Proposed acquisition by Coca-Cola would require prior Commission approval under the Commission's order of August 3, 1983. [*The Coca-Cola Company, C-3113*]

May 9, 1988[1]

Dear Mr. Prescott:

This is in response to your request for advice ("Request") on behalf of The Coca-Cola Company ("Coca-Cola") as to whether its proposed acquisition of the Institutional Food Service Group of H.P. Hood, Inc. ("Hood") requires prior Commission approval pursuant to Part III of the consent order in Docket No. C-3113 ("the order"). The Commission has carefully considered Coca-Cola's request and has concluded that the proposed acquisition is covered by Part III of the order. Accordingly, Coca-Cola must obtain the Commission's prior approval before Coca-Cola may acquire Hood.

Background

The complaint in this matter, which was issued with the consent order, challenged under section 7 of the Clayton Act and section 5 of the Federal Trade Commission Act, Coca-Cola's acquisition of Doric Foods Corporation ("Doric") in 1982. The complaint alleged that Coca-Cola's acquisition of Doric may have had the effect of substantially lessening competition or tending to create a monopoly. Complaint, paragraph 9. The consent order required the divestiture of Doric, which Coca-Cola completed in 1983. Part III of the order prohibits Coca-Cola, for a ten-year period, from acquiring without prior Commission approval, any interest in any firm that is engaged directly or indirectly in the manufacture and sale of "drinks, punches and ades." The order defines drinks, punches and ades as "non-carbonated, ready to serve, naturally or artificially flavored fruit drinks, fruit punches or fruit ades which contain 50% or less fruit juice and are customarily sold under refrigeration to the consumer."

The Request

The proposed transaction would involve the acquisition by Coca-Cola of the institutional food service group of Hood, consisting primarily of the Dunedin facility located in Dunedin, Florida ("Dunedin"). According to the Request, Dunedin procures raw fruit which it

[1] This matter was inadvertently omitted from Volume 110.

delivers to Alcoma Packing Company ("Alcoma") in Lake Wales, Florida, pursuant to contract. Alcoma processes the fruit into concentrate. The juice is then mixed, packaged and sold by Dunedin to institutional customers located in all fifty states. The Request states that Coca-Cola will likely succeed to co-packing arrangements that Dunedin presently has with Golden State Food Corporation of Pasadena, California and with Trenton Cold Storage Ltd. in Trenton, Ontario, Canada. The Request explains that under the co-packing agreements, the co-packer mixes, packages and warehouses fruit juices and other products according to formulas and specifications provided by Dunedin. Dunedin delivers to the co-packer substantially all the necessary ingredients and packaging materials (except purified water); the product is processed and packaged by the co-packer and then sold through the Dunedin distribution network. Request at 3, 4.

The Hood Institutional Food Service Group sells only to institutional customers, as distinct from grocery stores or retail customers. Institutional customers are said to include such purchasers as restaurants, schools, hospitals and other non-grocery store purchasers. The Request states that Dunedin processes and sells 15 different kinds of juice and juice drinks to institutional customers: orange, grapefruit, apple, grape, pineapple, cranberry, orange-pineapple, peach nectar, pear nectar, apricot nectar, fruit punch, lemonade, orange-grapefruit, prune and tomato. Request at 4.

The Request asserts three reasons why the proposed acquisition does not require prior Commission approval under Part III of the order: (1) the proposed transaction would take place in a different market from that with which the order was concerned; (2) virtually all of the products sold by Hood and Coca-Cola in the relevant market do not constitute "drinks, punches and ades" as defined in the order; and, (3) the amount of fruit drinks (as distinct from 100% fruit juice) sold by Hood is *de minimis* in relation to Hood's total sales and so small as to be of "no conceivable competitive significance" as a share of total sales of fruit drinks to institutional buyers in the United States. Request at 2. In the alternative, respondent has requested that the Commission waive the prior approval provision both because the proposed transaction requires a premerger filing under the Hart-Scott-Rodino Act and because, in its view, delay could have an adverse impact on the value of the proposed acquisition to Coca-Cola. Request at 11, 12.

Prior Commission Approval Is Required

The Commission has concluded that the proposed transaction requires prior approval pursuant to Part III of the order. The order is applicable to Coca-Cola's acquisition of any interest in a firm that is engaged in the manufacture of drinks, punches and ades as defined in the order and the information supplied in the Request indicates that Hood is so engaged. The order does not contain any exclusion for institutional sales nor does it contain a *de minimis* exception.

Coca-Cola contends the acquisition of Hood's Institutional Food Service Group does not require prior approval under the order because the proposed transaction would take place in a different market from that with which the order was concerned. According to the Request, the Doric transaction involved the retail market, while the proposed Hood acquisition involves only the institutional market. However, neither the complaint nor the order identifies or draws a distinction between a retail market or an institutional market. While the characteristics of the covered products are set forth in detail, nothing in either the complaint or the order limits the order's coverage to a particular channel of distribution. Part III of the order requires prior approval of acquisitions of assets of a firm that is engaged "directly or indirectly in the manufacture and sale of drinks, punches and ades." Coca-Cola does not seriously contend that Hood is not engaged in that activity. There is nothing in the order to suggest that the defined products are not covered unless they are sold in grocery stores or other retail stores. It would have been simple to draft a proviso excluding institutional sales from the coverage of Part III of the order if that had been intended. However, there is no basis for reading such an exclusion into the order at this time.

Coca-Cola claims that nearly all of the products sold by Hood and Coca-Cola to institutional customers do not fall within the definition of "drinks, punches and ades" set forth in the order. One of the categories respondent attempts to exclude from order coverage is products "sold to institutions (not to consumers)." Request at 7. However, as discussed above, there is no exclusion in the order for sales to institutions. And, of course, products sold to institutions ultimately reach the consumer, often by sale.* Coca-Cola concedes that some products sold by Hood come within the definition of drinks, punches and ades. Respondent acknowledges that [ ] of Hood's

*There is no requirement in the order that any sale that may be involved has to be made directly to the ultimate consumer by the manufacturer or distributor of the drink, punch or ade product.

sales consist of non-frozen non-concentrate single strength juices or fruit drinks that "might" be considered ready to serve and under refrigeration. Request at 8. Coca-Cola also acknowledges that a small percentage of Hood's institutional sales are products containing 50% or less fruit juice. Request at 9. While much of the institutional product sold by Hood may be outside the scope or the order the requirement or prior approval is not limited to companies whose sales consist solely of the covered products or a specific percentage of the covered products.

Finally, Coca-Cola argues that Hood's sales of fruit drink products possibly covered by the order represent an extremely small part of the Hood institutional business and amount only to a *de minimis* share of total United States sales of fruit drinks to institutional buyers. However, this order, unlike some other Commission orders, does not contain any *de minimis* exception. The order requires respondent to seek prior Commission approval for all proposed transactions covered by Part III of the order not merely for those that reach some subjective standard of competitive significance. The purpose of the prior approval requirement is to give the Commission the opportunity to determine the competitive effects of the proposed transaction.

The Commission has also considered Coca-Cola's request for a waiver of the prior approval provision in this matter because the proposed transaction requires a Hart-Scott-Rodino Act premerger filing and because of Coca-Cola's concern that delay could have an adverse impact on the value of the proposed transaction to Coca-Cola. The Commission finds no grounds for a waiver of the order's requirements in this case, even if it is assumed such a waiver is permissible. At the time that respondent agreed to this order, the Hart-Scott-Rodino procedures were in effect and Coca-Cola nevertheless agreed to the prior approval requirement. Similarly, Coca-Cola has failed to show any special costs or consequences of the prior approval requirement that were not contemplated when it agreed to the order. Accordingly, there is no basis for a waiver of the prior approval requirements of the order.

Based on the foregoing, the Commission is of the opinion that the proposed transaction requires prior Commission approval pursuant to Part III of the order in this matter.

By direction of the Commission.

Letter of Request

March 30, 1988

Dear Ms. Rock:

Pursuant to sections 1.1–1.4 and 2.41(d) of the Commission Procedures and Rules of Practice, 16 CFR 1.1–1.4 and 2.41(d), The Coca-Cola Company ("the Company") hereby requests advice confirming that its proposed acquisition of the Institutional Food Service Group of H.P. Hood, Inc. ("Hood") is outside the scope of the Decision and Order dated August 3, 1983 in the matter of *The Coca-Cola Company,* 102 FTC 1102, 1103 (Docket No. C–3113) (the "Consent Order").

Specifically, the Company requests a ruling that the proposed acquisition does not require the prior approval of the Commission under Part III of the Consent Order because (1) the present transaction would take place in a different market from that with which the Consent Order was concerned; (2) virtually all of the products sold by Hood and the Company in the relevant market do not constitute "drinks, punches and ades" as defined in the Consent Order (¶IC); and (3) the amount of fruit drinks (as distinct from 100% fruit juices) sold by Hood is *de minimis* in relation to Hood's total sales and so small as to be of no conceivable competitive significance as a share of total sales of fruit drinks to institutional buyers in the United States.

Alternatively, if the proposed transaction is deemed to fall within the Consent Order, the Company requests that the prior approval provision be waived with respect to the present transaction for the foregoing reasons and for the further reason that a complete Hart-Scott-Rodino filing will be made with respect to this transaction. Therefore, the benefits which would result from the prior approval provision of the Consent Order would be fully served by the premerger filing under the Hart-Scott-Rodino Act. Any unnecessary delay which might be occasioned by the prior approval provision of the Consent Order carries with it a risk that the value of this acquisition to the Company would be substantially impaired. Therefore, for serious business reasons, the Company wishes to avoid any undue delay in closing this transaction.

The Proposed Transaction

Under the letter of intent (Exhibit A hereto),* the Company would acquire assets constituting the *institutional* food service group of Hood, consisting primarily of the Dunedin facility located in Dunedin, Florida. ("Dunedin"). The total purchase price would be approximately $45 million. The closing is planned for May 1, 1988, and the transaction is subject to obtaining any necessary government approvals.

Dunedin procures raw fruit which, pursuant to contract, it delivers to Alcoma Packing Company, located in Lake Wales, Florida. Alcoma processes the fruit into concentrate. The juice is then mixed, packaged and sold by Dunedin to institutional customers located in all fifty states. The Company will likely succeed to co-packing agreements between Dunedin and Golden State Food Corporation of Pasadena, California and Trenton Cold Storage Ltd. located in Trenton, Ontario, Canada.[1] Under the co-packing agreements, the co-packer mixes, packages and warehouses fruit juices and other products[2] according to formulas and specifications provided by Dunedin. Dunedin delivers to the co-packer substantially all the necessary ingredients and packaging materials (except purified water); the product is processed and packaged by the co-packer and then sold through the Dunedin distribution network.

The Hood Institutional Food Service Group sells only to *institutional* customers, as distinct from grocery stores or *retail* customers. Institutional customers include such purchasers as restaurants, schools, hospitals and other non-grocery store purchasers. Dunedin processes and sells 15 different kinds of juice and juice drinks to institutional customers: orange, grapefruit, apple, grape, pineapple, cranberry, orange-pineapple, peach nectar, pear nectar, apricot nectar, fruit punch, lemonade, orange-grapefruit, prune and tomato.

I. The present transaction is outside the scope of the consent order because it would not take place in the product market with which the consent order was concerned.

The Commission has held that sales of orange juice to institutional

*Not reproduced herein.

[1] The Trenton facility sells solely in Canada.

