

Complaint

IN THE MATTER OF

ROCKLYN TEXTILE CORP., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION AND THE FLAMMABLE FABRICS ACTS

Docket C-1960. Complaint, June 30, 1971—Decision, June 30, 1971

Consent order requiring a New York City wholesaler and distributor of textiles, including pieces or bolts of fabric, to cease violating the Flammable Fabrics Act by importing or selling any fabric which fails to conform to the standards of said Act.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Flammable Fabrics Act, as amended, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Rocklyn Textile Corp., a corporation, and Joseph H. Nadboy, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Flammable Fabrics Act, as amended, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Rocklyn Textile Corp. is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York. Its address is 260 West 39th Street, New York, New York.

Respondent Joseph H. Nadboy is an officer of the corporate respondent. He formulates, directs and controls the acts, practices and policies of the said corporate respondent including those herinafter set forth. His address is the same as that of the corporation.

Respondents are wholesalers and distributors of textile fabrics.

PAR. 2. Respondents are now and for some time last past have engaged in the sale and offering for sale, in commerce and the importation into the United States, and have introduced, delivered for introduction, transported and caused to be transported in commerce, and have sold or delivered after sale or shipment in commerce, fabric, as the terms "commerce" and "fabric" are defined in the Flammable Fabrics Act, as amended, which fabric fails to conform to an applicable standard or regulation continued in effect, issued or

amended under the provisions of the Flammable Fabrics Act, as amended.

Among such products mentioned hereinabove were pieces or bolts of fabric.

PAR. 3. The aforesaid acts and practices of respondents were and are in violation of the Flammable Fabrics Act, as amended, and the Rules and Regulations promulgated thereunder, and constituted and now constitute unfair methods of competition and unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Division of Textiles and Furs proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Flammable Fabrics Act, as amended; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Rocklyn Textile Corp., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Individual respondent Joseph H. Nadboy is an officer of corporate

respondent. He formulates, directs and controls the acts, practices and policies of said corporate respondent.

Respondents are wholesalers and distributors of textile fabrics with their office and principal place of business located at 260 West 39th Street, New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That the respondents Rocklyn Textile Corp., a corporation, and its officers, and Joseph H. Nadboy, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from selling, offering for sale, in commerce, or importing into the United States, or introducing, delivering for introduction, transporting or causing to be transported in commerce, or selling or delivering after sale or shipment in commerce, any product, fabric or related material; or selling or offering for sale, any product made of fabric or related material which has been shipped or received in commerce as "commerce," "product," "fabric" and "related material" are defined in the Flammable Fabrics Act, as amended, which product, fabric or related material fails to conform to an applicable standard or regulation issued, amended or continued in effect, under the provisions of the aforesaid Act.

It is further ordered, That respondents notify all of their customers who have purchased or to whom has been delivered the fabric which gave rise to this complaint, of the flammable nature of said fabric and effect the recall of said fabric from such customers.

It is further ordered, That the respondents herein either process the fabric which gave rise to the complaint so as to bring it into conformance with the applicable standard of flammability under the Flammable Fabrics Act, as amended, or destroy said fabric.

It is further ordered, That the respondents herein shall, within ten (10) days after service upon them of this order, file with the Commission a special report in writing setting forth the respondents' intention as to compliance with this order. This special report shall also advise the Commission fully and specifically concerning (1) the identity of the fabric which gave rise to the complaint, (2) the amount of said fabric in inventory, (3) any action taken and any further actions proposed to be taken to notify customers of the flammability of said fabric and effect the recall of said fabric from

customers, and of the results thereof, (4) any disposition of said fabric since April 1970, and (5) any action taken or proposed to be taken to bring said fabric into conformance with the applicable standard of flammability under the Flammable Fabrics Act, as amended, or destroy said fabric, and the results of such action. Such report shall further inform the Commission as to whether or not respondents have in inventory any product, fabric, or related material having a plain surface and made of paper, silk, rayon and acetate, nylon and acetate, rayon, cotton or any other material or combinations thereof in a weight of two ounces or less per square yard, or any product, fabric or related material having a raised fiber surface. Respondents shall submit samples of not less than one square yard in size of any such product, fabric, or related material with this report.

It is further ordered, That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

MODLIN FABRICS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION AND THE FLAMMABLE FABRICS ACTS

Docket C-1961. Complaint, June 30, 1971—Decision, June 30, 1971

Consent order requiring a New York City seller and distributor of fabrics, including a white cotton organdy designated as Quality 9800, to cease violating the Flammable Fabrics Act by importing or selling any fabric which fails to conform to the standards of said Act.

Pursuant to the provisions of the Federal Trade Commission Act and the Flammable Fabrics Act, as amended, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Modlin Fabrics, Inc., a corporation, and Roy Modlin, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts, and the Rules and Regulations promulgated under the Flammable Fabrics Act, as amended, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Modlin Fabrics, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. Its address is 240 West 40th Street, New York, New York.

Respondent Roy Modlin is an officer of the corporate respondent. He formulates directs and controls the acts, practices and policies of the said corporate respondent including those hereinafter set forth.

The respondents are engaged in the sale and distribution of fabrics which are intended for use, or which may reasonably be expected to be used, in products, as the terms "fabric" and "product" are defined in the Flammable Fabrics Act, as amended.

PAR. 2. Respondents are now and for some time last past have been engaged in the sale or offering for sale, in commerce, and have introduced, delivered for introduction, transported and caused to be transported in commerce, and have sold or delivered after sale or shipment in commerce, fabrics, as "commerce" and "fabric" are defined in the Flammable Fabrics Act, as amended, which fabrics failed to conform to an applicable standard or regulation continued in effect, issued or amended under the provisions of the Flammable Fabrics Act, as amended.

Among such fabrics mentioned hereinabove was a 100 percent white cotton organdy designated as Quality 9800.

PAR. 3. The aforesaid acts and practices of respondents were and are in violation of the Flammable Fabrics Act, as amended, and the Rules and Regulations promulgated thereunder, and constituted, and now constitute unfair methods of competition and unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

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The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Division of Textiles and Furs, Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Flammable Fabrics Act, as amended; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Modlin Fabrics, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Respondent Roy Modlin is an officer of the corporate respondent. He formulates, directs and controls the acts, practices and policies of said respondent.

Respondents are jobbers of silk, woolen, cotton and rayon fabrics with their office and principal place of business located at 240 West 40th Street, New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of the proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Modlin Fabrics, Inc., a corporation, and Roy Modlin, individually and as an officer of said corpora-

tion, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from selling or offering for sale, in commerce, or importing into the United States, or introducing, delivering for introduction, transporting or causing to be transported, in commerce, or selling or delivering after sale or shipment in commerce any product, fabric, or related material; or manufacturing for sale, selling or offering for sale any product made of fabric or related material which has been shipped or received in commerce, an "commerce," "product," "fabric" and "related material" are defined in the Flammable Fabrics Act, as amended, which product, fabric or related material fails to conform to any applicable standard or regulation issued, amended or continued in effect, under the provisions of the aforesaid Act.

It is further ordered, That respondents notify all of their customers who have purchased or to whom has been delivered the fabric which gave rise to the complaint of the flammable nature of said fabric, and effect recall of said fabric from such customers.

It is further ordered, That the respondents herein either process the fabric which gave rise to the complaint so as to bring it into conformance with the applicable standard of flammability under the Flammable Fabrics Act, as amended, or destroy said fabric.

It is further ordered, That the respondents herein shall, within ten (10) days after service upon them of this order, file with the Commission a special report in writing setting forth the respondents' intentions as to compliance with this order. This special report shall also advise the Commission fully and specifically concerning (1) the identity of the fabric which gave rise to the complaint, (2) the amount of said fabric in inventory, (3) any action taken and any further actions proposed to be taken to notify customers of the flammability of said fabric and effect and recall of said fabric from customers and of the results thereof, (4) any disposition of said fabric since April 15, 1970, and (5) any action taken or proposed to be taken to bring said fabric into conformance with the applicable standard of flammability under the Flammable Fabrics Act, as amended, or destroy said fabric and the results of such action. Such report shall further inform the Commission as to whether or not respondents have in inventory any product, fabric, or related material having a plain surface and made of paper, silk, rayon and acetate, nylon and acetate, rayon, cotton or any other material or combinations thereof in a weight of two ounces or less per square yard, or any product, fabric or related material having a raised fiber surface. Respondents shall submit samples of not less than one square yard

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in size of any such product, fabric, or related material with this report.

It is further ordered, That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

INDIA NEPAL, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION AND THE FLAMMABLE FABRICS ACTS

Docket C-1962. Complaint, June 30, 1971—Decision, June 30, 1971

Consent order requiring a New York City importer and distributor of Indian-made goods, including ladies' scarves, to cease violating the Flammable Fabrics Act by importing or selling any fabric which fails to conform to the standards of said Act.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Flammable Fabrics Act, as amended, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that India Nepal, Inc., a corporation, and Murli P. Hathiramani, also known as P. H. Murli, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Flammable Fabrics Act, as amended, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent India Nepal, Inc., is a corporation orga-

nized, existing and doing business under and by virtue of the laws of the State of New York. Its address is 3 East 28th Street, New York, New York.

Respondent Murli P. Hathiramani, also known as P. H. Murli is an officer of the corporate respondent. He formulates, directs and controls the acts, practices and policies of the said corporate respondent including those hereinafter set forth.

Respondents are engaged in the importation and sale of Indian made goods, including, but not limited to, ladies' scarves.

PAR. 2. Respondents are now and for some time last past have been engaged in the sale and offering for sale, in commerce, and the importation into the United States, and have introduced, delivered for introduction, transported and caused to be transported in commerce, and have sold or delivered after sale or shipment in commerce, products, as the terms "commerce" and "product" are defined in the Flammable Fabrics Act, as amended, which products failed to conform to an applicable standard or regulation continued in effect, issued or amended under the provisions of the Flammable Fabrics Act, as amended.

Among such products mentioned hereinabove were ladies' scarves.

PAR. 3. The aforesaid acts and practices of respondents were and are in violation of the Flammable Fabrics Act, as amended, and the Rules and Regulations promulgated thereunder, and constituted and now constitute unfair methods of competition and unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Flammable Fabrics Acts, as amended; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an ad-

mission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent India Nepal, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Individual respondent Murli P. Hathiramani also known as P. H. Murli, is an officer of corporate respondent. He formulates, directs and controls the acts, practices and policies of said corporate respondent.

Respondents are engaged in the importing, wholesaling and retailing of various Indian made products including, but not limited to, scarves, with their office and principal place of business located at 3 East 28th Street, New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of the proceeding and of the respondents and the proceeding is in the public interest.

ORDER

It is ordered, That the respondents India Nepal, Inc., a corporation, and its officers and Murli P. Hathiramani, also known as P. H. Murli, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from selling, offering for sale, in commerce, or importing into the United States, or introducing, delivering for introduction, transporting or causing to be transported in commerce, or selling or delivering after sale or shipment in commerce, any product, fabric, or related material; or selling or offering for sale, any product made of fabric or related material which has been shipped or received in commerce as "commerce," "product," "fabric" and "related material" are defined in the Flammable Fabrics Act, as amended, which product, fabric or related material fails to conform to an applicable standard or regu-

lation issued, amended or continued in effect under the provisions of the aforesaid Act.

It is further ordered, That respondents notify all of their customers who have purchased or to whom have been delivered the products which gave rise to the complaint of the flammable nature of said products and effect the recall of said products from such customers.

It is further ordered, That the respondents herein either process the products which gave rise to the complaint so as to bring them into conformance with the applicable standard of flammability under the Flammable Fabrics Act, as amended, or destroy said products.

It is further ordered, That the respondents herein shall, within ten (10) days after service upon them of this order, file with the Commission a special report in writing setting forth the respondents' intentions as to compliance with this order. This special report shall also advise the Commission fully and specifically concerning (1) the identity of the products which gave rise to the complaint, (2) the number of said products in inventory, (3) any action taken and any further actions proposed to be taken to notify customers of the flammability of said products and effect the recall of said products from customers, and of the results thereof, (4) any disposition of said products since April 1970, and (5) any action taken or proposed to be taken to bring said products into conformance with the applicable standard of flammability under the Flammable Fabrics Act, as amended, or destroy said products, and the results of such action. Such report shall further inform the Commission as to whether or not respondents have in inventory any product, fabric or related material having a plain surface and made of paper, silk, rayon and acetate, nylon and acetate, rayon, cotton or any other material or combinations thereof in a weight of two ounces or less per square yard, or any product, fabric or related material having a raised fiber surface. Respondents shall submit samples of not less than one square yard in size of any such product, fabric, or related material with this report.

It is further ordered, That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent corporation shall forth-

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with distribute a copy of this order to each of its operating divisions.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

I. C. HERMAN & CO., INC., DOING BUSINESS AS ROBINSON
& GULLUBER, ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION AND THE FLAMMABLE FABRICS ACTS

Docket C-1963. Complaint, June 30, 1971—Decision, June 30, 1971

Consent order requiring a New York City importer and manufacturer of women's and men's wearing apparel, including ladies' scarves and accessories, to cease violating the Flammable Fabrics Act by importing or selling any fabric which fails to conform to the standards of said Act.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Flammable Fabrics Act, as amended, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that I.C. Herman & Co., Inc., a corporation, doing business under its own name and under the trade name Robinson & Golluber, and Bertram Greenberg and Sigmund Kleinman, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Flammable Fabrics Act, as amended, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent I.C. Herman & Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey. Its address is 151 Lanza Avenue, Garfield, New Jersey, with its executive and sales offices at 244 Madison Avenue, New York, New York.

Respondents Bertram Greenberg and Sigmund Kleinman are

officers of the corporate respondent. They formulate, direct and control the acts, practices and policies of the said corporate respondent including those hereinafter set forth.

Respondents are engaged in the importation, manufacture and sale of women's and men's wearing apparel, including but not limited to, ladies' scarves and accessories.

PAR. 2. Respondents are now and for some time last past have been engaged in the manufacture for sale, the sale and offering for sale, in commerce, and the importation into the United States and have introduced, delivered for introduction, transported and caused to be transported in commerce, and have sold or delivered after sale or shipment in commerce, products, as the terms "commerce" and "product" are defined in the Flammable Fabrics Act, as amended, which products fail to conform to an applicable standard or regulation continued in effect, issued or amended under the provisions of the Flammable Fabrics Act, as amended.

Among such products mentioned hereinabove, were 43 dozen ladies' sheer all rayon scarfs, style 5N649, imported from Japan.

PAR. 3. The aforesaid acts and practices of respondents were and are in violation of the Flammable Fabrics Act, as amended, and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Flammable Fabrics Act, as amended.

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

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The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondents Bertram Greenberg and Sigmund Kleinman are officers of the corporate respondent. They formulate, direct and control the acts, practices and policies of the said corporate respondent including those hereinafter set forth.

Respondent I.C. Herman & Co., is a corporation, doing business under its own name and under the trade name Robinson & Golluber. It is incorporated in the State of New Jersey, with its home office at 151 Lanza Avenue, Garfield, New Jersey, and its executive and sales office at 244 Madison Avenue, New York, New York.

Respondents are engaged in the importation, manufacture and sale of women's and men's wearing apparel, including but not limited to, ladies' scarves and accessories.

2. The Federal Trade Commission has jurisdiction of the subject matter of the proceeding and of the respondents and the proceeding is in the public interest.

ORDER

It is ordered, That the respondents I.C. Herman & Co., Inc., a corporation, doing business under its own name and under the trade name Robinson & Golluber, and its officers, and Bertram Greenberg and Sigmund Kleinman, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from manufacturing for sale, selling, offering for sale, in commerce, or importing into the United States, or introducing, delivering for introduction, transporting or causing to be transported in commerce, or selling or delivering after sale or shipment in commerce, any product, fabric or related material; or manufacturing for sale, selling or offering for sale, any product made of fabric or related material which has been shipped or received in commerce, as "commerce," "product," "fabric" and "related material" are defined in the Flammable Fabrics Act, as amended, which product, fabric or related material fails to conform to an applicable

standard or regulation issued, amended or continued in effect, under the provisions of the aforesaid Act.

It is further ordered, That respondents notify all of their customers who have purchased or to whom have been delivered the products which gave rise to the complaint of the flammable nature of said products and effect the recall of said products from such customers.

It is further ordered, That the respondents herein either process the products which gave rise to the complaint so as to bring them into conformance with the applicable standard of flammability under the Flammable Fabrics Act, as amended, or destroy said products.

It is further ordered, That the respondents herein shall, within ten (10) days after service upon them of this order, file with the Commission a special report in writing setting forth the respondents' intentions as to compliance with this order. This special report shall also advise the Commission fully and specifically concerning (1) the identity of the products which gave rise to the complaint, (2) the number of said products in inventory, (3) any action taken and any further actions proposed to be taken to notify customers of the flammability of said products and effect the recall of said products from customers, and of the results thereof, (4) any disposition of said products since September 14, 1970, and (5) any action taken or proposed to be taken to bring said products into conformance with the applicable standard of flammability under the Flammable Fabrics Act, as amended, or destroy said products and the results of such action. Such report shall further inform the Commission as to whether or not respondents have in inventory any product, fabric, or related material having a plain surface and made of paper, silk, rayon and acetate, nylon and acetate, rayon, cotton or any other material or combinations thereof in a weight of two ounces or less per square yard, or any product, fabric, or related material having a raised fiber surface. Respondents shall submit samples of not less than one square yard in size of any such product, fabric or related material with this report.

It is further ordered, That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That the respondent corporation shall forth-

with distribute a copy of this order to each of its operating divisions.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

LA ROSE HANDKERCHIEF CO., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION AND THE FLAMMABLE FABRICS ACTS

Docket C-1964. Complaint, June 30, 1971—Decision, June 30, 1971

Consent order requiring a New York City importer and distributor of textile fiber products, including certain sheer lightweight scarves, to cease violating the Flammable Fabrics Act by importing and selling any fabric which fails to conform to the standards of said Act.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Flammable Fabrics Act, as amended, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that La Rose Handkerchief Co., a partnership, and George Abousleman and Madeline Abousleman, individually and as copartners, trading as La Rose Handkerchief Co., hereinafter referred to as respondents, have violated the provisions of said Acts and Rules and Regulations promulgated under the Flammable Fabrics Act, as amended, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent La Rose Handkerchief Co., is a partnership organized, existing and doing business under and by virtue of the laws of the State of New York. Its office address and principal place of business was at 303 5th Avenue, New York, New York until January 31, 1971, when it discontinued operations at said address.

Respondents George Abousleman and Madeline Abousleman are partners of the partnership respondent. They formulate, direct and control the acts, practices and policies of the said partnership respondent including those hereinafter set forth.

Respondents are engaged in the sale, importation and distribution of textile fiber products, including, but not limited to, certain sheer lightweight scarves.

PAR. 2. Respondents are now and for some time last past have been engaged in the sale and offering for sale in commerce, and have introduced, delivered for introduction, transported and caused to be transported in commerce, and have sold or delivered after sale or shipment in commerce, products, as the terms "commerce" and "product" are defined in the Flammable Fabrics Act, as amended, which fail to conform to an applicable standard or regulation in effect, issued or amended under the provisions of the Flammable Fabrics Act, as amended.

Among such products mentioned hereinabove were certain sheer lightweight scarves, made of "All Rayon," imported from Japan, designated as Styles 1400/53, 1400/60 and 1400/R.

PAR. 3. The aforesaid acts and practices of respondents were and are in violation of the Flammable Fabrics Act, as amended, and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Flammable Fabrics Act, as amended; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the exe-

cuted agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent La Rose Handkerchief Co. is a partnership organized, existing and doing business under and by virtue of the laws of the State of New York. Its office and principal place of business was located at 303 Fifth Avenue, New York, New York until January 31, 1971, when it discontinued operations at said address.

Respondents George Abousleman and Madeline Abousleman are partners of said partnership. They formulate, direct and control the acts, practices and policies of said partnership.

Respondents are engaged in the sale of fabrics and products made therefrom, including, but not limited to, certain sheer lightweight ladies' scarves, made of "All Rayon," imported from Japan, designated as Styles 1400/53, 1400/60 and 1400/R.

2. The Federal Trade Commission has jurisdiction of the subject matter of the proceeding and of the respondents and the proceeding is in the public interest.

ORDER

It is ordered, That the respondents, La Rose Handkerchief Co., a partnership, and George Abousleman and Madeline Abousleman, individually and as copartners trading as La Rose Handkerchief Co., or under any other name or names, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from manufacturing for sale, selling, offering for sale, in commerce, or importing into the United States, or introducing, delivering for introduction, transporting or causing to be transported in commerce, or selling or delivering after sale or shipment in commerce, any product, fabric or related material; or manufacturing for sale, selling or offering for sale, any product made of fabric or related material which has been shipped in commerce, as "commerce," "product," "fabric" or "related material" are defined in the Flammable Fabrics Act, as amended, which product, fabric or related material, fails to conform to an applicable standard or regulation continued in effect, issued or amended under the provisions of the aforesaid Act.

It is further ordered, That respondents notify all of their customers who have purchased or to whom have been delivered the scarves which gave rise to this complaint of the flammable nature of such scarves and effect the recall of said scarves from said customers.

It is further ordered, That the respondents herein either process the scarves which gave rise to the complaint so as to bring them within the applicable flammability standards of the Flammable Fabrics Act, as amended, or destroy said scarves.

It is further ordered, That the respondents herein shall, within ten (10) days after service upon them of this order, file with the Commission an interim special report in writing setting forth the respondents' intentions as to compliance with this order. This interim report shall also advise the Commission fully and specifically concerning (1) the identity of the scarves which gave rise to the complaint, (2) the number of such scarves in inventory, (3) any action taken and any further actions proposed to be taken to notify customers of the flammability of said scarves and effect the recall of said scarves from customers, and of the results of such actions, (4) any disposition of such scarves since November 13, 1970, and (5) any action taken or proposed to be taken to flameproof or destroy said scarves and the results of such action. Such report shall further inform the Commission whether respondents have in inventory any fabric, product, or related material having a plain surface and made of paper, silk, rayon and acetate, nylon and acetate, rayon, cotton or combinations thereof in a weight of two ounces or less per square yard, or having a raised fiber surface made of cotton or rayon or combinations thereof. Respondents shall submit samples of any such fabric, product or related material with this report. Samples of the fabric, product, or related material shall be of no less than one square yard of material.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

ROSEN BROS. TEXTILE CORP., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION AND THE WOOL PRODUCTS
LABELING ACTS

Docket C-1965. Complaint, June 30, 1971—Decision, June 30, 1971

Consent order requiring a New York City importer and wholesaler of woolen fabrics to cease misbranding such wool products.

Complaint

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COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Rosen Bros. Textile Corp., a corporation, and Philip Rosen and Morris Rosen, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act of 1939, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Rosen Bros. Textile Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 3-5 Washington Place, New York, New York.

Respondents Philip Rosen and Morris Rosen are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation, and their address is the same as that of the corporate respondent.

Respondents are engaged in the importation and wholesaling of fabric. They ship and distribute fabric to various customers in the United States.

PAR. 2. Respondents, now and for some time last past, have introduced into commerce, sold, transported, distributed, delivered for shipment, shipped, and offered for sale, in commerce, as "commerce" is defined in said Wool Products Labeling Act of 1939, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a) (1) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder in that they were falsely and deceptively stamped, tagged, labeled, or otherwise identified with respect to the character and amount of constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were bolts of fabric which were stamped, tagged, labeled or otherwise identified by respondents as containing "40% acrylic, 40% reprocessed wool, 20% cotton" whereas, in truth and in fact, said wool products contained substantially different fibers and amounts of fibers than as represented.

PAR. 4. Certain of said wool products were further misbranded by

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Decision and Order

respondents in that they were not stamped, tagged, labeled, or otherwise identified as required under the provisions of Section 4(a) (2) of the Wool Products Labeling Act of 1939, and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were wool products, namely bolts of fabric with labels on or affixed thereto, which failed to disclose the percentage of the total fiber weight of the said wool products, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight of (1) wool; (2) reprocessed wool; (3) reused wool; (4) each fiber other than wool, when said percentage by weight of such fiber was 5 per centum or more; and (5) the aggregate of all other fibers.

PAR. 5. Certain of said wool products were misbranded in violation of the Wool Products Labeling Act of 1939 in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respect: that samples, swatches or specimens of wool products used to promote or effect sales of such wool products in commerce, were not labeled or marked to show the information required under Section 4(a) (2) of the Wool Products Labeling Act of 1939, and the Rules and Regulations promulgated thereunder, in violation of Rule 22 of the aforesaid Rules and Regulations.

PAR. 6. The acts and practices of the respondents as set forth above were, and are, in violation of the Wool Products Labeling Act of 1939, and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission

by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Rosen Bros. Textile Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 3-5 Washington Place, New York, New York.

Respondents Philip Rosen and Morris Rosen are officers of said corporate respondent. They formulate, direct and control the policies, acts and practices of said corporation and their address is the same as that of said corporation.

Respondents are importers and wholesalers of fabric.

2. The Federal Trade Commission has jurisdiction of the subject matter of the proceeding and of the respondents and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Rosen Bros. Textile Corp. a corporation, and its officers, and Philip Rosen and Morris Rosen, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the offering for sale, sale, transportation, distribution, delivery for shipment or shipment, in commerce, of wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from:

A. Misbranding such products by:

1. Falsely and deceptively stamping, tagging, labeling or otherwise identifying such products as to the character or amount of the constituent fibers contained therein.

2. Failing to securely affix to, or place on, each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

3. Failing to affix labels to samples, swatches or specimens of wool products used to promote or effect the sale of wool products, showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 4(a)(2) of the Wool Products Labeling Act of 1939.

It is further ordered, That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

INTERLOCUTORY, VACATING, AND MISCELLANEOUS
ORDERS

LEHIGH PORTLAND CEMENT COMPANY

Docket 8680. Order and Opinion, Jan. 5, 1971

Order vacating initial decision and remanding case to hearing examiner for further proceedings.

OPINION AND ORDER VACATING INITIAL DECISION AND REMANDING FOR
FURTHER PROCEEDINGS

This matter is before the Commission on notice by respondent of intention to appeal the hearing examiner's "Initial Decision on Motion for Partial Summary Judgment Under Section 3.24 of the Commission's Rules of Practice." Respondent filed with the examiner a motion seeking partial summary decision on certain portions of the complaint under Section 3.24 of the Commission's rules. Complaint counsel thereafter filed an opposition to the motion and a cross motion for summary decision. After oral argument, the hearing examiner filed the document titled as quoted above.

At issue in both respondent's and complaint counsel's motions is whether the commerce requirement of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act has been met with respect to certain acquired corporations. Neither motion seeks summary decision on all issues. Because of the limited scope of the motions, the initial decision does not attempt disposition of the entire proceeding.

The threshold question before the Commission is whether the hearing examiner's initial decision is a proper partial disposition of the issues being adjudicated. We find, for the following reasons, that this partial initial decision has no basis in Rule 3.24 and thus should not have been filed.

Commission Rule 3.24 provides for summary decisions on all or any part of the issues under adjudication. Section (a)(2) provides that summary decision may be rendered where "there is no genuine issue as to any material fact and that the moving party is entitled to such decision as a matter of law." In such instances "[A]ny such decision shall constitute the initial decision of the hearing examiner." On the other hand, Section (a)(5) provides that:

(5) If on motion under this rule a summary decision is not rendered upon the whole case or for all the relief asked and a trial is necessary, the hearing examiner shall make an order specifying the facts that appear without substantial controversy and directing further proceedings in the action. The facts so specified shall be deemed established.

Our Rule 3.24 was formulated on the basis of Rule 56 of the Federal Rules of Civil Procedure. Part (d) of Rule 56, the counterpart to Commission Rule 3.24(a)(5), has been interpreted to apply where judgment was not sought upon the whole case.¹ Courts often have distinguished a partial summary decision, which is an interlocutory order not final for appeal purposes, from a summary decision on the whole case, which is a final judgment.²

Rule 3.24 clearly does not provide for an initial decision on only part of the issues. In filing this initial decision, the hearing examiner has disregarded the procedures of Rule 3.24(a)(5) for handling partial summary decisions.

We, therefore, cannot consider this document an initial decision under Rule 3.24. Where a summary decision does not dispose of all issues, the decision must be framed in the form of an interlocutory order and must direct further proceedings in accord with Commission rules. Accordingly,

It is ordered, That the initial decision of the hearing examiner filed herein on November 17, 1970, be, and it hereby is, vacated; and

It is further ordered, That the proceedings be, and they hereby are, remanded to the hearing examiner for disposition in accord with Commission rules and this opinion.

EASTERN DETECTIVE ACADEMY, INC., ET AL.

Docket 8793. Order and Opinion, Jan. 5, 1971

Order denying respondent's request for assignment of counsel because of his financial inability to hire attorney.

OPINION AND ORDER DENYING MOTION FOR ASSIGNMENT OF COUNSEL

By letter dated December 21, 1970, which has been treated as a motion, respondents have asserted financial inability to retain counsel

¹ "In other words, interpreting paragraph (d) as a whole, it appears plain that a summary judgment is not contemplated or authorized for any portion of a claim less than the whole." *Biggins v. Oltmer Ironworks*, 154 F.2d 214, 216 (7th Cir. 1946). (Emphasis supplied.)

² *Hagberg v. City of Sioux Falls*, 281 F. Supp. 460 (S.D.S.D. 1968); *Driver v. F. A. Mitchell Co.*, 35 F.R.D. 226 (E.D. Pa. 1964); *Metal Coating Corporation v. Baker Manufacturing Corporation*, 227 F. Supp. 529 (W.D. Wis. 1964); *New Hampshire Fire Insurance Co. v. Perkins*, 30 F.R.D. 382 (D. Del. 1962); *Coffman v. Federal Laboratories, Inc.*, 171 F.2d 94 (3d Cir. 1948) cert. denied, 336 U.S. 913 (1949).

and have requested the Commission to assign counsel for the purpose of prosecuting an appeal in this matter, which is set for oral argument on January 6, 1971.¹ This question has been raised a number of times in the instant proceedings.

The issue of financial inability to retain counsel was first raised by the individual respondent herein on January 26, 1970, three months after the close of evidentiary hearings. In this letter, he requested dismissal of the action rather than appointment of counsel. In an order issued January 29, 1970, the hearing examiner denied this motion for dismissal, but stated that "[i]n the event respondents do wish to have counsel assigned to represent them, they should submit a further application setting forth in detail such facts as will support their assertion that they are financially unable to retain counsel, including copies of financial statements, income tax returns, and other similar documents from which an appraisal of their financial condition may be made." The examiner set February 9, as the date by which respondents were required to submit financial data.

In a letter dated February 10, 1970, respondent asserted to the hearing examiner that he had "attempted to obtain the services of an accountant to prepare a financial statement," but had been unable to do so. He also requested an extension of time within which to file proposed findings. The examiner denied this request on February 17, stating in passing that the respondent had "elect[ed] not to request an assignment of counsel." In a letter received by the Secretary's office on March 13, 1970, respondent complained in general terms that he had not been afforded an adequate opportunity to seek assigned counsel, and that he had been denied a fair hearing. In response to this letter, the Commission on April 6, 1970, vacated the initial decision stating "it is not clear in the particular circumstances that the hearing examiner provided a full opportunity for respondents (a) to establish their asserted financial inability to pay counsel and (b) to file their proposed findings and conclusions." The matter was returned to the examiner for further consideration of these issues.

On April 6, the examiner entered an order which stated, in part:

If respondents still desire the assignment of counsel, they should submit a new application therefor, on or before May 1, 1970. Such application should consist of (1) a sworn narrative statement setting forth in detail the facts on which they base their assertion that they are unable to pay for counsel to represent them and (2) appropriate supportive documentary evidence consisting

¹ The motion is made on behalf of both the individual and corporate respondents, who have been represented throughout these proceedings by the individual respondent Leven, appearing *pro se*. However, since the Commission's recent Policy Statement on Counsel for Indigent Respondents makes it clear that the right to assigned counsel in Commission proceedings extends only to natural persons and partnerships, this opinion will deal with the motion only as it pertains to the individual respondent.

of financial statements, income tax returns and such other documents as will permit an objective appraisal of their financial ability or lack of ability to retain counsel. So that there will be no misunderstanding, the examiner wishes to make it clear that respondents are not required to retain an accountant to prepare a special financial statement. Any financial statement which may have been prepared during the past year will suffice. If there are no such statements in existence, respondents need not submit any financial statement, except that if they conclude it would be to their advantage to submit a currently-prepared financial statement they may do so.

The examiner's order also provided that "[i]n the event respondents elect not to submit a request for the assignment of counsel, * * * but prefer to submit * * * informal findings without the use of record references and legal terminology or references, such findings and conclusions shall be submitted on or before May 1, 1970."

Respondent replied in a letter dated April 17, 1970, which made no effort to revive or press the request for assignment of counsel; instead, his letter was devoted to the claim that the short period provided for filing proposed findings demonstrated the examiner's bias, and he again moved to have the complaint dismissed. The examiner certified this motion to the Commission on April 30, 1970. On May 13, the Commission issued an order [77 F.T.C. 1628] denying this motion and reinstating the initial decision which had been vacated. In the opinion accompanying this order, the Commission noted that respondents "make no further claim regarding the assignment of counsel, the principal purpose for the return of the proceeding to the examiner, although they were given ample opportunity to do so." No further communications were received from the respondent prior to the present motion, which was received in the Secretary's office on December 22, fifteen days before the appeal was scheduled for oral argument.

As the foregoing summary of the record indicates, respondent has been provided with numerous opportunities to demonstrate that he is financially unable to retain counsel, and was expressly invited to do so in a form that would be non-technical and convenient to him. He has neither produced nor proffered any concrete, particularized facts in support of his claim, and he has not provided any reason or justification for his failure to press this claim until the eve of oral argument.

In these circumstances, we conclude that the respondent's due process rights have been fully safeguarded, and that there is no basis for further delaying final adjudication of this matter.

Having considered all of the views and arguments contained in all of the briefs submitted by respondents and complaint counsel in connection with this matter,

It is ordered, That respondent's motion for assignment of counsel be, and hereby is, denied.

CROWELL-COLLIER PUBLISHING COMPANY, ET AL.

Docket 2751. Order and Opinion, Jan. 21, 1971

Order denying respondent's petition that case be reopened for purpose of suspending effective date of Paragraph 3 of order.

OPINION OF THE COMMISSION

This matter is before the Commission upon a pleading of respondents entitled, "Motion to Reconsider Paragraph 3 of Order (or Petition to Reopen Proceeding)." The Commission is asked to suspend the effective date of Paragraph 3 of the order to cease and desist presently in effect pending Commission consideration and determination of proposed Rule (g) in its pending rulemaking proceeding applicable to door-to-door sellers. Respondents state that the Commission may regard its pleading as a "Petition for Reopening" due to changed conditions, under Subpart H of the Commission's Rules of Practice for Adjudicative Proceedings.

The Commission's order to cease and desist, issued on September 30, 1966 [70 F.T.C. 977], was made effective against respondents on February 4, 1969 [75 F.T.C. 241]. The order was affirmed by the United States Court of Appeals for the Sixth Circuit on May 27, 1970, *sub nom., P. F. Collier & Son Corporation v. Federal Trade Commission*, 427 F.2d 261 (1970). Certiorari was denied by the Supreme Court on November 23, 1970 [400 U.S. 926], thus making the order final. Under these circumstances, we deem it appropriate to treat respondents' pleading as a petition to reopen the proceeding, to be considered under Rule 3.72(b) of the Commission's Rules of Practice for Adjudicative Proceedings.

Paragraph 3 of the Commission's order requires that respondents, in connection with the direct or door-to-door sale and distribution of merchandise, cease and desist from :

Failing to disclose at the time admission is sought into the home, office or other establishment of the prospective purchaser or purchaser that the person making the call is respondent's salesman and is soliciting the sale of respondent's merchandise.

