the "Jencks rule" as described in the Commission's opinion of this date;

(2) deliver to respondents' counsel any of such reports or portions thereof found by him to be statements within the meaning of the "Jencks rule" and to be relevant for the purposes of cross-examination;

(3) if requested by respondents' counsel, reconvene the hearing-in-chief to permit respondents' counsel to utilize such reports or portions thereof for the purpose of cross-examining any of such witnesses whom respondents' counsel requests be recalled for such purpose; and

(4) issue a new initial decision which should include specific findings with respect to the issues presented on this remand.

Commissioner Elman dissented and has filed a dissenting opinion. Commissioner MacIntyre concurred and has filed a separate concurring statement.

DEAN FOODS COMPANY ET AL.

Docket 8674. Order, April 25, 1966

Order vacating hearing examiner's order denying respondent's request for subpoenas duces tecum directed to four dairies and ordering hearing examiner to reconsider the matter.

ORDER GRANTING APPEAL, VACATING RULING DENYING REQUEST FOR SUBPOENAS AND DIRECTING RECONSIDERATION

This matter is before the Commission upon the appeal of complaint counsel under § 3.17(f) of the Commission's Rules of Practice from the hearing examiner's ruling contained in his memorandum to complaint counsel, dated March 29, 1966, denying their request to issue subpoenas duces tecum directed to four named persons to appear and to testify and to produce documents, for the reason that a hearing had not been scheduled in the proceeding. The hearing examiner stated, in his memorandum, that the time and place of hearings will be fixed at a prehearing conference scheduled for May 23, 1966, that he sees no necessity to require the appearance of the parties prior to the time of the "regular hearings," and that the said counsel's request could be renewed after hearings have been scheduled.

Respondent Dean Foods Company filed a statement on April 11, 1966, in which it states it takes no position on whether the ruling appealed from should be affirmed or reversed, but that it does not want to be prejudiced in the securing, at a later time, of the information obtained.

The hearing examiner, under § 3.15(c) of the Commission's Rules of Practice, has the power and duty, *inter alia,* to take all necessary action to avoid delay in the disposition of proceedings and has all powers necessary to that end, including, among others, the power to issue subpoenas. The examiner's authority to issue subpoenas in a particular proceeding begins the moment he is designated as the hearing examiner in the matter. Thus, here the examiner had the power to issue the subpoenas requested by complaint counsel even though hearings had not yet been scheduled.

It seems to us that the examiner, considering complaint counsel's representations to him that the subpoenas are necessary because of the refusal or failure of four dairies to provide information necessary to such counsel in an attempt to obtain accurate market share data, took a very narrow view of his responsibilities in failing to provide such process so as to prevent future delay in the preparation for trial and in the trial of this case. We believe that it would be wholly appropriate in the circumstances to issue such subpoenas. The information sought would be obtained as an aid in the trial of the case. Such subpoenas are not considered, and are not to be considered, as investigational subpoenas.

This appeal will be entertained because the ruling complained of involves substantial rights, will materially affect the final decision, and because a determination of its correctness before the conclusion of the hearing will better serve the interests of justice. Accordingly,

It is ordered, That complaint counsel's appeal from the examiner's ruling denying their request for subpoenas duces tecum be, and it hereby is, granted.

It is further ordered, That the hearing examiner's ruling denying the request of complaint counsel for subpoenas duces tecum be, and it hereby is, vacated.

It is further ordered, That the hearing examiner forthwith reconsider, in the light of this order and the views of the Commission stated herein, the request of complaint counsel for the issuance of subpoenas duces tecum.

HUMPHREYS MEDICINE COMPANY, INC., Docket No. 8640
E. C. DeWITT & CO., INC., Docket No. 8642
GROVE LABORATORIES, INCORPORATED, Docket No. 8643
THE MENTHOLATUM COMPANY, Docket No. 8644

Order, Apr. 26, 1966

Order denying petitions of respondents that hearing examiner reconsider his denial of motion to suspend proceedings in all four cases pending the outcome of the *American Home Products* case, Docket 8641, and directing hearing examiner to offer respondents the opportunity to settle their cases through stipulation.

ORDER RULING ON MOTIONS CERTIFIED BY THE HEARING EXAMINER

This matter is before the Commission on the certification to the Commission, on April 20, 1966, by the hearing examiner of motions by the respondents in *Humphreys Medicine Company, Inc.,* Docket No. 8640, *The Mentholatum Company,* Docket No. 8644, *Grove Laboratories, Inc.,* Docket No. 8643, and *E. C. DeWitt & Co., Inc.,* Docket No. 8642. In each case respondent requested the hearing examiner to certify to the Commission its motion that the Commission permit reargument of, and reconsideration of, the motion of complaint counsel to suspend hearings in these proceedings pending issuance of the Commission's decision *In the Matter of American Home Products Corporation,* Docket No. 8641 [70 F.T.C. 1524]. Complaint counsel's motion to suspend was denied in each case by orders of the Commission, dated March 16, 1966.*

Respondent E. C. DeWitt & Co. also moves, in the alternative, that the proceeding in Docket No. 8642 be joined and consolidated with the *Matter of American Home Products Corporation,* Docket No. 8641. In this connection, DeWitt requests permission to withdraw its answer and to file an amended answer by which respondent "shall agree to be bound in the manner, and at the time and to the extent appropriate, by any order which the Commission may enter in said *Matter of American Home Products Corporation.*" Such order, according to respondent's motion, may include an affirmation of the hearing examiner's initial decision in that proceeding but is not limited to such a result or the Commission may take substantially the same action in Docket No. 8642 as it deems appropriate *In the Matter of*

*DeWitt requests the Commission to authorize the hearing examiner to reinstate his order of February 14, 1966.

American Home Products Corporation, Docket No. 8641. DeWitt's motion, in the alternative, further provides that the Commission may grant such additional relief as is deemed appropriate and in the public interest.

The hearing examiner, in the case of all four certifications, recommended that the motions certified be granted.

