the Commission's opinion concerning respondents' motion to dismiss the complaint issued October 29, 1971, and upon an examination of the materials produced pursuant to our decision today on their motion for production of Commission files, respondents' need for all or some part of the materials sought by the instant subpoena is already mooted.

Accordingly, we are sustaining the hearing examiner's decision to quash the subpoena for the reasons stated in this opinion. We agree with the examiner that the mere fact that Mr. Rowse wrote an article about the efforts of Congressman Rooney to spur government action against magazine sales subscription industry practices is not a sufficient basis for granting the subpoena.

Accordingly, we approve the hearing examiner's ruling that the subpoena to Mr. Rowse be quashed.

Chairman Kirkpatrick did not participate in this matter.

Order Denying Interlocutory Appeal From Examiner's Order Granting Motion to Quash Subpoena

Respondents the Hearst Corporation and Periodical Publishers' Service Bureau, Inc., having filed an interlocutory appeal from the hearing examiner's September 23, 1971 Order Granting Motion to Quash Subpoena to Arthur E. Rowse; and

The Commission having considered said appeal and the answer of Mr. Rowse in opposition thereto, and having determined, in accordance with the views expressed in the accompanying opinion that respondents' appeal should be denied;

It is ordered, That respondents' appeal from the hearing examiner's September 23, 1971 order granting the motion to quash the subpoena to Mr. Rowse be, and it hereby is, denied.

Chairman Kirkpatrick not participating.

THE HEARST CORPORATION, ET AL.

Docket 8832. Order and Opinion, Dec. 6, 1971

Order and opinion vacating subpoena *duces tecum* and remanding case to hearing examiner for reconsideration.

Order Vacating Subpoena Duces Tecum and Remanding to Hearing Examiner for Reconsideration

This matter is before the Commission on its own motion. Respondents the Hearst Corporation (Hearst) and Periodical Publishers' Service Bureau, Inc. (Periodical), applied to the hearing examiner, under Section 3.36 of the Commission's Procedures and Rules of Practice, for a subpoena *duces tecum* directed to Charles A. Tobin, Secretary, Federal Trade Commission, to produce specified documents contained in the Commission's records. Alternatively, Hearst and Periodical requested disclosure of the documents under 5 U.S.C. § 552 (1970) (the "Freedom of Information Act"). The examiner, on August 13, 1971, granted the motion for subpoena pursuant to Section 3.36 of the Commission's rules and to the provisions of 5 U.S.C. § 552.

By order dated September 1, 1971, the Commission, on its own motion, stayed the September 1st return date of the subpoena and by order dated December 6, 1971, the Commission, again on its own motion, placed the hearing examiner's order authorizing the subpoena on its docket for review pursuant to Section 3.36(e) of the Commission's rules.

Apart from the merits of the request for information, it is necessary to comment on the procedural aspects of seeking documents under the Freedom of Information Act by means of a motion for subpoena addressed to the hearing examiner. This procedure raises issues concerning the relationship of the Commission's discovery rules to the Information Act. The Information Act was intended to enlarge and clarify the right of access by the public to documents in administrative files. It is not concerned with discovery procedures applicable to adjudicative proceedings, and does not authorize the issuance of subpoenas. The congressional committee report states that the Act "is not intended to give a private party indirectly any earlier or greater access to investigatory files than he would have directly in such litigation or proceedings." [1] Conversely, it should be noted that the materials which are discoverable by a party under Section 3.36 of the rules include material which is not available to the public under the Information Act.

While respondents in Commission proceedings are members of the public and consequently may request access to Commission records under the Information Act like any other member of the public, such requests should not be confused with subpoenas for Commission records under Section 3.36 of the rules. As the Commission has previously noted, "requests for documents and information under the Freedom of Information Act are inappropriate when made within the framework of an adjudicative proceeding." [2] Thus, a respondent's request for ac-

[1] H.R. Rep. No. 1497, 89th Cong., 2d Sess., at 11 (1966).

[2] *Ash Grove Cement Co.*, Docket 8785 (Order dated July 15, 1970).

cess under the Information Act should not take the form of a motion to the examiner.[3] The application should be made pursuant to Section 4.11 of the rules, directly to the Commission, addressed to the Secretary.[4] Furthermore, inasmuch as a respondent's request under the Information Act is a separate matter from the pending adjudicatory proceeding the pendency of such a request is no ground for suspending or postponing the hearing in the proceeding.

Because respondents' request under the Freedom of Information Act was not properly before the hearing examiner, who lacked authority to issue a subpoena under the Act, that portion of his order granting the subpoena pursuant to the Act must be vacated. To avoid unnecessary delay, however, the Commission will not exclude the request from its consideration because of the improper procedural approach, but will treat the motion for subpoena as a request under the Act.

In order to facilitate consideration of the request for access, the staff is directed to gather any documents specified in the request to which the applicants are entitled under the Freedom of Information Act. The staff is further directed to keep a detailed record of the time expended in gathering such records to enable the Commission to determine the search fee to be charged pursuant to Rule 4.8(c). It should be noted that in determining whether the applicants are entitled to access to the records under the Information Act, the Commission will be acting in a purely administrative rather than in an adjudicative capacity. Consequently, problems relating to *ex parte* communications, which might arise in an adjudicative context, will not be present.

The hearing examiner also granted respondents' motion for subpoena under Section 3.36 of the Commission's rules. A cursory reading of the subpoena specifications, which are extremely broad, raises doubts as to whether the material to be produced is specified "as exactly as possible" and whether there has been a sufficient showing of "the reasonableness of the scope of the application" as required by Section 3.36 (b). Our granting respondents access to the material to which they are entitled under the Freedom of Information Act, however, will moot

[3] Section 3.22 of the rules, which states that during the time a proceeding is before a hearing examiner, all motions therein, except those filed under Section 3.42(g) (disqualification of hearing examiner) shall be addressed to the hearing examiner, does not apply because a request under the Information Act is not a discovery motion in the adjudicative proceeding.

[4] The Commission is aware of language in a prior opinion which may be construed to indicate that a different procedure should be followed. *Koppers Co.*, Docket 8755 (Order dated July 2, 1968 [74 F.T.C. 1579]). To the extent that such language conflicts with the present opinion, it is disapproved.

the issue of their right to the same records under Section 3.36. Also, our disposition of respondents' Appeal from Denial of Motion to Dismiss Complaint may render much of the material specified in the subpoena no longer relevant to respondents' case. It is appropriate, therefore, that we vacate the examiner's order of August 13, 1971, and remand the matter to him for a reconsideration, in the light of our denial of respondents' appeal, of the general relevancy of any material respondents originally requested which has not been made available to them under the Information Act. Accordingly,

It is ordered, That the hearing examiner's Order Authorizing Subpoena for Documents in Commission Records, dated August 13, 1971, be, and it hereby is, vacated and the matter remanded to the hearing examiner for the reasons expressed in this opinion.

Chairman Kirkpatrick not participating.

PHILIP MORRIS, INCORPORATED

Docket 8838. Order and Opinion, Dec. 6, 1971

Order granting complaint counsel's appeal from the hearing examiner's order staying the proceedings pending the United States Supreme Court's decision in *Federal Trade Commission* v. *The Sperry and Hutchinson Co.*, 405 U.S. 233; vacating and setting aside hearing examiner's order of Sept. 23, 1971; denying respondent's motion for a stay of all further proceedings; and remanding the matter to the hearing examiner for further proceedings.

ORDER AND OPINION GRANTING APPEAL, SETTING ASIDE EXAMINER'S ORDER WHICH STAYS PROCEEDING, AND REMANDING FOR FURTHER PROCEEDINGS

This matter is before the Commission upon complaint counsel's interlocutory appeal, filed November 5, 1971, from the hearing examiner's order staying the proceeding herein pending the United States Supreme Court's decision in *Federal Trade Commission* v. *The Sperry and Hutchinson Co.*, No. 70–70, October Term 1971 (S&H) [405 U.S. 233, 1972], requesting that the Commission reverse the hearing examiner; and upon respondent's answer thereto filed November 23, 1971.[1]

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[1] The Commission, by order issued November 1, 1971, granted complaint counsel's request for permission to file interlocutory appeal.

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The hearing examiner had no authority to order a stay in this proceeding on the ground of the possible effect of the decision in the *S&H* case. A question such as this is not directed to the hearing examiner's fact-finding function. Rather, it is addressed to the Commission's administrative discretion. *Graber Manufacturing Company, Inc.*, Docket No. 8038, 66 F.T.C. 1548 (1964); *O.K. Rubber Welders, Inc., et al.*, Docket No. 8571, 63 F.T.C. 2213 (1963). *Cf. First Buckingham Community, Inc.*, Docket No. 8750, Order Vacating Initial Decision and Dismissing Complaint, May 20, 1968 [73 F.T.C. 938]; *United Brands Company*, Docket No. 8835, Order and Opinion of the Commission Denying Respondent's Motion to Postpone Hearings and Dismiss Complaint, November 18, 1971 [p. 1005 herein]. Since the hearing examiner had no authority to rule on respondent's motion requesting a stay, he should have certified it to the Commission. As the matter has now been fully briefed on both sides on the appeal of complaint counsel and respondent's answer thereto, the Commission will proceed to consider the issue as though it were before it *de novo*.

Respondent argues that there is a fundamental legal issue which is common to both this case and the *S&H* case, that is, the scope of the term "unfair" in Section 5 of the Federal Trade Commission Act. It asserts that the framing of the issues in this case, the scope of discovery and the character of the evidence to be presented at the hearing could be significantly affected by the Supreme Court's disposition of the *S&H* case. Thus it states that a stay in the proceeding will promote the orderly and efficient administration of this case and, further, that it can result in no possible harm to the public interest since assertedly the practice challenged in the complaint was discontinued by respondent more than eight months ago.

We have carefully considered respondent's position, but we do not think the arguments made justify a suspension of the proceeding in this matter for an indeterminate period of time. The two cases are not so closely related that the Supreme Court's decision in *S&H* will likely have a bearing on the taking of the evidence in this case. Moreover, respondent has made no showing of any harm or injury which it will suffer by the continuation of this proceeding other than the inconvenience and the expense of continuing to defend itself, but such alone are not sufficient grounds to justify a suspension.

Finally, we conclude that a stay in the proceeding of an indefinite duration would, in fact, lead to excessive delay in finally disposing of this case on its merits.

In all the circumstances, we have come to the conclusion that respondent's request for suspension has not been justified and that it should be denied. Accordingly,

It is ordered, That complaint counsel's appeal be, and it hereby is, granted.

It is further ordered, That the hearing examiner's order staying further action in this proceeding, filed September 23, 1971, be, and it hereby is, vacated and set aside.

It is further ordered, That respondent's motion filed July 13, 1971, for a stay of all further proceedings pending the Supreme Court's decision in *Federal Trade Commission* v. *The Sperry and Hutchinson Co.* be, and it hereby is, denied.

It is further ordered, That this matter be, and it hereby is, returned to the hearing examiner for further proceedings in accordance with the Commission's Rules of Practice.

ASH GROVE CEMENT CO.

Docket 8785. Order, Dec. 8, 1971

Order vacating examiner's order of Oct. 12, 1971, which granted in part and denied in part the motion of third parties in regard to certain parts of subpoenas served on them.

ORDER RULING ON APPEALS

This matter is again before the Commission upon the joint appeal of Missouri Portland Cement Company (Missouri Portland) and Botsford Ready Mix Company (Botsford), third parties in this proceeding, from the hearing examiner's order of October 12, 1971, granting in part and denying in part their motion for a protective order with respect to some of the specifications of subpoenas served upon them on the application of respondent.

Previous appeals involving those subpoenas resulted in Commission orders of November 19, 1970 [77 F.T.C. 1671], and March 2, 1971 [78 F.T.C. 1566]. These appeals concerned the request by Missouri Portland and Botsford for "*Mississippi River*" treatment of the specifications of the subpoenas, the term "*Mississippi River*" being derived from the type of protective order entered by the Commission in a proceeding entitled *In the Matter of Mississippi River Fuel Corporation*, Docket 8657 [69 F.T.C. 1186]. After issuance of the Commission's order of March 2, 1971, remanding the matter to the hearing examiner, he set a prehearing conference for April 2, 1971, to select an accounting firm with regard to the specifications to receive *Mississippi River* treatment, and to consider the necessity for any further protective order as to the other specifications of the subpoenas. At the prehearing conference, counsel for Missouri Portland and Botsford refused to produce any documents in response to specifications 2, 3, 4, 5, 7, 9, and 10 of the Botsford subpoena and specifications 4, 5, 6, 7, and 8 of the Missouri Portland subpoena on the grounds that *Mississippi River* treatment should be extended to all of those specifications as well as the two specifications which were to receive such treatment, and counsel specifically refused to consider any other type of protective order.

On September 3, 1971, the Commission filed for enforcement of the subpoenas in the United States District Court in Kansas City, Missouri, and on September 9, 1971, the Court ordered officials of Missouri Portland and Botsford to show cause why the subpoenas should not be enforced. On September 29, 1971, Missouri Portland and Botsford reconsidered their previous refusal to supply data under a protective order other than a *Mississippi River* order and filed with the hearing examiner a motion for a protective order with regard to some of the specifications of the subpoenas. By order of October 12, 1971, the hearing examiner granted in part and denied in part the motion for a protective order.

The issue raised by this appeal is whether the hearing examiner should consider an offer to produce data, in return for confidential treatment, *after* the Commission has filed for enforcement of the subpoenas. Missouri Portland and Botsford had previously specifically refused to consider such treatment, and the Commission, relying on this refusal to negotiate, proceeded to prepare and file an enforcement action in the United States District Court in Kansas City, Missouri. The hearing examiner should not have considered further applications with respect to those subpoenas after the filing of the enforcement action. To do so is to interfere with the jurisdiction of the court and to encourage delay in the prosecution and completion of that lawsuit. Accordingly,

It is ordered, That the appeal by Missouri Portland and Botsford from the hearing examiner's order of October 12, 1971, be, and it hereby is, denied.

It is further ordered, That the hearing examiner's order of October 12, 1971, granting in part and denying in part the motion for protective order, be, and it hereby is, vacated.

Order

MISSOURI PORTLANT CEMENT COMPANY

Docket 8783. Order, Dec. 27, 1971

Order overruling the examiner's quashing of specification 6 of subpoenas *duces tecum* directed to seven third-party competitors of respondent, and returning the matter to the examiner for fashioning and issuance of an appropriate protective order.