This provision was included in the Commission's original order to cease and desist which was issued on September 30, 1966, but not made effective until the Commission's final order issued February 4, 1969. Respondents at that time had argued to the Commission that Paragraph 3 was improper and should not be included in the order. Among the contentions presented were that this proscription had not been imposed in prior cases where allegedly similar practices had been found and that respondents were being discriminated against and were being

subjected to an unduly harsh requirement. The Commission considered respondents' contentions but, for reasons fully stated in its opinion, concluded that the inclusion of the paragraph was "fully appropriate" and it declined to modify the order.

Respondents, on appeal to the Sixth Circuit, specifically questioned the inclusion of Paragraph 3 in the order to cease and desist. The Court rejected respondents' arguments, stating:

The fact that the orders issued against Crowell-Collier's competitors were insufficient does not mean that the order in this case must also be. Such a situation would afford the basis for an argument that Colliers' competitors should have been dealt with likewise, not that the petitioners should escape. *Heavenly Creations, Inc. v. Federal Trade Commission*, 339 F. 2d 7 (2d Cir. 1964); *Exposition Press, Inc. v. Federal Trade Commission*, 295 F. 2d 869 (2d Cir. 1961); *International Art Company v. Federal Trade Commission*, 109 F.2d 393 (7th Cir. 1940); *National Candy Company v. Federal Trade Commission*, 104 F.2d 999 (7th Cir. 1939). The purpose of Commission orders is not to put those employing deceptive acts or practices *in pari delicto* with each other [427 F.2d at 276].

Respondents filed a petition for rehearing, limited to the one issue—whether Paragraph 3 of the order should be affirmed. On July 14, 1970, the Sixth Circuit denied respondents' petition. Respondents petitioned for writ of certiorari, again contending that Paragraph 3 of the order should be deleted. The Supreme Court denied certiorari on November 23, 1970.

From the foregoing, it is evident that respondents have fully litigated, both before the Commission and the courts, the propriety of Paragraph 3 of the order. All of the contentions raised by respondents in their present pleading, but one, were previously presented to the Commission in the course of adjudicating this case. Similarly, they were all presented to the Sixth Circuit, which affirmed the Commission, and to the Supreme Court, which denied certiorari. The one new contention now made is that there are "changed conditions" in that the Commission has initiated a proceeding for the promulgation of a trade regulation rule concerning door-to-door sales and that Paragraph (g) of the proposed rule is similar to Paragraph 3 of the order to cease and desist.

This allegation falls far short of suggesting changed conditions of fact or law necessary to meet the requirements of Rule 3.72(b). The Commission's order was issued and affirmed by the Court notwithstanding respondents' allegation that Paragraph 3 was discriminatory and unduly burdensome in view of an absence of comparable proscriptions outstanding against their competitors. Certainly, consideration by the Commission of a rule which, if adopted, would impose similar requirements upon respondents' competitors cannot be relied upon to constitute such a change as would justify suspending the effectiveness

of the order to cease and desist. To the contrary, such a rule would remove the asserted disparity of treatment complained of by respondents.

For the foregoing reasons, it is concluded that respondents have failed to allege changed conditions of fact or law that would even suggest, let alone require, that the order to cease and desist should be modified by suspending the effective date of Paragraph 3. Nor is there any indication that the public interest so requires.

ORDER DENYING PETITION TO REOPEN

This matter having come before the Commission upon petition of respondents, filed November 24, 1970, pursuant to Section 3.72(b)(2) of the Commission's Rules of Practice, requesting that this proceeding be reopened for the purpose of suspending the effective date of Paragraph 3 of the Commission's order to cease and desist, and the Director, Bureau of Consumer Protection, having filed an answer in opposition to said petition; and

The Commission for the reasons set forth in the accompanying opinion having determined that the petition should be denied:

It is ordered, That the petition to reopen filed by respondents be, and it hereby is, denied.

AVNET, INC.

Docket 8775. Order and Opinion, Jan. 29, 1971

Order denying respondent's motion for a subpoena *duces tecum* and granting complaint counsel's motion for a subpoena *ad testificandum* directed to an official of the Bureau of Census.

ORDER AND OPINION RULING ON CERTIFICATION OF REQUEST FOR SUBPOENA TO GOVERNMENT OFFICIAL

This matter is before the Commission upon the hearing examiner's certification of January 11, 1971, of complaint counsel's motion for issuance of a subpoena *ad testificandum* addressed to Paul F. Berard, Chief, Metals and Machinery Branch, Bureau of the Census, United States Department of Commerce, which motion and certification is made pursuant to Section 3.37 of the Commission's Rules of Practice. Complaint counsel seek to have Mr. Berard appear and testify concerning proposed Commission Exhibit 270, *1967 Census of Manufacturers Series*, engine electrical equipment, SIC Code 3694, MC67 (2)-36E, which is a Bureau of the Census publication. More specifically, complaint counsel intend to elicit from the witness testimony which will establish that the Bureau of the Census publication was

prepared in the regular course of business as well as "explanatory information concerning the various product classifications contained therein." Complaint counsel state that Mr. Berard has indicated his willingness to appear and testify for these purposes. The examiner, in his certification, recommends that complaint counsel's request be granted.

The examiner further recommends that any subpoena which may issue directed to Mr. Berard be a subpoena *duces tecum* so as to include the specifications attached to respondent's motion of November 5, 1970. These specifications embrace the mailing list used by Bureau of the Census in collecting information regarding certain product codes in the 1967 Census of Manufacturers, with an indication of those who in fact furnished the information compiled under those product codes.

We adopt the examiner's recommendation as regards issuance of a subpoena *ad testificandum* requested by complaint counsel for the reasons stated in his certification, but we are of the opinion that respondent's motion of November 5, 1970, for the issuance of a subpoena *duces tecum* should be denied.

We disagree with the examiner's conclusion that respondent has satisfied the requirements of Section 3.37(b) of the Commission's rules as to necessity and relevancy of the specified material. Respondent's stated purposes for a subpoena *duces tecum* appear to be: (1) cross-examination and rebuttal of the report complaint counsel are expected to offer in evidence and (2) discovery of evidence necessary for preparation of its defense.

As to cross-examination, respondent will be afforded opportunity to question Mr. Berard regarding the terms used in the report and the manner in which the firms furnishing the information as well as the products were classified in the report. This, in our opinion, will adequately protect respondent's right to cross-examination.¹

¹ We believe the examiner's reliance on *Wirtz v. Baldor Electric Co.*, 337 F.2d 518 (D.C. Cir. 1964), is misplaced. That case involved a minimum wage determination, under Section 1(b) of the Walsh-Healey Act (41 U.S.C. § 35(b)), by the Secretary of Labor based on a survey which had been conducted by the Secretary for use in the particular proceeding. The requirement that the underlying survey material be made available to respondent's counsel when a summary based thereon is offered in evidence is well established, and the Commission has followed this rule in cases involving tabulations based on Section 6(b) special report surveys conducted for use in litigation. *E.g.*, *Grand Union Co.*, 62 F.T.C. 1491 (1963) [1963-1965 Transfer Binder] Trade Reg. Rep. ¶ 16,341, at p. 21,172. We are of the opinion that this rule does not obtain with respect to regular reports compiled and published by Bureau of the Census pursuant to Title 13 of the United States Code. Generally speaking, the latter is admissible without production of the underlying material in an administrative proceeding under Section 7 for the reason that necessity and circumstantial guaranty of trustworthiness is present and the Commission may take official notice thereof. *Cf. United States v. Aluminum Co. of America*, 35 F. Supp. 820, 823-825 (S.D.N.Y. 1940); *United States v. Aluminum Co. of America*, 148 F. 2d 416, 445, 446 (2d Cir. 1945); Dession, "The Trial of Economic and Technological Issues of Fact," 58 Yale L. J. 1019, 1242 (1949). This also appears to be the established practice before the courts and, as far as we are aware, has not been successfully challenged.

We are not persuaded by respondent's claimed need for the Bureau of the Census mailing list for preparation of its defense. We are unable to ascertain from respondent's motion of November 5, 1970, the reasons why respondent needs, apparently for discovery purposes, the mailing list from the Bureau of the Census when similar information based on SIC product codes and plants is readily available from published commercial sources.

It is ordered, That respondent's motion of November 5, 1970, for the issuance of a subpoena *duces tecum*, certified by the examiner, be, and it hereby is, denied.

It is further ordered, That complaint counsel's motion of January 6, 1971, for the issuance of a subpoena *ad testificandum*, certified by the examiner, be, and it hereby is, *granted*.

DIENER'S, INC., ET AL.

Docket 8804. Order and Opinion, Feb. 8, 1971

Order denying request for permission to file an interlocutory appeal from hearing examiner's ruling striking the testimony of a Commission attorney-investigator appearing as a witness.

DISSENT BY COMMISSIONER MACINTYRE

Here the Commission has in effect approved a method of trial in a lawsuit which I think is unwise. Therefore, I voice this dissent.

At the outset, let it be understood that I have no objection if any investigator of the United States Government who, in the conduct of his investigation, collected certain exhibits or factual statements, is called as a witness to identify such exhibits or to establish the fact that certain statements had been made by a party charged. I do object and think it unwise for an investigator to be called as a witness to testify about an investigation he has conducted and in the course of such testimony to be called upon to identify not only exhibits he collected and establish the fact that certain statements were made to him, but also be called upon to interpret evidentiary factual information and state conclusions with respect thereto. Of course when a witness is permitted to do that, his competence is open to question. Then, it is appropriate to subject him to unlimited cross-examination not only regarding his competence but all other matters relevant to his fitness to judge the guilt or innocence of the person charged. This would include such matters as bias, prejudice, credibility, etc. Even such unlimited cross-examination, which apparently the Commission is willing to permit here, does not remove the evil, nor cure the soreness,

inherent in the use of trial methods as are involved in this case up to this point.

I would approve the striking of the testimony of the witness in question and the issuance of a direction that the trial of this matter be pursued in a more traditional and acceptable manner.

OPINION OF THE COMMISSION

This matter is before the Commission upon complaint counsel's request for permission to file an interlocutory appeal pursuant to Section 3.23(a) of the Commission's Rules of Practice. Complaint counsel seek to appeal the hearing examiner's ruling of December 15, 1970, in which the examiner struck the testimony of a Commission attorney-investigator who appeared as a witness. The ruling was based on complaint counsel's failure to produce the summary memorandum written by such witness, and on the examiner's finding that the summary memorandum constituted a "Jencks" statement.

The examiner's ruling was correct. The summary memorandum prepared by Mr. Koman clearly constitutes a written statement made and signed by him, and the examiner has found that it relates to the subject matter of his testimony. It therefore qualifies as his "statement" as defined by the Jencks Act,¹ and is subject to production under the Commission's procedures.²

It is clear, however, that complaint counsel resisted production of the summary memorandum for lack of definite authorization from the Commission to release this type of document. Complaint counsel accurately characterize the summary memorandum as a confidential, internal document. We believe, however, that the principles of fairness underlying the "Jencks" rule deserve equal recognition. Commission counsel are therefore authorized to make a summary memorandum available to respondents where it contains statements which relate to the subject matter of testimony given by the government agent who prepared the memorandum. If complaint counsel elect not to produce, the hearing examiner should strike the testimony involved. It is also the examiner's duty, on the motion of complaint counsel, to excise the portions of any such statement which do not relate to the subject matter of the testimony of the witness.

In this case, since the examiner has correctly applied the law, there is no need for an interlocutory appeal. Inasmuch as complaint counsel were inhibited from producing the statement by factors beyond their control, however, the examiner might find it appropriate to reopen the record to give complaint counsel an opportunity to produce the

¹ 18 U.S.C. § 3500.

² See, *R. H. Macy & Co., Inc.*, Docket No. 8650 (March 10, 1966) [69 F.T.C. 1108].

Koman summary memorandum and, if produced, to afford respondent his full "Jencks" rights. Accordingly, complaint counsel's request for permission to file an interlocutory appeal is denied. An appropriate order accompanies this opinion.

Commissioner MacIntyre dissented, and filed a dissenting statement.

ORDER DENYING REQUEST FOR PERMISSION TO FILE INTERLOCUTORY
APPEAL

Upon consideration of the Request for Permission to File an Interlocutory Appeal from the Ruling of the Hearing Examiner Striking Testimony of a Witness, filed by complaint counsel on December 22, 1970, and for the reasons stated in the accompanying opinion,

It is ordered, That the request for permission to file an interlocutory appeal be, and it hereby is, denied.

Commissioner MacIntyre dissented and filed a dissenting statement.

ASH GROVE CEMENT CO.

Docket 8785. Order, March 2, 1971

Order denying joint appeals by two cement companies and the appeal by respondent from the examiner's order which denied the so-called *Mississippi River* confidential treatment for certain specifications in subpoenas in question and granted such treatment as to certain other specifications; vacating the hearing examiner's denial of the requested protective order; and remanding the matter of a protective order for reconsideration in accordance with the Commission's views.

ORDER RULING ON APPEALS

This matter is before the Commission upon appeals from the hearing examiner's orders ruling in two different instances on requests for confidential treatment. These will be considered separately below.

I

Cross-appeals from the hearing examiner's order filed December 7, 1970, have been filed, on the one hand, jointly by Missouri Portland Cement Company (Missouri Portland) and Botsford Ready Mix Company (Botsford), and, on the other, by respondent. They were filed, respectively, on December 21, 1970, and December 14, 1970. Respondent, on December 30, 1970, filed its answer and opposition to the joint appeal of Missouri Portland and Botsford, and complaint counsel, on December 31, 1970, filed an answer, opposing such joint appeal and supporting respondent's appeal.

The examiner's order in this instance, which was entered upon his reconsideration of the question in the light of the Commission's order issued November 19, 1970 [77 F.T.C. 1671], denied the so-called *Mississippi River* confidential treatment for certain specifications in the subpoenas in question and granted such treatment, although with modification, to Specification 2 of the subpoena served on Missouri Portland and Specification 6 of the subpoena served on Botsford.¹ The examiner stated that only the latter two specifications appear to include information covered by *Federal Trade Commission v. Crowther*, 430 F. 2d 510 (D.C. Cir. 1970).

Missouri Portland and Botsford argue in their joint appeal that the hearing examiner failed to comply with the Commission's remand order and that he should have applied the *Mississippi River* treatment to the other specifications involved. Respondent contends in its appeal that confidential treatment should have been denied for all of the specifications.

The issue raised as to the confidentiality requested by Missouri Portland and Botsford was thoroughly briefed before the Commission upon their appeal filed October 23, 1970. Thereafter the Commission issued its order and opinion, on November 19, 1970, setting forth the Commission's views of the pertinent legal precedents applicable to the matter and, among other things, directing the examiner to proceed in accordance with these views. The examiner complied, as indicated above, by issuing his order of December 7, 1970, granting *Mississippi River* treatment as to certain specifications and denying it as to others. No new facts or circumstances other than the examiner's order have been presented by either Missouri Portland and Botsford or by respondent. We do not believe in the circumstances that reconsideration would serve any helpful purpose. Moreover, we do not find that either of the appellants have satisfied Section 3.35(b) of the Commission's rules requiring a showing that the ruling complained of involves substantial rights and will materially affect the final decision and that a determination of its correctness before conclusion of the hearing is essential to serve the interests of justice.

Accordingly, the joint appeal of Missouri Portland and Botsford and the appeal of respondent will both be denied.

II

The other appeal before the Commission is that filed December 22, 1970, by Mississippi River Corporation and Stewart Sand and Ma-

¹ In *Mississippi River Fuel Corporation*, Docket No. 8657 (order issued June 8, 1966) [69 F.T.C. 1186], the Commission provided for a protective order under which the alleged confidential material was to be submitted to an outside accounting firm which would compile and present the material to respondent's counsel in such a manner as to protect its confidentiality.

terial Company (referred to hereafter as appellants) from the hearing examiner's order filed December 9, 1970, denying them a requested protective order covering certain specifications in subpoenas issued to them at the instance of respondent. The terms of the order which they requested the examiner to issue are set out in pages 512-514 of the transcript. It is not a *Mississippi River*-type order that appellants want. Rather, they seek protection from the disclosure of specified information, which they deem competitively sensitive, to certain officials of the respondent. They do not object to disclosure to respondent's counsel or accountants, or to any outside professional consultant. They give as a reason for their request their belief that the information is highly sensitive business data and that its release to respondent's high officials would put them at a competitive disadvantage.

The Commission, in a recent decision herein issued on November 19, 1970, concerning the first interlocutory appeal of Missouri Portland and Botsford, held that in light of the *Crowther* decision (*supra*), unless there are distinguishing features, the *Mississippi River* formula (see footnote 1) should be used. In both the prior appeal of Missouri Portland and Botsford and in this appeal of appellants the subpoenaed third parties are seeking protective orders in comparable circumstances. The mere fact that the appellants here ask for a less restrictive order than provided by the *Mississippi River* formula should not make their request any less meritorious; in fact, the order sought by appellants may be reasonable if, as alleged, the information is sensitive business data the release of which to respondent's personnel would put appellants at a competitive disadvantage. While the instructions set out in our prior order issued November 19, 1970, do not specifically apply because the so-called *Mississippi River* treatment is not requested here, the general principles there outlined should be considered by the examiner upon remand. Accordingly,

It is ordered, That the joint appeal of Missouri Portland Cement Company and Botsford Ready Mix Company from the hearing examiner's order filed December 7, 1970, be, and it hereby is, denied.

It is further ordered, That the respondent's appeal from the hearing examiner's order filed December 7, 1970, be, and it hereby is, denied.

It is further ordered, That the hearing examiner's order filed December 9, 1970, denying the protective order requested by Mississippi River Corporation and Stewart Sand and Material Company, be, and it hereby is, vacated.

It is further ordered, That the matter be, and it hereby is, remanded to the hearing examiner for his reconsideration and disposition of the request of Mississippi River Corporation and Stewart Sand and Material Company for a protective order in accordance with the views expressed herein.

UNITED STATES STEEL CORPORATION*

Docket 8655. Order, March 4, 1971.

Order granting appeals of two third party companies and quashing the subpoenas *duces tecum* issued by hearing examiner directed to said companies.

ORDER RULING ON APPEALS

This matter is before the Commission on the appeal of Colonial Sand & Stone Co., Inc., filed February 1, 1971, and the appeal of Andrew La Grega Ready Mix Corporation and others, also filed on February 1, 1971, both appeals pursuant to Section 3.35 of the Commission's Rules of Practice.¹ The appeal of Colonial is from an order of the hearing examiner, filed January 21, 1971, denying a motion to quash two subpoenas *duces tecum* requested by respondent herein and issued by the examiner on December 4, 1970. The appeal of Andrew La Grega and others is from a similar order denying a motion to quash or limit subpoenas *duces tecum* requested by respondent and issued by the examiner in December 1970. Both appeals challenge the subpoenas as calling for irrelevant information, imposing an oppressive burden of compliance, and threatening disclosure of confidential information. Counsel supporting the complaint have moved for permission to join in these appeals, to the extent that such appeals are based on the lack of relevance of the material sought. Respondent has filed briefs in opposition to the appeals and to complaint counsel's motion.

This matter was remanded to the Commission in *United States Steel Corp. v. Federal Trade Commission*, 426 F. 2d 592 (6th Cir. 1970) for findings of fact and further proceedings relating exclusively to the "failing company" defense. Responding to the remand, the Commission, by its order of September 25, 1970, limited the issues to whether:

- (a) As of January 1963 the financial condition and resources of Certified Industries was so dire that it faced the grave possibility of a business failure;
- (b) Between January 1963 and April 1964 no prospective purchaser other than United States Steel Corporation was interested in acquiring Certified;

*See 81 F.T.C. 629, for order and opinion modifying the initial decision, following remand by U.S.C.A. 6th Circuit, to conform with the views set forth in the Commission's opinion, adopting the modified initial decision following remand, and directing the filing of the findings and conclusions with the court.

¹ Respondent is in error in contending that the appeal should have been brought under Section 3.23 of the rules. Equally without merit is respondent's contention that the appeal was untimely filed. Notice of the examiner's ruling was not received by appellant until January 25, 1971. Therefore, the appeal was filed well within the period allowed by the rules.

(c) "Certified's opportunity for some form of continued competitive vitality through bankruptcy or similar proceedings" was "dim or nonexistent" either in January 1963 or in April 1964; and

(d) The U.S. Steel—Certified vertical ties did, in fact, take an unlawful cast as early as January 1963.

The information sought by respondent's subpoena relates generally to sales and purchases of portland cement and ready-mixed concrete by appellants and their general financial condition, from 1964 to 1969, a period following the acquisition by U.S. Steel of Certified. It is respondent's position that this information is relevant to issue "(c)" of the Commission's remand order, *supra*. Specifically, respondent argues, "To prove that a failing company's opportunity for continued competitive viability through bankruptcy proceedings was 'nonexistent' * * * a respondent would logically have to show what in fact would have occurred in such proceedings beyond the date of the acquisition." The information sought by the subpoena, respondent maintains, would show the state of the market, whether it was depressed or deteriorating, for the period after the acquisition. These factors, respondent contends, would be significant to a trustee or receiver confronted with determining what he would and could do with Certified.

It is Colonial's position that the condition of the market subsequent to the acquisition is irrelevant "in view of the Court of Appeal's mandate to determine Certified's status as a failing company by April 30, 1964." But, even assuming that such post-acquisition evidence was relevant, Colonial contends that the information sought by the subpoena has no bearing upon the state of the market, with a possible exception of Colonial's sales of ready-mixed concrete.

Neither of the two decisions leading to the remand of this matter, *Citizens Publishing Co. v. United States*, 394 U.S. 131 (1969), or *U.S. Steel Corporation v. Federal Trade Commission*, 426 F. 2d 592 (6th Cir. 1970), reached the question of the admissibility of post-acquisition evidence. However, this question is not one of first impression. Fortunately, the Commission has the advantage of hindsight in considering the use of post-acquisition evidence. In 1961 the Commission remanded the proceeding *In the Matter of Procter & Gamble Co.*, 63 FTC 1477, to obtain post-acquisition evidence. Two years later it realized that it had been mistaken and, in its review of the second initial decision, expressed regret at having delayed the matter unnecessarily. It therefore disregarded the post-acquisition data in making its findings, and based its final decision on the record submitted to it prior to remand. In so ruling, the Commission made the following observation:

That effective relief in a Section 7 proceeding becomes increasingly difficult, to the point of impossibility, over time, coupled with the other considerations we

have mentioned, argues in favor of sharply narrowing, wherever possible, the scope of permissible legal inquiry. Clear and relatively simple rules, and the rigorous exclusion of evidence which bears only remotely upon the central concerns of the statute, are essential if Section 7 is not to become a judicial and administrative nullity.

The Circuit Court held that the Commission had erred in failing to give weight to the post-acquisition evidence, *Procter & Gamble Co. v. Federal Trade Commission*, 358 F. 2d 74 (6th Cir. 1966). The Supreme Court, however, reversed the Circuit Court, holding:

Section 7 of the Clayton Act was intended to arrest the anticompetitive effects of market power in their incipiency. The core question is whether a merger may substantially lessen competition, and necessarily requires a prediction of the merger's impact on competition, present and future. * * * The section can deal only with probabilities, not with certainties. * * * And there is certainly no requirement that the anticompetitive power manifest itself in anticompetitive action before § 7 can be called into play. If the enforcement of § 7 turned on the existence of actual anticompetitive practices, the congressional policy of thwarting such practices in their incipiency would be frustrated. *Federal Trade Commission v. Procter & Gamble Company*, 386 U.S. 568, 577 (1967).

In the instant matter, respondent, U.S. Steel Corporation, would distinguish this holding from its request for post-acquisition data bearing on the failing company defense. In determining the question of Certified's prospects of surviving bankruptcy, respondent says that it is "unlike the competitive effect test of Section 7" as the latter is "solely one of reasonable probability. * * *" We disagree. A determination of a company's prospects for some form of continued competitive vitality through bankruptcy proceedings must also be based on a prognostication at the time of the acquisition. It would be anomalous to employ the incipiency test in judging the competitive impact of an acquisition and then defeat the purpose of that approach by applying a different test for determining the applicability of the failing company defense.

Further, even if we believed that the *Procter & Gamble* holding was inapposite, we would rule that the subpoenas in question be quashed, as the information sought too tenuously relates to the question of Certified's prospects of surviving bankruptcy. We recognize that even tenuous evidence may be admissible if no reliable evidence is otherwise available. But, surely, that is not the case here. Evidence of the state of the market and of Certified's financial strength at the time of the acquisition (or when the illegal ties obtained an "unlawful cast") and the period preceding such date, very clearly will effectively reveal the company's prospects at the time of the acquisition. Furthermore, this tenuous evidence should be rejected for the additional reason that it would very likely open the record to a variety of collateral questions: *e.g.*, what effect did the integrated U.S. Steel-Certified have on the state of the post-acquisition market; was the state of the post-acquisi-

tion market due to circumstances that could not be foreseen by a trustee in bankruptcy at the time of the acquisition? To resolve such questions would surely lengthen the hearings and shed little, if any, light on the central issues. Accordingly,

It is ordered, That the appeal of Colonial Sand & Stone Co., Inc., from the hearing examiner's order of January 21, 1971, be, and it hereby is, granted.

It is further ordered, That the appeal of Andrew La Grega Ready Mix Corporation and others, from the hearing examiner's order of January 21, 1971, be, and it hereby is, granted.

It is further ordered, That the subpoenas issued by the hearing examiner directed to appellants herein be, and they hereby are, quashed.

Chairman Kirkpatrick dissented to the foregoing action, and Commissioner MacIntyre did not participate.

THE FIRESTONE TIRE & RUBBER COMPANY

Docket 8818. Order, March 4, 1971

Order adopting suggestions of SOUP, INC., an intervenor, that it submit one copy of required documents, that the Commission pay for any costs charged for production of documents specified in the subpoena SOUP has requested, and holding in abeyance the suggestion that the Commission pay fees of those witnesses SOUP proposes to call at hearings.

ORDER ADOPTING IN PART THE HEARING EXAMINER'S RECOMMENDATIONS AND HOLDING PART THEREOF IN ABEYANCE

This matter is before the Commission upon the hearing examiner's certification of December 14, 1970, along with his recommendations, of SOUP's motion of November 17, 1970, to proceed *in forma pauperis* in Docket No. 8818, a proceeding in which SOUP has been permitted to participate to a limited degree. In his certification the hearing examiner recommends that the motion be partially granted and partially denied.

The motion seeks the following three rights:

- (1) Submission of one copy of motions, briefs, and other documents instead of the ordinarily prescribed number of copies;
- (2) The Commission will pay the witness fees of the five witnesses SOUP proposes to call at the hearings; and
- (3) The Commission will pay any costs respondent and/or its advertising agency may charge for production of the documents specified in the subpoena *duces tecum* SOUP has requested. * * *

In his certification the hearing examiner recommends that (1) be granted; that (2) be granted to the extent of payment of witness fees, but be denied as to payment for witnesses' traveling or sub-

sistence fees; and that (3) need not be decided now because the hearing examiner does not intend to issue any subpoena *duces tecum* at the request of SOUP that will require any charge by the respondent or any advertising agency. If this does become an issue, the hearing examiner intends to make a recommendation with respect thereto.

Upon consideration the Commission has determined to adopt the hearing examiner's recommendations as to (1) and (3). The Commission has further determined not to rule upon the hearing examiner's recommendation as to (2) at this time, pending a determination by the Comptroller General as to the Commission's authority to pay the fees referred to therein. Accordingly,

It is ordered, That the hearing examiner's recommendations as to (1) and (3) be, and they hereby are, adopted.

It is further ordered, That the hearing examiner's recommendation as to (2) be held in abeyance, pending a determination of the Commission's authority to pay the fees referred to therein.

PHILLIPS PETROLEUM COMPANY, ET AL.

Docket C-1088. Order and Opinion, March 4, 1971

Order denying respondent's petition for reconsideration of Commission's denial for an extension of time to comply with the provision of the order to construct a plant for the manufacture of low density polyethylene resin.

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

On July 13, 1970, respondent Phillips Petroleum Company ("Phillips") filed with the Commission an application for modification of the consent order entered herein on August 2, 1966 [70 F.T.C. 456]. Phillips sought an extension of nine additional months within which to effect compliance with Paragraph III of the order.¹ Respondent also requested an additional period of five years within which to comply with Paragraph IX of the order, which required Phillips to construct a plant for the manufacture of low density polyethylene resin (LDPE) within five years from the effective date of the order.²

¹ Paragraph III of the order states:

It is further ordered, That, within three (3) years from the date of divestiture of the Monument Plant as ordered by Paragraph II of this order (if such divestiture is accomplished within the two (2) year period therein specified), Phillips shall construct, or cause one of its subsidiaries to construct, facilities for the production of polypropylene resin with a minimum annual rated capacity of 35 million pounds.

² Paragraph IX of the order provides:

It is further ordered, That, within five (5) years from the effective date of this order, Phillips shall enter independently into the production of low density polyethylene resin at a newly constructed plant with a minimum annual rated capacity of 140 million pounds. Phillips shall promptly initiate the steps necessary for construction of said plant, and shall continue to use its best efforts to construct such plant and to bring it into production at the earliest possible date.

By order issued December 14, 1970, the Commission granted Phillips' request for an additional nine months to comply with Paragraph III of the order, and denied its requested extension of time to comply with Paragraph IX. The Commission's order stated that Phillips had not adduced any new facts in support of its requested five year extension since its execution of the consent order and that the modification was not required by the public interest.

Phillips now petitions the Commission for reconsideration of its refusal to grant the requested modification of Paragraph IX of the order, urging that the Commission erred by stating in the December 14 order that "respondent has not shown any new facts which were not reasonably known or knowable to it at the time it signed the consent order," without providing respondent an opportunity to argue whether it should have known the facts in question; and that the relevant pleadings raised "substantial factual issues" and therefore required the Commission to set the matter for evidentiary hearing pursuant to Section 3.72(b)(3) of the Rules of Practice.

In 1966 the Commission served a complaint on Phillips alleging that it had entered into an illegal joint venture agreement with National Distillers for the production of low density polypropylene, which was alleged to have removed Phillips as a potential *de novo* entrant into the LDPE market and which reduced competition between Phillips and National in the sale of propylene-based products. In 1966 Phillips voluntarily consented to the entry of an order disposing of this complaint in which Phillips agreed to liquidate the joint venture arrangement and, in the now disputed Paragraph IX, to enter into the production of LDPE at a newly constructed plant with a minimum annual capacity of 140 million pounds. The paragraph which was agreed to by Phillips provided a five year period in which to accomplish this. This five year period expires in August, 1971. Respondent's petition asserts that it has already constructed a plant for the manufacture of LDPE, but that a third production line will have to be added to the two now in existence in order to increase the plant's annual production capacity to the amount required by the order.

Rule 3.72(b) of the Commission's Rules of Practice provides that a respondent subject to an order which has become final may petition the Commission for its modification if changed conditions of fact or law or the public interest so requires. Subparagraph (3) of the rule provides that the Commission may in its discretion decide the matter on the papers filed or, if the pleadings raise substantial factual issues, set the matter down for such hearings as it may deem appropriate.

In its original petition for a modification of this paragraph to grant it an additional five years within which to comply, Phillips detailed the many start up costs and operations and time needed for each,

but did not at any point argue actual physical impossibility to complete the agreed to enlargement of the LDPE plant. Rather it argued that the LDPE market was "in balance" and that the additional new capacity would upset this "balance."

Paragraph IX of the order was clearly central to the relief agreed to by Phillips as well as to the Commission's willingness to dispose of the complaint by consent order. Its purpose is to require Phillips to enter into the production of LDPE as a significant competitive force (enter with a capacity to produce 140 million pounds), and thus to provide additional competition in the highly concentrated LDPE market.

The type of changed circumstances urged by Phillips in support of its petition concern the status of the LDPE market condition as Phillips views it and Phillips' contention that this market is not likely to enable it to obtain what it would consider a satisfactory return on investment.

Phillips agreed in the order to expand its LDPE plant to a specified capacity. It agreed further in 1966 that this expansion would be effected by 1971. No provision was made that the expansion should be conditioned on the state of the market. Indeed the expansion to which Phillips agreed was absolute. Clearly, it is not unreasonable to suppose that it could have been anticipated by both parties at the time of these negotiations that the LDPE market in 1971 might be different from what it was at the time of the negotiations. Yet the order was silent on the relevance of this factor. Instead it provided simply that Phillips should expand its LDPE capacity by 1971.

Agreement to such an order provision necessarily implies that both the respondent and the Commission have made a careful projection of market conditions for at least this far in the future, subject to allowances for predictive error. Subsequent changes in factual circumstances, if falling within the range of contingencies which were reasonably foreseen or foreseeable at the time of consent negotiations, clearly do not constitute the kind of changed conditions which are substantial and material enough to require modification of the order. To conclude otherwise would mean that a negotiated consent agreement could never operate with any finality to require compliance at a fixed future date—a result which would rob the consent procedure of much of its usefulness.

We hold that the current state of the market described by Phillips is not a circumstance which is material to the agreed to obligation contained in Paragraph IX to complete the plant expansion by 1971, and does not present the type of factual issue or changed circumstance required by the rule as a predicate for a petition to modify.

Moreover, to the extent that the current status of the LDPE market is a factor in considering whether the public interest requires the requested five year extension, we conclude that the differences in market characterizations between Phillips and the Bureau of Competition are of a minor nature, and relate primarily to long-run future developments. Certainly they do not constitute "substantial questions of fact" within the meaning of Rule 3.72(b)(3) so as to require a further evidentiary hearing.

Accordingly, we do not find any basis in the papers submitted by the parties for granting the requested modification nor do we find any disputed issue of fact bearing on the modification which would indicate the necessity for taking any evidence or holding any hearings. The papers now before us, both on the original petition and on the petition for reconsideration, adequately set out the arguments of the parties and on the basis of these papers we reaffirm our order of December 14, 1970, and deny the petition for reconsideration.

The Commission having fully considered the Petition of Respondent Phillips Petroleum Company for Reconsideration of Order Denying in Part Phillips' Application for Modification of Consent Order;

It is ordered, That respondent's petition for reconsideration be, and hereby is, denied.

UNIVERSAL ELECTRONICS CORPORATION, ET AL.

Docket 8815. Order and Opinion, March 29, 1971

Order denying petition for reconsideration of Commission's decision on grounds of ambiguity.

OPINION OF THE COMMISSION

This matter is before the Commission on the petition of respondents for reconsideration of the decision of the Commission in the above captioned matter received February 24, 1971. By its order of January 28, 1971 [78 F.T.C. 265], the Commission adopted as its own the initial decision of the hearing examiner filed November 6, 1970. The respondents, pursuant to Rule 3.55 of the Rules of Practice have now filed a petition for reconsideration of said decision and order.

Respondents petition alleges that two provisions of the order are confusing and ambiguous and that one of the possible readings in each case is illegal. The order paragraphs here are plain on their face. The caption paragraph contains the very specific language "* * * or any other products or any franchises or dealerships in connection therewith." It is clear from this language that the hearing examiner and the Commission intended that the order not be limited to only those products and franchises that were the subject of hearings before

INTERLOCUTORY DECISION

the Commission. Nor can it be seriously maintained not to so limit is illegal. *FTC v. Ruberoid*, 343 U.S. 470, 473 (1952).

Respondents make the same assertion with respect to Paragraph 3b *i.e.*, that it is ambiguous with one construction illegal. The third circuit has recently affirmed *per curiam* an order provision identical to the one in question here based upon substantially similar practices. The Court found the wording of said paragraphs not to be too vague for compliance. *Windsor Distributing Co. et al. v. FTC*, 437 F. 2d 443 (3rd Cir., 1971). The order compels the respondent to refund promptly all monies to any purchaser who has been induced to purchase after the date that the order becomes final by practices in violation of the order.

Respondents have raised no new questions with respect to this order as required by the rule. The petition for reconsideration, accordingly, is denied. An appropriate order accompanies this opinion.

