IN THE MATTER OF

KELLOGG COMPANY, ET AL.

Docket 8883. Interlocutory Order, Dec. 18, 1982

Staying the effective date of the Initial Decision until January 15, 1982.

ORDER

On November 20, 1981, the Director of the Bureau of Competition ("Director") filed a Withdrawal of Notice of Intention to Appeal. Complaint counsel had previously filed its Notice of Intention to Appeal the Administrative Law Judge's ("ALJ") initial decision in this matter and had subsequently reaffirmed its contention that the public interest would be served by Commission review of the merits as recently as October 1, 1981. Therefore, the Commission issued an Order on December 3, 1981, that required complaint counsel to provide a "Statement as to why the public interest is no longer served by full Commission review and consideration of the substantive merits of this matter."

On December 11, 1981, the Director of the Bureau of Competition filed a statement with the Commission. The Bureau Director's statement expressly acknowledged that it is "the decision of the Commission which should ultimately govern here. . . ." Director's Statement at 2. The Commission concurs with this view. Section 5 of the Federal Trade Commission Act clearly provides that a determination as to the public interest, for the purpose of invoking this Act, rests solely within the discretion of the Commission.

The Bureau Director has articulated his belief that the theory of Docket 8883 is inconsistent with the public interest because it "unavoidably extends Section 5 to condemn some forms of conduct that rationally flow from an industry's structure, and thus, to condemn the structure itself." Director's Statement, at 3. Moreover, the Director states that the relief sought by complaint counsel would be anticompetitive, potentially resulting in inefficient behavior to the ultimate detriment of the consumer. Director's Statement at 3–4.

After reviewing the record materials, the Commission has determined to permit a brief period for further comment from those complaint attorneys and economists who have conducted this litigation. Chairman Miller opposes the extension of time and would not place this matter on the Commission's docket. He believes that the views of all parties have been clearly articulated in their briefs before the ALJ and the Commission. (See separate statement.) Commissioner Clanton also is not inclined to place this matter on the

Commission's docket. However, in light of the Bureau Director's statement noting the differing views of the complaint attorneys litigating this matter, he would support the Commission's action. Respondents may also wish to provide their views on the Bureau Director's statement or on the issue of whether the Commission should place this matter on its own docket for review. Therefore, in order to afford a complete opportunity for all the parties to express their views,

It is ordered, That the parties file any statements, not to exceed thirty pages, if desired, no later than fifteen days following the date of issuance of this order.

It is further ordered, That the effective date of the Initial Decision of the ALJ in this matter is hereby stayed until January 15, 1982, pending a determination of the issues raised by the pleadings.

It is so ordered.

Chairman Miller dissented.

DISSENTING STATEMENT OF CHAIRMAN JAMES C. MILLER III

On November 3, 1981, I joined my fellow Commissioners in denying respondents' petition to affirm the Adminstrative Law Judge's (ALJ's) decison without briefs to the Commission. My reasons, as stated at that time, were as follows. First, the granting of such a petition would have been unprecedented and inconsistent with the Commission's own rules of procedure. Second, the Commission had before it, at the time, a notice of intention to file an appeal on the part of complaint counsel. To have granted respondents' petition would have required the Commission simultaneously to anticipate and resolve the merits of the then-pending appeal.

On November 23, 1981, the Director of the Bureau of Competition withdrew, without comment, the Bureau's notice of intent to appeal. In the interest of collegial inquiry, on December 3 I joined my fellow Commissioners in delaying for 15 additional days the effective date of the ALJ's decision in order to give the Commission an opportunity to hear the Bureau Director's reasons why an appeal would not be ir the public interest.

On December 11, the Bureau Director submitted his rationale t the Commission, stating, in part, that in his judgment the theory c which the case is based is not sound as a matter of law or publ policy and could not prevail in the courts.

The circumstances now facing the Commission are as follows:

(1) The ALJ, after reviewing over 20,000 pages of evidence ; argument, has concluded that, under the theory of the case arg

by complaint counsel, the evidence is not sufficient to support a finding of a law violation.

(2) The Director of the Bureau of Competition has concluded that, even if the evidence were found to be sufficient, the theory does not support a finding of a law violation.

(3) The case has occupied the Commission's attention for nearly a decade (the original complaint having been issued in April of 1972).

(4) The case already has cost the Commission and the taxpayers $5.9 million, and has cost the respondent private parties and, indirectly, consumers of their products, millions more.

(5) Further delays in resolving the case are draining and will continue to drain resources from the Commission's other important work.

With respect to the question of the Commission's need to hear further arguments before deciding whether to take the case on appeal on its own motion, I would note that the Commission has had ample time to review the Bureau Director's rationale for withdrawing the Bureau's notice of intent to appeal, has had since September 1st to review the ALJ's decision, and has had over eighteen months to review complaint counsel's and respondents' briefs filed with the ALJ.

I think it time the Commission acted to bring a merciful end to this case, whose result, if successfully prosecuted, would more likely harm consumers than help them. I cannot in good conscience vote either to bring the matter before the Commission for formal review or to extend further the period for making that decision.

Enough is enough.

IN THE MATTER OF

WORTHINGTON FORD OF ALASKA, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE MAGNUSON-MOSS WARRANTY AND FEDERAL TRADE COMMISSION ACTS

Docket C-3079. Complaint, Dec. 30, 1981—Decision, Dec. 30, 1981

This consent order requires four motor vehicle dealerships, located in various parts of the country, and their corporate officer, among other things, to make the text of written warranties readily available to prospective buyers, prior to sale; maintain up-to-date binders containing copies of written warranties in an easily accessible location; and conspicuously post signs advising consumers that all warranties are not the same and that written warranties are available for comparison upon request. Respondents are barred from improperly disclaiming, modifying or limiting the duration of implied warranties; and required to notify previous purchasers of motor vehicles whose implied warranty rights were improperly waived that they may have additional warranty protection. Each dealership must appoint an individual to be responsible for customer contacts resulting from the notice. Additionally, respondents are required to maintain specified records for a period of three years; instruct employees as to the requirements of the Magnuson-Moss Warranty Act; and institute a program of continuing surveillance to ensure compliance with the terms of the order.

Appearances

For the Commission: *Dennis D. McFeely.*

For the respondent: *Sandra S. Froman, Loeb and Loeb,* Los Angeles, Calif.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act ("Warranty Act"), the implementing Rule concerning the Availability of Written Warranty Terms ("Pre-Sale Rule") (16 C.F.R. 702 (1977)) duly promulgated on December 31, 1975 pursuant to Title I, Section 109 of the Warranty Act (15 U.S.C. 2309), and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Worthington Ford of Alaska, Inc., Worthington Chrysler-Plymouth, Inc., Worthington Ford, Inc., Cal Worthington Dodge, Inc., corporations, and Calvin Worthington, individually and as an officer of said corporations, hereinafter sometimes referred to as respondents, have

violated the provisions of said Acts, and the Pre-Sale Rule, 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. The present tense as used herein includes the past tense.

PAR. 2. Respondent Worthington Ford of Alaska, Inc. ("Ford Alaska") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Alaska with its principal office and place of business located at 1950 Gambell St., Anchorage, Alaska.

Respondent Worthington Chrysler-Plymouth, Inc. ("Chrysler-Plymouth California") is a corporation organized and existing under and by virtue of the laws of the State of California with its principal office and place of business located at 2850 Bellflower Boulevard, Long Beach, California.

Respondent Worthington Ford, Inc. ("Ford California") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its principal office located at 2850 Bellflower Boulevard, Long Beach, California.

Respondent Cal Worthington Dodge, Inc. ("Dodge Arizona") is a corporation organized and existing under and by virtue of the laws of the State of Arizona with its principal office and place of business located at 2850 Bellflower Boulevard, Long Beach, California.

Respondent Calvin Worthington is an officer of said corporations. He generally formulates, directs and controls the policies, acts and practices of said corporations, and his address is Route 3, Box 3924, Orland, California.

PAR. 3. Respondents are or have been engaged in the advertising, offering for sale, and sale of new and used automobiles and trucks to the public.