[2] Golden State also produces Shake-Ups, a dairy product similar to a milk shake. Dunedin has co-packing arrangements with Dairymens Inc. of Jacksonville, Florida and Dairylea of Oneida, New York for the production of Shake-Ups. Dunedin has a co-packing arrangement with Hood for the production of Frogurt, a frozen yogurt product.

customers constitute a separate line of commerce distinct from sales to retail customers:

> "The ALJ held that the evidence 'overwhelmingly shows' a separate line of commerce for COJ [chilled orange juice] [8] sold to the retail market, I.D. 56, justifying the exclusion of orange juice sales to institutions from consideration in assessing the competitive impact of the merger. I.D.F. 29–40. We agree with the ALJ's determination to exclude institutional sales, and note that respondents have not seriously challenged it on appeal."

Beatrice Foods Co., 101 FTC 733, 800 (1983). In so holding, the Commission referred to the "fundamental soundness of the ALJ's finding of a separate market of COJ sales to the retail segment". *Id.* at 800–801 n.7. *See also id.* at 743, 744, 785, 818.

The Consent Order dealt with sales in the *retail* market, while the Institutional Food Service Group of Hood sells solely to the *institutional* market. The Consent Order was concerned with the acquisition and divestiture of Doric Foods Corporation, a company which was involved solely in sales to the retail market. The data presented in connection with the Consent Order dealt with sales in the retail market and it was clearly those sales with which the Commission was concerned.[3] Thus, the Consent Order dealt with a market which the Commission has held to be separate and distinct from that in which the present acquisition would take place.

The Consent Order was addressed to "a line of commerce in a section of the country." (Complaint ¶9, 102 FTC at 1103). We believe that it should not be construed to cover acquisitions in lines of commerce that clearly were not involved in the transaction out of which the Consent Order arose.

The Consent Order was negotiated between the Commission and the Company at an early stage of the proceedings before a full investigation by the Commission could be completed. In a spirit of cooperation, the Company agreed to divest Doric Foods in order to resolve the Commission's antitrust concerns without incurring the large time commitment and expense which would have been involved in a full investigation and litigation of that matter. This type of cooperation should be encouraged by the Commission. As a matter of policy, the Company should not now be penalized by an overly expansive reading of the Consent Order.

[3] The market data submitted to the Commission was published by SAMI ("Selling Area Market Intelligence") and the A.C. Nielsen Company, which only publish data for sales to the retail market, not for the institutional market.

II. Nearly all of the products sold by Hood and by the company's institutional sales division fall outside the definition of "drinks, punches and ades" set forth in the consent order.

The Consent Order dealt with sales of "drinks, punches and ades" which were specifically defined as:

"non-carbonated, *ready to serve*, naturally or artificially flavored fruit drinks, fruit punches or fruit ades which contain *50% or less fruit juice* and are *customarily sold under refrigeration to the consumer*." Consent Order ¶I.C. (emphasis supplied)

Nearly all of the juices sold by the Company and by Hood to institutional customers do not fall within this definition because (1) they are 100% fruit juice (not 50% or less fruit juice); (2) they are sold as concentrate (not ready to serve); (3) they are sold frozen (not merely chilled and ready to serve) and/or (4) they are sold to institutions (not to consumers).

[ ] of the juice sold by the Company's institutional sales group is not sold in ready to serve form; it is sold as frozen concentrate, which must be mixed with water in a ratio of 3 parts water to one part of concentrate before it is served. The concentrate is sold in 32-ounce or 64-ounce containers which are mixed with water by hand or through a fountain-type dispenser.

The majority [ ] of Hood's sales (in gallons or gallon equivalents) to institutional buyers are also made in frozen concentrate in 32-ounce and 64-ounce sizes. In addition, Hood sells juices and juice drinks in single strength "portion control" form; juice and juice drinks sold in this form are typically transported and stored *frozen* and are then thawed shortly before they are sold by the institutional buyer to its customer. "Portion control" accounts for [ ] of Hood's sales. Only [ ][4] of Hood's sales consist of non-frozen non-concentrate single strength juices or fruit drinks and thus might be considered "ready to serve" and under "refrigeration" rather than concentrated or frozen at the time they are sold by Hood. But the great bulk of this [ ] consists of 100% orange juice and 100% grapefruit juice, not drinks, punches or ades.

Moreover, institutional products are not "sold to consumers" as required by the definition. They are sold to large institutions, such as restaurant chains, hotels, hospitals, schools and large institutional distributors. And they must be concerted to another form—mixed,

[4] The [ ] is included in the [ ] figure, since the single-strength juices are sold in "portion control" form. "Portion control" containers come in 4-ounce, 6-ounce and 10-ounce sizes.

dispensed or thawed—before they are ultimately consumed. For this reason as well, they do not fall within the terms of the Consent Order.

III. Hood's fruit drinks are a minimal portion of Hood's sales and a minuscule portion of total U.S. sales of fruit drinks to institutional customers.

Even if the products sold by the Hood Institutional Food Service Group which contain 50% or less fruit juice were deemed to be "drinks, punches or ades" for purposes of the Consent Order, such products are an extremely small part of the Hood institutional business. In fiscal year 1987[5] Hood sold to institutional customers a total of [ ] gallons of drinks containing 50% or less fruit juice. Hood's total institutional sales in fiscal year 1987 were [ ] gallons. Thus, products containing 50% or less fruit juice constituted less than [ ] of Hood's total institutional sales. In other words, over [ ] of Hood's institutional sales consist of products such as 100% orange juice, 100% grapefruit juice and other 100% fruit juices which could not conceivably be considered products containing 50% or less fruit juice.

No market data is publicly available to the Company which specifies total sales of "drinks, punches and ades" as defined in the Consent Order. However, the *U.S. Fruit Beverage Marketing and Packaging Report 1987* published by Beverage Marketing Corporation ("Beverage Marketing Report") publishes figures for total U.S. sales of "fruit drinks" (as distinguished from "fruit juice").[6] In calender year 1987, approximately 626,700,000 gallons of fruit drinks were sold in the United States.[7] This would give the Hood Institutional Food Service Group (which sold [ ] gallons of drinks containing 50% or less fruit juice in its fiscal year 1987) a share of [ ]—a share which is obviously *de minimis.* Approximately 68.31 million gallons of fruit drinks were sold to institutional buyers in 1987.[8] Hood's 1987 sales would give it a share of [ ] of sales of fruit drinks to institutional buyers—again a share which is *de minimis* by any standard.

Clearly, the proposed acquisition could have no conceivable anti-competitive impact on sales of drinks, punches and ades in the United States and there is no substantive antitrust reason to insist upon

[5] Hood's fiscal year runs from July 1 to June 30. Hood sales data was provided to the Company by Hood.

[6] "Fruit drinks" are defined as drinks which contain a percentage of fruit juice but are not 100% fruit juice. These include such drinks as lemonade, orange-ade or drink, cranberry juice cocktail, grape drink, fruit punch and other fruit drinks. Beverage Marketing Report at 54-55.

[7] Beverage Marketing Report at 13.

[8] *Id.* at 149.

compliance with the prior approval provision. *See, e.g., Beatrice Foods Co., supra,* 101 FTC at 818–19, 821, 825 (.57%); *Federal Trade Commission v. Beatrice Foods, Co.,* 587 F.2d 1225, 1230, 1234 (D.C. Cir. 1978) (0.19% and 0.5%) (appendix to order denying motion for rehearing en banc); *Federal Trade Commission v. Tenneco, Inc.,* 433 F. Supp. 105, 114 n.21 (D.D.C. 1977) (0.3%).

The purchase price to be paid for the Hood Institutional Food Service Group will be approximately $45 million. The transaction will be subject to the provisions to the Hart-Scott-Rodino Act, 15 U.S. Code §18a, and a complete premerger filing will be made in accordance with the permerger notification rules. Therefore, the Commission will have a full opportunity to review the competitive impact, if any, of this transaction. Thus, any benefits which may exist under the prior approval provision of the Consent Order would be fully served by the premerger filing, on the facts of this particular transaction. *Compare Diamond Crystal Salt Co.,* 3 Trade Reg. Rep. (CCH) ¶22,180 (Docket 7323, July 30, 1984); *ITT Continental Baking Co.,* 102 FTC 1298 (Docket 7880, October 12, 1983).

In 1987 the Premerger Notification Rules were modified to delete paragraph (b) of Rule 802.70. In so doing, the Commission stated that it wanted to "assure that the rule . . . does not create a barrier to voluntary settlements of antitrust actions by unnecessarily requiring public disclosures of information about acquisitions." 52 Fed. Reg. No. 44 p. 7073 (March 6, 1987). Much of the information needed to assess the present acquisition would likely be proprietary and confidential commercial information which the Company would not want to disclose publicly. Section 7A(h) of the Hart-Scott-Rodino Act provides that premerger filings under the Act are exempt from public disclosure. For this reason as well, the Hart-Scott-Rodino Act procedures would be preferable to the provisions of the Consent Order.

Finally, the business reasons, undue delay in closing this transaction would have a material adverse impact on the value of the acquisition to the Company. The acquisition has been publicly announced. Customers, employees, suppliers, co-packers and distributors for Dunedin have expressed uncertainty as to their roles in the post-acquisition Dunedin. Such uncertainty is exerting a negative impact on Dunedin's sales. It is therefore essential that the acquisition be closed as soon as possible in order to remove this uncertainty and prevent deterioration in the value of Dunedin. For this reason as well, we request expedited treatment of this application.

For all of the above reasons, we believe that the acquisition of the Hood Institutional Food Service Group would fall outside the terms of the Consent Order, and we request the Commission's advice confirming our interpretation. Alternatively, the lack of any competitive impact whatsoever in "drinks, punches and ades" is so readily apparent that compliance with the prior approval provision should be waived in this case.

We would be pleased to attempt to answer any questions which the Commission may have and to provide additional information which the Commission may believe to be necessary to respond to this request.

Respectfully submitted,

Darrell Prescott
Coudert Brothers
Counsel for The Coca-Cola Company

Re: American Dental Association
Docket No. 9093

October 4, 1988

Dear Mr. Sfikas:

This letter responds to the June 6, 1988 petition to reopen and modify the order in Docket No. 9093, filed on behalf of the American Dental Association ("ADA"). The petition asks the Commission to reopen the order and to modify it by adding language stating that the order does not bar ADA from enforcing its current rules on announcement of specialization. The Commission has considered the petition, its accompanying materials, and the public comments on ADA's request. As explained below, the Commission finds that ADA has not made a satisfactory showing that either changed conditions require reopening of the order or that public interest considerations warrant modification of the order at this time.

Background

The order that ADA seeks to modify is the result of a consent agreement entered into by ADA in which it agreed to be bound by the outcome of the Commission's suit challenging the advertising restrictions of the American Medical Association. The Commission sued ADA in 1977, charging the organization with violating Section 5 of the FTC Act through its suppression of virtually all forms of advertising by its members. In February 1979, ADA and FTC staff agreed to settle the case, under an agreement whereby the case would be decided by whatever final adjudicated order resulted in the then-pending *American Medical Association* case, Docket No. 9064. The consent order, which took effect in September 1979, also provided for certain interim relief pending final resolution of the case.

In 1982, the United States Supreme Court affirmed the Commission's decision and order against the American Medical Association, and a final order against ADA was issued on August 3, 1982. 94 FTC 448 (1982). That order prohibits ADA from restricting truthful, nondescriptive advertising. It specifically provides that ADA may adopt and enforce reasonable ethical rules governing advertising that it reasonably believes to be false or deceptive within the meaning of Section 5 of the FTC Act.

As early as August 1982, FTC staff had expressed concern that some of ADA's ethical provisions, including ones addressing specialty

announcements, might conflict with the order, as reflected in Exhibit E of your petition. In January 1988, Bureau of Competition staff formally notified ADA that the FTC was investigating ADA's compliance with the order. In June 1988, the instant petition to modify the order was received and placed on the public record for comment by interested parties.

The petition asks that the order be modified to provide expressly that ADA may enforce its rules on specialty announcements. ADA states that it is uncertain whether the order permits ADA to enforce these rules, and that a provision making clear that it may do so would be in the public interest because the rules promote competition and protect the public from deception. Petition at 7–8. ADA also submits that a change in antitrust law has occurred since the Commission issued the order that necessitates order modification. Petition at 8.