ORDER GRANTING INTERLOCUTORY APPEAL AND RETURNING MATTER TO HEARING EXAMINER

This matter having come before the Commission upon respondent's appeal, filed September 28, 1971, from the hearing examiner's clarification on remand dated September 17, 1971, of rulings quashing specification 6 of respondent's subpoenas *duces tecum* directed to seven third-party competitors of respondent in response to the Commission's request of August 23, 1971, for clarification as to his bases or reasons for such rulings, including "whether he considered the requested data relevant for purposes of discovery;" and

It appearing to the Commission that no bases or reasons have been shown to justify quashing specification 6 of said subpoenas *duces tecum* in view of the finding by the hearing examiner that the relevancy of the material sought thereby to the subject matter "appeared subject to plausible argument," and in view of the fact that alleged competitive damage in affording respondent access to sensitive commercial data is an inappropriate basis for quashing said specification; and

It further appearing to the Commission that production of the information sought should be directed, and that the sensitive information can be adequately shielded by an appropriate protective order; and

The Commission therefore having determined that the hearing examiner's order quashing specification 6 of the subpoenas *duces tecum* in question should be overruled, and that the matter should be returned to the hearing examiner for the fashioning and issuance of an appropriate protective order:

It is ordered, That respondent's appeal be, and it hereby is, granted.

It is further ordered, That the hearing examiner's order filed September 17, 1971, quashing specification 6 of the subpoenas *duces tecum* be, and it hereby is, overruled.

It is further ordered, That this matter be, and it hereby is, returned to the hearing examiner for the fashioning and issuance of an appropriate protective order.

With Commissioner MacIntyre not concurring.

ADVISORY OPINIONS WITH REQUESTS THEREFOR*

Use of Terms "Golden Finish," "Gold Brushed," and "Golden Manner," as Descriptive of Costume Jewelry Containing a Gold Coating of Ten-Karat Fineness and Three-Millionths to Five-Millionths of an Inch Thick. (File No. 713 7031)

Opinion Letter

JULY 2, 1971

DEAR MR. JONES:

This is in response to your letter of January 22, 1971, requesting an advisory opinion on the use of the terms "gold finish," "golden finish," "gold brushed," and "golden manner," as descriptive of costume jewelry containing a gold coating of ten-karat fineness and 3/1,000,000ths to 5/1,000,000ths of an inch thick.

As the Commission understands the facts, the fineness and thickness of this jewelry falls within the description guidelines for "gold flashed," or "gold washed" jewelry as set out in Rule 22C(3) of the Commission's Trade Practice Rules for the Jewelry Industry. The Commission believes that, if it were to sanction the use of these new terms, it may result in a proliferation of meaningless descriptive terms and would tend to confuse not only the jewelry industry but the average consumer as well.

The Commission, therefore, cannot approve the use of the terms you propose.

By direction of the Commission.

*Prior to October 29, 1969, in conformity with the policy of the Commission, advisory opinions were confidential and available to the public only in digest form. Digests of advisory opinions were published in the Federal Register. The policy was changed on October 29, 1969, to provide for publication of advisory opinions and requests therefor, including names and details, when rendered, subject to any limitations on public disclosure arising from statutory restrictions, the Commission's rules, and the public interest. The policy was again changed on December 22, 1971, to provide for the placement in the Commission's public record of advisory opinions and requests therefor, including names and details, immediately after the requesting party has received the Commission's advice, subject to any limitations on public disclosure arising from statutory restrictions, the Commission's rules, and the public interest.

In the case of requests for advice concerning proposed mergers, the requests together with supporting materials are placed on the public record as soon after they are received as circumstances permit, except for information for which confidential classification has been requested, with a showing therefor, and which the Commission, with due regard to statutory restrictions, its rules, and the public interest, has determined should not be made public. Any advice given under Section 1.3 of the Commission's Rules of Practice concerning proposed mergers, together with a statement of supporting reasons, are published when given.

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Request

Supplemental Letter of Request

MARCH 26, 1971.

DEAR MR. LEVIN:

This is in regard to our previous correspondence concerning the names and description of certain jewelry and in particular, to your letter of February 4, 1971.

Initially, I must decline to reveal the name of my client as I am not at liberty to do so. As I understand it, there is no requirement to reveal a client's name in order to receive an advisory opinion from the F.T.C. In any event, if a name is needed, mine should be sufficient because aside from my client's interest, I as a consumer, am entitled to such information from the Commission.

The material which you furnished me under cover of your February 4, letter was helpful. However, since that time, I have been attempting to advise my client regarding advertising copy describing the proposed line of costume jewelry. The jewelry in question is of the "gold washed" and "gold flashed" quality, i.e. a non-precious metal base with between 3/1,000,000 and 5/1,000,000 of an inch of gold of 10 Karat fineness affixed by electrolytic process. The line includes earrings, pendants, pins, bracelets and rings.

The problem arises as to how may such a line of costume jewelry be promoted in advertising copy and in particular how may the gold finish on this jewelry be described. Presently, the following descriptive terms are under consideration: gold finish, golden finish, gold brushed and golden manner. I feel that these descriptions are within the guidelines set out by the Commission. My opinion is also strengthened by observation of many other jewelry advertisements using these terms for jewelry with the same type of gold finish as we contemplate.

I would appreciate your advising me if the aforesaid terms, when used to advertise jewelry with the above described gold finish, would violate any rule or regulation of the Federal Trade Commission.

Since this matter is of the utmost urgency, I would indeed be grateful if you would give it attention at your earliest possible convenience.

Thank you for your cooperation.

Very truly yours,

(S) EDWARD S. JONES.

Letter of Request

JANUARY 22, 1971.

GENTLEMEN:

I represent a client who plans to market a line of costume jewelry consisting of non-precious metals and synthetic stones.

My client is presently considering several names for the individual pieces of jewelry as well as the entire line. Among these names are some using the word "Jewelled"; e.g. "Jewelled Heirloom". Also under consideration are names using the word "Golden"; e.g. "Golden Owl". In the latter example, the piece will actually be in the shape of a miniature owl of a golden color but containing no gold metal. In the former, the stones used will be synthetic.

I would appreciate your opinion as to whether the use of these names, as contemplated, would violate any rule or regulation of the Federal Trade Commission. If you are of the opinion that there would be such a violation without a further disclosure, would you indicate what wording would be sufficient. In this regard, we are considering using the legend "Costume Jewelry" on labels and labelling.

Thank you for your cooperation in this matter.

Very truly yours,

(S) EDWARD S. JONES.

Promotional Assistance Plan Whereby Labels from Grocery and Household Products May Be Redeemed When Affixed to Designated Portions of a Book Which the Company Proposes To Sell to Competing Retailers. (File No. 713 7030)*

Opinion Letter

JULY 1, 1971

DEAR MR. SHEPARD:

This is in response to your letter of January 11, 1971, requesting an advisory opinion concerning the legality of a proposed promotional assistance plan whereby labels from grocery and household products may be redeemed when affixed to designated portions of a book which you propose to sell to competing retailers.

As the Commission understands the facts, retailers will be offered an opportunity to provide their customers with personalized label redemption books for redemption by the issuing store. Each redeemable page of the book will contain label depictions of several products of a given manufacturer. Retailers need not stock any or all items on any particular page to acquire compensation for redemption. Each retailer may excise, prior to publication, any particular redeemable page. No partial page redemption will be allowed. Participating retailers will receive label redemption books based on the number of operable cash registers.

The Commission has given your proposal careful consideration and

*Book cover page not published.

has determined that it fails to provide functional availability on proportionally equal terms, as required by Section 2 of the amended Clayton Act. This determination is based on the feature of the plan which allows the deletion of only full pages by the retailer.

If a retailer does not stock all items on a particular page of the label redemption book, and yet wishes to obtain the promotional allowance, he must in effect encourage his customers to shop elsewhere for the labels from products he does not carry. The option of the retailer to delete an entire page does not, in the Commission's view, make the offer functionally available.

It is the Commission's view that deletion of only full pages also creates a situation where retailers receive disproportionate compensation on a per product basis. Because some retailers will stock only some of the products on a page containing several labels, the per-product compensation received will be greater than that received by a retailer stocking all items on a particular page.

Another area of concern stems from the method chosen for allocation of the label redemption books. It is the Commission's view that to base the number of books allocated to each store on the number of operable cash registers does not provide sufficient proportionality within the requirements of Section 2 of the amended Clayton Act.

By direction of the Commission.

Letter of Request

February 5, 1971

Dear Mr. Robbins:

Thanks for information and advice in your letter of January 29. It refreshed our understanding of your Commission's requirements.

I am sure you realize how carefully manufacturers are studying tripartite or any other kind of promotional activities or agreements.

From our own experiences, it is difficult to get a hearing on any new idea without first answering the question "Do you have an opinion or o.k. from FTC?"

My apologies for the length of the enclosure but we have been writing and rewriting, editing and reediting for quite some time, hoping to cover all details in such a way as to show the plan's ability to comply with your Commission's most exacting requirements.

If you have any questions I would appreciate a chance to supply answers by phone, letter or in person. A visit to Washington would be enjoyable.

As you might realize, we are not alone in seeking to develop new marketing ideas and if publicity on this plan is a requisite for your opinion, we trust it will be in generalities without specific mechanics, allowing us a little lead time in "covering the territory".

Listening for the phone and waiting for the postman, we are

Respectfully,

(S) GLEN SHEPARD.

Enclosure.

This will outline a new sales promotional or marketing program to be tested for the first time in the Greater St. Louis Metropolitan County Area as defined by the Office of Statistical Standards, U.S. Bureau of the Budget.

The plan involves a tripartite agreement between manufacturers and suppliers of food and household products and their customers, with our firm as third party or publishers.

From previous experiences, we know that manufacturers will want assurance that the plan is in compliance with the Clayton Act as amended by the Robinson-Patman Act and that it follows your Commission's most recent guidelines issued in March and June of 1969.

You will realize from detailed description of program that we fully appreciate the importance of (1) properly and adequately notifying all manufacturers' customers (retailers) of its availability (2) that it must be usable and suitable for any and all customers on proportionally equal terms (3) that ample time must be allowed for all customers to participate (4) that no customer of any manufacturer will be required to purchase products of another manufacturer as a condition for partipation and (5) that periodic or spot checks must be made to verify that customers are receiving equal treatment.

This idea is not an overnight happening but result of a long search for a viable marketing program which manufacturers can use as a supplement or alternate to "cents off" labels, couponing, sampling or other product identification return plans.

Success of test and future expansion of program depends on four factors (1) ability to perform in compliance with the law (2) pleasing manufacturers who pay major costs (3) sparking interest of retailers and (4) motivating consumer action.

We would appreciate your reviewing this plan and advising us of any deficiencies under the letter or spirit of the law. You might want to take into consideration the fact that this is a test and that prior to offering it in other market areas we would be willing to submit a full report on our performance for your evaluation.

The plan . . .

offers manufacturers a practical and less wasteful method of motivating consumers to buy and try their products.

offers all retailers (customers of the manufacturers) an inexpensive, personalized customer relations program, with a good potential for extra profits.

offers consumers a quick, convenient and attractive savings of over 20% on purchases of food and household products.

The Overall Plan, in Brief. Detailed Description Follows

1. Publisher solicits manufacturers to sponsor products in Cash-A-Brand Savings books, a new consumers' savings program. Personalized copies of books

are offered for sale to all customers of the manufacturers (retailers) within or on fringes of defined market area. Retailers distribute books to consumers at their store(s) or by other methods of their choosing. Books invite consumers to buy products and save labels, box tops or other identifications removable from sponsored items. Various pages (maximum of 14 in test edition) will show replicas of portions of labels, etc. to be fastened in place as proofs of purchase. Consumer returns any or all filled pages to issuing retailer for cash reward of 50¢ each. Publisher recovers filled pages by reimbursing retailers for cash advanced and paying retailer an extra 15¢ per page as a fee for handling transaction. Filled pages are returned to manufacturer with invoice covering payments to retailers and service charge of publishers.

2. Cash-A-Brand is not a game, lottery, sweepstakes or similar type promotion. All customers using savings books have same opportunity for cash rewards, based on labels, etc. returned.

The Plan in Detail

3. Principal feature is a book of 32 pages, size 8⅜″ x 10⅞″, printed in two colors throughout on white book paper by web offset.

4. Of the 32 pages, 28 will be offered for sale to manufacturers in units of two facing pages. Left-hand page will illustrate sponsored products, right-hand page will show replica of portion of labels, etc. to be fastened in place by consumers as proofs of purchase. Front cover will carry title of book, issuing retailer's name and address, information for consumers. Other two pages (inside front cover and facing page 3) will include instructions to consumers on use of book, emphasize saving features, describe easy methods of removing glued labels, etc.

5. When manufacturers' cooperation has been obtained, an offer will be made to all customers of the various manufacturers within the geographic boundaries of the market area and to any others outside of, or on fringes of that area who might be competitive to those within.

6. To sell as many books as possible and to assure that all sponsoring manufacturers' customers (retailers) will have knowledge of the program, the plan will be publicized throughout the area.

7. Publishers will contract with Direct Mail Corporation, 1533 Washington Avenue, St. Louis, Missouri, to prepare list of each food or grocery store, supermarket, area headquarters of each chain, voluntary or cooperative group or association and offices of each wholesaler of food and household products within the market area. (Mailing firm estimates over 3000 names will be on this list).

8. An "Offer to All Retailers" will be mailed to above mentioned list. Offer will describe plan in detail and show publisher's name, address and phone number for convenience of retailers having questions, needing further information or desiring personal visit from publisher's representative.

9. To further publicize the program a "Notice to All Retailers" will be published in each of the six daily newspapers within market area (two in Missouri and four in Illinois) on or about date offer is mailed. Published notice will give general outline of program and invite interested retailers to contact publishers for copy of formal offer or personal visit and explanation by representative.

10. Offer will be open to retailers for minimum of three months and at least 30 days prior to expiration date another offer will be made to same mailing list and "Notice to All Retailers" will be repeated in the six newspapers.

11. Cooperating manufacturers will be advised of publisher's methods of notification and invited to use their own means to further publicize the program

to their customers and to give publisher's name, address and phone number as contact.

12. Within three weeks from time offer is mailed and newspaper notices are printed the publishers will begin a telephone survey of retailers in all parts of the market area. Survey will check receipt of "offer", supply answers to questions and make appointments if personal visit is required. At least five calls will be made each business day (Monday through Friday) until expiration date of offer. A list of these calls with store name, person talked to, day, time and response will be kept in diary form and supplied to each sponsoring manufacturer on weekly basis.

13. To further publicize the program, each book sold to retailers will carry a statement from publishers, advising that books are available to all retailers within the area and time period stated, with name, address and phone number of publisher.

