule 10 [214.10].

- Section 440.8 replaces Rule 6(a) [214.6(a)].
- Section 440.21 replaces Rule 6(c) [214.6(c)].
- Section 440.23 replaces Rule 7(d) [214.7(d)].
- Section 440.24 replaces Rule 7(a) [214.7(a)].
- Section 440.25 replaces Rule 7(b) [214.7(b)].
- Section 440.26 replaces Rule 7(c) [214.7(c)].
- Section 440.32 replaces Rule 14(a) and (b) [214.14(a) and (b)].

(b) These rules do not replace outstanding FTC Cease and Desist Orders unless the orders themselves state otherwise. If a Cease and Desist Order applies to you and it differs from the rules given here, you can petition to amend the order.

(c) Current state laws and local regulations in this field are changed as follows:

(1) Parts of those laws and regulations that grant consumers at least the same rights stay in force. So do parts that fix fines and duties for you if you break one of the rules given here, and parts that are more strict as to the words you can use in referring to yourself or your firm.

(2) Parts that do not grant at least the same rights to consumers are replaced.

(3) Parts that are not replaced stay in force.

(4) The cancellation notice required by this Regulation must be used in all hearing aid sales or rentals. However, if a state law or local regulation grants greater rights to buyers, the FTC notice can be changed to reflect those greater rights.

(d) These rules do not supersede the provisions of the Federal Trade Commission's Trade Regulation Rule Concerning a Cooling-Off Period for Door-to-Door Sales, 16 CFR Part 429.

§ 440.52 Severability.

The provisions of this Regulation are severable. If any part of it is held invalid in any way, the rest of the Regulation will stay in force.

APPENDIX B

federal register

TUESDAY, JUNE 24, 1975
WASHINGTON, D.C.
Volume 40 ■ Number 122

PART II

FEDERAL TRADE COMMISSION

■

HEARING AID INDUSTRY

Proposed Trade Regulation Rules

FEDERAL TRADE COMMISSION

[16 CFR 440]

HEARING AID INDUSTRY

Proposed Trade Regulation Rule; Notice of Proceeding

Notice is hereby given that the Federal Trade Commission, pursuant to the Federal Trade Commission Act, as amended, 15 U.S.C. 41, et seq., the provisions of Part I, Subpart B of the Commission's procedures and rules of practice, 16 CFR 1.7, et seq., and section 553 of Subchapter II, Chapter 5, Title 5 of the U.S. Code (Administrative Procedure) has initiated a proceeding for the promulgation of a Trade Regulation Rule for the Hearing Aid Industry.

In accordance with the above notice the Commission proposes the following Trade Regulation Rule and to amend Subchapter D, Trade Regulation Rules, Chapter I of 16 CFR by adding a new Part 440:

PART 440—PROPOSED TRADE REGULATION RULE FOR THE HEARING AID INDUSTRY

Sec.

440.1 Preamble.
440.2 Definitions.
440.3 Form and manner of making required disclosures in television, radio and print advertisements.
440.4 Buyer's right to cancel.
440.5 Leases or rentals.
440.6 Seller may grant greater rights.
440.7 Selling techniques.
440.8 Prohibited representations concerning hearing aid sellers.
440.9 Prohibited representations concerning hearing aids.
440.10 Advertising representations that must be qualified.
440.11 Required disclosures concerning telephone options.
440.12 Necessary steps to insure compliance with this Part.
440.13 Record maintenance and retention.
440.14 Effect on prior Federal Trade Commission actions and on State laws and ordinances of State political subdivisions.

AUTHORITY: 38 Stat. 717, as amended (15 U.S.C. 41, et seq.)

§ 440.1 Preamble.

In connection with the advertising, promotion, offering for sale, sale, marketing, or distribution of hearing aids in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, it is an unfair and deceptive act or practice and an unfair method of competition within the meanings of sections 5 and 12 of that act for any seller to fail to comply with the following provisions of this Part.

§ 440.2 Definitions.

For the purposes of this Part the following definitions shall apply:

(a) *"Hearing aid."* Any wearable instrument or device designed for, offered for the purpose of, or represented as aiding persons with or compensating for impaired hearing.

(b) *"Sale"* or *"purchase."* A sale or purchase, or lease or rental for a period of more than 30 calendar days, of a hearing aid to a member of the consuming public.

(c) *"Seller."* Any person, partnership, corporation, or association engaged in the sale, lease or rental of hearing aids, or any employee, agent, salesperson and/or representative of same, whether made to a "buyer" or to another "seller."

(d) *"Buyer."* Any person, partnership, corporation, or association assuming a financial obligation in connection with a "sale," either for its personal use or for the use of a person on whose behalf the financial obligation is assumed.

(e) *"Purchase price."* The total price paid or to be paid for a hearing aid, including all interest charges, taxes, and charges for services rendered in connection with a sale; *Provided however*, That "purchase price" shall not include the pro rata portion of any charges for services:

(1) When such charges are separately stated in the contract for sale; and

(2) When the "buyer" has been given the option of not purchasing such services; and

(3) When such services have been rendered prior to the date of the buyer's exercise of his right to cancel under § 440.4.

(f) *"Represent" or "representation."* Any direct or indirect statement, suggestion or implication, including but not limited to one which is made orally, in writing, pictorially, or by any other audio or visual means, or by any combination thereof, whether made in an advertisement or otherwise.