ORDER DENYING PETITION FOR RECONSIDERATION OF DECISION

Upon consideration of the Petition for Reconsideration of Decision, filed February 24, 1971 by the respondents in the above captioned matter, the Commission, for the reasons set forth in the accompanying opinion, has determined that the petition should be denied. Accordingly,

It is ordered, That petition of the respondents Universal Electronics Corporation and Wendell Coker to reconsider the decision be, and it hereby is denied.

FOOD FAIR STORES, INC., ET AL. DOCKET 8786

H. C. BOHACK CO., INC., ET AL. DOCKET 8787

JEWEL COMPANIES, INC., ET AL. DOCKET 8788

BORMAN FOOD STORES, INC., ET AL. DOCKET 8789

FIRST NATIONAL STORES, INC., ET AL. DOCKET 8790

Order, April 12, 1971

Order directing General Counsel to file in District Court for the Northern District of Illinois documents advising the court that the Commission has found that issuance of the complaints is in the public interest.

STATEMENT OF EVERETTE MACINTYRE, COMMISSIONER

These matters are before the Federal Trade Commission for a reconsideration of the Commission's decision to issue the administrative complaints involved here.

As provided for in the Order of the United States District Court for the Northern District of Illinois, Eastern Division, in No. 69 C 1673, dated January 21, 1971, entered by Judge J. S. Perry, the Commission gave the parties to whom the administrative complaints have been directed opportunity to be heard in connection with this further reconsideration of the issuance of such complaints. The hearing included the filing of extensive briefs filed in the early part of March, 1971, and oral argument thereon March 23, 1971. On the latter date, the Commission announced it would take the matters under advisement and later announce its decision.

In view of some arguments and statements by others concerning my beliefs about the meaning of the law, it appears that it is appropriate and perhaps desired that I further explain my belief and position on the meaning of the law in question.

Prior to an earlier decision by the Federal Trade Commission to issue these administrative complaints I had made two statements. On one of those occasions I had included in one of my statements the sentence:

Congress did not, as the dissent seems to imply, leave it to the discretion of the Commission to decide, *as a matter of policy*, whether to enforce Section 2(c) of the Clayton Act when it has "reason to believe" that the statute is being violated (emphasis supplied).

On a later occasion, when the Commission was issuing these administrative complaints I made another statement in which I included the following sentence:

My decision to vote for the issuance of these complaints is based upon my conviction that their issuance is justified.

A member of the Federal Trade Commission who dissented to the Commission's action in the issuance of these administrative complaints at that time stated "The Commission apparently believes it has no discretion when it comes to squandering scarce resources on bringing such a proceeding." Apparently that remark, others in the same vein and arguments based thereon made to the courts, and especially in the light of the earlier statements I had made, caused the courts to wonder whether the Commission and I in particular had misconstrued our statutory obligation by assuming we had no discretion to consider whether the issuance of a particular complaint under the particular provision of the law involved would be in the public interest.

At the outset, I wish to say that I have never consciously voted for the Federal Trade Commission to institute a proceeding without my conviction that to institute such a proceeding was to the interest of the public. When I voted to institute the proceedings under reconsideration at this time, I likewise was convinced that my action was clothed

with public interest and was in the public interest. Likewise, I believe this last action of mine in these matters to be in the public interest. Therefore, I have not only considered that the public interest is involved, I have taken it into account and I am convinced that my actions are in accord therewith.

Now, with respect to statements I have made in the past regarding laws entrusted to the Federal Trade Commission for enforcement, let me say this: I do not think that the Federal Trade Commission "*as a matter of policy*" has discretion to decide not to enforce any one of those laws. That is not to say that I do not believe the Commission has discretion to decide whether to institute or not institute a particular proceeding under any one of those laws. As the parties argued before the Commission on March 23, 1971, in these matters the Commission has on a number of occasions failed to institute proceedings for violation of the provision of law involved here. In a number of those actions of the Commission I participated. I consider that in each such participation I exercised my proper discretion in avoiding the "squandering scarce resources" and unnecessary litigation.

Also, I wish to say that I have a strong belief and conviction that a public official in the exercise of discretion should not abuse discretion.

Although not involved in these cases nor in our reconsideration of the same, I have come to know some Federal Trade Commissioners, some members of the bar and a few others, who (according to my view of what they say and write) do not believe that the Federal Trade Commission, "*as a matter of policy*" should enforce Subsection (c) of Section 2 of the Clayton Antitrust Act according to the standards specified therein, but instead if that provision of law is to be enforced at all it should be enforced according to the different standards specified and spelled out in Subsection (a) of Section 2 of the Clayton Antitrust Act. I do not believe that the Federal Trade Commission has discretion "*as a matter of policy*" to do that. In my view that would be an abuse of discretion. My simple belief and position in that respect is based largely on the expressed views of the Congress, the courts and on what I have been able to learn as a student of the law.

It is regrettable that my small and simple belief and position in the above respect has been so utilized as to trouble so many, so much, and for so long.

ORDER REAFFIRMING DECISION TO ISSUE COMPLAINTS

Respondents herein having filed a motion for summary judgment in the United States District Court for the Northern District of Illinois, Civil Action No. 69 C 1673, requesting the court to permanently enjoin the Commission from further proceedings upon the ad-

ministrative complaints issued in the above docketed matters, stating as grounds therefor that the deciding vote to issue said complaints was cast upon the erroneous assumption that the Commission was bound to issue the complaints whether or not the public interest was served thereby; and

The District Court, on January 21, 1971, having extended to May 15, 1971, the time within which response to the motion for summary judgment may be filed and having ordered that during the pendency of said motion the Commission may reconsider its decision to issue the aforesaid complaints but that it shall give respondents an opportunity to be heard in connection therewith; and

The Commission having determined to reconsider its decision to issue the complaints and having afforded respondents an opportunity to be heard on briefs and oral argument, and on the basis of such hearing, having further determined that the complaint in each of the above docketed matters states a cause of action; and

The Commission although being of the opinion that neither Section 2(c) nor Section 11 of the Clayton Act requires a finding that issuance of a complaint is in the public interest,¹ nevertheless, upon the complaints, briefs and oral argument, specifically finds that issuance of a complaint in each of the above docketed matters is in the public interest and it reaffirms its decision to issue said complaints:

Accordingly, it is ordered, That the General Counsel be, and he hereby is, directed to file in the District Court for the Northern District of Illinois appropriate documents advising the court that the Commission has found that issuance of the complaints herein is in the public interest and that it has reaffirmed its decision to issue said complaints.

Commissioner MacIntyre filed a separate statement.

STANDARD OIL COMPANY OF CALIFORNIA, ET AL.

Docket 8827. Order, Apr. 13, 1971

Order denying motions of respondents that Commission reconsider the issuance of complaint against them and that Chairman be disqualified.

ORDER DENYING MOTIONS FOR RECONSIDERATION AND DISQUALIFICATION

This matter is before the Commission upon the motion of respondent Standard Oil Company of California (Standard) filed with the

¹ *Jewell Companies, Inc. v. Federal Trade Commission*, 432 F.2d 1155, 1160 (7th Cir. 1970).

hearing examiner March 16, 1971, and the motion of respondent Batten, Barton, Durstine & Osborn, Inc. (B.B.D. & O.) filed with the hearing examiner March 17, 1971, for reconsideration and disqualification, certified to the Commission on March 29, 1971. Respondent B.B.D. & O. has, in effect, joined in Standard's motion. It filed an identical motion to that filed by Standard and in support thereof states it "adopts and relies upon the material and arguments set forth by the Respondent STANDARD in its motion papers." Specifically, Standard and B.B.D. & O. have moved the Commission "(1) to reconsider its order of December 29, 1970, issuing the complaint herein, (2) to cancel and rescind the order and withdraw the complaint, and (3) to disqualify Chairman Kirkpatrick from further participation in any proceedings involving [respondents] and F-310, or in the alternative that Chairman Kirkpatrick disqualify himself." They also request an opportunity to appear and to argue their position orally before the full Commission.

Chairman Kirkpatrick, on April 8, 1971, filed for the record a memorandum in response to respondents' respective motions (which he considered as a single motion), stating among other things that he declines to disqualify himself and that he shall not be present and shall not participate in any deliberation or decision by the Commission concerning their motion that he be disqualified from further participation by the Commission.

The Commission thereafter met without the presence of Chairman Kirkpatrick and considered the above-referred-to motions.

On the point of Chairman Kirkpatrick's participation herein, under the Commission's practice a disqualification is treated as a matter primarily for determination by the individual concerned, resting within the exercise of his sound and responsible discretion. This practice, the Commission believes, is proper and consistent with the law, and in the instant case no basis for departing therefrom has been shown. Accordingly, the requests on this point will be denied.

Standard's grounds generally for its motion (which are also those of B.B.D. & O. by adoption) are as follows:

(a) that the Commission has violated Standard's constitutional and statutory rights, assertedly by prejudging the issues, thus foreclosing it from a fair trial, and by bringing this proceeding as a test case; and

(b) that the Commission had no "reason to believe" Standard's advertisements were false or deceptive and in violation of law and through its procedures assertedly published unfounded accusations against Standard; that the Commission was not informed, or misinformed, on the facts; and, finally, that the proceeding is assertedly contrary to the public interest and violates

Standard's constitutional rights to equal protection under the law.

Standard's (and B.B.D. & O.'s by adoption) factual basis to support its motion consists mainly of its references to the alleged prejudgment of Chairman Kirkpatrick (a matter above considered and of which we have made disposition), and, secondly, its arguments on the merits. The core of its contentions, aside from the assertions as to the Commission's Chairman, is that there are no sufficient grounds for the complaint and that therefore it should be withdrawn. We believe that the only proper way to decide such an issue is by a full trial on the merits. This proceeding, as all Commission proceedings, will be conducted according to the Commission's Rules of Practice and the Administrative Procedure Act. Standard and B.B.D. & O. are thus assured of a full and fair hearing on the charges against them. To examine the merits at this time, or to attempt to do so, would be an irregularity completely unjustified by the circumstances shown. Thus, so far as respondents request a reconsideration of the Commission's basis for the issuance of the complaint and the withdrawal thereof, their motions will be denied.

It is not believed that oral argument before the Commission on the matters raised would serve any useful purpose in the circumstances so those requests will likewise be denied. Accordingly,

It is ordered, That the motions of Standard Oil Company of California and Batten, Barton, Durstine & Osborn, Inc., for reconsideration and disqualification, filed respectively March 16, 1971 and March 17, 1971, be, and they hereby are, denied.

It is further ordered, That respondents' respective requests for the opportunity to appear and argue their position orally before the Commission be, and they hereby are, denied.

Chairman Kirkpatrick not participating.

AMERICAN BRANDS, INC.

Docket 8799. Order, April 14, 1971

Order granting motion requesting permission to file a consent agreement on a non-public basis and holding in abeyance motion to withdraw from adjudication.

ORDER GRANTING MOTION REQUESTING PERMISSION TO FILE A CONSENT AGREEMENT ON A NONPUBLIC BASIS AND HOLDING IN ABEYANCE MOTION TO WITHDRAW FROM ADJUDICATION PURSUANT TO SECTION 2.34(d)

The hearing examiner in this matter having certified to the Commission on February 12, 1971, a joint motion of counsel in support of

the complaint and counsel for respondent requesting permission to file a consent agreement with the Commission on a nonpublic basis and a joint motion to withdraw this matter from adjudication pursuant to Rule 2.34(d); and

The Commission having determined that examination of the Agreement Containing Order to Cease and Desist executed between counsel for respondent and counsel supporting the complaint may materially assist the Commission in deciding whether to withdraw this matter from adjudication:

It is ordered, That the motion requesting permission to file a consent agreement with the Commission on a nonpublic basis be, and it hereby is, granted; and

It is further ordered, That the motion to withdraw from adjudication be held in abeyance until such time as the Commission has examined the consent agreement executed by counsel.

UNION CARBIDE CORPORATION

Docket 8811. Order, April 20, 1971

Order denying request for leave to file interlocutory appeal and rescheduling the evidentiary hearings in hopes that, as a courtesy to the court, such extension of time may facilitate the expeditious conclusion of the collateral suit in the district court.

ORDER RESCHEDULING TRIAL DATE AND DENYING REQUEST TO FILE INTERLOCUTORY APPEAL

This matter is before the Commission upon respondent's request filed April 16, 1971, for leave to file an interlocutory appeal from the hearing examiner's order denying its request to reschedule the hearings and upon its further request for an order postponing the hearing date in this proceeding now set for May 10, 1971.

Respondent asserts, *inter alia*, that it filed, on April 8, 1971, in the U.S. District Court for the District of Columbia (*Union Carbide Corporation v. Federal Trade Commission*, Civil Action No. 714-71) a complaint praying for declaratory and injunctive relief in connection with the hearing examiner's order denying its motion for summary decision and related rulings. It states that on April 9, 1971, it moved the hearing examiner to reschedule the trial date from May 10, 1971, to July 12, 1971, in view of the complaint so filed and that the hearing examiner denied the request. Respondent claims that the hearing should be postponed as a courtesy to the court and to permit the court to determine respondent's legal rights, asking that the paper it filed be considered as its brief in support of its requests.

We see no reason why proceeding with the hearings should be considered in any way a discourtesy to the district court nor why this should interfere with any determination the court may make on respondent's complaint. While the extension requested would only result in unnecessary delay in this agency action, the Commission is of the opinion that a limited extension may facilitate the expeditious conclusion of the collateral suit in the district court. Accordingly,

It is ordered, That respondent's request for leave to file an interlocutory appeal from the hearing examiner's order filed April 14, 1971, is denied;

It is further ordered, That the trial date for evidentiary hearings in this proceeding is rescheduled for May 24, 1971.

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NATIONAL ASSOCIATION OF WOMEN'S AND CHILDREN'S
APPAREL SALESMEN, INC., ET AL.

Docket 8691. Order, April 29, 1971

Order denying respondents' petition for and oral argument on their appeal for reconsideration of the decision and order.

ORDER DENYING PETITION FOR RECONSIDERATION

This matter is before the Commission upon respondents' petition filed April 2, 1971, requesting the Commission, pursuant to Section 3.55 of its Rules of Practice, to reconsider its decision and order in this proceeding; and upon the answer of complaint counsel in opposition thereto filed April 14, 1971.

Respondents raise four points. Their first is an objection to the Commission's statement in its opinion issued July 30, 1970 [77 F.T.C. 988, at 1087] as follows:

Respondents do not challenge the examiner's findings that they agreed and combined to restrict the times, places and conditions under which clothing manufacturers may show and sell their merchandise, and that the NAWCAS affiliates and their individual members, as well as individual salesmen, have been similarly restricted. Nor do respondents challenge the conclusion that these practices standing alone constitute antitrust violations in contravention of the Federal Trade Commission Act. * * *

They assert that by reason of the breadth and scope of the final order they believe the Commission placed "undue weight upon their alleged concessions." (Pgs. 8-9, petition.) Respondents' position is that they did not intend to concede the illegality of the acts and practices enumerated in the complaint or abandon their claim that several of such are reasonable and unobjectionable.

Respondents, it seems, mainly take exception to the part of the statement averring they had not challenged that the practices were antitrust violations standing alone. The Commission, however, found and concluded, on the basis of the entire record, that the acts and practices alleged in the complaint violated the law as charged, discussing and explaining its reasons in the opinion in some detail. Therefore, respondents' contention on this point forms no basis for the requested reconsideration.

Respondents, secondly, take exception to Paragraph I (17) of the final order [78 F.T.C. 446, 451]. This prohibits them from:

Refusing to accept as an exhibitor at any trade show any salesman who may also be a manufacturer, importer, wholesaler, or jobber, or officers or employees thereof, whose line or lines of women's and children's apparel are not exhibited at that trade show by a member of NAWCAS or a member of any of its affiliates.

This provision, according to respondents, is so broad as to "permit manufacturers to fire or otherwise terminate their regular salesmen, or to refuse to use commission salesmen, to show lines at trade shows, and rather to use other employees, officers or non-salesmen of the company to avoid paying commissions on orders written at the show, to traveling salesmen." (Pg. 9, petition.) Respondents object to the whole provision but argue that if it is to be used it should be amended by inserting the phrase "bona fide" just prior to the word "salesman" in the second line, by inserting the phrase "and who travels the territory in which the trade show is held" after the word "jobber," and, finally, by inserting the phrase "who are also salesmen regularly traveling such territory and" after the word "thereof." The insertions of these words and phrases would, so far as this paragraph is concerned, limit the trade show to exhibitors falling within the meaning of the qualifying terms used and thus be restrictive in nature.

This is hardly a new question. Complaint counsel, in their recommended order, included a provision almost identical to that adopted by the Commission. Respondents, at the oral argument, dealt with the terms of the order, protesting that regulations and restrictions proposed would be harmful to the operation of a trade show (see, for instance, such parts of the transcript of oral argument on February 2, 1971, as pages 19, 22-24 and others), a position which the Commission, as a general proposition, rejected.

We believe that respondents' objections to this particular provision in the order amounts to unfounded speculation as to its possible future effects. One of the principal purposes of the order was to eliminate unreasonable restrictions and open up the shows to competition. To now amend the order as sought by respondents would amount to an authorization of certain restrictions inimical to that purpose with-

out any adequate demonstration of necessity. Also, we believe that the modifications urged upon us by the respondents would result in confusion as to the meaning and scope of the provision. In all the circumstances, we conclude that respondents' request on this point should be denied. Of course, respondents, on the basis of future experience under the order or otherwise, are not prejudiced, after this order becomes final, from seeking a modification of such paragraph pursuant to Commission Rule Section 3.72.

Respondents' third point has to do with I (2) and (3) of the final order [78 F.T.C. 449-50]. These paragraphs may be summarized as concerning agreements and other listed relationships or arrangements with any other party for the purpose or with the effect of preventing or interfering with a manufacturer from displaying, offering or selling his merchandise or with his efforts to do so in or from any space not contracted for and used by a representative who is a member of NAWCAS and others respectively listed. They deal with space availability to outsiders and not with other restrictive practices. These paragraphs contain certain prohibitions, but the prohibitions are stated in such a way as not to interfere with ordinary and proper agreements made for the sale and use of space. On the other hand, these paragraphs in no way modify other paragraphs in Part I of the order, which contain various other express prohibitions. There is nothing in the language of Paragraphs I (2) and (3) even remotely suggesting that respondents may impose restrictions otherwise prohibited by the order on those listed who contract for and use space.

Consequently, respondents' position, set out on page 10 of their petition, interpreting Paragraphs I (2) and (3) as providing that they "may impose restrictions upon the showing of line or lines of manufacturers in space actually contracted for *and used* * * * by respondent NAWCAS or its affiliates for the purpose of a trade show," is entirely unwarranted. We will not grant respondents' request for an order modification in this respect because it would be contrary to one of the purposes of the order. Furthermore, we don't believe any amendment is necessary because the order states the prohibitions in accordance with the Commission's intentions in the matter and does so clearly.

Finally, respondents submit that the petition should be granted because of alleged drastic changes in the industry and in the mode of operation of the respondents. They apparently seek further hearings so that asserted new facts may be presented to the Commission. Again, this subject is not new. It was raised at the oral argument before the Commission (see transcript dated February 2, 1971, pg. 8 *et seq.*). Respondents, in their brief filed September 4, 1970, discussed

at length asserted changes in the industry. Accordingly, respondents have had opportunities and have made use of such opportunities to raise this point. We were not, and are not now, persuaded that respondents have made a showing on alleged changes such as would justify holding further hearings in this case or reconsideration of the Commission's decision and order, and, so, we will not grant this request. Accordingly,

It is ordered, That respondents' petition for reconsideration filed April 2, 1971, be and it hereby is, denied.

It is further ordered, That respondents' request for oral argument on their petition for reconsideration be, and it hereby is, denied.

Chairman Kirkpatrick not participating.

STANDARD OIL COMPANY OF CALIFORNIA, ET AL.

Docket 8827. Order, May 7, 1971

Order granting request by respondent to file reply to answer of the Commission counsel to respondent's motions for reconsideration and disqualification.

ORDER GRANTING MOTION FOR RECONSIDERATION

This matter is before the Commission upon the request, filed April 19, 1971, by respondent, Standard Oil Company of California, for leave to file a reply to the answer, filed April 12, 1971, to respondents' motions for reconsideration and disqualification.

Respondents, Standard Oil Company of California ("Standard") and Batten, Barton, Durstine & Osborn, Inc., on March 16, 1971, and March 17, 1971, respectively, filed with the hearing examiner their motions for reconsideration and disqualification, seeking, in substance, reconsideration and rescission of the Commission's order issuing the complaint, the disqualification of Chairman Kirkpatrick and the opportunity to argue their position orally before the Commission. By memorandum of April 8, 1971, Chairman Kirkpatrick explained his decision declining to disqualify himself. On April 12, 1971, the above-mentioned answer to respondents' motions for reconsideration and disqualification was filed.

The Commission, by order of April 13, 1971, denied the motions of "Standard" and Batten, Barton, Durstine & Osborn, Inc., for reconsideration and disqualification, as well as their requests to argue their position orally before the Commission.

Respondent "Standard's" present request having been filed April 19, 1971, well after the Commission's order, dated April 13, 1971, will

therefore be treated as a motion for reconsideration of the Commission's action of April 13, 1971.

For the reasons contained in the motion for reconsideration, the Commission has determined to allow "Standard" ten (10) days from the date of service of this order within which to file a document in support of its motion. Accordingly,

It is ordered, That the request by counsel for respondent Standard Oil Company of California, filed April 19, 1971, for leave to file a reply to the answer filed by counsel for the Commission to respondents' motions for reconsideration and disqualification, be, and it hereby is, treated as a motion for reconsideration in support of which respondent "Standard" is allowed to file a document within ten (10) days from the date of service of this order.

Chairman Kirkpatrick not participating.

THE HEARST CORPORATION, ET AL.

Docket 8832. Order, May 26, 1971

Order denying motion of respondent International Magazine Service to dismiss or stay case because of pending trade regulation rule.

ORDER DENYING MOTION TO DISMISS OR STAY BECAUSE OF PENDING TRADE REGULATION RULE PROCEEDING

The hearing examiner in this matter has certified to the Commission, pursuant to Section 2.33 of the rules, a motion filed by respondent International Magazine Service on April 8, 1971, to dismiss certain paragraphs of the complaint on the ground that the matters therein are also the subject of the Commission's pending trade regulation rule proceeding concerning a cooling-off period for door-to-door sales, notice of which was published September 30, 1970 (35 Fed. Reg. 15164).

In the alternative, respondent moves that as a matter of administrative discretion, this adjudicative proceeding be stayed pending disposition of the rulemaking proceeding. Complaint counsel filed an answer on April 13, 1971, opposing the motion, and on May 4, 1971, respondent filed a reply to complaint counsel's answer. The examiner in certifying the question to the Commission on May 7, 1971, recommends, without stating his reasons, that the alternative motion for stay be granted.

Respondent's argument is that the "proposed trade regulation rule covers many of the alleged practices challenged in this proceeding" and that continuation of portions of this proceeding is unnecessary and unfair to respondent.

An examination of the respondent's motion reveals, however, that essentially it is only certain provisions of the proposed *order* served with the complaint, not the substantive allegations of the complaint itself, which respondent contends overlap with proposals now pending in the rulemaking proceeding. Thus, among other things, the proposed order would require respondent to cease and desist from representing that they are engaged in any activity other than soliciting business and to affirmatively disclose at the outset of each contact the purpose of the contact. Paragraph 9 of the proposed trade regulation rule, respondent notes, similarly would require (in connection with sales of consumer goods having a purchase price of \$10 or more) salesmen making solicitations at person's homes to reveal the purpose of their call at the outset. Other instances of duplication between the order and the proposed rule are asserted, including provisions which would prohibit misrepresentation of a buyer's right to cancel a contract, requiring the giving of a right to cancel contracts within 3 business days, and a requirement that a copy of the signed contract be left with the buyer with a specific cancellation form.

These provisions in the proposed order are based on allegations in the complaint that respondent has sold magazine subscriptions by unfair and deceptive acts and practices which are specifically set forth and described. See Paragraphs 4, 5, and 6 of the complaint. Remedial provisions similar to those in the proposed order have been adopted by the Commission in previous cases where the adjudicated facts had shown that companies had engaged in false and misleading representations to gain entry and make sales. In *Crowell-Collier Publishing Co.*, FTC Docket 7751 (Feb. 4, 1969), *aff'd sub nom., P. F. Collier & Son Corp. v. FTC*, 427 F. 2d 261 (6th Cir.), *cert. denied*, 400 U.S. 926 (1970), the Commission, on the basis of facts showing misrepresentations to gain entry into the home, required affirmative disclosure at the outset in all future solicitations that the person making the call is a salesman and that the purpose of his call is to sell merchandise. See also *Household Sewing Machine Co.*, FTC Docket 8761 (Final Order, August 6, 1969) [76 F.T.C. 207], where on the showing that the respondent had engaged in bait-and-switch tactics, the Commission required the respondent to grant to all purchasers a 3-day grace period during which all sales transactions negotiated in the consumer's home could be rescinded by the purchaser. The Commission explained its action by stating:

This will serve as a cooling-off period during which any consumer, who may be subjected to the unfair pressures resulting from the deceptions we have discussed or similar deceit, may reevaluate and cancel her purchase. Our order will require the notice of the cooling-off period to be clearly printed in a conspicuous place on the contracts and will also require that respondents provide a separate,

simple and clearly understandable cancellation form. In light of respondent's proclivity for the use of deception in both advertising and in the home, this is appropriate and necessary relief. (p. 10)

The instant complaint contains allegations similar to those in the above cases, namely that respondent's agents have misrepresented the purpose of business calls to gain entry, as well as various types of misrepresentations concerning contracts which customers have been induced to sign. As to the issues raised by respondent, it is important to note, therefore, that these allegations in Paragraphs 4, 5, and 6 of the complaint do not raise new principles or questions of law under Section 5 of the Federal Trade Commission Act.¹ They are the type of acts and practices which, if shown to have occurred, would constitute violations of the Federal Trade Commission Act under settled and long-standing interpretations of that statute. On the other hand, the purpose of the proposed trade regulation rule proceeding is to explore the question of whether the Commission should declare a new category of unfair practice in door-to-door solicitations; a rule which would require, without regard to a showing of misrepresentations in specific cases, sellers to provide buyers with certain information and options, including the right to cancel transactions within a certain period of time.

Whatever decision and order are adopted in this adjudicative matter will depend solely on what evidence is adduced in support of, or in opposition to, the particular allegations in this complaint. Such decision, and any question of appropriate relief in the form of a cease and desist order, will be completely independent of what transpires in the rulemaking proceeding. The rulemaking proceeding is still pending and there is no certainty at this point whether or to what extent the regulation as it was initially proposed will be adopted. Nor is there any way of now determining when the final decision on that question will be made.

In the circumstances, we find that it would not be in the public interest to dismiss portions of this complaint or stay this proceeding on the speculation that in the near future the Commission might issue a

¹ Paragraph 7 of the complaint can be read as alleging in the alternative that gaining access "without prior invitations to solicit" long-term magazine subscriptions, without affording the consumer the right to cancel within 3 days, is itself an unfair practice aside from any misrepresentations of fact. However, we note that according to a pleading filed by respondent on April 12, 1971, complaint counsel stated at a prehearing conference that "the Commission is not claiming that gaining access 'without prior invitation' is itself an unlawful practice." (Motion to Dismiss and/or for Summary Decision, p. 13 n. 3.) It does not appear that complaint counsel has disputed this construction of the complaint attributed to him. In any event, the question of whether it is *per se* an unfair practice to fail to provide a right of cancellation in door-to-door solicitations is a major issue in the trade regulation rule proceeding, which was initiated subsequent to the time that the proposed complaint in this matter was first served on June 1, 1970. To the extent this issue appears to be raised in Paragraph 7, it is hereby withdrawn and Paragraph 7 is modified *pro tanto*.

final trade regulation in the form it was proposed. And even if we were to assume that such a regulation would be adopted, we are not prepared, in the absence of what the record facts will show as to the respondent's practices, to assume that the public interest would be adequately protected without the need of placing respondent under the constraint of a cease and desist order.

Although we acknowledge that uniformity in treatment of members of the same industry is usually desirable, we have a primary obligation in these matters to see that the consuming public is adequately protected. Thus, in *P. F. Collier, supra*, the court rejected an argument by the respondents that by forcing their agents to affirmatively disclose the nature of their business when they approach a prospective customer, the order unfairly put them at a competitive disadvantage with other door-to-door sellers. The court stated: "Such a situation would afford the basis for an argument that Collier's competitors should have been dealt with likewise, not that petitioners should escape * * * The purpose of Commission orders is not to put those employing deceptive acts or practices in *pari delicto* with each other." (427 F. 2d at 276.) Accordingly,

It is ordered, That the motion of respondent International Magazine Service to dismiss or stay because of a pending trade regulation rule proceeding be, and it hereby is, denied.

Chairman Kirkpatrick not participating.

COWLES COMMUNICATIONS, INC., ET AL.

Docket 8831. Order, June 11, 1971

Order denying respondents' appeals which challenged examiner's order as requiring admissions on alleged irrelevant information and as denying or nullifying respondents' assertions of privilege against self-incrimination under the Fifth Amendment.

ORDER DENYING INTERLOCUTORY APPEALS

This matter is before the Commission upon two appeals, pursuant to Section 3.35(b) of the Commission's Rules of Practice, both filed May 19, 1971, the one by respondent Cowles Communications, Inc., and the other by the remaining respondents, from the order of the hearing examiner filed May 12, 1971, denying objections by respondents to complaint counsel's requests for admissions. The appeals are virtually identical, challenging the examiner's order as requiring admissions on alleged irrelevant information and as denying or nullifying respondents' assertions of privilege against self-incrimination under the Fifth

Amendment of the United States Constitution. Complaint counsel, on May 26, 1971, filed an answer in opposition to the appeals.

The record shows as background that complaint counsel, on March 17, 1971, filed requests for admissions for each of the respondents individually and that thereafter such requests were served on the respective respondents. Each such request is directed to the entity named as a respondent in the complaint, that is, Cowles Communications, Inc.; Civic Reading Club, Inc.; Educational Book Club, Inc.; Home Reader Service, Inc.; Home Reference Library, Inc.; and Mutual Readers League, Inc. For example, that directed to Cowles Communications, Inc., begins as follows:

COME NOW counsel supporting the complaint and, pursuant to the provisions of Section 3.31 of the Commission's Rules of Practice, request respondent COWLES COMMUNICATIONS, INC., (sometimes hereinafter "Cowles" or "the Company") to admit the truth of the matters hereinafter set forth.

No individual persons such as officers, directors or custodians are named therein. The requests are directed solely to named respondents, which appear to be corporate entities.¹

According to the hearing examiner, the "admissions sought by complaint counsel call for background information with respect to the issue of the authority and control of respondent Cowles Communications, Inc. over its subsidiaries, the other corporate respondents herein, * * *" (Hearing examiner's order filed May 12, 1971.) The various requests are similar and seek admissions to such facts as the date and place of incorporation, names of officers and directors for a specified time period, ownership information and other corporate data.

Respondents filed objections with the hearing examiner, contending (1) that the requests seek admissions of facts for a time period allegedly irrelevant, and (2) that the requests require responses within the constitutional privilege against self-incrimination. Respondents asserted privilege not only with respect to respondents "as corporations" or "as a corporation," but also "with respect to their [its] individual officers or directors who would be compelled to sign such admissions under oath and thereby may tend to incriminate themselves." They argued that in the circumstances the provisions of the Organized Crime Control Act of 1970 (Public Law 91-452), amending Title 18 of the United States Code by adding new Sections 6001 through 6005, are applicable and that the procedure for granting immunity thereunder must be followed before respondents can be required to answer requests for admissions.

¹In their answers to the complaint, all respondents denied the allegations in the complaint that they are corporations, except Cowles Communications, Inc., which respondent answered this allegation ambiguously.

The hearing examiner, on May 12, 1971, denied the objections made by the respondents, and respondents have made these appeals requesting "an order affirming all the objections" which they made to the hearing examiner and further relief that is just. They make the same arguments as they advanced to the hearing examiner.

The immunity provisions contained in Title 18 U.S.C. Sections 6001 through 6005, so far as they are relevant to this agency proceeding, require that in the case of any individual who has been or who may be called to testify or provide other information, the agency may, with the approval of the Attorney General and upon making certain specific determinations as to public interest and the refusal to testify on the basis of privilege, issue an order requiring the individual to give testimony or provide other information "which he refuses to give or provide on the basis of his privilege against self-incrimination," such order to become effective as provided in the statute granting the witness the immunity as therein set forth (emphasis supplied). Thus, the immunity statute requires that certain procedures be followed for an individual asserting his constitutional privilege. If the individual has no privilege to assert, the statute, as we construe it, does not apply. It is settled that a corporation is not protected by the constitutional privilege against self-incrimination. *Curcio v. United States*, 354 U.S. 118, 122 (1957). Accordingly, if respondents are incorporated, and for the purpose of this holding we assume they are corporations since they have asserted privilege as corporations, then they have no constitutional privilege against self-incrimination to assert and the immunity provisions of the new law do not apply to them.²

Respondents, in their objections to the examiner, also claimed such privilege for their officers or directors who would "sign such admissions under oath," a point not specifically pressed in their appeals here before us. In making this contention respondents cited no supporting authority. The United States Supreme Court precedents unquestionably establish that the privilege against self-incrimination is purely a personal privilege of the witness and cannot be asserted by the witness on the ground that some third person might be incriminated by his testimony. *Hale v. Henkel*, 201 U.S. 43, 69-70 (1906); *U.S. v. White*, 322 U.S. 694, 704 (1944). Thus, there would appear to be no

² While we believe the plain language of the statute excludes corporations which do not have any basis to assert privilege against self-incrimination, we note that the parties have cited no legislative references suggesting otherwise.

To the extent the committee reports touch on the subject they plainly suggest the exclusion of corporations. For instance, the Senate Judiciary Report on S. 30, the related crime bill before the Senate, outlines in general the constitutional privilege against self-incrimination in part in the following words:

"The privilege is personal; it may not be claimed to protect another. In addition it protects only natural persons; corporations or unions may not claim its protection." S. Rep. No. 91-617, 91st Cong., 1st Sess. 51 (1969).

grounds whatsoever for the respondents in this proceeding to assert privilege on behalf of their employees or agents, particularly where such are unspecified and unnamed. It appears that respondents, by asserting generally the privilege of some unnamed custodians or officers, whoever they may be, are in effect thereby claiming a privilege against self-incrimination for themselves as corporations. This they cannot do.

In any event, even if certain directors or officers of the respondents who would be asked to sign the admissions are in a position to assert a personal privilege against self-incrimination, the respondents then have the obligation to designate other agents who could sign such admissions without fear of self-incrimination.³ The holding in *United States v. Kordel*, 397 U.S. 1 (1970), appears to us to be directly in point on this question. There, in connection with requests for information by interrogatories, the Court held the officer of the corporation was not barred from asserting his privilege simply because the corporation had no privilege of its own or because the proceeding in which the government sought information was civil rather than criminal in character, but the court made clear that the corporation could not satisfy its obligation (under Rule 33 of the Federal Rules of Civil Procedure) simply by pointing to an agent about to invoke his constitutional privilege. Quoting in part from an earlier decision the Court stated:

"It would indeed be incongruous to permit a corporation to select an individual to verify the corporation's answers, who because *he* fears self-incrimination may thus secure for the corporation the benefits of a privilege it does not have." Such a result would effectively permit the corporation to assert on its own behalf the personal privilege of its individual agents [footnotes omitted; Court emphasis]. (397 U.S. 8.)

We conclude as to the assertion of privilege against self-incrimination for officers and directors that no proper grounds have been shown to require the application of the immunity procedures of Title 18 U.S.C. § 6001 *et seq.*

The appeals, so far as they raise the point of alleged irrelevancy, are also denied on the basis that no showing has been made that the ruling complained of involves substantial rights and will materially effect the final decision and that a determination of its correctness before the conclusion of the hearing is essential to serve the interests of justice. Accordingly,

³ The admissions here sought apply, so far as it appears, only to corporate data, and there is no indication that the admissions would implicate or incriminate any person such as an officer or director of corporations. Thus, on this issue there is little resemblance to cases cited by respondents involving self-incrimination of officials, such as *Curcio v. United States*, 354 U.S. 118 (1957), and *United States v. Daisart Sportswear*, 169 F.2d 856 (2d Cir. 1948).

