IN THE MATTER OF

ALL SEASONS AIR CONDITIONING CORP., ET AL.

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

Docket 9015. Complaint, Feb. 11, 1975—Decision, June 8, 1976

Consent order requiring two affiliated North Miami, Fla., home improvement firms, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act. Further, respondents are required to cease failing to notify consumers of their right to a three-day cooling-off period and to cease initiating work on customers' homes prior to the end of said cooling-off period.

Appearances

For the Commission: *H. Marshall Korschun, Albert Posnick,* and *Edward J. Carnot.*

For the respondents: *Taylor, Brion, Baker & Breene,* Miami, Fla.

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the regulation promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that All Seasons Air Conditioning Corp., Mastercraft Industries, Inc., corporations, and Murray Weintraub, Raymond Swier, and Saul Wolf, individually and as officers and/or managers of said corporations, hereinafter referred to as respondents, have violated the provisions of said Acts and regulation, 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. Corporate respondent All Seasons Air Conditioning Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida with its principal office and place of business located at 17140 N.W. 2nd Court, North Miami, Florida.

Corporate respondent Mastercraft Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida with its principal office and place of business located at 17162 N.W. 2nd Court, North Miami, Florida.

Respondent Murray Weintraub is the sales and advertising manager of corporate respondent All Seasons Air Conditioning Corp. and an

officer of corporate respondent Mastercraft Industries, Inc. Respondents Raymond Swier and Saul Wolf are officers of both corporate respondents. The three individual respondents formulate, direct and control the acts and practices of the corporate respondents, including those hereinafter set forth. Their address is 17140 N.W. 2nd Court, North Miami, Florida.

PAR. 2. Corporate respondent All Seasons Air Conditioning Corp. and the individual respondents are now, and for some time last past have been, engaged in the sale and offering for sale to the public, and installation of air conditioning systems at private residences.

Corporate respondent Mastercraft Industries, Inc. and the individual respondents are now, and for some time last past have been, engaged in the sale and offering for sale to the public, and installation of kitchen cabinets and equipment at private residences.

PAR. 3. In the ordinary course of their aforesaid business respondents regularly extend consumer credit and arrange for the extension of consumer credit, as "consumer credit" and "arrange for the extension of credit" are defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents, in the ordinary course and conduct of business and in connection with their credit sales, as "credit sale" is defined in the aforesaid Regulation Z, have caused and are causing customers to execute sales agreement contracts for the sale of respondents' goods and services. On these sales agreement contracts, respondents provide certain consumer credit information. Respondents do not furnish their customers prior to consummation of the transaction any separate statement containing all disclosures required in connection with a credit sale.

In most instances after the credit sale is consummated, respondents arrange for the extension of credit by local financial institutions whereby a loan, note, or other document is substituted for the sales agreement.

PAR. 5. By and through the use of the sale agreements, respondents:

1. Fail to print the term "finance charge," required by Section 226.8(c)(i) of Regulation Z and the term "annual percentage rate," required by Section 226.8(b)(2) of Regulation Z, more conspicuously than other terminology, as required by Section 226.6(a) of Regulation Z.

2. Fail to disclose the amount, or method of computing the amount of any default, delinquency, or similar charges payable in the event of late payments, required by Section 226.8(b)(4), clearly, conspicuously,

in meaningful sequence, as required by Section 226.6(a) of Regulation Z.

3. Fail to provide a description of the type of any security interest held or to be retained or acquired by the creditor in connection with the transaction, as required by Section 226.8(b)(5) of Regulation Z.

4. Fail to use the term "cash price" as defined in Section 226.2(i) to describe the purchase price as required by Section 226.8(c)(1) of Regulation Z.

5. Fail to use the term "cash downpayment" to describe the downpayment in money in connection with the credit sale, as required by Section 226.8(c)(2) of Regulation Z.

6. Fail to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as required by Section 226.8(c)(3) of Regulation Z.

7. Fail to use the term "amount financed" to describe the amount of credit extended, as required by Section 226.8(c)(7) of Regulation Z.

PAR. 6. By and through the use of respondents' sales agreements, a security interest, as "security interest" is defined in Section 226.2(z) of Regulation Z, is or will be retained or acquired in real property which is used or expected to be used as the principal residence of respondents' customers. The retention or acquisition of such security interest in said real property thereby entitles their credit customers to be given the right to rescind that transaction until midnight of the third business day following the consummation of the transaction or the date of delivery of all the disclosures required by Regulation Z, whichever is later.

Respondents have in certain instances failed to give their credit customers the right to rescind until midnight of the third business day following the consummation of the transaction or the date of delivery of all disclosures, whichever is later, and have failed to set forth the "Effect of Rescission" in the rescission notice to their customers, as required by Sections 226.9(a) and (b).

Further, respondents have made physical changes in customers' property, and performed work or services on such property before expiration of the three-day rescission period. Respondents' failure to refrain from commencing work pursuant to rescindable contracts before the rescission period has expired is in violation of Section 226.9(c) of Regulation Z.

PAR. 7. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' failures to comply with the provisions of Regulation Z as alleged in Paragraphs Five and Six herein constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having issued a complaint which charges the respondents named in the caption hereto with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission of the proposed findings of fact and conclusions of law submitted simultaneously with the agreement by the Commission's staff, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter provisionally accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(d) of its Rules, the Commission hereby makes the following findings of facts and conclusions of law, as admitted by respondents in the aforesaid consent agreement, and enters the following order:

1. Corporate respondent All Seasons Air Conditioning Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida with its principal office and place of business located at 17140 N.W. Second Court, North Miami, Florida.

2. Corporate respondent Mastercraft Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida with its principal office and place of business located at 17162 N.W. Second Court, North Miami, Florida.

3. Respondents Murray Weintraub, Raymond Swier and Saul Wolf are officers of both corporate respondents All Seasons Air Conditioning Corp. and Mastercraft Industries, Inc. The three individual respondents formulate, direct and control the acts and practices of the corporate respondents, including those hereinafter set forth. Their address is 17140 N.W. Second Court, North Miami, Florida.

4. Corporate respondent All Seasons Air Conditioning Corp. and the individual respondents are now, and for some time last past have been, engaged in the sale and offering for sale to the public, and installation of air conditioning systems at private residences.

5. Corporate respondent Mastercraft Industries, Inc. and the individual respondents are now, and for some time last past have been, engaged in the sale and offering for sale to the public, and installation of kitchen cabinets and equipment at private residences.

6. In the ordinary course of their aforesaid business respondents regularly extend and have extended consumer credit and arrange and have arranged for the extension of consumer credit, as "consumer

credit" and "arrange for the extension of credit" are defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

7. Subsequent to July 1, 1969, respondents, in the ordinary course and conduct of business and in connection with their credit sales, as "credit sale" is defined in the aforesaid Regulation Z, have caused customers to execute sales agreement contracts for the sale of respondents' goods and services. On these sales agreement contracts, respondents provided certain consumer credit information. Respondents did not furnish their customers prior to consummation of the transaction any separate statement containing all disclosures required in connection with a credit sale. In most instances after the credit sale was consummated, respondents arranged for the extension of credit by local financial institutions whereby a loan, note, or other document was substituted for the sales agreement.

8. By and through the use of the sales agreements, respondents:

a. have failed to print the term "finance charge," required by Section 226.8(c)(8)(i) of Regulation Z and the term "annual percentage rate," required by Section 226.8(b)(2) of Regulation Z, more conspicuously than other terminology, as required by Section 226.6(a) of Regulation Z;

b. have failed to disclose the amount, or method of computing the amount of any default, delinquency, or similar charges payable in the event of late payments, required by Section 226.8(b)(4), clearly, conspicuously, in meaningful sequence, as required by Section 226.6 (a) of Regulation Z;

c. have failed to provide a description of the type of any security interest held or to be retained or acquired by the creditor in connection with the transaction, as required by Section 226.8(b) (5) of Regulation Z;

d. have failed to use the term "cash price" as defined in Section 226.2(i) to describe the purchase price as required by Section 226.8(c)(1) of Regulation Z;

e. have failed to use the term "cash downpayment" to describe the downpayment in money in connection with the credit sale, as required by Section 226.8(c)(2) of Regulation Z;

f. have failed to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as required by Section 226.8(c)(3) of Regulation Z; and

g. have failed to use the term "amount financed" to describe the amount of credit extended, as required by Section 226.8(c)(7) of Regulation Z.

9. By and through the use of respondents' sales agreements, a security interest, as "security interest" is defined in Section 226.2(z) of Regulation Z, is or will be retained or acquired in real property which is used or expected to be used as the principal residence of respondents' customers. The retention or acquisition of such security interest in said real property thereby entitles their credit customers to be given the right to rescind that transaction until midnight of the third business day following the consummation of the transaction or the date of delivery of all the disclosures required by Regulation Z, whichever is later.

10. Respondents have in certain instances failed to give their credit customers the right to rescind until midnight of the third business day following the consummation of the transaction or the date of delivery of all disclosures, whichever is later, and have failed to set forth the "Effect of Rescission" in a rescission notice to their customers, as required by Sections 226.9(a) and (b).

11. Respondents have made physical changes in customers' property, and performed work or services on such property before expiration of the three-day rescission period. Respondents' failure to refrain from commencing work pursuant to rescindable contracts before the rescission period has expired is in violation of Section 226.9(c) of Regulation Z.

12. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

ORDER

It is ordered, That respondents All Seasons Air Conditioning Corp., and Mastercraft Industries, Inc., corporations, their successors and assigns and their officers, and Murray Weintraub, Raymond Swier, and Saul Wolf, individually, and as officers and/or managers of said corporations, and respondents' agents, representatives and employees directly or through any corporation, subsidiary, division or any other device, in connection with any extension of consumer credit or any advertisement to aid, promote, or assist directly or indirectly any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. § 226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. § 1601, *et seq.*), do forthwith cease and desist from:

1. Failing to print the term "finance charge," required by Section 226.8(c)(8)(i) of Regulation Z and the term "annual percentage rate," required by Section 226.8(b)(2) of Regulation Z, more conspicuously

than other terminology, as required by Section 226.6(a) of Regulation Z.

2. Failing to disclose the amount, or method of computing the amount of any default, delinquency, or similar charges payable in the event of late payments, required by Section 226.8(b)(4), clearly, conspicuously, in meaningful sequence, as required by Section 226.6(a) of Regulation Z.

3. Failing to provide a description of the type of each security interest held or to be retained or acquired by the creditor in connection with the transaction, as required by Section 226.8(b)(5) of Regulation Z, and with respect to a description of a security interest which is provided, failing to provide the description clearly and conspicuously as required by Section 226.6(a) of Regulation Z.

4. Failing to use the term "cash price" as defined in Section 226.2(i) to describe the purchase price as required by Section 226.8(c)(1) of Regulation Z.

5. Failing to use the term "cash downpayment" to describe the downpayment in money in connection with the credit sale, as required by Section 226.8(c)(2) of Regulation Z.

6. Failing to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as required by Section 226.8(c)(3) of Regulation Z.

7. Failing to use the term "amount financed" to describe the amount of credit extended, as required by Section 226.8(c)(7) of Regulation Z.

8. Failing, in any transaction in which a security interest or the future right to a security interest is retained or acquired in real property which is used or expected to be used as the principal residence of the customer, to comply with all requirements regarding the right of rescission set forth in Section 226.9 of Regulation Z.

9. Making any physical changes in a customer's property or performing any work or services on such property before expiration of the three-day rescission period provided for in Section 226.9(a) of Regulation Z, in any transaction in which a security interest or the future right to a security interest is retained or acquired in real property which is used or is expected to be used as the principal residence of the customer, as provided in Section 226.9(c) of Regulation Z.

10. Failing in any credit transaction to preserve evidence of compliance for a period of not less than two years as required by Section 226.6(i) of Regulation Z.

11. Failing, in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Sections 226.4 and

226.5 of Regulation Z, in the manner, form, and amount required by Sections 226.6, 226.7, 226.8, 226.9 and 226.10 of Regulation Z.

It is further ordered, That respondents promptly refund to any credit customer who did not receive from respondents, contemporaneously with a sales agreement for respondents' goods and services, a notice of right of rescission as required by Section 226.9 (b) of Regulation Z, any monies received from that customer, directly or indirectly, pursuant to a liquidated damages provision within respondents' sales agreements.

It is further ordered, That respondents promptly refund to any credit customer who did not receive from respondents, contemporaneously with a sales agreement for respondents' goods and services, a notice of right of rescission as required by Section 226.9(b) of Regulation Z, any monies retained as a penalty under the Florida Home Solicitation Sales Act.

It is further ordered, That respondents promptly refund to any credit customer who did not receive from respondents, contemporaneously with a sales agreement for goods and services, a notice of right of rescission as required by Section 226.9(b) of Regulation Z, and who did not have any physical changes made on his property by respondents, any monies received, directly or indirectly, from that customer.

It is further ordered, That respondents discharge any acquired lien on any real property that has arisen by operation of law in connection with any credit transaction in which any credit customer did not receive, contemporaneously with a sales agreement for respondents' goods and services, a notice of right of rescission as required by Section 226.9(b) of Regulation Z. Respondents shall by certified mail, return receipt requested, notify any credit customer who has a lien affected by this provision that (1) the lien has been discharged; (2) the customer has no further legal obligation resulting from the lien; and (3) the reason for the discharge of the lien is that respondents failed to comply with Section 226.9(b) of Regulation Z.

It is further ordered, That the respondents compile and provide to the Commission a list of the last known name, address, telephone number and date of transaction of all credit customers who have entered into a sales agreement with either of the corporate respondents since July 1, 1969.

It is further ordered, That respondents provide to the Commission a copy of any notice of right to rescission as required by Section 226.9(b) of Regulation Z, which has been provided to any credit customer by either of the corporate respondents.

It is further ordered, That respondents retain until at least one year after the initial compliance report has been filed with the Commission

all documents concerning credit transactions entered into with credit customers by either of corporate respondents since July 1, 1969.

It is further ordered, That respondents shall forthwith deliver a copy of this order to cease and desist to all present and future salesmen and/or other persons engaged in the sale of respondents' products and/or services, and to all present and future personnel of respondents engaged in the consummation or arrangement of any extension of consumer credit, and shall secure from each such salesman and/or other person a signed statement acknowledging receipt of said order.

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

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

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

HERBERT R. GIBSON, SR. T/A GIBSON PRODUCTS COMPANY, ETC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 2 OF THE CLAYTON ACT

Docket 9016. Complaint, Feb. 25, 1975—Decision, June 17, 1976

Consent order requiring Progressive Brokerage, Inc., and Barshell, Inc., two Dallas, Tex., brokerage firms and respondents in this case, among other things to cease collecting brokerage fees, commissions, or other compensations from sellers while acting for, or in behalf of, buyers.

Appearances

For the Commission: *Andrè Trawick, Jr., Paul W. Turley,* and *Richard H. Gateley.*

For the respondents: *Bardwell D. Odum, Shannon Jones, Jr., Passman, Jones, Andrews, Coplin, Holley & Co., Robert E. Rader, Jr., John M. Gillis, Gillis, Rogers & Taylor,* all of Dallas, Tex. and *Akin, Gump, Strauss, Hauer & Feld,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have violated and are now violating Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. § 45) and Section 2(c) of the Clayton Act, as amended (15 U.S.C. § 13), and believing that a proceeding by it in respect thereof is in the public interest, hereby issues this complaint, charging as follows:

I. RESPONDENTS

PARAGRAPH 1. Respondent Herbert R. Gibson, Sr., is an individual doing business under his own name and the registered trade names of Herbert R. Gibson, Sr., d/b/a Gibson Products Company, and Herbert R. Gibson, Sr., d/b/a The Gibson Trade Show, both unincorporated sole proprietorships. His principal place of business is 1228 East Ledbetter Dr., Dallas, Texas. His residence address is 1358 Bar Harbor Dr., Dallas, Texas.

PAR. 2. Respondents Herbert R. Gibson, Jr., Gerald P. Gibson, and Belva Gibson are individuals doing business under their own names or the registered trade names of Herbert R. Gibson, Sr., d/b/a Gibson Products Company and/or Herbert R. Gibson, Sr., d/b/a The Gibson

Trade Show, or employed by, representing or in some manner associated with either Herbert R. Gibson, Sr., individually or Herbert R. Gibson, Sr., d/b/a Gibson Products Company, or Herbert R. Gibson, Sr., d/b/a The Gibson Trade Show. Said respondents are now and have been participating in, or aiding and abetting in the participation of, the acts and practices hereinafter set forth. Their principal place of business is 519 Gibson St., Seagoville, Texas. Belva Gibson's residence address is 1358 Bar Harbor Dr., Dallas, Texas. Herbert R. Gibson, Jr.'s residence address is 10412 Shiloh Road, Dallas, Texas. Gerald P. Gibson's residence address is 6814 Alexander Dr., Dallas, Texas. Respondents Herbert R. Gibson, Sr., Herbert R. Gibson, Sr. d/b/a Gibson Products Company, Herbert R. Gibson, Sr. d/b/a The Gibson Trade Show, Herbert R. Gibson, Jr., Gerald Gibson, and Belva Gibson may sometimes be referred to hereinafter, collectively, as the "Gibson family respondents."

PAR. 3. (a) Respondents Gibson's, Inc., and Gibson's Discount Center, Inc., Ideal Travel Agency, Inc., and Gibson Warehouse, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of Texas, with their principal place of business located at 519 Gibson St., Seagoville, Texas.

(b) Respondent Gibson Products Co., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal place of business located at 1228 East Ledbetter Dr., Dallas, Texas. Respondents Gibson's, Inc., Gibson's Discount Centers, Inc., Ideal Travel Agency, Inc., Gibson Warehouse, Inc., Gibson Products Co., Inc., may sometimes be referred to hereinafter as the "Gibson corporate respondents."

PAR. 4. (a) Respondent Progressive Brokerage, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office located at 14802 Inwood Road, Dallas, Texas.

(b) Respondent Barshell, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office located at 14802 Inwood Road, Dallas, Texas.

(c) Respondent Al Cohen & Associates, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office located at 12514 Gulf Freeway, Houston, Texas.

II. BUSINESS

PAR. 5. Respondents Herbert R. Gibson, Sr., Herbert R. Gibson, Sr., d/b/a Gibson Products Company and respondents Herbert R. Gibson,

Jr., Gerald P. Gibson, and Belva Gibson, individually or as agents or associates of Herbert R. Gibson, Sr., are now and for many years have been engaged in the operation and control of a number of retail stores (hereinafter sometimes referred to as "Gibson family-owned stores"), reselling sundry types of products, including but not limited to soft goods, beauty aids, health supplies, automotive supplies, housewares, toys and hardware to the consuming public. Said products are purchased from a number of manufacturers, suppliers and handlers of such products.