Standard for Reopening a Final Order

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact require" such modification. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that those changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition. *Louisiana-Pacific Corp.*, Docket No. C–2956, Letter to John C. Hart (June 5, 1986), at 4.

If the Commission determines that a petitioner has made the required showing, the Commission must reopen the order to consider whether the modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one, given the public interest in the finality of Commission orders. *See Federal Department Stores v. Moitie,* 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

In addition, Section 5(b) provides that the Commission has discretion to modify an order when, in its opinion, the public interest requires such modification. Accordingly, Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51, invites respondents, in petitions

to reopen, to show how the public interest warrants the requested modification. To obtain review on this ground, the respondent must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C–2916, Letter to Joel E. Hoffman, Esq. (March 24, 1984), at 2 ("Damon Letter") (unpublished). If the respondent satisfies this threshold requirement, the Commission will balance the reasons favoring the modification requested against any reasons not to make the modification. Damon Letter at 2.

ADA Has Not Shown a Change in Law that Requires Reopening.

ADA submits that since entry of the order, "there has been a rather dramatic change in the law pertaining to alleged 'boycotts' or 'collective refusals to deal'." Memorandum at 33. Relying on *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), ADA states that it is now clear that it is "improper to label as unlawful *per se* membership rules merely because they may be labelled as a 'group boycott' or 'collective refusal to deal'." *Id.* at 23. Thus, ADA asserts, instead of *per se* treatment, "more careful analysis" of the economic effects of association membership rules is now required. Petition at 8.

ADA's contentions regarding changes in treatment of boycotts are not relevant to the order at issue here, because that order was not based on analysis of ADA's advertising restraints as a group boycott. The Commission's opinion in the *American Medical Association* case, which provided the basis for the order that ADA now seeks to modify, makes clear that the Commission did not treat the advertising restraints as *per se* unlawful boycotts. *American Medical Association*, 94 FTC 701, 996–1011 (1979), *aff'd as modified*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided Court*, 455 U.S. 676 (1982). Although acknowledging that "enforcement of [the challenged] restrictions by disciplinary action that threatens or results in the loss of valuable privileges associated with [AMA] membership has earmarks of a group boycott," the Commission explicitly stated in its opinion that it was applying rule of reason, and not *per se*, analysis to AMA's advertising rules. 94 FTC at 1003. It then proceeded to evaluate the anticompetitive nature of the restraints, including evidence of significant anticompetitive effects, 94 FTC at 1004–1008, and possible procompetitive justifications, 94 FTC at 1008–1010.

In sum, ADA's implicit suggestion that the order is based on a legal

theory that ADA's advertising rules were a *per se* illegal boycott is entirely misplaced. Its contentions about a movement away from characterizing membership rules as group boycotts, as reflected in *Northwest Wholesale Stationers, Inc., v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), are therefore irrelevant. ADA has failed to show any changes in statutory or decisional law that have the effect of bringing the order into conflict with existing law. *See System Federation No. 91 v. Wright*, 364 U.S. 642 (1961). Accordingly, the Commission finds that ADA has not made a satisfactory showing of changes in law that would require reopening of the order under Section 5(b).

ADA Has Not Shown that Modification Would Be in the Public Interest.

ADA has also asserted that modification of the order to provide that it may continue to enforce its rules on announcement of specialization would serve the public interest. ADA states that it believed that its specialty announcement rules "were not a part of Docket No. 9093" (Petition at 7), and that FTC staff's current investigation of ADA's compliance with the order has created uncertainty for ADA. ADA urges that the Commission eliminate this uncertainty by specifying that the order does not reach the specialty rules, on the grounds that the rules protect consumers from deception and promote competition by enhancing the quality of information available in the marketplace.

ADA has not demonstrated that it is in the public interest to reopen the order at this time. As noted above, ADA must demonstrate injury as a result of the order and show that such harm outweighs the continuing competitive need for the order. *See Cooper Industries, Inc.*, Docket No. C-2970, Letter to Sean F. Boland (September 16, 1987), at 2 (unpublished). ADA has not made such a showing.

First, uncertainty on ADA's part as to its compliance obligations does not require modification of the order. ADA states that it "should not be forced into a civil penalty action without appropriate guidance from the Commission as to whether its rules on specialty announcements are covered by its Consent Order." Petition at 7. Although it is not entirely clear what ADA means when it says it believed the rules in question were not "part of Docket No. 9093," ADA appears to be stating that it believed the rules did not violate the order because of the order's proviso, which enables ADA to regulate false or deceptive advertising. *See* Petition at 5 (assertion that the rules prevent

announcements that the ADA reasonably believes are false or deceptive within meaning of FTC Act). ADA does not content that the rules do not regulate advertising, or that they were otherwise excluded from coverage by the terms of the order. Thus, ADA in effect is asking the Commission for a declaration that the specialty rules do not violate the order.

The rules in question, however, are the subject of a current investigation into ADA's compliance with the order. The public interest would not be served by reopening the order to give ADA guidance that it is not in violation of the order when that very issue is under investigation. As a matter of general policy, the Commission believes that it is not in the public interest to reopen an order where substantial questions exist about a respondent's compliance with the very provision sought to be modified. This policy helps to ensure compliance with Commission orders. *See Union Carbide,* 108 FTC 184, 187 (1986).

The Commission finds no reason to deviate from this general policy in this instance. Substantial questions exist as to issues raised by ADA's petition, including, for example, the precise nature of claims that are restrained by ADA's rules, and whether and to what extent the rules serve to either (1) prevent deception of the public, or (2) prevent the dissemination of truthful, nondeceptive information. The staff's investigation seeks to resolve these issues, and preempting the investigatory process would not serve the public interest. ADA's reliance on *Mattel, Inc., et al.,* 104 FTC 555 (1984), for the proposition that it is in the public interest to modify an order to clarify a respondent's compliance obligations, is misplaced. In that case respondents sought order modification to clarify that certain *proposed* conduct would not violate the order. There was no question as to respondents' compliance with the order.*

Second, ADA's contentions that the rules protect consumers from deceptive claims do not establish a need to modify the order. If ADA is correct that the rules regulate advertising that is false or deceptive, then they do not conflict with the order. Moreover, even if ADA is incorrect, to the extent that ADA reasonably believed that its rules regulate advertising that is false or deceptive within the meaning of Section 5 of the FTC Act, as is asserted in the petition, then ADA

*When a respondent seeks guidance concerning whether prospective conduct would violate an order, it can request advice from the Commission. *See* 16 CFR 2.41(d). Because ADA already is engaging in the conduct in question, a request for advice in either a petition to reopen and modify or an application for an advisory opinion is inappropriate.

would not be in violation of the order. The order specifically provides that enforcement of ethical rules based on such reasonable belief does not conflict with the order.

Finally, to the extent that ADA is arguing that certain kinds of rules that restrain nondescriptive advertising, and thereby conflict with the order, can promote competition by standardizing information that is available in the marketplace, the Commission also finds that ADA has not established a need to reopen the order at this time. Both the rules on their face and the public comments received in connection with ADA's petition raise significant questions regarding ADA's claim that its specialty rules are all on balance procompetitive. In light of these questions, the Commission finds that public interest considerations do not warrant reopening the order at this time. Indeed, it would be premature for the Commission to attempt to reach a conclusion on this issue prior to completion of the staff's investigation.

In sum, the Commission has considered ADA's arguments and finds that ADA has not demonstrated that its requested modification would serve the public interest. ADA has not shown any need to modify the order not outweighed by the reasons not to reopen the order. Accordingly, the Commission finds that public interest considerations do not warrant modification of the order at this time.

Of course, the Commission's staff in the course of the investigation necessarily will consider ADA's contentions that its rules benefit consumers and are procompetitive. Furthermore, after completion of the staff's investigation, the Commission also will consider ADA's arguments. If, for example, the Commission should find reason to believe that ADA is in violation of the order, ADA's arguments may be relevant to the exercise of prosecutorial discretion. In evaluating whether to seek enforcement of the order in federal court, the Commission would consider whether the public interest warranted such action. In addition, after resolution of the compliance issues, if the Commission finds that public interest considerations warrant modification of the order, it has the authority to issue an order to show cause why the order should not be modified. 16 CFR 3.72. Moreover, this denial of ADA's petition to reopen and modify the order is without prejudice, and thus ADA is free to renew its request for modification of the order at a later time.

Conclusion

The Commission finds that ADA has not made a satisfactory

showing of changed circumstances to require reopening of the order, and has not demonstrated that the public interest warrants modification of the order at this time. The petition to reopen the order in Docket No. 9093 is therefore denied.

By direction of the Commission.

Re: Lindal Cedar Homes, Inc.
Docket No. 2774

October 28, 1988

Dear Mr. Sandler:

This is in response to the petition you filed on July 1, 1988 on behalf of your client, Lindal Cedar Homes, Inc., requesting that the above-referenced proceeding be reopened and that the consent order issued therein be set aside in its entirety or modified. The petition was filed pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b) and Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51 (1986).

Petitioner's Request

The petition states that changed conditions of law and fact and the public interest support the request to set aside the order. In the alternative, Lindal requests that the Commission modify the order to eliminate those terms which hinder Lindal's ability to compete in its various product lines and stated that a proposed modified order was being discussed with staff. Staff and Lindal did have general discussions and engaged in correspondence as to which sections of the order could possibly be modified, subject to Lindal submitting evidence showing a changed condition of fact or law or public interest considerations sufficient to justify each modification.

Lindal did not submit modification language with its request, proceeding instead with the July 1, 1988 petition, as filed. No comments were received after the placement of the petition on the public record.

The Order

On January 5, 1976, the Commission issued a complaint and order against Lindal Cedar Homes and Sir Walter Lindal, individually. The complaint alleged that Lindal misled consumers by misrepresenting the ease and economy of and time involved in building its houses, included unfair terms and warranties in its contracts with consumers, misled potential franchisees about the profits that could be made, and violated the Truth-in-Lending Act and its implementing Regulation Z.

The order comprises four main parts. Part I prohibits certain misrepresentations as to the ease and economy of or time involved in

constructing Lindal's houses. Part II prohibits the use of certain unfair terms in contracts and requires that certain warranties be given to the consumer. Part III incorporates the Commission's then-proposed Franchise Rule. Part IV requires Lindal to comply with the requirements of the Truth-in-Lending Act.

Changes in Law

In its petition, Lindal states that changed conditions of law and fact and the public interest require that this order, now twelve (12) years old, be terminated. With regard to changed conditions of law, Lindal asserts that two changes have occurred to support its petition. First, petitioner argues that in recent years both the Federal Trade Commission and the Department of Justice have included sunset provisions in consent orders. Petitioner asserts that this "policy" should be applied to this order. Secondly, petitioner asserts that the Commission's Franchise Rule, 16 CFR Part 436, has eliminated the need for those provisions of the order controlling its franchising activities.

To support its contention that there has been a change of law as to the duration of consent order, petitioner cites three Commission cases:[1] *C & D Electronics,* 109 FTC 72 (1987); *Saga International, Inc.,* 108 FTC 62 (1986); and *American Academy of Optometry, Inc.,* 108 FTC 25 (1986). These orders, however, do not reflect any policy by the Commission to terminate orders after a certain period of time. Although certain sections of the orders contain sunset provisions, the orders as a whole do not sunset. In fact, several sections of these orders do not contain any time limits. For example, Saga is prohibited from making representations that Saga's Home Free pest control will eliminate cockroaches; C & D Electronics is required to make certain disclosures with the sale of any cable television decoder, and American Academy is prohibited from restricting the advertising of the terms of sale for optometric services. Clearly, even these Commission orders do not indicate any broad Commission policy to limit the life of a Commission order.