----- ORDER, 110. 1000

It is ordered, That the respondents' appeals from the hearing examiner's order filed May 12, 1971 be, and they hereby are, denied. Chairman Kirkpatrick not participating.

STANDARD OIL COMPANY OF CALIFORNIA, ET AL.

Docket 8827. Order, June 24, 1971

Order denying respondent's motion for reconsideration of Commission's previous order denying the disqualification of the Chairman to hear this case.

ORDER DENYING MOTION TO RECONSIDER THE COMMISSION'S ORDER OF
APRIL 13, 1971

This matter is before the Commission upon respondent Standard Oil Company of California's (Standard) motion, and its memorandum in support thereof, for reconsideration of the Commission's order dated April 13, 1971 [p. 1580 herein], denying motions for reconsideration and disqualification. One portion of the original motion asks the Commission "to disqualify Chairman Kirkpatrick from further participation in any proceeding involving [respondents] and F-310, or in the alternative that Chairman Kirkpatrick disqualify himself."

In response to that motion, the Chairman, on April 8, 1971, filed for the record a memorandum stating that he declined to disqualify himself, setting forth the reasons why he felt he was not disqualified, and further stating that he shall not be present and shall not participate in any deliberation or decision by the Commission concerning the motions that he be disqualified.

On April 13, 1971, the Commission issued an order denying in their entirety the motions for reconsideration and disqualification. In that order the Commission recited the fact that the Chairman had filed the above memorandum and that the Commission thereafter met with-

out the presence of the Chairman and considered the above-referred-to motions. The Commission's order further stated that :

On the point of Chairman Kirkpatrick's participation herein, under the Commission's practice a disqualification is treated as a matter primarily for determination by the individual concerned, resting within the exercise of his sound and responsible discretion. This practice, the Commission believes, is proper and consistent with the law, and in the instant case no basis for departing therefrom has been shown. Accordingly, the requests on this point will be denied.

Standard challenges the procedure followed by the Commission in dealing with its motion. Specifically, respondent alleges that the Commission has abdicated its responsibility to determine the merits of the prior motion by permitting that motion to be "denied by the member of the Commission whose qualifications to participate in this matter were in consideration" prior to the time the Commission acted upon the motion itself.

The procedure that was followed here is that which the Commission has always followed where motions to disqualify individual members of the Commission have been filed. As reiterated many times by the Commission in previous cases :

Section 7(a) of the Administrative Procedure Act clearly empowers the Commission to determine whether a presiding officer conducting a "hearing" on behalf of the Commission is subject to "personal bias or disqualification." It is less clear that it was meant to apply to participation of individual agency members in final or appellate determinations. The inquiry called for by a motion for disqualification is necessarily subjective in nature. It is extremely difficult and delicate for a tribunal to assume the responsibility of weighing, objectively, the ability of one of its own members to make an objective judgment in a case. Further, the existence of such a power to disqualify carries with it an inherent danger of abuse, as a potential instrument for suppression of dissent.

Under the Commission's practice, disqualification is treated as a matter primarily for determination by the individual member concerned, resting within the exercise of his sound and responsible discretion.

American Cyanamid Company, 59 F.T.C. 1488 (Order of December 20, 1961); *id.*, 60 F.T.C. 1885 (Order of February 5, 1962 denying motion to reconsider); *Campbell Taggart Associated Bakeries, Inc.*, 62 F.T.C. 1510 (Order of May 7, 1963); *id.*, 62 F.T.C. 1511 (Order denying reconsideration). *Bakers of Washington, Inc.*, 66 F.T.C. 1569; *Sun Oil Co.*, 66 F.T.C. 1570. See also *Carvel Corporation*, 66 F.T.C. 1577. Furthermore, this policy is consistent with the practice followed by the Supreme Court and other Federal and State multimembered judicial tribunals when a motion to disqualify a member is filed, where there is no clear statutory authorization for the court to disqualify one of its members. Frank, "Disqualification of Judges," 56 Yale L.J. 605, 612. See also *Jewell Ridge Coal Corp. v. Local No. 6167*, 325 U.S. 897 (1945), (statement of Justice Jackson) : "Because of this lack of authoritative standards it appears always to have been considered the

responsibility of each Justice to determine for himself the propriety of withdrawing in any particular circumstances." We believe that the procedure used in this case was proper and consistent with the law.

In treating disqualification motions as matters "primarily for determination by the individual concerned," the Commission simply believes that a proper regard for the essential independence of each individual member of a multimember judicial body like the Commission requires a procedure, in disqualification matters, whereby the challenged member will respond personally to the challenge in question, and will decide for himself the merits of the challenge at a point in time *prior* to any action by his fellow members. Because of the obvious danger inherent in any action whereby a majority of Commissioners are required to pass judgment upon the qualifications of a fellow Commissioner with respect to a pending case, the Commission considers the challenged Commissioner's own judgment in such matters to be a factor in its deliberations with respect to such matters. However, the final decision to either grant or deny such a motion is based on the Commission's own determination of the merits in each case. With respect to the motion filed in the instant case to disqualify Chairman Kirkpatrick, the Commission does not see merit in it. This determination was and continues to be separate and apart from the Chairman's own decision to decline to disqualify himself.

Aside from respondent's challenge to the Commission's procedure, as discussed above, respondent's present motion and memorandum do not contain or allege facts or views that differ from those previously presented and considered by the Commission. Therefore, the Commission has determined that respondent's request for further consideration of this matter should be denied. Accordingly,

It is ordered, That respondent Standard Oil Company of California's motion for reconsideration of the Commission's order of April 13, 1971, be, and it hereby is, denied.

Chairman Kirkpatrick did not participate in the decision of this matter.

KENNECOTT COPPER CORPORATION

Docket 8765. Order, June 28, 1971

Order denying respondent's request for the reconsideration or reopening the case and also for certain confidential information.

ORDER DENYING PETITION FOR RECONSIDERATION OR REOPENING

On May 5, 1971 [78 F.T.C. 744], the Commission issued its final order in the captioned matter. Respondent has now filed a petition,

dated June 1, 1971, for reconsideration pursuant to Section 3.55 of the Commission's Rules of Practice or, in the alternative, for reopening of the proceedings pursuant to Sections 3.71 and 3.72(a) of the Rules of Practice. Respondent also moves, pursuant to the Freedom of Information Act (5 U.S.C. § 552) and Section 3.36 of the Rules of Practice, for the production of certain information and records by the Commission. The petition is accompanied by a memorandum in support thereof. Also before the Commission is the complaint counsel's Memorandum in Opposition to Respondent's Petition, received June 14, 1971, and respondent's Reply Memorandum in Support of its Petition, received June 17, 1971.

In its petition, respondent alleges that it has been deprived of its right to a hearing before a fair and impartial tribunal and has been denied due process of law for a number of reasons. Specifically, respondent states that

(a) the Commission as an official body and one or more individual Commissioners (i) have acted upon factual material not contained in the official record, (ii) have engaged in *ex parte* communications in connection with, and with respect to, the merits of this proceeding, and (iii) have been subjected to, and have acted in response to, political and other pressures in connection with the subject matter of this proceeding; (b) the Commission has issued Findings of Fact, Conclusions, and Final Order and Opinion which are arbitrary and inconsistent with official materials of the Commission which have been forwarded to the Congress and released to the public; and (c) the Commission's roles as investigator, prosecutor and judge, inherently and as exercised in this proceeding, constitute a denial of procedural due process.

In support of its petition, respondent first contends that the Commission acted upon factual material not contained in the official record and that the Commission's Findings of Fact, Conclusions, and Final Order and Opinion are arbitrary and inconsistent with other official material of the Commission. These allegations fail to state a basis for reopening this proceeding because the Commission's decision in Docket 8765 is based entirely and solely on the record of that proceeding. That record will determine whether the Commission's decision is supported by substantial evidence. *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474 (1951). Section 5(c) of the Federal Trade Commission Act (15 U.S.C. 45(c)) provides the appropriate procedure for review of the basis for Commission determinations.

Respondent's basic assertion is that the Commission's role as investigator, prosecutor and judge, inherently and as exercised in this proceeding, constitute a denial of procedural due process. The combination of investigative and judicial functions within an administrative agency does not violate due process. *Pangburn v. Civil Aeronautics*

Board, 311 F.2d 349, 356 (1st Cir. 1962), and cases cited therein; *Lehigh Portland Cement Company v. Federal Trade Commission*, 291 F. Supp. 628 (E.D. Va. 1968), *aff'd*, 416 F. 2d 971 (4th Cir. 1969); *San Francisco Mining Exch. v. Securities & Exchange Commission*, 378 F.2d 162, 167 (9th Cir. 1967). Congress, as a general practice, has vested administrative agencies with both the specified power to act in an accusatory capacity and with the responsibility of ultimately determining the merits of the charges presented. *Federal Trade Commission v. Cinderella Career and Finishing Schools, Inc.*, 404 F. 2d 1308, 1315 (D.C. Cir. 1968). Thus, while Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)) delineates the adjudicatory power of the Commission, Section 3 (Paragraph 3) of the Act (15 U.S.C. § 43) establishes the underlying authority to conduct any inquiry necessary to execute the Commission's enforcement responsibilities under the Federal Trade Commission Act: "The Commission may, by one or more of its members, or by such examiners as it may designate, prosecute any inquiry necessary to its duties in any part of the United States." The multiple roles of the Administrative Agencies are traditional and were reaffirmed by passage of the Administrative Procedure Act (5 U.S.C. § 551). That Act also provides the necessary safeguards to avoid the denial of due process to a respondent in an administrative proceeding.

Respondent's remaining allegations are likewise without support in law. None of the materials appended to respondent's motion represent any *ex parte* communication under the governing provisions of the Administrative Procedure Act (5 U.S.C. 554(d)). That Act proscribes only communications between the Commissioners and agency personnel engaged in investigative or prosecutive functions in a case, or a factually related case, pending before the agency for decision. The documents referred to do not relate to Docket 8765. Nevertheless, it is also noted that no Commission employee engaged in any investigative or prosecutive function with respect to Docket 8765 participated in the preparation or submission of these documents. *See, O'Malley Affidavit* (attached).¹

Respondent's contentions with regard to Commission activity in relation to its "energy study" are also clearly without merit. Thus, while Section 5(c) of the Administrative Procedure Act (5 U.S.C. § 554(d)) requires a separation of adjudicatory and prosecutorial functions within an agency, the Act specifically exempts the "agency" or "member or members of the body comprising the agency" from the requirements of that Section. 5 U.S.C. § 554(d) (2) (c); *Attorney General's Manual on the Administrative Procedure Act*, p. 58 (1947);

¹ Not reported.

see also, *Federal Trade Commission v. Cinderella Career and Finishing Schools, Inc.*, 404 F. 2d 1308, 1315 (D.C. Cir. 1968). The broad powers of investigation granted to the Commission by Congress are not held in abeyance merely because complaints charging specific and limited violations have been filed against an individual respondent. *Federal Trade Commission v. Waltham Watch Co.*, 169 F. Supp. 614, 620 (S.D. N.Y. 1959); *Lehigh Portland Cement Co. v. Federal Trade Commission*, 291 F. Supp. 628, 631 (E.D. Va. 1968), *aff'd per curiam*, 416 F.2d 971 (4th Cir. 1969). Indeed, the experience acquired in prior Commission proceedings, or the fact that the Commission has entertained similar matters in prior investigations or proceedings, does not disqualify an agency from participating in a subsequent, or concurrent, adjudicatory proceeding. *Pangburn v. Civil Aeronautics Board*, 311 F.2d 349 (1st Cir. 1962); *Lehigh Portland Cement Company v. Federal Trade Commission*, 291 F. Supp. 628 (E.D. Va. 1968), *aff'd per curiam*, 416 F.2d 971 (4th Cir. 1969); *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948); *Maremont Corporation v. Federal Trade Commission*, 431 F.2d 124 (7th Cir. 1970).

Respondent also moves, pursuant to the Freedom of Information Act (5 U.S.C. § 552) and Section 3.36 of the Rules of Practice for Adjudicatory Proceedings, for the production of certain confidential information and records. This request is for the purpose of providing "additional evidence in support of respondent's position as advanced herein." The Commission's determination that the arguments advanced by respondent are without *legal* merit, however, renders moot respondent's attempts to obtain further factual support for such arguments. Thus, for the purposes of respondent's present motions to reconsider or reopen, this request will be denied. This ruling does not, of course, preclude the respondent from seeking access to this information under the Freedom of Information Act and the appropriate non-adjudicatory procedures set forth in Section 4.11 of the Commission's Rules of Practice. Accordingly,

It is ordered, That respondent's request for reconsideration, or in the alternative, for reopening of this proceeding be, and it hereby is, denied.

It is further ordered, That respondent's request for certain confidential information and records pursuant to Section 3.36 of the Rules of Practice for Adjudicatory Proceedings be, and it hereby is, denied.

ADVISORY OPINIONS WITH REQUESTS THEREFOR

Use of the Word "Diamonflare" in Marketing a Product Which is
Not a Natural Diamond. (File No. 713 7014)

Opinion Letter

JANUARY 8, 1971

DEAR MR. DICKENS:

This is with further reference to your request for an advisory opinion regarding proposed use of the word "Diamonflare" in marketing a product which is not a natural diamond.

The Commission is of the opinion that use of the word "Diamonflare" in advertising or marketing a product which is not a natural diamond would be violative of Section 5 of the Federal Trade Commission Act, without a clear and equally conspicuous disclosure immediately preceding the word "Diamonflare" that the product is not a natural diamond.

By direction of the Commission.

Supplemental Letter Relative to Request

NOVEMBER 17, 1970

Re: Proposed use of designation "Diamond Flare" by Zale Corporation

DEAR MR. DICKENS:

Your letter dated October 30, 1970, addressed to the Commission has been referred to me for handling.

I have been unable to identify the "Diamondaire" matter to which you referred. Please furnish any additional information you can with regard to the report that its use was approved by the Commission. The name of the major manufacturer using the designation might enable me to locate additional information in our files.

As a matter of interest in connection with your request, a copy of the Commission's Trade Practice Rules for the Jewelry Industry as amended November 17, 1959, is enclosed. Rules 26, 37(b), 38 and 39 particularly appear to be germane.

Your request will be considered promptly, further, and you will be advised as soon as possible.

Very truly yours,

JOSEPH P. DUFRESNE,
Attorney, Office of General Counsel.

Letter of Request

OCTOBER 30, 1970

GENTLEMEN :

I would like to have your advisory opinion as to the availability of the name "Diamonflare" for use in the marketing of a product which is not a natural diamond. It has come to our attention that the name "Diamondaire" is being used by a major manufacturer of this type of merchandise, and it is reported that their use is approved by the Federal Trade Commission.

Your prompt response to this inquiry will be appreciated.

Very truly yours,

ZALE CORPORATION,
JOHN P. DICKENS,
Vice President and General Counsel.

Legality of a Promotional Plan Involving a Weekly Menu-Recipe-Coupon Featuring Supplier Advertising. (File No. 713 7006)

Opinion Letter

JANUARY 11, 1971

DEAR MR. CULLEN :

This is in further response to your request for an advisory opinion in regard to the legality of the proposed promotional plan outlined in your letters of August 14 and 28, 1970. The plan will involve a weekly menu-recipe-coupon featuring supplier advertising to be offered to all food retailers in a given trading area for distribution to their customers.

The Commission has given careful consideration to your request and has concluded that implementation of the promotional program in the manner described by your correspondence would not warrant a proceeding under the laws it administers, providing the following conditions and caveats are observed :

1. Since the proposed plan calls for your performance of certain obligations which are normally performed by the supplier, Guide 13 of the "Guides for Advertising Allowances" (see enclosed copy) must be complied with by you and by all participating suppliers.

2. Since some products sold by retailers of food are also sold by non-grocery store outlets, the proposed plan must be made available to all retailers, including but not limited to drug and hardware retailers, who may be competitive in the resale of a participating supplier's products.

3. Since it is unlikely that all retailers in a trading area will sell the products of all participating suppliers, product advertising on the menu-recipe-coupon must be so selected as to insure that only the products normally sold by a participating retailer are advertised on those allocated to him for distribution.

4. Since the Commission cannot now know how the proposed plan will operate in fact, you are directed to submit a written report to the Commission within six months from the receipt of this letter, and every six months thereafter, indicating the manner and extent to which your plan is being implemented.

You are further advised it is the Commission's view that as the promoter of the subject promotional plan you must make it clear to each supplier and each retailer that even though Mealttime Masterpieces, Inc., has been employed to implement the plan, it remains the supplier's responsibility to take all reasonable steps so that each of his customers who compete with one another in reselling his products is offered either an opportunity to participate in your plan on proportionally equal terms or a suitable alternative if the customer is unable as a practical matter to participate in the primary plan; if not, the supplier, the retailer and Mealttime Masterpieces, Inc., may be acting in violation of Sections 2(d) or 2(e) of the amended Clayton Act and/or Section 5 of the Federal Trade Commission Act.

By direction of the Commission.

Supplemental Letter of Request

AUGUST 28, 1970

DEAR MR. McMAHILL:

In response to your telephone call, you will receive within the next day or two a package containing the following materials:

1. Booklet, "All About MEALTIME MASTERPIECES" 11 copies
2. Bag Stuffers 10 copies
3. Main Course Organizers 10 copies
4. Schedule B, Allocation of Masterpieces, Bag Stuffers and Dispensers. Schedule C, Allocation of Window Banners and Signs, Menu Posters and Guide for Launching MEALTIME MASTERPIECES. 10 copies each

The booklet "All About MEALTIME MASTERPIECES" includes a brief description of our proposed service together with diagrams of the various dispensers and a mockup in black and white of the Menu-Recipe-Coupon.

We hope the above material will give you the ammunition which you requested.

The food industry representatives which we have already approached agree that MEALTIME MASTERPIECES is a unique service which should be of genuine value to the consumer as well as the supplier and the retailer. It appears that we are on the right track but we won't know until the supplier decides that MEALTIME MASTERPIECES is a good investment for his advertising dollar.

Needless to say, MEALTIME MASTERPIECES will not get to first base without a favorable opinion from the Federal Trade Commission so you can see why we are keeping our fingers crossed until we get the green light from your office.

Very truly yours,

(S) MAX O. CULLEN,
President.

Letter of Request

AUGUST 14, 1970

DEAR MR. TINLEY:

We respectfully request an advisory opinion with respect to a new service we intend to initiate. The program will involve a weekly menu-recipe-coupon to be offered to all food retailers in a given trade area for distribution to their customers. Each menu-recipe-coupon (hereinafter referred to as "Mealtime Masterpiece") has a printed menu and a photograph of a cooked dish on the front. The back includes cooking instructions for the pictured dish, a shopping list for the menu, and advertising space for several food products. A detachable cash discount coupon featuring one food product would be attached to each recipe. There would be no charge to the retailer or to the retailer's customers for this service. The suppliers of the products featured on the coupon and the advertising spaces would provide the revenue necessary for production and distribution expenses.

Indexed envelopes, without any advertising or promotional material for products, designed solely for customer convenience in filing the Mealtime Masterpiece would be sold to participating retailers for resale to their customers. The Mealtime Masterpiece and the indexed envelope will be dispensed in retail food stores from display devices which will be furnished without charge to the retailers.

We recognize that Mealtime Masterpieces, Inc. and the suppliers of the products advertised on the menu-recipe portion of the Mealtime Masterpiece and the supplier whose product is the subject of the cash discount coupon portion of the Mealtime Masterpiece are subject to laws enforced by the Federal Trade Commission. In designing our program and its implementation, we have sought to follow the guidance with respect to those laws furnished to the business community

in the Guides for Advertising Allowances and Other Merchandising Payments and Services.

We shall notify all retailers in a trade area and its periphery at least sixty (60) days prior to initiation of the program in their area to provide ample time for each to make an informed judgment about participation. A letter describing the program will be sent to all corporate chains and to all cooperative, voluntary, and independent wholesaler warehouses serving food retailers within the trade area and its periphery. Envelope stuffers, describing the program, will be provided for forwarding to the retailers. Prior to initiation of the program, announcements also will be made describing the program in publications which have a general distribution to the retailers within the trade area and its periphery. These announcements will also report that descriptions are being forwarded through warehouses servicing the retailers. The procedure for electing to participate will be simple and not burdensome to the retailer.

After the program has been launched, announcements about the program will be made at regular intervals (of at least every ninety (90) days) in these same publications. There will also be spot checks of a representative cross-section of retailers with at least such frequency, to verify that the suppliers' customers are receiving proportionally equal treatment to which they are entitled under the program. The participating suppliers will be notified of Guide 13 of the Guides for Advertising Allowances and Other Merchandising Payments and Services.

Mealttime Masterpieces, and the dispensers will be allocated to all food retailers, large and small, on the basis of their average cash register transactions. For each Mealttime Masterpiece allocated, the participating retailer will be paid a nominal amount for handling. This amount plus the usual 3-cent coupon handling charge, and the profit from the sale of the indexed envelopes will be more than adequate to cover the retailer's expenses in connection with our program. This program of cash register allocation will not favor the large retail food store over his smaller competitor. Studies have shown that the large supermarket has an average transaction of something in excess of \$7 while the smaller stores transactions average substantially less, frequently as low as \$1.00, so that there are more transactions in the smaller stores for a given dollar volume of sales. The items featured on the cash discount coupon will be available in the retail (food) stores and in the grocery products section of multi-function stores. Furthermore, the individual items advertised will not be selected in a manner which would require a retailer to purchase or promote products of suppliers which he does not carry as a condition to participating in the program.

To acquaint their customers with the Mealttime Masterpiece program prior to its institution, all participating food retailers will be furnished with bag stuffers describing the program. Allocation of bag stuffers also will be based on cash register transactions.

Homemakers in some areas will be more interested in menu-recipes than homemakers in other areas, and some retailers will be more aggressive than others in promoting their distribution so it can be expected that some retailers will need more menu-recipes than the cash transactions formula would indicate. It is our plan to provide each retailer with additional Mealttime Masterpieces if they are needed. Care will be taken, however, to see that retailers do not appropriate the coupons for redemption. Record keeping of product purchases and coupons redeemed will be audited on a spot basis in the event of any question so that there will not be an opportunity for misuse. In the event a participating retailer is appropriating coupons for his own use, the service will be terminated in accordance with Guide 11(a) of the Guides for Advertising Allowances and Other Merchandising Payments and Services. Undistributed menu-recipes will be picked up by us, the coupon will be removed and the menu-recipe will be offered to the home economics departments in the public and parochial high schools.

To assist in supplier compliance with the principles embodied in the recent proposed FTC and FDA "cents-off" regulations, we will maintain supporting records for the suppliers whose products are used in the coupons. Spot checks will also be made to be assured that retailers do not raise their prices on products for which the coupon is being used. No more than three promotions a year, including ours, will be accepted by us for any one product.

Our menu-recipe-coupon service is available and is functionally suitable and useable by all food retailers, regardless of size. No alternate plan is required. We believe our proposed program as outlined herein conforms with the Guides for Advertising Allowances and Other Payments and Services. While problems may arise, we believe we can handle them in a manner which will be fair and equitable and comport with those Guides.

If our program requires any changes to make it fully acceptable to the Federal Trade Commission, it will be appreciated if you will give us your recommendations and we'll be glad to modify the program accordingly.

We respectfully request that this matter be given as expeditious consideration as may be reasonably possible. As you are aware, great care is being taken by suppliers and retailers to comply with the Commission's Guides in this area and an Advisory Opinion is essen-

tial to such a program. The implementation of the program must therefore follow such approval.

Very truly yours,

(S) MAX O. CULLEN,
President.

Foreign Origin Labeling Requirements Before Electric Relay Control Devices Imported From West Germany May Be Sold in United States. (File No. 713 7016)

Opinion Letter

JANUARY 12, 1971

DEAR MR. BRICE:

This is in reply to your letter of October 30, 1970, requesting advice as to the foreign origin labeling requirements imposed by the Commission before electric relay control devices imported from West Germany may be sold in the United States.

As the Commission understands the facts, these electric relays will be packaged, individually by the foreign manufacturer, and imported by you for resale to industrial customers in this country. The devices may be ordered from you through a catalog which you will circulate to your customers.

In view of the decision by the Bureau of Customs that each electric relay device must be labeled so as to disclose the country of foreign origin, and the fact that the devices will be purchased in this country by skilled technicians for use in industrial processes, the Commission is of the opinion that no further markings will be required on the product or the product container beyond that which has been imposed by Customs. However, the catalog and all other advertising and samples used to solicit orders must, clearly and conspicuously, disclose the name of the country of origin.

By direction of the Commission.

Supplemental Letter of Request

DECEMBER 1, 1970

DEAR MR. LEVIN:

Enclosed is a copy of the Bureau of Customs letter of November 25, stating tariff items applicable to the Dold relays we expect to import from West Germany. This was the subject of my prior inquiry to the Federal Trade Commission requesting advice as to foreign origin label-

ing as may be necessary after the goods have cleared customs but before they are sold in the United States.

It is especially important that we have such advice at this time before we have placed our purchase orders with the manufacturer in Germany so that all such requirements may be included in our purchase order specifications.

Accordingly please advise regarding any mandatory labeling or marking requirements in addition to marking requirements as required in the tariff regulations referred to in the enclosed letter from the Bureau of Customs. An early reply will be appreciated.

Yours very truly,

(S) W. E. BRICE.

Enclosure—

NOVEMBER 25, 1970

DEAR MR. BRICE:

In your letters of September 25 and November 5, 1970, you asked for information concerning the dutiable status of certain pneumatic and electric time delay controls, relays, plugs and receptacles manufactured in West Germany. Each of these articles is described in the illustrated brochure submitted.

You indicate that the articles in question are component devices and parts to be used in electrical power distribution switchboards, sequence motor control circuits, motor protection and motor starting circuits, for time delay in making and breaking electrical power circuits and for the protection thereof.

The articles described as VR1u510 and VR1u560, time delay relays, are pneumatic delay mechanisms with timing dependent upon setting of a valve which meters air through allowing contacts to operate when air compressed by the electrical solenoid is exhausted. The Bureau has previously ruled that pneumatic timers such as these, are classifiable under the provision for electrical switches, relays, and other electrical apparatus for making or breaking electrical circuits, in item 685.90, Tariff Schedules of the United States (TSUS), with duty at the current rate of 12 percent ad valorem. On January 1, 1971, the effective rate of duty for this item will be reduced to 10 percent ad valorem.

The optional plug-in base (receptacle) for the ZS700.50 contactor timer, appears to serve as an adapter between the timing device and the electrical panel. Accordingly, we are of the opinion that it would be classifiable as an electrical apparatus used to make connections to or in electrical circuits, also under item 685.90, TSUS, dutiable at the current rate of 12 percent ad valorem.

The ZR710 and ZM711 timers with rotor clutch, the ZS2us2u407, ZS700.50, and the ZR722A contractor timers, and the ZR719 timers without clutch, are all time switches incorporating a synchronous motor. They permit the selection of a time range on a dial for switching electrical circuits on or off at predetermined time intervals. There is an established and uniform practice to classify such merchandise under the provision for time switches with watch or clock movements, or with synchronous or subsynchronous motors, in items 715.60 through 715.68, TSUS, with the rate of duty depending upon the value, as shown on the enclosed excerpt from the tariff schedules. The rates of duty for these items will also be reduced on January 1, 1971, as shown on the enclosed copy of the modified rates.

In the absence of a complete description of the optional front frame for the model ZR710 timer, we are unable to furnish a binding tariff classification. However, if this article is used as a protective cover for, or to partially enclose the subject timer, it would appear to be classifiable under the provision for cases for time switches, and parts of the foregoing cases, in item 720.36, TSUS, dutiable at the rate of 21 percent ad valorem. Effective January 1, 1971, the rate of duty for this item will be reduced to 18 percent ad valorem.

With respect to your request for information concerning marking requirements, enclosed please find a copy of the headnotes to Subpart E, Schedule 7, Part 2, TSUS.

Sincerely yours,

(S) ARTHUR P. SCHIFFLIN,
Acting Director,
Division of Tariff Classification Rulings.

Letter of Request

OCTOBER 30, 1970

GENTLEMEN:

We are making preparations to import "Dold-Relays" from Germany.

As illustrated in the enclosed Catalog, these industrial Control devices will be used in industrial plants, factories, and related plans for the control of motors, machines, heating elements, and similar.

Because of higher price, complexity, and technical nature we do not expect these control devices will be used or sold in trades leading to use in the home, automobile, or for other consumer purposes.

These products ordinarily will be selected, specified, and approved for purchase by engineers and experienced technicians employed by industrial firms.

Each item will be separately boxed by the manufacturer. Boxes will be marked with catalog number, rating, etc., for identification on our warehouse shelves and for correlation with our price lists, illustrated catalogs, and drawings.

Please advise what markings, if any, we are required to place on the box or the control device before it may be entered through customs and sold in the United States.

(An early reply will be appreciated. We hope to place initial orders within the next two or three weeks.)

Yours sincerely,

(S) W. E. BRICE.

Legality of Proposed Advertising and Promotional Plan Which Contemplates the Placing of "PostAds" Within Retail Outlets at the Point of Sale of the Supplier's Products, and Compensation to Merchants for "Reporting on an Historical and Current Basis the Shelf Movement of the Advertised Product." (File No. 713 7017)

Opinion Letter

JANUARY 14, 1971

DEAR MR. BERNSTEIN :

This is in response to your request for an advisory opinion in regard to the legality of a proposed advertising and promotional plan to be undertaken by PostAds, Inc. The plan contemplates the placing of "PostAds" within retail outlets at the point of sale of the supplier's products, and, in addition, compensation to such merchants for "reporting on an historical and current basis the shelf movement of the advertised product."

The Commission has given careful consideration to your request and has concluded that, if implemented in the manner outlined in your letter of June 26, 1970, as subsequently modified by your letters of September 15, 1970, and December 11, 1970, it would interpose no objection to that part of the proposal relating to the payments to be made for placing or installing "PostAds" within retail outlets. It is understood that approval is conditioned upon PostAds, Inc., making it clear to all participating suppliers that their responsibility is not relieved by the interposition of an intermediary between the suppliers and their customers, and that, even where PostAds, Inc., agrees to assume these responsibilities under Guide 13, the suppliers continue to have independent responsibilities under Guide 13(b).

The Commission, however, finds unacceptable that part of the program calling for payments to such merchants for "reporting on an historical and current basis the shelf movement of the advertised product" since the exchange of price or quantity sales information among retailers, or between retailers and suppliers might be used in such manner as to lessen competition. Since the legality of any such survey would depend on the manner of its implementation, the Commission considers that part of the request inappropriate for an advisory opinion under Section 1.1(c) of its rules "where the proposed course of action or its effects may be such that an informed decision thereon cannot be made or could be made only after extensive investigation, clinical study, testing, or collateral inquiry."

By direction of the Commission.

Second Supplemental Letter of Request

DECEMBER 11, 1970

DEAR MR. McMAHILL:

In connection with our conversation of today, I have been asked by our client to confirm the following to you:

1. In connection with our statement that the size of the signs would be approximately 22"x24", we will modify the size of the sign (within reason) so that a retailer who wishes a smaller sign will be accommodated. For example, if the competing retailer has space sufficient only to fit a sign 11"x12", PostAds will provide such a sign.

2. The compensation for the rental of the space utilized and reimbursement for the services rendered will be paid per store and will be the same for each participating store, with appropriate adjustments as indicated.

3. In addition, if a participating store wishes to have only four ads inserted in the fixture, PostAds will comply with their request and proportionately reduce the payment therefore, so that, for example, if PostAds were to pay six dollars per fixture and the fixture contained four ads and the participating customer wished only two ads, he would be paid the equivalent of three dollars.

As I indicated to Mr. Martin in our telephone conversation, PostAds will be unable to continue in business unless its application for an advisory opinion is processed in the immediate future. We filed the original request on June 26, 1970. We, therefore, respectfully request prompt attention to this matter.

Very truly yours,

(S) ROBERT S. BERNSTEIN.

Second Supplemental Letter of Request

SEPTEMBER 15, 1970

DEAR MR. STEINBACH:

Thank you for your letter of August 25, 1970. The delay in responding was due to my vacation.

In paragraph 2 of your letter, you inquire as to alternative plans available for stores selling the advertisers' goods *who do not* or cannot provide space for postads. It should clearly be understood that the fixtures containing the postads can be installed on shelves and walls in any retail outlet wishing to participate and every store wishing to participate has adequate space available for display of advertisements. Stores which *do not* wish to provide space have determined not to participate in this part of the Plan. We therefore feel that the Plan will be "functionally available" to all competing customers.

It is stated (p. 2) that PostAds, Inc. will pay the participating stores a certain sum each week as (i) rental for the space utilized, and (ii) in reimbursement for services rendered. It is also stated (pp. 4-5) that PostAds, Inc. will reimburse the participating outlets *at the same rate* for the space leased and for the services rendered.

It is currently anticipated that PostAds, Inc. will pay the participating outlets between \$1 and \$3 for the space leased and service in connection with installation and removal of posters, and between \$1 and \$3 for information regarding the shelf movement of the product advertised. When the program is instituted, fees for the space rented and services rendered will be definitively established.

As a result of your comments and to conform the rental fee to the requirements of Guide 11, we wish to eliminate footnote 1 on page 2 of our earlier letter. Space will be paid for only if PostAds, Inc. utilizes it.

Similarly, we wish to inform you that our proposal (p. 5) to offer back-lighted color transparencies to stores having sales in excess of \$25,000 per week has also been eliminated.

We trust that these comments have adequately responded to your inquiries.

Our clients are anxious to proceed with their proposed program, and we therefore ask that our request be processed as expeditiously as possible.

If you have additional comments or requests for information, please call me collect.

Very truly yours,

(S) ROBERT S. BERNSTEIN.

Supplemental Letter Relative to Request

AUGUST 25, 1970

DEAR MR. BERNSTEIN:

In reviewing your letter requesting an advisory opinion relative to the new marketing service to be inaugurated by PostAds, Inc., we have run into several questions that require clarification before we can properly go forward on the opinion.

As we understand your proposed program, PostAds, Inc., will promote products of manufacturers or suppliers through "PostAds" at point of sale traffic. These ads, approximately 22" x 24", will be placed eight to a store for thirteen week periods. It is not clear, however, what arrangements will be made for those stores also selling the advertisers' goods, who do not or cannot provide space for PostAds. In other words, what alternative plans are available for such stores? As you know, the promotional plan must be not only offered to all stores com-

peting in the distribution of the seller's goods, but the plan must be *functionally* available to all such competing customers, *i.e.*, useable.

It is also stated that in return for the services which the participating stores will render, PostAds will pay each such retail outlet a certain sum each week as (a) rental and (b) as reimbursement for services rendered. We will need to have more information as to how such payments are proportionalized under Guide 7. Also, it might be necessary to break down such payments as between (a) space rental and (b) service payments for supplying information on shelf movement of the particular products. The fixed rental fee must, of course, conform to Guide 11, notwithstanding footnote 1 on page 2 of your letter.

We cannot emphasize too strongly that tripartite promoters of advertising services have the duty to make certain that such plans, and all phases of them, are functionally available to all competing customers, including the smaller stores, and that the payments thereunder are proportionalized as between such customers. This would thus apply to that part of PostAds plan to make available to retail outlets having average gross sales of \$25,000 per week a back-lighted, moving color transparency advertising machine. The question that must be answered is: What is being offered to retail outlets not qualifying?

Your attention to these questions will be greatly appreciated.

Very truly yours,

(S) C. PAUL STEINBACH,
Attorney, Office of General Counsel.