PAR. 6. Respondent Herbert R. Gibson, Sr., Herbert R. Gibson, Sr., d/b/a Gibson Products Company and Herbert R. Gibson, Sr., d/b/a The Gibson Trade Show, together with or acting through respondent Gibson Products Co., Inc., sell or grant license or franchise agreements to retail stores which permit individuals or corporations in several States to use the trademarks, service marks and trade names of "Gibson's," "Gibson" (with design), "Gibson Products Company" and "Gibson Discount Center" (which stores may be referred to hereinafter as "Gibson franchised stores") and conduct trade shows for and/or attended by Gibson stores. There are presently in excess of 536 such retail stores in the States of Texas, Oklahoma, Kansas, Colorado and Arkansas among others. Sales of products by said retail stores, including the sales by the Gibson family-owned stores, are substantial and are believed to exceed $1,500,000,000 (One billion, five hundred million dollars) annually.

PAR. 7. (a) Respondents Gibson's, Inc. and Gibson's Discount Center, Inc., are now and for many years have been engaged in the business of controlling and operating Gibson family-owned stores, warehousing and selling to the consuming public sundry products in addition to selling or granting licenses or franchises to retail stores as described in Paragraph 6 herein. Said respondents have also served as instrumentalities for conducting other aspects of the Gibson family business including the various practices described herein.

(b) Respondent Ideal Travel Agency, Inc., is now and for many years has been engaged in the business of arranging transportation and accommodations for suppliers selling to some or all Gibson franchised stores and Gibson family-owned stores and has acted as a depository for the payments of induced promotional allowances.

(c) Respondent Gibson Warehouse, Inc. is now and for many years has been engaged in the business of receiving sundry products from some suppliers for resale and/or distribution to some or all Gibson franchised stores and Gibson family-owned stores.

(d) Respondent Gibson Products Company, Inc. is now and for many years has been engaged in the business of selling to the consuming

public sundry products and, in addition, conducting and/or serving as an instrumentality for conducting various other aspects of the Gibson family business and various practices as described herein.

PAR. 8. Respondents Progressive Brokerage, Inc., Barshell, Inc., and Al Cohen and Associates, Inc. are now and for many years have been engaged primarily in the business of affecting sales of sundry products for sellers located in various States of the United States and purchases by buyers located in the State of Texas. In such capacity, said respondents have demanded and received commission, brokerage and other compensation in connection with affecting purchases and sales of sundry products described herein.

III. COMMERCE

PAR. 9. In the course and conduct of their business, the Gibson family respondents and the Gibson corporate respondents have engaged and are now engaged in commerce or their acts and practices affect commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, in the following manner:

(a) They solicit, handle, arrange for the purchase and sale of products to retail stores from a large number of suppliers located throughout the United States and respondents cause these products when solicited, handled, arranged for or purchased by them to be transported from the place of manufacture to retail stores in several States for resale to the consuming public. There is now, and for many years has been, a constant current of trade in commerce in these products between and among various States of the United States.

(b) They have induced or induced and received payment or consideration from suppliers in various States of the United States for promotional services or facilities. There is now, and for many years has been, a constant current of trade in commerce in these promotional services or facilities between and among the various States of the United States.

(c) In the course and conduct of their business for the past several years, they have purchased, distributed and resold, and are now purchasing, distributing and reselling sundry products in commerce or affecting commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act, as amended, which they purchased from sellers located in various States of the United States other than the States in which said respondents are located. Said respondents have transported or caused such products to be transported from the sellers' places of business in various States of the United States to the buyers' places of business located in other States.

PAR. 10. Respondents Progressive Brokerage, Inc., Barshell, Inc., and

Al Cohen and Associates, Inc., in the course and conduct of their business as manufacturers representatives or brokers have been and are now affecting sales of sundry products including but not limited to soft goods, beauty aids, health supplies, automotive supplies, housewares, toys and hardware by sellers located in various States of the United States other than the State of Texas, and purchases by buyers located in the State of Texas, in or affecting commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act, as amended. Said respondents have transported or caused such products to be transported from the sellers' places of business in various States of the United States to the buyers' places of business located in other States.

IV. COMPETITION

PAR. 11. In the course and conduct of their business in or affecting commerce, except to the extent limited or restrained by the practices identified hereinafter, respondents, individually or in concert, are now and have been in competition with other corporations, persons, firms and partnerships in the soliciting, handling, arranging for or purchasing for resale or sale and distribution of sundry products including but not limited to soft goods, beauty aids, health supplies, automotive supplies, housewares, toys and hardware.

V. COUNT I — INDUCING DISCRIMINATORY ALLOWANCES

PAR. 12. The allegations of Paragraphs 1-3, 5-7, 9 and 11 are incorporated herein by reference.

PAR. 13. In the course and conduct of business in or affecting commerce, and particularly since 1959, the Gibson family respondents and the Gibson corporate respondents, acting individually or in concert, have knowingly induced and received, or received, from suppliers payment of something of value to or for said respondents' benefit as compensation or in consideration for services or facilities furnished by or through said respondents in connection with said respondents offering for sale, selling, soliciting, handling or arranging for sale of products to Gibson family-owned stores and to Gibson franchised stores or resale thereof.

PAR. 14. (a) For example, during February, May, August and November of each year, said respondents conduct, hold or direct or assist in conducting, holding or directing a trade show (hereinafter sometimes called the "Gibson Trade Show") at which products of suppliers are displayed. The Gibson Trade Shows are attended by employees, agents and associates of said respondents; franchisees and

licensees of respondents Herbert R. Gibson, Sr., and Herbert R. Gibson, Sr., d/b/a Gibson Products Company and their employees, agents and associates.

(b) In the course of the Gibson Trade Shows held during February, May, August and November of each year for 1969, 1970, 1971 and 1972, said respondents solicited and induced from most, if not all, suppliers one or more of the following payments or considerations:

(1) Payment for booth rental.

(2) Payment for services in connection with booth rental including but not limited to electrical contractor services and furnishings.

(3) Payment for advertising in a booklet or tabloid which was circulated among persons attending the Gibson Trade Show.

(4) Special trade show prices on one or more of the suppliers' products offered for sale at the Gibson Trade Show.

(5) Provision of personnel to prepare and attend the booth throughout the time the Gibson Trade Show was open.

(6) Special billing terms on all sales made at the Gibson Trade Show.

(7) Special allowances on all sales made at the Gibson Trade Show, calculated from a predetermined percentage of all such sales.

(c) Said respondents received from participating suppliers substantial sums each year for the 1969, 1970, 1971 and 1972 Gibson Trade Shows.

PAR. 15. In the course and conduct of business in or affecting commerce, and particularly since 1959, the Gibson family respondents and the Gibson corporate respondents, acting individually or in concert, have knowingly induced and received, or received, from suppliers the furnishing of services or facilities in connection with the selling, offering for sale, soliciting, handling or arranging for the sale of products sold to Gibson family-owned stores and Gibson franchised stores or resale thereof.

PAR. 16. For example, during the Gibson Trade Shows, agents, employees or representatives of suppliers performed valuable services such as staffing the booths rented by suppliers from respondents and demonstrating the suppliers' products therein. In addition to the furnishing of such services, other services were performed by suppliers which aided said respondents in the resale of suppliers' products.

PAR. 17. Typical of the suppliers who participated in the Gibson Trade Show at least once during the years of 1969, 1970, 1971 or 1972, and granted one or more of the special payments or considerations described above are:

Doranne of California, Inc. Los Angeles, California	Ceramic Wares

Armstrong Environmental Industries Los Angeles, California	Water Sprinklers
Revel, Inc. Venice, California	Toys (model kits)
L. M. Becker & Company Appleton, Wisconsin	Housewares
Beagle Manufacturing Company El Monte, California	Housewares
Bomar Manufacturing Co., Inc. Dallas, Texas	Jewelry
Ben–Mont Corporation Bennington, Vermont	Gift Wrapping Paper

PAR. 18. Many suppliers participating in the Gibson Trade Show for the years 1969, 1970, 1971 or 1972 did not offer or otherwise make available to all their customers competing with respondents in the sale and distribution of their respective products payments, allowances, services, facilities or other things of value on terms proportionally equal to those granted respondents.

PAR. 19. When the Gibson family respondents and the Gibson corporate respondents induced and received or received, payments, allowances, services, facilities or other things of value from suppliers, said respondents knew or should have known that they were inducing and receiving, or receiving, payments, allowances, services, facilities or other things of value from suppliers which said suppliers were not offering or otherwise making available on proportionally equal terms to all other customers of such suppliers who were competing with respondents.

PAR. 20. The acts and practices of respondents, as herein alleged, are all to the prejudice of the public and constitute unfair methods of competition in or affecting commerce and unfair acts and practices in or affecting commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. § 45).

VI. COUNT II — BOYCOTTING

PAR. 21. The allegations of Paragraphs 1-3, 5-7, 9 and 11 are incorporated herein by reference.

PAR. 22. The Gibson family respondents and the Gibson corporate respondents, in combination, agreement, understanding and conspiracy with all or some of the Gibson family-owned stores and Gibson franchised stores, have established, maintained and pursued a course of conduct eliminating or boycotting suppliers which did not grant all or some of the special allowances on sales during or incident to the Gibson Trade Show as described in Count I herein.

PAR. 23. Said respondents are now engaged and for many years have been engaged in the following unfair acts and practices, among others, in furtherance of the boycott:

(a) Dissemination of bulletins advising the Gibson family-owned stores and Gibson franchised stores not to purchase from designated suppliers.

(b) Communicating, directly or indirectly, to the Gibson family-owned stores and Gibson franchised stores not to purchase from designated suppliers.

PAR. 24. Such acts and practices, as herein alleged, of said respondents are all to the prejudice of the public and constitute unfair methods of competition and unfair acts and practices in or affecting commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. § 45).

VII. COUNT III — ILLEGAL BROKERAGE

PAR. 25. The allegations of Paragraphs 1-11 are incorporated herein by reference.

PAR. 26. (a) In the course and conduct of their business, the Gibson family respondents and the Gibson corporate respondents have been or are now utilizing the services of various manufacturers representatives and brokers such as respondents Progressive Brokerage, Inc., Barshell, Inc., and Al Cohen and Associates, Inc., to perform services for the Gibson family respondents and the Gibson corporate respondents by:

(1) Furnishing information concerning market conditions;

(2) Maintaining contact with various sellers;

(3) Inspecting and selecting specified qualities and quantities of sundry products; and

(4) Negotiating purchases of said products.

(b) Such manufacturers representatives and brokers, in performing the services enumerated above, have been or are now acting as agents or representatives of the Gibson family respondents and the Gibson corporate respondents. In such capacity, said manufacturers representatives and brokers, were or are subject to and under the direct or indirect control of the Gibson family respondents and the Gibson corporate respondents.

(c) In connection with such transactions, such manufacturers representatives and brokers, including respondents Progressive Brokerage, Inc., Barshell, Inc., and Al Cohen and Associates, Inc., are now or have been collecting and receiving brokerage, commissions, or other compensations from sellers of sundry products, when in fact they have been or are now acting for or in behalf of the Gibson family respondents or Gibson corporate respondents or are subject to the direct or indirect control of said respondents.

PAR. 27. The aforesaid acts and practices of said respondents, individually or in conjunction with each other, in receiving or accepting, or paying and granting, directly or indirectly, anything of value as commission, brokerage or other compensation, or any allowance or discount in lieu thereof from sellers, are in violation of subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. § 13) and are all to the prejudice of the public and constitute unfair methods of competition in commerce and unfair acts and practices in or affecting commerce within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. § 45).

DECISION AND ORDER AS TO RESPONDENTS PROGRESSIVE BROKERAGE, INC. AND BARSHELL, INC.

The Commission having issued its complaint on February 25, 1975, charging the respondents named in the caption hereof with violations of the Federal Trade Commission Act and the Clayton Act, and the respondents having been served with a copy of that complaint; and

The Commission having duly determined upon motion certified to the Commission under Section 3.25 of the Commission's Rules of Practice that, in the circumstances presented, there was a likelihood of settlement and that the public interest would be served by withdrawing the matter as to respondents Progressive Brokerage, Inc. and Barshell, Inc., from adjudication; and

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

The Commission having thereafter considered the aforesaid agreement and having determined that it provides an adequate basis for

appropriate disposition in part of this proceeding, and having accepted said agreement, and the agreement containing consent order having been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(d) of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following order in disposition of the proceeding as to respondents Progressive Brokerage, Inc. and Barshell, Inc.:

1. Respondent Progressive Brokerage, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office located at 14802 Inwood Road, Dallas, Texas.

Respondent Barshell, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office located at 14802 Inwood Road, Dallas, Texas.

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

ORDER

It is ordered, That respondents Progressive Brokerage, Inc., and Barshell, Inc., corporations (hereinafter referred to as respondents), their representatives, agents or employees, directly or through any corporate or other device, in connection with the sale of goods, wares or merchandise for any seller principal, in commerce, as "commerce" is defined in the Clayton Act, as amended, and in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist, except as otherwise permitted by law, from:

1. Paying, granting or allowing, directly or indirectly, to any buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, any allowance or discount in lieu of brokerage, or any part or percentage thereof, by selling any goods, wares or merchandise to such buyer at prices reflecting a reduction from the prices at which sales of such products are currently being effected by respondents for any seller principal where such reduction in price is accompanied by a reduction in the regular rate of commission, brokerage or other compensation currently being paid to respondents by such seller principal for brokerage services; or

2. In any other manner, paying, granting or allowing, directly or indirectly, to any buyer, or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage or other compensation or any

allowance or discount in lieu thereof upon, or in connection with, any sale of goods, wares or merchandise to such buyer for its own account.

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

It is further ordered, That respondents Progressive Brokerage, Inc. and Barshell, Inc., 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

RSR CORPORATION

Docket 8959. Order, June 22, 1976

Denial of complaint counsel's motion to deem respondent's failure to file timely notice of intention to appeal as waiver of its right to appeal.

Appearances

For the Commission: *K. Keith Thurman, James C. Egan, Jr.* and *Annthalia Lingos.*

For the respondent: *Wald, Harkrader & Ross,* Washington, D.C.

ORDER DENYING COMPLAINT COUNSEL'S MOTION TO DEEM RESPONDENT'S FAILURE TO FILE A TIMELY NOTICE OF INTENTION TO APPEAL AS A WAIVER OF ITS RIGHT TO APPEAL

Complaint counsel have moved for a determination by the Commission that respondent's failure to file a timely notice of intention to appeal from the initial decision, pursuant to Rule 3.52(a), or for an extension of time in which to file a notice, constitutes a waiver of its right to appeal. Respondent asserts that it decided not to appeal from the administrative law judge's determination of liability based on its belief that complaint counsel did not intend to appeal from the law judge's partial divestiture order. Once respondent was served with complaint counsel's notice, and after the filing deadline had passed, it filed its notice of intention to appeal.

Whether or not an adversary intends to challenge an order may well be relevant to a party's decision whether to appeal.* In the present case, respondent should have either filed a "protective" notice or attempted to determine from complaint counsel personally whether they intended to appeal. However, in view of respondent's apparent good faith belief that complaint counsel would not appeal and the fact that the untimeliness of respondent's filing has not delayed the briefing or the argument of the instant appeals, the Commission has determined to deny complaint counsel's motion.

It is so ordered.

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* *See* 9 J. Moore, *Federal Practice,* ¶204.11[1] at 927-28 (2d ed. 1975).

IN THE MATTER OF

WALTER KIDDE & COMPANY, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket 8957. Complaint, Mar. 20, 1974—Decision, June 29, 1976

Consent order requiring a Clifton, N.J., multimarket manufacturer, among other things to divest itself, within two years, of two of its door lockset product lines obtained through the acquisition of Arrow Lock Corporation. Further, the order requires respondent to license two other product lines and imposes a ten-year ban on acquisitions by respondent in the lockset manufacturing industry without prior F.T.C. approval.

Appearances

For the Commission: *Alfred J. Ferrogari, Harold Brandt,* and *Sandra Grayson.*

For the respondent: *S. Litvack* and *K. Newman, Donovan, Leisure, Newton & Irvine,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent Walter Kidde & Company, Inc., a corporation, has violated Section 7 of the Clayton Act, as amended (15 U.S.C. § 18) and that a proceeding in respect thereof would be in the public interest issues its complaint pursuant to Section 11 of the Clayton Act (15 U.S.C. § 22) stating its charges as follows:

I. DEFINITIONS

PARAGRAPH 1. For the purpose of this complaint, the following definitions shall apply:

a. Door locksets are:

(1) mortise locks and latches (A.N.S.I. series 1000)

(2) preassembled type locks and latches (A.N.S.I. series 2000)

(3) integral locks and latches (A.N.S.I. series 3000)

(4) bored locks and latches (A.N.S.I. series 4000)

(5) all other mortise, preassembled, integral and bored door locks and latches with functions not included in A.N.S.I. series 1000, 2000, 3000 or 4000 including any such proprietary door locks and latches

(6) all entrance handle locks with thumb piece with bored type lock mechanism

(7) series 3 — mortise locks and latch sets; series 8 — cylinder French door locks and locksets; series 121 — cylinder entrance door locks and

locksets; and series 123 — cylinder entrance door locks and locksets all of which are set forth in Federal Specification FF-H-OO-106(b)

(8) bored and mortise dead locks and latches.

b. A.N.S.I. Standard A 156.2 - 1972 refers to American National Standards Institute standard for locks and lock trim; B.H.M.A. Standard 601 refers to Builders Hardware Manufacturers Association standard for locks and lock trim and Federal Specification FF-H-OO-106(b) refers to specifications for builders hardware; locks and door trim promulgated for Federal government uses.

II. RESPONDENT

PAR. 2. Walter Kidde & Company, Inc. (hereinafter Kidde) is a Delaware corporation with its principal office and place of business located at 9 Brighton Road, Clifton, New Jersey.

PAR. 3. Kidde is a multimarket manufacturing and service corporation manufacturing and selling such products as safety, security and protection equipment and devices and a wide variety of consumer, commercial and industrial products. For the year ending 1972, it had sales of $832.4 million, net profit of $32.4 million and total assets of $661.8 million. On the basis of Kidde's 1972 financial statements, the May 15, 1973 *Fortune Directory* listed Kidde as the 169th largest industrial corporation in the United States based on total sales.

PAR. 4. At all times relevant herein, Kidde sold and shipped, and is now selling and shipping, products in interstate commerce throughout the United States. Hence Kidde was at the time of the acquisition challenged herein, and is now, engaged in commerce as "commerce" is defined in the Clayton Act.

III. ARROW LOCK CORPORATION

PAR. 5. Prior to October 4, 1971 Arrow Lock Corporation (hereinafter Arrow) was a corporation organized and existing under the laws of the State of New York with its principal office and place of business located at 4900 Glenwood Ave., Brooklyn, New York.

PAR. 6. At the time of its acquisition, Arrow was an important manufacturer and seller of door locksets, as defined herein, door lock assemblies and other hardware.

PAR. 7. For the calendar year ending 1970, Arrow had total sales of $4,750,000 and total assets of more than $2 million.

PAR. 8. At all times relevant herein Arrow sold and shipped products in interstate commerce and was engaged in "commerce" within the meaning of the Clayton Act.

IV. ACQUISITION

PAR. 9. Pursuant to an agreement of merger and plan of reorganization dated August 2, 1971, Kidde on October 4, 1971 acquired substantially all of the property, assets and business of Arrow in exchange for 122,928 shares of the company's common stock.