To further support its argument, Lindal cites several Department of Justice cases that are limited in duration and comments that the Department of Justice now has a policy of routinely including provisions automatically terminating consent decrees after a fixed

[1] Petitioner incorrectly cites these three cases as "proposed agreements." These cases are final Commission orders.

period. Petitioner has not shown that this policy has legal force sufficient to require even the Department of Justice to adhere to it. More importantly, the Commission is not bound by the policy of the Antitrust Division of the Department of Justice. The Commission, being an independent regulatory agency, generates its own policies to carry out the mandates conferred upon it by Congress. Thus, petitioner has not shown any changed condition of law that would require the Commission to sunset this order.

Further, the promulgation of the Franchise Rule is not a changed condition of law sufficient to vacate the order in its entirety. Rather, the order addresses several practices in addition to franchising activities, none of which could have been affected by promulgation of the Franchise Rule.

Changes of Fact

Petitioner also argues that changed conditions of fact exist, thereby meriting vacation of the order. As to Part I of the order, petitioner asserts three reasons why it serves no useful purpose. First, Lindal argues that Part I does not apply to its current business. This argument is premised upon Lindal's assertion that its product, distribution channels, and marketing have all changed since the order was issued. Prior to 1975, Lindal manufactured and sold primarily precut cedar homes intended for use by a customer as a second home, and designed to be constructed by the customer himself. The vast majority of houses Lindal sells today require professional construction. In addition to its Lindal homes, petitioner's product line now includes Justus log houses, sunrooms, hardwood flooring, and windows. These products are sold through separate distribution networks.

Second, as a result of selling mostly houses that require professional assistance, Lindal states that it has altered its advertising strategy. To support this argument, Lindal submits samples of its current advertising for comparison to its advertising at the time the order was issued. Petitioner's third argument is that there is now a panoply of local building laws that protect the consumer during construction.

Petitioner has not presented evidence of changed condition of fact sufficient to vacate the order. The major change in Lindal's current business is that it now sells primarily houses that require professional assistance. However, Lindal continues to derive about fifteen percent (15%) of its sales from consumers who build their homes without the assistance of a contractor. Although its current advertising strategy

seems to promote the design flexibility and versatility of a Lindal house, Lindal continues to make some claims as to the ease of construction. For example, Exhibit 2 of the Lindal Affidavit, entitled *Buyer's Guide to Prefabs, Kits, and Manufacturer Houses,* describes the ease of constructing a Lindal cedar house and a Justus house. Clearly, these statements, while not as central to Lindal's advertisements as those being made at the time the order was issued, show that Lindal continues to emphasize the ease of constructing its houses. Furthermore, the protection provided to consumers by local building laws is not the same protection provided by the order. Local building laws protect consumers during the actual construction phase, whereas the order is designed to protect consumers from misrepresentations and unfair contract terms.

Lindal argues that Part II of the order is superfluous. Lindal asserts that due to the increase in competition, it would maintain the requirements in this Part with or without the order. In fact, competitive forces have compelled Lindal to give the consumer more favorable terms than those required by the order. Lindal argues that paragraph 4 of part II-D is the most onerous requirement and imposes a major competitive impediment and that Part II-F became outdated ten years ago. Lindal also alleges a change in management and its business.

None of these alleged changed conditions of fact justifies setting aside the order. Merely alleging competitive hardship does not justify vacating the order. *See,* Secretary's Letter to petitioner, *Control Data Corporation,* FTC Docket No. 8940, dated April 22, 1988. Lindal fails to substantiate its claim of an increase in competition. As to Part II-D, many Commission orders require that a copy of the order be given to dealers and/or distributors. *See, e.g., Viobin Corporation,* FTC Docket No. C-3204. Moreover, the order does not prevent Lindal from responding to competition by offering what appear to be more favorable contract terms. Lindal also fails to elaborate as to how its change in management is a change sufficient to vacate the order. Further, the fact that Part II-F was complied with ten (10) years ago is not a reason to vacate the entire order.

Petitioner argues that Part III also is totally unrelated to Lindal's current business, as Lindal no longer sells franchises and has no economic reason for doing so again. The Commission finds Lindal's argument unconvincing. Although at this time it may not have any economic reason to sell franchises, Lindal may have the need to

resume sales of franchises in the future. Moreover, the fact that the order, in effect, duplicates the Commission's Rule on this subject is not a change in circumstances that justifies vacation of the order.

Lindal contents that Part IV also is superfluous because Lindal does not provide consumer financing today in connection with sales either of houses or of other products. The typical house is financed by a bank or mortgage lender. The fact that Lindal does not provide consumer financing at this time is not a changed condition of fact sufficient to vacate the order, however. There is nothing to prevent Lindal from providing such financing in the future.

Lindal further argues that it has complied with Parts V through IX throughout the twelve (12) years the order has been in effect, and because there is no reason to continue Parts I through IV, there is no reason to continue these ancillary provisions. However, since the Parts I through IV of the order will be maintained, Parts V through IX also will be maintained to ensure Lindal's compliance with the order.

Petitioner also argues that the order imposes a permanent competitive hardship on Lindal. According to petitioner, the very existence of the order scares off potential distributors. Lindal also argues that the order is a potential weapon to competitors and distributors who have a dispute with Lindal.

Petitioner fails to substantiate its claim that the order's requirement that Lindal must present the order to all prospective dealers and/or distributors impedes Lindal's ability to set-up distributorships. Lindal's affidavit merely asserts that there have been several instances in the past few years where the existence of the order has presented a problem. There is no evidence that any potential distributor has refused to carry Lindal's products because of the order. Also, the fact that a disgruntled distributor may use the order as evidence of Lindal's bad faith is not a reason to vacate the order.

Finally, Lindal argues that Sir Walter Lindal's reduced involvement with the company is a changed condition of fact that justifies vacation of the order as it applies to him. The petition recites that Sir Walter Lindal's children have taken over the management of the company and have radically altered the entire business. Lindal states that Sir Walter is a full-time consultant who carries out the policies set by management and is no longer responsible for Lindal's management. Also, he is near the age of retirement.

Notwithstanding Lindal's assertions, the reasons for naming Sir Walter Lindal in the order are still valid. The petition describes Sir

Walter's present duties as that of a consultant who carries out the policies set by management, but fails to elaborate as to what exactly those duties are. A consultant to a company may exercise great influence and be involved with the day-to-day operation of the company. Presumably, Sir Walter continues to have substantial financial interest in the company. Under these circumstances, continued application of the order to Sir Walter Lindal appears to be appropriate.

Conclusion

In light of the foregoing, the Commission denies Lindal's request that the proceeding be reopened and the consent order set aside in its entirety.

By direction of the Commission.

Re: Union Carbide Corporation
Docket No. C-2902

November 10, 1988

Dear Mr. Howard:

This letter responds to the "Request To Reopen Proceeding and Modify Order" ("request") filed on behalf of Union Carbide Corporation ("Carbide") on July 13, 1988, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51. In the request, Carbide asks the Commission to reopen the order in this matter, issued September 28, 1977, and modify Paragraph I.A.1 to allow Carbide to enter into requirements contracts with industrial gas distributors for terms up to five years, terminable on no more than 180 days notice. Paragraph I.A.1 of the order provides that Carbide shall not enter into any requirements contracts with distributors unless the initial term is not more than one year, terminable annually on not more than 90 days notice.[1]

The Commission has carefully considered Carbide's request and has concluded that Carbide has not made a satisfactory showing that changed conditions of fact or law or the public interest require reopening the order to determine whether it should be modified. In reaching this conclusion, the Commission has considered the request, the comments of Amerigas, Inc., and Carbide's responses to those comments.

Standards for Reopening and Modifying a Final Order of the Commission

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should modify the order if the respondent "makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside in whole or in part." A

[1] Carbide first asked the Commission to reopen the order and modify Paragraph I.A.1 on March 16, 1983; Carbide withdrew that petition on September 13, 1983. Carbide again petitioned the Commission to modify the order on May 22, 1986. The Commission denied the petition with respect to Paragraph I.A.1, on the grounds that Carbide had not shown changed conditions of law or fact that required reopening and that modification was not warranted in the public interest because the Commission had reason to believe that Carbide was in violation of the paragraph. Order Modifying Order Issued September 28, 1977 (November 14, 1986). A final judgment in settlement of the Commission's subsequent civil penalty suit against Carbide was entered in the Southern District of New York on August 8, 1988.

satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in conditions and shows that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition.[2] The burden is on the petitioner to make the satisfactory showing of changed conditions required by the statute.[3] This burden is not a light one in view of the public interest in repose and finality of the Commission's orders.[4] If the Commission determines that the petitioner has made the necessary showing of changed conditions of fact or law, it must reopen the order to consider whether modification is in fact required and, if so, the nature and extent of the modification.[5]

Section 5(b) also provides that the Commission may modify an order when, although changed conditions would not require reopening, the Commission determines that the public interest warrants such action. Respondents are invited in petitions to reopen to show how the public interest warrants the requested modification.[6] In the case of a request for modification based on the public interest, a petitioner must demonstrate as a threshold matter some affirmative need to modify the order.[7] If the Commission determines that the threshold showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification.[8]

Carbide Has Not Shown Changes of Fact or Law Within the Meaning of Section 5(b) of the Federal Trade Commission Act

Carbide has not shown fundamental changes in circumstances that would require reopening the order on the basis of changed conditions of fact or law. Carbide's 1988 request essentially reiterates the allegations of changes of fact and law that Carbide made in its 1986

[2] *Louisiana-Pacific Corp.*, Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 ("Louisiana-Pacific Letter").

[3] *See* Louisiana-Pacific Letter at 5-6.

[4] *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

[5] Although changed conditions may require that the order be reopened, modification is not necessarily required. S. Rep. No. 96-500, 96th Cong., 2d Sess. 10 (1979).

[6] Section 2.51 of the Commission's Rules, 16 CFR 2.51(b).

[7] *See Damon Corp.*, Docket No. C-2916, Letter to Joel C. Hoffman, Esq. (March 24, 1983), at 2 ("Damon Letter").

[8] *See* Damon Letter at 2; *see also Chevron Corp.*, Docket No. C-3147, 105 FTC 228 (1985) (public interest warrants modification where potential harm to respondent's ability to compete outweighs any further need for order)

petition to reopen and modify the order. The Commission determined that Carbide did not in its 1986 petition demonstrate changes of fact or law that would require reopening.[9]

Carbide in its request does not allege fundamental changes in fact that eliminate the need for the order or make continued application of the order inequitable. For example, Carbide does not alleged that it has exited the market for the production and sale of industrial gases or that its market share has been reduced to a *de minimis* level, either of which condition might be sufficient to demonstrate that the order no longer serves any purpose. Instead, Carbide alleges that the industrial gas industry has become more competitive, that Carbide has made some changes in its internal business operations relating to industrial gases and that Carbide's market share has been reduced in various lines of commerce within the industrial gas industry.[10]

These alleged changes in fact are not significantly different from those that Carbide alleged in its 1986 petition and that the Commission determined in its 1986 Order Modifying Order were not sufficient to require modification of Paragraph I.A.1 of the order. An increase in competition with respect to sales of industrial gases to independent distributors was an expected and intended result of the order.[11] Carbide has failed to show how these alleged changes reflect more than the normal, foreseeable development of the industry.

Carbide in its 1988 request alleges one changed condition of fact that was not presented in its 1986 petition. Carbide alleges that the accelerated pace of backward integration by independent distributors occurring after 1975 should be considered to be a changed condition of fact. Backward integration by distributors, however, apparently predated the order. *See* Request at 23. Carbide acknowledges that the trend to backward integration had begun before the order was issued, *id.*, but Carbide claims that the trend accelerated in the late 1970's and early 1980's, due in large part to tax code changes designed to

[9] *See* Order Modifying Order Issued September 28, 1977 (November 14, 1986), at 6-7.