Letter of Request

JUNE 26, 1970

DEAR MR. SHEA:

We are writing this letter to obtain an advisory opinion in connection with the following proposed transaction, which is not currently being followed and is not the subject of a pending investigation or other proceeding by the Commission or any other governmental agency.

Our client, PostAds, Inc. is a New York corporation formed to develop, introduce, manage and conduct sales and be marketing consultants.

PostAds, Inc. has developed a concept which will offer manufacturers a new marketing service which will allow them to advertise their products within retail outlets at the point of sales traffic. The point of sales advertisements ("PostAds") are planned to be approximately 22" x 24" in size, printed in color. PostAds will be placed in frames which in turn will be affixed to gondolas, counters and/or on the walls of the participating retail outlets in the markets selected.

At the start of the service, it is proposed to concentrate on products in the health and beauty aids field, although products in other non-

food categories may be included later. The types of stores in which PostAds may be placed will cover all competing outlets in the area of promotion in which the advertised products are offered for resale, including discount drug stores, department stores, chain and independent grocery stores, convenience stores and others.

PostAds, Inc., will undertake to make arrangements with the competing customers within the selected markets which will provide for the rental of space within the participating competing stores and the fulfillment of certain services by the participating store's management or other designated personnel. These services will include placing PostAds in (and removing PostAds from) their fixtures upon delivery, or according to a specific posting schedule; seeing that the PostAds remain in position during their specific posting periods; and reporting on an historical and current basis the shelf movement of the advertised product and all other products in that category according to conditions specified by the advertiser.

In return for the services which the participating stores will render, PostAds, Inc., will pay each participating retail outlet a certain sum each week as (i) rental for the space utilized,¹ and (ii) in reimbursement for services rendered. If the participating retail outlets are either unable or unwilling to supply the information as to the shelf movement of the products, etc., the fee paid for the service will be adjusted accordingly.

PostAds, Inc. and the Manufacturer or Supplier of the Product

The personnel of PostAds, Inc., will solicit advertising orders for PostAds, both from the manufacturers and/or their advertising agencies. The aim will be to post eight PostAds for each retail outlet, although smaller numbers may be used. Each PostAd will be sold for a 13-week posting period, within which time it is anticipated that manufacturers will display different advertisements for the same product, or different advertisements for a number of products. It is planned to have only one brand in any one product category posted at one time.

In fulfilling its contractual terms with the manufacturer and/or its advertising agency (PostAds, Inc. will pay the agency, if one is involved, the standard agency commission) the following actions are planned by PostAds, Inc. :

1. To select specific markets in which PostAds will be carried by competing retail outlets electing to participate. These markets will be chosen so as to give a balance of geographic and economic features for the purposes of testing, evaluating, introducing new products or

¹ This fixed rental fee will be paid irrespective of whether PostAds, Inc. actually utilizes the space leased.

for generally increasing the sale of an established product. PostAds, Inc. will take all reasonable steps necessary to assure that the promotional area chosen is a natural one and not drawn arbitrarily to exclude competing retailers.

2. As a third party intermediary, to enter into written agreements with manufacturers, if they so desire, to undertake manufacturers' obligations under Sections 2 (d) and (e) of the Robinson-Patman Act and as provided in Guide 13 of the "Federal Trade Commission's Guides for Advertising Allowances and other Merchandising Payments and Services" (the "Guides"), namely:

(a) to give notice to the manufacturers' customers of the relevant details of the plan in time to enable the manufacturers' customers to make an informed judgment as to whether to participate. Said notice will set forth the name, address and telephone number of the person from whom further details on the promotion may be obtained. PostAds, Inc. will make a determination as to the most practical manner of notifying the customers of the manufacturers of the plan and will be aided in its determination by Guide 8.

(b) PostAds, Inc. will make spot checks in order to ascertain whether the participating stores are furnishing the services they have agreed to furnish and if they are maintaining PostAds in the proper location.

(c) PostAds, Inc. will be prepared to implement the plan, from time to time, in a manner which will insure its functional availability to the manufacturers' competing customers within the promotional area who may wish to participate.

(d) PostAds, Inc. will provide certification in writing, at reasonable intervals, that manufacturers' customers are being treated in conformity with the plan.

3. To supply the manufacturer and its advertising agency with the addresses of central distribution points to which the printed PostAds are to be sent in bulk by the manufacturer and/or its advertising agency and from which they will be distributed to individual participating retail outlets in the selected markets, along with any special instructions or qualifications.

4. To cause PostAds to be posted in participating retail outlets and to furnish proof of the manufacturer and/or its advertising agency through affidavits and/or photographs that such has been done.²

5. To furnish to the manufacturer and its advertising agency at regular intervals during the course of the 13-week posting period information detailing the shelf movement of the advertised product

² PostAds, Inc. will also run spot checks designed to reach a representative cross section of the manufacturers' customers.

in the participating retail outlets. Certain basis historic and current shelf movement figures will be furnished for the rental fee paid by the advertiser; more detailed information, where available, will be supplied at additional cost to the manufacturer and his agency.

6. To change the order of posting in the participating retail outlets within the 13-week posting period according to instructions received from the manufacturer and/or his advertising agency as they determine.

7. To do all things necessary to the successful operation of the plan and to the satisfaction of the manufacturer and his advertising agency.

PostAds, Inc. and the Participating Retail Outlets

The personnel of PostAds, Inc., will undertake to inform all retail outlets competing in the resale of products advertised within the designated markets of the availability of the promotion and its terms. It will enter into arrangements with those participating outlets to reimburse them for (a) space leased at the same rate offered to all outlets, and (b) for services rendered such as (i) putting up and removing PostAds, (ii) supplying information regarding the shelf movement of the product advertised, etc., at the same rate offered to all outlets.

PostAds, Inc. may also offer to all competing retail outlets having average gross sales exceeding \$25,000 a week, a structure consisting of back-lighted, moving color transparencies. If the retail outlet qualifies to receive the lighted device it will pay a proposed weekly service fee which will be subsequently determined. Those retail outlets qualifying and which elect to have the lighted device will also be compensated for leased space and services at a standard rate which will be subsequently determined.

In fulfilling its contractual terms with participating retail outlets, PostAds, Inc. plans to take the following actions:

1. To deliver PostAd fixtures to the participating retail outlets, with complete instructions for their assembly and mounting. It will be the obligation of the management of the retail outlet to see that the fixture is properly set up in the space mutually agreed upon by PostAds, Inc., and the retail outlet. In some instances where there is an arrangement between PostAds, Inc., and a service merchandising organization, the service merchandiser normally calling on the store will undertake the obligation of erecting the PostAds fixture. In such case the fee for services to be paid to the participating retail outlet will be reduced accordingly.
2. To deliver PostAds to the retail outlets, along with a schedule of when they should be posted and replaced. In those stores serviced by

a service merchandiser organization with whom PostAds, Inc., has an agreement, the service merchandiser will deliver and post the advertisements.

3. To instruct the retail outlets on the kind of shelf movement information needed and to make arrangements for its transmittal to PostAds, Inc.

4. To remit promptly and at regular intervals to the participating outlets the agreed upon payments for the space leased by and the services rendered to PostAds, Inc., by the participating retail outlets.

We request your advice and opinion with respect to whether the foregoing program, if conducted in the manner set forth in this letter, conforms to the guidelines set forth in the Commission's Guides and whether the program may be put into operation by PostAds, Inc. without having the Commission take action against it, the suppliers, their agencies or the participating retail outlets. We also request your ruling as to whether the plan, implemented in the manner stated, raises any questions as to its legality under any of the laws administered by the Commission.

Very truly yours,

BATTLE, FOWLER, STOKES & KHEEL,
(S) ROBERT S. BERNSTEIN.

Legality of a Game or Contest Called "Play the STOCK MARK-IT," Wherein Contestants Try and Select Five Stocks From a List of Fifty Stocks on the NYSE Which Will Show the Greatest Appreciation During the Two-Week Period of the Contest. (File No. 713 7013)

Opinion Letter

JANUARY 15, 1971

DEAR MR. RICHARDSON:

This is in reference to your request for an advisory opinion on behalf of your client, Saunders, Stiver & Co., concerning the legality of a game or contest called "Play the STOCK MARK-IT," wherein the contestants will try and select five (5) stocks from a list of fifty (50) stocks on the New York Stock Exchange which will show the greatest appreciation during the two-week period of the contest.

The game as proposed will consist of six two-week contests. Each contest will have 5,111 winners, with prize money for each such

contest amounting to \$60,000. Thus, for the full six contests there will be 30,666 winners, receiving \$360,000. Contestants may enter the contest by obtaining a card, listing the fifty stocks and full rules of the game from a participating gasoline station free of charge, with no purchase necessary. Winners for each two-week contest will be determined by the services of University Computer, Inc., Cleveland, Ohio, and the names of the winners will be posted in each participating service station by the Wednesday following the end of the contest.

The Commission has given this matter careful consideration, and is of the view, based on the materials and information furnished, that an advisory opinion would be inappropriate under Section 1.1(b) of the Commission's rules, because this plan is substantially the same as several others that are now under investigation by the Commission.

This action implies neither approval nor disapproval of the course of action here involved.

By direction of the Commission.

Supplemental Letter of Request

AUGUST 5, 1970

DEAR MR. STEINBACH:

Pursuant to your discussions with Mr. Ford last week I am enclosing mock-ups of official rules, advertising, entry blanks and pass-outs relating to the \$tock-Mark-It game. I believe that these materials provide answers to the questions which were raised in your meeting with Mr. Ford. If any questions remain unanswered, or if you have suggestions for changes in the enclosed material, please let me know.

My telephone number is 216-781-2166. If I am not available, Mr. Ford will be happy to provide answers to any questions you have. We are anxious to provide any assistance or information requested and appreciate your consideration of this matter.

Very truly yours,

ROBERT A. RICHARDSON.

\$TOCK MARK-IT

Official Rules

1. You can obtain one \$TOCK MARK-IT contest entry card free with each visit to a participating SHELL station (no purchase necessary). Additional blanks are available by writing to \$TOCK MARK-IT headquarters for a free card.
2. Each entry card is self-addressed and contains two areas for punch-outs and one for a write-in.
3. The first punch area determines the number of the contest played. According to the schedule of deadlines below, punch the appropriate contest in which

you wish that particular card entered. Punch only once, other punches will make the card invalid. Make sure not to punch a contest which has already reached its deadline.

The program consists of six two-week contests.

Contest No.	Contest period	Deadline for entry	Contest ends	Winner announced
1	Jan. 15 to Jan. 26	Jan. 17	Jan. 26	Jan. 31
2	Jan. 29 to Feb. 9	Jan. 31	Feb. 9	Feb. 14
3				
4				
5				
6		etc.		

4. The second punch area numerically lists 50 New York Stock Exchange entries. With a hypothetical budget of \$50,000 (\$10,000 per entry), punch the 5 (five) spaces adjacent to the stock entries which you feel will most appreciate in the two-week contest period (more than 5 punches will invalidate the entry).
5. The third area is a write-in for use as a tie breaker. It need not be filled in in order to win if there is no tie; but if a tie occurs, this will determine the winner. Fill in in dollar-and-cent amount the total value of your imaginary \$50,000 portfolio at the close of the contest.
6. Upon completion of the card, place a 6¢ stamp on it and mail it to the address indicated. It must reach contest headquarters before the schedule deadline for each particular contest (Rule 3).
7. Proof of mailing is not accepted as proof of receipt. No responsibility will be accepted for lost, damaged or delayed entries (or requests for contest materials). All entries are sent entirely at the risk of the contestant.
8. The winners will be determined by the services of University Computer, Inc., Cleveland, Ohio and posted in all service stations by the Wednesday following the end of the contest (Rule 3). Prizes will be awarded on the basis of growth of the investment portfolio during the two-week contest period.
9. The award schedule is as follows for *each* two-week contest:

1 Grand Prize Winner	\$10,000.00
10 Second Prize Winners	1,000.00
100 Third Prize Winners	100.00
1,000 Fourth Prize Winners	10.00
4,000 Runners-Up	5.00
Total: 5,111 winners per contest (per contest)	
	60,000.00
10. Contest materials are void and will be rejected if not obtained through legitimate channels, or if any part is illegible, mutilated, smeared or tampered with, or if any materials contain printing or any other errors. No facsimiles are eligible. Void where prohibited by law.
Applicable taxes are the responsibility of the winners. Promotion ends -----
11. Offer open to all licensed drivers who, however, may turn over cards to members of their immediate families for entry in the contest except employees and agents (and their families) of SHELL and parties engaged in the development, production, distribution and judging of contest materials.

STOCK MARK-IT SIMULATOR

Simulate 0020000 entries, printing the 010 highest results every 0005000

Stock	Start price	End price	Percent gain or loss	
1	13.875	15.000	8.1081	DONNELLEY
2	14.125	16.875	19.4690	CONT MTGE
3	25.250	27.000	6.9307	ILL PW 4.08 PF
4	41.000	48.500	18.2927	CAN SOU RY
5	14.000	14.875	6.2500	CHRIS CRAFT PF
6	11.250	12.750	13.3333	JONES LAU
7	32.000	33.875	5.8594	PARK HANNIF
8	13.750	15.250	10.9091	SEDCO INC
9	55.000	58.000	5.4545	CEN ILL LT PF
10	14.875	16.250	9.2437	AM STERILIZ
11	27.500	29.000	5.4545	ZAPAT NOR PF
12	30.625	32.250	5.3061	AMDER CLAYT
13	28.500	30.000	5.2632	GIMBELS
14	19.000	20.000	5.2632	USM 1.50 PF
15	12.375	13.000	5.0505	ZAPAT NOR
16	51.000	53.500	4.9020	JER CPL PF
17	92.500	97.000	4.8649	WRIGLEY
18	10.500	11.000	4.7619	SCOTT FETZER
19	13.375	14.000	4.6729	SERVOMAT
20	8.000	8.375	4.6875	SPART IND
21	15.875	16.625	4.7244	STORER BRD
22	21.750	22.750	4.5977	HOMESTKE
23	16.750	17.500	4.4776	REVCO
24	27.750	29.000	4.5045	UTAH PW LT
25	17.000	17.750	4.4118	COLT IND
26	10.875	7.000	-35.6322	GEN HOST
27	6.500	4.375	-32.6923	BROWN CO
28	11.125	7.625	-31.4607	AM ZINC
29	12.125	8.375	-30.9278	LTV
30	23.000	16.500	-28.2609	NATOMAS
31	4.000	2.875	-28.1250	SELLON INC
32	23.000	16.625	-27.7174	NARCO SCIEN
33	11.000	8.000	-27.2727	LTV AA
34	7.875	5.750	-26.9841	CHADBRN INC
35	27.000	19.750	-26.8519	CHRIS CRAFT 2PF
36	11.750	8.625	-26.5957	LEASCO DATA
37	49.000	36.000	-26.5306	LEH V IND PF
38	16.000	11.875	-25.7813	EL MEM MG
39	15.625	11.750	-24.8000	PENN CENT
40	27.500	20.750	-24.5455	CAP C BDC5T
41	9.875	7.500	-24.0506	GT WASH INV
42	3.125	2.375	-24.0000	BERMEC CP
43	52.625	40.000	-23.9905	VEEDER INC
44	16.375	12.500	-23.6641	TELEX CORP
45	7.000	5.375	-23.2143	BENGUET
46	43.750	33.625	-23.1429	WILL ROSS
47	40.000	31.000	-22.5000	LTV 5 PF
48	39.000	30.250	-22.4359	WALL MURR PF
49	14.625	11.375	-22.2222	GIBRALT FIN

STOCK MARK-IT SIMULATOR, AFTER 5,000 ENTRIES

Place	Percentage gain or loss	5 selections				
1.....	10.4228	02	06	10	12	18
2.....	9.3896	01	19	11	02	10
3.....	9.1215	02	09	08	15	21
4.....	9.0833	12	11	08	04	09
5.....	7.6923	18	07	13	06	10
6.....	6.6896	14	21	11	06	19
7.....	6.4098	11	05	01	12	03
8.....	6.2432	08	13	20	15	12
9.....	6.1456	17	16	22	09	08
10.....	6.0475	04	10	02	11	49
Low.....	-28.4957					
Ave.....	-10.6531					

Letter of Request

JUNE 29, 1970

GENTLEMEN:

I am an attorney representing Saunders, Stiver & Co., Cleveland based company dealing in investment securities. My client has developed a contest which it desires to market. We will very much appreciate your review of the contest to determine that it does not involve a violation of any rules or policies of the Federal Trade Commission. Upon receipt of your advisory opinion my client proposes to attempt to interest a petroleum company or companies in the contest.

The contest will consist of selecting stocks from among New York Stock Exchange companies which will be listed on a card available to all customers at participating retail outlets of the petroleum company. It is expected that the game cards will be available at all geographic locations in which the participating petroleum company markets gasoline.

The cards for each contest will be available from two to four weeks. Each card will contain 50 stocks, from which participants will select the 5 which they believe will show the greatest appreciation from the last date on which the cards may be mailed to the Company until the date winners are determined. Each series of cards will be available for a period of two to four weeks. When the closing date for mailing a particular set of cards occurs, a new set of cards with a later closing date will be available at the service stations. Variations of items such as the number of stocks and the period of time for each game may occur if requested by a petroleum company, although permitted modifications will be nominal.

Since winners will be determined on the basis of the performance of the stocks selected, and all customers at participating outlets will be able to obtain cards, there will be no possibility of predetermining the geographic locations of winners. The number of winners will vary from ten to two thousand in each contest, as desired by the petroleum company. The number and the value of prizes to be awarded (subject to adjustment for ties) will be posted at participating outlets at the inception of the contest.

Information concerning winners of the contest will be posted within 72 hours of the termination date of the contest and distribution of prizes will be made within 48 hours of the determination of the winner.

It is our belief that the proposed contest has several features which set it apart from lotteries and similar games of chance. Most notable is the fact that the winners will be those participants who demonstrate the most skill in selecting stocks that appreciate in value. Also, because the winners will be determined on the basis of subsequently occurring facts, outside of the control of the parties to the contest, opportunity for manipulation is absent.

If any other facts are required for your determination please call me collect in Cleveland at (216) 781-2166.

Thank you for considering this matter. We will look forward to receiving your advisory opinion at the earliest possible date.

Yours very truly,

(S) ROBERT A. RICHARDSON.

**Advertisements Offering a Free Balloon Displayed at the Point
of Sale To Promote Soft Drinks. (File No. 713 7011)**

Opinion Letter

FEBRUARY 17, 1971

DEAR MR. SITEMAN:

This is in reply to your letter of September 22, 1970, requesting approval of advertising copy for an offer of a free balloon. The advertisements are to be displayed at the point of sale to promote Nesbitt's soft drinks.

Contained in the advertising copy submitted is the following language: "Free! Jolly Orange Giant 36" Playful, Bouncy, Stand-up Balloon just for enjoying the real, orange flavor of Nesbitt's." The offer is explained in the accompanying details which are not in immediate conjunction with the word "free," but which require the

submission of four Nesbitt cork bottle top liners (or facsimiles) plus 10 cents postage before a balloon may be obtained.

The Commission has given this matter careful consideration, and is of the view, based on the materials and information furnished, that the advertising copy is misleading and cannot be approved unless the requirement that the consumer submit 10 cents is disclosed clearly on the front side of the bottle hanger and in any other advertisements. Otherwise, if the promotion is to use the word "free," the company and not the consumer should have to pay for the cost of return postage.

By direction of the Commission.

Supplemental Letter of Request

NOVEMBER 5, 1970

DEAR MR. LEVIN:

We appreciate your letter of October 26, requesting additional information on the free balloon offer that will be put into effect by one of our clients.

To facilitate your review, I have listed the questions in your letter and their replies below:

- (1) Q. Has this plan been implemented to the extent that this special offer is currently available to consumers?
 - A. The promotion will be test marketed in mid-November and if successful, will be used on a broader scale in April and May of 1971.
- (2) Q. Please submit a bottle hanger on which this offer appears.
 - A. There are several pieces on which this offer will appear at the point of sale. All include the same information shown in the enclosed piece.
- (3) Q. Please submit all details in connection with this offer, if you have not already done so.
 - A. The offer is simply that by enclosing four cork liners from our client's soft drinks and 10 cents for postage we will send them a balloon free.
- (4) Q. Please describe acceptable facsimiles to Nesbitt cork liners.
 - A. Our client will accept any four pieces of paper on which the word "Nesbitt's" is printed. From prior experience, we find most customers will draw a circle and print the word "Nesbitt's" inside.
- (5) Q. Kindly furnish assurance that no portion of the ten cents postage submitted by the consumer is used to defray any of the costs of the balloons.

A. The ten cent figure has been used because this was the cost of postage indicated by the manufacturer.

In regard to the items outlined on Page 2, please note as follows:

(1) The price charged for soft drinks under this offer will *not* be increased to the consumer. As a matter of fact, normally there is a price offer in addition to the premium offer.

(2) The quantity, quality or size will *not* be affected by the offer of the free balloon.

(3) There are no conditions attached to the offer other than that they send in four cork liners or facsimiles and ten cents for postage.

I hope this will provide the information required by the Commission, and would appreciate receiving your confirmation that our client is complying with all legal requisites that might be applicable to this offer.

Sincerely,

SITEMAN/BRODHEAD, INC.,
(S) LEE SITEMAN, *President.*

Letter of Request

SEPTEMBER 22, 1970

GENTLEMEN:

Enclosed you will find advertising copy for a special offer we are making available to consumers throughout the United States.

No purchase of Nesbitt's Soft Drinks is required in that we will accept facsimiles of Nesbitt's cork liners. We will require 10¢ for postage. Our free offer involves a 36" tall balloon with a special design on it effecting a "Jolly Orange Giant." This balloon has a normal retail price of 39¢.

We would appreciate receiving your comments and approval of this copy at your earliest convenience.

Sincerely,

SITEMAN/BRODHEAD, INC.,
(S) LEE SITEMAN.

NESBITT FOOD PRODUCTS, INC.
Job No. 119-C70-3-Rev. 1
Giant Balloon Promotion
Bottle Hanger—2-color—2 sides
2¼" x 9"
(9-21-70)

JOLLY ORANGE GIANT

Dear **NESBITT'S**:

FREE!

Please send me my free
"JOLLY ORANGE GIANT" BALLOON.
Here are my 4 cork liners (or fac-
similes) from Nesbitt's Soft Drinks *and*
10¢ for postage.

just for enjoying
the *real*, orange

He will remind me when I have a
giant thirst to think of Nesbitt's first.

flavor of **NESBITT'S**

36" Tall! Playful! Bouncy! Stands

NAME _____
ADDRESS _____
CITY _____ STATE _____ ZIP _____

up on own feet!

YOURS FREE!

PASTE CORK LINERS HERE:
(found under bottle caps)

See reverse side for details.

() ()
() ()

Complete and mail this coupon to:

NESBITT'S
JOLLY ORANGE GIANT
P.O. Box 23505
Los Angeles, California 90023

Offer expires Dec. 31, 1971.
(Void where prohibited).

Bottler Code: ()

Legality of a Proposed Reciprocal Advertising Plan. (File No. 713 7019)

Opinion Letter

FEBRUARY 17, 1971

DEAR MR. BRAUNSTEIN:

This reply is in response to your letter of November 25, 1970, requesting an advisory opinion concerning the legality of a proposed reciprocal advertising plan.

As the Commission understands the facts, supermarkets will use space on their private-label packaging and shopping bags for advertising of local television and radio stations. A credit will be allowed the supermarket based on the number and type of packages

carrying the message. In turn, a time credit will be built up by the supermarket with the broadcasters involved. This credit will be used by the supermarket to advertise the store and its privately labeled merchandise. The promoter of this plan will receive compensation from the supermarket, and no manufacturer or supplier of any product sold by the supermarket will be involved in any way with this promotion.

The Commission has given this matter careful consideration, and is of the view, based on the information furnished, that an advisory opinion would be inappropriate under Section 1.1(c) of the Commission's rules, because the proposed course of action or its effects are such that an informed decision thereon cannot be made or could be made only after extensive investigation and collateral inquiry.

This action implies neither approval nor disapproval of the course of action here involved.

By direction of the Commission.

Letter of Request

NOVEMBER 25, 1970

DEAR SIRs:

We are a company that specializes in sales and new market development for products, in Supermarkets, Drug Stores, Department Stores and Variety Stores. It is our intention to offer to the supermarkets and Radio or T.V. stations the following proposal:

a) To the supermarket we propose the use of their private label packaging; such as milk cartons, orange juice cartons, bread wrappers and shopping bags.

The packaging will carry a printed message promoting the T.V. or radio station. The imprinted message will always carry, the name of the station, its logo, and its number on the dial. On occasion it may also make mention of a specific program the station carries.

Example:

I. One side of a milk container will carry the following message:
"Watch the Mike Douglas Show" Channel 13 WXAV T.V. Also
Station Logo

II. Shopping bag might read: "For the best young sound listen to Joe Jive" WXAV Radio 777 on your dial.

b) At no time will we promote a particular product.

c) We will never promote any program that is fully sponsored by a manufacturer whose products appear in the supermarkets.

Example:

KRAFT MUSIC HALL.

d) For each milk carton; etc, that carries a station's message in the local marketing area, the supermarket will receive for example; a one

penny credit for advertising time at full rate card from the station.

e) The supermarket will develop a time credit with the local radio or T.V. station. This time credit will be used by the supermarket to promote their stores and the sales of their private label products. At no time will the supermarket use this time credit to promote or advertise any standard brand merchandise.

The fees for originating and coordinating this type of promotion will be paid for by the supermarket, at the standard advertising agency rate of fifteen percent.

We are seeking your advice because in some of the programs mentioned on the cartons the station may have sold spot time to vendors of products sold in the supermarkets. It is our opinion that this factor would not constitute a violation of the Robinson Patman Act, since neither ourselves, or the supermarket would have any knowledge or control of who had been sold spot time by the station.

Since we have many supermarkets interested in the above proposal we would appreciate an opinion by the Bureau of Advisory Opinion before we proceed further with this promotion. We would be pleased to furnish any additional information you would desire.

Respectfully yours,

(S) ELLIOTT B. BRAUNSTEIN,
President.

Disclosure of Foreign Origin in Newspaper Advertisements. (File No. 713 7020)

Opinion Letter

FEBRUARY 26, 1971

DEAR MRS. FORMAN:

This is in reply to your letter of December 4, 1970, requesting advice concerning the legality of (1) failing to disclose the name of the country of foreign origin of imported merchandise in newspaper advertising, or (2) disclosing in newspaper advertisements that an item is "imported" without disclosing the name of the country of foreign origin.

As the Commission understands the facts, each imported item is labeled so as to disclose the country of foreign origin, and the newspaper advertisements promoting the sale of the imported items do not solicit for mail-order or catalog purchases.

The Commission is of the view, based on the information furnished, that failure to disclose the name of country of foreign origin in the

newspaper advertisements probably would not be in violation of any of the laws which it administers. The Commission is also of the view that it is permissible to use the word "imported" in newspaper advertisements promoting the sale of imported merchandise. If, however, the articles of wearing apparel are imported furs or are fur products containing imported furs, Sec. 5(a) (6) of the Fur Products Labeling Act requires that the name of the country of origin of the imported fur must be disclosed in advertising.

By direction of the Commission.

Letter of Request

DECEMBER 4, 1970

DEAR MR. SHAY:

Mr. Aliza of the Los Angeles Federal Trade Commission Office suggested that we write you for an opinion on the use of the word 'import' in newspaper advertising.

Our specific problem: Is it mandatory to use the term 'imported' if the article is an import or may it be omitted? Or if, on the other hand, we want to stress the fact that an article is imported, may we speak of 'imported coats' or must the source be defined, as 'coats imported from Spain'? And in the event that the leather for the coats came from Spain, but the coats were manufactured in Italy or the U.S. what would the proper reference be?

We would appreciate, too, any literature you could let us have on the subject. We are aware that there is a completely different set of rules for fur products which we are not concerned with at this time.

Thank you for your assistance.

Yours sincerely,

MRS. BEA FORMAN,
*Advertising Department, Robinson's,
Seventh and Grand, Los Angeles, Calif.*

**Legality of a Proposed Standard Certification Program. (File
No. 713 7002)**

Second Opinion Letter

MARCH 8, 1971

DEAR MR. ROCKWELL:

The Commission has given further consideration to your request for an advisory opinion on the legality of a proposed standard certification program, and in an effort to be as helpful as possible in this

important and difficult area involving programs of self-regulation believes that it would be desirable to amplify its letter to you of December 29, 1970, with the following comments.

The Commission is sympathetic to the growing interest in the development of plans for self-regulation which will avoid the strictures of the antitrust laws. On the other hand it is mindful of its responsibility to evaluate all such plans in light of the many anti-competitive potentialities inherent therein.

Some of the matters which must be considered in an evaluation of any program of self-regulation are:

- 1) Standardization and certification programs must not be used as devices for fixing prices or otherwise lessening competition. *See, e.g., Milk and Ice Cream Can Institute v. F.T.C.*, 152 F.2d 478 (7th Cir. 1946).
- 2) Standardization and certification programs must not have the effect of boycotting or excluding competitors. *See, e.g., Silver v. New York Stock Exchange*, 373 U.S. 341 (1963).
- 3) Standardization and certification programs must not have the effect of withholding or controlling production. *See, e.g., Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20 (1912); *National Macaroni Manufacturers Ass'n v. F.T.C.*, 345 F.2d 421 (7th Cir. 1965).
- 4) Construction or specification standards should not be used except in exceptional circumstances and never when performance standards can be developed.
- 5) It is incumbent upon any organization sponsoring, adopting, administering or enforcing standards to insure that its standards reflect existing technology and are kept current and adequately upgraded to allow for technological innovation.
- 6) Where certification is involved, no applicant for certification may be denied certification for any of the following reasons: (a) that he is a nonmember of any association or organization; (b) that he is a foreign competitor; or (c) that he is unable to pay the fee or cost charged for certification. *See Advisory Opinion Digest No. 152, 3 CCH Trade Reg., Rep. para. 18, 125 (December 13, 1967).*
- 7) Fees charged in connection with participation in a standardization or certification program must be reasonable as related to the direct and indirect costs involved.
- 8) Membership in groups or organizations sponsoring, promulgating or administering standardization or certification programs must be open to all competitors, domestic or foreign.
- 9) Due process must be accorded all parties interested in or affected by a standardization or certification program, including suppliers,

manufacturers, distributors, customers and users. Due process includes, but is not limited to, the conduct of timely hearings with prompt decisions on claims respecting standards or the denial of certification.

10) Standards and certification programs, unless otherwise clearly required by considerations of safety, may not be used to reduce, restrict or limit in any manner; the kinds, quantities, sizes, styles or qualities of products. *See, e.g.*, the consent decree in *United States v. General Electric Co.*, 1956 Trade Cas. paras. 67,714, 67,794, 67,795, 67,796 (D. N.J. 1954).

11) The exercise of the responsibility of validating any proposed standard should include a determination by a laboratory or other appropriate entity independent of those immediately affected by the proposed standard that the criteria set forth in such standard are meaningful and relevant. *See, e.g.*, the consent decree in *United States v. Southern Pine Ass'n*, 1940-43 Trade Cas. para. 56,007 (E.D. La. 1940).

12) The function and responsibility of determining whether any product is to be certified under any program involving certification should be performed by an appropriate organization independent of those immediately affected by such program. *United States v. Southern Pine Ass'n, supra.*

13) Representations made by standards organizations with respect to testing procedures, standards, etc., must be truthful. *See, e.g.*, *In the Matter of Parents' Magazine Enterprises, Inc.*, FTC Dkt. No. C-1133 (1966).

14) In cases involving a challenge to standards, the burden of proof respecting reasonableness is upon those who develop and enforce the standards. *Kestenbaum, Antitrust Questions In Voluntary Industry Standards*, p. 10, Address prepared for delivery before the National Association of Manufacturers Marketing Conference (October 9, 1969).

15) All standards must be voluntary.

16) Certification programs should avoid the use of single standard, "pass/fail" systems and, in lieu thereof, employ graded systems which preserve consumer and user options.

The foregoing criteria, which are by no means exhaustive, demonstrate the many factors which make it difficult to approve a standard certification program such as the one you suggest. The difficulty is increased by the uncertainty which exists in the court decisions on this subject. Accordingly, the problems of establishing a program which will qualify for approval before it can be seen in action are formidable.

Nevertheless, the Commission would like to assist in exploring the possibilities of self-regulation through standard certification. To that

end it has directed its staff to commence an in depth study of the subject to determine whether it is possible for the Commission to make a meaningful contribution to the development of a satisfactory and legal program.

The Commission is not presently in possession of sufficient information to enable it to make all of the determinations essential to an evaluation of your program. Even if this information were furnished, the Commission feels that it would be inappropriate for it to act in this area until the results of its present study are known. It must, therefore, decline to act at this time on your request for an advisory opinion.

By direction of the Commission.

First Opinion Letter

DECEMBER 29, 1970

DEAR MR. ROCKWELL:

This is with further reference to your request for an advisory opinion regarding the general format of ANSI's voluntary Certification Program.

Based on the information you have provided, it is the Commission's understanding that any manufacturer of a product covered by an American National Standard, which standard lends itself to a certification procedure, may apply to ANSI to have the product certified as conforming to the standard. The fees for submittal of a product to be certified are designed to support the program but to avoid placing participating manufacturers at a disadvantage in competing with non-participating manufacturers.

An independent qualified laboratory selected by the producer's trade association, or by the producer, and approved by ANSI determines whether the product complies with the standard. An approved certification mark may be placed on products submitted which are found to comply. Also, a public information program to inform consumers regarding the ANSI certification and what it means is in use and periodically, a listing of products which have been certified as issued.

To check on continued compliance of a certified product with the standard, there is continuing inspection and followup by the testing laboratory, using procedures tailored for each standard and administered by the appropriate trade association, all of which, however, is monitored by ANSI.

The Commission is of the view that an advisory opinion would be inappropriate in this matter inasmuch as an informed decision thereon could be made only after extensive investigation and collateral inquiry. In these circumstances, the request is inappropriate under Section

1.1(c) of the Commission's rules. It also appears that the course of action is already being followed. If this is the situation, the request for an advisory opinion is also inappropriate under Section 1.1(a) of the rules.

By direction of the Commission.

Letter of Request

MAY 6, 1970

DEAR COMMISSIONER WEINBERGER:

At the suggestion of Commissioner Jones I am writing you to let you know about our Certification Program.

As you know, the American National Standards Institute is the leading voluntary standards coordinator. We also handle all international standards through the International Organization for Standardization (ISO). Under separate cover I am sending a booklet describing our functions and a catalog of our standards. In addition, I am sending a copy of the LaQue Report and a copy of our Annual Report.

As a natural follow up on standards we have initiated a voluntary Certification Program in which any manufacturer can participate. Our basic requirements are that there be an American National Standard covering this item, that the standard be one that is adequate for certification, and that this program is available to anyone whether or not he is a member of a trade association or a domestic producer. I am also sending you a copy of an article I have written on certification and a copy of our procedures and a model contract which we have prepared.

We are aware of the active part the Commission has played in reviewing these Certification Programs and your various advisory opinions. Our certification is primarily aimed at consumer goods and is for the benefit of the consumers. Knowing of your concern in this area I am sure you will find this proposed program of interest. For your information I am also sending you a booklet on our Consumer Council and our consumer standards program. . . .

We would like to obtain approval of the general format of our program from the Commission. . . .

Very truly yours,

(S) WILLIAM H. ROCKWELL,
Director of Certification and Consumer Affairs.

**Proposed Dealer Purchase Stimulation Plan Whereby Dealers
Earn Points in Order To Qualify for an Expense Paid Trip.
(File No. 713 7021)**

Opinion Letter

MARCH 11, 1971

DEAR MR. JANKELL:

This is with further reference to your request for an advisory opinion regarding Miida's proposed dealer purchase stimulation plan whereby dealers might earn points in order to qualify for an expense paid trip to Rio de Janeiro or London.