(g) *"Advertisement" or "advertising."* Any written or verbal statement, illustration, or depiction, other than a label or in the labeling, which is designed to effect the sale of any hearing aid, or to create interest in the purchase of any hearing aid, whether the same appears in a newspaper, magazine, leaflet, circular, mailer, book insert, catalog, sales promotional material other literature, billboard, public transit card, point-of-purchase material, or in a radio or television broadcast or in any other media. "Advertisement" or "advertising" does not include:

(1) Signs which only identify the name of a seller and are located at the seller's place of business; or

(2) A listing in a telephone directory which gives only the seller's name, address and telephone number, and the brand(s) of hearing aids offered for sale; or

(3) Representations directed solely to physicians or audiologists.

(h) *"Audiologist"*. A person who:

(1) Possesses the Certificate of Clinical Competence in audiology granted by the American Speech and Hearing Association (ASHA); or

(2) Meets the educational and experience requirements for ASHA certification in audiology and has successfully completed the examination required for ASHA certification in audiology; or

(3) Meets the requirements of any applicable State law which defines the term "audiologist".

(i) *"Clearly and conspicuously disclose" or "clear and conspicuous disclosure."* Disclosing in a manner which (or a disclosure which):

(1) Can easily be understood (in the case of television and print advertising, also easily seen and read) by the casual observer, listener, or reader among members of the public; and

(2) Occurs each time the representation which creates the requirement for the disclosure is made, and in immediate conjunction with such representation, except that the disclosure required by § 440.8(a) need be made only once, in immediate conjunction with the major theme of an advertisement and at the outset of any other communication; and

(3) Is made in the same language, e.g., Spanish, as that principally used in communicating with the person(s) to whom the disclosure is addressed; and

(4) In any television advertisement, is made in the manner and form prescribed by § 440.3(a); and

(5) In any radio advertisement, is made in the manner and form prescribed by § 440.3(b); and

(6) In any print advertisement, is made in the manner and form prescribed by § 440.3(c).

(j) *"Used hearing aid."* A hearing aid which has been worn for any period of time by a buyer or potential buyer; *Provided however*, That a hearing aid shall not be considered "used" merely because it has been worn by a buyer or potential buyer as part of a bona fide evaluation conducted to determine whether to select that particular hearing aid for that buyer, if such evaluation has been conducted in the presence of the seller or a hearing health professional selected by the seller to assist the buyer in making such a determination.

(k) *"Telephone option."* An option available on hearing aids which enables the wearer to hear the electrical signal on the telephone line rather than the acoustic signal produced by the telephone.

§ 440.3 Form and manner of making required disclosures in television, radio and print advertisements.

(a) *Disclosures in television advertisements.* (1) Except for a disclosure required by § 440.8(a), any disclosure shall be made clearly and conspicuously and at least as clearly and conspicuously as any representation which creates a requirement for such disclosure.

(2) Except for a disclosure required by § 440.8(a) or § 440.10(a) (which shall be made simultaneously in the audio and video portions of the advertisement), any disclosure shall be made in the same portion (audio or video) of the advertisement in which the representation which creates the requirement for the disclosure is made.

(3) The video portion of any disclosure shall contain letters of sufficient size so that it can be easily seen and read on all television sets, regardless of the picture tube size.

(4) The video portion of any disclosure shall contain letters of a color and shade that readily contrast with the back-

ground, and the background shall consist of only one color or shade.

(5) No other sounds, including music, shall occur during the audio portion of any disclosure.

(6) The video portion of any disclosure shall appear on the screen for a sufficient duration to enable it to be completely read by the viewer.

(b) *Disclosures in radio advertisements.* Except in connection with § 440.8 (a), any disclosure in any radio advertisement shall be made clearly and conspicuously, and at least as clearly and conspicuously as the representation which creates the requirement for such disclosure. No other sounds, including music, shall occur during the disclosure.

(c) *Disclosures in print advertisements.* Except in connection with § 440.8 (a), any disclosure in any print advertisement shall be made clearly and conspicuously and at least as clearly and conspicuously as the representation which creates the requirement for such disclosure.

[See § 440.2(i).]

§ 440.4 Buyer's right to cancel.

(a) A seller shall include in every receipt or contract pertaining to a sale, in immediate proximity to the space reserved for the signature of the buyer, or on the first page if there is no space reserved for the signature of the buyer, a clear and conspicuous disclosure of the following specific statement in all capital letters of no less than twelve point bold face type of uniform font and in an easily readable style:

THE BUYER HAS THE RIGHT TO CANCEL THIS PURCHASE OR RENTAL FOR ANY REASON AT ANY TIME PRIOR TO MIDNIGHT OF THE 30TH CALENDAR DAY AFTER RECEIPT OF THE HEARING AID(S). SEE THE ATTACHED "NOTICE OF BUYER'S RIGHT TO CANCEL" FOR AN EXPLANATION OF THIS RIGHT.

(b) A seller shall furnish each buyer, at the time such buyer assumes any financial obligation with respect to the purchase, a completed form in duplicate, captioned "Notice of Buyer's Right to Cancel," which shall contain in no less than ten point type (twelve point bold face type for words in the "Notice of Buyer's Right to Cancel" which appear below entirely in capital letters) of uniform font and in an easily readable style, a clear and conspicuous disclosure of the following specific statements in the following format. A copy of such completed form shall be retained by the seller in accordance with § 440.13(a)(2).

NOTICE OF BUYER'S RIGHT TO CANCEL

This notice is for the buyer and each person who has assumed a financial obligation on the buyer's behalf: YOU HAVE THE RIGHT TO CANCEL THIS PURCHASE OR RENTAL. Here is information on:

Your right to cancel,
How to cancel,
What happens if you cancel, and
Other things you should know.

YOUR RIGHT TO CANCEL.