The Commission has determined that the motions certified have not stated grounds justifying further suspension of the hearings in these proceedings and that the hearing examiner should be directed to go forward with the hearings in these cases unless respondents are willing to stipulate in the course of the prehearing conferences that they will submit these proceedings to the Commission for disposition on the basis of the record in *American Home Products Corporation,* Docket No. 8641, and that they waive any further intervening procedural steps before the hearing examiner. In this connection, if any of the respondents wish to dispose of their proceeding on that basis they should further stipulate, if they are able to, on the basis of the facts applicable in their proceeding, that:

1. The advertising of the particular respondent had no significantly different effect upon the reader than the effect of the advertisements in *American Home Products*;

2. The effect of the use of respondent's preparation is not significantly different from the use of the preparation of American Home Products;

3. If there are any significant differences between the advertisements of respondents and the advertisements in the record in *American Home Products,* then the Commission, in its order disposing of the case may include appropriate provisions to take into consideration such differences.

If any respondent wishes to avail itself of this procedure, it will also be necessary for it to attach to the stipulation the relevant advertising, which it has utilized, for inclusion in the record. Finally, those respondents desiring to conclude their proceeding without hearings before the examiner should include in their stipulations a provision that the Commission may dispose of their proceeding at the time *American Home Products* is decided by such order as it deems necessary to the public interest in the light of the record of the particular case. Such stipulation should contain the further provision that the record, on which the Commission is to make its final disposition of this case and for the purposes of judicial review, is limited to the record of the

proceeding at the time the stipulation is filed, the stipulation and the attached advertisements as well as the record in *American Home Products*. Accordingly,

It is ordered, That the hearing examiner is directed to proceed with the hearings in these cases forthwith: *Provided, however,* That the examiner will, without further action, certify the record in the particular case to the Commission if the respondent in that proceeding and complaint counsel, within 30 days of the service of this order upon them, file a stipulation providing that:

1. They will submit the case to the Commission on the record in Docket No. 8641, *American Home Products Corporation,* and such other facts and records as provided for below;

2. (a) The facts applicable to the case support the stipulation that advertisements in the case had no significantly different effect upon readers from the effect of the advertisements in *American Home Products,*

(b) The facts applicable to the case support the stipulation that the effect of the use of respondent's preparation is not significantly different from the use of American Home Products' preparations;

3. To the extent that a respondent's advertisements differ significantly from those in *American Home Products,* the Commission may, in its order disposing of the proceeding, include appropriate provisions to take into consideration such differences;

4. The advertisements attached to the stipulation are representative of respondent's advertising claims and are to be included in the record of such proceeding;

5. Respondent waives any intervening steps before the hearing examiner;

6. The Commission may, on the basis of the stipulation, the attached advertisements and the record in *American Home Products,* issue such order as it deems necessary to the public interest;

7. The Commission is to issue its order disposing of such proceeding concurrently with the order setting forth its final decision in *American Home Products*; and

8. The record on which the Commission is to make its disposition of such proceeding and for the purpose of judicial review is limited to the record at the time the stipulation is filed, the stipulation with the attached advertisements and the record in *American Home Products.*

ALHAMBRA MOTOR PARTS ET AL.

Docket 6889. Order, May 5, 1966

Order setting aside cease and desist order of December 17, 1965, 68 F.T.C. 1039, as to respondents Earl Crawford, Lester L. Congdon, Margaret A. Ludwick, Otis M. Ludwick, E. L. Covey, Edward Gaughn, Carl D. Haase and Emma F. Wright.

ORDER SETTING ASIDE CEASE AND DESIST ORDER AS TO CERTAIN RESPONDENTS

Earl Crawford, Lester L. Congdon, Margaret A. Ludwick and Otis M. Ludwick have filed motions to set aside the cease and desist order of December 17, 1965 as to them and complaint counsel has filed a motion in behalf of E. L. Covey, Edward Gaughn, Carl D. Haase and Emma F. Wright to set aside this order as to those respondents. These motions are made pursuant to a provision in the order providing:

It is further ordered, That those respondents who severed their connection with Southern California Jobbers, Inc., prior to January 17, 1963, be, and they hereby are, granted permission, within sixty (60) days of the service of this order upon them, to file a motion requesting the Commission to set aside as to them the above order relating to warehouse distributor discounts.

It appears from respondents' motions, complaint counsel's motion and the supporting affidavits that this requirement has been satisfied in the case of Earl Crawford, Lester L. Congdon, Margaret A. Ludwick, Otis M. Ludwick, E. L. Covey, Edward Gaughn, Carl D. Haase and Emma F. Wright. Accordingly,

It is ordered, That the cease and desist order of December 17, 1965 relating to warehouse distributor discounts be, and it hereby is, set aside as to Earl Crawford, Lester L. Congdon, Margaret A. Ludwick, Otis M. Ludwick, E. L. Covey, Edward Gaughn, Carl D. Haase and Emma F. Wright.

SUBURBAN PROPANE GAS CORPORATION

Docket 8672. Order, June 2, 1966

Order remanding certification of question of postponing hearing date to hearing examiner with instructions that he expedite the proceedings in this case.

ORDER RULING ON CERTIFICATION OF NECESSITY FOR POSTPONING HEARING DATE

This matter has come on for a hearing upon the examiner's certification of the question of the necessity for postponement of formal hearings until October 1966.

On May 18, 1966, the examiner directed counsel to file not later than June 10, 1966, their requests, if any, for hearings at more than one time and place and designating the earliest feasible dates and places of such hearings, with their reasons, a list of witnesses and exhibits, such stipulations as have been agreed upon, and all other motions and requests which would further the expedition of the hearings.

In a motion filed May 25, 1966, complaint counsel assert, among other things, that the filings required by the examiner's order would be premature and could not be made with the aura of finality which should accompany such filings, and they contend that a different prehearing timetable as suggested by such counsel would dispose of many pending prehearing matters and point toward commencement of the hearings at the earliest possible date. Specifically, on the question of setting the date of hearings, complaint counsel assert that when they advised the examiner mid-October 1966 was the earliest possible hearing date, they "were dealing with many areas of guesswork which are still uncertain," and that while they still adhere to their original date, they emphasize that this is merely an estimate.

The examiner states that in light of the record, which includes complaint counsel's motion of May 25, 1966, he is of the opinion that the request of such counsel is reasonable and that the hearings should be deferred until October 1966. He requests the authority for such deferment.