[10] Carbide's alleged market share erosion is not a fundamental change requiring reopening of the order. Carbide apparently [ ] U.S. producer of merchant air separation gases, in terms of capacity, and has [ ] distributor locations. *See* Request, Exhibit 5. Although Carbide alleges that its percentage of sales of industrial gases to independent distributors (the product market alleged in the complaint) has decreased since 1977 from about [ ] *see* Request, Exhibits 4 & 5, and although more companies compete in the industrial gas market on a national level, Carbide consistently has remained one of the [ ] suppliers of industrial gases to distributors.

[11] The 1977 analysis of the consent order published for public comment stated that "[t]he Order furthers competition among industrial gas suppliers" by giving them the opportunity to sell to purchasers "for whose requirements there had been virtually no competition." 42 Fed. Reg. at 27,260 (May 27, 1977).

encourage capital investment.[12] But Carbide has not shown how the alleged increased backward integration has significantly affected Carbide's position in the industrial gas industry. Nor has Carbide shown how this alleged change of fact eliminates the competitive concerns identified by the Commission in its complaint, *i.e.*, that Carbide's actions lessened competition in the sale of industrial gases to independent distributors and deprived distributors of the opportunity to compete for industrial gas sales to certain classes of customers. The Commission concludes, therefore, that Carbide has not demonstrated a fundamental change of fact within the meaning of Section 5(b).

The Commission also concludes that the 1988 request fails to show that the law has fundamentally changed so that continued application of Paragraph I.A.1 of the order would be inequitable or harmful to competition. As explained fully in the Commission's 1986 Order Modifying Order responding to Carbide's 1986 petition, Carbide has not shown any changes in statutory or decisional law that have the effect of bringing the provisions of Paragraph I.A.1 into conflict with existing law, so that to continue the order would work an injustice.[13]

The changes of law that Carbide alleges in the request essentially repeat Carbide's 1986 claims, except for the discussion of two recent circuit court opinions, *Chuck's Feed & Seed Co., Inc. v. Ralston Purina Co.*, 810 F.2d 1289 (4th Cir. 1987), and *Ryko Manufacturing Co. v. Eden Services*, 823 F.2d 1215 (8th Cr. 1987), *cert. denied*, 108 S. Ct. 751 (1988). These cases, however, do not support Carbide's claims that the decisional law has changed. Rather, these cases demonstrate that there has been no change in the decisional law that has the effect of bringing Paragraph I.A.1 of the order into conflict with existing law.[14] Mere shifts in the emphases of legal analysis or

[12] Carbide also claims that any increase in backward integration occurring after 1975 and predating the order (September 28, 1977) is a "changed condition of fact for purposes of this Request to Reopen." Request at 23. Carbide states that it was not aware of the full extent of this backward integration at the time the order was issued and argues that the degree of change should be measured from the time of Carbide's perception rather than from when the change began. Under Section 5(b) of the FTC Act, however, the relevant comparison is between the facts that existed at the time the order was issued and the changes, if any, that occurred thereafter.

[13] *See System Federation No. 91 v. Wright*, 364 U.S. 642 (1961); *Bulova Watch Co.*, 102 FTC 1834 (1983).

[14] In *Chuck's Feed & Seed*, the court noted that exclusive dealership arrangements "have never been *per se* illegal under the antitrust laws" and that a rule of reason analysis applies, but over time the scope of that analysis has broadened. 810 F.2d at 1293–94, *citing Tampa Electric v. Nashville Coal Co.*, 365 U.S. 320 (1961).Similarly, the *Ryko* court applied the analysis developed in *Tampa Electric* and in *Continental T.V., Inc. v. GTE Sylvania*, 433 U.S. 36 (1977), to an exclusive dealing arrangement. *Ryko*, 832 F.2d at 1233–35. Although *Ryko* may support a conclusion that recent cases exhibit "diminished hostility towards exclusive dealing arrangements," Request at 37, it does not demonstrate a fundamental change in law within the meaning of Section 5(b) of the FTC Act.

refinements in the law fall short of the type of fundamental change in the law that would require reopening and modification of the order's prohibition of long term requirements contracts.[15]

The Public Interest Does Not Warrant Reopening and Modification of Paragraph I.A.1 of the Order

The Commission finds that Carbide has not demonstrated that reopening and modification of Paragraph I.A.1 is warranted in the public interest. Carbide's claims of competitive injury do not meet the threshold burden of establishing that Carbide is competitively disadvantaged as a result of the order in any way that was not contemplated when the order was issued. Even assuming that Carbide met that threshold burden, Carbide has not shown that the reasons favoring modification outweigh the reasons not to make the modification.

Carbide asserts that the order's prohibition against contracts having a term longer than one year has been a "disincentive" for Carbide to "construct, refurbish, and maintain packaging facilities" and allow Carbide to compete more effectively. Request at 25–26. This disincentive is said to exist because Carbide cannot risk making capital improvements to its gas packaging plants without the assurance of a customer base that long-term contracts would provide. Carbide asserts that it is competitively disadvantaged because a number of its competitors use supply agreements with terms up to five years.

Carbide's argument is almost entirely theoretical. Carbide broadly alleges that it has refrained from making investments at some of its packaging facilities, but Carbide has not demonstrated that these unilateral investment decisions have competitively disadvantaged Carbide or that the investment decisions were related to an inability to maintain long-term relationships with its independent distributors as a result of Paragraph I.A.1 of the order.

Carbide also has not demonstrated that long-term requirements contracts are necessary to give Carbide sufficient assurance to warrant the capital investment necessary to permit effective competition. Carbide's relationships with its independent distributors tend to be longer than one year, even without longer term requirements contracts, *see* Request, Exhibits 4 & 5, suggesting that market forces

[15] The Commission noted in *Beltone Electronics, Corp.*, 100 FTC 68 (1982), that both before and after *Sylvania*, there have been no bright line standards for judging requirements contracts.

other than the term of the contract may be responsible for the duration of the relationship between a supplier and its distributors. In addition, although Carbide asserts that it cannot compete effectively with other industrial gas suppliers who generally use requirements contracts with terms longer than one year, Carbide consistently has remained one of the [ ] suppliers of industrial gas to distributors since 1977, and Carbide has [ ] distributor locations. *See* Request, Exhibit 5. Airco, one of Carbide's competitors, also is subject to a Commission order barring long-term requirements contracts, but Airco apparently has expanded its industrial gas packaging facilities and distributor business significantly since the order was entered, *see* Request at 20, Exhibits 4 & 5, suggesting that Paragraph I.A.1 of the order does not create a competitive disadvantage.

Even assuming that Carbide had made an adequate showing of competitive disadvantage resulting from Paragraph I.A.1 of the order, Carbide has not demonstrated that there is no continuing need for Paragraph I.A.1 of the order. Although Carbide's market share is lower than it was when the order was entered, Carbide has not shown that it does not hold market power with respect to sales of industrial gases to distributors or that the order serves no purpose, especially in the local markets in which individual industrial gas packaging plants serve independent distributors.

Carbide also has not shown that any competitive disadvantage resulting from the order outweighs the strong public policy interest in repose and the finality of the Commission's orders.

For the reasons stated above, the Commission has determined that Carbide has not shown that changed conditions of fact or law require reopening of the order or that reopening and modification is warranted in the public interest. Carbide's request that the Commission reopen the order and modify Paragraph I.A.1 has been denied.

By direction of the Commission.

Re: National Indemnity Company et al.
Docket No. C-2932

December 20, 1988

Dear Mr. LaForce:

This is in response to the petition that you filed on August 30, 1988, on behalf of respondent National Indemnity Company and its six subsidiary corporations to reopen the proceeding and set aside the consent order issued in the above captioned matter. For the reasons stated below, the Commission concludes that National Indemnity has failed to make a satisfactory showing that changed conditions of law or fact require that this proceeding be reopened and the order set aside, or that the public interest so requires.

The petition requested the Commission to reopen the proceeding and set aside the order because of the changes in fact, changes in law and the public interest. In the alternative petitioners requested that the order be set aside as to all petitioners except Cornhusker Casualty Company. The petition was filed pursuant to Section 5(b) of the Federal Trade Commission Act 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice 16 CFR 2.51 (1986).

The Order

On October 18, 1978 the Commission issued a complaint and order against National Indemnity Company and six subsidiary corporations. The petition is filed on behalf of National Indemnity Company and six subsidiary corporations which are bound by the provisions of the order. Petitioners are involved in the sale of liability and property insurance to consumers.

The complaint alleged that petitioners failed to give consumers all the information required by Section 606(a) of the Fair Credit Reporting Act when petitioners procured investigative consumer reports. It also alleged that petitioners failed to give consumers all the information required by Section 606(b) when applicants requested further information about their reports. Accordingly, the order requires respondents to make certain specific disclosures under these two circumstances.

I. Changed Condition of Fact

The petition argues that all petitioners except Cornhusker Casualty

Company have ceased using investigative consumer reports, and, therefore, that the order no longer applies and this fact constitutes a change in fact which should require the Commission to vacate the order.

The Commission concludes that this argument does not apply to Cornhusker Casualty Company since it continues to use the investigative consumer reports. Further, although the other petitioners have ceased using the investigative consumer reports, the Commission has no assurance that this policy will not be changed by other officers of the respondents at a later date or some successors or assigns to respondents. If this happens the Commission would no longer have the availability of a civil penalty proceeding but would have to resort to obtaining another cease and desist order in an *ab initio* proceeding for violations of the Fair Credit Reporting Act.

Petitioners argue that the Commission's decision in *Union Carbide*, 108 FTC 184, supports their request. In Union Carbide though, the respondent did not just stop engaging in the welding business, but sold off its welding business. In other words, the likelihood of that respondent's resuming business practices covered by the order was much less than it is here, where all the respondents remain in the business of selling insurance by extension of credit, but have chosen not to use certain means to determine credit worthiness. Moreover, *Union Carbide* was a competition order and the divestment of an entire category of business would more likely be a change of fact relevant to the competitiveness of that category of business. The unfairness of violating the Fair Credit Reporting Act does not change with the number of firms in the business of selling insurance.

II. Changed Condition of Law

The petition argues that in recent years the Commission has made increasing use of "sunsetting" provisions both in its cease and desist orders and its modifications, and that the Department of Justice has adopted a similar policy, involving a period of ten years.

It is our understanding that the Antitrust Division of the Department of Justice has adopted such a policy, but the Commission is not under any obligation to adopt the same policy since it is an independent regulatory agency. See Secretary's Letter denying Petition to Reopen and Vacate Consent Order in re Lindal Cedar Homes Inc., Docket No. C-2774, October 28, 1988. The Commission has not adopted a set policy concerning the use of "sunset" provisions,

although it has chosen on occasion to sunset certain provisions in individual orders. The petition cites the modification in *Occidental Petroleum Company,* 101 FTC 373 (1983), in which the Commission decided in the ninth year after the order was issued that the public interest justified vacating certain "fencing-in" provisions of the order then and the rest of the order the next year even when there had been no change of law or fact requiring the vacating. The Commission agrees that this is an example of the use of a "sunset" provision and may be appropriate in certain individual cases, but *Occidental* was an antitrust case in which the Commission considered that competitive conditions were different from what they were ten years previously. This rationale cannot be extended, as a matter of policy, to deceptive practice cases and specifically Fair Credit Reporting Act cases. Moreover, even if the Commission had adopted a set policy on sunset provisions this would merely be an exercise of the Commission's discretion as an administrative agency in certain types of cases, and would not require the Commission to accept sunset provisions in all cases. Accordingly, the petition does not establish a changed condition of law that requires reopening the proceeding and vacating the order.