Any time before the end of _____
_____
(30 calendar days from the date you received the hearing aid(s))

you can cancel this purchase or rental for any reason and get most of your money refunded. If you purchased or rented two or more hearing aids in this transaction, you can cancel your purchase or rental of any or all of them. Upon cancellation, the seller can keep the following *cancellation charges:*

$_____ (for 30 days rental, for each cancelled hearing aid)
$_____ (for each custom ear mold made for the cancelled hearing aid(s))
$_____ (for batteries)

No other cancellation charges, penalties or fees are legal. However, the seller *can* keep the charges for any lease or rental period which ran prior to this transaction.

If, before the end of _____
_____
_____
(30 calendar days from the date you received the hearing aid(s))

the seller substitutes any other hearing aid(s) for the one(s) you originally purchased or rented, then the seller is required to provide you with a new "Notice of Buyer's Right to Cancel" and an additional 30 day period in which you can cancel the purchase or rental of the substitute hearing aid(s). The seller is not entitled to keep any of the cancellation charges listed above when such a substitution is made, but you will have to pay the additional cost involved if a more expensive hearing aid is being substituted. If you cancel the purchase or rental of the substitute hearing aid(s), the seller can keep only the cancellation charges listed above.

HOW TO CANCEL.

To cancel this purchase or rental, your cancellation must be actually delivered to the seller or postmarked no later than the end of
_____
_____
(30 calendar days from the date you received the hearing aid(s))

You may cancel by giving the seller any form of *written* notice of your cancellation, so long as you make it clear to the seller that you are *cancelling* and, if you received the hearing aid at your home, whether you want the seller to pick it up there. If you wish, you may use the "Cancellation Notice" form provided at the end of this notice. Keep a copy of your cancellation notice for your records.

WHAT HAPPENS IF YOU CANCEL.

The *seller's responsibilities* if you cancel are as follows: Within 15 calendar days after the date of your written cancellation notice he must:

(1) Actually return to you anything you traded in on the cancelled hearing aid(s) (including your old hearing aid(s)); and

(2) Cancel all financial obligations you assumed, as part of the purchase or rental, to cover the purchase or rental of the cancelled hearing aid(s); and

(3) Cancel all security interests (such as a mortgage) which were created in your property, as part of the purchase or rental, to cover the purchase or rental of the cancelled hearing aid(s); and

(4) Refund all payments you made toward the purchase or rental price of the cancelled hearing aid(s), less the cancellation charges listed in this notice and the charges for any lease or rental period which ran prior to this transaction.

Your responsibilities if you cancel are as follows:

(1) *If* you picked up the hearing aid at the seller's place of business, then you must return it there, either by actually delivering it or by having it postmarked (you must pay the postage) no later than 7 calendar days from the date of your written notice of cancellation; or

(2) If the hearing aid was delivered to your home, then you have a choice of what to do:

(i) You may return the hearing aid to the seller's place of business, either by actually delivering it or by having it postmarked (you must pay the postage) no later than 7 calendar days from the date of your written cancellation notice, *or*

(ii) If you notified the seller that you will make the hearing aid available at your home, you must do so. Then, if the seller does not pick it up within 20 calendar days from the date of your notice, you may keep it.

OTHER THINGS YOU SHOULD KNOW:

The seller is entitled to receive a cancelled hearing aid back in substantially as good condition as it was when you received it. However, the seller cannot refuse to accept a cancelled hearing aid because it shows signs of normal wear and tear such as scratches on the casing. Nor can the seller refuse to accept a cancelled hearing aid because of its defects, unless those defects were caused by your mistreatment of it.

To protect yourself at the time you cancel, you should do the following: If you deliver a cancelled hearing aid to the seller's place of business or the seller picks it up at your home, you should obtain a receipt from him. If you mail a cancelled hearing aid to the seller, the hearing aid should be sent "certified mail, return receipt requested."

If you cancel but do not fulfill your responsibilities, the seller will be entitled to sue you for the fair market value of the cancelled hearing aid(s) and the services you have in fact received.

If the seller refuses to honor a valid exercise of your right to cancel this purchase, or does not fulfill his other responsibilities, you have a right to sue him to make him fulfill all his responsibilities. In addition to giving you a right to sue the seller, such a refusal or failure would be a violation of a Federal Trade Commission Rule. Such violations should be reported promptly to the Federal Trade Commission, Washington, D.C. 20580.

The granting of this right to cancel does not deprive you of any of the other rights given to buyers under the law. Nor does it limit any rights you have concerning warranties made by the seller or provided by law.

CANCELLATION NOTICE*

_____
(Date of cancellation)

To: _____
(Seller)
_____
_____
(Seller's address)

I hereby cancel my purchase or rental of the hearing aid(s) which I received on
_____
(Date you received the hearing aid(s))

(*If* two or more hearing aids were purchased or rented at the same time, the buyer *must* check the appropriate box so that the seller will know how much of the purchase or rental is being cancelled)

I am cancelling the purchase or rental of:

- ☐ both hearing aids
- ☐ the hearing aid for my left ear
- ☐ the hearing aid for my right ear
- ☐ other (explain)

(*If* you received the cancelled hearing aid(s) at your home *and* you want the seller to pick it (them) up there, then check this box: ☐)

(Buyer's signature)

(Buyer's address)

*If you do not use this form you may still provide *written* notice to the seller by any other means, as long as you make it clear to the seller that you are *cancelling* and, if you received the hearing aid at your home but you cannot or do not want to return it to the seller's place of business, that the seller should pick up the hearing aid *at your home*.

