unfair disadvantage); *Louisiana-Pacific Corp.*, Docket No. C–2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter").8

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. Hart Letter at 5; 15 C.F.R. § 2.51. In such a case, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2 [1979–1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,207 ("Damon Letter"). For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order." Damon Corp., 101 F.T.C. 689, 692 (1983). Once such a showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. Damon Letter at 2. The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm. Damon Letter at 4.

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order. S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979); see also Rule 2.51(b) (requiring affidavits in support of petitions to reopen and modify). If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification.

The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one in view of the public interest in response and the finality of Commission orders. See Federated Department Stores, Inc. v. Moitie, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

## IV. The Order Should Be Reopened

AAOS has shown changed conditions of fact that require the Order to be reopened to consider modification. The decision by Congress to base reimbursement for medical services provided under Medicare on resource based relative value scales, with the participation of physicians and medical professional societies in identifying and modifying RBRVS for Medicare purposes, is a changed condition that makes application of the order inequitable.

The Order bars AAOS from "directly or indirectly initiating, originating, developing, publishing, or circulating, the whole or any part of any proposed or existing relatives value scales," while the Omnibus Budget Reconciliation Act of 1989, among other things, requires use of resource based relative value scales for purposes of physician reimbursement under Medicare and contemplates professional participation in the development of RBRVS. The Act requires the Department of Health and Human Services ("HHS") to consult with physician organizations in developing and modifying Medicare RBRVS. The Order addressed conduct that allegedly contributed to the unlawful maintenance of fees by orthopaedic surgeons. It now appears that the Order may inhibit participation by AAOS in the development and revision of RBRVS systems of reimbursement and thus may harm competition. Accordingly, the Order should be reopened to consider modification.

## V. The Order Should Be Set Aside

AAOS requests that the Order be set aside or modified to permit AAOS to distribute the Abt Restudy and similar information to third party payers, other medical societies and its members.

The Order, as modified in 1985, permits AAOS to "discuss[] relative value scales with governmental entities

and third-party payers." 105 F.T.C. at 248. The Commission, in modifying the Order in 1985, concluded that the Order's "restriction on [AAOS]'s ability to discuss relative value scales with third-party payers and governmental entities \* \* \* caused injury to [AAOS] and the public that outweighed any benefit that might be derived from the restriction." Id. The Commission also observed that the modification was consistent with its opinion in Michigan State Medical Society, 105 F.T.C. 191 (1983) ("MSMS"). Also consistent with MSMS, AAOS is not limited under the Order to responding to requests from government and third party payers. 10 AAOS "may have a useful role to play in offering suggestions and advice to third payers on a wide variety of issues, including reimbursement. \* \* \* [T]he potential value of this role is not limited to responsive communications but extends \* \* \* to similar communications initiated by" AAOS. 105 F.T.C. at 308.11

As the Commission recognized in MSMS, "there is some inherent danger in allowing any collective dialogue with third party payers on questions directly related to reimbursement amounts or policies." 12 Similarly, in modifying the Order in AAOS, the Commission cautioned that "serious antitrust concerns would arise were AAOS to negotiate or attempt to negotiate an agreement with any such party or engage in any type of coercive activity to effect such an agreement." 13 Such actions concerning terms of reimbursement could be examined under Section 5 of the Federal Trade Commission Act. 14

AAOS also would like to provide copies of the Abt Restudy to other medical professional societies. The process of establishing and refining

<sup>&</sup>lt;sup>8</sup> See also United States v. Louisiana-Pacific Corp., 967 F.2d 1372, 1376–77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification.").

<sup>&</sup>lt;sup>9</sup>AAOS also cited changed conditions of law and the public interest. Because the Order is set aside on the ground of changed conditions of fact, the Commission need not and does not consider the additional alleged grounds.

<sup>&</sup>lt;sup>10</sup>The Order, as modified in 1985, permits AAOS to discuss relative value guides with third party payers, but the staff of the Commission construed the Order as barring AAOS from providing relative value guides to third party payers. See Staff advisory opinion at 3 ("[B]ased on the information we now have, we cannot conclude that it would be consistent with the Order for AAOS to publish or circulate the Abt Restudy to the AAOS membership or to any non-governmental entity.").

<sup>&</sup>lt;sup>11</sup> See also Advisory Opinion in American Society of Internal Medicine, 105 F.T.C. 505, 510– 11 (1985).

<sup>&</sup>lt;sup>12</sup> The Order in *MSMS* permitted the dialogue and addressed the risk by barring the medical society from entering into unlawful agreements with third party payers regarding reimbursement. 101 F.T.C. at 308.

<sup>13 105</sup> F.T.C. at 249.

<sup>&</sup>lt;sup>14</sup> See, e.g., Department of Justice and FTC Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust, Statements 5 & 6, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,152, at 20, 782–785 (1994) ("Health Care Policy Statements").