III. Public Interest Considerations

The petition argues that the law-abiding record of petitioners goes to the issue of whether there is a public need for continuation of a cease and desist order. The order was issued because the notice given to consumers did not contain all the information required by Section 606 of the FCRA. Once the order was issued petitioners changed the disclosure forms to comply with the order and state that they have had an exemplary compliance record over the last ten years. On the other hand the petition does not contend that the order imposes any cost burden on petitioners.

The Commission has never adopted a policy that orders should be vacated simply because respondents have a good record of compliance. Parties under order are in every case bound by law to comply therewith. Because petitioners' conduct could change, the Commission has held that a respondent's good conduct and length of time under an order, particularly a consumer protection order, do not require that the proceedings be reopened and the order vacated. (Secretary's Letter denying Petition to Reopen and Vacate Order in re Beecham Inc., Docket No. 8547, April 11, 1984; in re Textileather Company, Docket No. 1585, January 20, 1984). Accordingly, the petition does not

establish that the public interest requires reopening the proceeding and vacating the order.

Based on the these considerations the request to reopen the proceedings and modify the order in this matter is denied.

By direction of the Commission.

**Re: Reader's Digest Association, Inc.
Docket Nos. C-626 and C-2075**

January 6, 1989

Dear Ms. Farquhar and Ms. Blatch:

On March 30, 1988, The Reader's Digest Association, Inc. ("Reader's Digest") filed a Request to Reopen and Modify Consent Orders and For Advice on Interpretation of Consent Order ("request"). In the request, Reader's Digest asks the Commission to reopen the proceedings in Docket No. C-2075 and modify Paragraph II(3) of the order to permit respondent to disclose on order forms or elsewhere the terms and conditions of its offers, so long as the order form directs consumers to the location of the disclosures. The request also asks that the Commission reopen the proceedings in Docket No. C-626 to modify Section 1 of the order by deleting the phrase "so as to leave no reasonable probability that the terms of the advertisements or offer might be misunderstood" (hereinafter "reasonable probability clause"). Finally, respondent seeks an advisory opinion regarding the meaning of the term "at the outset" in the same provision of the order in Docket No. C-626.

In supplemental petition dated August 2, 1988, respondent submitted additional arguments justifying the requested modification of the order in Docket No. C-2075. Respondent's original and supplemental requests were placed on the public record for thirty days. Encyclopaedia Britannica commented twice and an individual also provided comments. On October 6, 1988, Reader's Digest responded to the comments of Encyclopaedia Britannica. In that response, Reader's Digest renewed most of its earlier requests, and noted that if the Commission confirmed that it interpreted the disclosure requirement in Section 1 of the order in Docket No. C-626 in a more liberal manner than respondent, then such interpretation would obviate the need for the requested deletion of the reasonable probability clause.

The Commission has considered respondent's request that the Commission reopen the proceedings in Docket No. C-2075 and modify Paragraph II(3) of the order. It has determined that Reader's Digest has failed to demonstrate any changed conditions of fact or law that would require the requested modification.

Respondent argues that the Commission's decisions in *Encyclopaedia Britannica*, 87 FTC 421 (1976), and *Grolier, Inc.*, 91 FTC 315

(1978), constitute a change in law because the orders in those matters require respondents to place on order forms disclosures concerning bulk sales offers only. According to Reader's Digest, this demonstrates that the Commission no longer requires that all disclosures appear on order forms. Further, respondent asserts that the Commission had the opportunity to require the disclosure of sales terms of merchandise sold through negative option plans when it adopted the Negative Option Rule, 16 CFR 425, before the order in Docket No. C-2075 became final. Respondent states that the Commission's failure to do so evidences a change in law.

The Commission does not agree that either of these circumstances demonstrates a change in law. The disclosure requirement in Paragraph II(3) of the order in Docket No. C-2075 is not necessarily inconsistent with the orders against Encyclopaedia Britannica and Grolier or with the Negative Option Rule. Instead, the provision at issue simply provides a different remedy resulting from the parties' negotiations over settlement of the misconduct alleged in the complaint. In addition, the more stringent disclosure requirement in the order in Docket No. C-2075 may have been justified by the fact that Reader's Digest was already a respondent to a Commission order in Docket No. C-626.

Even if the respondent has not demonstrated that changed conditions of law or fact require reopening, the Commission may determine that the public interest warrants reopening of an order if respondent demonstrates that the order impedes competition. See *Damon Corp.*, Docket No. C-2916, 101 FTC 689, 692 (1983). When such a showing is made, the Commission will weigh the reasons favoring the requested modification against any reasons not to make the modification. The Commission does not believe that Reader's Digest has provided a sufficient showing of competitive harm resulting from the continued application of the order provision to it. Respondent has provided samples of its competitors' mailing packages to demonstrate that other firms have flexibility in disclosing the terms and conditions of offers. However, respondent has asserted that it suffers competitive harm because, unlike its competitors, it lacks the flexibility to place the required disclosures other than on the order form.

The respondent's competitors have greater flexibility in devising promotions is not adequate grounds for reopening. Reader's Digest agreed to this order knowing that its competitors would not face such

restraints. The Commission has recognized that respondent's burden of demonstrating that modification is required is not a light one. *Damon Corp.*, Docket No. C-2916 (letter to Joel Hoffman of March 29, 1983). Because Reader's Digest has failed to support its assertions of competitive harm caused by continued imposition of the order provision, it has failed to meet its burden under *Damon* to show competitive harm sufficient to warrant vacation of the provision. Nor has Reader's Digest shown that other reasons support its contention that the need for the provision no longer exists. Therefore, the Commission denies respondent's petition to modify the order in Docket No. C-2075.

Respondent also asked the Commission to reopen the order in Docket No. C-626 to delete the reasonable probability clause. Reader's Digest interprets this phrase to impose on respondent a requirement not only to disclose the terms and conditions of offers for free merchandise clearly and conspicuously, but to do so in a manner "so as to leave no reasonable probability that the terms...might be misunderstood." Respondent believes that this cumulative requirement places it under a higher standard than an obligation merely to disclose its terms and conditions clearly and conspicuously.

The Commission has considered this portion of respondent's request and hereby denies it because Reader's Digest has failed to demonstrate that changed conditions of fact or law require deletion of the reasonable probability clause. In any event, the Commission notes that respondent's interpretation of the reasonable probability clause to impose a dual disclosure requirement is incorrect.

Reader's Digest states that the Commission's view of what constitutes a deceptive act or practice has changed since the time it entered the order in Docket No. C-626. Respondent asserts that now the Commission considers only those acts "likely to mislead consumers acting reasonably under the circumstances" as deceptive under Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. However, the Commission's complaint against Reader's Digest in this matter alleged that respondent's disclosure of free offers was false and deceptive because respondent had not made them "so as to leave no reasonable probability that the terms...might be misunderstood." Reader's Digest seems further to argue that, with the exception of the "Guide Concerning Use of the Word 'Free' and Similar Representations," 16 CFR 251(c)(1987) ("Free Guides"), the Commission no longer considers this language appropriate.

On the contrary, the Commission has used this language in other orders before and since it issued the order in Docket No. C–626. *See, e.g., In re Hiken Furniture Co.,* 91 FTC 1115, 1130 (1978); *In re Book-of-the-Month Club, Inc.,* 50 FTC 778, 779 (1954). In fact, as respondent points out, the Commission continues to use language virtually identical to the reasonable probability clause in its Free Guides. The continued use of the language in the Free Guides reflects the Commission's confidence in the propriety of the language of the reasonable probability clause.

In addition, the Commission does not agree that this provision, even in combination with the "clear and conspicuous" requirement, imposes on respondent a standard higher than a requirement that it simply disclose clearly and conspicuously the terms of its offers. In the Commission's view, the disclosure requirement of Section 1 of the order in Docket No. C–626 contemplates two alternative standards, *i.e.,* that the disclosure be either: clearly and conspicuously explained; or set forth at the outset so as to leave no reasonable probability of being misunderstood. Accordingly, the requested modification is unnecessary.

Finally, respondent has asked the Commission to furnish an advisory opinion regarding the meaning of the term "at the outset" in Section 1 of the order in Docket No. C–626. Apparently unsure of precisely what constitutes a disclosure "at the outset" of an advertisement or offer, respondent asks whether it would be complying with that requirement if it discloses the terms and conditions of offers for free goods in the same manner as required by Paragraph II(3) of the order in Docket No. C–2075. In other words, respondent seems unclear about whether it would be complying with the "at the outset" requirement by disclosing the terms of offers to free goods either on the order form, or elsewhere in the promotional materials in the case of catalogue sales offers, so long as Reader's Digest clearly indicates on the order form where consumers can find the disclosures.

The Commission has considered respondent's request for an advisory opinion on this issue. It agrees that compliance with Paragraph II(3) of the order in Docket No. C–2075, constitutes compliance with the "at the outset" requirement in Section 1 of the order in Docket No. C–626.

By direction of the Commission, Chairman Oliver and Commissioner Machol dissenting.

Dissenting Statement of Chairman Daniel Oliver

I dissent from the Commission's decision to deny RDA's request to reopen and modify the orders in Docket No. C-626 and Docket No. C-2075. RDA asked for two changes: (1) to delete the phrase "so as to leave no reasonable probability that the terms of the advertisements or offer might be misunderstood" from Paragraph I of the order in Docket No. C-626, and (2) to modify Paragraph II(3) of the order in Docket No. C-2075 to permit disclosure of the terms and conditions of RDA's sales offers either on the order form or elsewhere in the materials, so long as the order form directs consumers to the location of the disclosure. In my view, there are strong public interest grounds for making these proposed changes.

Docket No. C-2075

RDA's request to modify Paragraph II(3) of the order in Docket No. C-2075 is premised on the theory that the Commission, in issuing the *RDA* order, held as a general proposition that all terms and conditions of an offer must be disclosed on the order form. RDA asserts that the law changed when the Commission adopted the Negative Option Rule, 16 CFR Part 425, and issued the orders in *Encyclopaedia Britannica, Inc.*, 87 FTC 421 (1976), and *Grolier, Inc.*, 91 FTC 315 (1978).

I find it unnecessary to reach the question whether a post-order change of law occurred, because the public interest grounds for granting RDA's request are abundantly clear. RDA has demonstrated convincingly that it is put at a competitive disadvantage by the order form disclosure requirement. RDA, for example, provided samples of its competitors' order forms, which demonstrate that other firms have the flexibility, among other things, to use a single, standardized order form for all promotions. Given the same flexibility, RDA would be able substantially to reduce its costs of complying with the order.

At the same time, consumers would be no less informed in making purchasing decisions under the modified order. Not only would RDA, like its competitors, have to refer on the order form to disclosures elsewhere in the materials, but RDA also has volunteered to abide by the disclosure standard set forth in the Negative Option Rule preamble (*i.e.*, all terms and conditions would be contiguous to each other, appear as a distinct element of the promotional material, and be printed in type size as large as that of the predominant copy).

The public interest is served when an order can be modified to continue the existing level of consumer protection at a lower cost of

compliance. The Commission recently applied this principle in modifying portions of the *Encyclopaedia Brittanica* order.[1] Consumers benefit from such modifications because the savings derived by the respondent are likely to be passed on in the form of lower prices. RDA's petition presents just such a case. Accordingly, I would grant RDA's request to modify the order in Docket No. C-2075 on public interest grounds.

Docket No. C–626

I would also grant RDA's request to delete the phrase "so as to leave no reasonable probability that the terms of the advertisements or offer might be misunderstood" from Paragraph I of the order in Docket No. C–626. Although RDA has stated that the interpretation now adopted by the majority would obviate its concerns about the phrase, RDA did not withdraw its request. For the reasons set forth below, I believe the change should be made even if RDA is no longer as concerned about the language as it once was.