(c) Before furnishing copies of the "Notice of Buyer's Right to Cancel" to the buyer, a seller shall complete both copies of each such notice by entering:

(1) The date which is "30 calendar days from the date on which the buyer received the hearing aid(s)", in each of the three blanks provided for it. If the seller does not or cannot know the exact date on which the buyer's receipt of the hearing aid(s) will take place, then the appropriate blanks shall be completed so as to reasonably insure that the 30 calendar day period does not begin to run before receipt by the buyer has actually taken place; and

(2) The cancellation charges allowed under § 440.4(g)(1); and

(3) The seller's full name and address (in the "Cancellation Notice" form); and

(4) The date the buyer received the hearing aid(s) (in the "Cancellation Notice" form). If the seller does not or cannot know the exact date on which the buyer's receipt of the hearing aid(s) will take place, then the date of receipt by the buyer shall be estimated so as to reasonably insure that it does not precede the actual receipt of the hearing aid(s).

(d) A seller shall not include in any contract or receipt any confession of judgment or any waiver of any of the rights to which the buyer is entitled under this Part, including but not limited to the buyer's right to cancel the sale in accordance with the provisions of § 440.4.

(e) At the time the buyer purchases a hearing aid, a seller shall inform him orally of the existence of the buyer's right to cancel.

(f) A seller shall not misrepresent in any manner the buyer's right to cancel; nor shall the seller make any representation or perform any act or practice which in any way negates, contradicts, detracts from or is inconsistent with a full understanding or a proper exercise of such right to cancel.

(g) A seller shall honor any valid notice of cancellation by a buyer and within 15 calendar days after the date of such notice:

(1) Refund all payments made toward the purchase price of the cancelled hearing aid(s), less any lease or rental charges applied as payments toward the purchase price of the cancelled hearing aid(s) and only those "cancellation charges" which are properly set forth in the "Notice of Buyer's Right to Cancel" as required by § 440.4(c) and are within the following limits:

(i) [Following are two mutually exclusive formulas for the "cancellation charge" for 30 days rental]

(A) *Alternative 1.* The cancellation charge for 30 days rental for each cancelled hearing aid shall not exceed the total of $15 plus 5 percent of the purchase price (excluding any "cancellation charges" for any custom ear mold or batteries).

(B) *Alternative 2.* The cancellation charge for 30 days rental shall not exceed the sum of $30 per cancelled hearing aid or 10 percent of the purchase price (excluding any "cancellation charges" for any custom ear mold or batteries), whichever is the lesser. This $30 maximum shall be adjusted annually after the effective date of this part to account for the annual percentage adjustment in the United States City Average All Items Consumer Price Index (1967=100) published by the Bureau of Labor Statistics of the United States Department of Labor. The computation of this annual adjustment shall be as follows: The Index for the month in which this part becomes effective shall be the Base Index. The Index for that same month in subsequent years shall be divided by this Base Index and the result of that division shall be multiplied by the sum of $30 to arrive at the maximum which shall obtain until the publication of the Index in the next subsequent year.

(ii) The cancellation charge for any custom ear mold and a 30 day supply of batteries shall not exceed twice the actual cost of such ear mold and/or batteries to the seller or the seller's regular selling price for such ear mold and/or batteries, whichever is the lesser. In computing the actual cost, all rebates, discounts, and any other similar allowances provided to the seller must be considered; and

(2) Return any goods or property traded in on the cancelled hearing aid(s), in substantially as good condition as when they were received by the seller; and

(3) Take all action necessary or appropriate to terminate:

(i) All financial obligations assumed by the buyer as part of this transaction to cover the purchase of the cancelled hearing aid(s); and

(ii) All security interests created in connection with this transaction to cover the purchase of the cancelled hearing aid(s).

(h) If, within 30 calendar days from the buyer's receipt of a purchased hearing aid, a seller substitutes another hearing aid for the originally purchased one, the seller shall treat such a substitution as a "sale" of a hearing aid for the purposes of § 440.4 by providing each buyer with a new "Notice of Buyer's Right to Cancel" and an additional 30 calendar day period in which to cancel. The cancellation charges set forth in the subsequent "Notice of Buyer's Right to Cancel" shall remain the same as those indicated in the original "Notice of Buyer's Right to Cancel."

(i) The provisions of paragraphs (a) through (h) of this section shall not apply to a sale:

(1) Made pursuant to a written recommendation of a specific hearing aid, by serial number or by model, made by a physician or an audiologist who receives no direct or indirect financial compensation from the seller for such recommendation or for services rendered in connection with such recommendation; *Provided, however;* That § 440.4(i)(1) shall not be construed to prevent any physician or audiologist from requesting or requiring as a condition of his referral to a seller that a patient be offered a trial period prior to a purchase; or

(2) Made to replace a damaged or worn out hearing aid when the replacement hearing aid which is sold is identical to such damaged or worn out hearing aid.

§ 440.5 Leases or rentals.

When leasing or renting a hearing aid for a period of up to 30 calendar days, a seller shall:

(a) Limit any lease or rental charges for any trial period(s) of up to 30 calendar days to only the total dollar amount of cancellation charges permitted to be retained by the seller under § 440.4(g)(1); and

(b) Clearly and conspicuously disclose such lease or rental charges orally to the potential buyer before any financial obligation relating to the lease or rental is assumed by the potential buyer; and

(c) Furnish each potential buyer, at the time any financial obligation relating to the lease or rental is assumed by the potential buyer, a form or contract which clearly and conspicuously discloses, in no less than ten point type of uniform font and in an easily readable style:

(1) The complete name and address of the lessor or renter; and

(2) The dates on which the trial period begins and ends; and

(3) All lease or rental charges.

§ 440.6 Seller may grant greater rights.

The seller may accord a buyer greater or more extensive rights than those to which the buyer is entitled under the provisions of this Part. In such instances, a seller may make suitable amendments in all appropriate documents to reflect the granting of such rights.

§ 440.7 Selling techniques.

(a) No seller shall utilize any device to demonstrate the performance which a consumer can expect from a hearing aid, when the performance of such a device differs in any material respect from that of said hearing aid.