PAR. 4. In the course and conduct of their business, respondents offer for sale and sell to consumers, consumer products distributed in commerce as "consumer product," "consumer," "distributed in commerce," and "commerce," are defined by Sections 101(1), 101(3), 01(13) and 101(14), respectively, of the Warranty Act. Respondents re, therfore, suppliers as "supplier" is defined by Section 101(4) of ie Warranty Act.

PAR. 5. Respondents, in the course and conduct of their business ive offered for sale and sold automobiles and other consumer oducts manufactured after July 4, 1975 costing the consumer in cess of $15.00, many of which are warranted by the manufacturer.

Respondents are, therefore, sellers as "seller" is defined in Section 702.1(e) of the Pre-Sale Rule.

COUNT 1

PAR. 6. Alleging violation of the Warranty Act and Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One through Five are incorporated by reference herein as if fully set forth verbatim.

PAR. 7. In connection with the offering for sale and sale of automobiles and other consumer products manufactured after January 1, 1977, respondents have failed, as required by Section 702.3(a) of the Pre-Sale Rule, to make the text of the written warranties offered in connection with such products available for prospective buyers' review prior to sale.

PAR. 8. Respondents' failure to comply with the Pre-Sale Rule as described in Paragraphs Six and Seven of this complaint is a violation of the Warranty Act, and, pursuant to Section 110(b) of the Warranty Act, is an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act, as amended.

COUNT 2

PAR. 9. Alleging violation of the Warranty Act and Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One through Five are incorporated by reference herein as if fully set forth verbatim.

PAR. 10. In the course and conduct of their businesses, respondents Ford Alaska, Chrysler-Plymouth California, Ford California, and Calvin Worthington, sell service contracts to purchasers of new and used automobiles and trucks manufactured after July 4, 1975. Respondents have, with respect to those same purchasers, disclaimed all implied warranties (including the implied warranties of merchantability and fitness for a particular use) arising under state law and otherwise available to purchasers of respondents' automobile and trucks.

PAR. 11. In the course and conduct of their business, responden Dodge Arizona and Calvin Worthington sell service contracts purchasers of used automobiles and trucks manufactured after Ju 4, 1975. Respondents have, with respect to those same purchase disclaimed all implied warranties (including the implied warrant of merchantability and fitness for a particular use) arising un state law and otherwise available to purchasers of responde automobiles and trucks.

PAR. 12. Respondents' disclaimer of the implied warranties as described in Paragraphs Ten and Eleven of this complaint is a violation of Section 108 of the Warranty Act, and, pursuant to Section 110(b) of the Warranty Act, is an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Worthington Ford of Alaska, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Alaska with its principal office and place of business located at 1950 Gambell St., Anchorage, Alaska.

Respondent Worthington Chrysler-Plymouth, Inc., is a corporation organized and existing under and by virtue of the laws of the State of California with its principal office located at 2850 Bellflower Boulevard, Long Beach, California.

Respondent Worthington Ford, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the

State of California with its principal office and place of business located at 2850 Bellflower Boulevard, Long Beach, California.

Respondent Cal Worthington Dodge, Inc. is a corporation organized and existing under and by virtue of the laws of the State of Arizona with its principal office and place of business located at 2850 Bellflower Boulevard, Long Beach, California.

Respondent Calvin Worthington is an officer of said corporations. He generally formulates, directs, and controls the policies, acts and practices of said corporations, and his address is Route 3, Box 3924, Orland, California.

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

Order

I. *Definitions*

A. *Warranty Act* means the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (15 U.S.C. 2301 *et seq.*).

B. *Service contract* means such contract as is defined in Section 101 (15 U.S.C. 2301) of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (15 U.S.C. 2301 *et seq.*).

C. The definition of terms contained in Section 101 of the Warranty Act and in Rule 702 promulgated thereunder (16 C.F.R. 702.1) as presently defined and as may be amended hereafter, shall apply to the terms of this order.

D. *Trucks* means all trucks except those larger than one ton capacity.

E. *Truck parts* means all truck parts which are at any time used on trucks as defined in I.D.

II.

It is ordered, That respondents Worthington Ford of Alaska, Inc., Worthington Chrysler-Plymouth, Inc. Worthington Ford, Inc., Cal Worthington Dodge, Inc., corporations, their successors and assigns, and their officers, and Calvin Worthington, individually and as an officer of said corporations, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary division or other device, in connection with the offering for sale and sale of automobiles, trucks and truck parts, and other consumer products:

A. Shall make available for the prospective buyer's review, prior to sale, the text of each written warranty on new cars, new trucks, and other new consumer products costing the consumer more than $15, by use of one or more of the following means:

(1) clearly and conspicuously displaying the text of the written warranty in close conjunction to each warranted product; and/or

(2) maintaining a binder or series of binders which contain(s) copies of the warranties for the products sold in each showroom in which any consumer product with a written warranty is offered for sale. Such binder(s) shall be maintained in each such showroom, or in a location which provides the prospective buyer with ready access to such binder(s), and shall be prominently entitled "Warranties" or other similar title which clearly identifies the binder(s). Such binder(s) shall be indexed according to product or warrantor and shall be maintained up to date when new warranted products or models or new warranties for existing products are introduced by substituting superseding warranties and by adding new warranties as appropriate. The respondent shall either:

i. display such binder(s) in a manner reasonably calculated to elicit the prospective buyer's attention; or

ii. make the binder(s) available to prospective buyers on request, and place signs reasonably calculated to elicit the prospective buyer's attention in prominent locations in the display area advising such prospective buyers of the availability of the binder(s), including instructions for obtaining access; and/or

(3) displaying the package of any consumer product on which the text of the written warranty is disclosed, in a manner such that the warranty is clearly visible to prospective buyers at the point of sale; and/or

(4) placing in close proximity to the warranted consumer product a notice which discloses the text of the written warranty, in a manner which clearly identifies to prospective buyers the product to which the notice applies,

Unless 16 C.F.R. 702.3(a)(1) is amended, in which case respondents shall comply with said regulation as amended.

B. Shall clearly and conspicuously display the text of each written warranty provided by respondents, or any of them, for used cars or trucks in a window of each warranted vehicle; *provided*, that in the event the Federal Trade Commission issues a final Trade Regulation Rule establishing requirements which make compliance

with this paragraph legally impossible, or which requires disclosure of warranty terms on window forms, then this paragraph will be null and void.

This Section II shall not apply to media advertising.

III.

It is further ordered, That:

A. Respondents post, in a prominent location in each showroom, a sign, at least 36 inches wide by 48 inches high and reasonably calculated to elicit prospective buyers' attention, which contains a verbatim reproduction of the following language:

IMPORTANT!

NOT ALL WARRANTIES ARE THE SAME

Compare warranties before you buy

There is warranty information in this showroom

If you can't find it, ask for it

Check for these things:

What costs are covered?

What do *you* have to do?

Are all parts covered?

How long does the warranty last?

B. Any respondent who offers warranties on used automobiles or trucks, shall post, in each used vehicle sales lot, in a prominent location, in a position reasonably calculated to elicit a prospective used vehicle buyer's attention, a sign, at least 36 inches wide by 48 inches high which contains a verbatim reproduction of the following language:

IMPORTANT!

NOT ALL WARRANTIES ARE THE SAME

Compare warranties before you buy

Warranties (when given) are on the windows of used cars

If you don't see it, ask about it

Check for these things:

What costs are covered?

What do *you* have to do?

Are all parts covered?

How long does the warranty last?

C. The sign required by paragraphs III.A and III.B shall be posted for a period of not less than three years after service upon respondents of this order. The language in such sign shall be unencumbered by other written or visual matter, shall be spaced, indented and punctuated as indicated in paragraphs III.A and III.B above, and shall be printed in black against a solid white background, as follows:

1. The title of each sign shall be the work "Important" and shall be printed in capital letters in 4-inch boldface type followed by an exclamation mark.
2. The next phrase shall be printed on a separate line in capital letters and in 3-inch medium face type.
3. The next three phrases shall be printed on separate lines and in 3-inch medium face type.
4. Each succeeding phrase shall be printed on a separate line and in 2-inch medium face type.
5. The word "Important!" and each phrase shall be at least one inch from every other phrase.