V. TRADE AND COMMERCE

PAR. 10. Builders hardware represents a portion of all building construction costs with door locksets, as defined herein, a major item of builders hardware.

PAR. 11. In 1970, the four largest manufacturers of door locksets, as defined herein, accounted for 72 percent of the industry's total sales.

PAR. 12. In 1970, Kidde accounted for 6.3 percent of the domestic sales of door locksets while Arrow accounted for 2.9 percent. In that year, of the approximately 19 door lockset manufacturers in the United States, Kidde ranked 5th and Arrow ranked 8th. In 1972, Kidde was the 4th largest door lockset manufacturer in the United States.

PAR. 13. The door lockset market has become increasingly concentrated. In 1969, the top four firms accounted for 72 percent of the market and by 1972, their share had increased to 75 percent.

VI. THE EFFECTS OF THE ACQUISITION

PAR. 14. The effect of the acquisition by Kidde of Arrow may be substantially to lessen competition, or to tend to create a monopoly throughout the United States by eliminating actual competition between Kidde and Arrow in the manufacture and sale of door locksets as defined herein.

VII. VIOLATION CHARGED

PAR. 15. The acquisition of Arrow by Kidde on October 4, 1971 constitutes a violation of Section 7 of the Clayton Act as amended (15 U.S.C. § 18).

DECISION AND ORDER

The Federal Trade Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and the respondent having been served with a copy of the complaint; and

The Commission having withdrawn the matter from adjudication for

the purpose of considering settlement by the entry of a consent order; and

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

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent Walter Kidde and Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 9 Brighton Road, Clifton, New Jersey.

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

ORDER

I

It is ordered, That as used herein:

A. The term "Kidde" means respondent Walter Kidde & Co., Inc., a corporation organized and existing under the laws of the State of Delaware with principal offices at 9 Brighton Road, Clifton, New Jersey, all predecessors thereof and successors thereto.

B. The term "Arrow" means the Arrow Lock Corporation, a wholly-owned subsidiary of Kidde, with offices at 4900 Glenwood Ave., Brooklyn, New York.

C. The term "Sargent" means Sargent & Company, a division of Kidde, with offices at 100 Sargent Dr., New Haven, Connecticut.

D. The term "door locksets" means those products described in Paragraph 1a(1) through (8) of the complaint herein.

E. (1) "5 Line" means the door lockset product line heretofore sold by Sargent under the trade name "5 Line."

(2) "Arrow mortise lockset" means the mortise door lockset product line heretofore sold by Arrow.

(3) "Integralock" means the door lockset product line sold by Sargent under the registered trademark "Integralock."

(4) "Keso product line" means the security cylinders and keys sold by Sargent under the registered trademark "Keso."

II

It is ordered, That, subject to the prior approval of the Federal Trade Commission, respondent Kidde, a corporation, through its officers, directors, agents, representatives, employees, successors and assigns, shall as soon as possible and in any event no later than two (2) years from the date this order becomes final, divest itself of the 5-Line and the Arrow mortise lockset by divesting absolutely and in good faith all right, title and interest to and in all equipment, tools, parts, tooling, blueprints, drawings, assembly plans and instructions which are itemized or described in Schedule "A"* hereto and are referred to hereinafter as "the divested property." Said divestiture shall be made to an acquirer able to use the divested property in the manufacture and sale of door locksets in the United States. In addition, Kidde, shall offer for sale to any such acquirer of the divested property such inventories of the 5-Line and the Arrow mortise lockset as may be negotiated by and between the parties to any transaction entered into pursuant hereto. *Provided, however,* that nothing contained herein shall be deemed or construed to limit in any way the right of Kidde, Sargent or Arrow to engage in the manufacture, assembly, distribution and/or sale of any product, subject only to the provisions of Section V hereof regarding prohibitions on future acquisitions.

III

It is further ordered, That, upon the written request of the acquirer of the divested property, Kidde shall furnish such technological information and make available for a reasonable period of time such personnel and technical assistance as may be reasonably necessary to enable such acquirer to relocate and use the divested property in the production of door locksets. For each such person furnished Kidde may charge an amount not to exceed the reasonable traveling and living expenses and the actual cost to Kidde for the time involved.

IV

It is further ordered, That, pending divestiture, Kidde shall not, except in the ordinary course of business, make any changes, or permit

* Because of the substantial cost of printing Schedule "A" of the order, only two copies were made and are available for review at the Office of the Secretary if necessary.

any deterioration in the divested property so as to frustrate or impair the requirements of this order.

V

It is further ordered, That Kidde shall cease and desist for a period of ten (10) years beginning on the date this order becomes final from acquiring, or acquiring and holding, directly or indirectly, without prior approval of the Federal Trade Commission, any part of the assets, stock, share capital, or other actual or potential equity or right of participation in the earnings of any concern, corporate or noncorporate, which is engaged in the manufacture and sale of door locksets in the United States, or from entering into any agreement or understanding with such a concern whereby Kidde acquires control over the business activities thereof; *provided, however,* That the provisions of this Section V shall not apply to any acquisition or holding of, or other transaction whereby Kidde acquires or holds control over, a concern (or part thereof) which is not engaged in the manufacture and sale of door locksets in the United States.

VI

It is further ordered, that:

A. For a period of five (5) years following the effective date of this order, insofar as it now has or may acquire the power to do so, Kidde shall grant, on a reasonable royalty basis, to any person making written request therefor: (a) a nonexclusive right to use such know-how, trademarks, goodwill and other rights as Kidde may have in connection with the manufacture and sale within the United States of the Integralock; and/or (b) a nonexclusive sublicense to manufacture, have manufactured, use and sell in the United States, the Keso product line, as well as any other of Kidde's rights in and to the Keso product line which it now has or may acquire and which it may legally be entitled to license or sublicense.

B. For purposes of this Section VI, a reasonable royalty is defined as a rate (a) in the case of the Integralock, not to exceed two percent (2%) of sales; and (b) in the case of the Keso product line, not to exceed the greater of: (i) five percent (5%) of sales; or (ii) a per unit rate of fifty cents ($.50) plus the equivalent in United States currency of .75 Swiss franc.

C. Each license or sublicense granted pursuant to this paragraph shall include, if desired by the licensee or sublicensee, all of Kidde's rights in and to the registered trademarks "Integralock" (T.M. Reg. No. 861,953) and "Keso" (T.M. Reg. No. 784,400) and U.S. Patents Nos.

3,303,677 and DES 206,397 as well as any and all future patents, patent applications and know-how issued, filed or acquired by Kidde which relate to the Keso product line or the Integralock.

D. Nothing contained herein shall be deemed to prevent Kidde from refusing to grant a license or sublicense to any person for *bona fide* business reasons indicating that such person cannot or will not fulfill the duties, obligations and responsibilities of a licensee or sublicensee, including but not limited to the following reasons: (a) lack of financial responsibility or credit worthiness; (b) inability to agree upon reasonable terms and conditions of a license or sublicense agreement; (c) failure to meet any qualification imposed by law or governmental regulation or specification; or (d) information indicating that the grant of a license or sublicense to such person would impair Kidde's goodwill or the confidentiality of its business secrets. *Provided, however*, that any such refusal shall be made in writing, stating the reasons therefor *and provided further* Kidde shall notify the Federal Trade Commission in writing within ten (10) days of any such refusal stating the reasons therefor.

E. Upon the request of any licensee or sublicensee, Kidde shall furnish to said licensee or sublicensee necessary technical information and know-how and make available such supervisory personnel and technical assistance as may reasonably be necessary to establish production of the Integralock and/or the Keso product line on a going basis. For a period of two (2) years following the date of each license or sublicense agreement, upon the request of each licensee or sublicensee, Kidde shall make available at a place designated by the licensee or sublicensee, a person or persons technically qualified in the manufacture of the Integralock and/or the Keso product line for the purpose of furnishing to the licensee or sublicensee such manufacturing, engineering and technical assistance and know-how as may reasonably be required for the manufacture of the Integralock and/or Keso product line which Kidde has and/or may acquire and which it may at that time lawfully disclose. For each such person or persons furnished Kidde may charge an amount not to exceed his reasonable travel and living expenses and the actual cost to Kidde for the time involved.

F. If, during the term of the license or sublicense agreement, Kidde develops or receives any new technical information pertaining to the manufacture of the Keso product line and/or the Integralock, Kidde shall promptly and fully make available to each licensee or sublicensee such technical information.

G. The duration of any license or sublicense granted pursuant to the terms of this order, shall, at the option of the licensee or sublicensee, be for a duration of not less than fifteen (15) years,

provided, however, that provision may be made for the termination of said license or sublicense agreements by either party on 90 days notice to the other if the other party shall be in default or breach of any material provision of said license or sublicense agreement and such default or breach shall not have been cured within such 90 day period. Except as provided herein the rights granted to any licensee or sublicensee shall not be terminated or abated.

VII

It is further ordered, That nothing in this order shall be deemed to prevent any licensee or sublicensee or applicant for a license or sublicense, from attacking in any proceeding or controversy, the validity, scope, or enforceability of any patent nor shall this order be construed as imputing any validity, enforceability or value to any such patent.

VIII

It is further ordered, That Kidde shall not voluntarily dispose or permit the disposition of any patents, trademarks or rights thereunder or voluntarily perform or fail to perform any act so as to deprive it of the power to grant or cause to be granted the licenses or sublicenses required by this order. However, the obligations set forth in this order with respect to the granting of licenses or sublicenses shall be subject to Kidde's continued right to license or sublicense said products and said obligations shall automatically abate if, and to the same extent that Kidde's right to license or sublicense should be terminated or become impaired during the period hereof; *provided, however,* that Kidde shall notify the Federal Trade Commission in writing immediately upon knowledge that any such termination or impairment will occur or has occurred setting forth the circumstances and reasons therefor.

IX

It is further ordered, That Kidde shall, within six (6) months after the effective date of this order, and every six (6) months thereafter, until Kidde has fully complied with the provisions of this order, submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which Kidde is endeavoring to comply or has complied with this order. All compliance reports shall include among other things that may from time to time be required, a summary of contacts, offers, contracts or negotiations with anyone for

the divested property, and the identity of all such persons and copies of all written communications to and from such persons.

X

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

ADVISORY OPINIONS

Tripartite Promotional Plan (See Digest No. 103, 70 F.T.C. 1886; revoked Sept. 11, 1973, 83 F.T.C. 1839. File No. 673 7012, released February 6, 1976.)

Opinion Letter

January 29, 1976

Dear Mr. Bellan:

This is in response to your request for a new advisory opinion. By notice dated October 5, 1973 the Commission revoked the October 27, 1966 advisory opinion, captioned above, to Merchants Broadcasting Systems, Inc. The firm, as you have advised, is now known as Super-Marketing Services.

The Commission, in its notice of revocation, advised that if you wished to modify the method of operation outlined in your previous request to be in compliance with the Commission's Guides (a copy of which was enclosed with the notice), it would consider issuance of a new advisory opinion.

Your original request for advice from the Commission dates from a period before the Supreme Court's decision in the matter of *Federal Trade Commission* v. *Fred Meyer, Inc., et al.*, 390 U.S. 341 (1968), and before promulgation by the Commission in 1969 of Guides responsive to the Court's opinion and decision in that case. The Guides, accordingly, deal with some additionally defined aspects of the law of subsections (d) and (e) of Section 2 of the Clayton Act, as amended, including third-party performance of seller's obligations, viz., performance of such obligations by promoters of tripartite promotional assistance plans. You have informed the Commission that your tripartite promotional plan has been modified to eliminate the earlier requirement that the retail seller of any products promoted under the program must "* * * provid[e] shelf space at least equal to that given competing products selling in the same volume."

Withdrawal of this requirement could operate to resolve the problem of possible primary line competitive foreclosure inherent in the lease or purchase of retailers' shelf space, either directly or by means of so-called promotional allowances. On the basis of this factor alone, however, the Commission is unable to determine whether your plan complies with the Commission's Guides, as amended August 4, 1972.

Among the several open issues presented are (1) whether, in conjunction with Guide 13 (third party performance of seller's obligations), the plan satisfies Guide 8, dealing with means of

notification and, in particular, notification to indirectly supplied retail customers; (2) whether the program satisfies Guide 9 relative to its availability to and useability, in a practical business sense, by all competing customers on proportionally equal terms; and (3) whether the plan satisfies Guide 11, concerning customer performance and overpayments. The Commission notes that payments under the subject program apparently are in consideration, in substantial part, for services of a non-merchandising or non-promotional character. Moreover, the extent and nature of any required performance of specific advertising or merchandising services by competing retail customers are not spelled out. In these circumstances the Commission cannot determine whether payments and services under the program are or are not available to and accorded all competing customers on proportionally equal terms. Accordingly, your request for a new opinion is denied.

By direction of the Commission.

Letter of Request

October 16, 1973

Dear Mr. Tobin:

It has come to my attention that a portion of the advice given in this matter is not in accord with the Commissions view of the law as expressed in the "GUIDES FOR ADVERTISING ALLOWANCES AND OTHER MERCHANDISING PAYMENTS AND SERVICES," as amended, specifically, item (1) providing shelf space at least equal to that given competing products selling in the same volume.

I warrant that this portion of "The Plan" is not and has not been implemented as long ago as August of 1969 as evidenced by its absence in our "letter of offering" enclosed.

Based on this modification of "the Plan," I respectfully request the issuance of a new advisory opinion.

Should a new advisory opinion be forthcoming, I would appreciate it being made out to our new corporate name, Super-Marketing Services.

Respectfully,
/s/ Rudy Bellan
President

Enclosure to Letter of Request

Gentlemen:

SUPER-MARKETING SERVICES is offering a program to all retail grocery

and drug stores in this area whereby cash payments and/or background music can be earned in consideration for promotional services rendered to suppliers.

SMS as the promoter of its promotional assistance plan would like each supplier and each retailer to understand that even though SMS is employed as an intermediary, the supplier should still recognize his responsibility to take reasonable steps to see that each of the supplier's customers who compete with one another in reselling his products is offered the opportunity to participate in the SMS promotional assistance plan on proportionally equal terms.

Retail stores wishing to participate may elect to do so under either Plan "A" or Plan "B". Plan "A" and its alternative, Plan "B" are briefly described below:

PLAN "A"-

1. SMS is making available a promotion and merchandising service to be sold to suppliers whose products are normally handled by retail grocery and drug stores. In order that the merchandising service be both valuable and salable to suppliers, each participating retail store MUST agree to perform the following promotional services for SMS-promoted products:

a] Stock SMS-promoted products in adequate quantities on shelf and in the warehouse;
b] Regularly provide periodic "off-shelf" displays for each SMS-promoted supplier;
c] Allow SMS representatives to place mutually agreed upon "point-of-sale" material;
d] Allow SMS representatives to enter stores at regular intervals for the purpose of rendering store-level reports to the suppliers.

2. SMS will provide a background music suitable for the store's sales area. If no loud speaker system exists, SMS will provide the speakers, amplifier and microphone necessary to broadcast the SMS background music. The sound system may also be used for paging purposes. Stores will be charged a one-time installation charge for installing the sound equipment and a monthly charge for the background music service.

3. In exchange for the promotional services performed by the store for participating suppliers, SMS will compensate the store in an amount equal to 2% of the store's net purchases of SMS-promoted products. The store will be credited the 2% payment whether the store

purchases the SMS-promoted products directly from the supplier or through a wholesaler. Payments earned will be subject to a maximum per store per supplier.

PLAN "B"-

1. SMS is making available a promotion and merchandising service to be sold to suppliers whose products are normally handled by retail grocery and drug stores. In order that the merchandising service be both valuable and salable to suppliers, each participating retail store MUST agree to perform the following promotional services for SMS-promoted products:

A) Stock SMS-promoted products in adequate quantities on the shelf and in the warehouse;

b) Regularly provide periodic "off-shelf" displays for each SMS promoted supplier;

c) Allow SMS representatives to place mutually agreed upon "point-of-sale material;

d) Allow SMS representatives to enter stores at regular intervals for the purpose of rendering store-level reports to the suppliers.

2. In exchange for the promotional services performed by the store for participating suppliers, SMS will compensate the store in an amount equal to 2% of the store's net purchases of SMS-promoted products. The store will be credited the 2% payment whether the store purchases the SMS-promoted products directly from the supplier or through a wholesaler. Payment earned will be subject to a maximum per store per supplier.

We have listed on the reverse side a list of manufacturers and promoted products currently under contract and participating in the SMS service in your area. It should be recognized that the list of participating suppliers is subject to change due to cancellations and SMS would like to point out that the above methods are used and suggested for use to comply with Section 2(d) or (e) of the Clayton Act and/or Section 5 of the Federal Trade Commission Act.

The above description of the SMS Program, and its alternative, briefly outlines its purpose and function. SMS invites your participation. If you are interested in either Plan "A" or Plan "B", please write or call for full details.

Very truly yours,
SUPER-MARKETING SERVICES
Norman L. Wanetick

S.M.S.
SUPER-MARKETING SERVICES
SPONSORS

PRODUCT	SPONSOR
AMSCO SPONGES	AMERICAN SPONGE & CHAMOIS CO.
AUNT JANE'S PICKLES	AUNT JANE DIV. BORDEN CO.
AUSTIN PRODUCTS	JAMES AUSTIN CO.
BANQUET FROZEN FOODS	BANQUET CANNING CO.
BEECH NUT BABY FOODS	BEECH NUT LIFESAVERS, INC.
BERIO OLIVE OIL	FILLIPO BERIO OLIVE OIL CO.
BERTOLLI OLIVE OIL	BERTOLLI TRADING CORP.
BREAST-O-CHICKEN TUNA	WESTGATE CALIFORNIA PRODUCTS CO.
BRYLCREAM	BEECHAM PRODUCTS CO.
CATS PRIDE CAT LITTER	BANQUET CANNING CO.
COCA COLA	COCA COLA COMPANY
COMSTOCK PIE FILLINGS	COMSTOCK DIV. BORDEN CO.
CONTINENTAL BAKING CO.	BRAUN BAKERY DIV.
DAD'S DOG FOOD	DAD'S PRODUCTS CO.
DAILY REFRIGERATED JUICES	DAILY JUICE CO.
DIAMOND CRYSTAL SALT	DIAMOND CRYSTAL SALT CO.
EASY MONDAY CLEANING PRODUCTS	BLUE MAGIC CO.
FIRCH BAKING CO.	PRIVATE LABEL BAKERY PRODUCTS
FISHER & CHEFS DELIGHT	FISHER CHEESE CO.
FLAVOR HOUSE NUTS	FLAVOR HOUSE NUT CO.
FRESHLIKE VEGETABLES	LARSEN & CO.
GEORGIA PACIFIC PAPER PRODUCTS	GEORGIA PACIFIC CO.
GRASS (MRS.) SOUPS	I.J.GRASS NOODLE CO.
GULF BELLE SHRIMPS	SOUTHLAND CANNING CO.
GULFSPRAY INSECTICIDES	GULF OIL CORP.
HERB OX BUILLION CUBES	PURE FOODS CO.
HORMEL MEAT PRODUCTS	GEO. A. HORMEL & CO.
HYGRADE DAIRY CO.	PRIVATE LABEL BUTTER
JOY DOG FOOD	BEST FEEDS CO.
KAL KAN DOG FOODS	KAL KAN FOODS
KING COFFEE FILTERS	KING COFFEE FILTERS CO.
KING COLE VEGETABLES	DRAPER-KING COLE CO.
KLEEN KITTY CAT LITTER	PRIDE OF VALLEY, INC.
LOTTA COLA & REGENT BEVERAGES	REGENT BOTTLING CO.
NORDIC SEA FOODS	LIVE FISH CO.
PFIEFFER SALAD DRESSINGS	PFEIFFER FOODS
PURITY CHEESE	PURITY CHEESE CO.
RAGU SPAGHETTI SAUCES	RAGU PACKING CO.
RICHS FROZEN FOODS	RICH PRODUCTS CO.
RICE A RONI	POREA SALES CO.
STERLING SALT	INTERNATIONAL SALT CO.
SUE BEE HONEY	SOUIX HONEY ASSN.
SWIFT CANNED MEATS	SWIFT & CO.
TETLEY TEA	TETLEY DIV. BEECH NUT
WILSON CANNED MEATS	WILSON & CO.