The examiner, we believe, misconceives his role and his authority in connection with the conduct of a Commission proceeding. The examiner clearly must guard against any unwarranted delays in the prehearing stage and exercise his powers in such a way as to bring the matter to trial at the earliest possible date. However, within that limitation, if such it be, he has broad discretion in all pretrial procedures and arrangements and specifically in the matter of fixing an appropriate date for the formal hearings. We note that even at this time it apparently is uncertain whether or not the hearings can be set for October 1966, since the time for these hearings will depend upon the disposition of various pretrial matters. In such circumstances, the Commis-

sion is not in a position to make a sound decision in the matter. This is something peculiarly within the hearing examiner's province, especially since he is in a position to call the parties together and to iron out difficulties, if any, so that the hearings can commence with all possible speed.

The Commission notes that the formal complaint in this proceeding was issued more than six months ago, and the hearing examiner has not yet fixed a definite date for the commencement of hearings. The Commission believes that altogether too much time for utilization of prehearing procedures has already elapsed. We do not know where the fault, if any, lies; but it is the special duty of complaint counsel and the hearing examiner to carry out both the Commission's statutory obligation to "proceed with reasonable dispatch" (Section 6(a) of the Administrative Procedure Act) and its expressed policy that adjudicative proceedings "shall be conducted expeditiously" (Section 3.1 of the Commission's Rules of Practice). We stress that the examiner should brook no undue delay. He has, we believe, all of the powers necessary to see to it that the parties dispose of all pretrial matters in a reasonable time and to get on with the trial of the case. He should use them.

It is ordered, That this matter be, and it hereby is, remanded to the examiner for further conduct of the proceedings in accordance with the views herein expressed.

THE MENTHOLATUM COMPANY

Docket 8644. Order and Opinion, June 8, 1966

Order rejecting stipulation of respondent pursuant to order of April 26, 1966, and remanding case to hearing examiner for trial unless, within 10 days, respondent submits a new stipulation.

OPINION OF THE COMMISSION

This matter is before the Commission on the certification to the Commission on May 27, 1966, by the hearing examiner of a stipulation entered into by counsel supporting the complaint and counsel for respondent pursuant to the Commission's order dated April 26, 1966, which provided that the hearing examiner was to proceed with the hearing in the case forthwith unless a stipulation was filed within 30 days of service of said order containing the provisions set forth in said order.

Paragraph 2(b) of the Commission's order of April 26, 1966, stated that to comply with its terms the stipulation entered into by counsel must provide that:

> The facts applicable to the case support the stipulation that the effect of the use of respondent's preparation is not significantly different from the use of American Home Products' preparations.

Paragraph 2(b) of the stipulation submitted by counsel provides as follows:

> The effect of the use of respondent's preparation is not significantly different from the use of the preparation of American Home Products *other than as set forth in advertisements hereto attached which show that the Mentholatum product contains benzocaine, technically Ethyl p-Aminobenzoate, as listed in official compendia (U.S. Pharmacopeia, U.S. Formulary) as a local anesthetic and hexachlorophene listed in the U.S. Pharmacopeia as a local anti-infective.* (Emphasis added.)

The qualified agreement entered into by counsel clearly does not comply with the requirements set forth in Paragraph 2(b) of the Commission's order and would seemingly require the Commission to make a scientific evaluation of the merits of respondent's alleged ingredients "Benzocaine" and "Hexachlorophene." Since the stipulation contains no agreement among counsel concerning the significance and effects of these alleged ingredients, the Commission would be unable to determine the effect, if any, of the presence of these ingredients in respondent's preparation on the issues in the case.

Paragraph 3 of the stipulation provides:

> That the Commission in its order disposing of the case may include appropriate provisions and take into consideration such differences as the inclusion of the anesthetic and local anti-infective.

This language does not state directly that it is designed to encompass differences in advertising as well as in the product. It is, therefore, not in direct conformity with the requirements of Paragraph 3 of the Commission's order of April 26, 1966, which states:

> To the extent that a respondent's advertisements differ significantly from those in *American Home Products*, the Commission may, in its order disposing of the proceeding, include appropriate provisions to take into consideration such differences.

It would appear, therefore, that the stipulation submitted by counsel does not fully comply with the requirements of the Commission's order of April 26, 1966, and that it contains some omissions and ambiguities which should be clarified before it can be accepted. It is accordingly rejected for these reasons and

counsel are granted an additional 10 days within which to resubmit an amended stipulation.

ORDER ON STIPULATION CERTIFIED BY HEARING EXAMINER

The Commission in an order dated April 26, 1966 [p. 1179 herein], having directed the hearing examiner to proceed with the hearing in the case forthwith unless the parties entered into a stipulation in accordance with the provisions set forth in said order, in which event the hearing examiner was ordered to certify the record to the Commission; and counsel supporting the complaint and counsel for respondent having on May 20, 1966, entered into a stipulation purportedly complying with the provisions of said Commission order dated April 26, 1966; and the matter having been certified to the Commission by the hearing examiner on May 27, 1966; and the Commission having determined that said stipulation does not comply with the requirements set forth in its order of April 26, 1966:

It is ordered, That the stipulation submitted by counsel be and hereby is rejected and the matter returned to the hearing examiner who shall proceed with the hearing in this case forthwith unless, within 10 days after the service of this order upon respondent, a stipulation is filed with the hearing examiner complying with the requirements set forth in the Commission's order of April 26, 1966, whereupon the hearing examiner shall again certify the record in this case to the Commission without further action.

MISSISSIPPI RIVER FUEL CORPORATION

Docket 8657. Order, June 8, 1966

Order denying motions to quash several subpoenas duces tecum directed to officials of ready-mix concrete companies, and further providing that the subpoenaed documents be turned over to an accounting firm selected jointly by Commission and respondent's counsel.

ORDER ENTERTAINING AND DENYING APPEALS FROM HEARING EXAMINER'S DENIAL OF MOTIONS TO QUASH OR LIMIT SUBPOENAS

In January 1965, the Commission issued the complaint in this case charging that respondent's acquisitions of ready-mix concrete firms in Kansas City, Missouri, Memphis, Tennessee, and Cincinnati, Ohio, during the period from September 1963 through

January 1964, violated Section 7 of the amended Clayton Act. On the application of respondent's counsel, the hearing examiner on January 27, 1966, entered an order for the taking of depositions and the issuance of subpoenas *duces tecum* to 33 portland cement manufacturers and 30 ready-mix concrete distributors and their officials, many of whom have moved to quash or limit these subpoenas. On April 12, 1966, the hearing examiner heard oral argument and conducted a conference on the motions to quash or limit the subpoenas. Thereafter, on April 28, 1966, the hearing examiner issued an order denying the motions to quash but modifying and limiting the subpoenas in some respects. The matter is now before the Commission on the appeal from the hearing examiner's order of a number of those persons subpoenaed.