IV.

It is further ordered, That respondents, in connection with the sale of automobiles, trucks and truck parts, and other consumer products in instances where respondents either make a written warranty to the consumer with respect to such consumer product, or, at the time of sale or within 90 days thereafter, enter into a service contract with the consumer which applies to such consumer product, shall:

A. Not disclaim or modify except as permitted by Section 108(b) of the Warranty Act, any implied warranty with respect to a consumer product;

B. Not limit the duration of any implied warranty with respect to a consumer product unless:

1. the written warranty is clearly and conspicuously designated a "Limited Warranty"; and

2. the limitation is for a period of time at least as long as the duration of any written warranty provided by respondents with respect to the product; and

3. the duration of the written warranty is for a reasonable duration; and

4. the limitation is conscionable, is set forth in clear and unmistakable language, and is prominently displayed on the face of the warranty.

V.

It is further ordered, That respondents shall:

A. Notify each consumer who purchased from respondents an automobile or truck manufactured after July 4, 1975, and who entered into a service contract with respondents at the time of sale, or within 90 days thereafter, or who received a warranty made by respondents and who executed either:

1. an offer to purchase which included language purporting to waive all implied warranties, or

2. a retail installment contract or security agreement which included language purporting to waive all implied warranties,

by mailing to each such consumer at the consumer's last residential address contained in the sales file folder, the notice set forth in the Appendix attached to this order. The Appendix may be sent by Worthington Ford, Inc. on behalf of Worthington Chrysler-Plymouth, Inc. and Cal Worthington Dodge, Inc. The address and telephone number of Worthington Ford of Alaska, Inc. shall be inserted in the appropriate blanks of the notices which are to be sent to customers of that dealership and the address and telephone number of Worthington Ford, Inc. shall be inserted in the appropriate blanks of the notices to be sent to all other customers of respondents.

If the notice is returned undelivered, the return envelope is to be retained and the notice shall be sent to the customer's last

employment address known to respondents or to the address of a co-signer, relative or other person through whom the customer may be reached.

B. Designate a responsible individual or individuals on behalf of each dealership and insert the name or names of the individual(s) for each dealership in the blank in the notice set forth in the Appendix, and provide written instructions to all dealership personnel who are normally in contact with the public and who have been regularly employed for seven (7) or more consecutive days, including, but not limited to, salesmen, service writers, office staff and service managers, directing them to refer all inquiries in response to the said notice to the designated individual(s). These written instructions shall also direct that said personnel shall not take any actions inconsistent with said notice to consumers.

C. Respond in writing to each oral or written communication received from consumers who were sent the notice contained in the Appendix to this order.

D. Not raise the defenses of disclaimer of implied warranty, or limitation or modification of implied warranty (except as permitted by Section 108(b) of the Warranty Act), in any correspondence, in any writing, or in any case or suit brought by consumers against respondents in connection with automobiles, trucks or truck parts, or other consumer products purchased from respondents if:

1. said products were manufactured after July 4, 1975; and either,
2. the consumer entered into a service contract with any of the respondents covering said product at the time of the sale or within 90 days thereafter; or
3. respondents made a written warranty to the consumer with respect to such consumer product.

E. Not raise the defense of lapse of statute of limitations with respect to any claim for the repair or replacement of an automobile, truck or truck part, or other consumer product purchased from respondents, based on breach of an implied warranty, in any correspondence, in any writing, or in any case or suit brought by consumers against respondents in connection with automobiles, trucks, or truck parts, if such claim is asserted by a consumer within six months from the date on which the notice set forth in the Appendix attached to this order is mailed, and if:

1. said product was manufactured after July 4, 1975; and either,
2. the consumer entered into a service contract with any of the

respondents covering said product at the time of the sale or within 90 days thereafter; or

3. respondents made a written warranty to the consumer with respect to such consumer product.

VI.

It is further ordered, That:

A. Respondents deliver a copy of this order to cease and desist to all of their present and future managerial employees and salespersons regularly employed for seven (7) or more consecutive days, and secure a signed statement acknowledging receipt of the order from each such person.

B. Respondents instruct all present and future employees, salespersons, agents, and other representatives of respondents, regularly employed for seven (7) or more consecutive days and engaged in the sale of automobiles or other consumer products on behalf of respondents, as to respondents' specific obligations and duties under the Warranty Act, all present and future implementing Rules promulgated under the Act and this order including but not limited to oral instruction accompanied by delivery to each of the above persons the most current Commission consumer education pamphlet on warranties on the following:

1. the availability and location of warranty information;
2. the nature of and differences among full warranties, limited warranties, and service contracts.

C. Respondents institute a program of continuing monitoring to reveal whether respondents and respondents' employees, salespersons, agents, and other representatives are in compliance with this order.

D. Respondents maintain complete records for a period of not less than three (3) years from the date of the incident, of any written information received which indicates the possibility of a violation of this order by any of respondents' employees, salespersons, agents, or other representatives.

E. Respondents maintain, for a period of not less than three (3) years after service upon them of this order, complete business records, including customer sale folders, relating to the manner and form of respondents' continuing compliance with all the terms and provisions of this order.

F. The records described in VI. D. and E. shall be available upon

request for inspection and copying by representatives of the Federal Trade Commission at respondents' place of business during normal business hours upon reasonable advance notice.

G. The corporate respondents named herein notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporate respondents which may affect compliance obligations arising out of this order.

H. For a period of five years after service upon him of this order, the individual respondent named herein shall promptly notify the Commission of the discontinuance of his present business or employment relating to the sale of consumer goods or services and/or of his affiliation in a management or ownership capacity with a new business or employment relating to the sale of consumer goods or services.

I. 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.

Appendix

[Name and Address of Consumer] [Date]

Dear [Name of Consumer]:

You may have some added warranty protection for your car or truck. When you bought your vehicle, there was a line on the back of the contract which said that you did not have any implied warranties under state law. This is not so. You do have these warranties, which are described below. Implied warranties only cover, however, the condition of the vehicle at the time it was purchased.

First, you have a warranty of "merchantability." This means the car or truck you purchased must have been fit for ordinary use. Second, you may have a warranty of "fitness for a particular purpose" if you bought your car or truck on the basis of any representation we might have made that the vehicle was fit for a *particular* purpose which is *different* from the ordinary purpose for which cars and trucks are used.

If you feel that you have a claim under one of these warranties, please contact us, preferably in writing, at (insert full address) and give us all the details.

If you wish to call us about any claims you may have, please call us at (insert full telephone number) and speak to __________ .

We will consider your claim and get back to you in writing as to what we are willing to do. We will not say that you have given up any implied warranty rights, nor will we tell you that you waited too long if you make your claim within 6 months of the date of this letter.

If you are not satisfied with our response, you may want to talk to the Federal Trade Commission in Seattle, Washington (Tel. (206) 442–4655).

However, we are not responsible for fixing any damage caused by normal wear and tear, by your misuse of the car or truck, by events beyond our control, or by your failure to properly care for your vehicle.

Proposed trucking allowance program of food and grocery seller would not violate the Robinson-Patman Act or the Motor Carrier Act of 1980. [*813 7002, Procter & Gamble Co.*]

July 29, 1981

Dear Mr. Hemminger:

This is in response to your request, contained in your letters dated September 2, 1980, March 18, 1981, and April 16, 1981, on behalf of the Procter & Gamble Company (P & G), for an Advisory Opinion pursuant to Sections 1.1-1.4 of the Federal Trade Commission's Rules of Practice and Procedure, 16 C.F.R. §§ 1.1-1.4(1980). Specifically, you set forth P & G's intention to offer customers, who elect to pick up certain P & G products at specified P & G shipping point plant locations, hauling allowances that would be deducted from P & G's uniform delivered price. The Commission understands that these allowances would be offered on certain P & G products on an experimental basis, rather than on every product sold by the company, although P & G intends that, if results of the experiment are favorable, it would expand the allowance program to other products. You have requested that the Commission advise you of the legality of instituting P & G's allowance program in relation to Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13 (1970), and to Section 8 of the Motor Carrier Act of 1980, Pub. Law 96-296, 94 Stat. 798 (July 1, 1980) ("Section 8").