In its petition, RDA contends that the "no reasonable probability" language creates a legal standard for disclosure. RDA reads Paragraph I of the order as stating a four-part test: the terms and conditions of the offer must be (1) clearly and conspicuously (2) explained or set forth (3) at the outset (4) so as to leave no reasonable probability of being misunderstood. The majority, however, now informs RDA that the order requires nothing more than a "clear and conspicuous" disclosure. The majority gives RDA its choice of two options: *either* the terms and conditions must be "clearly and conspicuously explained" *or* the terms and conditions must be "set forth at the outset so as to leave no reasonable probability" of being misunderstood.

In my view, RDA is probably correct that the disputed language was intended to set a disclosure standard. First, the manner in which RDA has parsed the order provision seems intuitively more logical than the manner in which the majority has done so. Second, the majority's interpretation renders the disputed language mere surplusage, a result we must avoid if we presume, as we should, that the Commission did not carelessly include extraneous language in its orders in 1963. Third, a comparison of the order with Section 251.1(c) of the Commission's "Free" Guides, 16 CFR Part 251, supports RDA's interpretation. Section 251.1(c) uses virtually the same terms

[1] Order Reopening the Proceeding and Modifying Cease and Desist Order, Docket No. 8908 (July 5, 1988).

as the order, but restates them in such a way that the "no reasonable probability" standard is clearly not optional and clearly more than just explanatory.[2]

If the disputed language does set a disclosure standard, then the question becomes whether that standard survives the Commission's 1983 Deception Statement and the decisions in *Cliffdale Associates, Inc.*, 103 FTC 110 (1984), and *International Harvester Co.*, 104 FTC 949 (1984). RDA contends, correctly in my view, that it does not. It seems highly unlikely that the Commission would today issue a complaint alleging, as did the RDA complaint in 1963, that an offer is deceptive because its terms and conditions are not "set forth at the outset so as to leave no reasonable probability that [they] might be misunderstood." Nor is an order provision that requires RDA to "leave no reasonable probability" that its offer "might be misunderstood" consistent with the view that "a company cannot be liable for every possible reading of its claims, no matter how far-fetched." *International Harvester*, 104 FTC at 1056–57.

The majority correctly observes that the Commission was using several different disclosure formulations both before and after the order in Docket No. C–626 was issued, that the same formulation was used as recently as 1978, and that similar language continues to appear in the "Free" Guides. The majority's reliance on those observations is misplaced, however. No order post-dating the Deception Statement has used RDA-type language. Moreover, continued use of the language in the "Free" Guides should not necessarily inspire the Commission's confidence, because the relevant portion of the Guides has not been re-examined since 1971.

Even if the "no reasonable probability" language was not intended to set a disclosure standard, it should still be deleted. In fact, there is even greater reason to delete it. The importance of the Commission's saying what it means in its orders cannot be overstated. Extraneous language creates unnecessary public confusion and uncertainty. Firms with orders similar to RDA's, for example, may have been—and may continue to be—chilled from engaging in permissible behavior. RDA itself labored for 25 years under the misimpression that its disclosure obligations were greater than the majority now interprets them to be. And even firms not under order, not to mention the legal community,

[2] Section 251.1(c) states in part:

When making "Free" or similar offers all the terms, conditions and obligations upon which receipt and retention of the "Free" item are contingent should be set forth clearly and conspicuously at the outset of the offer so as to leave no reasonable probability that the terms of the offer might be misunderstood.

may be left scratching their heads over how extensive their disclosures must be to avoid Section 5 liability.

These considerations lead me to conclude that granting RDA's request to delete the "no reasonable probability" language from the order in Docket No. C–636 would be in the public interest, not only to eliminate any actual or apparent conflict with the deception analysis the Commission now employs, but also the reduce the costs to the public of uncertainty over the standards the Commission is using. Interpreting order language to alleviate the respondent's concerns, as the majority has done here, may be sufficient in other contexts, but it is not enough in this case.

**Re: Bulova Watch Company, Inc.
Docket No. C–1887**

January 19, 1989

Dear Mr. Codraro:

This is in response to the "Petition To Reopen And Modify Consent Order" ("request"), which you filed on behalf of Bulova Corporation ("Bulova") on August 24, 1988. The request asks the Commission to reopen the consent order in Docket No. C–1887 ("the order") to add a proviso to paragraph 1 of the order, which prohibits Bulova from entering into any agreement, understanding or course of conduct that has as its purpose maintaining resale prices on its watch or clock products. Bulova seeks to add to paragraph 1 of the order a proviso incorporating language from the recent decision of the United States Supreme Court in *Business Electronics Corp. v. Sharp Electronics Corp.*, 108 S.Ct. 1515 (1988). Additionally, Bulova requests the Commission to set aside paragraphs 4A and 5 of the order. Paragraph 4A of the order prohibits Bulova from terminating any dealer because the dealer has in the past or might in the future discount Bulova watch or clock products or advertise such products at less than the suggested retail price. Paragraph 5 of the order prohibits Bulova from terminating any retailer because Bulova has reached an understanding with one or more other retailers not to continue to sell its watch or clock products to the terminated retailer.

The Commission has carefully considered Bulova's request and has concluded that Bulova has not shown that either changed conditions of law or public interest considerations require reopening of the order.

Standard for Reopening a Final Order of the Commission

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside in whole or in part." A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition.

Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4.

The Commission may also modify an order pursuant to section 5(b) when, although changed circumstances would not require reopening, the Commission determines that the public interest requires such action. Therefore, Section 2.51 of the Commission's Rules, 16 CFR 2.51, invites respondents in petitions to reopen to show how the public interest warrants the requested modification. In the case of a request for modification based on this latter ground, a petitioner must demonstrate as a threshold matter some affirmative need to modify the order. *Damon Corp.*, Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983) ("Damon Letter") at 2. If the showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification. *Id.* The Commission will also consider whether the particular modification sought is appropriate to remedy the identified harm.

Whether the request to reopen is based on changed conditions or on public interest considerations, the burden is on the respondent to make the requisite satisfactory showing. The language of Section 5(b) plainly anticipates that the petitioner must make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes it clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission may properly decline to reopen an order if a request is "merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979). If the Commission determines that the petitioner has made the required showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one given the public interest in repose and the finality of the Commission's orders. *See Federated Department Stores v. Moitie,* 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

Bulova Has Not Shown Changed Conditions of Law That Would Require Modification

Bulova has not shown any fundamental change in the law that would require any of the modifications of the order that it has requested.[1] Paragraph 1 of the order, the core provision forbidding resale price maintenance, prohibits a practice that was *per se* illegal at the time the order was issued and continues to be *per se* illegal. Although Bulova refers to *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), as a "fundamental change in the law governing vertical customer restrictions"(Request at 10), it changed the law only as to nonprice vertical restraints. *Sylvania* stated that "the *per se* illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy" from those involved in *Sylvania.*[2] Likewise, the recent decision of the United States Supreme Court in *Business Electronics Corp. v. Sharp Electronics Corp.*, 108 S. Ct. 1515 (1988), on which Bulova also relies (Request at 12, 13), involved only a restatement and clarification of the law as to resale price maintenance, not a fundamental change. The Court noted that vertical agreements on resale prices have been illegal *per se* since *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).[3] Accordingly, there is no necessity for amending paragraph 1 of the order to include the proviso requested by Bulova (Request at 9) because nothing in the *Sharp* case brings paragraph 1 of the order into conflict with existing law.

Bulova has also failed to show any fundamental change in the law with respect to paragraphs 4A and 5 of the order. These are "fencing-in" provisions that protect against conduct that might lead to or facilitate a violation of the injunction against resale price maintenance set forth in paragraph 1 of the order.[4] Paragraph 4A of the order prohibits Bulova from refusing to sell Bulova watch or clock products to any dealer because the dealer "has in the past or might in the

[1] The Commission does not interpret the Request to claim that there have been changed conditions of fact that would require a reopening of the order. In any event, Bulova's position appears not to have changed materially since 1983, at which point the Commission concluded that changed conditions of fact did not require modifying or deleting these provisions in the order.

[2] 433 U.S. at 51 n. 18 (1977).

[3] *Business Electronics Corp. v. Sharp Electronics Corp.*, 108 S. Ct. 1515, at 1519 (1988).

[4] It has been held that the Commission has the authority to prohibit otherwise lawful activities that could be used to facilitate unlawful conduct. *FTC v. National Lead Co.*, 352 U.S. 419, 430 (1957) (decrees often suppress a lawful device when it is used to carry out an unlawful purpose); *Vanity Fair Paper Mills, Inc. v. FTC*, 311 F.2d 480, 488 (2d Cir. 1962) (an order may require one who has violated the law to conform to a

future discount Bulova watch or clock products or advertise such products at less than the suggested retail price...." *Bulova Watch Co., Inc.*, 78 FTC 556, 561 (1971). Paragraph 5 of the order prohibits Bulova from refusing the sell to any retailer because Bulova has agreed or reached an understanding with one or more other retailers not to continue to sell its watch or clock products to the retailer in question. No fundamental change in the law has occurred with respect to these provisions of the order and, indeed, Bulova asserts none. The practice forbidden by paragraphs 4A and 5, standing alone, were never *per se* violations, but were included in the order to forestall their use as part of a broader scheme of unlawful resale price maintenance.

Bulova Has Not Shown That Modification of the Order Would Be in the Public Interest

Bulova has not shown that the public interest requires the modifications of the order that it requests. An order modification is in the public interest if the respondent demonstrates some affirmative need to modify the order and the Commission determines that the reasons for modifying the order outweigh the reasons not to make the modifications. In this instance, Bulova has not met the threshold burden of the public interest test. In particular, Bulova has not provided any evidence to support its assertion that the provisions of the order that it seeks to have the Commission modify or set aside are presently causing it competitive harm.

Bulova asserts that the provisions of the order from which it seeks relief limit its freedom to refuse to sell to discounters. According to the request:

> The effect of such a limitation invites deep discounters to obtain a free ride on Bulova dealer's [sic] cooperative advertising programs, an expense they cannot incur and still offer such discounts. Moreover, *those sellers cannot afford to honor warranties and properly service and repair the watch products.* The seller promoting price alone is a disincentive to the creation of an aggressive force of dealers loyal to the Bulova product and willing to offer services and financial commitments to its success. (Emphasis in original).

Request at 7. However, Bulova's request does not include any documentation of this alleged competitive injury and Bulova has declined an invitation from the staff to provide such documentation. In fact, Bulova informed the staff that discounters are not causing the alleged cooperative advertising or warranty problems for Bulova at

the present time. In view of Bulova's failure to document its assertions that the provisions of the order that it seeks to modify or set aside are causing it competitive injury, the Commission has concluded that respondent has not shown that modification of the order would be in the public interest.

Based on the foregoing, the Commission has determined that Bulova has not demonstrated that either changed conditions or public interest considerations require the order to be reopened. Accordingly, the Commission has denied Bulova's request to reopen and modify the order.

By direction of the Commission.

Re: Louisiana-Pacific Corporation
Docket No. C-2956

March 9, 1989

Dear Messrs. Carlsen and Arthur:

This letter responds to the "Petition to the Commission To Reopen Proceeding for the Purpose of Setting Aside a Final Order and for Other Relief" ("petition") filed on behalf of Lousiana-Pacific Corporation ("Louisiana-Pacific") on November 9, 1988, pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice, 16 CFR 2.51 (1988). In the petition, Louisiana-Pacific asks the Commission to reopen and set aside the consent order in this matter, issued February 27, 1979.