Based on the available information, the Commission is of the view that an advisory opinion would be inappropriate in this matter inasmuch as an informed decision thereon could be made only after extensive investigation and collateral inquiry. In these circumstances, the request is inappropriate under Section 1.1(c) of the Commission's rules.

By direction of the Commission.

Letter of Request

DECEMBER 28, 1970

GENTLEMEN:

We are the attorneys for Marubeni-Iida (America), Inc., who among other things, distributes cameras, photographic equipment and accessories. The company has recently begun marketing a broad line of such merchandise in the low and moderate price ranges under its brand name "Miida", through six regional distributors who sell the Miida line to approximately 12,000 photography stores and retailers who carry photographic supplies.

Marubeni wishes to institute a sales incentive program to promote the Miida line, and in accordance with the Commission's Procedures and Rules of Practice covering Industry Guidance, desires a staff review of the proposed course of action. The proposed course of action has not yet been implemented and it is not currently being followed by the company. At a conference held with Joseph P. Dufresne, Esq. of the Commission's staff, we have been advised that the same or substantially the same course of action is not under investigation and is not and has not been the subject of a current proceeding, order, or decree initiated or obtained by the Commission or another governmental agency. It is the considered opinion of the company and this

office that an informed decision on the proposed course of action and its effects can be made without recourse to extensive investigation, clinical study, testing or collateral inquiry.

The proposed sales incentive program is designed to stimulate sales of all items in the Miida line. At the start of the program, each item would receive a predetermined point value. Point values would not be principally determined by price nor will they fluctuate as a function of price. Rather, in considering point values for each item, consideration would be given to such factors as: The item's ability to create and build brand image; brand name identification; percentage of markup; and age and size of inventory. Some examples of point value assignments are: Cameras (assorted prices and styles) 15 point; Binoculars (assorted prices and styles) 10 points; interchangeable camera lenses, depending on size and type, from one point to 20 points; and slide projectors 15 points. From time to time, the company may change or reassess point values for certain items or certain types of items in order to stimulate or increase sales of those item lines or particular types of items within a line, but no change would become effective without full and adequate prior notice to all existing and potential Miida retailers.

Every retailer who now carries the Miida line, and all others who wish to carry the line, will be given stamp books similar to those currently issued by the trading stamp companies. The point value of all items purchased by a retailer will be determined and the retailer will receive one "Miida Stamp" for each point.

It is anticipated that the first promotion would commence in mid January, 1971, and continue until mid December of the same year. Each retailer who had accumulated 2,500 stamps during the promotion period would receive a ten-day all expense paid trip to Rio de Janeiro in mid February, 1972. The trip is being obtained by the Company at group package rates of approximately \$750. per person. A copy of the proposed itinerary is attached.

Those retailers who acquired sufficient additional stamps could bring their wives or friends. For those retailers who are unable to acquire sufficient stamps to obtain a second ticket, provision will be made for the purchase of the second ticket at the Company's cost.

It was stated earlier that point values were being assigned to items based upon factors other than price. Depending, therefore, upon the mix of the Miida line merchandise purchased by a retailer, 2,500 stamps could be acquired for an aggregate of purchases ranging between \$14,000 and \$20,000. A "typical" composite order which indicates the modest scope of the purchase requirements is attached.

Based upon Marubeni's years of experience in the distribution of photographic equipment and accessories, the Company estimates that

even a small full line photography shop of the "ma and pa" variety spends at least \$10,000.00 per year on the types and price ranges of merchandise covered by the Miida line. Retailers who failed or were unable to acquire the requisite number of stamps during the eleven months promotion period would have the right to apply them towards the 2,500 stamps required for the trip being offered in the next annual promotion. It is anticipated that the promotions would continue annually for at least five years and even a small "ma and pa" photography shop could, with a minimum of effort, acquire sufficient stamps in less than half that time.

The Company recognizes that the world of business is fraught with many risks and that there may come a time when the Company is unable or unwilling to renew the promotion for the next ensuing year. The Company can obtain at group rates, and in the event of non-renewal, would offer a trip to London for 1,000 stamps, to those who had not attained, and were unable to attain, during the remainder of the promotion period, the 2,500 stamps. A copy of that proposed itinerary is also attached.¹ The Company would, of course, give all retailers plenty of advance notice of the non-renewal and creation of alternative trips so that each retailer could check his stamp status, determine which plan was attainable for him, and plan his purchases during the balance of the promotion period. It is to be noted that the London trip could be acquired for an aggregate of purchases of as little as \$3,600.00.

It must, at this juncture, also be noted that the market share of both the Miida line and the Company's entire photographic materials distribution are negligible considering that they compete with Kodak, Ansco, Bell and Howell, Honeywell and all of the well known foreign lines, as well as a host of private labels. It is, therefore, in Marubeni's best interests to make every retailer who carries a line of photographic equipment and accessories aware of the promotion and the Miida line. The Company will extensively advertise the promotion in the trade publications and follow up with personal contact by the distributors. Notices of any changes or amendments would be handled in a similar manner, and, in addition, would be supported by mailings to all participating retailers.

Marubeni feels that by these means it has evolved a promotion concept whereby every retailer, small and large, has the ability to qualify. The Company trusts that the Commission, after review of the foregoing, will concur, and awaits the Commission's comments.

¹ Because of its length, this attachment has not been included.

Should the Commission desire any further information or clarification of any aspect of the proposed course of action, please contact the undersigned.

Very truly yours,

RATHHEIM, HOFFMAN, KASSEL & SILVERMAN,
(S) RICHARD JANKELL.

TYPICAL ORDER FOR 1 YEAR

	<i>Points</i>
10 Cameras at 15 points each.....	150
10 Cases at 3 points each.....	30
10 Pair 7 x 28 RP binoculars at 10 points each.....	100
10 Pair 8 x 32 RP binoculars at 10 points each.....	100
10 Pair 8 x 56 RP binoculars at 10 points each.....	100
10 Pair 7 x 35 Macrofocus wide angle binoculars at 10 points each.....	100
10 Pair 8 x 40 Macrofocus wide angle binoculars at 10 points each.....	100
10 Pair 9 x 35 Macrofocus wide angle binoculars at 10 points each.....	100
10 Pair 10 x 40 Macrofocus wide angle binoculars at 10 points each.....	100
10 Stereo devices at 10 points each.....	100
10 Projection tables at 5 points.....	50
36 Pair assorted spectacles at 1 point each.....	36
6 Illuminated viewers at 2 points each.....	12
6 Hand print viewers at 2 points each.....	12
20 Assorted adapters at 1 point each.....	20
6 Slide projectors at 15 points each.....	90
3 S/A adapters at 3 points each.....	9
10 25mm wide angle lenses at 10 points each.....	100
36 28/35/135/200mm lenses at 1 point each.....	36
10 100mm lenses at 2 points each.....	20
10 90/190 zoom lenses at 2 points each.....	20
6 70-230 zoom lenses assorted at 20 points each.....	120
6 85-205 zoom lenses assorted at 20 points each.....	120
12 Foot switches at 1 point each.....	12
24 Assorted easels at 2 points each.....	48
24 Triclamps at 6 points each.....	144
24 Pistol grip (FA-002) at 4 points each.....	96
24 Pistol grip (FA-003) at 1 point each.....	24
12 2-way bounce head at 1 point each.....	12
24 3-section step-on tripod at 2 points each.....	48
24 4-section step-on tripod at 4 points each.....	96
3 Spotting scopes at 10 points each.....	30
96 Lens pouches at 5 points per doz.....	40
6 Cases IA-005L at 6 points each.....	36
6 Cases IA-005U at 5 points each.....	30
6 Cases IA-055 at 5 points each.....	30
6 Cases IA-006 at 3 points each.....	18
6 Cases IA-066 at 5 points each.....	30
24 Shoulder bags at 1 point each.....	24
24 IB-001/IB-002 bags at 5 points each.....	120
Total.....	2,463

NOTE.—Plus carded goods:

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**Proposed Acquisition by a Cement and Aggregate Producer of
Certain Assets of a Producer and Seller of Concrete and
Block, and Dry Building Materials. (File No. 713 7008)**

Opinion Letter

MARCH 12, 1971

DEAR MR. SATTEE:

This is with further reference to your request for an advisory opinion approving the proposed purchase of certain assets of Burnup by Maule.

It is the Commission's understanding that Maule proposes to acquire for \$384,000 from Burnup all of the physical assets, excepting transit mix trucks, located at Melbourne, City Point and Micco, Florida, owned by Burnup for use in the production and sale of ready-mix concrete and concrete block and for the purchase and sale of dry building materials. Maule currently supplies Burnup with aggregate and is a potential supplier of cement to Burnup from Maule's Miami mill.

In pertinent part, the Commission's "Enforcement Policy with Respect to Vertical Mergers in the Cement Industry," issued January 3, 1967, provides that ". . . the Commission intends to investigate expeditiously every future acquisition by a cement producer of any substantial ready-mix concrete firm in any market to which such acquiring producer is an actual or potential supplier" (I, p. 9). The Policy Statement provides further that acquisition of any ready-mix concrete company, or other cement consumer, which regularly purchases 50,000 barrels of cement or more annually, will be considered a substantial acquisition (II, p. 9). The available information indicates that in each of the two years prior to notification to the Commission of the proposed acquisition, Burnup purchased more than 50,000 barrels of cement.

The information you have provided is not sufficient for the Commission to make a determination as to whether the proposed acquisition is subject to the jurisdiction of the Commission. However, if the acquisition is consummated an investigation to determine this and other questions will be initiated, since the information does indicate that the type and size of the acquisition would fall within the Commission's Enforcement Policy with Respect to Vertical Mergers in this industry.

By direction of the Commission.

Supplemental Letter of Request

JANUARY 25, 1971

DEAR MR. DUFRESNE:

Relative to your requests for information as set forth in your letter of December 28, 1970, the following is in answer to Item No. 1:

Maule Industries, Inc., was incorporated February 21, 1946, in the State of Florida.

Maule Industries operates in the counties of Dade, Broward, Palm Beach, Martin, St. Lucie, Brevard and Volusia. Within these counties, Maule operates ready-mix concrete plants, concrete block plants, concrete pipe plants, a small operation at Fort Pierce, Florida, buying and reselling building materials, aggregate plants in Dade and Broward counties, prestress and precast concrete components in Dade county, asphalt plants in Dade County and as of April of 1970, we had completed a cement mill and are producing cement for distribution to our concrete products and ready-mix plants with some sales to other consumers producing in Southeast Florida only.

The purchase of supplies is primarily from Florida suppliers with the exception of heavy equipment which comes through Florida distributors but originates in other parts of the United States; an example of this would be cranes, bulldozers, ready-mix trucks and other heavy pieces of construction equipment.

As to Burnup & Sims, Inc., they advise us that they were incorporated in May 1941, in the State of Florida. This company is mainly in construction which is, in the most part, doing underground work for utility companies in laying cables and other communication transmissions. They have now branched into some ownership and construction for others of CATV installations.

Their concrete operations are confined to the Brevard County area of Florida where they operate one main plant, one satellite plant and one portable plant. They produce in Brevard County ready-mix concrete, concrete block and also operate a small building materials yard. Their cement is purchased from General Portland Cement Company in Florida. They do not operate in the concrete industry in any other state. However, they do have a small concrete plant on the island of Barbados which they originally set up to satisfy their needs for ready-mix concrete and thereafter continued it as a concrete operation.

In conclusion, our operations in the concrete products industry and in the cement industry relative to Maule and to Burnup & Sims are confined solely to the State of Florida.

I believe this would answer the Question No. 1 of your request and would allow us to disregard the remaining questions as was indicated.

Very truly yours,

MAULE INDUSTRIES, INC.,
(S) A. L. SATTEE,
Executive Vice President, General Manager.

Supplemental Letter Relative to Request

DECEMBER 28, 1970

DEAR MR. SATTEE:

This is with further reference to your request for an advisory opinion.

The information contained in the Special Report you have submitted establishes that the proposed acquisition of the Burnup & Sims assets comes within the purview of the Commission's "Enforcement Policy with Respect to Vertical Mergers in the Cement Industry." A copy of which was sent to you previously. In view of the foregoing, it is requested that you provide us with the information called for below:

1. The state and date of incorporation and a complete description of the business and geographic area of operations of Maule and Burnup & Sims. Please include information regarding all supplies purchased from suppliers located outside of the State of Florida and sales to customers located outside of the State of Florida. If no such sales or purchases are made, you may disregard the remaining questions.
2. A description of each class of capital stock of Maule and Burnup & Sims, the total number of shares of each class authorized and outstanding on December 1, 1970, and for each class of such stock, list all owners of record on December 1, 1970, who owned 1% or more of such class of stock. List also any beneficial interest therein not shown on the records of Maule and Burnup & Sims, or its registry or transfer agent, but, in fact, known to any of them.
3. The names and addresses of all officers and directors of Maule and Burnup & Sims, and the location of all the firms' offices, plants and distribution terminals.
4. Copies of contracts, options and agreements relating to the acquisition. Please include letters of intent, correspondence, internal memoranda, summaries, minutes of meetings, reports, surveys, analyses, studies, or writings of any sort, including printed or typewritten matter, made by or for Maule, referring in any way to the acquisition of assets or stock, commitment to purchase stock, or the acquisition of stock voting rights, of Burnup & Sims.

5. Original or photocopies of:

(a) All annual, quarterly and other reports made by Maule and its affiliates to their stockholders since January 1, 1968.

(b) All prospectuses, solicitations or proxy statements, and statements listing securities filed by Maule, or its affiliates with any state corporation and/or stock exchange since January 1, 1968.

(c) All reports and prospectuses submitted by Maule and its affiliates to the Securities and Exchange Commission since January 1968.

(d) All documents, including correspondence, internal memoranda, summaries, minutes of meetings, press releases, reports, surveys, analyses, studies, announcements and writings of any sort, including printed or typewritten matter, made by, made for, or in the possession of Maule, or any subsidiary, affiliate or stockholder, or any agent acting on behalf of any of them, referring in any way to:

(1) entry or expansion by Maule into new product lines or new marketing areas—into the Orlando, Florida SMSA, particularly (defined by the Bureau of the Budget as encompassing Orange and Seminole Counties)—at any time during the past five years, or in the future;

(2) Maule's market share, rank, or position with reference to the sale and distribution of portland cement, ready-mix, aggregates, and concrete products in any geographic market during the past five years or in the future;

(3) general studies, surveys, and analyses of the portland cement, ready-mix, concrete product, or aggregate industries within the geographic marketing area of Maule, during the past five years or in the future.

(4) the most recent brochures and catalogs describing and illustrating all products manufactured or distributed by Maule.

6.(a) Identify and locate each Maule plant manufacturing portland cement, ready-mix, aggregates or concrete products, showing the yearly capacity of each in barrels, cubic yards, tons and other appropriate units for the year 1970.

(b) Identify and locate each terminal and/or storage facility of Maule for portland cement and concrete products, together with the storage capacity of each, in barrels and other appropriate units, respectively, for the year 1970.

7. For each portland cement, ready-mix and concrete products producing plant operated by Maule, during the period January 1, 1968 to date, submit the following:

(a) Location, yearly rated capacity, and detailed description of the geographic area, by county, into which shipments were made;

(b) The production of portland cement, ready-mix, aggregates and concrete products in barrels, cubic yards, tons and other appropriate units for each of the years 1968 and 1969;

(c) Total shipments of portland cement, ready-mix, aggregates and concrete products by county in dollars and in barrels, cubic yards, tons and other appropriate units for each of the years 1968 and 1969. (Include any cement or cement products transshipped through distribution terminals.);

(d) Total shipments of portland cement, ready-mix, aggregates and concrete products in dollars and in barrels, cubic yards, tons and other appropriate units shipped into the Miami, Florida Standard Metropolitan Area (SMSA) (defined by the Bureau of the Budget as encompassing Dade County), and the Ft. Lauderdale-Hollywood, Florida SMSA (defined by the Bureau of the Budget as encompassing Broward County).

(e) List your competitors in the sale or distribution of portland cement in the Miami and Ft. Lauderdale-Hollywood SMSA's and indicate the plant or distribution terminal from which they compete; and

(f) Total shipments of portland cement, in barrels, and aggregates in tons to Burnup & Sims for each of the years 1968, 1969, and in 1970 to December 1. (Include any cement or aggregates transshipped through distribution terminals.)

8. Describe the classes of trade (*e.g.*, ready-mix, concrete products, contractors, etc.) to whom Maule sells and/or distributes its products, indicating the method and means used to sell, advertise and promote the sale of such products to each class of customers.

9. For each class of trade (ready-mix, concrete products, contractors, etc.) described in answering Question 8, (a) state the total dollar value of Maule's sales to such class during 1969 and to December 1, 1970, and (b) within each class, identify by name, address and dollar value of purchases Maule's twenty largest customers in the sale of portland cement, ready-mix, concrete products and aggregates in the Miami and Ft. Lauderdale-Hollywood SMSA's for the year 1969, and to December 1 in 1970.

10. Provide copies of any agreement, understanding, or condition between Maule and Burnup & Sims, or anyone acting on behalf of them, relating to (a) Burnup & Sims purchases of portland cement from Maule, and (b) any purchased by Maule from Burnup & Sims. If such agreement, understanding, or condition is not in writing, describe its terms in detail.

With regard to Burnup & Sims, we also need to have the following and ask that either you provide it or that you request Burnup & Sims to send it to us direct:

1. Amount and percentage of Brevard County's annual consumption of ready-mix supplied by Burnup & Sims from January 1, 1968, to the present.
2. Amount and percentage of Brevard County's annual consumption of concrete products supplied by Burnup & Sims from January 1, 1968, to the present.
3. The amount and percentage of Brevard County's annual consumption of cement consumed by Burnup & Sims from January 1, 1968, to the present.

Your submittal of this additional information will facilitate our further consideration of your request.

Very truly yours,

JOSEPH P. DUFRESNE,
Attorney, Office of General Counsel.

Supplemental Letter of Request

DECEMBER 11, 1970

DEAR MR. DUFRESNE:

Enclosed is completed FTC Form B and Supplement No. 1.

Relative to the relationship between Ferre Industries, please be advised that Ferre Florida Corporation, a real estate operating company, is the parent of Maule Industries, Inc. Ferre Florida Corporation is not involved in cement or building materials in any manner. It is owned in total by the Ferre family who also have approximately 65% control of Puerto Rican Cement Company with mills at Ponce and San Juan, Puerto Rico.

I hope the enclosed information is sufficient to get an opinion from the Federal Trade Commission relative to the Burnup & Sims proposed acquisition. If other information is needed, we will comply immediately.

Very truly yours,

MAULE INDUSTRIES, INC.,
(S) A. L. SATTEE,
Executive Vice President, General Manager.

THIS REPORT IS REQUIRED BY LAW. It is mandatory under the authority of the Federal Trade Commission (15 U.S.C. 46). Budget Bureau No. 56-R-0024 Approval Expires September 30, 1972

FTC Form B (1-69)

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580
SPECIAL REPORT

INVESTIGATION TO EFFECTUATE ENFORCEMENT POLICY WITH
RESPECT TO VERTICAL MERGERS IN CEMENT INDUSTRY
SIXTY (60) DAY NOTIFICATION OF ACQUISITION OR MERGER

INSTRUCTIONS

Complete form B and forward to the Chief, Division of Mergers, Bureau of Restraint of Trade, Federal Trade Commission, Washington, D.C. sixty (60) days prior to the consummation of any acquisition involving a ready-mixed concrete, concrete products, or aggregate producer by your company.

Failure to file this special report on or before the reporting date constitutes default and may subject the reporting company to penalties authorized by law. If extenuating circumstances prevent compliance with the notice required by this special report, the Chief, Division of Mergers, Bureau of Restraint of Trade, Federal Trade Commission, Washington, D.C. 20580, area code 202-393-6800, should be notified immediately.

Additional copies of this form, if needed for a complete response to this report may be reproduced by the reporting company or obtained from the Federal Trade Commission.

The answer to each question must be completed on this form or on a continuation sheet containing the name of the reporting company and the question.

All questions must be answered. However, if the correct response to any question is "None" or "Not Applicable" indicate such response in each appropriate place.

Answers should be derived from company books and records. If books and records are not available, enter your best estimates. Estimated data should be followed by the notation "Est."

DEFINITIONS

ACQUISITION: Acquiring directly or indirectly the whole or any part of the stock or assets of any company engaged in the manufacture of ready-mixed concrete, concrete products, or aggregates.

REPORTING COMPANY: The reporting company is the company to which this form is addressed; the reporting company is responsible for providing all of the information requested, including information for subsidiaries.

SUBSIDIARIES: This report should include the reporting company and all domestic subsidiaries in which the reporting company and/or subsidiaries owned 50 percent or more of the outstanding voting stock, and which were engaged in the manufacture or distribution of portland cement, ready-mixed concrete, aggregates or concrete products.

DOMESTIC: Consists of the 50 States, territories, and possession of the United States, and Puerto Rico.

ESTABLISHMENT: An establishment is defined for the purposes of this report as a single physical location where industrial operations are performed, where business is conducted, or where services are rendered. Examples of establishments are ready-mixed concrete production facilities, sales offices, etc.

PORTLAND CEMENT: Includes Types I through V of portland cement as specified by the American Society For Testing Materials (ASTM). Neither masonry nor white cement is included.

READY-MIXED CONCRETE: Includes all concrete manufactured and delivered to a purchaser in a plastic and unhardened state. Ready-mixed concrete includes central-mixed concrete, shrink-mixed concrete and transit-mixed concrete.

AGGREGATES: Includes sand, gravel, and stone.

CONCRETE PRODUCTS: Includes concrete brick and block, concrete pipe, and precast and prestressed concrete products.

1. Name and Address of Reporting Company: *Maule Industries, Inc.* (Name) *Miami, Florida* (Address)

2. Name and Address of Acquiring Company: *Burnup & Sims, Inc.* (Name) *West Palm Beach, Florida* (Address)

(If acquisition is to be made by a subsidiary of the reporting company, be sure to enter name of subsidiary making acquisition).

3. DESCRIPTION OF COMPANY TO BE ACQUIRED:

a. Name and address: *None* (Name) ----- (Address)

Production assets of Burnup & Sims at Melbourne, City Point, and Micco, Florida

b. Date Acquisition to be consummated: *Dependent upon clearance by F.T.C.* Indicate the percent of stock to be acquired: *Physical assets only.* Indicate the percent of total assets to be acquired if acquisition of assets: *All physical assets excepting transit mix trucks.* Describe assets to be acquired: *At Melbourne: All on leased property, Concrete Batch Plant, Block machines (2), Warehouse Lease, Aggregate Loading Equipment, Block Delivery Equipment, Dry Goods Delivery Trucks; At City Point: Concrete Batch Plant and five acres of land. At Micco: Portable concrete Batch Plant on Leased Land.*

c. Cost of acquisition: *\$384,000.* The dollar consideration, including cash and the value of stock transferred and other financial obligations assumed by the reporting company.

d. Describe principal business activity of company to be acquired as of the date of notification (e.g., manufacturer of ready-mixed concrete, aggregates, etc.). *Production and sale of concrete and block and purchase and sale of dry building materials.*

e. Attach certified copies of Profit and Loss Statement and Balance Sheets of the company to be acquired for the 3 years prior to the date of notification. *See attached.*

4. ASSETS:

Report total assets of the company to be acquired as of date of notification *\$384,000.*

(Report in dollars; omit cents)

If total assets reported are of different date specify date *September 30, 1970.*
(Month) (Year)

5. GROSS RECEIPTS:

Report gross receipts from operations of company to be acquired during the twelve month period prior to date of notification *Year ended April 30, 1969: \$1,568,422.*

If data are reported for different period, specify year for which data are reported: *Year beginning ----- and ending Year ended April 30, 1970, \$1,480,112. 3 Months ended July 31, 1970 \$361,456.*

6. SHIPMENTS TO CUSTOMERS:

Report shipments to customers from domestic establishments of company to be acquired during twelve month period prior to notification. (Report combined figures for all domestic establishments.) If data are reported for different period, specify year for which data are reported: *Year beginning ----- and ending -----*

- a. Ready mix concrete: *48,800 yards* *\$850,000.*
(Number of cubic yards) (Delivered value in dollars)
- b. Concrete products: *\$1,010,000 Block and Concrete.*
(FOB value in dollars)
- c. Aggregates: *\$ None.*
(Delivered value in dollars)

7. ESTABLISHMENTS OF COMPANY TO BE ACQUIRED:

Description of establishments owned or operated by company to be acquired during twelve month period prior to notification.

- a. Ready-mixed Concrete and Concrete Products Manufacturing Establishments. Report in the manner indicated, the information requested on consumption of portland cement for each establishment of the company to be acquired which manufactured ready mix concrete or concrete products during the twelve month period prior to notification. If information is reported for a different period, specify year for which data are reported: *Year beginning ----- and ending -----*

Portland Cement Consumption During 12 Months Prior to Notification

<i>Name and address of establishment</i>	<i>Barrels of 376 pounds</i>	
	<i>Total consumption</i>	<i>Purchased from acquiring company</i>
<i>Melbourne, Florida, Concrete & Block -----</i>	<i>58,000</i>	<i>-----</i>
<i>City Point, Florida -----</i>	<i>None</i>	<i>-----</i>
<i>Micco, Florida, Portable Batch Plant -----</i>	<i>13,000</i>	<i>-----</i>

- b. Report name and address of each portland cement supplier, including the acquiring company, and the amounts purchased during the twelve month period prior to notification.

<i>Name and address</i>	<i>Barrels purchased</i>	<i>Location of plants (terminals) from which shipped</i>
<i>January 1 to August 31, 1970: General Portland Cement Co -----</i>	<i>53,748</i>	<i>-----</i>
<i>1969:</i>		
<i>General Portland Cement Co -----</i>	<i>81,310</i>	<i>-----</i>
<i>Ideal Cement Co -----</i>	<i>2,883</i>	<i>-----</i>

- c. All other establishments of company to be acquired:

Name and address of establishment, principal business activity.

Burnup & Sims. Contracting business in the United States and Caribbean Islands. Proposed disposition is total and only concrete and concrete products establishments of Burnup & Sims in the United States.

8. GEOGRAPHIC AREAS:

Report in the manner indicated the geographic area, including the names of counties, in which the company to be acquired sold its products during the twelve months prior to notification.

- a. Ready-mixed concrete *Brevard County, Florida, only*
- b. Concrete products *Brevard County, Florida, only*
- c. Aggregates: *None.*

9. COMPETITORS:

Report the names and addresses of the competitors of the company to be acquired for the twelve months prior to notification.

- a. Ready-mixed Concrete: *Rinker Materials, Melbourne, Cocoa, Rockledge, Titusville, Florida. Dixie Concrete, Cocoa, Florida.*
- b. Concrete Products: *Same as a.*
- c. Aggregates: *None.*

10. CERTIFICATION:

This report was prepared under my direction and is true and correct to the best of my knowledge.

A. L. Sallee
(Signature and title of company official)

December 9, 1970
(Date)

Executive Vice President and General Manager

Subscribed and sworn to before me at the City of *Miami*, State of *Florida*, this *9th* day of *December*, 1970.

Eleanor S. Fecci
Notary Public

Notary Public, State of Florida, at Large.
My Commission Expires March 28, 1972.
My Commission Expires -----

Person to contact, if necessary, regarding this report:

Mr. A. L. Sallee
(Name)

Miami, Florida
(Address)

305-377-8941
(Telephone Number)

This Report IS REQUIRED BY LAW. It Budget Bureau No. 56-R-0024
mandatory under the authority of the
Federal Trade Commission (15 U.S.C. 46) Approval Expires September 30,
1972

Supplement No. 1 To FTC Form B (1-69).

SIXTY (60) DAY NOTIFICATION OF ACQUISITION OR MERGER

1. Name and address of Reporting Company:

Maule Industries, Inc.
(Name)

100 Biscayne Boulevard, Miami, Florida 33132
(Address)

2. Name and address of acquiring Company:

Burnup & Sims, Inc.
(Name)

West Palm Beach, Florida
(Address)

(If acquisition is to be made by a subsidiary of the reporting company, be sure to enter name of subsidiary making acquisition.)

3. Name and address of company to be acquired:

 (Name)

 (Address)

4. Date of Agreement (if any): *Dependent upon clearance by F.T.C.*

a. Date acquisition to be consummated:-----

b. Indicate type of acquisition: *Physical Assets Only.*
 (Stock or Assets)

5. Company to be acquired is engaged in the production of:

a. Ready-mixed concrete.

b. Concrete Products

c. Aggregates. (*None*)

d. Other-----

A. L. Saitte,

December 9, 1970

(Signature and title of company official)

(Date)

Executive Vice President, and General Manager

Supplemental Letter of Request

NOVEMBER 9, 1970

DEAR MR. DUFRESNE:

In accordance with our telephone conversation of this date, please be advised that you may proceed as described in Part 1.4 of "General Procedures", relevant to public disclosure.

Very truly yours,
 ANDREW L. SATTEE

Letter of Request

SEPTEMBER 30, 1970

DEAR MR. SHEA:

We are seeking an opinion regarding a contemplated acquisition by Maule Industries, Inc.

As of April, 1970, Maule Industries is a cement producer with a new mill at Miami, Florida, producing at a rated capacity of 2.4 million barrels per year. This mill was primarily constructed to supply Maule Industries' operations in ready-mix and other concrete products which the Company has been selling since 1920.

All of the cement production at this time is going into Maule or Maule-associated operations, primarily in the ready-mix and block producing plants.

Prior to the construction of the mill, Maule had been attempting to establish itself in concrete producing markets further North in Florida as well as in the Orlando area. We had, to that extent, been negotiating with a company called Burnup & Aims in Brevard County, Florida, with plants at Melbourne and City Point in that county. Since 1965

we have been negotiating on and off with the Burnup & Sims corporation but had never concluded an agreement due to differences in our opinions as to valuation of the operations.

Burnup & Sims has in the last two years become a public corporation, over the counter, and has specialized in construction work and diversified into CATV, during which time they have been in contact with us to sell to us their last remaining concrete operation, i.e., the Brevard County plant.

To the best of our knowledge, Brevard County is serviced by three concrete-producing firms: Rinker Materials, considered the largest producer of concrete in Florida, and operates four plants in Brevard County; Dixie Concrete, a small producer operating in Cocoa, and Burnup & Sims operating only in Melbourne with a dormant plant at City Point, Florida. Consequently, the main plant that we are interested in, the Melbourne plant, is in an area serviced by only one other producer, Rinker Materials. Were Burnup & Sims to close the Melbourne plant, there would be only one remaining plant.

Burnup & Sims purchases 100% of their cement requirements from the Florida Portland Cement Company and has purchased at least 95% of their cement requirements from the Florida Portland Cement Company since 1963. The cement purchases by Burnup & Sims runs about 50,000-80,000 barrels per year.

Maule is now in serious negotiation with the Burnup & Sims Company wherein we would expect to acquire their Brevard plants, i.e., the Melbourne plant and the inactive City Point plant. We would, of course, then use our own cement in producing ready-mix and block in this new operation, and the operation will continue to use the Maule-produced aggregate which we have been selling to them for many years.

Maule is a Florida-based corporation, manufacturing and selling its products only in the State of Florida and specifically the southeastern portion of the State. We wish to acquire this Brevard County operation which is as I have related above, one that we have been negotiating for since 1965.

We would very much appreciate your opinion as to whether we would be within the confines of the Federal Trade Commission rulings in acquisitions such as this.

Very truly yours,

MAULE INDUSTRIES, INC.,
(S) A. L. SATTEE,
Executive Vice President, General Manager.

—

**Proposal To Provide Packages of Food and Grocery Products
With Slide Projection Advertising of Their Products in Retail
Outlets (File No. 713 7022)**

Opinion Letter

MARCH 12, 1971

DEAR MR. CASH:

This is in further response to your request of October 28, and December 19, 1970, for an advisory opinion on behalf of your client, Projected Advertising Network, Inc., concerning its proposal to provide packagers of food and grocery products with slide projection advertising of their products in retail outlets.

As the Commission understands your submittal, your client proposes to install display devices capable of exposing 140 photographic slide advertising messages at fixed intervals in retail outlets. Supplier-advertisers will purchase advertising space on a slide package and, in turn, your client will reimburse participating retailers on the basis of "the number of transactions and dollar volume per store during a specified period as that volume is determined by the industry standards." The plan contemplates utilization of projection equipment of a type useable in various retail outlets and an appropriate alternative for those outlets, which for practical business reasons, are unable to participate in the primary program.

The Commission has given careful consideration to your request and has concluded that implementation of the promotional program by your client in the manner described by your correspondence would not warrant a proceeding under the laws it administers, providing the following conditions and caveats are observed:

1. Since the proposed promotional assistance plan calls for your client's performance of certain obligations which are normally performed by suppliers, Guide 13 of the "Guides for Advertising Allowances" (see enclosed copy) must be complied with by your client and by all participating suppliers.
2. Since some products sold by retailers of food are also sold by non-grocery store outlets, the proposed promotional assistance plan must be made available to all retail outlets, whether grocery or non-grocery in nature, which may be competitive in the resale of a participating supplier's products.
3. Since it is unlikely that all retail outlets in any trading area will sell the products of all participating suppliers, participating retailers

must be given the prior opportunity to prohibit the advertising of a product not offered for sale in their stores.

4. Since the Commission cannot now know how the proposed plan will operate in fact, your client is directed to submit a written report to the Commission within six months after institution of the program, indicating the manner and extent to which it is being implemented.

You are further advised it is the Commission's view that your client, as the promoter of the subject promotional assistance plan, must make it clear to each supplier and each retailer that even though Projected Advertising Network, Inc., has been employed to implement the plan, it remains the supplier's responsibility to take all reasonable steps so that each of his customers who competes with another in reselling his products is offered either an opportunity to participate in your client's plan on proportionally equal terms or the appropriate alternative if the customer is unable, as a practical matter, to participate in the primary plan; if not, the supplier, the favored retailer and your client may be acting in violation of Sections 2(d) or 2(e) of the amended Clayton Act and/or Section 5 of the Federal Trade Commission Act.

By direction of the Commission.

Supplemental Letter of Request

December 19, 1970

DEAR MR. McMAHILL:

Thank you for your letter of November 30, 1970 with reference to Projected Advertising Network, Inc. In response to the inquiries made on page two of your letter please be advised as follows:

1. We believe, as set forth in our request for an advisory opinion under the heading "mechanics" that the projector-screen is functionally usable by all retailers regardless of size. However, in those instances where it is determined that there are retailers, who for practical business reasons, are unable to participate in the proposed program, a proportionately equal alternative promotional program will be made available by furnishing those retailers with photographic prints or color slides of the transparencies provided to us by the advertisers.

2. All retail store outlets, whether grocery or non-grocery in nature, selling competitive products will be offered the same program.

I believe the foregoing answers the inquiries set forth in your letter and I trust that an advisory opinion may now be rendered. I would appreciate hearing from you so that I may advise my client when he might look forward to receiving the opinion. Thanking you and wishing you the best for the holiday season. I am

Sincerely,

(S) ALBERT D. CASH.

Letter of Request

OCTOBER 28, 1970

DEAR MR. TINLEY:

I am enclosing revised Request for Advisory Opinion in connection with the proposal of Projected Advertising Network, Inc. As you will recall, this was a project of photographic slide projection in the grocery field about which we met in late August for an informal conference.

I would appreciate your processing our Request for Advisory Opinion.

May I take this opportunity to thank you and Mr. McMahon for the courtesies extended to us in August.

Sincerely,

(S) ALBERT D. CASH, JR.

REQUEST FOR ADVISORY OPINION

The undersigned hereby request an advisory opinion from the Commission pursuant to the Federal Trade Commission Act, the Sherman, Clayton and Robinson-Patman Acts and more particularly Sec. 2(d) and 2(e), Clayton Act, and Sec. 5 F.T.C. Act. This is an original submittal for a requested advisory opinion and the proposed course of action is not currently being followed by the requesting party and is not the subject of a pending investigation or other proceeding by the Commission or any other governmental agency.