In reviewing your request, the Commission has concluded that Section 8 appears to be a limited exemption from the Robinson-Patman Act, as that statute was interpreted by the Commission in Advisory Opinion No. 147, 72 F.T.C. 1050 (1967) (digest). Section 8 appears to permit a limited class of sellers—"sellers of food and grocery products"—to engage in practices similar to those the Commission believed, in Advisory Opinion No. 147, might violate the Robinson-Patman Act. The Section 8 exemption applies, however, only if all of that statute's other requirements are met.[1]

The Commission has carefully reviewed your Request in light of the applicable statutes and has concluded that the allowance program P & G intends to institute would appear, based on the facts you have supplied in support thereof, to be consistent with the terms of

[1] Although Section 8 does not assign any enforcement responsibilities to the FTC, the Commission believes that it has authority to interpret Section 8 by virtue of its effect on the Robinson-Patman Act amendments to the Clayton Act, a statute which the Commission has the authority and obligation to enforce. 15 U.S.C. 21(a) (1970). The legislative history of Section 8 recognizes Congress' desire to have the Commission continue to enforce effectively the Robinson-Patman Act.

the Section 8 exemption to the Robinson-Patman Act:

> (1) P & G appears to be a "seller of food and grocery products" who will offer allowances with respect to "purchased food and grocery products." The products on which it intends to offer allowances—Downy and Bounce fabric softeners, Biz detergent, and Comet cleanser—are products sold primarily in grocery stores.

In this connection, the Commission would point out its view that P & G could fall outside the Section 8 exemption if it offered allowances otherwise conforming to that statute on products that are not sold primarily in grocery stores, notwithstanding the fact that in terms of other products, P & G is a "seller of food and grocery products." Allowances under Section 8 may be offered only with respect to "purchased food and grocery products."

> (2) The allowances P & G intends to offer would appear "not to exceed" P & G's "actual cost" of delivery to a particular customer.

This conclusion is based solely on data supplied by P & G in support of its request, comparing proposed allowances and actual costs on a customer-by-customer basis, for customers in Illinois and the St. Louis metropolitan area. These data, for purposes of this conclusion, have been assumed to be true for these customers and, moreover, representative for all P & G customers wherever they are located. The Commission would caution that this conclusion is based solely on these assumptions. Should P & G offer allowances that in some cases *do* exceed the actual cost P & G would have incurred to deliver, such allowances, of course, would fall outside the scope of the Section 8 exemption. The Commission would add, however, in this connection, that P & G's plan to reevaluate the dollar value of its allowances as costs change over time appears consistent with Section 8.

> (3) P & G's intended allowances would seem to be "available to all customers."

P & G has averred in its request and a subsequent submission that it intends to offer allowances to all customers, regardless of their retail trade identification as operators or suppliers of, *e.g.*, grocery stores, drug stores, general merchandise retail stores, and so forth. This would seem to be required by Section 8, the terms of which do not modify or limit the word "customer." This term, to be generally consistent with other laws administered by the Commission, simply

means any person who purchases from P & G for resale. Also, P & G's intention to "broadly announce" its allowances is helpful to meet Section 8's availability test.

(4) P & G's allowances, as calculated by uniform application of a formula under which the amount of allowance on identical quantities of products varies only by distance traveled by the customer, are "nondiscriminatory" in application, as that term is used in Section 8.

The Commission understands the term "nondiscriminatory" in Section 8 to mean, in part, that customers located the same distance from the shipping point ("similarly situated") should receive equal allowances, all other things being equal. The uniform application of P & G's single-mode allowance formula would appear to result in equal allowances for similarly situated customers.

In addition, the Commission would point out that P & G's intention to see to it that customers actually travel the distance they specify is consistent with Section 8's requirements that compensation be not in excess of actual cost and that compensation be on a nondiscriminatory basis. Sellers should be encouraged to engage in this type of oversight, so long as it, too, is conducted on a nondiscriminatory basis, to guard against overcompensation and the potential for discriminatory allowances to which some but not all customers would be entitled and which might be hidden in inflated customer reports of distance to be traveled.

Furthermore, P & G's intention to permit customers to designate one shipping point for pick up and another for calculation of the distance component of the allowance formula appears acceptable *only* if the resulting calculation is based upon the distance from the *closer* shipping point. P & G's program clearly would fall outside the Section 8 exemption if customers were permitted to pick up at a nearby location and receive an allowance calculated by reference to a more distant shipping point. Such a practice would appear to result in discriminatory allowances to certain customers and, moreover, might lead to the conclusion that P & G uses a "basing point" pricing system rather than a system of uniform delivered prices.

(5) P & G's plan to make pick-up allowances available on truckload quantity shipments does not appear to make those allowances "unavailable" to an identifiable class of customers of food and grocery products.

P & G intends not to permit customers to pick up or receive any allowances on less-than-truckload (LTL) quantity shipments. In support of this intention, P & G has presented information which tends to show that about 90% of its shipments at present are in truckload lots and, further, that the remaining 10% of LTL shipments arise from a variety of reasons, among them P & G's inability to fill a truckload order resulting in LTL shipments to customers who ordinarily purchase in truckload lots and a customer—who can otherwise purchase in truckloads—choosing to purchase LTL for its convenience. In addition, P & G has submitted its views that virtually all retail grocery stores are either operated by or supplied by grocery distribution centers (whether operated by retail grocery chains or independent grocery wholesalers or retailer-owned cooperative wholesalers) which have the ability to, and normally do, purchase in truckload quantities to obtain the best price and maintain optimum inventory levels and which, moreover, have the capability to take advantage of P & G's offer of truckload allowances.

For purposes of this Advisory Opinion, consistent with the Commission's Rules, the Commission is prepared to accept these assertions as given. Thus, these asserted facts form the basis for the Commission's belief that P & G's plan to limit allowances to truckload quantities is consistent with Section 8's requirement that compensation be made available to all customers on a nondiscriminatory basis. This conclusion might not hold true, however, if it appeared that an identifiable class of customers lacked the capability ever to purchase in truckload quantities.[2] Under those circumstances, some form of allowance might be required for LTL shipments to meet Section 8's "availability" test. The Commission expresses no view as to whether P & G's assumptions may be true outside the recognized food and grocery distribution industries.

Your letter with its attached exhibits requesting this Advisory Opinion has been placed on the Commission's public record, in accordance with Section 1.4 of the Commission's Rules, 16 C.F.R. § 1.4 (1980). Your separate request for continuing confidential treatment of Exhibit C of your Advisory Opinion request, pursuant to Rule 1.4, has been considered by the Commission. The Commission will not disclose Exhibit C without giving P & G ten days advance notice of intended disclosure, as required by Section 6(f) and Section 21(c) of the Federal Trade Commission Act, as amended, 15 U.S.C. 46(f), 57b-2(c).

By direction of the Commission.

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[2] See, for example, *Universal-Rundle Corp.*, 65 F.T.C. 924 (1964).

SEPARATE STATEMENT OF ACTING CHAIRMAN CLANTON

While I am in agreement with the Commission's advisory opinion letter to Procter & Gamble in most respects, there is one point of departure on which I believe that the majority's opinion should give additional guidance. The majority's letter defines "similarly situated customers" to include only those customers who are located equal geographical distances from the shipper's dock. While it is correct under a single-mode, mileage-based backhaul allowance formula that, in order to meet the non-discrimination criterion of Section 8, the amount of compensation for identical purchases by similarly situated customers should vary only by the distance from the seller's dock, I believe that our advice should go a step beyond this.

I would take this opportunity to acknowledge the possibility, without attempting to define the circumstances, that customers might be "similarly situated" in cost-related ways other than mere geographical distance and, conversely, that between equidistant customers clear cost differences based on actual experience may be established. Such cost-related circumstances might involve the historic use of different or multiple modes of transportation to different customers, so that a formula measuring only mileage from a seller's dock using single-mode rates may not truly reflect all the circumstances under which customer comparability could be achieved. In short, I believe the majority's letter can be read as saying that a single-mode, mileage-based backhaul allowance formula is the *only* system that a seller can use which will comply with the terms of Section 8, and I would disagree with such a narrow interpretation.