(b) No seller shall visit the home or place of business of a potential buyer for the purpose of inducing a sale without having obtained, prior to any such visit, the express written consent of such potential buyer to such a visit. Such consent shall clearly and conspicuously state that such potential buyer is aware that the seller may attempt to sell a hearing aid during such a visit.

(c) If a hearing aid has been used, loaned, rented, leased, reconditioned, re-

furbished, repaired or rebuilt, that fact shall be clearly and conspicuously disclosed:

(1) In the oral sales presentation, before the buyer assumes any financial obligation with respect to the purchase; and

(2) In any advertisement relating to such hearing aid; and

(3) On the container in which such hearing aid is packaged; and

(4) On a tag which is physically attached to such hearing aid.

(d) No seller shall represent that a person can or may be able to participate in a hearing aid testing or evaluation program if the primary and/or ultimate purpose of such program is to sell hearing aids to persons who participate unless such purpose is clearly and conspicuously disclosed.

(e) No seller shall prepare, approve, fund, disseminate or cause the dissemination of any advertisement which, because of its form and/or content, cannot be easily understood as being designed to effect the sale of hearing aids, or to create interest in the purchase of hearing aids, by the audience to whom such advertisement is directed.

§ 440.8 Prohibited representations concerning hearing aid sellers.

(a) No seller shall make any representation to members of the consuming public without clearly and conspicuously disclosing that it is a seller of hearing aids. The disclosure requirement of § 440.8(a) will be satisfied by a clear and conspicuous statement of the name of the seller's business, if that name includes the words "hearing aid center" or other words which clearly identify that the establishment is a seller of hearing aids.

(b) No seller shall represent that it is a governmental or other public service establishment or a nonprofit medical, educational or research institution unless such is the fact. Such a representation is made by the use of names such as "hearing center" (but not "hearing aid center"), "hearing institute," "hearing aid institute," "hearing bureau," "hearing aid bureau," "hearing clinic," "hearing aid clinic," "speech and hearing center," "speech and hearing aid center," and "senior citizen surveys."

(c) No seller shall represent that it or any of its employees, agents, salespersons and/or representatives is a physician or an audiologist, unless such is the fact. One example of a violation of § 440.8(c) is the use of the term "audiologist" to describe one who is not an audiologist as defined in § 440.2(h); and

(d) No seller shall represent that the service or advice or a physician or an audiologist will be used or made available in the selection, adjustment, maintenance or repair of a hearing aid, unless such is the fact.

(e) No seller shall represent that it or any of its employees, agents, salespersons and/or representatives is a "counselor" or a "consultant."

§ 440.9 Prohibited representations concerning hearing aids.

(a) No seller shall represent that any hearing aid will restore or help restore normal or natural hearing or will enable or help enable wearers to hear sounds normally or naturally.

(b) No seller shall represent that any hearing aid will in any way reverse, halt, or retard, or in any way help to reverse, halt or retard the progression of hearing loss, including but not limited to the use of expressions such as "Act now before it's too late," "Delay may be harmful," or "I caught your hearing loss just in time." Section 440.9(b) does not prohibit, however, a clearly stated and adequately qualified representation as to the difficulties which a consumer may encounted in adjusting to a hearing aid if he gets out of practice in using his hearing.

(c) No seller shall represent that a hearing aid model or feature is new for a period greater than one year from the date on which it was first marketed in the United States.

(d) A seller shall maintain an adequate system for insuring that all advertising it prepares, approves, funds or disseminates is in compliance with § 440.9(c).

(e) No seller shall represent that any hearing aid brand or model possesses any general or specific feature or characteristic or embodies any concept or principle (hereinafter referred to as a "characteristic") unless:

(1) Each such characteristic is clearly and conspicuously disclosed; and

(2) Each such disclosed characteristic provides some significant benefit(s) to the wearer of a hearing aid; and

(3) There is a clear and conspicuous disclosure of each such specific benefit; and

(4) There is a clear and conspicuous disclosure of the specific condition(s) under which or the category or categories of hearing aid wearers by which each such disclosed benefit will be received; and

(5) At the time of making any such representation the seller possesses and relies upon competent and reliable scientific or medical evidence which fully establishes that each benefit is significant and will be received by a significant number of buyers under the condition(s) disclosed; *Provided, however,* That if a seller who is not a manufacturer determines prior to making a representation that the representation is contained in materials which he has received from the manufacturer, such seller shall not be liable for failure to possess and rely upon such evidence if such seller can establish that he neither knew nor had reason to know, nor upon reasonable inquiry could have known:

(i) That the manufacturer did not possess such evidence; or

(ii) That the representation could not be substantiated by such evidence; or

(iii) That the representation was false; and

(6) If the represented characteristic(s) is (are) compared generally or specifically to the comparable characteristic(s) possessed by any other hearing aid brand(s) and/or model(s), including but not limited to any representation of newness (other than a representation that a hearing aid is not "used" as described in § 440.2(j)):

(i) There is a clear and conspicuous disclosure of the hearing aids with which such comparison is made; i.e., so that the comparison is not in the form of a dangling comparison; and

(ii) There is a clear and conspicuous disclosure of each particular characteristic with respect to which such comparison is being made; and

(iii) Each such compared characteristic provides a significantly greater benefit than the benefit provided by the comparable characteristic in the disclosed hearing aid brand(s) and/or model(s) with respect to which the advertised hearing aid(s) is (are) being compared; and

(iv) At the time of making any such representation the seller possesses and relies upon competent and reliable scientific or medical evidence which fully establishes that each compared characteristic provides a significantly greater benefit than the benefit provided by the comparable hearing aid brand(s) and/or model(s); *Provided, however,* That if a seller who is not a manufacturer determines prior to making a representation that the representation is contained in materials which he has received from the manufacturer, such seller shall not be liable for failure to possess and rely upon such evidence if such seller can establish that he neither knew nor had reason to know, nor upon reasonable inquiry could have known:

(A) That the manufacturer did not possess such evidence; or

(B) That the representation could not be substantiated by such evidence; or

(C) That the representation was false.