APPLICANT

The applicants are two individuals who propose, upon approval hereof, to form an Ohio corporation, Projected Advertising Network, Inc., for the purpose of bringing their proposal to fruition.

PROPOSAL

This request concerns a proposed promotional plan in the grocery field. The applicants propose to secure advertising from packagers of food and grocery products and to place the ads inside retail grocery stores by means of photographic slide projection on a screen, the space to be leased by the store to applicants.

MECHANICS

The screen size is a maximum of 40' x 40' for large supermarkets and alternate smaller sizes grading down to 5½' x 7' for small stores. The screen would be suspended inside of the stores in such a location as to attract the attention of the most possible shoppers patronizing the particular store. Selection of the exact location would be made after consultation with the store owner or manager so as to obtain the largest possible audience taking into consideration such practical considerations as may pertain to the individual store such as shelving placement and traffic flow. The projector case is approximately 14" x 28" x 14" for projection onto the 40' x 40" screen down to 12" x 12" x 6" in the case of the smallest screen. The projector will be located at a distance of 14' to 20' from the screen in large stores and at lesser distances in the case of smaller stores. The projector operates on common household current. Because of

the size of the screen and projector and distance from projector to screen and voltage of electric current used, the device can be located in any grocery store regardless of size. The advancement of the art of photographic projection is such today that there is existing equipment available for any store regardless of its size or location therein that the owner or manager may desire to place the equipment.

IMPLEMENTATION

The applicants would own, operate, install and continually service a projector-screen in each grocery store desiring the services of the applicants. Upon acceptance by the grocery store owner or manager the applicants would enter into a standard lease for space in each grocery store providing in substance that applicants would be leased space for the projector and screen and that the store would furnish the electricity required to operate the projector and would give applicants' agents access during reasonable business hours to service the equipment. In addition, the store owner or manager would be given the opportunity to refuse to have shown in his store slides of products not sold in the store concurrently with the showing of the slide as more fully set forth herein.

SLIDES

Each projector will handle a maximum of 140, 2" x 2" photographic slides and a minimum of 1 slide should the store owner so desire. Each prospective advertiser can purchase a "package" of one to five slides which will be placed consecutively on the projector so that each slide will be shown in a continuing sequence.

Each advertiser will be obligated to purchase a minimum package of one to five slides or multiples thereof for a minimum of four week period or multiples thereof. The message on each slide may be changed at the discretion of the advertiser every two weeks. Each advertiser must, in addition to purchasing a package of one to five slide spaces, furnish the applicants with a 2¼" x 2¼" color transparency for each of the slide spaces. The applicants will then reproduce 2" x 2" color slides for use in the projectors. If the advertiser desires a change every two weeks he must likewise furnish the 2¼" x 2¼" color transparency for each two week period.

Advertisers will be solicited from packagers of food and grocery products with the limitation that said products must prior to the acceptance of said ad or concurrently with the showing thereof be offered for sale in the particular store in which the slide is shown. Each store owner will be given the prior opportunity to prohibit the showing of a slide which advertises a product not offered for sale in his store.

At the outset, for purposes of aiding the Commission in its consideration of applicants' proposal, it might be well to refer to the Commission's consideration of the case set forth in Advisory Opinion Digest No. 387, October 29, 1969. In that opinion the Commission considered a proposed tripartite promotional plan in the grocery field. Applicants' proposal falls under a similar classification.

Applicants' proposal meets the established F.T.C. Guides. The following demonstrates the applicability of the Guides beginning with Guide 240.6.

PAYMENTS TO GROCERY STORE OWNERS FOR RENTAL OF SPACE

Applicants propose to pay each grocery owner per projector-screen installation payments based upon the number of transactions and dollar volume per store during a specified period as that volume is determined by the industry standards. By basing the payments on transactions per store, the smaller retailer will re-

ceive proportionally more in terms of dollar sales because the small retailers' dollar sales per transaction tend to be lower than for the larger retailers. Determination of the transactions per grocery store are arrived at by using the classification of grocery stores as set forth in *Progressive Grocer Magazine* as follows:

Class	Sales per year	Sales per store per week	Transactions per store per week	Payments per installation per 4 week period
Supermarket 1.....	Over 2MM.....	Over \$38,460.....	Over 6,858.....	\$50.00
Supermarket 2.....	1MM to 2MM.....	\$19,230 to \$38,460.....	3,428 to 6,858.....	45.00
Supermarket 3.....	500,000 to 1MM.....	\$9,615 to \$19,230.....	1,714 to 3,428.....	40.00
Superettes 1.....	300,000 to 500,000.....	\$5,770 to \$9,615.....	1,028 to 1,714.....	35.00
Superettes 2.....	150,000 to 300,000.....	\$2,885 to \$5,770.....	514 to 1,028.....	30.00
Small stores 1.....	100,000 to 150,000.....	\$1,920 to \$2,885.....	342 to 514.....	25.00
Small stores 2.....	Less than 100,000.....	Less than \$1,920.....	Less than 342.....	25.00

The classifications would be reviewed annually as so indicated by the current *Progressive Grocer Magazine* Classification together with a review annually of each stores' dollar transaction volume.

Installation and servicing of the equipment would be paid for by applicant at no cost to the store owner.

INFORMING COMPETING CUSTOMERS OF AVAILABILITY OF APPLICANTS SERVICE

The applicants would inform competing retailers of the opportunity to participate in the plan through personal solicitations and advertisements in Trade journals directed to every grocery retailer in the country.

FUNCTIONAL SUITABILITY

As stated above, because of the advancement of the art of photographic projection is such today there is existing equipment that can be utilized by every grocery store regardless of size. The proposal is therefore functionally available to all competing customers. No matter how small a grocery store may be, it is difficult to envision one that would not have the necessary space requirements.

Respectfully submitted.

PROJECTED ADVERTISING NETWORK, INC.
 (S) ALBERT D. CASH, JR.,
 Counsel, 920 Central Trust Tower, Cincinnati, Ohio.

Proposal To Distribute Free to Retail Outlets a Weekly Magazine.
 (File No. 703 7116)

Opinion Letter*

MARCH 22, 1971

DEAR MR. O'BRIEN:

This is with further reference to your request of January 15, 1971, for reconsideration of the advisory opinion identified above.

*Opinion letter of August 12, 1970 appears in 77 F.T.C. 1755.

It is the Commission's understanding that the plan originally proposed has been substantially revised. The Commission's consideration has, accordingly, been limited to the revised plan, and does not involve a reconsideration of its advisory opinion of August 12, 1970, with respect to the original proposal.

In essence, In-Store proposes to distribute free to retail outlets such as grocery stores, drug stores, notions stores and the like a weekly magazine to be called "TV Plus." The magazine would contain feature articles of general interest and the TV schedules of stations serving the trade area in which the magazine will be distributed.

Advertisements for products sold in the retail outlets would also appear in "TV Plus." These advertisements would be solicited by In-Store from the producers or suppliers of the products.

The number of copies which a retail outlet participating in the plan would be provided weekly, would be determined on the basis of the annual dollar volume of sales of the chain, association of retail outlets, or independent outlet, in the trade area in which the plan would be attempted. It is understood that initially this would be the New York Metropolitan area.

Notification of retailers as to availability of the plan would be made by means of: personal contact; by representatives of In-Store urging participating advertisers to notify their customers of the plan; advertising in trade journals normally distributed to retail outlets; and by means of a notice in the publication itself as to how one might participate. Regardless of the means used, In-Store would insure that each eligible reseller is, in fact, offered the opportunity to participate.

After a retailer indicated his interest in participating, he would receive his copies of the magazine for weekly distribution in timely fashion, either from warehouses serving him or by mail or parcel delivery to his place of business.

Periodically, In-Store would check on each retailer's eligibility and fulfillment of the distribution undertaking to which he had agreed. Independent wholesalers, who distribute the magazine to retailers for In-Store, would be compensated at a rate of $\frac{1}{4}$ ¢ per copy of the magazine distributed to their customers, the retail outlets. No payment will be made to chain or cooperative distributors or to any retailers.

Those participating retailers, including those identified with a cooperative or wholesaling group, with a distinctive trade mark symbol, may request In-Store to print such trade mark symbol on the cover of copies of the magazines they receive. Retailers not having such a trade mark symbol will be provided a rubber stamp free, which is designed for use by them in stamping as many as four lines of such

information as they desire on the cover of the copies they receive. There would be no charge either to those who have their own trade mark symbol or to those who request the rubber stamp.

Additionally, all participating retail outlets would be offered the option of a page in the body of the magazine which they could use for such purposes as they desire in promoting products peculiar to their stores or otherwise. In order to avail themselves of this option, however, such participants would be obliged to furnish the plate, artwork and other layout at no expense to In-Store. For participants not able in a practical business sense to take advantage of this option, In-Store would, at the request of the participant and using information supplied by him in the form of an ad mat or other description, print a black and white page to promote products or to convey an advertising message of the participants, which page would be printed and inserted in the requesting participants' copies of the magazine by In-Store at its own expense.

On the basis of the information supplied by In-Store, the Commission is of the opinion that implementation of the plan in the manner outlined would not warrant initiation of proceedings under laws administered by the Commission.

The Commission believes, however, that you should caution suppliers against including "special" offers, such as redeemable coupons for a particular product, in their advertisements. This, because resellers not stocking such products would be placed improperly in the position of promoting such products.

Also, since the Commission cannot know now how the proposed plan will operate in fact, your client is directed to submit a written report to the Commission six months after institution of the program, indicating the manner and extent to which it is being implemented.

You are further advised it is the Commission's view that as the promoter of the promotional plan, In-Store must make clear to each supplier and each retailer that even though In-Store has been employed to implement the plan, it remains the supplier's responsibility to take all reasonable steps so that each of his customers who competes with another in reselling the supplier's products is offered either an opportunity to participate in the plan on proportionally equal terms or a suitable alternative if the customer is unable as a practical matter to participate in the primary plan; if not, the supplier, the retailer and In-Store may be acting in violation of Sections 2 (d) or (e) of the amended Clayton Act and/or Section 5 of the Federal Trade Commission Act.

By direction of the Commission.

Letter of Request

JANUARY 15, 1971

DEAR MR. SHEA:

This is to request further consideration by the Commission of a proposed plan of In-Store Publications, Inc. ("ISP"), 41 Richmondville Avenue, Westport, Connecticut 06880, to publish and distribute a weekly magazine called "TV PLUS" free of charge to consumers through retail outlets in the New York Metropolitan area. It is requested that the proposed plan set forth below be considered in lieu of the plan outlined in our letter of September 30, 1970, which may be disregarded by the Commission.

The Proposed Plan

ISP plans to contract with manufacturers and suppliers of consumer products for the advertising and promotion of their products in "TV PLUS" magazine. Such manufacturers and suppliers will defray all costs of preparing the advertisement for publication and will be charged rates by ISP based on circulation of "TV PLUS" magazine. Aside from the form and content of their advertisements, participating manufacturers and suppliers will have no control over the style and content of the magazine nor the policies and practices of ISP. It is anticipated initially that the magazine will focus on advertisements of consumer products such as bread, milk, cereal, canned goods, soap products and the like which are customarily sold in retail food outlets.

In addition to consumer product advertisements, the magazine will contain a complete seven-day television schedule, syndicated columns, and feature articles of particular interest to shoppers which will change weekly with publication.

"TV PLUS" magazine will be made available weekly to all participating retail outlets at no charge on the basis of one magazine for each \$1000 of gross annual retail sales in the New York Metropolitan area. The only obligation placed upon such outlets will be to distribute the available supply of "TV PLUS" magazines free of charge to consumers, and to certify from time to time to ISP the number of magazines distributed. Except as specifically provided for herein, the participating retail outlets will have no control over the style and content of the magazine nor the policies and practices of ISP.

In view of the large number of retail outlets in the New York Metropolitan area that may be eligible to receive "TV PLUS" magazine, ISP proposes to employ a variety of methods of notification as to its availability. First, it intends to urge participating advertisers to

notify all their competing customers of the availability of "TV PLUS" magazine in their various sales flyers and bulletins which are sent periodically to retail outlets. Secondly, ISP proposes to enter into contracts with multi-outlet retailers and wholesalers serving independent retail outlets providing for distribution of the magazine in the New York Metropolitan area. Wholesalers will be encouraged to give notice of the magazine to their customers and those who distribute magazines to independent retailers and who secure their agreements to distribute the magazine to the consuming public will receive $\frac{1}{4}$ ¢ per copy distributed to the independent retail customers. Thirdly, ISP proposes to publish at the beginning of each quarter notice in trade papers of general circulation among retail outlets in the Metropolitan New York area such as "Supermarket News" and "Progressive Grocer." A sample form of the notice to be published is attached as Exhibit "A". To determine the efficacy of this notice, ISP will from time to time, by telephone and personal contact, conduct spot checks to determine if actual notice is being received by retail outlets. Finally, ISP proposes to publish in each issue of "TV PLUS" magazine a notice indicating the availability of the magazine to retail outlets in the New York Metropolitan area.

Upon being notified that an individual retail outlet is interested in "TV PLUS" magazine, ISP will send a letter (Exhibit "B") outlining all of the relevant details as to the availability of the magazine. To assure that the proper number of magazines will be distributed by ISP to the retail outlet in accordance with the plan and to assure participating advertisers that the magazine is actually being distributed to the consuming public, ISP will require the retail outlet initially, and from time to time thereafter, to certify to ISP in writing the amount of his annual retail sales and the number of "TV PLUS" magazines actually distributed to the public. A copy of the proposed form of certification is attached as Exhibit "C". ISP will then mail the appropriate number of copies to the retail outlet no later than Thursday prior to the week in which the magazine is to be disseminated to the public or deliver them no later than the following Monday.

With respect to multi-outlet retailers in the New York Metropolitan area, ISP proposes to negotiate and to enter into agreements with such retailers providing for the distribution by them of "TV PLUS" magazine to each of their retail outlets in the area. ISP will deliver the requisite number of magazines to the retailer's warehouse, and in return for receiving the magazine, the retailer will agree to (a) distribute the magazine to each of its retail stores in the Metropolitan New York area, and (b) certify to ISP distribution figures showing the number of magazines of each issue distributed by each of its stores during each week of the agreement and provide such other information

pertaining to the distribution of the magazine as may be reasonably requested by ISP. A specimen copy of the proposed form of Agreement with multi-outlet retailers is enclosed as Exhibit "D".

Likewise, ISP proposes to enter into agreements with wholesalers serving independent retail outlets in the Metropolitan New York area whereby they will agree to (a) distribute "TV PLUS" magazine to each of the retail stores they serve in the area, and (b) certify to ISP distribution figures showing the number of copies of each issue distributed by each of their stores during each week of the agreement. In return for performing these services, the wholesaler will be entitled to receive an allowance of $\frac{1}{4}\phi$ from ISP for each magazine distributed.

While it is not possible to predict with accuracy the exact number of "TV PLUS" magazines which will be required to supply retail outlets in the Metropolitan New York area, ISP proposes to evaluate at the end of each quarter of operations the number of magazines needed and to take steps to provide the necessary copies in the subsequent quarter. Based upon an investigation of printing facilities available for the New York Metropolitan area, in the first quarter of operation ISP will initially be able to distribute up to 2 million magazines weekly. ISP is prepared to expand the number of magazines available in subsequent quarters. It is anticipated that by the third quarter of operation ISP will be able to distribute approximately 4 million magazines weekly, and that within a twelve to eighteen month period it will be able to distribute substantially more copies of "TV PLUS" magazine if necessary. In the unlikely event there are insufficient numbers of magazines available in a quarter, ISP will add an appropriate number of copies to the retail outlet's entitlement of magazines in subsequent quarters.

The format and contents of "TV PLUS" magazine will be the same for all participating retail outlets although the following options are available. For those outlets, regardless of sales volume, which have their own logo or distinctive trade name symbol, ISP will offer to print at no charge a separate cover page bearing the logo and/or trade name identification of the retail outlet. Similarly, retail cooperatives and associations of independent retail outlets with their own logo or distinctive trade name symbol may also obtain copies of "TV PLUS" magazine with a separate cover page bearing the logo or distinctive trade name symbol of the organization for distribution to their membership.

Although the format of the cover page will vary for each participating retail outlet with its own logo or trade name symbol, aside from this identification, the outlet will have no control over the contents of the cover page and ISP by agreement retains control of the contents of this page and artistic considerations will govern its format. There

will be no commercial messages printed on the cover which will be of benefit to the retail outlet.

For retail outlets without their own logo or distinctive trade name symbol, ISP will make available at its expense a rubber stamp which may be used by such outlets to personalize copies of "TV PLUS" magazine distributed to consumers in their stores. The stamp may contain whatever information the retail outlet wishes within a maximum of four lines, including store name, address, telephone number, store hours, principal products, i.e. "fresh meat," "Fresh milk and eggs," etc. A prominent place will be provided on the cover of the magazine for the retailer to place the stamp.

As a second option, ISP will also offer weekly to all participating retail outlets one page of the magazine which may be used to print whatever information the retail outlet desires such as a private label advertisement. If the outlet desires ISP to print the page, it must provide at its own expense the plate and other layout and artwork material required. Retail cooperatives and associations of independent retail outlets who desire to avail themselves of this page may also participate on the same basis.

For individual retail outlets unable as a practical matter to provide the necessary printing material, ISP will print, based on information supplied by the retailer in the form of an ad mat or other description, a separate page in black and white which will be placed by ISP in the copies of "TV PLUS" magazine to which the retail outlet is entitled prior to delivery. This page may contain whatever information the retail outlet desires, including weekly specials, store hours, etc., provided it is in good taste and in keeping with the overall quality of the magazine. In addition, in lieu of the page printed by ISP for retail outlets furnishing their own plate and artwork, the "TV PLUS" magazines available to the individual retail outlet will also have a page devoted to a weekly public service announcement.

Conclusion

ISP submits that its proposed amended plan, if implemented in the manner outlined herein, will not violate any of the statutes administered by the Federal Trade Commission, including Sections 2(d) and (e) of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act.

"TV PLUS" magazine will be made available to all participating retail outlets in the New York Metropolitan area on proportionally equal terms, i.e. one magazine weekly for each \$1000 of annual retail sales by the outlet in the area. Thus, the requirements of Guide 7 of the Commission's Guides for Advertising Allowances and Other Merchandising Payments and Services will be met.

Retail outlets in the New York Metropolitan area will be notified of the availability of the magazine in compliance with Guide 8 through personal solicitation by participating advertisers, personal contact by ISP, notification by wholesalers serving independent retail outlets, by publication in the magazine itself, and by publication at the beginning of each quarter of an appropriate notice of the magazine's availability in trade publications of general circulation in the New York Metropolitan area.

Delivery of the required number of copies of the magazine to all participating retail outlets will be accomplished by ISP by mailing or delivering the magazines directly to the outlet; by agreement with multi-outlet retailers; or by agreement through wholesalers serving independent retail outlets in the New York Metropolitan area. Thus, the requirements of Guide 9 will be met.

With regard to Guide 13, Example 3, of the Commission's Guides, it is important to emphasize that retail outlets are not required to purchase from any of the suppliers who advertise in "TV PLUS" magazine in order to receive the magazine. The basis of proportionality set forth in the plan is the annual retail sales of the outlet in the area—not the amount of purchases from supplier-advertisers. Thus, the retail outlet is entitled to the magazine whether it purchases from one, all or none of the advertisers.

ISP considers it unlikely, however, that any retail outlet will be distributing magazines bearing advertisements of products not being stocked and sold since the kinds of products advertised will be those customarily found in the kinds of retail outlets interested in the magazine. Every effort will be made to avoid any instance where the retail outlet may not be carrying all of the products advertised in the magazine. Indeed, ISP assures the Commission that as the program develops it will do whatever is necessary under the law to meet the objections of retail outlets who may not wish to distribute copies of "TV PLUS" magazine which contain advertisements of products they might not thereafter carry.

It is significant, we think, that ISP insists only that the magazines be given away free of charge to consumers. The retail outlet is not required to perform any kind of promotional activity ". . . as a condition to receiving promotional payments or services from the seller . . ." There is no requirement, for example, that the retail outlet post stickers or signs indicating the availability of the magazine in the store.

"TV PLUS" magazines will be distributed at the checkout counter as the consumer leaves the store, and will most likely not be looked at until the consumer arrives at home. It is a substantially different kind of activity than in-store broadcasting, for example, which promotes "impulse buying" in the store. There consumers are constantly

bombarded with periodic announcements about products some of which the retail outlet may not be carrying.

Also, it is important to emphasize that "TV PLUS" magazine will contain a host of features of interest to consumers in addition to product advertisements. The magazine will contain a complete seven-day television schedule, syndicated columns, feature articles, and public service messages which will have no relation whatsoever to product promotion.

ISP believes that the retail outlet will come to regard "TV PLUS" magazine as a form of institutional advertising which will benefit the sale of all of the products sold in the store. Consumers, aware of the availability of the magazine at no cost, will be drawn to the store to shop the full range of the products available.

ISP believes that "TV PLUS" magazine will benefit suppliers, retailers, and consumers alike. Suppliers will be able to advertise their products in a weekly magazine of wide distribution at reasonable rates. Retailers will have a free, attractive and usable weekly magazine available to them for distribution to consumers. Consumers will have at no cost an informative magazine containing the weekly television schedule and articles of current interest.

ISP is not at the present time printing or distributing "TV PLUS" magazine, and it does not intend to do so until it receives the approval of the Federal Trade Commission. Since it cannot commence operations until it receives approval, it respectfully requests that this matter be given prompt attention by the Commission.

Accordingly, it is respectfully requested that the Commission reconsider its earlier advice and approve the plan as amended herein. If additional information is desired by the Commission or its staff, please do not hesitate to call or write the undersigned.

Respectfully submitted.

HOWREY, SIMON, BAKER & MURCHISON
(S) DAVID C. MURCHISON.
(S) FRANCIS A. O'BRIEN.

Enclosures of Counsel:
JOSEPH J. McCANN, Jr., Esq.
25 Broadway
New York, N.Y.

EXHIBIT "A"

To be published at the beginning of each quarter in trade papers of general circulation in the area.

NOTICE

In-Store Publications, Inc. is offering free to all retail outlets in the New York Metropolitan area a weekly publication called "TV PLUS" magazine combining

FEDERAL TRADE COMMISSION DECISIONS

TV schedules and women's service features to be distributed FREE to shoppers starting _____ in the New York Metropolitan area.

Copies of the magazine will be made available each week to retail outlets on the basis of annual retail sales.

For further information, call or write to:

In-Store Publications, Inc.
41 Richmondville Avenue
Westport, Conn. 06880
Tel. No. 203-227-7291

This offer is open to all retail outlets and will be honored by In-Store Publications insofar as copies of "TV PLUS" magazine are available in each quarter. In the unlikely event that insufficient copies of the magazine are available in a quarter, an appropriate addition will be made to the number of magazines to which you are entitled in subsequent quarters.

ISP

EXHIBIT "B"

IN-STORE PUBLICATIONS, INC.

WESTPORT, CONN. 41 RICHMONDVILLE AV. 06856 227-7291

Dear Sirs:

In response to your inquiry, In-Store Publications plans to distribute in the New York Metropolitan area, beginning _____, a weekly magazine titled "TV PLUS," which combines weekly TV schedules and articles of interest to the consumer.

"TV PLUS" will be distributed free of charge to retail outlets on the basis of one magazine for each one thousand dollars of annual retail sales, and it will be either mailed to you no later than Thursday of the week prior to the week in which the magazines are to be distributed or delivered to you no later than the following Monday.

If you have your own store logo or other distinctive trade name identification, ISP will print the cover of "TV PLUS" magazine with the identification. For the purposes of this offer, cooperatives or associations of retail outlets which have their own logo or distinctive trade name identification are entitled to participate on the same basis. If you do not have your own store logo or distinctive trade name identification, ISP will make available, upon your request, at no charge a stamping unit which you may use to stamp the cover within the place provided. The stamp may contain whatever information you desire within a maximum of four lines.

In addition, ISP will make available to you each week one page of the magazine for whatever information or advertisements you desire to be printed provided the information or advertisements to be included are prepared and delivered to ISP at your cost not later than 60 days prior to the date the magazine is to be delivered. If you are unable as a practical matter to provide the necessary printing materials, ISP will offer to print at its expense a page in black and white which will be placed in the magazine by ISP. This page may contain whatever commercial information you desire provided it is delivered to us not later than 60 days prior to the date the magazine is to be delivered.

In order to show your interest in the program and to ascertain the number of copies of "TV PLUS" to which you are entitled to distribute free to your customers, the attached form must be completed in its entirety and forwarded to the above address. If significant changes in your volume of business occur within

ADVISORY

a year, please notify ISP so that the number of copies of "TV PLUS" magazine available to you may be adjusted accordingly.

Sincerely,

JOHN G. ARBOUR,
President.

Attachment.

EXHIBIT "C"

Name of Store or Stores: _____

Location of Store or Stores: _____

Name of Owner and/or Owners: _____

Name of Supervisor or Store Manager: _____

Name and Location of Principal Wholesaler: _____

Dollar Amount of Retail Sales. (These figures must be accompanied by an acceptable certificate executed by the owner or manager of the Store or Stores involved.)

1969: _____

1970: _____

1971: (Projected) _____

Signed _____, 1971

EXHIBIT "D"

In-Store Publications, Inc.
41 Richmondville Avenue
Westport, Connecticut 06880

DEAR SIRs:

This letter, when signed by you, will constitute the Agreement between us.

1. (a) At no cost to us, you agree to publish a weekly magazine (the "Magazine") in form and style substantially similar to that attached hereto and incorporated herein as Exhibit A and, commencing _____ to deliver _____ Magazines weekly on _____, or if a holiday on the next day not a holiday to our warehouse at _____ no later than 12:00 p.m. Each Magazine of each issue shall contain a front cover with our name, store logo or trademark shown thereon; one page of which shall contain such information or advertisements as we shall provide you for inclusion in the Magazine; a complete television schedule for the seven day period commencing the Saturday following delivery; and feature articles, syndicated columns and advertisements, the content and quantity of which you shall determine in your sole discretion. Information or advertisements to be provided by us for inclusion in any issue of the Magazine shall be prepared and delivered to you at our cost not later than 60 days prior to the date you are required to deliver that issue to us. If we shall fail to deliver such information or advertisements within the time required, you shall have the right to use such space as you in your sole discretion shall determine. It is agreed that the Magazine will be made available to us weekly on the basis of 1 for each

\$1000 of our annual retail sales in the New York Metropolitan area, and that we will from time to time at your request report to you our annual retail sales in the Metropolitan New York area in order to determine the number of Magazines to which we may be entitled.

2. At our sole cost, we agree to promptly distribute the Magazines to each of our stores in the New York Metropolitan area and to cause each such store to distribute one Magazine free to each of our customers from no later than 1:00 P.M. on the Wednesday immediately following delivery until our supply of that issue of Magazines shall be exhausted but no later than the close of business on Tuesday of the following week.

3. Except as otherwise provided in this Agreement, we shall have no control over any material appearing in the Magazine, except that the use of our name or of any of our trademarks shall only be in a manner approved by us.

4. The term of this Agreement shall run from the date hereof until June 30, 1972; thereafter, such term shall be automatically extended for one year periods unless we shall give you six months prior written notice of termination. You may terminate this Agreement at any time on written notice to us.

5. We will certify to you distribution figures showing the number of Magazines of each issue distributed by each of our stores during each week of this Agreement and we will provide you with such other information pertaining to the distribution of the Magazine as you may reasonably request.

6. Except as stated in Section 9, you shall indemnify and hold harmless us, our successors and assigns, subsidiaries and affiliates from any claim, liability, loss, damage or expense arising out of a violation of any copyright, trademark or patent.

7. We shall indemnify and hold harmless you, your successors and assigns, subsidiaries and affiliates from any claim, liability, loss, damage or expense arising out of or claimed to arise out of any information or advertisement submitted or approved by us for inclusion in the Magazine.

8. You or your representatives shall have the right to enter on our premises and those of our stores to inspect our procedures for distributing the Magazines at such reasonable times as you shall determine.

9. During the term of this Agreement we agree not to publish or distribute a magazine under our name or that of a subsidiary or affiliate of ours with content similar to the Magazine. If this Agreement is terminated by either party, we agree not to publish or distribute such a magazine within one year of such termination without first making available to you, on an exclusive basis, the opportunity to publish or distribute such a magazine on terms at least as favorable as those offered by us to, or to us by, any other person, firm or corporation.

10. Your status hereunder is that of an independent contractor and we do not and will not have actual, potential or any other control over you.

11. All notices required to be given pursuant to this Agreement will be given in writing or by telegraph, if to us at ----- and if to you at 41 Richmondville Avenue, Westport, Connecticut 06880 or to such other address as may be designated in writing by either party hereto to the other party.

12. This Agreement will be governed by the laws of the State of New York as if it were executed and to be performed entirely within such State and will not be assigned by either party, without the prior written consent of the other party hereto. This Agreement may be changed only by a writing signed by both parties hereto.

Please indicate your agreement with and acceptance of the foregoing by dating and signing an enclosed copy of this letter in the space indicated and returning it to us.

Very truly yours,

By -----

Accepted and Agreed to
this day of , 1971
IN-STORE PUBLICATIONS, INC.

By -----

**Marketing of Form Letters To Be Used in Debt Collection
Activity. (File No. 713 7023)**

Opinion Letter

MARCH 22, 1971

DEAR MR. BRODER:

This is in reply to your letter of October 9, 1970, on behalf of Eagle Credit Corporation, requesting advice from the Commission concerning the marketing of a number of form letters to be used by your client in its proposed debt collection activity.

The Commission has given careful consideration to your request, and is of the view based on the materials and information submitted, that the proposed program is substantially the same as several others which are currently being investigated by the Commission. Accordingly, pursuant to its Rules of Practice, Section 1.1(b), the Commission considers it inappropriate to issue the requested advisory opinion.

By direction of the Commission.

Supplemental Letter of Request

NOVEMBER 3, 1970

Attn: William H. Wentz, Esq.

GENTLEMEN:

I wish to acknowledge receipt of your letter dated October 27, 1970.

I wish to furnish you with the additional information which you requested. Eagle will base its fee on a flat fee basis. The form letters that are sent out, will be sent out by Eagle. The forms are not to be sold or distributed by Eagle's clients, but will be sent out in the mail by Eagle.

In connection with the third paragraph of your letter, Eagle intends to make available to its clients information concerning the fact that it has been requested previously to aid a particular client relative to credit problems that client has faced with a specific individual. It will provide the client with such information as the nature of the request

of the original client, so that the subsequent client can contact the original client if necessary, to determine the outcome. In other words, Eagle will not pass on the credit worthiness, financial responsibility, or paying habits, but merely report the fact that it has been involved in certain credit problems on behalf of a client, and involving a debtor. Any company so informed, may then check with the original company to determine the disposition. Eagle has not yet proceeded in this direction, and will not if your office determines that this service is not proper.

With regard to the fourth paragraph of your letter, the form letters will be sent to a debtor by our office when a client requests us to do so and furnishes us with the name and address, and the amount owing. The scope of authorization from the client may involve merely a letter writing function, or it may involve the subsequent referral by Eagle to a local collection agency or attorney. After the sequence of letters are sent to the debtor by Eagle, Eagle will either submit the account to a local agency or attorney, or return the account to its client, in accordance with instructions and conditions under which we operate for that client. Eagle intends not to use any phrases involving "we shall proceed", or "we are proceeding with appropriate action against you", or "recommend that your account be placed for legal processing to collect", where Eagle knows that such action is not to occur. In no case will Eagle state something in a letter that it knows for a fact will not occur. Eagle intends to utilize a completely different form letter in connection with small debts which will contain no threat at all, but merely appeal to the debtor's moral and ethical duty to pay an honest and just debt. If you wish, we will be happy to furnish you with a copy of that letter.

With regard to your request for copies of contracts, Eagle has no such contract with any company, and does not intend to require any contract. At this time, Eagle intends to charge a client a fee of \$1.80 per account handled, where more than one letter is requested, and \$.50 if only one letter is requested. I am enclosing an introductory announcement which will be used.

If there is any other information which you request, please do not hesitate to contact me.

Yours truly,

(S) STANLEY H. BRODER.

EAGLE CREDIT CORP.,
NEWARK, N.J.

We are pleased to announce the establishment of a unique collection tool—*Early Bird Pre-Collection Service*.

Early Bird Pre-Collection Service provides you with a means of utilizing an outside agency (with its effective third party approach) to convert delinquent accounts into dollars at an unbelievably low cost.

Early Bird provides a bonded, letter-demand service with a series of up to nine proven effective collection letters that we send out for you on our letter-heads. Each letter, containing progressively stronger but ethical language, is accompanied by a self-addressed envelope with your company name and address as well as the account number of your customers for easy identification.

Our price for all of this is \$1.80, per account, when 100 or more accounts are submitted at one time.

We will be happy to handle 50 collection accounts for you at *no charge* whatsoever, if they are submitted to us at one time. We are confident that this will demonstrate our prowess.

The only information needed is: (1) Name and address of customer; (2) Account #; (3) Amount owing.

You have nothing to lose in testing Early Bird's proficiency, and many thousands of dollars to gain.

If you have any question, or wish to discuss our service, please feel free to telephone me "collect" at (201) 624-1600.

We want to assure you that we will provide you with the same quality of service, integrity, and results that the Eagle name has always represented.

Yours truly,

EAGLE CREDIT CARD PICK-UP SERVICE,
S. H. BRODER, *Executive Director.*

Letter of Request

OCTOBER 9, 1970

GENTLEMEN:

My client is about to engage in the collection business. They have not yet, however, commenced in this business yet.

We request that the enclosed form letters be examined.* We believe that all of these letters are fair and not deceptive. We would appreciate an advisory opinion from you.

Yours truly,

(S) STANLEY H. BRODER.

Legality of a Promotional Assistance Plan Whereby Grocery Products Will Be Advertised on Shopping Carts of Retail Grocery Stores. (File No. 713 7024)

Opinion Letter

APRIL 2, 1971

DEAR MR. CHAPMAN:

This is in response to your letter of October 2, 1970, requesting an advisory opinion on behalf of your client, Market Makers Interna-

*These form letters have not been reproduced in this volume because of their great number. However, they are available for inspection at the Division of Legal and Public Records, Federal Trade Commission, Washington, D.C.

tional, concerning the legality of a proposed promotional assistance plan whereby grocery products will be advertised on shopping carts of retail grocery stores. Alternatively, advertising placards will be offered to retailers who do not use shopping carts.

As the Commission understands the facts, each retailer will be placed in one of five categories depending upon the volume of business it transacts in a month. Retailers then will be compensated on the basis of the volume of business per month per store, and the number of shopping carts rented for advertising purposes. Stores which do not use shopping carts will be paid for displaying placards at a certain rate per placard which varies in accordance with the volume of business transacted.

The Commission has given this matter careful consideration, and is of the view that implementation of the proposed plan in the manner described would result in discriminatory promotional allowances being granted customers competing in the resale of a participating supplier's products. In such event, participating suppliers, the favored retailers and your client may be acting in violation of Sections 2(d) or 2(e) of the amended Clayton Act and/or Section 5 of the Federal Trade Commission Act.

By direction of the Commission.

Letter of Request

OCTOBER 2, 1970

Re: Michael Coleman

DEAR MR. LEVIN:

We are writing this letter pursuant to your letter of September 25, 1970, addressed to Mr. Coleman.

The following is the proposed plan and procedure for obtaining an advisory opinion which my client requested in his letter of September 15, 1970.

1. Market Makers International proposes to lease space on the front inside and outside of grocery shopping carts owned and/or operated by food clearing companies and independent grocery stores for the purpose of attaching a placard which will be used as a vehicle for changeable copy advertising inserts.

2. Compensation to store chains or owners will be paid yearly by Market Makers. The amount of the compensation will be determined by the negotiated percentage of gross income as agreed to by the specific chain or store owner and Market Makers.