Letter of Request

September 2, 1980

Dear Sir:

This is a request for an Advisory Opinion pursuant to Sections 1.1-1.4 of the Commission's Rules on behalf of The Procter & Gamble Distributing Company, Cincinnati, Ohio (hereinafter referred to as "Company").

Set forth in detail in this letter and its attachments* is the Procter & Gamble Customer Pick-up Allowance Plan (Plan) for payment of an allowance to customers choosing to pick up merchandise at plant locations rather than receiving shipment under the Company's uniform delivered prices at the customer's warehouse location.

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Careful consideration has been given to designing the Plan in accordance with the Company's understanding of its obligations under the Robinson-Patman Act and Section 8 of the Motor Carrier Act of 1980. The Company does not presently permit customers to pick up orders at point of shipment.

Review of this Plan by the Federal Trade Commission and an opinion regarding its lawfulness is requested in connection with any issues it may present regarding the applicability of the Robinson-Patman Act, Section 8 of the Motor Carrier Act of 1980, and any other statute enforced by the Commission.

1. *General Description of the Procter & Gamble Customer Pick-Up Allowance Plan.*

The Plan presented for consideration by the Commission is limited to certain selected brands in the Bar Soap & Household Cleaning Products Division (BS&HCP). If the test of this Plan is sucessful, consideration would be given to expansion of the Plan to other brands and shipping locations.

The test Plan would apply to 17 separate sizes of four brands: Downy, Biz, Comet, and Bounce. These items represent about 68% of total case volume in the BS&HCP Division which markets nationally 45 separately priced items. Only the designated brand(s) would be available for pick-up at six producing plant locations for these brands around the country. For example, only Downy and Biz would be available at Lima.

The Plan requires customer pick-up of orders in unit-load, full truckload quantities of the brand(s) produced at designated locations. The customer pick-up allowance will be reflected in the customer's invoice as a deduction from the uniform delivered carload price. The formula for calculating the amount of the transportation allowance is developed from two basic cost elements of motor carrier operation: (1) driver labor for loading and unloading at $16.25 per hour (current national Teamsters' wages and fringes); and (2) operating cost of $1.00 per mile (current national average to run a tractor and trailer 100,000 miles per year). These two factors are computed over a distance between the Company's designated shipping point for the customer and the customer's designated destination, converted to a rate per hundred pounds, and paid to the customer based on the total weight purchased.

Exhibit A* to this letter is a copy of the contract that will be used

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with each customer desiring to participate in the Plan. This contract incorporates the Operating Guidelines which a customer must observe in the areas of order placement, appointment scheduling, and dock disciplines. These Operating Guidelines are included as Attachment A* to Exhibit A.

2 . *Pick-Up Allowance Calculation Formula.*

The formula for calculating how much each customer will be paid for picking up its order will have uniform application regardless of the brand involved or the shipping location. The amount of the allowance will vary depending on the distance between the Company's shipping point and the customer's designated destination. In congested markets where plant shipping areas converge for the same brand, the customer can elect either shipping point to make a pick-up. In other markets, the allowance will be calculated solely on the basis of the Company's designated shipping point for the customer even though the customer may elect to pick-up at a more distant location.

The driver labor and operating expense factors in the formula are two elements of cost making up a common carrier or contract freight rate and current comparisons show that these factors represent about two-thirds of such rates as would be paid by the Company if the order were delivered to the customer. These two basic cost elements of motor carrier operation can be more fully described as follows:

a) *Driver labor for loading and unloading:* Four hours are allowed at the current national Teamsters' wages and fringes rate of $16.25 per hour ($65.00). This reflects the most prevalent standard in the food and grocery industry. The four hours allowed for loading and unloading parallel the hours allowed under MC-88, the national uniform detention rule.

b) *Operating expenses of $1.00 per mile:* This rate per mile is designed to cover motor carrier operating costs. It is based on the national average cost to run a tractor and trailer 100,000 miles per year, and covers the following factors: driver, cost of equipment, fuel, tires, repair and maintenance, licensing, insurance, interest, and road use taxes. Support for determining this figure comes from a variety of sources including trucking industry cost surveys. We have included a recent survey by Hertz published in *Traffic*

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World, May 19, 1980 as Exhibit B*.

This operating expense classification represents two-thirds of for-hire carrier rates on average since it does *not* include amounts for profit or costs of sales and administration that would be included in a straight for-hire situation.

Pick-up loads transported less than 75 miles will earn the minimum allowance of $140.00 regardless of load weight or distance. This minimum allowance level recognizes the higher fixed cost involved in driver time for metropolitan traffic and tends to parallel the increase in local freight rates by for-hire carriers. This minimum for local pick-up is still within the range of two-thirds of the Company's average cost of local delivery.

The two factors in our allowance calculation formula will escalate over time and the Company would plan to review these factors periodically and make changes as needed.

3 . *The Plan is designed to maintain Procter & Gamble's efficient distribution system while meeting the intent of Congress to create better efficiency in transportation.*

Procter & Gamble has developed a delivery system in the BS&HCP Division which is tailored to volume, plant number and locations, and the product replenishment requirements of our customers. The resulting distribution pattern concentrates shipment of over 95% of this Division's volume from strategically located production points directly to customers. In addition, almost 90% of our customer shipment volume is in truckload or carload quantities. Therefore, our plants handle huge volumes with what we consider to be unusually high shipping efficiencies. We need to be careful not to significantly disturb these shipping efficiencies, or the result would be higher costs which in turn would tend to increase base prices and, thus, lead to higher consumer prices on our products.

The specific purpose of Section 8 of the Motor Carrier Act of 1980 is to permit and encourage increased transportation efficiencies and cost savings in the marketing and delivering of food and grocery products, with the ultimate beneficiary of such cost savings being the American consumer. True cost savings must be realized within the transportation/distribution system to generate true consumer benefits.

Support for customer pick-up focuses on a reduction of large trucks

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running empty on return trips to home base following full load delivery of products to retail outlets. By picking up a full load of supplier product for the return trip, those trucks are literally replacing another truck which normally would carry that load. This full load replacement transportation maximizes fuel and cost savings within the total system.

Limiting pick-up to producing plant locations is another factor which importantly protects the efficiencies that are already in place at Procter & Gamble. Many other large food and grocery suppliers depend upon a broad network of warehouse distribution centers from which customer shipments are made. These multiple commodity distribution warehouse operations, after receiving product from several producing locations, store, handle, and assemble customer orders for shipment to final destinations. Obviously, this more complex system better suits the marketing objectives and/or requirements of many suppliers, but adds several elements of cost to total delivery expense which this Company has successfully avoided.

Other BS&HCP items will be available for delivery by the Company from a producing plant warehouse that are not designated for customer pick-up under the Plan. These are either lower volume items produced at that pick-up location or they have been shipped from other producing plants for filling combined full carload or smaller orders when a customer's order includes those items. The lower volume items made at the pick-up location are not included because of the test nature of the Plan. On items shipped from other producing plants delivery and other costs have already been incurred. Such items do not qualify under the Plan because they do not maximize the full economies which otherwise exists when a customer picks-up a full truckload of an item that has been made at the producing plant location.

4 . *The Plan complies with the intent and spirit of the Motor Carrier Act of 1980.*

a) *Allowance payments would not "exceed seller's cost of delivery".* As indicated above, the pick-up allowance calculation formula would return to the customer about two-thirds of the Company's actual delivery expense on average. Section 8 of the Motor Carrier Act of 1980 permits payment of a customer pick-up allowance which "... does not exceed the actual cost to the seller of delivery to such customer . . .." The reasonable interpretation of this requirement is that the actual cost ceiling is the amount a seller would pay to a carrier as its actual shipping rate. Thus, a

special negotiated rate would apply, if available, rather than a published or list rate.

Examination of allowances under our formula against the actual cost to the Company indicates that in every instance the Company's cost of delivery would exceed the amount of the allowance. For purposes of illustration, we have included Exhibit C,* which is a diagram and chart showing the effect of the customer pick-up plan in the Illinois market in terms of anticipated customer participation and the customer pick-up allowance rates under the Plan versus cost of delivery by the Company.