Because the requirements of Paragraphs I, II, III and V of the order were carried out with the divestiture of the Rocklin medium density fiberboard plant, these provisions have no future effect, and the Commission sees no purpose in considering whether to reopen them.[1] The remainder of this letter, therefore, focuses on the request to reopen and set aside Paragraph IV of the order, which requires Louisiana-Pacific to obtain the Commission's approval before making certain acquisitions. This prior approval requirement expires March 28, 1989.[2]

The Commission has carefully considered Louisiana-Pacific's petition and has concluded that Louisiana-Pacific has not made a satisfactory showing that changed conditions of fact or law require reopening the order or that the public interest warrants reopening. Accordingly, the Commission denies Louisiana-Pacific's petition.

I. Standard for Reopening a Final Order of the Commission

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b),

[1] Pursuant to a remand from the district court, *United States v. Louisiana-Pacific Corp.*, 645 F. Supp. 962 (D. Or. 1987), the Commission is considering whether to modify the divestiture requirement on the basis of Louisiana-Pacific's 1981 petition to reopen. The divestiture requirement is an issue in that case because the court may consider the Commission's reasonableness in denying the 1981 petition in assessing civil penalties for Louisiana-Pacific's failure to timely divest.

[2] Louisiana-Pacific also asks that the Commission dismiss the pending civil penalty action, on the ground that additional proceedings are not in the public interest. Louisiana-Pacific's contention is premised on its assumption that the Commission wrongfully declined to modify the order in 1981. That issue is still pending, however, and no court has held that the Commission erred in denying modification. The request to dismiss the civil penalty action does not involve reopening the order under Section 5(b) and is not addressed in this letter.

provides that the Commission shall reopen an order to consider whether it should modify the order if the respondent "makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside in whole or in part." A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in conditions and shows that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition.[3] The burden is on the petitioner to make the satisfactory showing of changed conditions required by the statute.[4] The burden is not a light one, in view of the public interest in repose and finality of the Commission's orders.[5] If the Commission determines that the petitioner has made the necessary showing of changed conditions of fact or law, it must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification.[6]

Section 5(b) also provides that the Commission may modify an order when, although changed conditions would not require reopening, the Commission determines that the public interest warrants such action. Respondents are invited in petitions to reopen to show how the public interest warrants the requested modification.[7] In the case of a request for modification based on the public interest, a petitioner must demonstrate as a threshold matter some affirmative need to modify the order.[8] If the Commission determines that the threshold showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification.[9]

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[3] *See* S. Rep. No. 96-500, 96th Cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *Pay Less Drugstores Northwest, Inc.*, Docket No. C-3039, Letter to H. B. Hummelt (Jan. 22, 1982) (changed conditions must be unforeseeable, create severe competitive hardship and eliminate dangers order sought to remedy); *see also United States v. Swift Co.*, 286 U.S. 106, 119 (1932) ("clear showing" of changes that eliminate reasons for order or such that order causes unanticipated hardship).

[4] *See Damon Corp.*, Docket No. C-2916, Letter to Joel C. Hoffman, Esq. (March 24, 1983), at 2 ("Damon Letter"); *Gautreaux v. Pierce*, 535 F. Supp. 423, 426 (N.D. Ill. 1982) (petitioner must show "exceptional circumstances, new, changed or unforeseen at the time the decree was entered").

[5] *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

[6] Although changed conditions may require that the order be reopened, modification is not necessarily required. S. Rep. No. 96-500, 96th Cong., 2d Sess. 10 (1979).

[7] Section 2.51 of the Commission's Rules, 16 CFR 2.51(b) (1988).

[8] *See* Damon Letter at 2.

[9] *See* Damon Letter at 2; *see also Chevron Corp.*, Docket No. C-3147, 105 FTC 228 (1985) (public interest warrants modification where potential harm to respondent's ability to compete outweighs any further need for order).

II. Louisiana-Pacific Has Not Shown Changes of Law or Fact That Require Reopening of the Order Within the Meaning of Section 5(b)

Louisiana-Pacific has not shown significant or fundamental changes in circumstances that require reopening the order. The Commission therefore has determined that reopening is not required on the basis of changed conditions of law or fact.

Louisiana-Pacific's petition fails to show any change in the law since the order was issued that would make continued application of the order inequitable or harmful to competition. Louisiana-Pacific has not shown any changes in statutory or decisional law that have the effect of bringing the provisions of Paragraph IV into conflict with existing law, so that to continue the order would work an injustice.[10]

Louisiana-Pacific alleges that changes in enforcement standards and guidelines are changes in the law that require reopening. But changes in enforcement standards and guidelines are not changes in the law within the meaning of Section 5(b). *See Allis-Chalmers Manufacturing Co. v. White Consolidated Industries,* 414 F.2d 506, 524 (3d Cir. 1969), *cert. denied,* 396 U.S. 1009 (1979). Moreover, there have been no changes in enforcement standards or guidelines that have had the effect of bringing Paragraph IV of the order into conflict with existing law. Paragraph IV of the order simply requires that Louisiana-Pacific obtain the Commission's approval before making certain acquisitions. The Commission has generally continued to include prior approval provisions in its divestiture orders, and any request for prior approval under Paragraph IV would be examined under current standards. Finally, Louisiana-Pacific's argument that its acquisition of Fibreboard would not have been challenged under current enforcement standards and guidelines questions the premises of the order and is not a basis for reopening under Section 5(b). *See United States v. Swift & Co.,* 286 U.S. 108, 119 (1932) ("The injunction, whether right or wrong, is not subject to impeachment in its application to the circumstances that existed at its making."); *United States v. Swift & Co.,* 189 F. Supp. 885, 907 (N.D. Ill. 1960), *aff'd per curiam,* 367 U.S. 909 (1961).

Nor has Louisiana-Pacific made a satisfactory showing that changes of fact require reopening the order. Louisiana-Pacific alleges that changes in the competitive structure of the industry support modification of the order. But the changes Louisiana-Pacific relies on

[10] *See System Federation No. 91 v. Wright,* 364 U.S. 642 (1961); *Bulova Watch Co.,* 102 FTC 1834 (1983).

do not amount to fundamental changes within the meaning of Section 5(b).

Louisiana-Pacific has shown that its share of the complaint markets has declined since the order was issued, but it has not identified a fundamental change in its market position, such as reduction of its market shares to *de minimis* levels or its exit from the markets. *Cf. Union Carbide Corp.*, Docket No. C-2902, 108 FTC 184 (1986) (exiting industry a change in fact requiring reopening). And the petition demonstrates that concentration has increased in two of the complaint markets since the order was entered, a change that does not support reopening.

Nor does the absence of government challenge to acquisitions by Georgia-Pacific Corporation constitute or evidence a changed condition. There is no basis for inferring a change in law or fact from the exercise of prosecutorial discretion in particular cases.[11]

Louisiana-Pacific also alleges that overcapacity in the industry from 1979 through 1983 supports its request for reopening. Alleged overcapacity in this period, however, says nothing about the current state of competition in the industry and thus does not provide a basis for reopening the order.[12]

Finally, although there has been some new entry since the order was issued, this fact by itself is insufficient to require reopening the order. Indeed, most of the "entry" listed by Louisiana-Pacific is not new entry but capacity expansion (actual and planned) by firms already in the markets. Louisiana-Pacific identifies no new entry or additions to capacity in the Pacific Coast complaint market and points only to expansion of capacity in the Western complaint market. Thus, Louisiana-Pacific has not shown a significant change in entry conditions that would indicate there is no continuing need for the order.[13]

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[11] Louisiana-Pacific asserts that the absence of government challenge to certain acquisitions by Georgia-Pacific is "evidence that competitors now enjoy competitive advantage (due to lack of any prior-approval requirement) not available to L-P." Petition at 13. Section 5(b) does not require equal treatment of firms under order and firms not under order. *See* S. Rep. No. 96-500, 96th Cong., 1st Sess. 9 (1979).

[12] Overcapacity by itself does not necessarily reduce the likelihood of collusion. *See FTC v. Elders Grain, Inc.*, Nos. 88-2493, 88-2494, slip op. at 8 (7th Cir. Jan. 30, 1989); *see also* Asch & Seneca, "Is Collusion Profitable?," 10 *Journal of Reprints* 492 (1976); Hay & Kelley, "An Empirical Survey of Price Fixing Conspiracies," 17 *J. Law & Econ.* 13 (1974). Thus, overcapacity alone is not evidence that there is no need for this order.

[13] Louisiana-Pacific also states that in 1988 it "spun off" shares of the Fibreboard Corporation, so the acquisition is now "undone." The extent to which Louisiana-Pacific relies on this development as a change in fact supporting reopening is not clear. Louisiana-Pacific does not alleged that the spin-off had any effect on the medium density fiberboard/particleboard market or on Louisiana-Pacific's position in that market and it

In sum, although Louisiana-Pacific does point to certain changes in the markets, these changes do not amount to fundamental changes that require reopening the order. And Louisiana-Pacific has shown no fundamental changes in its position in those markets. Louisiana-Pacific has not pointed to any changes in the relevant statutory or decisional law. Accordingly, the Commission has determined not to reopen the order on the basis of changed conditions of law or fact.

III. Louisiana-Pacific Has Not Shown That the Public Interest Warrants Reopening the Order

Louisiana-Pacific has not demonstrated that reopening the order would be in the public interest. Louisiana-Pacific asserts that the prior approval requirement places it at a competitive disadvantage but admits that the costs imposed by the requirement were entirely foreseeable at the time the order was issued. Louisiana-Pacific argues that its request is supported by cases in which the Commission has modified orders on the ground that the costs imposed by the order outweighed any continuing need for the order. The Commission has determined, however, that unlike the respondents in the cases cited in the petition, Louisiana-Pacific has failed to show that the public interest warrants removal of the prior approval requirement from this order.

Louisiana-Pacific has not made the threshold showing of injury required under the public interest standard. None of the three examples cited by Louisiana-Pacific to show the adverse effect of the prior approval clause shows that particular, concrete harm has resulted from Paragraph IV of the order. For example, Louisiana-Pacific does not show—nor does it allege—that negotiations to acquire either the American Forest Products assets or the Masonite assets were unsuccessful because of the prior approval requirement. According to the petition, both sellers "expressed concern" about the possibility that the prior approval clause could delay a sale to Louisiana-Pacific, and other firms ultimately acquired the assets. Petition at 19–20. These allegations include no claims about cause and effect. The prior approval clause does not appear to have worked any hardship to Louisiana-Pacific in the Kirby Lumber transaction. Louisiana-Pacific states that Kirby's particleboard plant was "incidental" to the acquisition, and its was excluded from the assets acquired by Louisiana-Pacific so that prior approval would not be necessary. The "incidental" asset did not prevent the transaction from going forward.

Any future costs of competitive disadvantage caused by the order's prior approval requirement are extremely short-lived, because the prior approval requirement will expire by its own terms on March 28, 1989. Louisiana-Pacific has not shown any reason to accelerate the expiration of Paragraph IV, nor did Louisiana-Pacific ask that the Commission consider the petition on an expedited basis.

This case is unlike those on which Louisiana-Pacific relies to support its public interest argument. In each of those cases, the petitioner made the requisite threshold showing of an affirmative need to modify the order.[14]

IV. Conclusion

For the reasons stated above, the Commission has determined that Louisiana-Pacific has not shown that changed conditions of law or fact require reopening of the order or that reopening and modification of the order is warranted in the public interest. Louisiana-Pacific's request that the Commission reopen the order and set it aside has been denied.

By direction of the Commission.

[14] We also note that unlike the orders in those cases, Louisiana-Pacific's prior approval clause will expire in a few weeks, a fact that bears on the magnitude of harm it would suffer assuming it had made the threshold showing. In two of the cases Louisiana-Pacific cites, *Foremost Dairies*, Docket No. CC-1161, 104 FTC 548 (1984), and *United Brands*, Docket No. 8835, 108 FTC 40 (1986), the petitioners sought relief from perpetual order requirements that had been in effect for more than ten years. In the other cases cited by Louisiana-

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