14. Success of program depends on selling as many books as possible to retailers for distribution to consumers and if other methods of creating retailer interest can be devised they will be used.

Details of Offer as It Will Be Made to All Retailers

15. Any and all customers of sponsoring manufacturers will be invited to purchase personalized copies of Cash-A-Brand Savings Book at 3¢ per copy. Personalization of books will include imprinting of retailer's store name, street address and city on front and back covers. Included with each order of books will be free window signs, shelf-talkers, ad mats and other materials to assist retailer in promotion of program.

16. Any retailer may purchase books in quantities of 500 or more with maximum based on number of operable cash registers or checkout counters, which basis is used as simple and equitable method of evaluating store size and customer traffic.

(a) Store(s) with one register or checkout counter may order maximum of 500 books at rate of 3¢ each. Price includes imprinting of store name, address and city on front and back covers, window signs, shelf-talkers, ad mats and other promotional materials supplied by publishers.

(b) Store(s) with two or more registers or checkout counters may order books in multiples of 500 in any quantity from minimum of 500 to maximum of 500 for each register or checkout counter at rate of 3¢ each. Price includes imprinting of store name, address and city on front and back covers, window signs, shelf-talkers, ad mats and other promotional materials supplied by publishers.

(c) Retailers with more than one store including chains or other groups pooling an order for any reason will supply list of locations from which books are to be distributed with number of registers or checkout counters in each, if ordering more than 500 books for any location.

17. Offer to retailers will list manufacturers and products being sponsored. Any retailer stocking for resale one or more of the products may participate in the program.

18. No retailer(s) will be required to purchase or stock any additional or unwanted products as a condition for participation. Retailer(s) stocking one or more products may purchase books to provide savings for their customers without any obligation to make all items available at retail to those customers. Any retailer may delete any manufacturers' pages that are objectionable without

penalty or extra charges of any kind. Publisher will provide alternate copy for any such pages deleted. This copy will be of general consumer interest, such as recipes, household hints, health tips, beauty aids, etc. As any pages deleted will change total savings as shown on front cover, publisher will make change necessary without charge.

19. Retailer(s) desiring to individualize books by deleting any manufacturer's pages and using space for their own copy may do so by supplying camera-ready copy to fit space, paying charge for necessary plate changes and ½¢ per copy extra for each two-page manufacturer's unit displaced.

20. Books will be offered with title "Cash-A-Brand" Savings Book. Any retailer(s) desiring to change title to one of their own choosing may do so by supplying type or art-work necessary and paying charge for plate change necessary.

21. Any retailer(s) desiring to further individualize their books by complete change in style of covers, copy on inside front cover, facing page 3 or colors of ink may do so by supplying camera-ready copy and paying for plate changes or press washups necessary. Copy submitted will be subject to publisher's approval and publisher will reserve all rights of copyright or registration of trademarks.

22. Voluntary, cooperative, other groups, associations or chains of retailers pooling order and indvidualizing covers of books under conditions outlined above may personalize each member or individual store's books with imprint of store name, address and city on front and back covers without penalty or extra charge of any kind.

(We feel it is necessary to explain how it is economically feasible for us to personalize books with individual retailer's name, address, city. Press facilities include a set of two special imprinting cylinders. While one is in operation the other is idle. While one order of books is running and imprinting an order (using rubber plates made in advance) the next retailers name, etc. is being placing on idle cylinder. As an order is completed a set of gears shift the idled cylinder into operation and run continues without stopping press.)

23. Retailer desiring to further individualize their books by any other methods acceptable to publishers may do so by supplying camera-ready copy and paying charge for plate changes necessary.

24. To assure consumers of minimum 20% savings on sponsored products, each redeemable page will be limited to products that consumer can purchase for \$2.39 or less at normal retail. Thus one manufacturer could show six products averaging about 39¢ each, while another might show four averaging 59¢ and another three averaging 79¢ each, etc.

25. Offer to retailers will announce approximate date of first press run and no retailer will have books delivered prior to that date. Offer will also include approximate date of second press run to be made after "offer" is repeated (see pp. 10). Retailers can choose either run for production of their books. Retailers individualizing their books may select delivery date other than either of above, providing it is not in advance of first general press run. (See next pp.)

26. Each redeemable page will carry a final redemption date of approximately three months from date books are to be put in circulation by retailers. An unpublicized grace period will allow retailers to redeem pages for another 30 days after that printed date to avoid misunderstandings with customers delayed by illness, vacations, etc. Retailer(s) may individualize timing of their

promotion by changing redemption date on each redeemable page, providing that date is not in advance of date shown in books delivered from first press run.

27. Three months, plus 30-day grace period will allow consumers approximately 17 weeks to take advantage of total savings which could amount to $7.00 if all 14 redeemable pages are sponsored by manufacturers and acceptable to retailers. Probable cost of all products necessary to fill 14 pages is estimated at between $30.00 and $31.00 as few manufacturers will be able to fit products to exact maximum of $2.39. Consumers would need to spend from an estimated $1.80 to absolute maximum of $1.97 per week to take full advantage of all savings offered.

28. Retailers will be invited to display signs announcing grace period when expiration date of their books approaches. Publisher is considering supplying these signs and if included in service will deliver such signs to each cooperating retailer.

29. Methods by which retailer sput books in circulation will be of no concern to publishers. They may chose to distribute them to customers at their checkout counters or cash registers, by house-to-house in their neighborhood, by mail or other methods of their choosing.

30. Program offers retailers the opportunity to advance sizeable cash reward to *their* customers, knowing they will be reimbursed and paid 30% profit on cash thus advanced (15¢ for each 50¢). Retailer ordering minimum 500 books will actually be putting 7000 redeemable pages into circulation (500 x 14) if book contains maximum. If 100 of those 7000 pages are redeemed (1.42%) retailer will have recovered initial investment of $15.00 (100 x 15¢) and any additional redemptions will be profit. If 3% redeemed, retailer will recover 210 x 15¢ or $31.50, if 5% or 350, $52.50, etc.

As Program Relates to Manufacturers

31. Publishers proposal to manufacturers will include details as outlined above and any manufacturer joining program will agree to participate in all orders from retailers, providing of course, that retailer agrees to inclusion of that manufacturer's products in books ordered.

Summary

Publishers are confident of their ability to make this a viable marketing program, simple, practical and economical for manufacturers, exciting and profitable for retailers and with attractive savings to consumers.

A favorable response from you will allow us to quickly find out if manufacturers are interested. Next steps would be to please retailers and then motivate families to save on their food and household budgets.

If this too lengthy explanation leaves any questions unanswered, please let us know. It is offered in good faith and without equivocation, misleading language or evasions of any kind. Designing a program which is as usable and suitable for small neighborhood confectionery or grocery store as for a large chain or group has been a challenge to our organization for some time. This idea, simple as it now might seem, is the result of a long and diligent search for an answer.

Respectfully submitted,

/S/ GLEN SHEPARD

Applicability of Trade Regulation Rule Concerning the Unavailability of Advertised Food Specials. (National Association of Broadcasters and Time Life Broadcasting, Inc.)

*Opinion Letter**

SEPTEMBER 1, 1971

Pursuant to your letter of July 9, 1971, the Commission has considered your request for an advisory opinion regarding the interpretation of the recently promulgated Trade Regulation Rule concerning the unavailability of advertised food specials.

The Commission is of the opinion that your request is inappropriate for an opinion under Section 1.1 of the Commission's Procedures and Rules (see enclosed copy of Procedures and Rules). Section 1.1 provides for consideration of requests for advice "with respect to a course of action *which the requesting party proposes to pursue.*" (Emphasis added.) As your submission states, the opinion is requested on behalf of your client who is a broadcaster, while the rule to which your request is addressed is directed to retail food advertisers. Thus, it appears that the request is not founded on a proposal by your client to pursue any particular course of action with respect to the Trade Regulation Rule in question.

For the reasons above stated, the Commission is of the opinion that your request for an advisory opinion is inappropriate and, therefore, denies the request.

Letters of Request

JULY 9, 1971

DEAR MR. TOBIN:

The National Association of Broadcasters (NAB), in accordance with Rule 1.3 of the Commission Rules, herewith seeks from the Federal Trade Commission an advisory opinion as to the applicability of its recently promulgated Rule on the availability and pricing of food specials, effective July 12, 1971, to the distant dissemination of broadcast advertising via cable television. The Rule specifies in part that:

> * * * it is an unfair method of competition, in connection with the sale or offering for sale by retail food store of food and grocery products or other merchandise, to offer any such product for sale at a stated price, by means of any advertisement disseminated in any area served by any of its stores which are covered by the advertisements which do not have such products in stock, and readily available during the effective period of the advertisement.

As the national trade organization for television and radio, with 536 television and 3,359 radio stations in its membership, NAB is vitally

*Identical opinion letters were sent to both correspondents; Mr. John B. Summers and Mr. William S. D'Amico.

interested in bringing to the Commission's attention certain aspects of this new rule which will have a deleterious effect upon broadcast advertising.

The signals of many television and radio stations in this country are extended far beyond their normal coverage areas by the facilities of community antenna television (CATV) systems. Relying primarily upon microwave, these CATV systems freely pick broadcast signals off the air and carry them long distances, feeding them into homes where such signals could otherwise never be received. The broadcast station whose signal is utilized in this fashion has no control whatsoever over the CATV system's selection or carriage of its signals since FCC rules do not require the CATV system to obtain permission from the originating station.

Only recently have broadcast stations been able to persuade retail food operations to make use of television and radio as an advertising medium to any significant extent. However, NAB has come to understand through its membership that many of these newly gained retail food store clients are terminating all of their broadcast advertising because they are fearful that if their locally purchased commercial spots are carried at will by CATV systems into areas where the statements in the ads on the availability of products and prices are inapplicable, they will then be in violation of the FTC Rule. As stated earlier, broadcast licensees are without any means of controlling the situation since the CATV systems involved are free to pick up a broadcast signal and carry it far afield whether or not the originating station gives its consent.

As a practical matter, it is unlikely that a viewer or listener would be misled into thinking that distant station advertising brought into his area by a CATV system applies to retail food operations in his community; station identifications required by the FCC, together with the particular wording and references in the ads themselves doubtless will put the audience on notice as to the geographic area for which the ad is intended.

Accordingly, NAB respectfully requests the Commission to issue an interpretation of Paragraph I of the Rule in order to clarify that the Rule's advertising provisions apply only to definable markets served primarily by the advertising medium being used and not to markets into which the medium is not intentionally directed. Such an interpretation of the Rule would insure as well that broader competition is encouraged among food retailers since their uninhibited use of the broadcast medium would be preserved.

Respectfully submitted.

(S) JOHN B. SUMMERS,
(S) LOUISE O. KNIGHT,
Counsel.

JULY 9, 1971

DEAR MR. TOBIN:

The purpose of this letter is to secure, in accordance with Rule 1.3 of the Commission's Rules, an advisory opinion as to the requirements of the Trade Regulation Rule effective July 12, 1971, concerning the unavailability of advertised food specials.

Our client, Time Life Broadcasting, Inc., owns and operates television broadcast stations nationally. The stations' broadcast signals, including the call signs identifying the principal cities of the stations, are often transmitted by independent CATV systems into distant markets which would not receive those signals without such transmission. The broadcast stations whose signals are utilized in this fashion have no control over the CATV system's selection or transmission of their signals because the Federal Communications Commission's Rules do not require a CATV system to obtain permission from the originating stations.

As a result of independent CATV transmission, advertisements which are meant to inform consumers within a station's coverage area are transmitted into distant markets. Consequently, advertisements for food and grocery specials available in the coverage area may be televised in distant markets where the specials are not available.

We are of the opinion that since the stations' call signs are transmitted into the distant markets, the consumers within those markets cannot reasonably be expected to be deceived as to the availability of goods or prices. Additionally, we are of the opinion that the advertiser cannot be considered to have violated the Commission's Trade Regulation Rule by not making readily available in their stores in those distant markets goods advertised for the benefit of consumers in the broadcast coverage area, since transmission to those markets is beyond the control of both the advertiser and the broadcaster.

However, in order to remove any doubt as to the implications of this Rule on advertisers in light of CATV transmission, it is respectfully requested that the Commission advise us as to its opinion concerning the impact of the Trade Regulation Rule under these circumstances.

The dilemma in which our client finds itself is that potential advertisers are reluctant to utilize the broadcasting media because of their fear of liability under the Commission's Trade Regulation Rule as a consequence of CATV transmission. We have been informed by the National Association of Broadcasters that our client's experience is not unique. Accordingly, NAB intends to seek an advisory opinion similar to the one we are hereby requesting.

Sincerely,

PIERSON, BALL & DODD.
(S) William S. D'Amico

Promotional Assistance Plan for Providing Manufacturers and Suppliers of Products Normally Sold in Grocery Stores With In-Store Moving Advertisements of Their Products. (File No. 713 7027)

Opinion Letter

SEPTEMBER 3, 1971

DEAR MR. KINTNER:

This is in response to your request of March 8, 1971, as modified by your letter dated June 21, 1971, for an advisory opinion regarding a promotional assistance plan coming within the purview of Sections 2 (d) and (e) of the Robinson-Patman amendment to the Clayton Act. Your request was submitted in behalf of MARPOS Network, Inc., concerning its promotional assistance plan for providing manufacturers and suppliers of products normally sold in grocery stores with in-store, moving advertisements of their products.

It is the Commission's understanding, essentially, that the basic plan calls for MARPOS to install mechanized display units in retail outlets, which mechanisms could handle thirty (30) placards bearing sixty (60) advertisements. These would be suspended from a track across the ceiling of the outlet. The placards would travel from one side of the outlet to the other. Stores unable to use the basic plan would be offered mechanisms handling fewer signs, stationary signs hung from cables or other in-store promotional aids such as shelf signs, flyers, handbills and the like.

Most of the advertising would promote products sold in the store; however, some products not sold in the store might be advertised and public service messages also might be included. Retailers would not be obligated to accept advertisement for products which they did not stock.

MARPOS would lease space for identical periods of time in the outlets of participating retailers for installation of the mechanism, irrespective of the display alternative used. A maximum annual payment of $1500.00 per location would be a ceiling over payments to high volume retailers and a minimum payment of $12.50 would be a floor under payments to all other participating retailers.

The rental paid would be calculated uniformly, either on the basis of the current annual dollar gross volume or the number of cash register transactions at each store location. Either alternative basis acceptable to the Commission would be agreeable to MARPOS.

MARPOS would apprise retailers of the plan by means of advertisements in national, regional and local trade journals, and newspapers. Also, letters would be sent to all corporate chains and to all cooperative, voluntary, and independent wholesale warehouses serving retailers in the trading areas in which the plan is offered.