Section 3.17 of the Commission's Rules of Practice provides that an appeal to the Commission from the hearing examiner's ruling granting or denying a motion to limit or quash any subpoena "will be entertained by the Commission only upon a showing that the ruling complained of involves substantial rights and will materially affect the final decision and that a determination of its correctness before conclusion of the hearing will better serve the interests of justice." The Commission has determined that the requisite showing has been made in this case and it therefore entertains the appeals.

Complaint counsel and respondent's counsel have stipulated, for the purposes of this proceeding only, that if a cement consumer had or has one or more of the relationships described below with a portland cement manufacturer, then during the existence of that relationship, the cement consumer is likely to be influenced to buy a significant part of its cement requirements from such manufacturer:

(1) Any debt due of a cement consumer to a manufacturer which has been owing for more than 60 days;

(2) Debts of a cement consumer guaranteed by a cement manufacturer;

(3) Any lease between a cement manufacturer and a cement consumer for assets used by the consumer in the production or distribution of ready-mixed concrete or concrete products;

(4) Any lease-purchase agreement between a cement manufacturer and a cement consumer for assets used by the consumer in the production or distribution of ready-mixed concrete or concrete products;

(5) Any right or option of a cement manufacturer to acquire any of the stock or assets of a cement consumer;

(6) Any sale of equipment or other property where the deferred purchase price is secured by lien or retention of title by a cement manufacturer to a cement producer;

(7) The furnishing of equipment or other property by a cement manufacturer to a cement consumer without charge or for a consideration less than the fair value of the property;

(8) Any contribution of capital by a cement manufacturer to a cement consumer;

(9) The placing or retaining on the payroll of a cement manufacturer of any officer or employee of a cement consumer; and

(10) The presence on the Board of Directors of a cement consumer of one or more directors common to a cement manufacturer.

The subpoenas at issue here seek documents and writings which reflect any of these relationships* for the years 1963 through 1965 and, as modified by the hearing examiner, the geographic area covered is that defined in the complaint. The hearing examiner's order provided that the subpoenas may be complied with by mailing the specified papers to respondent's counsel in lieu of personally appearing and testifying. The order contains further provisions with reference to the copying of documents and disclosure of their contents, all designed to protect the confidentiality of the information submitted in response to the subpoenas.

Appellants launch a broadly based attack on the validity of the subpoenas. They argue first that the subpoenas constitute an effort on the part of respondent to engage in a discovery proceeding unauthorized by the Commission's Rules. We disagree. By the subpoenas, respondent proposes to gather evidence by which it expects to prove certain aspects of the structure of the cement and ready-mix markets in the relevant geographical areas. The subpoenas cover a limited and specified class of documents relating to specifically defined relationships—relationships which constitute elements of the economic setting in which the challenged mergers took place. On this basis, we reject appellants' contention that "respondent's purpose is not to obtain evidence but to conduct an expedition in the hope of discovering something helpful."

*The hearing examiner's order modified the subpoenas to require data as to debts owing for more than 90 days rather than the 60 days stipulated.

Although it is not necessary to decide now, and we do not decide, whether the type of evidence that respondent seeks to elicit by the subpoenas will constitute a defense to the Section 7 violations charged in this case, it does appear that the material sought is relevant to an appraisal of market conditions in the cement industry and pertinent to the issues in this case. Respondent is entitled to gather such information for purposes of making its defense. It is clear that the information sought would not be given voluntarily and that it is available to respondent only through compulsory process. If respondent is denied the opportunity to collect this material, it will be unable to lay the foundation for whatever legal arguments, based on market conditions, it may wish to make. It is to be emphasized that the Commission does not imply its acceptance or rejection of any legal argument that respondent may choose to make in its defense. We merely hold that respondent is not to be foreclosed, at this stage of the proceeding, from attempting to make its defense by being denied the opportunity to obtain the necessary evidence. We also reject appellants' contentions that some items of the subpoenas are not relevant.

Appellants contend also that respondent's real purpose is to gather highly confidential competitive data which will be "of incalculable value to respondent in competing with movants." The Commission believes that the data sought is not of so confidential or sensitive a nature as appellants claim and, moreover, that the protective provisions of the examiner's order render it highly unlikely that the material submitted by appellants can be put to unfair or improper competitive use by respondent. However, out of an abundance of caution and in order to avoid any possibility that the allegedly confidential data will be improperly used, we direct that material submitted in response to the subpoenas should be submitted to a reputable and disinterested accounting firm, to be selected by the hearing examiner in consultation with the parties, which shall compile and present the material to respondent's counsel in such manner that no individual company's confidential arrangements or data will be revealed. This shall be in addition to the protective provisions already contained in the examiner's order. The request for oral argument is denied.

It is so ordered.

Commissioner MacIntyre not participating.

MODERN MARKETING SERVICE, INC., ET AL.

C. H. ROBINSON COMPANY AND NASH-FINCH COMPANY

Dockets 3783, 4589. Order, June 9, 1966

Order denying respondents' request to either terminate case or to defer filing of proposed findings until the Supreme Court has ruled on *F.T.C.* v. *Jantzen, Inc.*, 356 F. 2d 253 (9th Cir. 1966), but granting a 30 day extension to prepare findings.

ORDER DENYING RESPONDENT'S MOTION TO TERMINATE PROCEEDING, OR, IN THE ALTERNATIVE, TO DEFER FILING OF PROPOSED RECOMMENDATIONS AND GRANTING REQUESTED EXTENSION OF TIME FOR FILING RECOMMENDATIONS

This matter is before the Commission upon the hearing examiner's certification, under § 3.6(a) of the Commission's Rules of Practice, of a motion of respondent, Nash-Finch Company, filed May 4, 1966, requesting that the proceeding be terminated, or, in the alternative, that the filing of proposed recommendations and other submissions with the examiner be deferred until such time as the United States Supreme Court has ruled that the Commission has authority to conduct a proceeding for enforcement of a pre-1959 Clayton Act order which was commenced subsequent to the enactment of the Clayton Act Finality Act. In addition, respondent, on May 6, 1966, filed a motion to extend from June 9, 1966, to August 9, 1966, the time to file its proposed recommendations with the examiner, in the event that its May 4, 1966, motion is denied.