Since the proposed Plan is based on full truckload orders the issue of incremental or marginal cost of a certain single order contributing to a combined truckload rate is not a consideration in this Plan. We hasten to point out that even though the issue is not presented here, any interpretation of the actual cost standard of Section 8 would require application of marginal or incremental costs would, in our view, be unrealistic and would result in discriminatory allowance payments among competing purchasers in conflict with other language in Section 8.

b) *All retailers will have an opportunity to benefit from the savings represented by the allowances paid under the Procter & Gamble Customer Pick-Up Plan.* The food and grocery distribution system operates primarily on a two step movement of goods pattern:

(1) *Shipment of full loads* of merchandise (70% by truck, 30% by rail) from individual manufacturers to customer distribution centers; and

(2) Delivery of full or partial truckloads in mixed assortments from the grocery distribution centers to retail outlets.

Numerically, about *1,000* manufacturers supply approximately *10,000* separate items to *2,500* food and grocery warehouse distribution centers, for combined deliveries to about *185,000* retail outlets. The warehouse operations, whether chains, cooperative group wholesaler, voluntary group wholesaler, or unaffiliated wholesaler, buy in truckload or carload quantities from manufacturers to meet normal turnover demand and/or to secure the optimum price available. In the test phase of the Company's Plan it is estimated that 127 warehouse customers will participate out of a total of over

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1,500 who purchase BS&HCP items. These warehouse accounts in turn will distribute brands picked-up under the Plan to thousands of individual retail stores.

A full truckload move by any of the above types of warehouse accounts provides the opportunity for pick-up cost savings to all types and sizes of retail outlets serviced by them. This has been confirmed by spokesmen for the largest wholesale and retail associations. Exhibit D* contains excerpts of testimony presented at hearings on various legislative proposals authorizing payment of customer pick-up allowances which support and amplify this point.

Exhibit E* is a diagram prepared by the National American Wholesale Grocers Association illustrating the movement of products from manufacturer through warehouse distribution centers to retail outlets.

Finally, Section 8 expresses in Subsection (b) the "... sense of Congress that any savings accruing to a customer by reason of compensation permitted by Subsection (a) of this Section should be passed on to the ultimate consumer". Thus, Section 8 itself makes retailers who purchase from wholesalers a necessary link in the chain to pass on any savings recognized by that wholesaler through receipt of a customer pick-up allowance under the proposed Plan. The obligation to see that these benefits are in fact, passed along to the retailer and ultimate consumer has been assigned to the ICC under the Motor Carrier Act.

c) *The allowance would apply to "food and grocery" products.* The brands described above are two fabric softeners, a laundry presoak and a hard surface cleanser. These are generally classed as cleaning products which are normally sold in grocery stores. Webster's New Collegiate Dictionary defines "groceries" as "commodities sold by a grocer". It is our opinion that any Procter & Gamble consumer brand sold in grocery stores would be within the term "food and grocery products" as used in Section 8. We believe this should be the case even though some items, like Comet, may also be resold in small volume by a jobber customer for institutional use.

d) *The plan would be "non-discriminatory" in application and effect.* As indicated above and in Exhibit C,* the allowance formula would be applied uniformly to any customer willing to participate in the Procter & Gamble Plan. While individual customer

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allowance amounts will vary on the basis of distance as a result of uniform application of the formula, similar differences also exist in the cost which the Company must pay to a carrier under similar circumstances. The chart in Exhibit C* will clearly illustrate this point.

The Procter & Gamble Customer Pick-Up Plan will be broadly announced to the trade with appropriate publicity and notices on price lists which are sent to customers.

The Plan requires a customer to declare its destination for the order it is picking up. This is the basis on which the customer's allowance will be calculated. The opportunity does exist for customers to abuse the Plan by delivering the product to stores or warehouses which are closer to the shipping point than the location designated by the customer. It is the Company's intention to protect against this possibility by reserving the right to inspect a customer's shipment records to verify their delivery destination on orders picked up by a customer. This would be done in cases where suspicious circumstances exist or as part of a periodic spot check procedure.

Any allowance overpayment discovered by the Company would result in an immediate bill back to the customer to recover this amount. Repeated abuses of the requirements of the Plan could result in a 12 month suspension from the Plan after which the customer could be automatically reinstated subject to continued observance of the requirements of the Plan. All sanctions would be applied uniformly and objectively.

It is respectfully requested that the proposed course of action as described receive the consideration of the Commission and that an Advisory Opinion issue.

Very truly yours,

/s/ David G. Hemminger

Senior Counsel, Trade Regulation

Second Letter of Request

March 18, 1981

Dear Mr. Tasker:

The purpose of this letter is to address two specific questions that

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you raised regarding the Procter & Gamble Customer Pick-up Allowance Plan that was described in our Request for an Advisory Opinion of September 2, 1980. Your first question related to the requirement of the Plan for a truckload order and how this requirement might affect customers purchasing in less than truckload quantities.

As indicated in our Request, 90% of the total volume of BS&HCP products is currently shipped in truckload quantities. The 10% volume in less than truckload quantities results from a variety of reasons:

1. The Company offers the sale of BS&HCP brands for direct delivery to creditworthy customers for a minimum order size of 25 cases. There are some customers who purchase in this minimum.
2. Less than truckload orders occasionally are the result of our being unable to fulfill shipment against an original truckload order. The customer receives the truckload price under these conditions.

Small LTL order shipments are considerably more costly to the Company on a per case basis than truckload orders and much of this cost is not recovered through the higher price charges for small orders under our quantity discount structure. However, it is estimated that all such orders were shipped to only 2% of approximately 160,000 stores carrying BS&HCP brands that are not supplied by a chain warehouse. About half of the LTL shipments were to chain stores like K-Mart who had chosen to by-pass their central warehouse facilities by electing direct store delivery at a higher price under the Company's quantity discount structure. The other 98% of such stores are supplied by wholesale warehouse accounts.

Some chain retailers and wholesale accounts who warehouse also order on an LTL basis to their warehouse. While this may represent their optimum inventory level, they could well have the capacity and the financial resources to purchase in truckload quantities, especially if a customer pickup allowance opportunity were available.

As stated in the Request, Procter & Gamble must balance any arrangement to accomodate customer pick-up with the total efficiencies inherent in the Procter & Gamble distribution system. To allow the pick-up of LTL orders would create serious disruptions in the efficient, large-scale distribution system at our producing plants which would inevitably result in overall higher costs. Other suppliers have announced customer pick-up allowance programs since the enactment of the Motor Carrier Act of 1980. Most of the plans which have reached our attention are in fact limited to truckload orders as well.

As stated in Section 4(b) of the Procter & Gamble Request, it is an-

ticipated that the benefits of the customer pick-up allowance plan will accrue to small resellers through wholesalers as required by Section 8(b) of the Act and as indicated by the testimony before the Select Committee on Small Businesses of the United States Senate contained in Exhibit D* of our Request. Any retailer choosing to purchase through a wholesaler to obtain the benefit of customer pick-up savings gained by the wholesaler, rather than buy direct from Procter & Gamble, may do so. There is no requirement that obligates a customer to continue to purchase from Procter & Gamble on a direct basis. In this regard, we believe the Plan is non-discriminatory, applies uniformly and thus is fully within the requirements of Section 8 of the Motor Carrier Act of 1980.

Your second request was to clarify the availability of the Customer Pick-up Allowance Plan to *all resellers* of the BS&HCP brands included in the Plan. It is clearly the intent of Procter & Gamble to extend its Plan to any reseller at the wholesale or retail level regardless of trade classification.

I request that this letter be accorded temporary confidential status, and that it be considered exempt from disclosure under the Freedom of Information Act, until the Commission has issued its opinion in response to Procter & Gamble's Request. This request is made for the reason described in Mr. McHenry's letter to Mr. Carol Thomas, Secretary, of September 8, 1980.

If you have any questions regarding the above, please feel free to call me at any time.