Based on its consideration of the plan, as outlined above, the Commission approved the plan as submitted by the applicant on the condition that proportionalization of payments be based upon the number of cash register transactions at each participating retail outlet and that retailers who choose to use alternatives such as handbills will also be paid an amount equal to what they would receive if they rented space for signs.

By direction of the Commission, without the concurrence of Commissioner Dixon.

Supplemental Letter of Request

JUNE 21, 1971

DEAR MR. DUFRESNE:

This letter will supplement our March 8, 1971, Request for Advisory Opinion on behalf of MARPOS Network, Inc. concerning the company's proposed third party promotional program. The following discussion reflects careful consideration of those points raised in your letter of June 11, 1971, and reviewed in detail at our June 17 conference with you, Assistant General Counsel John R. Ferguson, and Eugene A. Higgins, attorney, Bureau of Competition.

In your letter of June 11, you indicated the Federal Trade Commission's interest in determining "whether MARPOS is willing to modify its proposed method of proportionalizing payments so that they are based on participating retailers sales or purchases of the products advertised, rather than gross sales, and by eliminating the system of bracket classifications." In addition to these areas of Commission inquiry, we will confirm several statements made by us in clarification of the proposed promotional program at the June 17 conference.

Basis for Proportionalization of Payments Under Program

At the outset, we note that MARPOS will modify its proposed plan to remove the bracket classification system set forth on pages 7–9 of our March 8, 1971, submission. While this alteration of the program does pose some administrative problems not present in our earlier proposal, MARPOS is of the view that program implementation will not be jeopardized thereby. For this reason, and consistent with the company's good faith efforts to formulate a plan which will comply with applicable law, the bracket classifications have been removed from the MARPOS proposal.

In reconsidering the presently proposed basis for proportionalization under the plan—average annual dollar gross volume—in light of the agency's inquiry concerning a modification of the payment basis to retailers' sales or purchases of the promoted products, the company has concluded that the latter approach would create insurmountable administrative difficulties. Moreover, it is our considered judgment that such a method of proportionalization in the type of tripartite program contemplated would not only operate to discourage and disfavor the participation of smaller retail outlets, but could also effectively foreclose participation in the program by smaller or regional suppliers.

Use of participating retailers' sales or purchases of the products advertised would require such an extensive amount of recordkeeping and auditing that the cost of program implementation would be prohibitive to all parties involved. Such recordkeeping would require the correlation of numerous products and involve constant auditing to reflect changes in the products advertised over short periods of time. In the latter connection, MARPOS anticipates that all of the various products represented under the proposed program would be scheduled at one week to multiple week/month intervals per location. Further; such records would have to identify product location by store, which is indeed burdensome in view of the disparate distributional techniques involved. Consequently, many intermediate and smaller-sized retail outlets would be unable to underwrite the costs inherent in a recordkeeping function of the scope required by such a method of proportionalization.

Only those retail outlets with computerized reporting capabilities could capture such costly sales information.

In the case of supplier responsibilities engendered by this method, we submit that all participating suppliers, regardless of size, would be hard pressed to provide the record and audit overview required, in part because of the multi-faceted distribution channels employed in reaching their retail customers; these variations in distribution would present a formidable challenge to supplier-participants to isolate product sales on a per store (retailer-participant) basis.

We recognize that the Commission's searching inquiry into the possible employment of another method of proportionalizing payments is not intended to foreclose other approaches which would also insure proportionally equal treatment of all retailer-participants in the program. Our review of the substantial difficulties inherent in a promoted products method of arriving at proportionalization, by no means exhaustive in its coverage, indicates, however, that such an approach would not have the beneficial effects tentatively anticipated by the agency, and would render program implementation economically impractical to the small retailer and small supplier.

In an effort to be fully responsive to the expressed concern of the Commission for a change in the proportionalization method, MARPOS has carefully studied other alternatives which might be acceptable to the Commission. Accordingly, the company would modify its program so that the basis of proportionalizing payments would be one of the following methods: (1) payments would be based on actual (not average) annual gross dollar volume of sales per location, eliminating the bracket classifications while retaining the present maximum volume, payment ceiling feature of the plan; or (2) payments would be based on the number of transactions per retail location for specified periods.

In either case, computation of payment would be derived through the application of a uniform percentage factor.

Proposed Alternative Methods of Proportionalization

A method which bases program payment on actual annual gross dollar volume of sales would favor the smaller retailer-participant in view of the maximum payment limitation (ceiling limit for outlets exceeding $3 million actual annual gross volume), and minimum payment "zero plus" factor.

The Commission staff has indicated concern that, to the extent gross volume of sales reflected privately branded sales by large retail outlets, such as chains, this method would favor these large outlets over smaller retailers not carrying private label goods. The establishment of a maximum level for payment should effectively attenuate the impact of private label sales in the actual annual dollar gross volume basis of computation.[1] Correctively, the "zero plus" minimum would raise even the smallest retailer-participant to a point where he would receive a fair payment.

Turning to the second alternative—number of transactions—we again note that the use of number of transactions per location as the basis of proportionalization would also tend to favor the smaller retailer, whose dollar sales per transaction typically are lower than that for larger retailers. MARPOS is prepared, in this regard, to determine actual number of transactions on a per store basis for the specified periods.

As was the case with the first alternative method discussed above, while the bracket classification system would be eliminated, the minimum-maximum limits would be retained. This latter factor would further insure favorable treatment of the smaller participants under the program.

There are noteworthy advantages in the employment of either actual annual gross dollar volume of sales or number of transactions per store for specified periods *vis-a-vis* predicating payments on the retailer-participants' sales or purchases of the products advertised.

First, either suggested method permits smaller and regional suppliers' greater access to point-of-purchase advertising. If payment were based on products advertised, out-of-store media advertising of national suppliers, such as television, radio and newspapers, would provide an unintended impact of the MARPOS program by focusing larger retailer sales efforts on major product brands, to the exclusion of those of smaller and regional suppliers. This would be the case, since the combined effect of national brand advertising would assure greater sales of such products, thereby resulting in higher program payments to the large retail outlets participating in the program.

Secondly, the use of products advertised for computation of payments would encourage the larger retail outlets with greater shelf space to shift product exposure in favor of the product lines of national suppliers, as a means of obtaining larger payments. MARPOS intends to assure that equal access to its program is provided to large and small suppliers alike. In particular, the small retailer with limited shelf space, who must carry a line of competing products for his customers, would be unable to give greater shelf exposure to prod-

[1] The Commission is, of course, aware that a substantial number of grocery supermarkets have annual gross dollar sales in excess of $3 million. It is these large stores which typically carry private brands.

ucts advertised in his store by MARPOS and would thus be disadvantaged over the larger stores with shelf space to adjust to take advantage of promotions with payments based on gross sales or purchases.

Thirdly, basing payments on either the actual annual gross dollar volume of sales or the number of transactions not only aids the smaller or regional supplier, but also favors the smaller, participating retail outlets. With respect to the latter, the fairer treatment accorded the smaller retailers would serve to encourage their participation, without imposing a prohibitive recordkeeping cost factor on them.

Other Aspects of Proposed Program Under Review

Several additional points were raised in our conference of June 17 which deserve attention here. Although previously indicated in the March 8 Request for Advisory Opinion, we want to emphasize that participating retailers will not be required to carry advertising for products not sold in their respective locations.

Consistent with the company's good faith efforts to insure that its program is fair and reasonable in its application, MARPOS is prepared to report periodically to the Commission's staff the manner in which its program is being implemented.

* * * * * * *

In conclusion, we should like to emphasize that the MARPOS program has been developed by Don Fedderson Productions, a firm which produces the My Three Sons, Lawrence Welk, and other television shows. The Fedderson executives are careful and thorough; they have never had any past difficulty with federal agencies. They made it clear to their counsel and to the Commission's staff that they intended to extend themselves to the limit in complying with all prior guidelines of the agency in developing the MARPOS promotion, since the company is undertaking substantial investment in designing and testing the program.

Every effort has been made to follow every Commission staff suggestion to the letter, including informal clearance of every word of revised drafts. During this period of nine months, Don Fedderson Productions has invested in good faith nearly $600,000.00 in design and redesign of machines, field testing of machine operations, securing consumer reaction, and other steps necessary to ready the program for actual operation. If clearance of the MARPOS program is granted, the same degree of good faith and care will be taken in actual operation of the program, including making its results and any problems known to the Federal Trade Commission, or making such adjustments as may be necessary to comply with the law as interpreted by the Commission and the Courts.

Sincerely,

ARENT, FOX, KINTER, PLOTKIN & KAHN.
(S) EARL W. KINTER.
(S) LAWRENCE F. HENNEBERGER.
(S) SALVATORE A. ROMANO.

Letter of Request

MARCH 8, 1971

DEAR MR. TOBIN:

Under a separate letter of today's date, we are submitting a Request for Advisory Opinion on behalf of our client, MARPOS Network, Inc., which addresses itself to a promotional program under consideration by that company.

We are submitting the March 8, 1971, Request for Advisory Opinion in lieu of our earlier Request for Advisory Opinion of February 2, 1971, and, accordingly, we are withdrawing the February 2 Request letter and seek Commission review and action only as to our Request letter of March 8, 1971.

Sincerely,

ARENT, FOX, KINTER, POLTKIN & KAHN.
(S) EARL W. KINTER.
(S) LAWRENCE F. HENNEBERGER.
(S) SALVATORE A. ROMANO.

MARCH 8, 1971

DEAR MR. TOBIN:

In accordance with § 1.2 of the Federal Trade Commission's rules, we are submitting herewith a Request for Advisory Opinion on behalf of MARPOS Network, Inc., concerning a third-party promotional program contemplated by that company.

Requesting Party

MARPOS Network, Inc. (herein Network) is a wholly-owned subsidiary corporation of Don Fedderson Productions, Inc., a California corporation. Network proposes to establish a tripartite promotional allowance program. As a third-party intermediary, Network would enlist suppliers as participants in its program, which will be oriented toward point-of-purchase advertising in retail grocery outlets (locations). The proposed program is not presently in operation and the requesting party is not the subject of any pending investigation or other proceeding by the Federal Trade Commission or any other governmental agency.

The Nature of the Program

Network has developed a new advertising medium for point-of-sale advertising of consumer products in retail outlets. A central feature of the program is the installation by Network of motion advertising displays. The display device involved constitutes a unique promotional approach in advertising suppliers' products in retail outlets.

Network's program will be oriented toward advertising products normally sold only in retail grocery outlets. In any situation where a participating supplier featuring one or more products in Network's program also sold such products in non-grocery outlets competing with grocery stores in the program, Network would expand its program (with appropriate program notification and review safeguards) so as to assure that competing non-grocery retail outlets were offered functionally suitable treatment on terms proportionally equal to those provided grocery stores under the program.

Network will make it clear to potential retailer participants that they are not required to carry any particular product or products as an incident of the program, and that product advertising will be selected to assure that only products normally sold by participating retail outlets would be advertised in their locations.

In view of the disparate sizes, physical structures and customer traffic among retail grocery outlets, Network has developed three variations of its display approach.

The "Type A" display unit involves a promotional device, which would carry thirty (30) frames moving on a conveyor-type track system suspended from the ceiling across the center of the retail outlet. Moving in and out of two fixed stations anchored on the opposite walls, the frames travel periodically across the center of the retail outlet. Each sign would be forty (40) inches high and sixty (60) inches wide. Although each unit would be capable of carrying sixty (60) color advertisements (one on each side of the thirty (30) frames), Network might retain some of the sides for the purpose of conducting public service and related messages. The remaining sides would be devoted to advertisements of products sold by suppliers.

The "Type B" display unit is a variation of the "Type A" device, designed so that it can be installed in retail outlets which, because of their limited lateral size, or some other physical characteristic, cannot accommodate the "Type A" promotional device. This device is installed so that it moves within the store on a rectangular course, and both sides of each sign would be visible to customers in the retail outlet. In addition, the size of the signs is scaled down to twenty (20) inches high by thirty (30) inches wide to accommodate the size of the retail outlets involved. However, the same number of sides would be devoted to advertising the products of suppliers and the same number of sides would be retained by Network for public service messages as in the "Type A" display.

The "Type C" display unit has been designd, with three variations, to accommodate retail outlets which could not utilize in a practical business sense either the "Type A" or "Type B" units: (1) sixty (60) one-sided colored advertising displays suspended from stationary cables installed on the ceiling of the store; (2) thirty (30) two-sided colored advertising display frames suspended from stationary cables installed on the ceiling of the store; or (3) where neither (1) nor (2) would be usable or suitable. Network, as an alternative extension of its program, would provide advertising displays of reduced size or point-of-purchase materials such as paste-on, slot or other types of removable signs, stuffers, handbills, or similar promotional materials on terms proportionally equal to those otherwise provided under (1) and (2) of the program, as outlined immediately above.

Thus, the variations of the "Type C" display unit would accommodate retail outlets in accordance with their respective physical characteristics, so that one of these variations would be usable and suitable and tailored to the physical needs of the outlets involved.

It should be noted that the number and the size of the frames for the displays are approximate and might be altered, depending on economic considerations. Moreover, the signs will be designed so that their size would not preempt the space available in medium and smaller retail outlets for the advertising of suppliers who are not participating in Network's program.

Regardless of which display unit (A, B or C) is involved, Network will enter into standard lease arrangements with retail grocery outlets which elect to participate in its program. Such leases will authorize the installation of the display unit and will provide for the payment of rent to the retail concern, based on its current average annual dollar gross volume of sales, irrespective of the display alternative used. Network will have complete responsibility for installing, servicing and maintaining the display units. The retail outlet will incur no expense under the program.

Conformance With Applicable Law

Network has designed its program with a view toward compliance with Sections 2(d) and 2(e) of the Robinson-Patman Act amendments to the Clayton Act, and the Federal Trade Commission's Guides for Advertising Allowances and Other Merchandising Payments and Services, which contain the detailed implementation of the provisions of Sections 2(d) and 2(e).

Network recognizes that its program places it in the position of a third-party promoter or intermediary. The Commission's *Guides* specifically note that suppliers can discharge their obligations with regard to the applicable statutory provisions by the good faith utilization of a third-party promoter or other intermediary, provided both comply with certain specified standards.

Although supplier-sponsors would continue to bear responsibility for the legal operation of a third-party promotional program within the context of the good faith standard established under the *Guides*, Network, as a third-party intermediary, recognizes its responsibilities in the administration and operation of its program, and submits the following information to detail the manner in which it will operate and implement its program.