In his certification of May 20, 1966, the examiner recommended that the Commission deny both parts of the first motion and grant the second.

Respondent's contention in support of the requested termination is that the Commission has no authority to prosecute this proceeding, inasmuch as all statutory provisions for the enforcement of pre-1959 Clayton Act orders, by a proceeding commenced after July 23, 1959, were repealed by enactment of the Clayton Act Finality Act. Respondent cites in support the recent decision of the Court of Appeals for the Ninth Circuit in *Federal Trade Commission* v. *Jantzen, Inc.*, 356 F. 2d 253 (1966).

Respondent supports its alternative request for a deferment of the filing of proposed recommendations until the Supreme

Court has ruled upon the *Jantzen* doctrine with a plea against subjecting it "to irreparable injury in the form of the costs of briefing and preparing and submitting proposed findings and conclusions, in a highly complex and confusing legal and factual context."

Commission counsel urge that both alternatives be denied. They argue that the decision of the Ninth Circuit conflicts with other judicial precedents and does not warrant immediate termination or deferment of all pending compliance matters relating to pre-Finality Act orders; that *Jantzen* does not curtail the Commission's investigative authority; and that the requests for termination or deferment "are but two more of respondents' continuing efforts in this 3½ year-old proceeding to stall and frustrate the Commission's inquiry."

The order directing an investigational hearing in this matter issued on February 1, 1963 [62 F.T.C. 1486]. The record was finally closed by the hearing examiner on April 25, 1966. There remains only the submission by the parties of proposed recommendations and the subsequent examiner's report to the Commission. The Commission considers the decision of the Ninth Circuit in *Jantzen* as being limited to that respondent only and does not find in the motion of Nash-Finch Company a valid reason for either terminating or staying this proceeding. Accordingly,

It is ordered, That respondent's motion to terminate the proceeding or, in the alternative, to defer the filing of proposed recommendations with the hearing examiner be, and it hereby is, denied.

Counsel for respondent in their second motion represent that they have insufficient time to prepare adequate proposed recommendations in this matter. As reasons they list the length of the record (approximately 3,000 pages), the number of exhibits involved (over 300), the complexity of the issues, and the fact that they are presently engaged in the preparation of proposed findings in a matter currently before another Commission hearing examiner. Counsel for the Commission have no objection to an extension, but would limit it to 30 days. We find that a reasonable extension to both sides is warranted. Accordingly,

It is further ordered, That respondent and counsel for the Commission are granted an extension to July 25, 1966, to file their proposed recommendations with the hearing examiner.

Commissioner Elman not concurring and Commissioner MacIntyre not participating.

BEST & CO., INC.

Docket 8669. Order, June 9, 1966

Order denying respondent's request to appeal from hearing examiner's order setting June 21, 1966, as date on which hearings will commence.

ORDER DENYING REQUEST FOR PERMISSION TO FILE INTERLOCUTORY APPEAL FROM HEARING EXAMINER'S ORDER SCHEDULING HEARINGS

Upon consideration of respondent's request for permission to file an appeal from the hearing examiner's order dated May 27, 1966, and filed May 31, 1966, setting hearings in this proceeding to commence on June 21, 1966, the Commission has determined that the request should be denied. The Commission now has before it respondent's appeal, filed May 19, 1966, from the hearing examiner's order of May 10, 1966, denying respondent's motion for depositions from 14 supplier witnesses and for subpoenas *ad testificandum* and *duces tecum* in aid of such depositions. The Commission also has before it respondent's request for permission to appeal from the hearing examiner's order of May 10, 1966, denying respondent's motion to suspend and bar complaint counsel from further participation in this proceeding, also filed on May 19, 1966. Complaint counsel's answers were filed on May 27, 1966. On June 6, 1966, the Commission granted respondent's motion of June 1, 1966, and permitted respondent to submit a reply to complaint counsel's answers on allegedly new matters raised by complaint counsel and allegedly not considered by the hearing examiner. This reply has not yet been received. In connection with its motions, respondent's rights wil be fully protected. After the Commission has decided respondent's appeal and request for permission to file an interlocutory appeal filed on May 19, 1966, the hearing examiner will be authorized to take whatever steps are necessary to carry out that decision. There has been no showing here, as required by § 3.20 of the Commission's Rules of Practice, of extraordinary circumstances necessitating an immediate decision by the Commission to prevent detriment to the public interest. Accordingly,

It is ordered, That respondent's request for permission to file an interlocutory appeal from the hearing examiner's order scheduling hearings be, and it hereby is, denied.

Commissioner Elman not concurring.

BEST & CO., INC.

Docket 8669. Order and Opinion, June 23, 1966

Order denying respondent's appeal from hearing examiner's motion for depositions from 14 supplier corporations, and from his denial of motion to suspend complaint counsel, and remanding the suspension motion to the hearing examiner.

OPINION OF THE COMMISSION

On November 1, 1965, the Commission issued its complaint, stating it has reason to believe that respondent violated the Federal Trade Commission Act by inducing or receiving promotional allowances not made available on proportionally equal terms to its competitors. This matter is now before the Commission on respondent's appeal from the hearing examiner's order of May 10, 1966, denying respondent's motion for depositions from fourteen supplier corporations, respondent's request for permission to file an interlocutory appeal from the hearing examiner's order of the same date refusing to suspend complaint counsel from further participation in this proceeding, complaint counsel's answers and respondent's reply.

The crux of respondent's appeal relating to the deposition issue seems to be the contention that the hearing examiner's prehearing order of December 21, 1965, has not been observed by complaint counsel. Respondent contends in this connection that had complaint counsel complied with that order the need for depositions would have been either wholly obviated or at least the scope of the request would have been materially reduced.