3. Market Makers proposes to lease the space on the front of said carts to food manufacturers and/or packers for one month periods for

the purpose of displaying advertising inserts. Rates have not been established by Market Makers, but the rate will be uniform. Rates will be computed on a per store basis.

4. A national sales and advertising program will be implemented by Market Makers. Space will be sold on a regional basis as well as a national basis. Space on these carts will be sold on a first come-first serve basis.

Please forward your opinion on this matter at your earliest convenience.

Very truly yours,

(S) HARRY A. CHAPMAN, JR.

Implementation of a Mail Order Business Involving Advertising and Sale of Dietary Information and Calamine Lotion as a Remedy for Acne. (File No. 713 7009)

Opinion Letter

APRIL 14, 1971

DEAR MR. THALER:

This is in further reference to your request for advice as to the propriety of implementing a mail-order business for advertising and sale of dietary information and calamine lotion, as a remedy for acne. A fourteen-day money-back guarantee is offered in connection with this plan.

You are advised that the Commission has given the submitted advertising careful consideration, and that it is impractical at this time for the Commission to make an informed decision as to whether or not the advertising which you propose constitutes a violation of any of the statutes which the Commission enforces.

By direction of the Commission.

Letter of Request

JULY 11, 1970

GENTLEMEN:

Before investing in a mail order business along the lines of the enclosure, I would greatly appreciate it if you could comment on the Federal propriety of such a plan. In other words, does the plan violate any Federal statutes?

As you may notice, the plan offers a money-back guarantee, it is not medical, only standard "calamine" lotion would be used and it is basically a readjustment of the individual's diet.

If I can be of any further help, kindly let me know. Thanking you for any consideration, I am,

(S) IRWIN R. THALER.

In response to your inquiry of recent date, we are herewith furnishing you with information of the utmost importance to you.

Acne is generally caused by faulty secretion of the sebaceous glands. This secretion is manufactured from certain food substances. Consequently, consensus of opinion indicates that improper diet may play an important part in certain poor complexions. A choice is made for you of the foods that you eat in order to give you the best selection of everyday foods that may improve the appearance of your skin. We are prepared to analyze your diet very carefully and supply you with a corrected personalized diet of everyday common foods for you. All we ask you to do is to submit to us the enclosed chart fully answered.

As you undoubtedly know, obesity is being attacked by so-called "Weight Watchers" organizations. Our technique is more or less along those same lines. It is predicated on diet therapy and in no sense or manner should be considered a medical type of treatment.

Nonetheless, since skin trouble is such a stubborn and lasting problem and while it is our opinion that you may be able to obtain improvement by utilization of the above-mentioned diet therapy we also send you a small bottle of standard "calamine" lotion. This is done so that the unsightliness of your acne may be diminished while you are endeavoring to correct it. Moreover, and this is important, we offer a moneyback guarantee for our method. So irrespective of your concern for a clearer skin, it will not cost you one cent to try this method.

In other words you may follow our plan for a period of two weeks, meanwhile eating the everyday foods that are not known to foster skin eruptions while avoiding the prohibited foods. At the same time use our standard "calamine" complexion formula regularly and after a period of 14 days if you are not entirely satisfied you may return the unused portion of the lotion and your money will be cheerfully refunded with no questions asked. Imagine! At absolutely no cost to you, if you so desire, you may try our method to rid yourself of an ugly skin condition. Whether you have a few pimples or a very bad acne you have nothing to lose by answering the chart and sending it to us with

You, too, will be grateful when you receive the following :

1. Analysis of your diet and personal correction.
2. A suggested 7 day diet which you may follow.
3. List of foods which are believed to aggravate acne.
4. A bottle of calamine lotion.
5. Generally acceptable instructions on how to take care of your skin while on our plan.

We feel that we do not have to emphasize to you the handicaps of a poor complexion such as embarrassment, self-consciousness, etc. Do not dismay. Let us have the opportunity of bringing you a method which may help you to achieve improved skin appearance.

Legality of a Plan To Sell a Patented, Electric-Operated, Advertising Device Called a Vectograph to Suppliers for Their Advertising Use With the Retailers of Their Products. (File No. 713 7025)*

Opinion Letter

Dear Mr. Baron:

MAY 5, 1971

This is in response to your letter of October 9, 1970, requesting advice as to the legality of a proposed plan to sell a patented electric operated advertising apparatus called a vectograph. The device will be sold to suppliers for their advertising use with the retailers of their products.

As the Commission understands the facts, the vectograph will be sold outright to suppliers. No distribution or placement services are to be performed by you on behalf of the purchasing company, and except for the purchase price, no other compensation is received by you. Pursuant to this plan to sell the machine, there is no intention to promote use of the vectograph on behalf of the purchasing company, and your interests in the invention will terminate after the sale is consummated.

The Commission is of the view, based on the information furnished, that the plan for outright sale of the vectograph in the manner described would not involve any of the laws administered by the Commission.

This opinion in no way relates to the legality of the patent or your right to use the patent.

By direction of the Commission.

Supplemental Letter of Request

DEAR MR. LEVIN:

MARCH 18, 1971

Thank you for your letter of February 25, 1971. I hope to answer the various questions you posed in the aforementioned letter:—

(1) No further services are contemplated to the purchasing company by either Mr. Tamarin or Baron & Company.

(2) If an outright sale of the patent is consummated, neither Mr. Tamarin nor Baron & Company would receive any compensation for the placement and disposition of the vectograph.

*Illustrations of the Vectograph are not reproduced in this volume, but are available for public inspection at the Federal Trade Commission, Washington, D.C.

(3) Since we have not negotiated the purchase of our patent at this time, it is impossible to describe in detail any arrangements which we may have with the purchaser with respect to the use of the device in retail outlets which sell the company's products.

(4) Neither Mr. Tamarin nor Baron & Company have any intention of promoting the vectograph on behalf of a company or companies which might purchase the aforesaid patent rights.

The inventor, Mr. Tamarin, has the patent or invention for sale. Once it is sold to a customer, the customer has the sole and exclusive right as to what is to be done with the invention. Both Mr. Tamarin's interest and Baron & Company's interest in the invention generally will terminate after the sale is consummated.

If there is anything further we can do to help you, please do not hesitate to contact me.

Very truly yours,

(S) ROBERT R. BARON,
President.

Supplemental Letter Relative to Request

FEBRUARY 25, 1971

DEAR MR. BARON:

This is in further reference to your letter of October 9, 1970, requesting advice as to the legality of a proposed plan to sell to certain manufacturers an electric operated advertising apparatus called a vectograph. By letter of February 12, 1971, you indicated that this device will be marketed by outright sale of the patent and its manufacturing rights. On February 19, 1971, you informed me by telephone that your client was Mr. B. J. Tameron, and that the ultimate clients will be the companies who purchase the vectograph.

I have studied your proposed plan, but it is still unclear to me what, if any, arrangements you will have with or services you will perform for the companies to whom you have sold the rights to the vectograph. The answer to the following questions, therefore, will be most helpful to further consideration of this plan:

1. After the sale of the vectograph, are any further services provided to the purchasing company by Mr. Tameron or Baron and Company?
2. Does Baron and Company or Mr. Tameron receive any compensation from the purchasing company for the placement and distribution of vectographs with retailers who sell the companies products?
3. Please describe in detail any arrangements which Baron and Company or Mr. Tameron may have with the companies who purchase vectographs with respect to the subsequent use of or the avail-

ability of the vectograph in retail outlets which sell the companies' products.

4. If Baron and Company or Mr. Tameron will promote, on behalf of the companies which purchase the vectograph, the further use of the vectograph by the retailers who sell the companies' products, please describe the promotional plan in detail.

Enclosed is a copy of the Commission's Guides for Advertising Allowances and Other Merchandising Payments or Services. If you will be acting at any time as an intermediary between a manufacturer and his retailer customers, Guide 13 on page 13 of the enclosed Guides will explain your obligations under the laws which the Commission administers.

You are assured that your request will receive prompt attention when the necessary information is furnished. If I may be of further assistance, please advise.

Very truly yours,

STUART A. LEVIN,
Attorney, Office of General Counsel.

Supplemental Letter of Request

FEBRUARY 12, 1971

DEAR MR. LEVIN:

May I belatedly thank you for your letter of October 28, 1970. Our client has had some health problems, and due to these problems, we have been unable to answer your correspondence of this date.

Following are the answers to the questions as outlined in your letter of October 28:

(1) The ultimate clients who will be using the vectograph will be anyone possibly of the following:

American Tobacco Company
Phillip Morris
Liggett & Meyers
Brown & Williamson
General Motors
Coca-Cola
Budweiser Brewing Company
R. J. Reynolds
Gillette
Lever Brothers
Procter and Gamble
Warner-Lambert

(2) The vectograph will be marketed by outright sale of the patent and its manufacturing rights to any one of the aforementioned companies for their advertising use with the retailers of their products. It will be the ultimate client's decision as to the method and means of placement, whether the equipment be rented, given away or sold to the retailer.

For your convenience, I am enclosing copies of your letter of October 28 and Miles W. Kirkpatrick's letter of October 14.

We shall look forward to hearing from you at your earliest possible convenience.

Very truly yours,

(S) ROBERT R. BARON,
President.

Supplemental Letter Relative to Request

OCTOBER 28, 1970

DEAR MR. BARON:

This is in reference to your letter of October 9, 1970, requesting advice regarding the use of a proposed promotional plan to be implemented through the use of a patented electric operated apparatus for displaying Vectographic prints. This matter has been assigned to me for further consideration.

It will be helpful to the Commission's study of this matter if you will furnish the following information:

1. The name of your client who will be using the vectograph.
2. Please describe in detail how you intend to market the vectograph. For instance, the device may be sold to manufacturers for placement with their retailers, or the vectograph may be sold to retailers who will rent space to manufacturers. A third alternative might be placement and rental of the device by your client. In any event, it is essential that you furnish us with a complete description of the particular plan which your client intends to implement.

If we may be of any further assistance, please do not hesitate to contact us.

Very truly yours,

(S) STUART A. LEVIN,
Attorney, Office of General Counsel.

Letter of Request

OCTOBER 9, 1970

DEAR MR. KIRKPATRICK:

Thank you for the advice and comments you extended to me yesterday during our telephone conversation.

As discussed, our client wishes to determine FTC use and approval of a device used at the point of purchase. This device is a patented electric operated apparatus for displaying Vectographic prints. This device would be used to advertise various types of sundries—such as razors, tooth brushes, food products, cigarettes and toiletries. This device would be primarily used in areas of mass retail merchandising—such as super markets, discount stores, drug stores, etc.

I have enclosed, for your edification, some background sketches of the device taken from the patents.

A Vectograph is a sandwich of two oppositely polarized photographic views of two stages of motion. For example, if you had a photograph of your Gillette razor open view on one polarized sheet and the identical position and overlaying view showing its closed position when you twist the handle, these two stages of motion when exactly overlaid one upon the other into a bonded transparency when viewed through alternating polarized light source would have the effect upon the viewer of continuing opening and shutting action of the Gillette razor.

From the foregoing simple illustration, it will be readily understood that when any two stages of motion printed on oppositely polarized sheets, which are exactly bonded in overlaid position one upon the other, when viewed through alternating polarized material from a constant light source would sequentially appear to the viewer as a realistic opening and closing motion picture.

The foregoing brief description of this display device is the subject of a patent issued to my client bearing U.S. Patent No. 2,995,981. The enclosed patent office drawings, figures one to three inclusive, show one preferred embodiment of the display apparatus, and figure 7 shows a cross section of a constant fluorescent light source, number 29, around which revolves oppositely polarized sheets 37 (green) and 36 (red) which project alternating polarized light on a parabolic reflector, number 28 as shown in figure 5, which reflects the alternating polarized light through the Vectograph sandwich 19 and 11, figure 5, thereby in rapid succession illuminating the two stages of motion such as in the case of the opening and closing Gillette razor.

Your comments are most welcome concerning the above matter as we have followed with interest the Commission's rulings concerning tobacco advertising and methods of advertising. We would not attempt to promote a product or device that we feel would in any way run counter to the directives of the Federal Trade Commission; therefore, I shall look forward to hearing from you concerning this matter at your earliest possible convenience.

Very truly yours,

(S) ROBERT R. BARON,
President.

Proposed Advertising for a Book About Investing. (File No. 713
7012)

Opinion Letter

MAY 25, 1971

DEAR MR. AYYASH:

This is in reply to your request for an advisory opinion on your proposed advertisement of the book "Harian's Investing for a Sound 6% and More." The proposed advertisement reads:

How to get sound 6%-15%. Amazingly by profitable ways to make your money work. This new book could be your best investment. Satisfaction guaranteed. Send \$2.95; Ayyash Caravan, 3121 Princeton Ave., Phila., Pa. 19149.

According to the Commission's understanding of the proposal, the refund of the full purchase price under the guarantee will be subject to the condition that the book be returned within ten days of receipt by the purchaser.

Because the advertisement fails to state clearly and conspicuously the conditions on the guarantee, as required by the Commission's "Guides Against Deceptive Advertising of Guarantees," 16 C.F.R. §§ 239.1, 239.3 (1970), the guarantee portion of the advertisement must be considered deceptive.

The Commission has given the remainder of the advertising careful consideration and is of the view that with respect to claims made by the author which state what is in the book, proceedings by the Commission would not be warranted provided: the advertising only purports to express the opinion of the author or to quote the contents of the book; the advertising discloses the source of statements quoted or derived from the contents of the book; the advertising discloses the author to be the source of opinions expressed about the book; and, the book is not promoting another product as part of a commercial scheme.

By direction of the Commission.

Letter of Request

SEPTEMBER 1, 1970

GENTLEMEN:

I would like to promote the sale of the book "Harian's for a Sound 6% and more" by the editors of Harian Publications, Greenleaf, L.I., New York 11740.

This book is most helpful and informative to the average person who is interested in investing his money profitably without too great a risk. It offers sound investment suggestions in many cases, and, at the same time advises the reader to check-up on all suggestions before in-

vesting. Therefore, I believe this publication is honest and reliable, worthy of promoting its sale.

I propose to present its sale by advertising in a few reputable Men's Magazines as follows:

How to get sound 6%–15%. Amazingly profitable ways to make your money work. This new book could be your best investment. Satisfaction guaranteed. Send \$2.95; Ayyash Caravan, 3121 Princeton Ave., Phila., Pa. 19149.

Will you please let me have your opinion about the legitimacy of this offer and advertisement. Your prompt reply will be greatly appreciated.

Very truly yours,

(S) SUBHI M. AYYASH.

**Denial of Petition for Reconsideration of Prior Advisory Opinion*
Regarding Proportionally Equal Treatment of Retail Co-
operatives and Nonaffiliated Retailers. (File No. 703 7117)**

Opinion Letter

MAY 27, 1971

DEAR MR. LAW:

This is in response to your letter of January 15, 1971, requesting clarification or possible reconsideration of the advisory opinion issued to Frank Gomon Associates, File No. 703 7117, insofar as it relates to retailer-owned cooperatives.

The Commission's view of what the law requires with respect to promotional allowances for services provided by retailer-owned cooperatives and chain store businesses to manufacturers of products which they sell is reflected in example 2 of Guide 3 of the Commission's Guides for Advertising Allowances and Other Merchandising Payments and Services. This example states that headquarters of chains and of retailer-owned cooperatives are customers of the manufacturer, while the individual retail outlets of such chains or cooperatives are not customers of the manufacturer. A wholesaler's independent retailer customers, however, are customers of the manufacturer. Consequently, the headquarters of each chain and retailer-owned cooperative, and individual nonaffiliated retailers as customers who compete in the resale of the manufacturer's product, in accordance with Sections 2(d) and 2(e) of the Clayton Act as amended by the Robinson-Patman Act, must be treated on proportionally equal terms.

*For prior opinion letter of August 7, 1970, see 77 F.T.C. 1752.

The plan submitted to the Commission by Frank Gomon Associates provided for a method of compensation pursuant to which each retailer-customer would receive a fixed payment per advertising unit. Intermediary third party wholesalers, jobbers, and cooperatives were to receive the same amount of money per advertising unit for notifying their accounts, securing advertising orders, and distributing the advertisements. Although it was not clear whether the cooperatives mentioned by the requesting party were, in fact, retailer-owned cooperatives, the Commission was of the view that retailer-owned cooperatives should be specifically covered, and conditioned its approval of the plan accordingly.

For purposes of establishing proportionality of compensation in the particular factual situation present in *Frank Gomon Associates*, retailers who are not members of a retailer-owned cooperative must be treated on terms proportionally equal to other customers such as headquarters of the retailer-owned cooperatives. This result would seem to be impossible if the cooperative was compensated as the wholesaler, and individual retailers who own the cooperative received additional compensation. However, there is no double compensation in instances where retailer-owned grocery warehouse distributing firms which sell to retailers who have no share in the ownership or control of such firms, receive promotional assistance in connection with sales to such independent retailers, comparable to that accorded competing wholesalers, jobbers or other intermediaries.

The opinion in *Frank Gomon Associates*, therefore, appears to be consistent with the requirements of Sections 2(d) and 2(e) of the amended Clayton Act, and, as such, Commission review would not seem to be warranted. The Commission would not, however, initiate enforcement action under these sections where it appeared that the granting of "double" compensation to a retailer-owned cooperative for services actually performed under a promotional advertising program, did no more than equalize the net retailer allowance available to the retail members thereof with the retailer allowance made available to independent retailers purchasing from wholesalers.

Enclosed is a copy of the Commission's Guides for Advertising Allowances and Other Merchandising Payments and Services, and a copy of the News Release dated November 6, 1970, which sets forth the Commission's opinion in *Frank Gomon Associates*, and contains reprinted correspondence from the requesting party.

Since the above interpretation does not agree with the position taken by you in your letter of January 15, 1971, the Commission has construed your request as a petition to reconsider Advisory Opinion File No. 703 7117, in accordance with the fifth paragraph of your letter. The petition to reconsider is hereby denied.

By direction of the Commission.

Letter of Request

JANUARY 15, 1971

DEAR MR. SHEA :

We represent Cooperative Food Distributors of America, a national trade association whose members consist of retailer-owned grocery warehouse distributing firms located at various points in the United States. Said retailer-owned grocery warehouse distributing firms purchase merchandise from suppliers primarily for resale to the retail grocers which own said firms.

Accordingly, the firms which are members of Cooperative Food Distributors of America would be considered to be retailer-owned cooperatives of the type referred to in example 2 under Guide No. 3 of the Federal Trade Commission's Guides for advertising allowances and other merchandising payments and services which were promulgated subsequent to the Supreme Court's decision in the Fred Meyer, Inc. case.

Because example 2 of Guide No. 3 was relied upon by the Commission in the Advisory Opinion which it announced on November 6, 1970 pursuant to the request of Frank Gomon Associates, our client is extremely concerned as to one aspect of that Opinion insofar as it relates to retailer-owned cooperatives. The portion of the Opinion which our client is concerned with is that part which apparently denies to retailer-owned cooperatives the right to receive both the payments which the supplier proposed to make for participation in its promotional plan and the additional payments of the same amount which the supplier proposed to make as compensation for making the supplier's offer known to the customers of retailer-owned cooperatives and for other services performed in connection with the supplier's plan.

If the intent of the Opinion in this respect is that the retailer customers of ordinary wholesalers may receive payments for participating in the plan and that the wholesalers may receive additional equal payments for the services performed by them, but that retailer-owned cooperatives can only receive one payment, then, in our opinion, such a plan would be operated in a manner which would discriminate against retailer-owned cooperatives. Accordingly, it would be greatly appreciated if you would advise us if this is the intended effect of the portion of said Advisory Opinion to which we have referred.

If the foregoing is the intended effect, then we respectfully request that the Commission reconsider said portion of its Advisory Opinion and publish a revision of it which would eliminate any discriminatory effect on retailer-owned cooperatives. However, if such an effect was not intended, then we believe it would be in order for the Commission to clarify the Opinion in order to make it clear that retailer-owned cooperatives would be permitted to receive both of the payments con-

templated to be made by a supplier in connection with a plan such as that proposed by Frank Gomon Associates.

We might add that our client is not interested in this Advisory Opinion because of any specific instance which has been brought to its attention involving operation of the particular plan proposed by Frank Gomon Associates, but that our client's principal concern is that the Opinion could be construed as containing an interpretation of Section 2(d) of the Clayton Act which would discriminate against retailer-owned cooperatives and which, in our opinion, would be contrary to the proper legal application of Section 2(d) to participation by retailer-owned cooperatives in a supplier's promotional plan.

Very truly yours,

GATENBEY, SPULLER, LAW & JOHNSON,
BY FRED H. LAW, JR.

**Proposed Quality Certification Program for the Carpet Industry.
(File No. 713 7026)**

Opinion Letter

JUNE 4, 1971

DEAR MR. PAULES:

This is with further reference to your request for an advisory opinion regarding a proposed product quality certification program of The Carpet and Rug Institute.

The Commission has directed an in-depth study of the subject of industry self-regulation through standard certification. The study is referred to in the news release dated March 22, 1971, which was previously furnished to you with a letter of April 14, 1971, announcing the advisory opinion given the American National Standards Institute (ANSI). A copy of your proposal has been forwarded to the Bureau of Competition for its careful consideration in connection with its study of this subject. The Commission feels that it would be inappropriate for it to act in this area until the results of its present study are known. Accordingly, as we previously advised the American National Standards Institute, we must decline to act at this time on your request for an advisory opinion.

By direction of the Commission.

Letter of Request

APRIL 2, 1973

DEAR MR. TOBIN:

Under Paragraph 1.1 of the Procedures and Rules of Practice of the Federal Trade Commission, permission is granted for any person,

partnership, or corporation to request an advisory opinion from the Commission with respect to a course of action which the requesting party proposes to pursue. Pursuant to this provision, the Carpet and Rug Institute, a trade association for the carpet and rug industry, whose members manufacture approximately 95% of the carpets and rugs produced in the United States, hereby requests the advice of the Commission on the acceptability in whole or in part of "A Proposed Quality Certification Program for the Carpet Industry", a copy of which is enclosed herewith.

In compliance with Paragraph 1.2, we hereby affirmatively state that the proposed program (1) is tentative in form, (2) is not currently being followed, and (3) is not the subject of any pending investigation or other proceeding by the Commission. There is, however, involvement by another agency of the Government in that this proposed program has been developed at the request of and under the guidance of the Architectural and Engineering Division, Federal Housing Administration, Department of Housing and Urban Development.

At the suggestion of FHA, we have consulted with two other organizations who currently administer industry certification programs—the Architectural Aluminum Manufacturers Association and National Particleboard Association—and to the extent practicable have patterned our proposed program after theirs.

In developing this proposed program, we have been guided by various recommendations and principles published by the Commission in (1) previous advisory opinions on the subject of industry certification programs, and (2) Chairman Kirkpatrick's speech of January 28 to the New York State Bar Association. We feel that we have met the guidelines set forth in these documents.

Following is an individual discussion of each of these points and its applicability to our proposed program:

1. ". . . the actual or likely effect of a particular program will usually be determinative, and the best of intentions will not . . . legitimize a means of self regulation which has a dampening impact upon competition." (Kirkpatrick, M. W., speech to N.Y. State Bar Assn., 1/28/71)

The proposed program, embodying a classification system, whereby standards are established for five separate levels of quality, should allow ample competition within and between these classes. Furthermore, a large aspect of the competition among individual carpets and rugs is attributable to esthetic differences, which are not controlled by the certification program.

2. "Due process requirements . . . should be scrupulously observed . . ." (*ibid.*)

Paragraph 26 (a) of the proposed License Agreement outlines the procedure to be followed in instances where non-compliance with the program requires exclusion from the program or de-certification of an individual product. This procedure includes the right of appeal from the Administrator's decision to an impartial Hearing Officer selected from a panel of technically qualified persons who are not connected with the industry. It is still not clear, because of pending investigations as to availability of other sources, whether the physical policing of compliance prior to the right of appeal will be handled directly by employees of the Carpet and Rug Institute or will be handled by some independent agency which is equipped to make the inspections and to administer the policing features of the program. It is the preference of the Carpet and Rug Institute to use an outside agency, but as of this moment the availability of such agency is somewhat questionable.

3. "The program should avoid exclusionary or coercive tactics or effects . . ." (*ibid.*)

Three mechanisms are used in the proposed program for enforcement of compliance: (1) removal of product listing from Directory of Certified Products; (2) withdrawal of right to affix certification label and/or imprint; and (3) exclusion from program by termination of licensing agreement. While Chairman Kirkpatrick cautions that any enforcement mechanism could be considered "the private assumption of public power", it is also obvious that no certification could succeed without some sanctions against the transgressor, and the steps proposed in the CRI program would seem to be the absolute practical minimum.

4. "The program should be based on clearly defined standards . . ." (*ibid.*)

CRI Standard No. 1 (pp 21-33) was developed to provide a definitive statement of the quality levels necessary in carpet for consumer and commercial use.

5. "The standards should be . . . related to the legitimate purpose for which the program exists . . . sufficiently general to avoid unessential restraints on . . . imagination and freedom; but sufficiently precise to insure objectivity in their application and impartiality in their enforcement." (*ibid.*)

CRI Standard No. 1, and in fact the entire Certification program, was developed in response to suggestions from the Federal Housing Administration. The standards, therefore, reflect primarily the needs of FHA for a definition of the qualities of carpet acceptable for FHA financing, and secondarily the need of the ordinary consumer for information upon which she can make an informed choice among the varieties and qualities of carpet available to her on the market.

No attempt has been made to stifle the creativity of the carpet manufacturer in the development of esthetic properties which are such an important factor in the marketing of the industry's products.

6. "While . . . self-regulation may extend beyond a concern with deception . . . additional restraints on business activity [must not] contribute to restraints on desirable forms of competition." (*ibid.*)

While CRI feels that its proposed program meets this guideline, the Commission must make its own evaluation, based on the program as submitted.

7. ". . . compliance must be voluntary." (McLaren, R. W., Assistant Attorney General, as quoted in Final Report, National Commission on Product Safety, June 1970, and referred to in Kirkpatrick speech cited above)

While participation in the program is voluntary, compliance with prescribed standards must be enforced in order that the program itself lead to desirable results. The mechanism of enforcement, which the CRI considers to be a minimum assumption of power, is discussed in paragraph 3 above.

8. "A wide cross section of interested parties should be invited to participate in developing a standard." (*ibid.*)

Previous experience, by CRI and other standards-setting groups, has pointed up the difficulty of obtaining assistance from "consumers", or consumer representatives, in the development of standards. The function of setting standards for industrial products is highly technical, and requires the kind of expertise not generally available to consumer representative organizations. However, the apparent lack of "consumer participation" in the standards development is in fact illusory because this program was developed at the behest of and in cooperation with the Federal Housing Administration, and particularly its Architectural and Engineering Division, who in this instance is clearly in the same situation as the "consumer", particularly insofar as it concerns the protection of the public interest. It is contemplated that the FHA staff of the Architectural and Engineering Division will evaluate and approve the proposed program or revisions of it as they may require, including the specific details of the standard, before it goes into operation.

9. "Discrimination must be avoided. Testing procedures and certification should be made available on a non-discriminatory basis to all manufacturers." (*ibid.*)

The non-discriminatory basis of the program is expressed in the preamble to the License Agreement on pages 2 and 3, where it states that "Licensor is willing to license any and all manufacturers . . . of

carpet to participate in said Certification Program under the terms and conditions hereinafter set forth".

10. "Undue restrictions on freedom of design should be avoided. Performance standards are preferable to material or design specifications, and grading systems have less competitive impact than a single standard for approval." (*ibid.*)

An earnest effort has been made in the proposed program to avoid any "undue restrictions on freedom of design." Classifications for all carpet types currently manufactured have been included; and provision has been made for the addition of new fibers or construction methods developed in the future.

While performance standards have been used to the extent possible (flammability, colorfastness, delamination, etc.), there are at present no valid performance tests available for such important carpet characteristics as durability and appearance retention. These latter characteristics have therefore been dealt with by the use of material specifications—on pile weight and density.

Work is continuing—by CRI as well as by other standards-setting organizations such as ASTM—on the development of true performance standards for durability and appearance retention. As progress is made in this work, its results will be incorporated in amendments to the program.

The desirability of a "grading system" over a single standard from the standpoint of competitive impact has been recognized in the proposed program. Five classes, as defined on pages 28 and 29 of CRI Standard No. 1, have been established to represent the range of possible consumer and commercial applications. The definitions of these Classes will be available to the consumer, and will provide her with the kind of technical information she needs in order to make an informed purchase.

11. "All present or future producers are to have free, unrestricted, and non-discriminatory access to the program, whether association members or not." (FTC Advisory Opinion Digest, No. 96, October 19, 1966)

See comment No. 9 above.

12. "The association will affirmatively offer and accord to non-members an equal opportunity for certification at a cost no greater than, and on conditions no more onerous than, those imposed upon comparably situated association members for whom comparable services are rendered." (*ibid.*)

The License Agreement, set forth on pages 1-20 of the attached program, makes no distinction between members of CRI and non-members

in either the benefits accorded to licensees, or the obligations required thereof. Fees for participation in the program, which will be established by the CRI Board of Directors, will apply equitably to all licensees.

13. "A uniform certification mark will be awarded to all who qualify." (*ibid.*)

The CRI certification mark (label and/or seal) has not yet been designed; but its use and appearance will be uniform for all licensees, whether or not they are members of CRI.

14. "General supervision of the certification program will be vested in a policy board, or committee, substantially representative of all producers, such board, or committee, to have, among its other duties, the responsibility for ensuring non-discriminatory access to the program." (*ibid.*)

The proposed program assigns the responsibility for general supervision to the Board of Directors of CRI. Non-members of CRI are not, of course, represented on the Board; but the necessity for the Board to operate within the legal framework established by the License Agreement—which prescribes the non-discriminatory character of the program—will protect the interests of all participants.

On the basis of adherence to the above guidelines, we submit that the proposed CRI Certification Program should meet any possible objection the Commission may raise; however, we are receptive to suggestions if the Commission feels that a modification should be made so long as the suggestions are within the realm of feasibility and enforceability. We submit further that the advantages of such a program—to the ordinary consumer, as well as to the Federal Housing Administration at whose request it was developed—far outweigh any remote possibility of the lessening of competition.

Because of the importance of this proposed program to the overall mortgage financing program of the Federal Housing Administration, we believe the FHA would join with us in urging the Commission to grant an advisory opinion on this submission. We refer you to Mr. Porter Driscoll, Director of the Architectural and Engineering Division, FHA, for further information on their position in this matter.

The staff and members of the Carpet and Rug Institute stand ready to confer with the Commission staff, or to provide any further information desired.

Sincerely yours,

(S) GEORGE E. PAULES,
President.

Proposal To Publish and Distribute to Manufacturers of Competing Product Lines Sold in the Automotive Aftermarket a Composite Interchange Which Will Show the Interchangeability of Their Products With Parts Produced by Original Equipment Manufacturers and With Each Other. (File No. 713 7028)

Opinion Letter

JUNE 25, 1971

DEAR MR. TWEDDLE:

This is in further response to your request of March 23, 1971, for Commission advice concerning your proposal to publish and distribute to manufacturers of competing product lines sold in the automotive aftermarket a composite interchange which will show, by part number only, the interchangeability of their products with parts produced by original equipment manufacturers and with each other.

The Commission has given careful consideration to your request and has concluded that implementation of your proposal to publish and distribute a composite interchange under the circumstances described in your correspondence would not warrant a proceeding under the laws it administers, providing the following conditions are observed:

1. All manufacturers of competing product lines for resale in the automotive aftermarket will, in fact, be accorded an equal and continuing opportunity to participate in the program you have proposed.
2. The part number references contained in the proposed publication are not used in a manner as would result or be likely to result in the unlawful stabilization of existing pricing structures within the industry.

By direction of the Commission.

Letter of Request

MARCH 23, 1971

DEAR MR. TOBIN:

I am the Assistant to the President of the Tweddle Litho Company, and I am taking this opportunity to request from you an advisory opinion, in writing, on a service that we are planning to offer.

The following background information is needed to give you a full understanding of why I am requesting your opinion.

I was in Chicago on March 9, 1971, and attended a M.E.M.A. Luncheon, whose speaker, was a substitute guest speaker from the Federal Trade Commission. At the end of his speech he suggested that if anyone had anything that might give them reason to doubt the legality of certain actions to contact the Federal Trade Commission for their advice.

I have had reason to call the Federal Trade Commission in Cleveland, Ohio and talked to a Mr. Leslie Spisak your Attorney there. He said, after explaining my query, "that he did not see any illegality in it but suggested that I write to you for an advisory opinion prior to proceeding."

The service that we are planning to offer has to do with the Automotive Aftermarket. In the automobile market there are two (2) main markets. One is original equipment manufacturers, to be referred to as O.E.M. (Ford, G.M., Chrysler and AMC.) The second is the Automotive Aftermarket, which is made up of approximately 3,500 manufacturers of replacement parts all of various sizes. These companies make parts for replacement in cars, trucks, etc. For example, when a fan belt breaks in your new car you may go to a Gas Station or Jobber to buy a new one rather than to the dealer you purchased the car from. To give an approximation of size, A.S.I.A. claims its members' gross sales amount to \$26,000,000,000.00.

All manufacturers make different replacement parts, no one manufacturer makes all of them; however, there may be ten (10) manufacturers of one part. These manufacturers find the O.E.M. part and do engineering work on it and then develop their own part which is equivalent to the O.E.M. part. They then assign their own part number to this part, and from this create an O.E.M. number to their own number interchange.

Example

<i>O.E.M.</i>	<i>Manufacturer (A)</i>
1234 A	789 D
71146 B	790 D
7478 C	791 D

This gives them a cross-reference to O.E.M. part numbers when they sell their parts to Warehouse Distributors, who in turn, sell to Jobbers who then sell to retail Gas Stations and the general public. The consumer may come to a Jobber that carries Manufacturer A's product he may have a Ford part number 1234 A. The Jobber does not stock Ford parts, only A's, so he looks in the interchange and finds the appropriate part number and sells the consumer Manufacturer A's equivalent part.

The next phase of interchanging is that all manufacturers must interchange to each others part number; i.e., Manufacturers A, B, C, D, and E, must interchange to O.E.M. and to each other. This happens because a consumer may have already had the part replaced by some other manufacturer, goes to a Jobber that does not handle the manufacturer's product but his competitors. This means that there must be both competitive as well as O.E.M. interchanges.

Our company plans to offer the following computer service along with computerized typesetting and printing of and distribution of

the interchanges. We plan to use this service to open doors for the larger typesetting and printing jobs within each manufacturer.

This service consists of our offering to all manufacturers of competing product lines. Those that don't want it won't have to use it. My personal opinion is that the smaller manufacturers will and the larger ones that have O.E.M. information more readily available will not.

Each manufacturer will feed to us his O.E.M. part number interchange and feed new numbers as they appear. We will sort on the computer based upon O.E.M. number sequence and printout in the following format:

<i>OEM</i>	-----	1234 D
<i>A</i>	-----	1789
<i>B</i>	-----	348
<i>C</i>	-----	971 C
<i>D</i>	-----	8391 A
<i>E</i>	-----	7934 Z

From this we can generate more accurate O.E.M. to manufacturer interchanges, also by computer sorts competitive interchanges for each manufacturer. Our Company would then via computer typeset and print all interchanges.

We feel that this service will accomplish the following:

- A. Cut down on manufacturer's manpower.
- B. Clean up all existing interchanges.
- C. Cut down on production time.
- D. Save money to the manufacturers.
- E. Save time and trouble to the consumer.
- F. Make manufacturers more competitive and save consumer's money.
- G. Give our Company added volume.
- H. Give our Company a better chance to do more volume.

Your kind consideration of the above information will be appreciated and should your advisory opinion prove favorable it would be extremely beneficial to all parties concerned.

I am forwarding carbon copies of this letter to Senators Hart and Griffin from Michigan so that I may also have their reaction to this planned service.

Sincerely,

TWEDDLE LITHO COMPANY,
 (S) MICHAEL E. TWEDDLE,
Assistant to the President.

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