Very truly yours,

/s/ David G. Hemminger

Senior Counsel, Trade Regulation

Third Letter of Request

April 16, 1981

Dear Mr. Pfunder:

This letter will confirm our telephone conversation yesterday at which time I advised you of a minor change in the Procter & Gamble Request for an Advisory Opinion. That change involves the deletion

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of the Baltimore Plant as a pickup point for Downy fabric softener. This product will be supplied in full truckload quantities solely from the Lima, Ohio plant for destinations in the eastern United States due to cost considerations.

I have enclosed those pages which are part of the Request* that will show a deletion of the Baltimore Plant as a pickup location. Please note that there have also been some minor wording changes in the Operating Guidelines (Exhibit A,* Attachment A*) which have been made for purposes of clarification. These changes have been highlighted in the attached document.*

It is our judgment that the deletion of the Baltimore Plant as a pickup point and the other word changes in the Operating Guidelines would not affect the substantive legal evaluation of the Company's Request, nor should they contribute to any further delay in action by the Federal Trade Commission upon the Request. Should you have any questions please call me.

Very truly yours,

/s/ David G. Hemminger

Senior Counsel, Trade Regulation

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Issued guidance in defining and interpreting key terms of Robinson-Patman Act and Motor Carrier Act of 1980. [*813 7002, Grocery Manufacturers of America, Inc.*]

July 29, 1981

Dear Mr. Brown:

This is in response to your request of October 8, 1980, on behalf of the Grocery Manufacturers of America (GMA), for an Advisory Opinion pursuant to Sections 1.1-1.4 of the Federal Trade Commission's Rules of Practice and Procedure, 16 C.F.R. §§ 1.1-1.4 (1980). The Commission has carefully reviewed your request and has concluded that, while you have not provided sufficient information to permit a response in detail to each and every one of your detailed factual situations, some general and, it is hoped, useful guidance in responding to your request is appropriate.

All nine of the factual situations you posit relate to the recently-enacted legislation, Section 8(a) "(a)" of the Motor Carrier Act of 1980, Pub. Law 96-296, 94 Stat. 798 (July 1, 1980) ("Section 8"). Section 8 permits "a seller of food and grocery products using a uniform zone delivered pricing system to compensate a customer who picks up purchased food and grocery products at the shipping point of the seller if such compensation is available to all customers of the seller on a nondiscriminatory basis and does not exceed the actual cost of delivery to such customer." The Commission believes it is appropriate to offer advice in connection with the questions of law that may arise under Section 8, because of that statute's relationship, as set forth in its legislative history, to the Clayton Act as amended by the Robinson-Patman Act of 1936, 15 U.S.C. 13 (1970). The latter statute is enforced by this Commission. To the extent that Section 8 creates a limited exemption from the Clayton Act or, as a practical matter, may provide a new defense to a claim of violation of that statute when its terms are met, the Commission believes that it has authority to interpret Section 8 in light of the historic principles embodied in the Robinson-Patman Act, and especially those precedents that are not inconsistent with the purposes of Section 8.

Your nine factual situations address, in essence, three issues under Section 8. The first has to do with the meaning of the phrase "actual cost" under the statute and the related second issue addresses Section 8's use of the phrase "nondiscriminatory basis." The third issue relates to the breadth of the exemption or defense available under Section 8 by focusing on the identity of "sellers of food and grocery

products" who may offer to compensate customers under Section 8; the identity of products, in connection with the sale of which compensation may be offered under Section 8; and the identity of customers who are eligible to receive compensation under the statute.

Turning first to your six factual situations relating to the meaning of "actual cost", the Commission is of the view that it cannot advise with any precision what the exact actual cost would be under these situations without engaging in an extensive collateral inquiry beyond the scope of the Commission's advisory opinion rules. The determination of the precise actual cost in each instance would depend upon the facts of each situation.

It appears, however, that at least one common principle would apply to that determination in each situation. The determination of a seller's "actual costs" should be based on the actual costs the particular seller would have incurred had that seller performed his obligation to deliver under the uniform delivered price to a particular buyer. If a common carrier would have provided the service, the published common carrier rate should be used. If a contract carrier would have performed the service, the contract rate should be used. If the seller leases trucks or uses its own trucks, it should know its actual costs and those should be used. If the seller ships by rail, rather than by truck, under its uniform delivered price system, the rail rates should be used, even if those rail rates do not result in full compensation to a customer using a truck to pick up. Section 8 and its legislative history are clear that the critical reference is to the seller's costs, not the buyer's. Moreover, this approach is fully consistent with the approach required to be taken when questions of "actual cost" arise under the Robinson-Patman Act.

"Actual costs" need to be determined only for one purpose under Section 8: to establish a "ceiling" amount, above which compensation may not be granted in compliance with Section 8. It should be kept firmly in mind that compensation, according to Section 8, need not equal those actual costs. The statute only requires that compensation "not exceed" such costs.[1] This concept is also fully consistent with the analysis of cost-based discounts, rebates and other forms of price reductions under the Robinson-Patman Act.

In addition to "not exceeding" a seller's actual costs, compensation under Section 8 must be "available to all customers on a nondiscriminatory basis." Your factual inquiries also touch on this issue.

The seller presumably can use indirect costs (*see* your factual inquiry no. 2) as well as direct costs to determine cost ceiling, so long as the allowances based on the ceiling are offered and applied on a nondiscriminatory basis, discussed below. The Commission would add, however, that the use of such costs should be approached with caution, inasmuch as they may be difficult to allocate on a nondiscriminatory basis.

The Commission understands this proviso to mean that similarly situated customers — that is, customers located the same distance from a seller's shipping point — should have the opportunity to, and be entitled to, receive the same dollar value of compensation for picking up identical quantities of food and grocery products. Thus, it appears generally correct that the amount of compensation for identical purchases by similarly situated customers should vary only by the distance traveled to deliver.

Given these understandings, the Commission believes it is appropriate to advise you with respect to your factual inquiries addressing the computation of "actual" cost in less than truckload (LTL) shipping situations. The Commission believes that compensation to customers on an LTL basis, if such compensation is reflective of the seller's usual "actual costs," is permitted under Section 8. The Commission notes, however, that determining the actual cost ceiling in LTL circumstances appears to be complicated, as evidenced by your factual situation no. 1. In addition, it would seem that, depending upon how "actual" costs are determined in the LTL context, similarly situated customers conceivably could be entitled to receive different dollar value compensation. This result would appear to be inconsistent with Section 8's requirement that compensation be available on a non-discriminatory basis, and sellers should proceed with caution in this area to avoid stepping outside of Section 8.[2]

Your remaining factual inquiries address the breadth of Section 8. The statute only applies to food and grocery products sold under a uniform delivered pricing system. The Commission believes that food and grocery products should be defined as products sold primarily in grocery stores. The Commission also believes that in a situation where the seller sells both "food and grocery products" and other types of goods, Section 8 permits the seller to offer compensation with respect to those food and grocery products but not with respect to other types of goods it may sell. If a seller of food and grocery products offers compensation under Section 8, however, the seller must so offer to all customers who may purchase those products, regardless of the type of retail outlet — grocery store, drug store, etc. operated or supplied by the customer. Section 8 does not contain any language limiting or modifying the word "customer".[3]

[2] In this regard it should be noted that it would appear that a seller of food and grocery products may limit the opportunity to receive compensation by setting minimum quantity purchases without losing the Section 8 exemption if such minimum quantities do not make the allowances unavailable to an identifiable class of purchasers.

[3] The definition of "customer" in this context is consistent with established principles of Robinson-Patman law enforcement. *See, e.g.,* the FTC's Guides for Advertising Allowances and Other Forms of Merchandising Payments and Services, Guide 3, which defines customer as "someone who buys for resale directly from the seller, the seller's agent, or broker; and, in addition, a customer is any buyer of the seller's product for resale who purchases from or through a wholesaler or other intermediate reseller." 16 C.F.R. § 240.3 (1980).

The Commission has tried to bring to bear, in providing this limited advice, its accumulated expertise in matters having to do with direct and indirect forms of price discrimination under the laws which it administers. It is hoped that you and the membership of GMA will find this advice of some use in implementing Section 8 of the Motor Carrier Act of 1980.

By direction of the Commission.