Tripartite Promotional Assistance Program (See 79 F.T.C. 1040 for opinion letter; revoked Sept. 11, 1973, 83 F.T.C. 1839. File No. 713 7027, released February 6, 1976.)

Opinion Letter

January 29, 1976

Dear Mr. Kintner:

This is in response to your request that the Commission reconsider its October 5, 1973 revocation of the advisory opinion issued to MARPOS on September 3, 1971, and that that advisory opinion be reinstated.

The Commission has given very careful consideration to your request. At issue, essentially, is whether the tripartite promotional assistance plan offered by MARPOS, which provides payments to participating retailers on the basis of the number of cash register transactions realized by such stores, assures payments and services on proportionally equal terms to all competing customers as required by the applicable provisions of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

The Commission's 1973 revocation of the MARPOS program resulted from a reexamination of that program in light of the Commission's Guides, as amended August 4, 1972. The payment plan, as this reexamination disclosed, permits substantially unequal payments to competing retail customers, if and when there are substantial differences among and between such customers relative to size or aggregate product sales and, hence, established customer patronage.

If, as a matter of example, competing retailers "A" and "B" are assumed to be participants under the subject program and the annual number of cash register transactions recording aggregate product sales by store "A," reflects a level ten times higher than that of store "B," store "A" may receive ten times the compensation available to store "B" in providing the identical facility or service. Store "B," because its overall product sales are less, is denied a proportionally equal payment under the program, even if its resales of the promoted product are comparable. The lower payments that store "B" is eligible to receive, thus, bear no relationship to the quantities of the promoted products it may handle; no relationship to the amount of advertising space it provides (or to the extent of mechanical display facilities involved); and no relationship to the direct or indirect costs attributable to any or all such facilities. Such a payment plan clearly gives large buyers a discriminatory preference over smaller ones. A maximum payment limitation of $1500 for 500,000 or more cash register transactions together with a minimum payment of $12.50, does not

serve to neutralize the disproportionality of this payment plan, as so analyzed.

The Commission has noted your particular reference, in conjunction with the subject request, to Advisory Opinion No. 88. You are advised that Advisory Opinion No, 88. File No. 663 7022, was withdrawn by the Commission June 29, 1972, press release dated July 7, 1972.

The Commission has concluded that the advisory opinion issued to MARPOS on September 3, 1971, revoked by notice of October 5, 1973, should not be reinstated.

By direction of the Commission.

Letter of Request

February 5, 1974

Dear Mr. Tobin:

In your letter of October 5, 1973, you have advised us that the Federal Trade Commission has revoked the Advisory Opinion issued to our client MARPOS Network, Inc., on September 3, 1971.

For the reasons set forth in detail below, we respectfully request a reinstatement of the MARPOS Advisory Opinion, which was the result of extensive agency staff review, and expressly "approved [by the Federal Trade Commission] * * * on the condition that proportionalization of payments be based upon the number of cash register transactions at each participating retail outlet. * * *"

In good faith reliance on the Trade Commission's advice, MARPOS Network, Inc. has expended hundreds of thousands of dollars to develop and implement a highly innovative promotional arrangement, and to encourage supplier and retail outlet participation. The Commission's summary revocation of the MARPOS Advisory Opinion is not required by the public interest; misconstrues the MARPOS program and consequent legal application; and arbitrarily and severely penalizes MARPOS Network, Inc. for the company's substantial investment in and management commitment toward the program in reliance on the Commission's approval.

Background Statement

Essentially, the MARPOS third party promotional program offers payments based upon actual cash register transactions to participating retail outlets in return for leased space for variations of mobile as well as stationary advertising displays of participating suppliers' products.

It is our understanding that the Trade Commission's revocation of the Advisory Opinion issued on September 3, 1971, to MARPOS Network, Inc. was predicated on agency-perceived noncompliance of the MARPOS

program with "Guides 9 and/or 11" of the Commission's *Guides for Advertising Allowances and Other Merchandising Payments and Services,* as amended August 4, 1972.

In a press announcement issued on October 25, 1973, by the Commission concerning the revocation of 12 advisory opinions (including MARPOS), the agency observed that "in many instances, advisory opinions, which were revoked today approved compensation schemes based upon, for example, gross sales or customer count as determined by cash register transaction." Such an approach was viewed as inconsistent with the Guides' admonition against allowances that had little or no relationship to the cost or approximate cost of the services performed.

In discussions held with the Commission's staff on December 17, 1973, we were advised it was assumed that retailer-participants in the MARPOS program would receive payments grossly in excess of the cost of the services being performed by these retailers, in view of the method of proportionality employed by the program.

Discussion

A. *Basis for Proportionality*

As the Commission's file in this matter will reflect, our initial submission to the agency on behalf of MARPOS posited a program under which payments were related to the gross dollar sales volume of each participating retail location. The company thereafter recast its proposed program as a result of a Commission request that MARPOS reconsider the method of payment. Thus, in our June 21, 1971, letter to the Commission, we resubmitted the MARPOS program on the basis of two alternative methods of proportionalization—cash register transactions or actual annual dollar gross volume at each participating retail outlet.

MARPOS' proposal of the cash register transactions payment method was fully responsive to the Commission's request and proved to be a fairer and more accurate method of measuring the service being provided by participating retail outlets.

The utilization of the number of actual cash register transactions as the basis for proportionality *within the maximum payment limit established by the* MARPOS program precludes the very problem of excess payments which appears to be the concern of the Commission's staff. MARPOS has imposed a maximum on the number of cash register transactions for which it will compensate participants in the program. Consequently, large retail chains, whose cash register transactions per location easily exceed the maximum, do not receive excessive

payments. In addition, smaller retail outlets, although smaller in size and in annual gross volume of sales, are placed on a more equal footing with their larger competitors since the smaller stores typically experience more cash register transactions in proportion to their annual dollar volume of sales.

B. *Reasonableness of Payments*

The MARPOS program does not result in excess payments to participating retail outlets. Each participating retail outlet is reimbursed for the leasing of ceiling space on a uniform percentage of the number of cash register transactions—3/10 of 1 cent for each cash register transaction for featuring 45 advertising signs of participating suppliers. The maximum annual payment of $1500 for 500,000 or more cash register transactions converts into a participating supplier payment of $33 per sign per location. The participating retailer is thus receiving 7 cents per thousand transactions per sign per location per year. Thus, the basis for proportionality results in payments which certainly are not excessive under any standard.[1]

As Guide 7 makes clear: "No single way to proportionalize is prescribed by law. Any method that treats competing customers on proportionally equal terms may be used." *See Vanity Fair Paper Mills, I. c.* v. *FTC*, 311 F.2d 480, 486 (2d Cir. 1962), *cert. denied*, 372 U.S. 910 (1963). Utilizing number of cash register transactions per location as the basis for payment, within the minimum-maximum limits established by MARPOS, is fair and non-discriminatory *vis-a-vis* participating retail outlets. Indeed, the use of a more conventional method of proportionalization— a precentage of retailer purchases of products from participating suppliers— would not operate in favor of the smaller retailer participants as does the MARPOS method.

The number of cash register transactions does bear a relationship to the purchases of suppliers' products. In Advisory Opinion No. 88, *FTC Advisory Opinion Digests* 81 (1969), the Commission noted:

> Insofar as using the number of consumers exposed to the commercials as the standard for measuring payments to retailers, the Commission felt that this method accords with the value of the service to the supplier and in the long run will probably correspond fairly closely to the amount of purchases of the supplier's product. One reason for this is that suppliers probably will not join the plan or stay with it if they are making payments to stores without any corresponding increase in their volume of sales by those stores. Therefore, under these circumstances the Commission felt it was reasonable to permit proportionalization to be based on the estimated number of customers, particularly where, as in this case, the measure for estimating the number of customers is weighted in favor of the small stores. (*Id.* at 83-84.)

[1] We have summarized the maximum payment unit figures discussed above in an appendix to this letter.

Significantly, the Commission has never withdrawn this statement approving number of cash register transactions as a reasonable method of proportionalizing. Certainly, the revised *Guides* contain no suggestion whatsoever that cash register transactions would be an unacceptable basis.

No member of the Commission's staff has ever suggested that the MARPOS program is discriminatory or that it results in any adverse effect upon competition. Yet the Commission's *Guides* clearly indicate that the question of excess payments falls within the purview of Section 2(a) of the Robinson-Patman Act:

> A seller who pays a customer for services that are not rendered, or who overpays for services which have been rendered, may thereby violate Section 2(a) of the Clayton Act, as amended. *Guides* at p. 3.

This is consistent with the court's analysis in *R. H. Macy & Co.* v. *FTC*, 326 F.2d 445, 449 (2d Cir. 1964). Recognizing that Section 5 of the Federal Trade Commission Act would apply to a third-party promoter, it is inconceivable that any Section 5 liability would attach to an intermediary for implementing a program that is non-discriminatory and is without any possible adverse effect on competition.

We point out that a supplier *discount* program which provided a percentage of the retail purchasers' cash register transactions similar to the MARPOS method would not violate Section 2(a), since such a discount would be non-discriminatory and could have no adverse effect upon competition. This is especially so were the discount equivalent to the MARPOS annual payment of 7 cents per sign per one thousand cash register transactions per retail location. Such a payment, when viewed within the conceptual framework of Section 2(a) as would necessarily be the case were excess payments alleged, could not have an adverse competitive effect.

C. *Cost-Value Controversy*

Amended Guide 9, in a footnote, cautions that "allowances that have little or no relationship to cost or approximate cost of the service provided by the retailer may be considered in violation of [Sections 2(a) or (e) of the Robinson-Patman Act]. * * *"

Guide 11, as revised, states that the seller should not overpay his customer for promotional services rendered. Guide 11 continues:

> When customers may have different but closely related cost in furnishing services that are difficult to determine * * * the seller may furnish to each customer the same payment if it has a reasonable relationship to the cost of providing the service or is not grossly in excess thereof.

These recent amendments should not be applied in Procrustean fashion to tripartite promotional allowance programs.

Under such programs, it is the third party promoter who underwrites the cost of formulating a promotional medium to advertise a participating supplier's product. The costs and risks of the promoter continue once the program is operational. In many tripartite arrangements, a participating customer incurs no costs.

If the Commission, in its revocation action, takes the position that a demonstration of customer-participant cost be made, then effectively the many space rental tripartite programs which represent little or no cost to the participating customer—or which do not lend themselves to cost analysis—are declared by the agency to be unlawful *per se*.

We do not believe that the Trade Commission intended such a result in amending Guides 9 and 11.

The MARPOS program involves the lease and novel utilization of retail grocery outlet ceiling space. The "cost" of the ceiling space provided by the participating retailer is not determinable in the same sense as shelf or floor space. As a consequence, the reasonableness of program payments in terms of retailer facilities provided can only be measured by consideration of the value of the ceiling space as an advertising medium. Employed as an advertising medium, this space carries a measurable value (space "cost") to the retail participant in the program in the same way as all other advertising media. Thus, one speaks of the value of an advertising medium—and consequently the cost to an advertiser to employ the medium—in terms of television viewer or radio listener *exposure*, or newspaper or magazine *circulation*. This is a significant consideration for the ceiling rental payment basis utilized by MARPOS: number of cash register transactions at each participating store location. Viewed in these terms, the MARPOS program "cost" or "value" as an advertising medium compares most favorably with the program payment to participating retail outlets.

In *Lever Brothers Co.*, 40 F.T.C. 494, 512 (1953), the Commission stated:

> The law does not prohibit a seller from paying for services of various types. In some cases it might be his duty to do so in order to meet the test of availability. Nor does the law require a seller to pay at the same rate, per unit of product sold, for types of services which are of unequal cost or value. The practical result of such a rule would be to restrict the payments to some type of service that every single customer could furnish. It would adopt uniformity as its goal rather than proportionality. Payments must be made in good faith for services or facilities actually rendered and there should be a fair and reasonable relation between the amount of the payment and the type of service rendered.
>
> * * * * * * *
>
> While Section 2(d) requires that payments shall be made available on proportionally

equal terms to all competing customers, no standards are laid down in the law for accomplishing this result. Indeed no standard could be laid down which would insure exact proportionality with the mathematical accuracy of a slide rule.[2]

Although the Commission admonished against excessive promotional payments, it recognized that payments could be based on the value of the service to the supplier as well as bear a reasonable relationship to the *cost or value* of the services rendered by retailer-participants. *See Giant Food, Inc.*, 58 F.T.C. 977, 1010 (1961). This is consistent with the flexible view of Congress toward proportional equality as reflected in the legislative history of the Robinson-Patman Act.

The legislative history of the Robinson-Patman Act is clear and unambiguous with respect to the issue of value and cost. Thus, it was emphasized that a promotional allowance "becomes unjust when the service is not rendered * * * or when, if rendered, the payment is grossly in excess of its value. * * *" S. Rep. No. 1502, 74th Cong., 2d Sess. 7 (1936). Value to the seller was a recognized factor in determining proportionality. S. Rep. No. 1502, 74th Cong., 2d Sess. 8 (1936). In short, "proportionally equal terms" was viewed as a flexible standard permitting consideration of the value of the service to the seller as well as fair treatment to competing retailers:

The phrase "proportionally equal terms" is designed to prevent the limitation of such allowances to single customers on the ground that they alone can furnish the service or facilities or other consideration in the quantities specified. *Where a competitor can furnish them in less quantity, but of the same relative value, he seems entitled, and this clause is designed to accord him, the right to a similar allowance commensurate with those facilities.* To illustrate: Where, as was revealed in the hearings earlier referred to in this report, a manufacturer grants to a particular chain distributor an advertising allowance of a stated amount per month per store in which the former's goods are sold, a competing customer with a smaller number of stores, but equally able to furnish the same service per store, *and under conditions of the same value to the seller*, would be entitled to a similar allowance on that basis. H. Rep. No. 2287, 74th Cong., 2d Sess. 16 (1936) (Emphasis added.)

The Senate and House debates reinforce the conclusion that "proportionally equal terms" was not intended to be wedded to costs as applied to promotional allowance provisions. Thus, Congressman Utterback, in explaining the promotional sections, noted:

The bill also prohibits the seller from furnishing services or facilities to the purchaser in connection with the processing, handling or sale of the commodities concerned unless they are accorded to all purchasers on proportionally equal terms. Again the last phrase has reference to the several purchasers' equipment and ability to satisfy the terms upon which the offer is made, or the services, or facilities furnished to any other purchaser.

There are many ways in which advertising, sales, and other services and facilities may

[2] The court's analysis in *Colonial Stores, Inc.* v. *FTC*, 450 F.2d 733, 743-744 (5th Cir. 1971), confirms the approach adopted by the Commission in *Lever Bros.*

be either furnished or paid for by the seller upon terms that will at once satisfy the requirements of the Bill concerning equitable treatment of all customers, and at the same time satisfy the legitimate business needs of both the seller and the purchaser. 80 Cong. Rec. 9418 (1936). See 80 Cong. Rec. 9416 (1936).

Thus, in enacting the Robinson-Patman Act, Congress did not intend to impose an inelastic standard of proportional equality.

There is no sound rationale for concluding that "no cost" tripartite promotional programs are legally impermissible, where all participating customers are being treated fairly and there is no likelihood of any anti-competitive effect.

D. *Economic Impact of Summary Revocation*

The stigma of the Federal Trade Commission's withdrawal of the MARPOS Advisory Opinion effectively forecloses the company from pursuing the underlying program any further. This negative economic impact on MARPOS is as undeserved as it is severe. More specifically, at the time that MARPOS was advised of the revocation, the company had expended or committed for more than one million dollars in developing and promoting its program, as follows:

Development of original prototype machine and subsequent 12 test machines used to test the equipment in Kansas City, Dallas and Tampa, in addition to costs of preparation of ads and Nielsen tests to measure effectiveness of this media.	$385,253
Design, engineering and manufacture of new machine by Bayer Manufacturing Co. in Los Angeles, and test of this machine in a Los Angeles supermarket.	200,000
Salaries of personnel engaged specifically for Marpos, consisting of engineers and personnel to sign up supermarket chains and salesmen to solicit advertisers.	290,000
Sales expenses, including preparation of promotional materials to solicit supermarkets and advertisers, advertising and travel expenses.	175,941
	$1,051,194

Clearly, the summary revocation of the Advisory Opinion has resulted in irreparable harm to MARPOS. The Commission's arbitrary and precipitous action was not required by the public interest, and nothing in the Robinson-Patman Act, its legislative history or Section 5

of the Federal Trade Commission Act warrants the conclusion ostensibly underpinning the agency's revocation. Indeed, if there is an element of cost to be considered here, assuredly it is the cost of a promotional program which was carefully drawn by MARPOS and undertaken in good faith reliance on Federal Trade Commission approval of the plan.

Request for Reinstatement

MARPOS requests that the Commission reconsider its revocation action, and that the MARPOS Advisory Opinion, as set forth in the agency's letter of September 3, 1971, be reinstated.

Respectfully submitted,
ARENT, FOX, KINTNER,
PLOTKIN & KAHN
By /s/
Earl W. Kintner
By /s/
Lawrence F. Henneberger
By /s/
Salvatore A. Romano

Appendix to Letter of Request

MARPOS PROGRAM PAYMENT ANALYSIS FOR PARTICIPATING RETAILERS RECEIVING MAXIMUM PAYMENT

R = Participating Retailer
S/A = Supplier/Advertiser Participant
[Note: the analysis below is based upon *maximum* payment to an R, $1,500 per year.]

1. R receives an advertising space rental payment of 3/10 of 1 cent per cash register transaction, with a maximum payment (ceiling) of $1,500 (500,000 *or more* transactions) and a minimum payment (floor) of $12.50 (regardless of minimum number—approximately 417—of transactions).

2. In the maximum payment situation, MARPOS reserves 7 signs for public service messages (non-product).

R reserves 8 signs for own product/service and perhaps public service promotions.

S/A advertising is featured on 45 signs.