The prehearing order in question provided, in pertinent part, that complaint counsel should furnish to respondent's counsel the following data:

a. A statement of the issues of fact and of law which they regard as being involved in the proceeding, and of the party's position on each such issue. Such statement shall include each party's version of the facts, transactions or events out of which the complaint or any defense thereto arises, and shall not be a mere repetition of the pleadings.

b. A list of the witnesses which the party proposes to call in support of his or its position on each issue of fact. Such list shall include the name, address, occupation and business connection of each witness, and the issue with respect to which it is expected he will testify.

c. A narrative statement of the testimony which it is expected each witness named in subparagraph b, above, will give in support of the party's version of the issues.

d. A list of the documentary evidence which the party proposes to offer in support of his or its position on each issue of fact, and the issue with respect to which it will be offered. Such list shall include a brief description

of the document, the date (if any), by whom prepared or written, and to whom sent.

e. Copies of all documents proposed to be offered, unless the documents came from the files of the opposing party or there is otherwise reason to believe that such party has a copy thereof. In the event it is not feasible to supply copies of particular documents by reason of the size or nature thereof, compliance with this subparagraph may be effected by affording opposing counsel a reasonable opportunity to inspect and make appropriate notes regarding the document in advance of the prehearing conference.[1]

Respondent, in its appeal, claims that disclosure by complaint counsel, although formidable in bulk, is more superficial than real. (Page 3, respondent's appeal brief.)

The hearing examiner, in ruling on respondent's motion for depositions, stated it is his opinion that the taking of such depositions is unnecessary and would result in undue delay of the proceeding, involving to a large extent a duplication of the trial in this case. In supporting this conclusion, he pointed to the fact that two prehearing conferences had already been held. He stated further that as a result of his order scheduling the initial prehearing conference and additional directions to counsel that complaint counsel has turned over, or will have completed turning over, substantially in advance of the hearing, a list of their witnesses, narrative statements of the testimony of such witnesses, a list of their documents and copies of all but those voluminous documents for which summary tables have been substituted.[2] The examiner, in denying the motion for depositions, stated that he is satisfied that counsel for respondent has been supplied with sufficient information so as to be reasonably prepared for cross-examination and the offering of defense evidence. He further stated that in large part the information which counsel for respondent seeks to elicit by the deposition procedure is irrelevant, since it involves such matters as other alleged forms of discriminatory payments and services, and a possible cost justification defense.

It is important to note that the examiner further stated that to the extent that there may be relevant information which respondent may have to obtain from such supplier witnesses, he

[1] According to respondent's appeal, compliance with items a through d would apparently have given it sufficient information to prepare its defense and for the trial of this case so as to obviate the depositions in question or at least permit a material reduction in their scope.

[2] These summary tables are apparently the summarizations referred to as Tables I, II and III in the pleadings. Table I purports to reflect certain suppliers' total sales and advertising allowances in 1962 and 1963 to respondent and certain other retailers. Table II purports to reflect advertisements by respondent during the years 1962 and 1963, to the cost of which certain suppliers contributed. This data, according to the motions filed, includes the names of the publications, the suppliers and style numbers of merchandise featured in such advertisements. Finally, Table III purports to reflect sales by such suppliers to respondent in 1962 and 1963, of the style numbers shown in Table II, as well as the sales by certain suppliers of identical styles during the same period to other retailers.

is satisfied that despite the alleged failure of one of fourteen suppliers to cooperate that the respondent would be able to obtain such information by voluntary processes. The examiner went further, stating that if he were wrong in this assumption, that appropriate arrangements could be made without undue delay in the hearings to secure such information by compulsory process. In this connection, we note that § 3.10 of the Commission's Rules of Practice specifically states that at any time during the course of a proceeding the hearing examiner, in his discretion, may order that the testimony of a witness be taken by deposition and that a witness produce documentary evidence in connection with such testimony.

It is apparent that the examiner carefully weighed the possibility of obtaining substantial results from the deposition procedure which respondent seeks against the delay which, in his opinion, would entail an interruption of many months in the trial of this proceeding and that he came to the conclusion that such a delay is simply not warranted in light of the extremely tenuous possibility that substantive results would be achieved.

In effect, the examiner, in his order of May 10, 1966, held that his directions for pretrial disclosure by complaint counsel have been complied with. This, of course, is a factual determination which the hearing examiner is far better equipped to make than we. The hearing examiner is in a position to discuss these matters with counsel for both sides and to thoroughly examine the material submitted pursuant to his order. In his capacity as trier of fact and in his proximity to the proceeding in the trial stage, the examiner is in a far better position than the Commission to determine what is necessary for either side to prepare for the trial of the case and for cross-examination of the other party's witnesses. We affirm, therefore, in this case the rule that as to matters of discovery the hearing examiner has broad discretion and that he will not be reversed absent a clear showing of abuse of such discretion. See *American Brake Shoe Company*, Docket No. 8622, Order Denying Appeal From Denial Of Applications For Depositions And Subpoenas, issued September 1, 1965 [68 F.T.C. 1169]. We have little hesitation in applying that rule in this instance since it is clear that the examiner is keenly aware of his responsibility to respondent to ensure it has the information necessary for the preparation of its defense and for cross-examination of complaint counsel's witnesses. In this connection, we have already noted the examiner has stated his willingness to grant respondent compulsory proc-

ess for such information as it may need for these purposes should that need become apparent during the course of the hearing. We also note the statement of the examiner, brought to our attention by complaint counsel's answer, that if respondent is unable to cross-examine certain witnesses because they do not have the requisite information or if the witnesses called by respondent in its defense are not familiar with the transactions under consideration, he would then recess the hearing until respondent could obtain appropriate witnesses. The examiner specifically stated, in this connection, that he would follow this procedure to ensure that respondent would not be precluded from being able to make a full cross-examination and to offer a complete defense. It is clear that the hearing examiner will fully protect respondent's rights during the course of these proceedings and there is no need for Commission intervention at this time.

Finally, it is apparent that the examiner has only followed the mandate of the Commission to exert positive control of the proceedings, to define the relevant issues, and to exclude irrelevant material in the prehearing stage of the case. Here the examiner has exercised the responsibility of isolating the essential issues, which is primarily his. He should not be reversed for taking that initiative. See *Topps Chewing Gum, Inc.*, Docket No. 8463, Opinion And Order Disposing Of Motions, July 2, 1963 [63 F.T.C. 2196].

We turn now to respondent's request for permission to file an interlocutory appeal from that part of the examiner's order denying respondent's motion to suspend complaint counsel from further participation in this proceeding. The ground for that motion was that complaint counsel allegedly communicated with a prospective witness so as to induce it not to make available to respondent certain information material to the defense. According to respondent, complaint counsel communicated with counsel for such witness in order to encourage the witness not to cooperate with respondent's counsel in verifying data contained in tables which had been turned over to respondent.