A. *Proportionalization:* In return for the retailer-lessors' permitting Network to install the advertising display units, Network will provide a rental or lease payment to each participating retail grocery outlet. The method of proportionalization for the rental or lease payment is based on the current average annual dollar gross volume of sales. Network has formulated "Classification Brackets," based upon the current average annual dollar gross volume of sales of the retail outlets involved. Each participating retail grocery outlet will be paid the amount of rental specified for the "Classification Bracket" applicable to that outlet. The rental or lease payment as among the brackets is designed to assure proportionally equal treatment through the use of a constant and uniform percentage factor. At the present time it is anticipated that the uniform percentage factor will be one/twentieth ($\frac{1}{20}$) of one percent (1%) of the current average annual dollar gross volume of sales applicable to the particular "Classification Bracket" of the outlet involved. The percentage factor may be altered prior to implementation of the program or during different phases of its operation. In any event, the percentage factor would be uniformly and constantly applied to assure proportionally equal treatment to all retail outlets participating in the program.

Network provides the following rate schedule with a breakdown of the "Classification Brackets" to illustrate how the constant percentage factor will operate in providing the rental or lease payment:

Dollar volume classification bracket of listed location	Average annual dollar gross volume of listed location	Annual rate of payment per listed location
1	$3,000,000 and over	$1, 500
2	$2,800,000 to $3,000,000	1, 450
3	$2,600,000 to $2,800,000	1, 350
4	$2,400,000 to $2,600,000	1, 250
5	$2, 200,000 to $2,400,000	1, 150
6	$2,000,000 to $2,200,000	1, 050
7	$1,900,000 to $2,000,000	975
8	$1,800,000 to $1,900,000	925
9	$1,700,000 to $1,800,000	875
10	$1,600,000 to $1,700,000	825
11	$1,500,000 to $1,600,000	775
12	$1,400,000 to $1,500,000	725
13	$1,300,000 to $1,400,000	675
14	$1,200,000 to $1,300,000	625
15	$1, 100,000 to $1,200,000	575
16	$1,000,000 to $1,100,000	525
17	$900,000 to $1,000,000	475
18	$800,000 to $900,000	425
19	$700,000 to $800,000	375
20	$600,000 to $700,000	325
21	$500,000 to $600,000	275
22	$400,000 to $500,000	225
23	$300,000 to $400,000	175
24	$200,000 to $300,000	125
25	$100,000 to $200,000	75
26	$50,000 to $100,000	37. 50
27	0 to $50,000	12. 50

As indicated in the rate schedule, the method of proportionalization will tend to favor the smaller retail outlets in view of the maximum and minimum payment brackets. Economic feasibility requires that Network establish a maximum limit on the amount of payment to be received; consequently, the percentage factor would operate with a ceiling limit for those outlets which exceed $3 million in current average annual dollar gross volume of sales. Therefore, at the presently contemplated rate, the maximum payment would be $1500. In addition, within each "Classification Bracket" the smaller volume retail outlets tend to be favored to the extent that the payment is computed by applying the percentage factor to the median current average volume within each bracket. Although this is the case, the situation is consistent with the essential purpose of applicable law and fosters the overall fairness of the program.

The method of proportionalization comports with the admonition in the Commission's *Guides* that payments should be proportionalized on a basis that is fair to all customers who compete in the resale of the supplier's products. The method utilized is consistent with the traditionally and generally accepted methods of basing payments on the dollar volume or on the quantity of goods purchased during a specified period.

B. *Competing Customers:* In view of obvious limitations in the production of the promotional display units, Network initially plans to conduct its promotional program in selected trading areas. Essentially, the program will be offered in major geographical markets, utilizing a time factor in reaching each such market or groups of markets. Suppliers will be enlisted to participate on the basis of all competing retail outlets in the trading area (s) involved.

It is anticipated that Network will establish a cut-off date by which time retail grocery outlets within a particular geographic market or area will be permitted to sign up for initial participation in the program. Network would advise retail outlets that they would have thirty (30) days from the time Network conducted its notification campaign in which to sign up for the program within the particular geographic market or trading area.

Permitting retail outlets a thirty (30) day period in which to react is considered well within reasonable bounds in view of the form of notification that is being provided (see "Notification and Monitoring," *infra*, at p. 13). However, within approximately ninety (90) days from the completion of the initial phase of the program, and periodically thereafter, Network would return to the geographical market or area to provide the retail grocery outlets in that area (including new entrants in the trading area) another opportunity to participate in the program (including the alternative methods of participation). In defining each market, Network will take steps to assure that any competing retail outlets operating on the periphery or fringe of each market, but outside the area selected, would be given an opportunity to participate in the promotional program.

C. *Functional Availability:* In order to ensure that its program is functionally available to the needs of the various and disparate retail outlets involved, and taking into consideration economic factors which make it prohibitive to install the "Type A" unit in all retail grocery outlets, Network has designed three alternative methods of participation in its program. However, *the basis for the rental or lease payment is the same under each alternative.*

The "Type A" display unit involves the utilization of the promotional device, suspended from the ceiling, which would move across the center of the retail outlet. This would be usable and suitable for the larger volume grocery retail outlets desiring to participate in the program. Consequently, retail outlets with current average annual dollar gross volume of sales falling within the larger numbered "Classification Brackets" could easily utilize the promotional device.

The "Type B" display unit relates to the promotional unit with the scaled down signs suspended from the ceiling which would move rectangularly around the center portion of the retail outlet. This is usable and suitable for intermediate size retail outlets falling within the middle numbered "Classification Brackets," which cannot accommodate the "Type A" unit either due to the limitations imposed by physical characteristics and/or insufficient volume, which make it economically impracticable to install the "Type A" unit.

Where neither the "Type A" or "Type B" unit would be usable and suitable to the particular needs of the smaller retail outlet, Network has designed a further alternative, the "Type C" display unit. In thsi latter instance, the same number and size of the signs that are employed in the "Type B" facility would also be used in the "Type C" unit, subject to the alternative treatment outlined on page four (4) herein for stores in the "Type C" category. However, because of the smaller size of the store, as well as economic factors which make it prohibitive to install the "Type A" or "Type B" unit, these alternatives would be usable and suitable for retail outlets which have current average annual dollar gross volume of sales falling within the lower numbered "Classification Brackets." Again, the rental or lease payment would be made on the same basis as is the case with the "Type A" and "Type B" units.

It is again emphasized that Network's leasing arrangements with retail outlets will be uniform and non-discriminatory. Each retail outlet will, by the terms of the lease, be enlisted as a program participant for an identical period of time from the date of the installation of the display unit.

D. *Notification and Monitoring:* With respect to each geographical market that it enters, Network will provide notification to all competing retail grocery outlets. As part of its program of notification, Network intends to carry on publicity through advertisements at reasonable intervals in various recognized trade publications of general and widespread distribution, setting forth the essential features of the promotional program and identifying the specific source for further particulars and details of the program. In those areas where local or regional trade publications exist, Network would also advertise availability of its program in these latter trade publications. In addition, Network will provide suitable "essential features" advertising (including source identification) in newspapers of general circulation within the geographic market. Letters describing the program will be sent to all corporate chains and to all cooperative, voluntary, and independent wholesale warehouses serving the selected trading areas, along with envelope stuffers describing the proposed program in detail, to be supplied to their retail customers. These notification procedures have been carefully designed by Network to insure their effectiveness in practice.

Network would be responsible for the installation, servicing and maintenance of the promotional devices under each aspect of its program. As a consequence, Network personnel would visit participating retail outlets periodically and monitor retailer use of the furnished displays.

Each participating retail outlet would be required to provide Network with reasonable assurance that its current dollar gross volume of sales justifies placing it within the proper "Classification Bracket," and would be required to notify Network of any changes in this respect which would affect the former's "Classification Bracket." In addition, Network will spot check to ascertain whether current dollar gross volume of sales justifies placing individual locations within their respective "Classification Brackets."

E. *Certification Requirements:* At reasonable intervals, Network would provide written certification to all participating suppliers that the latters' retail customers are being treated in conformity with Network's third-party agreement, as well

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as applicable law and the Federal Trade Commission's *Guides* implementing that law. Such certification will be made at appropriate intervals for each geographical market.

Conclusion

Network has designed a third-party promotional program which is honest in its purpose and fair and reasonable in its application. At each step, it has sought to abide by the standards imposed by the Commission's Guides, with a view toward assuring proportionally equal treatment to all participating retail outlets, adequate notification and proper monitoring. Network anticipates that it will undertake periodic reevaluations of its program to assure that its implementation is conducted pursuant to applicable legal standards. Indeed, the present request is submitted for the purpose of obtaining the Commission's guidance to assure that the program's design and implementation will be consistent with the legal requirements.

Respectfully submitted,

ARENT, FOX, KINTNER, PLOTKIN & KAHN.

(S) EARL W. KINTNER.

(S) LAWRENCE F. HENNEBERGER.

(S) SALVATORE A. ROMANO.

Designation of the gold content of a ballpen. (File No. 723 7001)

Opinion Letter

SEPTEMBER 7, 1971

DEAR MR. HERRIOT:

This is with reference to your request for an advisory opinion regarding designation of the gold content of the ballpen you plan to market. The Commission is of the opinion that:

(1) Abbreviation of the term "electroplate" or "electroplated" to indicate that an item is gold electroplate[d] would tend to mislead many consumers who would not know what the abbreviation signified, would, therefore, constitute an unfair and deceptive practice in commerce within the meaning of Section 5 of the Federal Trade Commission Act. Various industry guides dealing with the labeling of gold content suggest a policy against abbreviation of the terms "electroplated" (*see* 16 C.F.R. §§ 23.22, 202, 226) and the most recent guides for the Watch Industry forbid it in terms (*see* 16 C.F.R. § 245.3(m)).

(2) Designation of the karat fineness of a gold electroplated pen

may be made by placing the karat designation before the designation of "gold electroplate[d]."

(3) Designation of the thickness of the gold electroplate may be made by placing the thickness designation before the designation of "gold electroplate[d]." Designation of thickness may be made in terms of inches only, or in terms of both inches and microns, but not in terms of microns only since the significance of microns is not generally understood by consumers and may tend to mislead.

(4) Designation of the weight of the gold electroplate as proposed may not be made, since the Guides for the Pen and Mechanical Pencil Industry (16 C.F.R. § 226) do not provide for such designation, and its use may tend to mislead consumers.

For the foregoing reasons, of the designations you propose, "22 K GOLD ELECTROPLATE," with "electroplate" designated by the same size letters as "gold," may be used to identify the pen you describe. The following designations are inappropriate for the indicated reasons:

(1) 22 K GOLD E.P.—abbreviation
(2) 22 K E.P. GOLD—abbreviation
(3) 22 K G.E.—abbreviation
(4) 2½ MICRONS 22 K G.E.—abbreviation; use of microns only
(5) 2.5 M 22 K G.E.—abbreviation; use of microns only
(6) 2.5 MICRONS 22 K GOLD ELECTROPLATE—use of microns only
(7) 1/50 22 K GOLD ELECTROPLATE—use of weight designation
(8) 1/50 22 K G.E.—abbreviation; use of weight designation
(9) 1/50 22 K GOLD E.P.—abbreviation; use of weight designation

By direction of the Commission.

Letter of Request

7 July 1971

Honorable Commissioners:

This is a request for the Commission to furnish an advisory opinion.

We plan to manufacture and market in the United States a ballpen having a gold electroplated casing. Attached is a drawing (HH 7/7/71) of the proposed ballpen.* The casing consists of four metal parts: pushbutton; pocket clip; cap; and barrel. Each of said parts will be electroplated with a gold alloy of 22 karat fineness to a minimum

*Not reproduced in this volume. The sketch is available for inspection at the Division of Legal and Public Records, Federal Trade Commission, Washington, D.C.

thickness of at least 2.5 microns, i.e. 100 millionths of an inch. The plating will be more than 2% (i.e. 1/50) of the weight of the casing.

We propose to place on the cap (in addition to our trademark and the "U.S.A." country-of-origin mark), one of the following markings:

22 K GOLD E.P.
or
22 K GOLD ELECTROPLATE
or
22 K E.P. GOLD
or
22 K G.E.
or
2½ MICRONS 22 K G.E.
or
2.5 M 22 K G.E.
or
2.5 MICRONS 22 K GOLD ELECTROPLATE
or
1/50 22 K GOLD ELECTROPLATE
or
1/50 22 K G.E.
or
1/50 22 K GOLD E.P.

The markings set forth above appear to be neither expressly approved nor expressly disapproved in the various FTC Trade Practice Rules dealing with gold representations, i.e. the rules for: the Fountain Pen and Mechanical Pencil Industry; the Jewelry Industry; the Sun Glass Industry; and the Metallic Watchband Industry.

Said various Trade Practice Rules, by setting forth examples, expressly approve the use of abbreviations such as "G.F." (for Gold Filled), "G.P." (for Gold Plate), and "R.G.P." (for Rolled Gold Plate), but do not expressly set forth any examples of suitable analogous abbreviations usable on gold electroplated items.

Said Rules expressly permit use of a weight designation and a karat designation for items marked as "rolled gold plate", "R.G.P.", "Gold Filled" or "G.F."; but do not expressly go into the matter of a karat designation for gold electroplated items or the matter of a thickness or weight designation for gold electroplated items.

The FTC Guides for the Watch Industry, which are more recent than said Rules, expressly approve using a karat designation or a thickness designation together with the term "Gold Electroplate". These Guides, however, have different (and greater) thickness requirements for use of the term "Gold Electroplate".

Will you please give us your advisory opinion on the legal permissibility, under Section 5 of the FTC Act, of each of the above-proposed markings for the ballpen casing described above. Any further guidance you deem advisable would also be appreciated.

Thank you.

Respectfully submitted,

HOWARD M. HERRIOT,
Legal Counsel.

Proposed Acquisition of Controlling Stock Interest in Another Life Insurance Company. (File No. 713 7029)]

Opinion Letter

SEPTEMBER 21, 1972

DEAR MR. LOCHNER:

This is with further reference to your request for an advisory opinion regarding MONY's proposed acquisition of North American.

The Commission is of the view that before an informed decision could be made in response to your request extensive investigation would be necessary. In this circumstance, MONY's request for an advisory opinion is inappropriate under Section 1.1(c) of the Commission's Rules.

The foregoing should not be construed as an indication that the Commission is not deeply concerned about the potential for anticompetitive effects attending an acquisition of the size contemplated in your request.