3. At $1,500 per year, S/A (through MARPOS) is leasing advertising space costing S/A $33.33 per sign per location ($1,500 divided by 45 signs).

4. On the basis of cash register transactions, R is receiving

approximately 7 cents per thousand transactions per sign per year per location ($33.33 divided by 500) from each S/A.

Memo to the File

January 9, 1974

Re: MARPOS Network–Advisory Opinion File No. 713 7027

On December 14, 1973, Cal Collier, Tom Tucker, Gene Higgins and I met with Earl Kintner, Larry Henneberger and Sal Romano of the Arent, Fox law firm, which represents MARPOS. They had asked for the meeting in order to discuss the Commission's letter rescinding the advisory opinion.

Mr. Kintner mentioned the firm has about $1,000,000 invested in its operation and that as a result of the letter of rescission, enrolled suppliers have decided not to participate any longer. As a consequence, MARPOS stands to lose its investment. Mr. Kintner said he felt they had been treated unfairly because MARPOS had no advance notice that the Commission was considering rescission.

Mr. Kintner also mentioned payments by MARPOS to resellers are based on customer count, in accord with the advisory opinion, at a rate of two-thirds of a cent per customer to a maximum payment of $1500 per location per year and a minimum of $12.50 a year. For example, $1500 is obtained by MARPOS from payments of about $33 by each of 45 participating suppliers to large resellers' outlets. MARPOS retains the difference between the payments by the suppliers (which are much in excess of $1500 or $33 per supplier per year) and the sums paid to the resellers. Thus, the maximum amount paid per location to a reseller by MARPOS is $33, with the balance of payments made by suppliers being held as compensation to MARPOS for its services.

In the course of the conference, it was brought out that no information apparently is available as to any relationship between what a participating supplier might pay to his customers by using a conventional basis of calculating promotional assistance (*e.g.*, a percentage of the volume of purchases of the promoted product in a certain period) as compared with the $33 payments to the largest retailers per year per location which the supplier pays under the MARPOS plan.

Mr. Kintner emphasized that the "floor" and "ceiling" provisions ($12.50 and $1500.00) of the plan were inserted to insure that small resellers received something and that large resellers did not receive excessive payments. He said that proportionalization based on customer count tended to favor smaller resellers. He did not agree that

the fact that larger volume resellers usually sell a wider variety of goods unrelated to products normally sold in supermarkets, thereby increasing customer count, would counteract the smaller average dollar purchase figure common to smaller resellers, which would tend to increase *their* customer count. Mr. Kintner also mentioned that he believed that "cost" to provide promotional assistance rather than the "cost or value" to the advertiser was the better position for the Commission to take in measuring the reasonableness of payments for promotional assistance (*see* footnote 2 to Guide 9).

Gene Higgins made the point that his concern stemmed from the fact that larger resellers appeared to be receiving far more than any costs they incurred in allowing installation of the MARPOS system. Mr. Kintner and his colleagues conceded that such costs would be minimal (*e.g.*, cost of electricity), because MARPOS' personnel install, maintain and repair the mechanism.

Mr. Collier pointed out that the Commission had receded from the "cost or value" position in measuring whether a promotional assistance payment was proper in favor of "cost" because predicating such payments on "value" to the supplier would make it possible to pay excessive amounts to some resellers on the basis that advertising in their outlets was of greater worth to the suppliers than it would be in other resellers' outlets. He commented that if resellers purchased or leased the equipment there clearly would be "cost" to which the payments could be related but that with an intermediary in the picture, it was difficult to determine what "costs," if any, the resellers would have in using the systems.

Dufresne said he believed the thrust of the only theoretically viable charge the FTC might make in litigation against MARPOS would be a Section 5 count on the theory that large resellers were being unfairly favored by virtue of the fact that MARPOS was "collecting" funds from suppliers and paying large sums to some resellers and much smaller sums to other resellers. He discounted the possibility that an R-P action would lie because no supplier pays more than $33 per year per location for his participation in the plan plus the fact that the payments which may be made have a "floor" and a "ceiling" and are proportionalized on the basis of customer count.

Mr. Kintner indicated he would submit a request to the Commission for an advisory opinion pursuant to the invitation contained in the letter of rescission.

/s/
Joseph P. Dufresne

Tripartite Promotional Assistance Plan (See Digest No. 418, 77 F.T.C. 1709; revoked Sept. 11, 1973, 83 F.T.C. 1839, File No. 703 7083. File No. 763 7002, released February 6, 1976.)

Opinion Letter

January 29, 1976

Dear Mr. Odessky:

This is in response to your request for an advisory opinion concerning a revised tripartite promotional assistance plan on behalf of Don Odessky, Inc.

It is the Commission's understanding that the revised Odessky plan essentially involves artistically designed aisle-end merchandising displays featuring products of participating suppliers, erected in retail outlets in appropriately varying sizes so as to be useable in a practical business sense by all such outlets, both large and small. These aisle-end displays are featured for one week periods and are in addition to, and are independent of, the extent of shelf space otherwise devoted to the sale of the promoted products.

Payments under the plan to participating retailers are based on a percentage of purchases and are limited to the cost of the displays. The cost has been calculated in six ranges, from $50 to $125 for the most elaborate of the displays. Such costs, of course, are subject to change. Determination of the above costs takes into consideration the construction, labor, signpainting, material and the cost of dismantling at the end of the week. For those retailers not wishing the aisle-end display, but desiring alternatives such as handbills, newspaper advertising, bag stuffers and other means of promotions, proportional payments will similarly be based on costs.

All participating customers of the same supplier are paid at an identical rate (based on the dollar quantity of goods purchased) but in no event will such payment exceed the cost of the display or other promotion. Payments are made by the Odessky firm from moneys paid to it out of the available promotional assistance program funds of participating suppliers.

All customers of participating suppliers in a competing trade area are notified of the program and asked to participate. Retailers are notified orally and in writing by first class mail. Notice includes a description of the plan and alternative methods of promotion together with all relevant details.

The Odessky company is responsible for insuring that all customers are advised of the availability of the program and for determining costs of the promotion utilized. It additionally sees to it that the

services the supplier is paying for are furnished, by checking the stores, the displays or other promotions utilized, and also by making certain that no overpayments are involved.

Under the plan, no supplier may contract for more than six of the one-week displays in any one calendar year. The maximum payment to a retailer by a single supplier would thus be $750 per store (assuming, for illustration, the maximum tentative cost figure of $125 referenced above). Payments would be less if the cost involved were for smaller, and thus less expensive, displays or if a supplier did not choose to promote his product six times during the annual period.

Based on its understanding of the revised plan as outlined above, the Commission has concluded that it will not initiate action if the plan is implemented in the manner described.

You are advised that the Commission has carefully considered that aspect of the subject plan relating to the lease through Odessky of display or shelf space. The Commission notes that, strictly speaking, the lease of shelf space, as such, is not involved, although the merchandise display devices, as described, appear clearly to provide a product merchandising facility as well as a product display. The plan, however, provides restrictions on the frequency with which a supplier may participate (*i.e.*, only six times in one year for a week at a time) and limits payments to retail stores to the actual cost to erect displays or provide alternative services.

In limiting allowance payments to the cost of displays, the Commission expects that no unnecessary costs to construct or reconstruct displays will be occasioned. Rather, the Commission expects that, in its intermediary function, Odessky, Inc., will see to it that any excess payments will be returned to the supplier involved, if payments in fact exceed the approximate cost necessary to erect displays.

To assure that the plan is implemented so as to provide allowances to all competing purchasers on proportionally equal terms, Don Odessky, Inc., should report to the Commission, after the plan has been in operation for one year, the full extent of retailer and supplier participation, including time periods and products involved, and the total allowances paid to each participating retailer by each supplier under the plan.

By direction of the Commission.

Third Supplemental Letter Relative to Request

March 4, 1974

Dear Mr. Dufresne:

This will supplement my submissions of December 20, 1973, January 7 and February 5, 1974, seeking an advisory opinion on behalf of Don Odessky, Inc. I want to thank you for arranging the meeting with Messrs. Tucker and Higgins and the following attempts to clarify some of the questions raised.

As our first letter of December 20, 1973, indicates, Don Odessky, Inc., is a service company whose primary function is to assist small canners and packers, as well as other suppliers, in the promotion of their products. The Odessky Company contacts the retailer customers, explains the various promotions available, insures proof of performance and is responsible for disbursing funds from the supplier to the customer. In all respects, Don Odessky, Inc., acts as an agent for suppliers in insuring that promotional funds are, in fact, used for promoting suppliers goods rather than being pocketed as a "cash discount."

Various promotional vehicles are available, such as newspaper advertising, flyers, point-of-sale material, handbills, promotional contests and artistic displays. Since the artistic displays have raised most of the questions during our discussion, some further explanation appears in order, but we hope it is clear that the customer can select any number of promotions and is not limited to these displays. Further, if he does choose an alternative to the basic plan, the customer is reimbursed for a total of 100% of the costs of the alternative chosen.

Our original letter described these displays as similar to billboards or signs that are erected in windows or on walls to advertise merchandise. The payment for these displays should not be equated with the purchase of shelf space, because the displays are not like shelf space in that they are primarily designed to promote the product, and the fact that merchandise can be picked up by the customer is incidental. The product promoted in these displays is available on the shelves and the fact that it is available on the displays is ancillary and subordinate to the primary purpose of such displays, which is to promote the product. Under no circumstances will payment be made for shelf space. The advertising displays must follow certain basic designs, which in some cases involve "Disney" type drawing of animals, animated cartoons and other eye-catching devices. The displays exhibit the merchandise and in most instances the consumer can purchase the merchandise from the display. These displays should not be confused with so-called permanent ends where merchandise like soft drinks and potato chips stand permanently. The Odessky displays are a form of billboarding or displaying of a product for a one-week period.

The costs of these displays have been accurately figured by having a member of Retail Clerks Union No. 77 in Los Angeles build various

designs using strict cost procedures. The costs involve the construction, labor, sign painting, material and the cost of dismantling at the end of the week. The size of the display contributes the greatest factor in determining costs. In examining the cost in the smallest display which is required for a payment of $50.00 to the retailer, it has been determined that the labor involved amounts to $41.25. To this figure must be added the cost of art work and material which accounts for the balance of $8.75. In examining the costs of the most expensive displays, using the same methods, it has been determined that labor costs amounted to $91.91. The difference between that sum and $125.00 is accounted for by the cost of sign painting and material. In some cases the cost of painting exceeds the amount budgeted in the larger displays because their designs involve much artistic work if the product is to be promoted successfully; however, no payments exceed $125.00, which is the cost to produce the most elaborate of the displays.

With regard to the question raised at the meeting as to what happens if a customer does not earn enough under a supplier's program to pay for a display, he is offered alternatives previously referred to so that the money earned is expended for promotion. The Odessky Company does work with suppliers and fits the Odessky program into the supplier's overall program. The supplier is informed of the requirements of the Robinson-Patman Act and if the supplier decides to offer promotional assistance, the Odessky Company advises the supplier of his duty to have a plan for providing the assistance, to inform customers of the plan, to insure that it is proportional and available to all competing customers, and to check to see that the services are furnished.

The means of proportionalization that the Odessky firm suggests is that the payments be based on the dollar volume of purchases of the promoted product or on the quantity of the goods so purchased during a specified period. This is the means which Guide 7 "Proportionally Equal Terms" of the Commission's Guides for Advertising Allowances indicates is the best method to calculate the payments or allowances to be made by suppliers in providing promotional assistance. As a rule, most packers and canners pay an allowance of four percent on purchases for advertising and promotions. The Odessky Company, however, does not set or determine the precise allowance that will be paid and there is no uniform rate.

If the supplier agrees to participate in the Odessky plan he is billed by the Odessky Company for his costs in providing the promotional assistance and the Odessky Company thereafter makes the necessary payments to the customers and furnishes detailed reports to the suppliers so that there is a proper accounting as to the promotional

funds received by each customer. This is a service to the supplier, because he can be certain, as called for by Commission Guide "Checking Customer's Use of Payments," that he is receiving performance for the funds expended, and he receives a detailed accounting so that the proper deduction can be made from the retailer's promotional account.

In conclusion, we believe that this program insures that small suppliers will have an opportunity to promote and display their products in grocery stores. The fact that no supplier can purchase more than 6 displays a year for a one-week duration is reasonable, pro-competitive and guarantees that the Odessky plan will not prevent other suppliers who do not participate in the Odessky plan from having the opportunity to advertise their goods and to display their products in retailers' places of business. The plan has been carefully designed to assure that a reasonable and proper balance is maintained between in-store display space which is available to suppliers who participate in the Odessky plan in providing promotional assistance to the retailers and other non-participating suppliers who wish to provide in-store promotional assistance to the retailers, but do not choose to do so using the Odessky Company plan.

With kind regards, I am

Sincerely yours,
/s/ Basil J. Mezines

Second Supplemental Letter Relative to Request

February 5, 1974

Dear Mr. Dufresne:

This is in further reference to the request of Don Odessky, Inc., for an advisory opinion pursuant to Sections 1.1-1.4 of the Commission's Rules and procedures. This request for an opinion was filed by my letter dated December 20, 1973, and by supplemental letter of January 7, 1974. Since these two letters were filed, I have had several conferences with you which seem to indicate that further clarification is necessary.

When the Commission announced that it had revoked 12 Advisory Opinions dealing with promotional allowances, it stated that the action was taken because the previous opinions approved compensation schemes based upon, for example, gross sales or customer counts as determined by cash register transactions. In addition, the Commission referred to footnote 2 in Example 1 of Guide 9 which states "Also the purchase of display or shelf space, whether directly or by means of so-

called allowances, may be considered an 'unfair method of competition' in violation of Section 5 of the Federal Trade Commission Act."

The request for an Advisory Opinion indicates clearly that the Don Odessky company will base all payments made for the services furnished on the precise dollar volume of goods purchased during a specified period. In short, the company is in complete agreement with the Commission that the customer count method or gross receipts method of proportionalization is not a proper basis for assuring that payments made are on proportionally equal terms. Basing the payments on a percentage of the dollar volume of purchases assures that such payments are proportional and fair to all customers who compete in the resale of the seller's product.

Guide 5 states that window and floor displays are included in the list of services or facilities covered by the Act where the seller pays the buyer for furnishing them. Of course, if a customer seeks to buy an unreasonable amount of floor space, this could result in a restraint on trade which is obviously the reason why the Commission cautioned promoters in footnote 2 to be careful that the purchase of display or shelf space does not result in "an unfair method of competition" in violation of Section 5 of the Federal Trade Commission Act. This footnote was designed to cover situations whereby a seller has, or may, monopolize shelf or display space in grocery stores to the detriment of competitors. The request filed on behalf of Don Odessky, Inc., dated December 20, 1973, provides, on page 2, a limit on the number of displays any one supplier can contract for during the course of a year, in order to prevent one supplier from purchasing all available promotional space in the store. Specifically, the letter of request states that "during any calendar year, no single supplier can contract for more than 10 displays in one store. Since each store can usually set up 5 displays, at the end of each aisle, this means that it is possible for a store to contract for at least 260 a year." It was believed that if a supplier could contract for a maximum of 10 displays out of a possible 260, there was no likelihood that any restraint of trade would take place. Since discussing this matter with you and Mr. Odessky, I have come to the conclusion that the maximum number of displays that can be purchased should be reduced to 6. Thus, the maximum number of displays a supplier can contract for during one week represents a little over 2% of the space available in a grocery store during the course of the year.

I strongly believe that limiting the maximum number of displays to 6 for a one-week period will guarantee that there will be no monopolization of the display space and there is not even the remotest possibility that any restraint of trade will take place. Moreover, the

Odessky company will certify that all competing suppliers will be provided with display space in order to insure that no supplier of the grocers receives a competitive advantage. Thus, no supplier will be foreclosed from promotional display space in a store.

We also believe that the method of payment based upon the precise cost of the displays or on costs that are figured on the basis of designing and constructing one display will also insure that payments made are not in excess of the actual or approximate cost of providing the promotional service. Under the Odessky plan proof of a performance is guaranteed since it is their responsibility to inspect the displays for suppliers in order to be certain that they are erected for the stated period and the design of the display is in accord with the agreement that has been reached with the customer.

When the FTC revoked these Advisory Opinions it offered the parties an opportunity to modify their methods of operations so that the Commission could consider the issuance of a new Advisory Opinion. Mr. Odessky has followed this strong suggestion from the Commission and has modified his program to comply with what he believes the Commission has requested. If we are incorrect in our assumption, make any other modifications that you feel necessary. We would appreciate the advice of the staff so that we can submit a program to the Commission that meets its requirements in complying with the Guides.

With kind regards, I am

Sincerely yours,
/s/ Basil J. Mezines

First Supplemental Letter Relative to Request

January 7, 1974

Dear Mr. Dufresne:

Thank you for your letter of January 3, 1974, concerning the application of Mr. Don Odessky of Don Odessky, Inc., for an advisory opinion.

We stated in our letter that "the amount of the payment would be based on a percentage of purchases with a relationship to the cost of the display" so that it would be clear that no overpayments would be permitted. All customers would be paid at the same rate and this would be done by basing the payments on the dollar quantity of goods purchased during a specified period. Specifically, a supplier would give each competing customer an allowance of four (4%) percent on the dollar volume of purchases to promote his product. All customers of the same supplier would be paid an identical rate but in no event to exceed the cost of the display or other promotion. The amount earned could be

used for displays, newspaper advertising, handbills and stuffers. Whatever the means of promotion selected, the payments made would be calculated by actual or approximate costs and would never be more than the cost of the promotion utilized.

The Odessky company, as a service organization, would be responsible for insuring that all customers were advised of the availability of the program, and fixing the costs of the promotion utilized so that some customers did not receive payments in amounts greater than the costs of the promotion and thus obtain a price advantage. There would always be a ceiling on payments. The Odessky company would see to it that the services the supplier is paying for are furnished by checking the stores, the displays and other promotions utilized and also by making certain that no overpayments are involved. By utilizing the services of a third party to monitor the program, performance can be verified and the obligations of the Robinson-Patman Act will be satisfied.

Again, thank you for your interest and if you need any additional information, please give me a call.

Sincerely yours,
/s/ Basil J. Mezines

Letter of Request

December 20, 1973

Gentlemen:

This is a request for an advisory opinion pursuant to Sections 1.1 - 1.4 of the Commission's Rules on behalf of Don Odessky, Inc., a California corporation located at 511 N. La Cienega Boulevard, Los Angeles, California.

The Commission by letter of October 5, 1973, revoked an advisory opinion granted to Don Odessky Associates under date of April 6, 1970, and invited the petitioner to seek the issuance of a new advisory opinion if it was agreeable to modifying the method of operation outlined in its previous request in order to be in compliance with the Guides for Advertising Allowances and Other Merchandising Payments and Services, as amended, particularly Guides 9 and 11.