The examiner, in his order of May 10, found the conduct of complaint counsel regarding the communication with the witness in question did not come within the scope of § 3.15(d) of the Rules of Practice, whereunder the examiner is authorized to suspend attorneys who refuse to comply with his direction, are guilty of disorderly conduct, dilatory tactics or contemptuous language. He found, however, that complaint counsel's action was ill-advised under the circumstances in view of the fact that

counsel for respondent had given assurance during the prehearing conference that the confidentiality of the tables would be maintained and that complaint counsel had given no inkling of the need to communicate with any witness before turning over the tables in question. The examiner further found that nevertheless the tables had been turned over to respondent's counsel and there had been no prejudice to respondent as a result of the communication with the witness. The examiner stated that it was his understanding that the witness would cooperate with respondent's counsel in verifying the information in Table II [3] and that any delay in completing the work has not been the result of any communication from complaint counsel. In making these findings, he took into consideration the fact that it is to the advantage of complaint counsel that the checking of this data be completed as soon as possible so that the table may be offered in evidence by agreement without the necessity of the calling of a witness.

Respondent, not satisfied with this disposition, filed a request for permission to file an interlocutory appeal from the order of the examiner refusing to suspend Commission counsel. In this connection, respondent, on the basis of its reconstruction of complaint counsel's contact with the supplier witness, asserts that Commission counsel, in the course of such conversations, made various misrepresentations to the witness and concealed certain material facts in order to obstruct respondent's opportunity to secure information within the possession of such witness. Complaint counsel, in their answer before the Commission, deny having made the alleged misstatements or concealing material facts from the witness as alleged by respondent. Respondent, in its reply, claims this denial raises new matters not previously considered by the hearing examiner.

The Commission accepts the hearing examiner's finding that no harm has resulted to respondent as a result of the activities complained of. Nevertheless, it believes that in view of respondent's insistence on pressing its charges against complaint counsel the matter should be remanded to the hearing examiner for a specific finding on the issue of whether complaint counsel made misstatements to the witness in question and concealed from it material facts with the intent of preventing respondent from gaining access to information to which it is entitled. Merely contacting a witness to inform him that data he furnished the Commission will be turned over to a respondent or a third party without more is, of course, a neutral act not warranting charges

[3] See note 2, *supra*.

of impropriety. A determination of whether respondent's allegations have any basis in fact involves factual questions, including a resolution of the evident dispute between respondent's counsel on the one hand and complaint counsel and counsel for the witness on the other. The hearing examiner, in his position as trier of fact, is in a much better position to resolve such issues than the Commission. In fairness to all concerned, specific findings should be made on the questions outlined above. The examiner may make such findings on the basis of the information now available to him or, if it is necessary in his opinion, he may, in his discretion, at a suitable time in this proceeding, call as witnesses before him all those having knowledge of the facts relevant to respondent's charges against complaint counsel. There should, however, be no interruption of those hearings now scheduled to commence on June 29, 1966. When the examiner has made his findings on these points, he is to certify the matter to the Commission with his recommendation for disposition.

ORDER DENYING APPEAL AND REQUEST FOR PERMISSION TO FILE AN INTERLOCUTORY APPEAL

This matter is before the Commission on respondent's appeal from the hearing examiner's order of May 10, 1966, denying respondent's motion for depositions from fourteen supplier corporations, respondent's request for permission to file an interlocutory appeal from the hearing examiner's order denying respondent's motion to suspend complaint counsel, complaint counsel's answers in opposition thereto and respondent's reply. The Commission has determined that the appeal and the request for permission to file an interlocutory appeal should be denied. The Commission has further determined that the dispute in connection with respondent's motion to suspend complaint counsel should be remanded to the examiner for further findings and action in accordance with the instructions set forth in the accompanying opinion. Accordingly,

It is ordered, That respondent's appeal from the hearing examiner's order of May 10, 1966, denying depositions, and respondent's request for permission to file an interlocutory appeal from the hearing examiner's order of May 10, 1966, denying the motion to suspend complaint counsel, be, and they hereby are, denied.

It is further ordered, That this matter be, and it hereby is, remanded to the examiner for findings and further action in connection with respondent's motion to suspend in accordance with the directions set forth in the accompanying opinion.

BEST & CO., INC.

Docket 8669. Order, June 28, 1966

Order denying respondents' appeal from hearing examiner's order denying issuance of subpoenas duces tecum directed to complaint counsel's witnesses.

ORDER DENYING RESPONDENT'S APPEAL AND REQUEST FOR A STAY OF THE PROCEEDING

Upon consideration of respondent's appeal from the hearing examiner's order denying application for issuance of subpoenas duces tecum filed June 27, 1966, and respondent's request for a stay in the hearing pending disposition of this appeal, the Commission has determined that the appeal should be denied.

The examiner denied respondent's request for subpoenas against complaint counsel's witnesses on the ground that it made an insufficient showing of relevance to justify their issuance at this time in view of the magnitude of the request for information. The examiner further determined that much of the data which respondent desires to subpoena is either patently irrelevant, its relevance has not been adequately demonstrated, or is largely covered by the subpoenas issued on the application of complaint counsel. The examiner also took into consideration the fact that granting respondent's application to any substantial extent at this time would create a grave risk of a substantial postponement of the hearings.

We also note that the examiner recognized that respondent might more appropriately develop certain of the evidence which it seeks during its defense rather than in the course of cross-examination. In this connection, we further note that the examiner has stated his willingness, during the course of the hearings, to make compulsory process available to respondent if necessary. What respondent requires in the way of additional information for cross-examination will become apparent during the course of the hearings and the examiner has indicated that he will make ample provision to ensure that respondent will be able to fully cross-examine complaint counsel's witnesses as it is entitled to do. (See our Order Denying Appeal and Request for Permission To File Interlocutory Appeal issued June 23, 1966 [p. 1193 herein].)

In short, at this time there is no indication that the examiner has abused his discretion in denying respondent the subponeas which it seeks, and there is no reason for the commission to intervene at this stage and to interfere with his conduct of the

proceedings. At this time the examiner is in a better position to make such determination than the Commission. Accordingly,

It is ordered, That respondent's appeal from the hearing examiner's order denying application for issuance of subpoenas duces tecum filed June 27, 1966 be, and it hereby is, denied.