(f) For purposes of § 440.9(e)(6), a general or unqualified representation that a hearing aid is unique, revolutionary or special will be deemed to be a comparison to all other hearing aid brands and models; *Provided, however,* That a representation that a hearing aid is revolutionary or special will not be deemed to be a comparison to all other hearing aid brands and models if it is clearly and conspicuously disclosed that the comparison being made is to less than all other hearing aid brands and models.

(g) No seller shall represent that a hearing aid model is smaller than other hearing aid models unless, in addition to making all disclosures prescribed by § 440.9(e):

(1) The quality and range of sounds produced by representative samples of such hearing aid model are at least of

substantially the same quality and range as the sounds produced by representative samples of each of the different brand(s) and/or model(s) of hearing aids with which it is being compared, and, at the time of making any such representation the seller possesses and relies upon competent and reliable scientific or medical evidence which fully establishes the relative quality and range of sounds produced by such hearing aids; *Provided, however*, That if a seller who is not a manufacturer determines prior to making a representation that the representation is contained in materials which he has received from the manufacturer, such seller shall not be liable for failure to possess and rely upon such evidence if such seller can establish that he neither knew nor had reason to know, nor upon reasonable inquiry could have known:

(i) That the manufacturer did not possess such evidence; or

(ii) That the representation could not be substantiated by such evidence; or

(iii) That the representation was false; or

(2) It is clearly and conspicuously disclosed that such hearing aid does not produce sounds which are at least of substantially the same quality and range as the sounds produced by the hearing aid brand(s) and/or model(s) with which it is being compared.

(h) No seller shall use the words "prescribe" or "prescription" or any other word(s) or expression(s) of similar import.

(i) No seller shall represent that a hearing aid which routes the signal from one ear to the other ear enables the wearer to hear out of the ear from which the signal is being routed.

(j) No seller shall represent, through the use of words or expressions such as "invisible," "hidden," "hidden hearing," "completely out of sight," "conceal your deafness, "hear in secret," "unnoticed even by your closest friends," "no one will know you are hard of hearing," "your hearing loss is your secret," "no one need know you are wearing a hearing aid," "hidden or out of sight when inserted in the ear canal," or by any other words or expressions of similar import, that any hearing aid or part thereof is hidden or cannot be seen, unless such is the fact.

(k) No seller shall represent, through the use of words or expressions such as "no cord," "cordless," "100 percent cordless," "no unsightly cord dangling from your ear," "no wires," "no tell-tale wires," or other words or expressions of similar import, that a hearing aid can be worn without any visible cord or wire, unless such representation is true and it is clearly and conspicuously disclosed that a plastic tube (or similar device) runs from the instrument to the ear, if such is the fact.

(l) No seller shall represent, through the use of words or expressions such as "no button," "no ear button," "no buttons or receivers in either ear," or other words or expressions of similar import, that a hearing aid can be worn without any button or other receiver in the ear, unless such representation is true and unless it is clearly and conspicuously disclosed that an ear mold or plastic tip is inserted in the ear, if such is the fact.

(m) No seller shall represent that any hearing aid can eliminate unwanted noise; *Provided, however*, That it shall not be a violation of § 440.9(m) to represent accurately the ability of a hearing aid with a telephone option to attenuate acoustical background signals, if such is the fact.

(n) No seller shall represent that any hearing aid can operate without batteries, unless the power source for such a hearing aid can be recharged from a household electric outlet.

§ 440.10 Advertising representations that must be qualified.

No seller shall prepare, approve, fund, disseminate or cause the dissemination of any advertisement:

(a) Which makes any general or specific representation that a hearing aid will or has the capacity to affect hearing capability or hearing quality, unless it is clearly and conspicuously disclosed that many persons with a hearing loss will not receive any significant benefit from any hearing aid; *Provided, however*, That nothing herein shall prohibit a truthful representation that hearing aids can help many persons with a hearing loss.

(b) Which makes any representation that a hearing aid will enable a person with a hearing loss to distinguish or understand speech sounds in noisy situations, unless, in addition to the disclosure required by § 440.10(a), it is clearly and conspicuously disclosed that many persons with a hearing loss will not be able to consistently distinguish and understand speech sounds in noisy situations by using any hearing aid.

(c) Which makes any representation that a hearing aid will enable a person with a hearing loss to distinguish or understand speech sounds in group situations, unless, in addition to the disclosure required by § 440.10(a), it is clearly and conspicuously disclosed that many persons with a hearing loss will not be able to consistently distinguish and understand speech sounds in group situations by using any hearing aid.

(d) Which makes any representation that the use of two hearing aids, one in each ear, will be beneficial to persons with a hearing loss in both ears, unless, in addition to the disclosure required by § 440.10(a), it is clearly and conspicuously disclosed that many persons with a hearing loss in both ears will not receive greater benefits from the use of two hearing aids, one in each ear, than from the use of one hearing aid.

§ 440.11 Required disclosures concerning telephone options.

(a) No seller shall prepare, approve, fund or disseminate any advertisement which represents that a hearing aid has a telephone option, unless it is clearly and conspicuously disclosed that the telephone option will not work on all telephones.