This application for an advisory opinion supplements previous information filed with the FTC and is for the purpose of informing the Commission as to a future course of action proposed so as to conform to the Guide's requirements. Don Odessky, Inc. functions much like an advertising agency rendering a service to suppliers in the promotion of

merchandise. The Odessky plan is a tripartite arrangement which essentially involves the display of suppliers' products in grocery stores. These displays, which include artistic advertising designs, function the same as billboard advertising or ingenious advertising signs. The advertising displays are usually erected at the end of an aisle in grocery stores and display the suppliers' products in various imaginative ways. Billboard companies usually put up large signs or displays on the roofs or other property of large supermarkets. This source of promotion and revenue is not available to small grocers. By transferring the same concept to the grocery store, as well as other retailers, on a much smaller scale, the program is available to most stores — both large and small. Grocers, especially the smaller and less organized, do not have the expertise or the facilities to design and produce the displays that are created by the petitioner. The Odessky company has the capabilities and does design displays and furnishes advertising material to be used on such displays. The layout and drawings are composed by petitioner and the work is done by the store employees. Usually there are six different variations of displays and the cost of each varies between fifty and one hundred and twenty-five dollars including material and labor. The costs never exceed one hundred and twenty-five dollars.

The Odessky company contacts suppliers and offers its service and determines if they wish to enter into joint promotions with grocers and other retailers for the purpose of promoting the suppliers' products in stores. If the suppliers are agreeable, then all customers in a competing trade area are notified of the program and asked to participate. Retailers are notified orally and in writing by first class mail. Such notice includes a description of the plan as well as the alternative methods of promotions together with all relevant details. The notices also indicate that the displays are set up for one week. Additionally, a limit is placed on the number of displays any one supplier can contract for during the course of a year, in order to prevent one supplier from purchasing all available promotional space in the store. During any calendar year, no single supplier can contract for more than ten displays in one store. Since each store can usually set up five, this means that it is possible for a store to contract for as many as two hundred and sixty a year. Petitioner would maintain records showing the number of displays used by suppliers, the names and addresses of the customers, the time period involved together with the cost. Petitioner would also be responsible for obtaining statements showing performance to ensure that retailers do not receive funds where no performance is involved.

The retailers have received payments on the basis of the number of persons coming through the store and being exposed to the advertising displays. On the same theory that advertisers are interested in the circulation of newspapers carrying ads. The records disclose that large corporate chains have not fared as well as the smaller chains. However, it is clear that the Commission feels that the register count method of proportionalization is not a satisfactory basis for granting an advisory opinion. Thus, the future action proposed is that each retailer report to the petitioner the amount of purchases of the suppliers' product during the period that the promotional display is employed. Generally, this can best be done by basing the payments on the dollar volume of goods purchased. The amount of the payment to the customer would be based on a percentage of purchases with a relationship to the cost of the display. The costs have been calculated to be in six ranges from $50.00 to $125.00. The precise costs are fixed like mechanic's repair costs books, based on average costs. This takes into consideration the procurement of merchandise; taking down previous display; building new displays, moving and pricing merchandise; and designing advertising material and the display itself.

For those retailers not wishing the display and desiring alternatives such as handbills, newspaper advertising, bag stuffers and other means of promotions the payment would also be based on costs. Retailers would be required to make available for inspection purchase records in order to verify the dollar volume of goods purchased during the period.

The Odessky company will continue to keep records of cash register transactions in order to satisfy suppliers that advertising displays are being seen by customers entering the stores. The figures obtained from the retailers concerning purchases of the supplier's products will also be periodically verified with the supplier and the latter will be kept informed to ensure that payments made are consistent with the supplier's overall promotional program.

This promotional program recognizes the realities of the ever increasing use of service organizations such as petitioner to assist suppliers in implementing promotional services on proportionally equal terms. The Odessky company receives a commission from the supplier for its services in the same manner as advertising agencies. The Odessky company also warrants that the promotional services made available fit into the supplier's program so that the payments made by the supplier are in accord with the Guides for Advertising Allowances and Other Merchandising Payments and Services, as amended August 4, 1972.

It is respectfully requested that this proposed course of action in response to the Commission's suggestion to modify the existing program, receive the consideration of the Commission and that a new advisory opinion issue.

Respectfully submitted,
/s/ Basil J. Mezines

1437

Magnuson-Moss Warranty Act prohibits a bedding manufacturer from giving a longer warranty in connection with purchase of a matching mattress and foundation set than is given with the purchase of either the mattress or foundation separately. (File No. 763 7003, released March 11, 1976)

Opinion Letter

February 27, 1976

Dear Mr. Clark:

This is a response to your letter to the Commission requesting an advisory opinion on behalf of the National Association of Bedding Manufacturers. You ask whether Section 102(c) of the Magnuson-Moss Warranty Act, Public Law 93-637, 15 U.S.C. §2302(c), prohibits a bedding manufacturer from giving a longer warranty in connection with the purchase of a matching mattress and foundation set than is given with the purchase of either the mattress or foundation separately.

The relevant portion of Section 102(c) provides:

> No warrantor of a consumer product may condition his written or implied warranty of such product on the consumer's using, in connection with such product, any article or service (other than article or service provided without charge under the terms of the warranty) which is identified by brand, trade, or corporate name.

The Commission has carefully considered the matters set forth in your letter. It is the Commission's conclusion that Section 102(c) prohibits the practice you describe. Section 102(c) draws no distinction between extension of a product warranty conditioned upon subsequent purchase of a separate branded article or service, and extension of a product warranty conditioned upon simultaneous purchase of a separate branded article or service. Both are forbidden by the plain words of the statute. A mattress and a box-spring are clearly two distinct products, frequently purchased separately by consumers. Their separateness cannot be overcome by charactertizing their combination as a "bedding set." In the example you present, the warrantor's offer of extended warranty coverage on a mattress is conditioned upon purchase by the consumer of a separate article (a box-spring) identified by brand, trade, or corporate name. It is this use of a product warranty in such a way that it may induce purchase of a separate branded article which Section 102(c) prohibits.

By direction of the Commission.

Letter of Request

July 18, 1975

Dear Mr. Tobin

This is a request for an Advisory Opinion, pursuant to 16 C.F.R. 1.2, that Section 102(c) of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act does not prohibit the longstanding practice followed by many bedding manufacturers, which is to give a longer warranty in connection with the purchase of a matching mattress and foundation set than in connection with the purchase of either the mattress or foundation separately. The Federal Trade Commission should issue such an opinion for the following reasons:

1. The legislative history of Section 102(c) clearly indicates that it was intended to prohibit manufacturers, principally automobile manufacturers, from conditioning their warranty obligation on the consumer's continuing to use only authorized dealers and authorized parts for maintenance and repair. [H. Rep. No. 93-1107, p. 37.] Because automobiles and major appliances involve substantial investments and are susceptible to defects which may be expensive to repair, consumers have a strong interest in preserving the manufacturer's warranty obligation. Such conditions in the warranties on those products, therefore, imposed substantial economic coercion on consumers and thereby restricted their freedom of choice in connection with substantial expenditures for parts and service after the original sale of the article. Thus, such conditions in a warranty were prohibited because they had the classic characteristics of a tie-in. This is not the case in the sale of a matched mattress – foundation since there is no such economic coercion involved and no requirement that the consumer make any further brand-name purchases after the date of the original purchase.

2. A warranty issued in connection with the sale of a matching mattress–foundation set is not

> condition[ed] * * * on the consumer's using, in connection with such product, any article or service (other than article or service provided without charge under the terms of the warranty) which is identified by brand, trade, or corporate name * * *

within the meaning of Section 102(c) of the Act since a matching mattress – foundation set is a separate consumer product within the meaning of Section 101(1) of the Act. The mere fact that the mattress and foundation may be purchased separately does not alter the fact that a matching mattress – foundation set is a separate consumer product. Clock–radios, radio-phonograph combinations, pen and pencil sets, golf club sets, and two- and three-piece suits are only some of the many examples of consumer products sold in combination as one

product even though their respective components may be purchased and used separately.

3. There is no requirement in the Warranty Act that a manufacturer which elects to give a written warranty must give the same warranty on all his products. On the contrary, one important premise of the Act is to preserve the individual manufacturer's freedom of selecting the type and duration of written warranty he wishes to give in connection with the sale of his various products and to rely on competitive pressures in the market place to maximize warranty protection to the consumer. Thus, the ultimate goal of the Warranty Act is to encourage and increase effective competition among manufacturers in the giving of written warranties which the consumer can understand and count on.

4. Competition in the giving of warranties will be decreased rather than increased if Section 102(c) is interpreted to prohibit a manufacturer from giving longer written warranties in connection with the sale of sets or combinations of his products than he does in connection with the separate sale of the respective components. Such an interpretation of Section 102(c) would be no less anticompetitive and unjustified than would be adoption of a rule that a manufacturer may not charge a lower price in connection with the sale of a set or combination of his products than the sum of the sale prices at which he sells the respective components.

5. Purchasers of matching mattress - foundation sets will be deprived of the benefits of the longer warranties which many manufacturers are willing to offer as an inducement to purchase of the sets. The manufacturers which give such longer warranties are willing to do so only because they know from years of experience that product life is longer — and damage and/or consumer dissatisfaction is less likely—where a mattress is used in connection with a foundation that is specifically designed to provide the proper support for that particular mattress.

6. The waiver provisions of Section 102(c) do not provide a practicable alternative to the over 1,250 bedding manufacturers, many of whom are small businessmen who cannot afford to assemble the documentation necessary to come into the FTC and demonstrate that their particular mattresses and foundations will "function properly" and last for the extended warranty period only if both are used together.

Your prompt attention to this matter will be greatly appreciated by the many bedding manufacturers who are vitally concerned with this problem.

Sincerely,

/s/ Roger A. Clark,
Counsel for the
National Association of Bedding
Manufacturers

1441

Proposal to collect certain information from dealer customers for use in scheduling manufacture of popular styles of shoes would not violate modified order to cease and desist. (Docket 7606 - Brown Shoe Company, Inc., released March 19, 1976)

Opinion Letter

March 10, 1976

Dear Mr. Taylor:

The Commission has considered the request in your letters of January 7, and February 13, 1976, for advice as to whether your client, Brown Group, Inc., may engage in a proposed course of action without violating the modified cease and desist order issued by the Commission in the above-captioned matter on August 3, 1966. Your letter states that your client is the successor to Brown Shoe Company. [*See* 70 F.T.C. 491 for modified order.]

From your letter, it appears that Brown proposes to collect certain information from its dealer customers for use by it in scheduling its manufacture of popular styles of shoes. Dealer customers will be asked to report, on a voluntary basis, their sales of Brown brand shoes, by brand and stock number, for the first four to six weeks of each selling season. You state that the intended result of this program is to improve Brown's ability to respond to reorders for popular types of shoes by its dealer customers.

On the basis of the facts submitted, you are advised that the Commission is of the opinion that the operation of the proposed dealer reporting program, on a voluntary basis, would not violate the modified order issued in this matter.

By direction of the Commission.

Supplemental Letter Relative to Request

February 13, 1976

Dear Mr. Johnson:

In connection with our letter request of January 7, 1976, for an advisory opinion of the Commission on the proposed early dealer sales reporting program for Brown brand shoes described in that letter, Mr. Gravatt of your office has indicated that you wanted to know whether or not the annual IRD store profitability survey was still being prepared for Brown by the Russell Allen Company of New York.

The Company has informed me that the last such survey prepared for Brown by the Russell Allen Company was based upon 1969 annual

store statistics and was prepared and distributed in 1970, and that no similar report has since been prepared by or for Brown.

As indicated in our previous letter, the Company continues to request and obtain necessary credit information from its dealer customers for use by its Credit Department and monthly gross sales figures (which are voluntarily reported by approximately one-fourth of the IRD outlets) on the same basis as previously described to the Commission in the Company's compliance reports.

I hope this is the information you require and that we may obtain a favorable ruling on our request in the near future.

Very truly yours,
/s/ Edwin S. Taylor

Letter of Request

January 7, 1976

Dear Mr. Gercke:

This firm represents Brown Group, Inc. (formerly Brown Shoe Company, Inc.) which, as you may recall, is operating under a Modified Order to Cease and Desist issued by the Commission on August 3, 1966 in connection with Brown's Independent Retailers Division ("IRD") program (FTC Docket No. 7606). A copy of the Order is enclosed.

In connection with its manufacture and sale of in-stock branded lines of shoes, i.e., branded shoes that are stocked by Brown for reorder by its dealer customers during the selling season, Brown would like to ask its dealer customers to report their sales of Brown brand shoes, by brand and stock number, for the first four to six weeks of each selling season. Such a report would be entirely voluntary on the dealers' part and would only pertain to Brown brand shoes. Sales of competitors' shoes would not be reported. The request for this sales information and the reports themselves would be handled by Brown's Research Department, and the individual reports and any information contained in them would not be available to Brown's IRD division or to any of its branded lines selling divisions, although summaries of such information would be published to such divisions for their information and guidance but without disclosing particular information as to any individual dealer customer.

These reports of early sales would be tabulated by computer and would provide Brown with an early indication as to the particular styles of Brown brand shoes that were and were not selling well in each region of the country. This, in turn, would enable Brown to modify its manufacturing schedules for in-stock shoes to increase production of popular styles in each brand and cut back on apparently

unpopular styles. The intended result is the maintenance by Brown of better balanced seasonal stocks of Brown brand shoes and improved ability on Brown's part to respond to reorders for such in-stock shoes by its dealer customers.

In a letter to you dated September 26, 1967, Brown advised that it was eliminating the receipt of monthly or other periodic business summaries or reports from IRD dealers, except to the extent that such information was necessary for credit reasons, or was requested in the form of monthly gross sales figures, the results of which are summarized by Brown and published to IRD dealers monthly in order to advise such dealers of current business trends in independent retailer shoe stores across the country. This action was taken voluntarily by Brown in order to resolve a controversy which had developed between the Commission and Brown, during the initial compliance report period, over the continued receipt by Brown from IRD dealers of periodic business reports containing sales and other business information. (See July 26, 1967, letter from Joseph W. Shea, Secretary to Brown Shoe Company, Inc.) There is no language in the Commission's Order which expressly prohibits the receipt of such reports.

The purpose of this letter is to inquire whether, in the opinion of the Commission, the early sales reporting program described above, which involves only Brown brand shoes and not the shoes of competitors, would violate the Commission's Order of August 3, 1966. We respectfully submit that these early sales reports from Brown's dealer customers would not have either the purpose or effect of violating the Order and that they should be permitted.

If the Commission should require any additional information in order to make its determination won't you please let me know. The Company wishes to put the above program into operation in connection with the Spring 1976 selling season. This means that the letters to Brown's dealer customers should go out by February 1, 1976. Anything you or other members of your staff can do to expedite our request for an opinion from the Commission will be appreciated.

Very truly yours,
BRYAN, CAVE, McPHEETERS
& McROBERTS
/s/ Edwin S. Taylor

Conflict between State law and Trade Regulation Rule on Cooling-Off Period for Door-to-Door Sales. (File No. 763 7005, released May 20, 1976)

Opinion Letter

May 4, 1976

Dear Mr. Offen:

This is in response to your inquiry as to the effect of the Commission's Trade Regulation Rule Concerning a Cooling-Off Period For Door-to-Door Sales on notice language required by States which have adopted the Uniform Consumer Credit Code (UCCC).

A related Commission opinion was issued to Mr. Melville W. Feldman on May 20, 1975.

In question (1) you asked:

> Is the Uniform Consumer Credit Code (UCCC) notice of cancellation form inconsistent with the FTC notice forms?

Under the Rule, a summary notice of the right to cancel must be given in the contract in "substantially" the form stated in part (a) of the Rule, and the Notice of Cancellation form must also be provided.* These notices must be given in contracts used in transactions in or affecting commerce. Provisions of State law which also require that certain notice language be given are preempted by the Commission's Rule to the extent that they are directly inconsistent with it. As stated in the advisory opinion issued to Mr. Feldman, notice language required by State law which misrepresents in any manner the buyer's right to cancel conferred by the Commission's Rule is directly inconsistent with the Rule and therefore preempted.

The Rule does not, however, preempt a) consistent State requirements, including those which grant buyers greater protection than is conferred by the Rule, or b) private rights of action based on such consistent State requirements conferred by state cooling-off laws.

The UCCC form of notice reads as follows:

BUYER'S RIGHT TO CANCEL

If this agreement was solicited at your residence and you do not want the goods or services, you may cancel this agreement by mailing a notice to the seller. The notice must

* In your letter, you refer to "notice of cancellation forms," while in this advisory opinion the Commission refers instead to the "form of notice" required by the Rule or by State law— since the Rule requires both a summary notice in the contract and an attached "Notice of Cancellation" form.

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say that you do not want the goods or services and must be mailed before midnight of the third business day after you sign this agreement. The notice must be mailed to:

(insert name and mailing address of seller)

If you cancel, the seller may keep all or part of your down payment.

The Commission believes that the specific provisions of the UCCC form of notice misinform buyers as to their rights under the Rule and conflict with it as follows:

"If this agreement was solicited at your residence * * *."

The Rule's summary notice contains no parallel provision, but the coverage of the Rule is broader than that of the Code; generally, the Rule covers sales made by means of personal solicitation at a place other than the place of business of the seller. This Code notice language would misinform buyers as to the scope of their right to cancel under the Rule and is therefore in conflict with the Rule.

"[A]nd you do not want the goods or services * * *."

This provision implies that the buyer must state a specific reason for cancelling the transaction, a condition not required by the Rule. The Rule's Statement of Basis and Purpose notes that the words "for any reason" were eliminated from the final version of the Rule since such a requirement would tend to constrain the exercise of a buyer's right to cancel. This and related UCCC notice language would misinform buyers as to cancellation requirements of the Rule and are in conflict with the Rule.

"You may cancel this agreement by mailing a notice to the seller."

This provision also misinforms the buyer of his rights, because under the Rule a buyer may cancel by delivering a copy of the cancellation form provided (or any other written notice) or by sending a telegram—in addition to mailing a notice to the seller. These methods of cancelling are specifically mentioned in the Rule's Notice of Cancellation form. In the Commission's view, this and other language to the same effect in the UCCC notice conflicts with the Rule.

"If you cancel, the seller may keep all or part of your down payment."

This is directly inconsistent with the parts of the Rule which

> provide, and which inform the consumer, that he may cancel "without any penalty or obligation." In addition, the Rule specifically provides that portions of State laws which permit the imposition of a cancellation fee are "among those which will be considered directly inconsistent."

As a result, all provisions of the *body* of the UCCC form of notice are preempted by the requirements of the Commission's Rule.

If a State should so require, a seller may include in his contracts the State notice in addition to the Commission's summary notice, so long as all State language which is inconsistent with the Rule is stricken in transactions covered by the Rule. The Commission emphasizes that its application of the preemptive effect of the Rule is limited to the UCCC example presented. Notice language appearing in other State legislation which is consistent with the Rule is not preempted by the Rule.

Inconsistent UCCC notice language may be stricken either by being lined through, or, if satisfactory to the State in question, by being eliminated from contracts covered by the Rule.

In appropriate situations a composite notice, if it satisfies the requirements of State law, can also be given. The Commission would not object to a composite which in a manner consistent with the Rule notifies the buyer of all of the information contained in its summary notice, including the reference to the attached Notice of Cancellation form. Such a composite must also comply with the Rule's summary notice requirements as to placement and size of type in the notice.