SEPARATE STATEMENT OF ACTING CHAIRMAN CLANTON

While I am in agreement with the Commission's advisory opinion letter to the Grocery Manufacturers of America in most respects, there is one point of departure on which I believe that the majority's opinion should give additional guidance. The majority's letter defines "similarly situated customers" to include only those customers who are located equal geographical distances from the shipper's dock. While it is correct under a single-mode, mileage-based backhaul allowance formula that, in order to meet the non-discrimination criterion of Section 8, the amount of compensation for identical purchases by similarly situated customers should vary only by the distance from the seller's dock, I believe that our advice should go a step beyond this.

I would take this opportunity to acknowledge the possibility, without attempting to define the circumstances, that customers might be "similarly situated" in cost-related ways other than mere geographical distance and, conversely, that between equidistant customers clear cost differences based on actual experience may be established. Such cost-related circumstances might involve the historic use of different or multiple modes of transportation to different customers, so that a formula measuring only mileage from a seller's dock using single-mode rates may not truly reflect all the circumstances under which customer comparability could be achieved. In short, I believe the majority's letter can be read as saying that a single-mode, mileage-based backhaul allowance formula is the *only* system that a seller can use which will comply with the terms of Section 8, and I would disagree with such a narrow interpretation.

Letter of Request

October 8, 1981

)ear Secretary Thomas:

This letter requests an advisory opinion pursuant to FTC Rules of

Practice and Procedures § 1.1 on the meaning of (A) the terms "actual cost" and the interrelated term "nondiscriminatory"; and (B) the term "food and grocery products", as contained in Section 8(a) of the Motor Carrier Act of 1980, Pub. Law 96-296, as applied to the factual situations described below.

Grocery Manufacturers of America (GMA) is a trade association composed of the leading manufacturers of food and grocery products sold in retail outlets throughout the United States.

As a result of numerous inquiries from our members, we are aware of their deep concern about the definition of the above-mentioned terms and the requirements manufacturers must meet in order to lawfully grant the pickup allowances authorized by Section 8. None of the terms is defined in the section and the legislative history offers, at best, only limited guidance as to their application.

The situation remains unclarified even though Section 8 became law on July 1, 1980. In the absence of clarification, many manufacturers are reluctant to implement the section because deviation from its requirements might well expose them to Robinson-Patman liability, especially in the form of treble damage suits.

Accordingly, GMA seeks, on behalf of its members, authoritative advice from the Commission on the factual situations which are described below and which have grown out of the inquiries of our members. Such advice would not only materially assist the industry in complying with laws administered by the Commisssion, but would also assist the Commission by minimizing the number of requests for advisory opinions. The public interest would also be served by early resolution of these substantial questions for which there are no Commission or judicial precedents.

A. *"Actual Cost" and "Non-Discriminatory"*

In each of the factual situations described below, food and grocery products are involved, and the seller utilizes a valid uniform zone delivered price system. As can be seen, all of the situations deal with the definition of "actual cost" and numbers 1 and 3 also involve the term "nondiscriminatory".

1. If, using one truck, it costs seller $1 per case to deliver LTL shipments to buyers A, B, and C; $.80 per case to deliver to B and C when A picks up, and $.75 per case to deliver to C when A and B pick up, what is seller's "actual cost" in each case?

Comment: Both committee reports would seem to suggest that

$.20 per case is the actual cost when A picks up, i.e., $1 minus $.80. Beyond that, however, the situation is far from clear. Carrying these examples to their logical conclusion, B would then get an allowance of $.05 per case and C, $.75 per case. If the three buyers are roughly equidistant from the seller, as they could easily be, these differences, based on the order in which the buyer elected to switch from delivery to pickup, fly in the face of fairness to say nothing of the requirement in Section 8 that such allowances be made available on a non-discriminatory basis. In this case, it would appear that the only course for the seller to avoid discrimination after the first buyer picks up is to offer an allowance of $.05 per case to each buyer, even though such a result could be questioned in view of the purpose of Section 8.

2. A seller calculates, using its own trucks, the operating costs for a delivery to be $10. Must he also attempt to compute allocable overhead, joint, and fixed costs in determining actual cost?

Comment: Seller's books should yield operating costs, but computing and allocating other types of costs is an administrative and bookkeeping nightmare fraught with opportunities for anti-competitive behavior and endless conflicts among buyers, sellers, competitors, and the government.[1] The Commission would certainly be forced into issuing detailed guidelines if non-operational costs are to be recognized, and even then, the conflict would go on.

3. Seller A, using its own trucks, bases its determination of "actual cost" on common carrier rates for comparable deliveries. Seller B uses a mix of its own trucks and regulated carriers. How would Seller B determine actual cost?

Comment: In the first case, use of common carrier rates would seem precluded. As the House Interstate and Foreign Commerce Committee report states: "actual cost" means "the cost which would have been incurred if delivery to the customer had been made by the seller in the ordinary course of its business and by means, modes, and under conditions that would have been elected by the seller"[2] (See ılso Senator Long's statement at the time of final passage).[3] As the 'oregoing quote also suggests, the answer in the second case would eem to be dictated by the particular circumstances of each situa-

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See statement by Alfred F. Dougherty, Jr., former Director, Bureau of Competition, Federal Trade Commission, hearings before the Senate Select Committee on Small Business on "Customer Pickup Proposals and Their Im- :t on Small Business and the Robinson-Patman Act." April 3, 1980, p. 26.
H.Rept. 96-1069, at 20 (June 3, 1980).
126 Cong.Rec. § 7686 (June 20, 1980).

tion—the mode that had been used to make deliveries to the buyer in the past, or to other buyers similarly situated.

4. A seller using only regulated carriers can have a product delivered to a buyer by carrier A for $10 and by carrier B for $11. What is seller's "actual cost"?

Comment: The legislative history (see quote from committee report above) suggests that it would be the rate of the carrier the seller is, in fact, using. If neither carrier is being used, $10 would seem to be the proper answer.

5. Seller A makes deliveries by regulated carriers. May he permit a buyer to pick up a truckload order in two half truckload lots and receive a pickup allowance based on the higher LTL rate?

Comment: Again, the legislative history quoted above would seem to preclude such a practice.

6. A seller delivers most of its food and grocery products by rail. In such a case, would the answers to questions 1 and 5 be altered?

Comment: As long as the rail deliveries are made under a uniform delivered pricing system, it would appear that the result should be the same. There is nothing in the language of Section 8 limiting its application to truck deliveries by the seller, and the excerpt from the committee reports quoted in the comment under item 3, above, shows clear Congressional intent that actual cost be measured on the basis of delivery modes the seller chooses.

B. *"Food and Grocery Products"*

In each of the factual situations described below, the seller utilizes a valid uniform zone delivered price system and would make actual cost allowances available on a non-discriminatory basis.

1. A seller of food products has been approached by a large drug store chain desirous of picking up certain food products at the seller's dock and receiving an actual cost allowance pursuant to Section 8. The seller intends to offer the allowance.

Comment: We think the seller appears to be on sound legal grounc Neither the section nor the legislative history evidences any requir

ment for the customer to be engaged in the food or grocery industry; the "food and grocery products" limitation in the section applies only to the seller of products.

2. Seller makes toys and food. A supermarket chain desires to pick up several lines of toys and receive an actual cost allowance under Section 8. Seller is uncertain whether or not to grant the allowance.

Comment: Toys would not normally be regarded as a grocery product. Yet, if they are sold in retail outlets whose principal business is selling food, i.e., a grocery store, then they may, by virtue of this fact, be considered as grocery products.

3. Seller, which manufactures prescription and OTC brand name drugs, has been approached by a retail drug chain which desires to buy the drugs at seller's dock and receive a Section 8 allowance. Seller is uncertain whether it can legally grant the allowance.

Comment: This situation goes beyond 1 and 2 above, in that neither the business of the buyer or seller is principally related to food, yet such drugs are widely sold in outlets such as supermarkets where their presence might well qualify them to be treated as grocery products.

Please feel free to call upon us for further information or if we can help you in any other way to facilitate responses to these questions.

Sincerely,

/s/ Stephen A. Brown

Vice President and General
Counsel

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