We think it obvious that no conclusive judgment with respect to the legality of the transaction can be rendered by the Commission on the basis of the facts submitted. Whether or not MONY's acquisition of a controlling interest in North American would be lawful could only be determined after extensive investigation of all relevant factors, including the history, structure and behavior of the industry and markets affected by the acquisition. Questions such as the effects on potential competition and on barriers to entry cannot be determined without conducting a full investigation of a sort which is inappropriate in responding to a request for an advisory opinion.

In expressing its opinion, the Commission emphasizes that it does not imply any view as to whether, if the acquisition is consummated, the Commission would issue a complaint. The Commission's determination in such regard would depend on the outcome of the extensive investigation that would be required; and such investigation would entail an

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*Because of the volume of material submitted, all of the materials are not published. However they are on the public record and are available for inspection at the Division of Legal and Public Records, Federal Trade Commission, Washington, D.C.

examination into various relevant competitive factors as they might exist at the time proceedings were instituted.

By direction of the Commission.

Letter of Request

MAY 27, 1971

DEAR MR. TOBIN:

Our client, The Mutual Life Insurance Company of New York ("MONY"), 1740 Broadway at 55th Street, New York, New York 10019, respectfully requests an Advisory Opinion as to whether an acquisition by MONY of a majority of the capital stock of North American Life and Casualty Company ("N. Am") would or would not, in the opinion of the Federal Trade Commission ("FTC"), violate any of the laws administered by the FTC, including Section 7 of the Clayton Act.

On May 12, 1971, MONY notified the FTC of the contemplated acquisition pursuant to the FTC's Pre-Merger Notification Resolution, and filed its Special Report on May 20, 1971. Notices of the proposed acquisition have been or will be filed with the New York and Minnesota Insurance Departments. These departments are authorized to disapprove the transaction based upon considerations similar to those of Section 7 of the Clayton Act. 27 *McKinney's* [*N.Y.*] *Insurance Law* §§ 46–a(b); 67; *Minnesota House Bill* No. 1595, Sec. 2, Subd. 4, effective May 15, 1971. We know of no other investigation of the proposed transaction. In requesting an Advisory Opinion, MONY does not waive such rights as it may have under the McCarran-Ferguson Act (15 U.S.C. § 1012[b]) to claim that the proposed acquisition is not subject to the jurisdiction of either the FTC or the Department of Justice.

MONY was incorporated in the state of New York on April 12, 1842. It is a mutual life insurance company and sells to the public only participating ("par") insurance, that is, insurance on which dividends are from time to time paid to the policyholders.

MONY operates in 50 states, the District of Columbia, Puerto Rico, the Virgin Islands and Canada. It sells a broad line of life, accident and health insurance, including whole life and endowment, term, individual and group. MONY does not sell and has no subsidiaries which sell other forms of insurance, such as property-liability. MONY has not to date acquired any existing company in or out of the insurance field. It caused to be organized and owns several small companies related to its activities, to wit MONY Advisers, Inc., which in turn provides investment management for MONY Fund, Inc., an open-end mutual investment company. MONY Advisers, Inc., owns MONY Sales, Inc., which offers shares of the Fund to the public. Other wholly or partly owned or sponsored companies are MONY Mortgage Investors, a real estate investment trust, Key Resources, Inc., a premium financing subsidiary, and Insurance Systems of America, which produces and markets computer software systems for the life insurance industry.[1]

N. Am was incorporated in the state of Minnesota on April 17, 1896. It is a stock life insurance company and sells only non-participating ("non-par") insurance, that is, insurance with respect to which no dividends are paid to the policyholders.

N. Am is licensed in 49 states (all except New York), the District of Columbia and Canada. It sells a broad line of life and accident and health insurance, including whole life and endowment, term, individual, group and accident and health. Despite the word "Casualty" in its name, N. Am does not sell and has no subsidiaries which sell other forms of insurance, such as property-liability.

In May 1968, N. Am acquired the assets and business of a small life company, Thomas Edison Life Insurance Company, of Des Moines, Iowa, and the latter's wholly-owned subsidiary Nalac Financial Plans, Inc., a broker-dealership. At the time of acquisition, Thomas Edison Life had about $51,000,000 of insurance in force. Thomas Edison Life's operations were fully merged into N. Am's and figures herein relating to N. Am, since the merger, include Thomas Edison Life.

We are advised that the considerations weighed by MONY in reaching a tentative decision to acquire N. Am included the following:

(a) The belief that the investment of funds in the stock of N. Am would be more beneficial to MONY's policyholders than would the placement of such funds in other investments currently available to MONY.

(b) Acquisition of N. Am would aid MONY in broadening its access to the brokerage market. N. Am, in contrast to MONY, is geared to a brokerage operation. N. Am, we understand, has averaged 38% of its new sales of life insurance from brokers, in contrast to MONY's 3%. N. Am is said to have around 9,400 brokerage contracts, of which about 400 are considered active. MONY can expect some though not a large flow of business from such of N. Am's brokers as do not have strong ties with other mutual companies. N. Am's 250 career agents might also generate some business for MONY.

[1] See Special Report of MONY, filed May 20, 1971.

(c) MONY's field force, consisting of some 4,500 career agents, could be expected to channel some business to N. Am. To some clients, only low cost term or low premium non-par whole life, unavailable from MONY,[2] can be sold. Those sales are now lost by MONY to unrelated stock companies. To the extent that these sales were directed to N. Am, MONY would, through its ownership of N. Am stock, indirectly share in the profits therefrom. Moreover, for MONY's agents to be able to offer non-par insurance through an affiliated company tends to broaden the services which can be offered to clients.

(d) Experimenting with new lines of business is easier for a small stock company than an established mutual company. N. Am might serve as a testing ground for such new lines.

(e) MONY could offer to N. Am financial services and to its agents and brokers a broader product line including mutual funds and variable annuities.

(f) MONY could provide for reinsurance for N. Am.

(g) MONY's reputation in the industry could increase the confidence in N. Am of prospective clients of N. Am.

A. The Product Market

Both MONY and N. Am sell the normal complement of whole life, endowment and term, individual and group, and accident and health. Since accident and health insurance is a minor part of the business of both companies, we are of the opinion that the significant product market, viewing the acquisition as horizontal in nature, is life insurance generally.

MONY, as we have said, cannot sell non-par insurance. N. Am sells only non-par insurance. The distinction between non-par and par insurance may suggest the presence of a conglomerate aspect to the acquisition. Later herein we present our view that non-par and par insurance should not be considered as separate product lines.

B. The Geographic Market

Both MONY and N. Am are licensed in all states, except that N. Am is not licensed in New York. The nation, therefore, undoubtedly constitutes a relevant geographic market. We shall, however, also consider state and regional markets.

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[2] MONY, being a mutual life insurance company, is forbidden by law to sell non-par insurance. 27 *McKinney's* [*N.Y.*] *Insurance Law* § 216(5).

C. Concentration, Market Shares and Rankings in the National Market

The sale of life insurance is a very large business, and many of the companies engaged in the business are large. The absolute size of the companies in the insurance industry is not, however, indicative of concentration within the industry, as sometimes may be true in other industries. Unlike the surety and fidelity insurance markets, which are the subject of the Commission's proposed complaint challenging the merger of American General Insurance Company and Fidelity Deposit Company of Maryland, concentration in the life insurance market has been declining for many years.

Concentration and market shares in the life insurance industry may be measured by various tests, including admitted assets, total insurance in force, ordinary insurance in force, ordinary premiums received, group insurance in force and group premiums received. In 1969, the most recent year for which we have complete statistics, concentration of the four largest in the life insurance business was as follows: [3]

Admitted Assets (Total)	$213, 257, 000, 000
Four largest (a)	78, 919, 641, 000
Percent of 4 largest (Percent)	37. 01
Insurance in Force (Total)	$1, 482, 280, 000, 000
Four largest (b)	431, 159, 151, 000
Percent of 4 largest (Percent)	29. 08
Ordinary Insurance in Force (Total) (c)	$678, 887, 000, 000
Four largest (d)	223, 517, 169, 000
Percent of 4 largest (Percent)	32. 9
Ordinary Premiums Received (Total) (c)	$14, 833, 000, 000
Four largest (e)	5, 151, 000, 000
Percent of 4 largest (Percent)	34. 13
Group Insurance in Force (Total) (c)	$483, 240, 000, 000
Four largest (f)	225, 079, 000, 000
Percent of 4 largest (Percent)	46. 58
Group Premiums Received (Total) (c)	$4, 289, 000, 000
Four largest (f)	1, 647, 527, 000
Percent of 4 largest (Percent)	38. 41

[3] Except where otherwise noted, statistical figures herein are taken from *Best's Insurance Reports, Life-Health*, 1970 ("Best's"). For convenience, *Fortune's* List (May 1970) of the 50 largest insurance companies is appended hereto as Exhibit A. *Fortune* of May 1971 has very recently been published. It contains certain statistics for the 50 largest life insurance companies in 1970. A copy is attached as Exhibit B. Comparison with the 1970 *Fortune* indicates that for all practical purposes the 1969 figures used herein are representative.

(a) Prudential, Metropolitan, Equitable, New York Life.
(b) Metropolitan, Prudential, Equitable, John Hancock.
(c) From *1970 Life Insurance Fact Book*, pp. 20, 22, 29, 59 (*"Fact Book"*).
(d) Prudential, Metropolitan, New York Life, John Hancock.
(e) Prudential, Metropolitan, New York Life, Equitable.
(f) Metropolitan, Prudential, Aetna, Equitable.

Under any of these tests, market shares of the four largest fall far short of the description of a highly concentrated market in the Department of Justice *Merger Guidelines*, ¶ 4, where such a market is described as one where the four largest firms have 75% or more.

The 1969 percentages, moreover, represent a significant and steady decline over a period of many years. On an asset basis, for example, the larger firms had the following percentages of the life insurance market in the years indicated:

	[a] 1937	[b] 1939	[b] 1955	[b] 1957	[c] 1966	[c] 1969
Percent of assets held by:						
Largest firm	18.0	17.6	15.5	15.3	13.06	13.01
Two largest	31.7	NA	NA	NA	26.07	25.59
Four largest	49.3	49.0	44.8	44.1	38.12	37.01
Eight largest	60.7	NA	NA	NA	51.06	49.79
Ten largest	70.7	70.2	64.6	63.7	54.97	53.84
Twenty largest	NA	NA	[d] 73.63	[d] 72.62	[d] 66.53	[d] 65.11
Fifty largest	NA	NA	[d] 85.10	[d] 84.37	[d] 78.65	[d] 77.16

[a] From Vol. 1, Verbatim Record of the Proceedings of the Temporary National Economic Committee, Feb. 6, 1939, pp. 14, 34, Exh. No. 222. The eight largest firms at that time, in terms of assets, were Metropolitan, 18.0%; Prudential, 13.7%; N.Y. Life, 9.6%; Equitable, 8.0%; MONY, 5.1%; Northwestern Mutual, 4.5%; Travelers, 3.5%; and John Hancock, 3.5%. These percentages are those of 308 companies reporting. In 1935, there were 373 life insurance companies in the country (*1967 Life Insurance Fact Book*, p. 97). Hence, the TNEC percentages are probably reasonably close to the percentage of all companies.

[b] Senate Report No. 1834. The Insurance Industry, 86th Cong., 2d Sess., Report of the Committee on the Judiciary, Aug. 9, 1960 p. 224.

[c] *Best's*.

[d] *Best's; Fortune*, July 1956 (Supplement), p. 15; Aug. 1958, p. 119; June 1967, p. 218; May 1970, p. 206.

The decline in concentration is confirmed on a life insurance in force basis:

[In percent]

	1963	1964	1965	1966	1967	1968	1969
Four largest	34.09	33.21	31.93	31.18	30.53	29.62	29.09
Eight largest	46.77	45.81	44.33	43.46	42.93	42.26	(a)41.66

The same trend appears when the market shares are based on premiums received: (b)

(a) The twenty largest had the following percentages in the years indicated: 1955—67.19%; 1957—65.08%; 1966—55.75%; 1969—51.55% (*Best's; Fortune*).

(b) *Unique Manual Digest*, 1964, 1965; *Fortune*, 1966–70; *Fact Book*, p. 57. The percentages exclude Canadian companies doing business in the United States. Their inclusion would decrease the percentages indicated by 1% to 2%. Premium receipts include premiums from Accident and Health Insurance.

[In percent]

	1963	1964	1965(c)	1966	1967	1968	1969
Four largest	35. 91	35. 09	35. 23	33. 95	33. 19	32. 00	31. 02
Eight largest	49. 57	48. 67	48. 89	47. 36	46. 69	45. 58	44. 28

In contrast, the trend toward concentration in the *American General* case was, in the surety field:

(c) Temporary interruption of downward trend caused by adoption of Servicemen's Group Life Insurance ("SEGLI") which increased largest company's share as prime insurer.

[In percent]

	1962	1968
Four largest firms	25	31
Eight largest firms	43	48

And in the fidelity insurance field:

[In percent]

	1962	1968
Four largest firms	24	31
Eight largest firms	44	54

While the market share of the larger life insurance companies was declining, the number of life insurance companies has shown a significant increase in the last twenty years (*Fact Book*, p. 108):

Year:	Number of companies
1950	649
1955	1, 107
1960	1, 441
1965	1, 634
1966	1, 711
1967	1, 724
1968	1, 776
1969	1, 820
1970	[4] 1, 804

[4] *Best's Review*, March 1971, p. 10.

While some of these companies are quite small, fairly new companies have apparently progressed quite well. According to the *Fact Book* (p. 108), life insurance companies founded between 1926 and 1945, which accounted for 4% of life insurance in force in 1945, had increased their market share to 10% by 1968, and companies founded after 1945 had achieved 13% of the total.

MONY, considered in absolute terms, is of course a large company. Compared to the giants in the life insurance industry, however, it is not large, and its market share as well as that of N. Am are very small, as shown by the following table:

	MONY	N. Am
1969:		
Admitted assets	$3, 641, 935, 000	$136, 082, 087
All insurance in force	14, 742, 963, 000	3, 548, 921, 000
Ordinary insurance:		
In force	11, 554, 551, 000	1, 910, 324, 000
Premiums received	285, 627, 000	26, 548, 000
Group insurance:		
In force	2, 736, 049, 000	1, 638, 561, 000
Premiums received	17, 715, 000	8, 765, 000

	MONY	N. Am	Combined
1969—Percentage of total market:			
Admitted assets	1. 71	0. 06	1. 77
All insurance in force	0. 99	0. 24	1. 23
Ordinary insurance:			
In force	1. 70	0. 28	1. 98
Premiums received	1. 93	0. 18	2. 11
Group insurance:			
In force	0. 57	0. 34	0. 91
Premiums received	0. 41	0. 20	0. 61

In terms of admitted assets, MONY in 1969 ranked eleventh in size [5] and N. Am ranked 138th. The acquisition of N. Am will not increase MONY's ranking.