(b) Before a buyer assumes any financial obligation with respect to a hearing aid which has a telephone option, a seller shall clearly and conspicuously disclose the limitations of the telephone option orally to the buyer. Such disclosure shall include the following information:

(1) A statement that the telephone option will not work on all telephones; and

(2) A statement which indicates whether or not the telephone option will work on the telephones in the seller's trade area. If the telephone option will work on some, but not all, of the telephones in the seller's trade area, a statement indicating the types of telephones on which it will work shall be included in this disclosure; and

(3) A statement which indicates whether or not the approximate percentage of telephones in the seller's trade area on which the telephone option will work is increasing, decreasing, or remaining about the same.

§ 440.12 Necessary steps to insure compliance with this Part.

Every seller shall take such steps as are necessary to reasonably insure full compliance with the provisions of this Part by its employees, agents, salespersons, and/or representatives. At a minimum, such steps shall include:

(a) Furnishing each employee, agent, salesperson and/or representative with a copy of the Rule in this Part, either at the time of its promulgation or at the time their employment is commenced; and

(b) Obtaining from each employee, agent, salesperson and/or representative a signed and dated receipt for the copy of the Rule in this Part provided in accordance with § 440.12(a); such receipt to state that the recipient is aware that the seller is required to and will take appropriate disciplinary action for violations of this Part, which shall, in the event of willful violations or repeated violations, consist of the imposition of a fine, suspension, or dismissal of the employee, agent, salesperson and/or representative involved; and

(c) Establish and maintain a disciplinary system which will include, in the event of willful violations or repeated violations, the imposition of a fine, suspension, or dismissal of the employee, agent, salesperson and/or representative involved.

§ 440.13 Record maintenance and retention.

A seller shall maintain accurate and adequate records which may be inspected by Commission staff members upon reasonable notice and which pertain to the activities listed below. Such records shall be retained for a period of no less than three years. In the case of records covered by § 440.13(d), the three year period shall commence each time a representation supported by such records is made.

(a) All hearing aid sales. Documents which must be maintained and retained include but are not limited to:

(1) Copies of all contracts of sale; and

(2) Copies of all "Notices of Buyer's

Right to Cancel" provided to buyers in accordance with § 440.4(b); and

(3) Copies of all cancellation notices of any kind received from buyers exercising the right to cancel; and

(b) All hearing aid leases or rentals. Documents which shall be maintained and retained include but are not limited to copies of all contracts or forms provided in accordance with § 440.5; and

(c) All home sales visits. The prior express written approval required for each home sales visit by § 440.7(b) shall be maintained and retained; and

(d) Substantiation of representations. Documents which must be maintained and retained include but are not limited to all evidence required by §§ 440.9 (e) through (g); and

(e) All steps taken in accordance with the requirements of § 440.12.

§ 440.14 Effect on prior Federal Trade Commission actions and on State laws and ordinances of State political subdivisions.

(a) Sellers in compliance with this Part are exempt from the provisions of the Federal Trade Commission Trade Regulation Rule Concerning a Cooling-Off Period for Door-to-Door Sales, 16 CFR Part 429.

(b) This Part shall not be construed to supersede the Trade Practice Rules for the Hearing Aid Industry, promulgated July 20, 1965, by the Federal Trade Commission (16 CFR Part 214) except in the following instances:

(1) section 440.7(c) of this Part supersedes Rule 14 (a) and (b) (§ 214.14 (a) and (b)).

(2) section 440.8(b) of this Part supersedes Rule 10(a) (§ 214.10(a)).

(3) section 440.8(d) of this Part supersedes Rule 6(a) (§ 214.6(a)).

(4) section 440.9(h) of this Part supersedes Rule 6(c) (§ 214.6(c)).

(5) section 440.9(j) of this Part supersedes Rule 7(a) (§ 214.7(a)).

(6) section 440.9(k) of this Part supersedes Rule 7(b) (§ 214.7(b)).

(7) seection 440.9(l) of this Part supersedes Rule 7(c) (§ 214.7(c)).

(c) This Part shall not be construed to supersede any of the provisions of any outstanding Federal Trade Commission Cease and Desist Orders. The method for resolving any inconsistencies between this Part and such Cease and Desist Orders shall be by a petition to amend the provisions of such Orders.

(d) By taking action in this area, the Federal Trade Commission does not intend to preempt action in the same area, which is not inconsistent with this Part, by any State, municipal, or other local government. This Part does not annul or diminish any rights or remedies provided to consumers by any State law, municipal ordinance, or other local regulation, insofar as those rights or remedies are equal to or greater than those provided by this Part. In addition, this Part does not supersede those provisions of any State law, municipal ordinance, or other local regulation which impose obligations or liabilities upon sellers, when sellers subject to this Part are not in compliance therewith. This Part does supersede those provisions of any State law, municipal ordinance, or other local regulation which are inconsistent with this Part to the extent that those provisions do not provide a buyer with rights which are equal to or greater than those rights granted a buyer by this Part. This Part also supersedes those provisions of any State law, municipal ordinance, or other local regulation requiring that a buyer be notified of a right which is the same as a right provided by this Part but requiring that a buyer be given notice of this right in a language, form, or manner which is different in any way from that required by this Part. In those instances where any State law, municipal ordinance, or other local regulation contains provisions, some but not all of which are partially or completely superseded by this Part, the provisions or portions of those provisions which have not been superseded retain their full force and effect.

(e) This Part is not intended to supersede any State law, municipal ordinance, or other local regulation which more strictly limits the terminology by which hearing aid sellers may legally refer to themselves.

UNITED STATES GOVERNMENT

memorandum

DATE: 25 SEP 1978

REPLY TO ATTN OF: Thomas J. Donegan, Jr., Assistant Director for Food and Drug Advertising

SUBJECT: Staff Report on the Proposed Hearing Aid Industry Trade Regulation Rule

TO: Commission

The staff members of the Hearing Aid rule have prepared a lengthy report analyzing the record evidence in support of the recommended rule governing the advertising and sale of hearing aids. While I am somewhat uncomfortable with the manner in which the staff has characterized some of the record evidence, I support their recommendation that a trade regulation rule is necessary and that the rule is supported by the record evidence.