In the interest of uniformity, the Commission encourages UCCC States to determine that the Rule's summary notice would satisfy their State notice requirements. The Commission also recommends (where greater State rights to consumers are not contemplated) that States amend their cooling-off statutes either to provide that the Commission's form of notice may be given in lieu of the State notice or to provide that it become the mandatory State language.

In question (2), you asked:

> Do the Commission's right of cancellation forms provide as much as or more protection than the forms required in state statutes following the language and requirements of the UCCC?

Because the UCCC provisions misinform buyers of rights granted by the Rule, it is the Commission's view that all portions of the body of the UCCC notice are preempted. To the extent that language required by the UCCC notice misinforms buyers of rights granted by the Rule, the UCCC form of notice provides less protection than that provided by the Rule.

In question (3), you asked:

> If the answer to question two is yes, may companies assume that use of the FTC notice will be deemed to exempt companies involved in interstate commerce from state statutory requirements as to the form of notice required by the UCCC?

Since as stated in answer to question 1, the Commission's Rule preempts the body of the notice requirement contained in state statutes following the UCCC, companies involved in transactions in or affecting commerce in those States must comply with the Rule's provision, and if they include the State's notice the body of it must be lined through.

In question (4), you asked:

> 4. If the answer to question two is not yes:
> a. Must a company prepare a composite notice combining the appropriate provisions of both the state law and the FTC rule; or
> b. Will the FTC prepare a model composite of the state law and federal rule which the industry must follow; or
> c. Do the states have the authority to prepare the composite which the industry must follow?

The Commission's answer to question two also responds to question 4. For guidance in other situations, the Commission notes that a "seller" within the scope of the Rule is not required to prepare a composite, although a composite notice is one way in which both Commission and State requirements might be satisfied. A model composite has not been prepared because of the differences in the notice requirements of the various States and because language acceptable to States which also meets the requirements of the Commission's Rule will be acceptable for Commission purposes as well. The Commission is willing to accept a composite notice prepared by a State which meets the criteria indicated above.

In questions (5) and (6), you asked:

> 5. In the event that a state with an existing cooling-off statute refuses to recognize the preemptive effect of the FTC's trade regulation rule, will a company, despite good faith efforts to reconcile the differences between the federal rule and state statute, be prosecuted under the Commission's rule for printing forms in compliance with the state law rather than the FTC rule if such state law is inconsistent with the Rule?
>
> 6. If the answer to question five is yes, will the remedies sought include providing consumers with the opportunity to rescind sales contracts and to receive restitution?

In the absence of a specific factual situation, the Commission cannot define a course of action it might pursue. In general, companies which violate the Rule are subject to Commission action, including administrative proceedings and proceedings instituted under Sections 205 and

206 of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, when appropriate and in the public interest.

In question (7), you asked:

> * * * May DSA advise its member companies that the change in the fourth paragraph [of the Rule's Notice of Cancellation] was merely a technical correction, that the prior version [enacted by the State of Texas] is not stronger than the final version, and that Texas provision does not preempt the rule?

The Commission's notice of change in the Rule, 38 F.R. 30104 (Nov. 1, 1973), stated that the change was "merely * * * editorial and * * * not intended to create, alter, or revoke any substantive rights or duties provided by the original language of the rule."

The Commission, therefore, finds that the Texas provision is consistent with the current provision in the Rule, and that either it or the current provision in the Rule will be acceptable to the Commission as to sellers subject to the Rule. This editorial change was made to clarify the buyer's obligations, however, and the Commission therefore recommends that States incorporate the current language in the Rule in any required notice of cancellation forms.

In questions (8) and (9), you referred to an analysis of the conflict between the Oklahoma cooling-off statute (an adaptation of the UCCC), and the Commission's Rule. The analysis was prepared by James A. McCaffrey, Deputy Administrator of the Oklahoma Department of Consumer Affairs. In this connection, you asked:

> 8. May DSA inform its members that the FTC accepts the interpretation contained in Mr. McCaffrey's analysis?
>
> 9. May DSA advise our member companies that this composite form is approved by the FTC for use in Oklahoma?

The Commission observes that Mr. McCaffrey, in his proposed contract notice composite, has provided an example of state required language which, though apparently in conflict with the Rule, could be presented so as to avoid conflict with its requirements. Rather than deleting "at your residence" from the UCCC notice, he has added the disjunctive "or at a place other than the place of business of the seller." This language, taken from the definitional section of the Rule, serves to explain types of transactions covered without necessitating the striking of state language.

However, in Mr. McCaffrey's proposed composite form of contract notice, buyers would be misinformed that a need exists to provide sellers with a reason for cancellation in transactions subject to the Commission's Rule and that "mailing" constitutes the only permissible

means of cancellation. The Commission, therefore, is unable to approve Mr. McCaffrey's proposed composite contract notice.

Since the UCCC does not require a Notice of Cancellation form, the need under Oklahoma law for any such composite is not apparent. However, should State law make provision for a composite form which was consistent with the requirements of the Commission's Rule, the Commission would view such a notice as acceptable. The Commission would of course take the same view should consistent State notice requirements also reference rights according buyers greater protection than those conferred by the Rule.

By direction of the Commission.

Correspondence Relating to Request

November 6, 1975

Dear Mr. Chairman:

This is in response to your inquiry of October 28, 1975 relating to the petition filed by the Direct Selling Association concerning the Commission's "cooling-off" rule for door-to-door sales and also a request by the Association for an advisory opinion.

The Direct Selling Association's petition of July 26, 1974 was considered by the Commission in March, 1975. The petition was for amendment of the Cooling-Off Rule to provide an exemption from the Rule's notice requirements for those sellers which give clear and conspicuous notice of an unconditional money-back guarantee. By letter dated March 20, 1975, a copy of which is enclosed, the Commission notified the Direct Selling Association of its determination that the petition did not warrant commencement of a proceeding to amend the Rule.

The request for an advisory opinion from the Direct Selling Association and other generally related questions concerning the preemptive effect of the Commission's Cooling-Off Rule, are collectively under study by the staff. The Commission considered the first of such requests in May of this year. It issued an advisory opinion to Mr. Melville W. Feldman relating to the preemptive effect of the Commission's Rule on May 20, 1975 [85 F.T.C. 1215]. I am advised that the several additional questions raised by the Direct Selling Association will be presented to the Commission in the near future. As I am sure you appreciate, questions involving preemption raise difficult and complex issues.

Your continued interest in the work of the Commission is greatly appreciated. I hope that you will not hesitate to call on me if I can be of further assistance.

Sincerely,
/s/ Lewis A. Engman
Chairman

October 28, 1975

Dear Chairman Engman:

On January 30, 1975 I wrote to you concerning the failure of the Commission to respond to the petition filed by the Direct Selling Association on July 26, 1974 with regard to the trade regulation rule providing a cooling off period for door-to-door sales.

I understand that as of this date the Direct Selling Association has still not received a grant of its request or a denial. As you know, the Committee has before it in S. 642 a provision which would require the Commission to respond within 120 days after the submission of a petition. It is just this kind of situation which inclines us to act affirmatively on a time limit proposal.

I would appreciate hearing from you on the Commission's response to either the petition or the request for an advisory opinion filed by the Direct Selling Association in this matter.

Sincerely yours,

/s/ WARREN G. MAGNUSON
Chairman

January 30, 1975

Dear Mr. Chairman:

More than six months ago the Direct Selling Association petitioned the Federal Trade Commission to amend the trade regulation rule providing a cooling-off period for door-to-door sales. I am not aware of whether or not the petition has any merit, since I have not even reviewed it. However, I am concerned that in the six-month period the only response which the Direct Selling Association has received was a somewhat pro forma response from the Commission Secretary indicating that the petition was being reviewed.

It would appear since many firms are awaiting the Commission's decision that matters of this sort should be expedited or at least a timetable provided to petitioners so that they could make plans accordingly. I hope that you will keep me informed of the progress of the Commission in considering this petition.

Sincerely yours,

/s/ WARREN G. MAGNUSON
Chairman

January 27, 1976

Dear Neil:

I regret the delay in processing your request for an advisory opinion regarding preemption and the Commission's trade regulation rule governing door-to-door sales. As you know, preemption involves some very difficult questions, and these questions are under consideration by the staff. I hope that the Commission will be able to advise you in the near future.

Sincerely yours,
/s/ Robert J. Lewis
General Counsel

January 15, 1976

Dear Bob:

Thanks for your thoughtful letter. It was especially appreciated since it does, at times, get lonely out here in the cold.

By the way, do you have any idea about when I'm going to get a response to my preemption advisory opinion request? (Copy enclosed along with two letters to the Commission from Senator Magnuson.) I think a response might help to clarify the issue for all concerned.

Again, thanks for your note.

Sincerely,

Neil H. Offen
Senior Vice President and

Legal Counsel

January 14, 1975

Dear Mr. Collier:

On June 6, 1974, this organization filed a request for an Advisory Opinion with the Commission (copy enclosed). To date, we have not received a response to our request. May I please have a status report so that I can advise the scores of corporations awaiting the Commission's assistance.

Thank you.

Very truly yours,

/s/ Neil H. Offen
Vice President and Legal Counsel

September 23, 1974

Dear Mr. Offen:

This will acknowledge your letter of September 19 seeking information as to the status of the Direct Selling Association's request for an advisory opinion.

The opinion in question is in process of preparation and you will be notified of the Commission's disposition of it as soon as possible.

Very truly yours,

/s/ Charles A. Tobin,
Secretary

September 19, 1974

Dear Secretary Tobin:

On June 6, 1974, the Direct Selling Association (DSA) filed a request for an advisory opinion relating to the preemptive effect of the Commission's Trade Regulation Rule Providing a Cooling-Off Period for Door-to-Door Sales (16 CFR 429.1). On July 26, 1974, DSA filed a petition to amend the above-cited rule to provide alternative notice compliance for companies providing a money-back guarantee. To date DSA has not received a response to either our advisory opinion request or to our petition to amend the rule.

Since the rule is in effect, the need for Commission response is immediate. DSA therefore requests that the Commission inform us as to when we may expect to receive the advisory opinion requested and the reaction of the Commission to our petition to amend the rule.

Very truly yours,

/s/ Neil H. Offen
Vice President and Legal Counsel

Supplement to Letter of Request

June 7, 1974

Dear Secretary Tobin:

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This letter is to supplement the request of the Direct Selling Association for an Advisory Opinion concerning the Commission's cooling-off trade regulation rule (16 CFR 429.1). In question seven, DSA mistakenly attributed statements by a representative of the Texas state consumer credit agency to that of the office of the Texas Attorney General. Please note this correction. Please also note that a representative of the Texas Attorney General has publicly stated that, if called to testify in an action brought in Texas against a company using the FTC rule notice of cancellation form, he would conclude that the rule is not in compliance with Texas law.

Thank you for your consideration.

Very truly yours,

/s/ W. Alan Luce
Attorney and Director/State and Local Affairs

Letter of Request

June 6, 1974

Dear Secretary Tobin:

This letter is submitted on behalf of the Direct Selling Association (DSA) to request an Advisory Opinion on specific matters relating to the Commission's trade regulation rule entitled "Cooling-Off Period For Door-To-Door Sales" (16 CFR 429.1). DSA is the national trade association representing the leading manufacturers, distributors and retailers of products sold in the home.

DSA has been informed by Commission staff that the state of Oklahoma has raised questions concerning the preemptive effect of the rule on their respective cooling-off statute and the right to interpret and compare provisions contained therein. Prior to this time the industry had assumed that a state law with weaker "Notice of Cancellation" provisions was totally preempted as to such notice provisions by the trade regulation rule. The validity of this assumption is now in question.

Specifically, Mr. James A. McCaffrey, deputy administrator of the Oklahoma Department of Consumer Affairs, stated in a memorandum entitled "Analysis of The Uniform Consumer Credit Code Buyer's Right To Cancel and The Federal Trade Commission Rule on Door-To-Door Sales" which is in the possession of Commission staff, the following:

> Questions have arisen as to the appropriate procedure to be followed by sellers in Oklahoma subject to the jurisdiction of the code and the rule. The rule will not be construed to annul or exempt any seller from complying with the code, except to the extent the code is directly inconsistent with the rule. Further, if any provisions of the code are more restrictive than the rule, then those code provisions must be followed. Accordingly, sellers subject to the code and the rule must accord the consumer the greater of the benefits provided by the code or the rule. Therefore, until such time as the Oklahoma legislature should amend the code with respect to home sales, all seller-creditors must comply with those provisions of the code which are not directly inconsistent with the rule. Such compliance cannot be achieved by a seller if the complete buyer's right to cancel provided in the code is given along with the complete notice of cancellation provided in the rule. It is suggested that one "composite" notice be given to a buyer; one which provides the most favorable benefits to the consumer and is not directly inconsistent with the rule. (Complete statement enclosed.)

DSA has also been informed that various comments and questions reflecting varying positions and interpretations have been received by the FTC staff from state government representatives, including those from Colorado, Connecticut, Indiana, Kentucky, Minnesota, Texas and Wisconsin. Due to the element of uncertainty as to what notice of cancellation forms are acceptable to whom and where, the negotiation of commercial paper in the direct selling area has become more difficult and, reportedly in some instances, unavailable. It should also be noted that there exists a serious paper shortage making it difficult to easily obtain or print forms that comply with the FTC rule and/or state statutory requirements, thereby complicating bona fide compliance attempts. Accordingly, since DSA intends to provide up to date guidance to its members in preparing notice of cancellation forms, the following questions are submitted to the Commission for your advice and guidance:

1. Is the Uniform Consumer Credit Code (UCCC) notice of cancellation form inconsistent with the FTC notice forms?
2. Do the Commission's right of cancellation forms provide as much as or more protection than the forms required in state statutes following the language and requirements of the UCCC?
3. If the answer to question two is yes, may companies assume that use of the FTC notices will be deemed to exempt companies involved in interstate commerce from state statutory requirements as to the form of notice required by the UCCC?
4. If the answer to question two is not yes;
    a. Must a company prepare a composite notice combining the appropriate provisions of both the state law and the FTC rule; or

b. Will the FTC prepare a model composite of the state law and federal rule which the industry must follow; or

c. Do the states have the authority to prepare the composite from which the industry must follow?

5. In the event that a state with an existing cooling-off statute refuses to recognize the preemptive effect of the FTC's trade regulation rule, will a company, despite good faith efforts to reconcile the differences between the federal rule and the state statute, be prosecuted under the Commission's rule for printing forms in compliance with the state law rather than the FTC rule if such state law is inconsistent with the rule?

6. If the answer to question five is yes, will the remedies sought include providing consumers with the opportunity to rescind sales contracts and to receive restitution?

The following questions relate to areas generally covered above but are directed at other specific dilemmas facing this association and its members for which DSA needs the Commission's guidance:

7. Please note the reported position of the office of the Attorney General of Texas which in a communication to the Commission staff contends that Texas law (which tracked the rule's notice language prior to the Commission's November 1, 1973, change of paragraph four of the "Notice of Cancellation") is stronger than the final FTC language and must therefore be used in Texas in place of the rule language. May DSA advise its member companies that the change in the fourth paragraph was merely a technical correction, that the prior version is not stronger than the final version, and that Texas provision does not preempt the rule?

8. Attached is the entire analysis by Mr. McCaffrey, previously alluded to above, in which the state of Oklahoma contends that certain portions of its code provide more protection to Oklahoma consumers than the Federal rule. May DSA inform its members that the FTC accepts the interpretation contained in Mr. McCaffrey's analysis?

9. Also contained in the analysis is a composite notice of cancellation form submitted to the Commission by Oklahoma. May DSA advise our member companies that this composite form is approved by the FTC for use in Oklahoma?

Since we intend to advise our companies as to the matters touched upon above as quickly as possible, DSA respectfully requests that the Commission issue an Advisory Opinion as soon as possible to help minimize potential legal and economic liabilities that DSA and other

direct selling industry companies may face, as well as to help insure that consumers are provided the substantive protections sought by the rule and various state laws. Thank you.

Respectfully submitted,

/s/ Neil H. Offen
Vice President and Legal Counsel

Enclosure to Letter of Request

STATE OF OKLAHOMA

DEPARTMENT OF CONSUMER AFFAIRS

3033 North Walnut Avenue

Oklahoma City, Oklahoma 73105

April 17, 1974

In re: Federal Trade Commission Rule on Door to Door Sales.

This will acknowledge receipt of your letter of March 22, 1974, concerning the above rule.

We have received and studied a copy of the *Federal Trade Commission Trade Regulation Including A Statement of Its Basis and Purpose* with regard to its impact on the Uniform Consumer Credit Code, hereinafter referred to as "Code". A brief study of such FTC publication reveals irreconcilable conflicts with certain provisions of the Code. Such conflicts have been discussed at length with Ms. Anne Fortney, Attorney, Bureau of Consumer Protection in Washington. Her responsibility is to coordinate resolutions, if any, between state law and the Regulation.

Attached hereto is the analysis made by the Department concerning the Code "Buyer's Right to Cancel" and the FTC Rule. We have furnished the FTC with the same analysis with a request for their observations. If we receive indications of substantial difficulties from the view of the staffers of the FTC, we will notify you as soon as possible. Further, we intend to send this same analysis to each member of industry requesting our interpretation of the FTC Rule.

Sincerely,

/s/ James A. McCaffrey,
Deputy Administrator

ANALYSIS OF THE UNIFORM CONSUMER CREDIT CODE BUYER'S RIGHT TO CANCEL AND THE FEDERAL TRADE COMMISSION RULE ON DOOR TO DOOR SALES

Prepared by James A. McCaffrey, Deputy Administrator of the Oklahoma Department of Consumer Affairs

I. Observations in general:

The Oklahoma Consumer Credit Code, hereinafter referred to as "Code", cited as Title 14A O. S. §§2-501 through 2-505, provides for a "Buyer's Right to Cancel" to be given in a home solicitation [1] sale of a consumer credit sale.[2] The Federal Trade Commission has promulgated a trade regulation rule concerning a "Cooling-Off Period for Door-To-Door Sales", hereinafter referred to as the "Rule".[3] Questions have arisen as to the appropriate procedure to be followed by sellers[4] in Oklahoma subject to the jurisdiction[5] of the Code and the Rule. The Rule will not be construed to annul or exempt any seller from complying with the Code, except to the extent the Code is directly inconsistent with the Rule.[6] Further, if any provisions of the Code are *more* restrictive than the Rule, then those Code provisions must be followed.[7] Accordingly, sellers subject to the Code and the Rule must accord the consumer the greater of the benefits provided by the Code or the Rule. Therefore, until such time as the Oklahoma Legislature should amend the Code with respect to home sales, all seller-creditors must comply with those provisions of the Code which are not directly inconsistent with the Rule. Such compliance cannot be achieved by a seller if the complete Buyer's Right to Cancel provided in the Code is given along with the complete notice of cancellation provided in the Rule. It is suggested that one "composite" notice be given to the buyer; one which provides the most favorable benefits to the consumer and is not directly inconsistent with the Rule. Any state law will be considered to be directly inconsistent with the Rule if such law does not accord the buyer, with respect to the particular transaction, a right to cancel[8] at least as similar as the Rule, or which allows for the imposition of any fee or penalty upon cancellation[9] or which does not require the seller to give the customer a separate[10] form, written[11] and oral[12] of a "notice of cancellation" as least similar to the form and manner required in the Rule.[13]

II. Observations as to Form:

§429.1(a) and (b) of the Rule set forth the various forms of the

required summary notice and notice of cancellation. It provides:[14]

In connection with any door-to-door sale, it constitutes an unfair and deceptive act or practice for any seller to:

(a) Fail to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution,[15] which is in the same language,[16] *e.g.*, Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer[17] or on the front page of the receipt if a contract is not used and in bold face type of a minimum size of 10 points,[18] a statement in substantially the following form:

"YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT."[19]

(b) Fail to furnish each buyer, at the time he signs the door-to-door sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate,[20] captioned "NOTICE OF CANCELLATION," which shall be attached to the contract or receipt and easily detachable,[21] and which shall contain in ten point bold face type the following information and statement in the same language, *e.g.*, Spanish, as that used in the contract:

"NOTICE OF CANCELLATION

(enter date of transaction)
(Date)

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT[22] EXECUTED BY YOU WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE,[23] AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELED.