In terms of insurance in force, MONY ranked thirteenth in size in 1969,[6] and N. Am ranked sixty-fifth. The acquisition of N. Am would increase MONY's ranking to eleventh. The combined market shares of the two companies, however, will remain far below the top eight.

Like the concentration trend in the industry as a whole, MONY's share of the market has declined substantially. In 1937 MONY ranked as the fifth largest life insurance company in the country, with 5.1% of the total assets of all 308 companies reporting.[7] In 1969 MONY ranked eleventh with 1.71% of total assets of all life insurance companies.[8] On the basis of total life insurance in force, MONY declined from 1.09% in 1965 to 0.99% in 1969.[9]

N. Am's share has also declined slightly during the past five years. In terms of total insurance in force, N. Am had 0.28% in 1965 and 0.24% in 1969. In terms of total premiums N. Am ranked 97th in 1969, with only 0.14% of the market (*Fact Book*, p. 59). We are informed that in 1970, N. Am's premiums of various kinds declined from previous years so that N. Am may decrease in ranking on that basis.

The declining concentration trend in the industry, the extremely low market shares of MONY and N. Am, and the very low combined market share in our opinion distinguish the contemplated acquisition from previous cases where the enforcement agencies prevailed. See *United States* v. *Pabst Brewing Co.*, 384 U.S. 546 (1966) (combined share 4.5%; increasing concentration; Pabst moved from 10th to 5th position); *United States* v. *Alcoa*, 377 U.S. 271 (1964) (acquiring company ranked first with 27.8%; acquired company 1.3%; high concentration); *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 272 (1965) (acquiring company ranked third; acquired company ranked sixth; combined company ranked second; combined market share 7.5%; both companies growing rapidly; increasing concentration); *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 342, 345 (1962) (combined company second in retail market; combined market shares in

[5] MONY remains eleventh in 1970 (*Fortune*, May 1971, p. 194).

[6] MONY continues in thirteenth position in 1970 (*Fortune*, May 1971, p. 194).

[7] From Vol. 1, Verbatim Record of the Proceedings of the *Temporary National Economic Committee*, Feb. 6, 1939, pp. 14, 34, Exh. 222. In 1935, there were 373 life insurance companies in the country (*1967 Life Insurance Fact Book*, p. 97). Hence, the TNEC percentages appear reasonably close to the percentages of all companies.

[8] *Best's*.

[9] MONY's percentage of the assets of the 50 largest life insurance companies declined slightly from 2.21% in 1969 to 2.18% in 1970. Its percentage of the insurance in force of the 50 largest companies remained virtually stationary in the same period, increasing from 1.544% in 1969 to 1.545% in 1970. *Fortune*, May 1970, p. 206; *Fortune*, May 1971, p. 194.

numerous local markets ranged from 51.8% downward with only a few around 5%; trend toward concentration).

Moreover, in the complaint in which the Commission proposes to challenge Warner-Lambert Company's acquisition of Parke, Davis & Co., it is alleged that the merger will increase Warner-Lambert's ranking from 12th to 3rd place in the total hospitals and drug stores market and from 15th to 5th place in the ethical drug market. Although the proposed complaint does not allege market percentages of particular drugs, it does allege that, unlike the MONY acquisition, Warner-Lambert and Parke, Davis ranked, prior to the merger, among the top 4 or 8 sellers of some drugs. *FTC Determination to Issue Complaint*, File No. 711 0618, released April 20, 1971.

D. Ease of Entry

Unlike many industries, the life insurance industry is one where, in the interest of protection of the policyholders, the responsibility of the entrant should be more important than ease of entry. To the extent that barriers do exist, they derive principally from state regulation which, for example, imposes minimum capital and surplus requirements on new companies. These requirements vary from $70,000 in Arizona to $3,000,000 in New York.

In some states the requirements are no doubt overly lenient. A recent study suggests that a hypothetical new life company with $1,400,000 paid-in surplus and capital is likely to be insolvent in 5 to 8 years. A new company with $1,900,000 is likely to remain solvent under a basic expense pattern, but insolvent in 6 years under a higher expense pattern advocated by some experts. With $7,400,000 of paid-in surplus and capital, the company is likely to remain solvent under either test. E. J. Leverett, Jr., *Paid-In Surplus and Capital Requirements of a New Life Insurance Company*. Paper Presented at 1969 A.R.I.A. Annual Meeting.[10]

Other than the state-created barriers we know of no other significant barriers. As we have previously noted, many new life insurance companies come into being each year. This fact alone indicates that the conditions of entry do not foreclose new entrants.

Moreover, we do not see that the proposed acquisition would have any effect on ease of entry. The existence for many years of life insurance companies far larger than MONY has not, on the record, had a chilling effect on new entrants.

[10] A copy is annexed as Exhibit C.

E. N. Am Has Not Been a Disruptive Force in the Industry

We know of no respects in which N. Am has been an unusually competitive factor in the life insurance market (*Guidelines*, ¶ 8). The fact that N. Am's market share has remained relatively static for several years suggests that it has not. Nor does N. Am possess any asset which confers on it an unusual competitive advantage.

Following the acquisition, MONY's financial resources and prestige will perhaps afford N. Am's agents an additional selling point, and MONY's managerial resources will afford N. Am marketing and investment advice. It is also expected that recommendation of N. Am's non-par insurance by MONY's agents will possibly guide some business to N. Am. N. Am's market shares are so low, however, that it is impossible to foresee that these intangibles will have a significant impact on competition.

F. Market Shares on a State and Regional Basis

In thirteen states, MONY has 2% or more of the business on a 1968 ordinary and group permium basis. N. Am, however, has 2% or more only in its home state, Minnesota, with 2.13%. Here MONY has a mere 1.15% of the business, and the two companies 3.28% of the market. The minimum figures of the Guidelines, indicating even the likelihood of governmental challenge, are therefore not approached in N. Am's most important state.

In only eight states do the two companies have 3% or more of the business on a 1968 ordinary and group premium basis. These states are listed below, together with the corresponding market shares of MONY and N. Am, and their combined market shares.

[In percent]

	MONY	N. Am	Total
Alaska	8. 17	0. 04	8. 21
Idaho	5. 96	. 07	6. 03
Montana	4. 19	. 75	4. 94
Mississippi	3. 55	. 06	3. 61
Minnesota	1. 15	2. 13	3. 28
Louisiana	3. 04	. 02	3. 06
Wyoming	2. 90	. 58	3. 48
South Dakota	1. 35	1. 96	3. 31

Looking at the several state markets, it is difficult, in our opinion, to discern the possibility of a significant anticompetitive effect resulting from the acquisition. The only states where the market share of MONY exceeds 5% [11] are Alaska and Idaho. In neither of these states does N. Am add as much as 0.1% to MONY's market share. N. Am states that it has never had sales agencies in either state. N. Am's business in force in each state has been transferred from the original state of issue. At the end of 1969, N. Am reported only 101 policies for insurance in force of $1,998,000 in Alaska and only 582 policies for $2,878,000 of insurance in Idaho.

In Montana, N. Am has some agency force but its minimal market share of less than 1% does not add significantly to MONY's strength in that state.

Under the foregoing circumstances, it seems impossible to foresee any significant anticompetitive effect in any state.

Our view gains support when it is appreciated that we are discussing a very small percentage of the total United States market. For example, ordinary insurance in force in Alaska is only 0.1% of the national total, Idaho's percentage is only 0.31%, and Montana's only 0.32% (*Fact Book*, p. 20). Thus the three states together have only 0.73% of the ordinary insurance in force in the United States.

A region of the country may in appropriate circumstances constitute a proper geographic market in which to measure the effects of an acquisition.[12] We have selected for study the two industry-recognized regions in which the proposed MONY and N. Am combination would be the largest, the North Central (E & W) Region and the Pacific Region. The North Central Region has about 28.9% of the life insurance in force in the United States, and the Pacific Region has about 13.2% (*Fact Book*, p. 25).

The following table shows the market shares on an ordinary and group premium basis enjoyed by MONY and N. Am in 1968 in the states of the North Central Region:

[11] The minimum market share referred to in the *Guidelines* for either of the companies in an industry not highly concentrated. In the FTC Policy Statement of January 17, 1967, regarding mergers in the Food Distribution Industry, which was marked by increasing concentration, the FTC said that a merger of food or grocery stores representing not more than five percent of total food store sales in any city or county will not ordinarily require specific Commission review (1 Trade Reg. Rep. ¶ 4520, at p. 6807). In a similar Policy Statement of November 27, 1968, the Commission said that it would examine mergers in the increasingly concentrated Textile Mill Products Industry where the combined market share was 5% or more in a submarket in which the four leading firms had 35% or more of the market (1 Trade Reg. Rep. ¶ 4540, at p. 6821).

[12] *United States* v. *Pabst Brewing Co.*, 384 U.S. 546 (1966).

[In percent]

North Central (E & W)	MONY	N. Am	Combined
Illinois	1. 30	0. 23	1. 53
Indiana	0. 98	. 11	1. 09
Iowa	1. 89	. 53	2. 42
Kansas	1. 39	. 05	1. 44
Michigan	1. 05	. 14	1. 19
Minnesota	1. 15	2. 13	3. 28
Nebraska	0. 82	0. 17	0. 99
North Dakota	1. 13	1. 33	2. 46
Ohio	1. 41	0. 05	1. 46
South Dakota	1. 35	1. 96	3. 31
Wisconsin	1. 50	0. 62	2. 12

The non-weighted average combined market shares of MONY and N. Am in the North Central Region is 1.94% and the weighted percentage would be somewhat less.

The following table shows the market shares on an ordinary and group premium basis enjoyed by MONY and N. Am in 1968 in the states of the Pacific Region:

[In percent]

Pacific	MONY	N. Am	Combined
California	1. 86	0. 34	2. 20
Oregon	2. 13	0. 21	2. 34
Washington	2. 48	0. 25	2. 73
Alaska	8. 17	0. 14	8. 21
Hawaii	0. 61	0. 36	0. 97

The non-weighted average combined market shares of MONY and N. Am is 3.29%. Using a weighted average to acknowledge California's 77% of the Pacific Region Market, the combined market share of MONY and N. Am becomes 2.27%. In both regions the percentages are significantly below the minimum market share involved in mergers which the Department of Justice states that it will ordinarily challenge.

In the state and regional markets, as in the national market, the low market shares of both companies make it impossible to foresee any anticompetitive effects deriving from the acquisition.

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G. Conglomerate Aspects of the Proposed Acquisition

As we have said, the proposed acquisition appears basically to be a horizontal merger. We do not believe that it has conglomerate aspects. A conglomerate aspect, if one exists, derives from the circumstance that MONY which does not, and by law cannot, sell non-participating insurance,[13] is acquiring stock of a firm which sells only non-par insurance.[14]

We acknowledge, of course, that the Supreme Court has recognized submarkets the boundaries of which may be determined by such practical indicia as "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325 (1962).

The life insurance industry, however, views par and non-par insurance as essentially the same product. Life insurance agents want to be able to sell both types. As a consequence, a majority of the established stock companies sell both par and non-par. Franklin Life, the nineteenth largest ordinary life insurer, for example, issues both kinds, and its present insurance in force is split about 50–50 between par and non-par.

MONY, as we have said, is forbidden by New York law to sell non-par insurance. 27 *McKinney's Insurance Laws* § 216(5). Some states, however, permit a mutual company to sell non-par as well as par.

The non-par insurance characteristic of lower premiums becomes blurred in practice because of devices whereby mutual insurance premiums can be more closely equated with non-par premiums. Though MONY has resisted issuance of par insurance at non-par premium levels, it has issued a par life plan with a decrease in amount after two years, which simulates a non-par life contract by using dividends after issuance to buy term insurance to replace the decrease.

Let us assume *arguendo*, however, that par and non-par life insurance constitute separate submarkets. MONY's acquisition of N. Am is, we respectfully submit, equally valid under Section 7 of the Clayton Act.

The Commission's Bureau of Economics *Economic Report on Corporate Mergers* (October 1969) proposes guidelines for conglomerate

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[13] Except for conversion to extended term under non-forfeiture policy provisions, and for group insurance available to MONY's own staff.

[14] If a label were required, this aspect of the acquisition could be perhaps described as a conglomerate merger of the product-extension variety. *Economic Report on Corporate Mergers*, Bureau of Economics, Federal Trade Commission (Oct. 1969) p. 1–32).

mergers (Summary and Highlights of the Report, pp. 17–18). According to the Bureau, the following criteria describe conglomerate mergers most likely to violate the law: (1) When the acquiring corporation is a large enterprise having a substantial volume ($250 million in sales or assets) in one or more concentrated industries, and (2) when the acquired firm is one of the leading firms in at least one concentrated industry (a leading firm is one of the 4 to 6 largest sellers, and a concentrated industry is one where the four leading firms account for 40% or more of sales.

The Department of Justice *Guidelines*, ¶¶ 17, 18, focus on conglomerate acquisition by potential entrants. The Department says that it will ordinarily challenge any merger between one of the most likely entrants and (i) any firm with 25% or more of the market, or (ii) one of the two largest firms in a market in which the shares of the two largest amounts to 50% or more, or (iii) one of the four largest firms in a market in which the shares of the eight largest firms amount to 75% or more, providing the merging firm's share amounts to 10% or more, or (iv) one of the eight largest firms in a market in which the shares of these firms amount to 75% or more, provided either (a) the merging firm's share is not insubstantial and there are no more than one or two likely entrants, or (b) the merging firm is a rapidly growing firm.

MONY's acquisition of N. Am falls far short of the Bureau's and the Department's standards for a merger which might be challenged. On the basis of non-par ordinary insurance in force [15] of $264,766,000,000 in 1969, the top four companies had 17.90% of the market and the top eight had 27.13%. Concentration in this assumed submarket is therefore even less than in the total life market, and far short of the Bureau and Department of Justice *Guidelines*.

The company to be acquired, N. Am, in 1969, on the basis of ordinary non-par insurance, ranked 23rd among all stock companies, and had a market share of 0.72%. Again, according to the *Guidelines*, the proposed acquisition plainly is not one that should be challenged.

With particular reference to the Department's *Guidelines*, which focus on conglomerate acquisitions by potential entrants, it should be noted that MONY is not "one of the most likely entrants" by internal expansion because it is legally prohibited from selling non-par insurance. 27 *McKinney's Insurance Law* § 216(5).