There appears to be sufficient record evidence to establish the conclusion that the over 14.5 million hearing-impaired individuals suffer a lack of information about hearing loss, hearing aids, and the variety of individuals and their respective qualifications who dispense and sell hearing aids. Hearing aids can benefit some but not all of these hearing-impaired individuals. In addition, periods of adjustment are almost always required. The record also reveals the prevalence of a variety of deceptive and unfair marketing techniques that take advantage of the existing consumer ignorance or vulnerability to mislead consumers into the belief that the hearing aid can offer greater benefits than may in fact be true.

The recommended rule attempts to remedy the documented problems by a comprehensive approach to the advertising and marketing of hearing aids. Of critical importance is the buyer's right to cancel. This portion of the rule requires retailers to provide each buyer with the opportunity to cancel the purchase within 30 days after delivery of the aid and receive a refund less certain allowable charges. The record clearly reveals that consumers can only assess the benefits the aid will offer by actual use. The trial period should thus allow consumers adequate opportunity to inspect the aid, adjust to its use (and limitations), and verify whether or not it will, in fact, offer them some benefit. The trial period should also provide disincentives that will inhibit sellers from engaging in deceptive techniques to market aids. If claims are not borne out through actual experience, sellers will have to refund the purchase price. In addition, any returned hearing aids will have to be sold as used rather than new aids.

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Although the buyer's right to cancel is designed to provide a strong economic incentive to sellers to refrain from engaging in unfair sales practices, allowable cancellation charges were established so as not to unfairly penalize honest sellers. However, record evidence on the costs of retailing hearing aids and costs of their subsequent return suggest that dishonest sellers may continue to profit, albeit not as much, even if aids are returned. A related issue is whether some oral misrepresentations are in fact more likely to induce initial sales than they are to induce subsequent cancellations when the buyer discovers that he or she has been deceived. For example, the misrepresentation that a master hearing aid simulates the performance of wearable hearing aids may induce consumers to purchase hearing aids. It is less clear that once a consumer discovers the deception he or she will cancel. In such circumstances, sellers may continue to profit unjustly. We will be seeking comments on whether or not allowable cancellation charges should be altered to diminish the dishonest seller's ability to continue to profit from misrepresentations.

The recommended rule is further designed to remedy specific abuses, by regulating advertising as well as oral sales claims. The record indicates that one of the worst abuses has been the oral misrepresentations made by salespersons at the time of initial contact. Some of these misrepresentations are further explicitly suggested by sales manuals. Provisions prohibiting certain oral misrepresentations in particular may pose practical difficulties in detecting and proving violations. However, the record seems to support the view that such deceptive claims are instrumental in persuading consumers, sometimes unnecessarily and often to their detriment, to purchase hearing aids. In light of the critical nature of many of these misrepresentations, we will particularly focus on comments concerning whether it would be more effective to require affirmative disclosures instead of prohibiting false or misleading claims.

For example, Section 440.6, requires sellers to affirmatively disclose their status as sellers of hearing aids. Sections 440.8, 440.10, 440.30 and 440.35, respectively, prohibit sellers from misrepresenting their titles, qualifications, and purpose (i.e., to sell). This information might be effectively communicated by means of a required "door-opener" affirmatively requiring the seller to disclose this information. To further ensure each consumer receives the disclosures, the rule might require consumers

to initial the card to acknowledge its receipt. Comments focusing on the probable consequences of such a requirement will be particularly helpful in resolving the issue.

Other provisions of the rule prohibit various false or misleading claims concerning the hearing aid itself. We will thus be particularly interested in comments on whether the buyer's right to cancel may serve to alleviate the necessity for such detailed regulation of the conduct of the sales situation. Similarly, we will seek comments on whether affirmative disclosures are a more effective means of curbing the sales misrepresentations these provisions are designed to address and the need for such prohibitions in advertising claims as compared to the need for them in oral sales presentations.

For example, Section 440.13 prohibits claims that hearing aids will shut out all unwanted background noises. Sections 440.24, 440.25, 440.26, and 440.27, respectively, prohibit false misrepresentations that hearing aids are invisible, cordless, have no ear buttons, or operate without batteries. Section 440.32 prohibits sellers from representing that a consumer's experience with a testing device demonstrates the way a consumer can expect to hear with an aid. While such prohibitions on advertising claims may prevent the problem of "bait" advertising, we will be especially interested in comments addressing whether the need for such prohibitions on sales claims would be alleviated by the trial period which would allow the consumer to discover the truth or falsity of the claims through self-testing.

Other deceptive claims may not be discoverable through self-testing. Affirmative disclosures, similar to the door-opener suggested above, may therefore be a more preferable approach. For example, Sections 440.11 and 440.12 prohibit representations that hearing aids will restore normal hearing or will retard the progression of hearing loss. Such claims can act as effective lures for unsuspecting consumers. We will thus look for comments focusing on the need to convey this information affirmatively, balanced against the potential for discouraging consumers from trying hearing aids.

The staff's efforts have culminated in a comprehensive recommendation for regulation. The recommended rule is also written in "plain English." Special attention has been

given to the consumer notices which have been designed to be read and easily understood by consumers and, further, to serve as a step-by-step guide in the event the consumer seeks to cancel. The staff's efforts in this respect appear to have an excellent opportunity for success.

CONCUR:

Albert Kramer

Albert H. Kramer, Director
Bureau of Consumer Protection

* U.S. GOVERNMENT PRINTING OFFICE : 1978 O-620-680/49