IF YOU CANCEL, YOU MUST MAKE AVAILABLE TO THE SELLER AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED,[24] ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE; OR YOU MAY IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE SELLER REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE SELLER'S EXPENSE AND RISK.

IF YOU DO MAKE THE GOODS AVAILABLE TO THE SELLER AND THE SELLER DOES NOT PICK THEM UP WITHIN 20 DAYS[25] OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION. IF YOU FAIL TO

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MAKE THE GOODS AVAILABLE TO THE SELLER, OR IF YOU AGREE TO RETURN THE GOODS TO THE SELLER AND FAIL TO DO SO, THEN YOU REMAIN LIABLE FOR PERFORMANCE OF ALL OBLIGATIONS UNDER THE CONTRACT.[26]

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO

(Name of Seller), AT *(Address of seller's place of business)* NOT LATER THAN MIDNIGHT OF *(date)*

I HEREBY CANCEL THIS TRANSACTION.

____

(Date)

(Buyer's signature)"

III. Observations as to substantive differences:

Other provisions of the Rule provide:

(c) Fail, before furnishing copies of the "Notice Cancellation" to the buyer, to complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the transaction,[27] and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation.[28]

(d) Include in any door-to-door contract or receipt any confession of judgement[29] or any waiver of any of the rights to which the buyer is entitled[30] under this Rule including specifically his right to cancel the sale in accordance with the provisions of this Rule.

(e) Fail to inform each buyer orally, at the time he signs the contract or purchases the goods or services, of his right to cancel.[31]

(f) Misrepresent in any manner the buyer's right to cancel.[32]

(g) Fail or refuse to honor any valid notice of cancellation by a buyer and within 10 business days after the receipt of such notice, to (i) refund all payments made under the contract or sale; (ii) return any goods or property traded in, in substantially as good condition as when received by the seller;[33] (iii) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale[34] and take any action necessary or appropriate to terminate promptly any security interest created in the transaction.[35]

(h) Negotiate, transfer, sell, or assign any note or other evidence of indebtedness to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased.[36]

(i) Fail, within 10 business days of receipt of the buyer's notice of cancellation, to notify him whether the seller intends to reposses or to abandon any shipped or delivered goods.[37]

(NOTE 1: *Definitions.* For the purposes of this Rule the following definitions shall apply:

(a) *Door-to-Door Sale* — A sale, lease, or rental[38] of consumer goods or services with a purchase price of $25.00[39] or more, whether under single or multiple contracts, in which the seller or his representative personally solicits the sale, including those in response to or following an invitation by the buyer, and the buyer's agreement or offer to purchase is made at a place other than the place of business of the seller.[41] The term "door-to-door sale" does not include a transaction:

(1) made pursuant to prior negotiations in the course of a visit by the buyer to a retail business establishment having a fixed permanent location where the goods are exhibited or the services are offered for sale on a continuing basis;[42] or

(2) in which the consumer is accorded the right of recision by the provisions of the Consumer Credit Protection Act (15 U.S.C. §1635) or regulations issued pursuant thereto;[43] or

(3) in which the buyer has initiated the contract and the goods or services are needed to meet a bona fide immediate personal emergency of the buyer, and the buyer furnishes the seller with a separate dated and signed personal statement in the buyer's handwriting describing the situation requiring immediate remedy and expressly acknowledging and waiving the right to cancel the sale within three business days;[44] or

(4) conducted and consummated entirely by mail or telephone; and without any other contact between the buyer and the seller or its representative prior to delivery of the goods or performance of the services;[45] or

(5) in which the buyer has initiated the contact and specifically requested the seller to visit his home for the purpose of repairing or performing maintenance upon the buyer's personal property. If in the course of such a visit, the seller sells the buyer the right to receive additional services or goods other than replacement parts necessarily used in performing the maintenance or in making the repairs, the sale of those additional goods or services would not fall within this exclusion;[46]

(6) pertaining to the sale or rental of real property,[47] to the sale of insurance[48] or to the sale of securities or commodities by a broker-dealer registered with the Securities and Exchange Commission.[49]

(b) *Consumer Goods or Services* — Goods or services purchased, leased, or rented primarily for personal family, or household purposes, including courses of instruction or training regardless of the purpose for which they are taken.[50]

(c) *Seller* — Any person, partnership, corporation, or association engaged in the door-to-door sale of consumer goods or services.[51]

(d) *Place of Business* — The main or permanent branch office or local address of a seller.[52]

(e) *Purchase Price* — The total price paid or to be paid for the consumer goods or services, including all interest and service charges,[53]

(f) *Business Day* — Any calendar day except Sunday, or the following business holidays; New Year's Day, Washington's Birthday, Memorial Day, Independence

Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.)[54]

* * * * * * *

IV. Suggestion as to form:

Based upon the previous analysis and the recognition of the substantive differences between the Code and the Rule, we suggest that the following forms may be considered to be compatible with the Code, the Rule and the appropriate "more favorable" provisions:

A. In immediate proxmity to the space reserved in the contract for the signature of the buyers and in boldface type of at least 10 points, the following:

BUYER'S RIGHT TO CANCEL

IF THIS AGREEMENT WAS SOLICITED AT YOUR RESIDENCE OR AT A PLACE OTHER THAN THE PLACE OF BUSINESS OF THE SELLER AND YOU DO NOT WANT THE GOODS OR SERVICES, YOU, THE BUYER MAY CANCEL THIS TRANSACTION BY MAILING A NOTICE TO THE SELLER AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER YOU SIGN THIS TRANSACTION. THE NOTICE MUST BE MAILED TO:
(name and address of the seller)

SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.

B. Attached to the contract, easily detachable and in boldface type of at least 10 points, the following:

NOTICE OF CANCELLATION

(Enter date of transaction)
(Date)

YOU MAY CANCEL THIS TRANSACTION WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE DATE YOU SIGNED THIS AGREEMENT.

IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY INSTRUMENT EVIDENCING THE OBLIGATION EXECUTED BY YOU WILL BE RETURNED WITHIN 10 BUSINESS DAYS AFTER THE CANCELLATION, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELED.

IF YOU CANCEL, YOU MUST MAKE AVAILABLE TO THE SELLER AT YOUR RESIDENCE ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALES; HOWEVER, YOU MUST TAKE REASONABLE CARE OF THE GOODS IN YOUR POSSESSION BEFORE CANCELLATION AND FOR A REASONABLE TIME THEREAFTER; OR YOU MAY IF YOU WISH, COMPLY WITH THE INSTRUC-

TIONS OF THE SELLER REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE SELLER'S EXPENSE AND RISK.

IF YOU DO MAKE THE GOODS AVAILABLE TO THE SELLER AND THE SELLER DOES NOT PICK UP THE GOODS WITHIN 20 DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION. IF YOU FAIL TO MAKE THE GOODS AVAILABLE TO THE SELLER, OR IF YOU AGREE TO RETURN THE GOODS TO THE SELLER AND FAIL TO DO SO, THEN YOU REMAIN LIABLE FOR ALL OBLIGATIONS UNDER THE CONTRACT.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM TO

____

(NAME OF SELLER)

AT

____

(ADDRESS OF SELLER'S PLACE OF BUSINESS)

NOT LATER THAN MIDNIGHT OF

____

(DATE)

I HEREBY CANCEL THIS TRANSACTION.

________ ____________________

(DATE)

(BUYER'S SIGNATURE)

1463

Trade Regulation Rule Concerning Mail Order Merchandise recognizes that delivery time is not entirely within the control of sellers and therefore mandates performance in terms of shipping time. (File No. 763 7006, released June 15, 1976)

Opinion Letter

May 24, 1976

Dear Messrs. Daly and Bauer:

This is in response to your recent letter expressing concern that delivery delays beyond the control of your organization's members may have unfortunate consequences in light of the Commission's recently promulgated trade regulation rule concerning mail order merchandise.

The trade regulation rule recognizes that delivery time is not entirely within the control of sellers and therefore mandates performance in terms of shipping time. Therefore, postponement of enforcement of the rule is not warranted since a seller will be in compliance with the rule if merchandise is shipped as required. The fact that a parcel encounters unanticipated delays in delivery will not constitute a violation of the rule if a seller indeed ships as required.

The Commission is aware that complaint letters generally report a nondelivery or late delivery. The individual consumer is not usually in a position to know when a package is shipped. It should be noted, however, that a large portion of the complaint letters received report not only a failure to deliver or late delivery, but an inability to obtain an appropriate response from the seller involved.

In conclusion, the Commission recognizes that delays beyond the control of the shipper may result in complaints alleging apparent noncompliance with the trade regulation rule. Preenforcement investigation, however, would reveal whether these complaints reflect a violation of the rule or merely malfunctions of the delivery system.

By direction of the Commission.

Letter of Request

April 9, 1976

Dear Chairman Collier:

As you are no doubt aware, rather disturbing problems have come to the Nation's attention in recent weeks concerning problems with the destruction of mail order parcels by machinery in some of the U.S.P.S. various new Bulk Mail Centers around the country. Even now it is

impossible to determine how widespread the problem is, but Congress is examining the matter. Enclosed is the 12 page Report of the Subcommittee on Postal Facilities, Mail and Labor Management of the Committee on Post Office and Civil Service of the House of Representatives indicating what their initial investigation has shown.

As the trade association representing some 1600 mail order companies across the country we are always concerned when any number of parcels—no matter how small a percentage they may represent—do not reach the consumer. This worry takes on new proportions in light of your recently promulgated Trade Regulation Rule on the delayed delivery of mail order merchandise. We urge the Commission to consider, for the present, suspending the enforcement of the rule until the United States Postal Service corrects this problem which we are sure they will do in a reasonable amount of time.

If a suspension is not possible, we would then urge the Commission to consider that an unknown proportion of any complaints they may now be receiving on delayed delivery could be attributed to parcels being damaged in the bulk mail center and thus not being forwarded to the consumer. We would assume the Commission would seek to determine how significant a factor this was before proceeding to move against any company on the basis of delayed delivery complaints.

Please inform us of your intentions in this regard.

Very truly yours,

/s/ John Jay Daly
Senior Vice President

/s/ Gary L. Bauer
Ass't Dir. – Gov't Affairs

Clarification of definition of "business arrangement" in Trade Regulation Rule Concerning Preservation of Consumers' Claims and Defense. (File No. 763 7007, released June 18, 1976)

Opinion Letter

May 28, 1976

Dear Mr. Pohanka:

This is in response to your letter of May 21, 1976 requesting an Advisory Opinion.

In your letter you asked the Commission to clarify whether the ongoing procedure between a seller and lender in order to perfect a lien constitutes a "business arrangement" for purposes of the Trade Regulation Rule, "Preservation of Consumers' Claims and Defenses."

The Commission, in requiring the notice in certain direct loans, was intending to reach those relationships where the seller is arranging credit, through either an established pattern of referrals or an affiliation.

The perfection of a security interest is a pro forma procedure performed by a seller whether he arranges credit for the consumer or the consumer arranges credit for himself. When a seller is helping a creditor perfect his security interest, whether by a recording of the lien on the title or any other method, this activity alone does not constitute arranging credit.

The Commission does not regard such activity, absent an established pattern of referrals or some other affiliation with the creditor, to be a "business arrangement" or form of creditor affiliation within the meaning of the Rule. Nor would the extent or frequency of such activity, standing alone, bring the conduct within the definition of "purchase money loan" under the Rule.

By direction of the Commission.

Letter of Request

May 21, 1976

Dear Mr. Tobin:

This is a request for a formal advisory opinion concerning the applicability of the Trade Regulation Rule concerning Preservation of Consumers Claims and Defenses, effective May 14, 1976.

This opinion is desperately needed by automobile dealers located throughout the United States, particularly in the State of Texas because that state has a little "FTC Statue" which imposes heavy fines on dealers and imposes civil liability for violations of FTC Rules. In

other words, a Staff Opinion will not suffice and a formal opinion of the Commission is necessary.

The single question posed in this request is as follows:

Under the Certificate of Title Act in Texas, the seller of a motor vehicle is required to transfer the certificate of title to the purchaser. If the financing of the purchase of the vehicle involves a security interest, the lender, in order to perfect his lien, must record that lien on the certificate of title. It is not a legal duty of the seller or the purchaser to secure the recordation of the lien. By mutual understanding between dealers and lenders, it is a customary and almost universal practice that the dealer communicates with the creditor and secures "drafting information". This information always includes a request by the creditor that the dealer make application for certificate of title, note the creditor's lien thereon, and draft on the creditor for the purchase price. This voluntary cooperation between seller and creditor inures to the mutual benefit of seller and creditor in that it enables the seller to receive his purchase money in an expeditious manner and provides the creditor with the security of his lien. This is an ongoing procedure which may be repeated many times during the course of a single day between one dealer and one creditor who have no other business connection.

Based on the above fact pattern, we request an advisory opinion as to whether such procedure is a "business arrangement" or any type of "affiliation" within the meaning of the Rule.

Sincerely yours,
/s/ John J. Pohanka
President

Eligibility of former students for partial tuition refunds. (Docket No. 8953, 86 F.T.C. 860, released July 9, 1976)

Opinion Letter

June 21, 1976

Gentlemen:

This is to advise you that the Commission has given consideration to your submission under cover of your letter of April 26, 1976, of questionnaires which you have sent out pursuant to the order in the above referenced matter and the determinations you have made with respect thereto regarding eligibility for tuition refund as prescribed by said order. In accordance with said order you have submitted said questionnaires for review by the Commission and an advisory opinion as prescribed in Section 3.61(d) of the Commission's Rule of Practice.

Except as noted below, the Commission has determined that your submission represents compliance with the applicable order provisions regarding eligibility of former Lear Siegler students for partial tuition refunds.

One questionnaire (Appendix 1) was determined by you to be not payable because, under item 7, the former student listed as his reason for not seeking a job in the computer field, the unavailability of jobs in the state where he lived. The Commission is of the opinion that this represents a legitimate excuse for not seeking employment because it is related to job demand as specifically provided in Part III, paragraph 5(d)(2) of the Commission's order. Accordingly the Commission is of the opinion that said student's claim for partial tuition should be honored.

Three questionnaires (Appendices 2-4) were determined to be not payable because the former students failed to provide the information requested under item 4, the month and year in which they entered the school. Such information is contained in the computer printout which was furnished by you pursuant to Part III, paragraph 1 of the order, under the cover of letter from your counsel dated October 31, 1975. Information contained in said printout indicates that the entry dates for both of the students represented by the two questionnaires were within the eligibility period prescribed in the order. Accordingly, the Commission is of the opinion that the two students should be included in the refund for the amount of the tuition which they have indicated they paid.

Although the order does not specifically provide for an advisory opinion pertaining to the amount of money which is to form the basis for computing pro rata refunds, the Commission has found several questionnaires in which it feels that your determination of the amount

of tuition paid by the student was in error. In four of the questionnaires (Appendices 5 through 8) the Commission has noted that monies indicated as downpayments were not included as tuition paid by the student. Since the order does not specifically exclude downpayments from the amount which is refundable, the Commission is of the opinion that such money should be included in the basis for making the refund computation.

Finally in four additional questionnaires, (Appendices 9-12) the Commission has noted that obvious errors were made by the students in responding to item no. 15. By reviewing the entire questionnaire rather than focusing on item 15, it becomes clear that the amount of money entered thereunder was in fact a loan rather than a gift and therefore should be included in the basis used for computing tuition refunds.

It is the opinion of the Commission, based upon the information furnished that with the twelve exceptions noted hereinabove, your eligibility determinations under Part III, paragraph 5 of the Commission's order represent compliance with that provision to the extent that your obligations under other order provisions have been fulfilled. This opinion is not intended to apply to any other duties or obligations imposed upon you by the order other than your responsibility under Part III to make initial determinations as to who constitutes eligible class members for purposes of the required tuition refunds.

The Commission has also reviewed the cases of three individuals whose responses to the questionnaires were received too late to be considered with the others. In all three cases, the names and addresses were known prior to December 29, 1975, but due to oversights of various parties, these individuals did not receive questionnaires in a timely manner. (1) Gary Bise's name and full address was on the list of persons eligible to receive questionnaires, but he did not receive one; (2) Craig O'Neal's name and address was left off said list due to clerical error on the part of Commission staff; and (3) Richard H. Fuller, Sr.'s name and partial address was on the list of persons eligible to receive a questionnaire, but he did not receive one. Gary Bise's questionnaire (Appendix 13) and an affidavit of telephone interviews of Craig O'Neal and Richard H. Fuller, Sr. (Appendix 14) have been reviewed, and the Commission considers Bise, O'Neal and Fuller to be eligible for a partial tuition refund on the basis of the information each has provided.

The student questionnaires are being returned to you under separate cover.*

By direction of the Commission.

Letter of Request

April 26, 1976

Dear Mr. Gross:

We have today forwarded, under separate cover, all Appendix D questionnaires we have received as of the above date under Part III of the above-captioned order. We hereby request advice as to whether our determination of who is an eligible class member complies with the terms of the Order provision.

Those questionnaires of persons who we believe to be eligible are designated by a red check in the upper right-hand corner of the cover page. The amount of entitlement is noted and circled in red on page 5. In several cases, the amount of tuition claimed was in excess of the maximum tuition ever charged and was accordingly reduced and noted.

A red slash was placed through the question which made each member ineligible.

We will expect your advice and the return of all Appendix D questionnaires before June 24, 1976. We would appreciate receiving your advice as much in advance of June 24 as possible since it now appears that the thirty-day period for calculating refund, writing checks and writing notification letters is inadequate, particularly if the eligibility list is as shabby as the initial listing was.

Should further substantiating documentation be desired for any of our determinations, please contact us. To document each and every determination would be extremely burdensome and produce little benefit for the costs incurred.

Sincerely,
/s/ J. V. German, Manager
Regulatory Agency Relations

* Not reproduced herein for reasons of economy, but available for public inspection at Public Reference Branch, Room 130 of the Federal Trade Commission Building, Washington, D.C.

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