Under these circumstances, MONY instead proposes to acquire a small company which, we respectfully submit, satisfies the conditions

[15] We are advised that as a practical matter group insurance can be eliminated from a consideration of market shares and rankings in the non-par market because the bulk of group insurance is issued on a participating basis.

of the Commission's "toehold" acquisition theory as enunciated in *Matter of Bendix*, Docket No. 8739, 3 CCH Trade Reg. Rep. ¶ 19,288 at 21,439 (1970). There, it will be recalled, the Commission held illegal Bendix's acquisition of Fram, which ranked third in the automotive filter industry with 12.4% of the market, when smaller companies were available for acquisition. Although the Commission did not expressly place an advance stamp of approval on an acquisition of a company such as Hastings Manufacturing Company, ranking seventh with 3.2% of the market, it did not disapprove that possibility and, in the context of the opinion, seems to grant at least tacit approval.[16]

Here, N. Am is a much smaller factor than Fram and, with a market share in the non-par market of 0.72% and a ranking among all stock companies of 23rd, it is, indeed, a much smaller factor than Hastings.

Accordingly, we believe that under any of the tests discussed, MONY's proposed acquisition of N. Am, even assuming that the acquisition has a conglomerate aspect, is valid.

In conclusion we respectfully request an Advisory Opinion as to the validity of the proposed acquisition. We will be happy to respond to requests for any additional facts, and to cooperate in any way possible.

Sincerely,

Royall, Koegel & Wells,
(S) H. Allen Lochner,
Attorneys for the Mutual Life Insurance Company of New York.

Applicability of the Standard for the Surface Flammability of Small Carpets and Rugs (DOC FF 2–70) to Terry Bath Mats. (File No. 723 7003)

Opinion Letter

December 2, 1971

Dear Mr. Lucas:

This is in response to your request for an advisory opinion as to the applicability of the Standard for the Surface Flammability of Small Carpets and Rugs (DOC FF 2–70), issued under the Flammable Fabrics Act to terry bath mats.

On December 18, 1969, the Department of Commerce published in the Federal Register a proposed Standard for the Surface Flammability of Carpets and Rugs and invited comments from interested parties.

[16] See also *Matter of Kennecott Copper Corporation*, FTC Docket No. 8765, issued May 5, 1971, where Kennecott, the largest copper company, sought to acquire Peabody Coal Company, the largest coal producer.

On April 16, 1970, the Department of Commerce published in the Federal Register the final Standard for the Surface Flammability of Carpets and Rugs (DOC FF 1–70). However, as a result of the comments received, this Standard excluded smaller carpets and rugs.

Nonetheless, in the same issue of the Federal Register of April 16, 1970, the Department of Commerce published a notice of need and a proposed complementary standard for small carpets and rugs. Subsequently, a final Standard for the Surface Flammability of Small Carpets and Rugs (DOC FF 2–70) was published on December 29, 1970, which becomes effective on December 29, 1971.

It must be noted that the definition of "Small Carpet" as contained in the DOC FF 2–70, clearly appears to encompass bath mats. This, in part, reads as follows:

(c) "Small Carpet" means any type of finished product made in whole or in part of fabric or related material and intended for use or which may reasonably be expected to be used as a floor covering which is exposed to traffic in homes, offices, or other places of assembly or accommodation. * * *

Moreover, further inquiries by members of the Commission's staff disclose that bath mats were the product which was responsible for the exclusion of small carpets and rugs from the Standard of April 16, 1970 (DOC FF 1–70), and for the development of the less rigid Standard (DOC FF 2–70), which permits the cautionary labeling for small carpets and rugs which do not meet the minimum flammability requirements.

In view of the circumstances as outlined above, there appears to be no doubt that bath mats are included within the scope of the Standard for the Surface Flammability of Small Carpets and Rugs (DOC FF 2–70).

By direction of the Commission.

Letter of Request

AUGUST 31, 1971

DEAR SIR:

This is to request an advisory opinion as to the applicability of Regulation DOC FF 2–70, "Standard For The Surface Flammability Of Small Carpets And Rugs," issued under the Flammable Fabrics Act, to terry bath mats (as distinguished from small bath rugs or carpets). This Regulation becomes effective in December 1971 and the requesting party is not the subject of a pending investigation or other proceeding by the Commission or any other governmental agency.

The terry bath mat product to which this request applies is a distinctive product and defined as an absorbent mat which (a) has dimensions of less than one square yard, (b) is woven on terry looms of textile fiber of a heavy terry construction, (c) has no face, pile or backing characteristic of a rug or carpet, and (d) is made and intended to be temporarily stood upon in the bathroom for water absorbency purposes immediately following the bath.

This question has been discussed with representatives of the Commission and the Department of Commerce and is of significant importance to the towel and bath mat industry. Your advisory opinion is needed in the near future in order to make production arrangements in ample time prior to the effective date of the Regulation should they be required.

Attached hereto is a brief in support of the position of this company that such products are not properly within the scope of the Standard. We will be glad to provide further information or evidence upon request. A specimen terry bath mat is being forwarded under separate cover to illustrate statements set out in the attached brief.

The writer can be reached by telephone at 919–623–8147.

I would appreciate acknowledgment of receipt of this request.

Very truly yours,

(S) W. B. LUCAS,
General Counsel.

RE: APPLICABILITY OF DOC FF 2–70 TO TERRY BATH MATS BRIEF OF FIELDCREST MILLS, INC.

This request for advisory opinion is directed to the fundamental question of whether the Flammable Fabrics Act and the Standard For The Surface Flammability Of Small Carpets And Rugs (DOC FF 2–70) are properly applicable to terry bath mats.

As used herein, a terry bath mat is defined as an absorbent mat which (a) has dimensions of less than one square yard, (b) is woven on terry looms of textile fiber of a heavy terry construction, (c) has no face, pile or backing characteristic of a rug or carpet, and (d) is made and intended to be temporarily stood upon in the bathroom for water absorbency purposes immediately following the bath.

I. TERRY BATH MATS ARE RARELY ON THE FLOOR AND DO NOT POSSESS THE ESSENTIAL CHARACTERISTICS DESCRIBED IN THE DEFINITION OF SMALL CARPETS AND RUGS

Part 1(c) of the Standard defines "Small Carpet" as fabric intended for use or may reasonably be expected to be used as a floor covering *which is exposed to traffic in homes*, etc. and, in Part 1(e), "Traffic Surface" is defined as a surface of a small carpet or rug *which is intended to be walked upon.*

A terry bath mat is an article specially made to provide the water absorbency of a towel and is normally on the floor only during the bath period. It is usually found on a hanger, rack, or tub at all other times. Its characteristics and functions are far more closely akin to a towel than a carpet or rug and it lacks any face, pile, backing, or skid resistance characteristic of a carpet or rug. It is made to be stood upon—not to withstand traffic or to be walked upon, characteristics essential to an article's classification as a small carpet or rug under the Standard.

Any potential risk of its contact with electric heaters is the same as that of a towel and it should be classified as a towel product rather than a floor covering product.

II. THERE IS NO FACTUAL EVIDENCE OR HISTORY OF A TERRY BATH MAT BECOMING IGNITED OR SMOLDERING TO CAUSE INJURY OR DAMAGE

The Notice of Standard in the Federal Register dated December 29, 1970, in subparagraph (c), recites the statutory requirement that the Standard "Is limited to small carpets and rugs which currently present the unreasonable risks specified in (a) above," and under the "Intent of the Standard" section, it is stated that the intent is to afford "protection to the general public from an unreasonable risk of the occurrence of fire."

Many millions of terry bath mats have been in use all over the world for approximately 100 years. Petitioner and its predecessors have produced millions of these articles and have never received a complaint or any information that a terry bath mat has been involved in igniting or supporting a fire or smoke. There has been no showing of a need for regulation of terry bath mats to protect the public from unreasonable risk as required under the Flammable Fabrics Act and there have not been any allegations or evidence to support a determination that cotton terry bath mats constitute any risk whatsoever. There is strong evidence to the contrary in that terry bath mats meet the flammability standards for wearing apparel under the Flammable Fabrics Act.

It is clear that a serious question exists as to the fulfillment of the statutory requirement of a finding of "unreasonable risk" in the case of terry bath mats. An interpretation that they are not included would lend much greater credence to the legality and validity of the Standard. Clearly, the statutory requirement of a showing of need for regulation has not been met with respect to this article.

III. THE INITIAL NOTICE OF PROPOSED FLAMMABILITY STANDARD AS PUBLISHED IN THE FEDERAL REGISTER ON APRIL 16, 1970, ACKNOWLEDGED THAT BATH MATS WERE NOT A SERIOUS HAZARD

Under the "Basis For Proposed Flammability Standard" section of the Notice, it is stated with respect to small rugs—"For many uses, *particularly as bath mats in bathrooms*, they are not used under or near other combustible interior furnishings." It is submitted that a terry bath mat is used only in the bathroom and is not suitable or interchangeable for use as a rug or carpet in any other room. Although a small rug or carpet may be multi-purpose, a terry bath mat is single purpose and constitutes a different and distinguishable article which, as stated in the above Notice, is not used under or near other combustible interior furnishings. Some may be used outside the bathroom as foot-wipe mats at home entrances or as sleeping mats for pets, but such use does not constitute use as a carpet or rug intended to be walked upon in the normal application.

It is submitted that if and when flammability standards are established for bath towels, then terry bath mats should properly meet these standards.

IV. INCLUSION OF TERRY BATH MATS IN THE STANDARD IS NOT LOGICAL OR CONSISTENT WITH OTHER REGULATIONS UNDER THE ACT

Terry towels and bath mats meet the flammability standards for wearing apparel under the Flammable Fabrics Act. Many garments are made from terry cloth. A determination that terry bath mats are hazardous on the floor while terry cloth is safe on the person is a paradox which the public and industry will find difficult and confusing. Logic dictates that such a situation should not be a part of a program intended to protect the public. It weakens the entire program and presents a vulnerable point to legal attack in the future.

V. A DETERMINATION THAT TERRY BATH MATS ARE FLOOR COVERING SUBJECT TO THE STANDARD IS NOT IN THE PUBLIC INTEREST

If terry bath mats are ultimately determined to be subject to the Standard, manufacturers have three alternatives:

1. *Treat presently used fibers against flammability.*

Treatments presently known adversely affect the texture or "hand" of the article and significantly add to its cost. The unattractive terry bath mat would lose a great deal of its consumer appeal and usually result in the consumer purchasing a small bath rug at a higher price.

2. *Manufacture from different materials.*

To do this results in a sacrifice in absorbency and an increase in price, making the article less salable with the result that the consumer would probably purchase a higher priced product.

3. *Apply the required label when the Standard is not met.*

Retailers generally do not wish to handle any product that has an indication of hazard associated with it. The logical tendency will be to replace it with other articles serving the same purpose, all of which will be at a higher price.

On this point, it is particularly tragic that an article which has been used safely for many years by the many millions of units and has never been proven or even indicated to be hazardous should be subject to the probability of greatly reduced usage due to an unnecessary and erroneous application of flammability standards which would have an effect contrary to the public interest the Standard is intended to serve.

It is submitted that cotton terry bath mats as defined above clearly distinguishes them from all other small rugs and carpets and are not properly within the scope, definition, and intention of the Flammable Fabrics Act or the Standard.

FIELDCREST MILLS, INC.,
(S) W. B. LUCAS,
General Counsel.

AUGUST 31, 1971.

Opinion

Proposed Plan To Advertise and Use a Special Renewal Voucher Which May Be Applied to Subscription Renewals for "Changing Times" Magazine. (File No. 723 7004)*

Opinion Letter

DECEMBER 10, 1971

DEAR MR. MORGAN:

This is in response to your letter of April 8, 1971, requesting Commission advice concerning a proposed plan to advertise and use a "special renewal voucher" which may be applied to subscription renewals for "Changing Times" magazine.

As the Commission understands the facts, this voucher will be given to new subscribers who submit two dollars with their request for a trial subscription to "Changing Times." The voucher is worth one dollar when it is applied to a one-year renewal subscription after the trial period expires.

The Commission has given this matter careful consideration and has determined that, based on the information furnished, it would not initiate proceedings under statutes it administers, provided the plan is implemented in the manner described.

By direction of the Commission.

Supplemental Letter of Request

MAY 3, 1971

DEAR MR. WENTZ:

I certainly enjoyed our telephone conversation on Friday, and your ideas were most helpful to me.

Enclosed is a corrected copy of our radio commercial. This includes the stapled-on paragraph "B" at the bottom of Page 2, which you did not get, a slightly revised version of the final paragraph on Page 3 (to include the word "renewal"), and a revised first paragraph of the closing commercial along the lines you suggested.

I believe these revisions should make the offer completely clear. Thanks again for your help.

Sincerely,

(S) BOYCE MORGAN,
Vice President.

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*Because of the volume of materials submitted, all are not published. However, they are available for public inspection at the Division of Legal and Public Records, Federal Trade Commission, Washington, D.C.

Letter of Request

APRIL 8, 1971

DEAR MR. PITOFSKY:

We would very much appreciate an advisory opinion from the Federal Trade Commission on the following matter:

We plan to use a voucher offering to new subscribers to Changing Times magazine, a $1 reduction on the subscription price, if and when they continue their subscription beyond the trial period.

Attached is a rough layout of the voucher itself, which we would send to the new subscriber when we receive his trial subscription. It is marked "A".

Also attached are the commercials used in our 15-minute radio programs. The portions of the commercials which refer to this proposed new cash-up offer are marked "B" and "C".

For background, I am also enclosing one of our present direct mail packages offering a trial subscription to "Changing Times". The slip marked "D" covers the Tax Booklet which we are currently offering as a cash-up. If our test of the $1 voucher on radio is successful, we may also test this voucher in our direct mail.

What we are asking for specifically is your advisory opinion on this new voucher offer. However, we would also appreciate your comment on the way we qualify our use of the word "free" in our subscription offers. We have made a special effort to avoid any misunderstanding as to what the new subscriber must do to obtain our material. And we would like to be sure that our practices here are in line with the Commission's thinking.

It was a pleasure meeting you earlier this week. We'll look forward to receiving the advisory opinion as soon as it is convenient.

Sincerely,

(S) BOYCE MORGAN,
Vice President.

DECISIONS AND ORDERS

[1]Commodities involved in dismissing or vacating orders are indicated by *italicized* page reference.

DECISIONS AND ORDERS

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DECISIONS AND ORDERS

*Covering practices and matters involved in Commission orders. For index of commodities, *see* Table of Commodities. References to matters involved in vacating or dismissing orders are indicated by *italics*

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