Commissioner Elman not participating.

DEVCON CORPORATION ET AL.

Docket C-607. Order, April 7, 1966

Order directing hearing examiner to receive evidence on question of whether Commission's order of Oct. 11, 1963, 63 F.T.C. 1034, should be changed to focus on the applied properties of the products in question rather than on their metal content.

ORDER DIRECTING HEARINGS

The Commission on October 25, 1965, having issued its order to respondents to show cause why the order to cease and desist in this matter issued October 11, 1963 [63 F.T.C. 1034], should not be changed so that the order's proscriptions should focus upon the applied properties of the products in question rather than upon their metal content, and

Respondents having filed a response to said order to show cause averring that the change proposed by the Commission raises questions of fact requiring evidentiary hearings, and

The Commission being of the opinion that the public interest will be best served by reopening this proceeding for the reception of evidence for and against the alteration and modification of Paragraph 1(a) of its order to cease and desist dated October 11, 1963, and setting aside Paragraph 1(b) of said order in accordance with proposed order to cease and desist contained in its show cause order of October 25, 1965.

It is ordered, That this matter be assigned to a hearing examiner for the purpose of receiving evidence in support of and in opposition to the question whether the public interest requires that the Commission's order to cease and desist of October 11, 1963, be altered, modified or set aside in accordance with the Commission's order to show cause dated October 25, 1965.

It is further ordered, That the hearings be conducted in accordance with Part 3, Subparts C, D, E and F of the Commission's Rules of Practice.

It is further ordered, That the hearing examiner, upon conclusion of the hearings, certify the record together with his recommendation to the Commission for final disposition of this matter.

No. 12. Promotional assistance—Publisher payments to a single reseller of the publisher's periodical.

The Federal Trade Commission announced today that it had recently advised a publisher of a periodical that the proposed promotional assistance Plan described below would be violative of Section 2(d) of the Robinson-Patman amendment to the Clayton Act. Section 2(d) provides in essence that it is unlawful for a supplier in interstate commerce to offer promotional assistance to his customer in reselling the supplier's product unless a proportionally equal offer also is made to the customer's competitors who sell the same product.

Essentially, the proposed Plan provided for a payment of $75 weekly to the operator of a chain of newsstands. In return, the operator would (1) place the publication on sale on the newsstands, (2) submit daily sales reports to the publisher for each newsstand, (3) favorably display the publication on the stands and (4) provide stock control to avoid sell outs.

The Plan was deemed violative of Section 2(d) because it was to be offered only to the one operator of newsstands. Under the Plan, his competitors in selling the publication were not to be offered promotional assistance—proportional or otherwise.

The Commission's Guides for Advertising Allowances discuss the requirements for such promotional assistance Plans in considerable detail and will be of assistance to persons comtemplating their use. Copies of the Guides are available from the Secretary, Federal Trade Commission, Washington, D.C. 20580. (File No. 663 7020, released Jan. 5, 1966.)

No. 13. Discount-buying membership organization.

A recent Federal Trade Commission advisory opinion informed a promoter that there were no actionable trade restraints inherent in his proposed plan.

As explained by the promoter, the plan involved the formation

*In conformity with policy of the Commission, advisory opinions are confidential and are not available to the public, only digests of advisory opinions are of public record. Digests of advisory opinions are currently published in the Federal Register.

of a membership organization. Membership, available at an annual fee to the general public without restriction, confers the right to purchase at a stated discount from the prevailing prices of retail merchants. Local retailers can participate in the plan without restriction.

The Commission pointed out that its approval was limited to the proposed plan itself and no views were expressed as to the plan's implementation. Without imputing any lack of good faith to the requesting party, the Commission noted that if, for example, members of the purchasing public were misled or deceived, or could be misled or deceived, as to benefits available under the plan, such result might be actionable. (File No. 663 7029, released Feb. 1, 1966.)

No. 14. Exclusive use of trademark in designated trading area.

In an advisory opinion announced today the Federal Trade Commission disapproved a contemplated license agreement modification which would give a licensee the exclusive right within a designated trading area to use the licensor's trademark in connection with the licensee's sale of produce purchased from third-party growers.

As the request for an advisory opinion was presented, the requesting licensor, a state agency, owns a registered trademark or certification mark which it licenses through one (1) year, nonexclusive agreements with wholesale distributors for use in connection with their sale of repackaged produce purchased from third-party growers. The purpose of the mark is to advertise and encourage greater use of a particular product, and to protect its original identity.

As a condition for the renewal of a license agreement, the licensor is requiring that the requesting licensee submit his operations to continuous inspection by a designated inspection agency. The requesting licensee indicated that it will be necessary to remodel his plant facilities, and that the initial capital investment and expense of a resident inspector will be considerable. In return for this added expense, the licensee requested that the licensor revise the present license agreement to give him the exclusive right within a designated trading area to use the trademark in connection with his sale of certain produce. It was said that the proposed exclusive license is intended to prevent use of the trademark by competitors in the described trading area in connection with their repackaging and sale of similar produce.

Unlike the ordinary trademark owned by a single producer and

applied solely to his goods, the mark here involved is a certification mark owned by a state agency. Such a mark is intended to identify goods produced by many competing growers. Since it is intended that the public take the certification mark as a representation that the only bona fide produce of that type is the produce sold under this mark, restriction of its use to the requesting licensee could result in giving him an unfair competitive advantage over other wholesale distributors who are in fact selling the same produce but who do not have the right to use the certification mark. The result could be to impose an unreasonable restraint, not upon intrabrand competition (as would be the case with the usual exclusive trademark license), but upon competition between competing brands of the produce involved.

The fact that the right to use the certification mark is conditioned upon utilization of the inspection procedure required by the licensor is no justification for insulating the requesting licensee's company from the competition of other repackers of similar produce.

The Federal Trade Commission advised that it is of the opinion that the proposed exclusive license agreement would probably be in violation of Section 5 of the Federal Trade Commission Act. (File No. 663 7012, released Mar. 5, 1966.)

No. 15. Proposed trade association resolution by wholesalers suggesting pricing and business policies to their suppliers.

A trade association composed of wholesalers of rebuilt products has requested an advisory opinion from the Commission as to the legality of a proposed Resolution suggesting certain conduct to the trade association of rebuilders who supply the wholesalers. The Resolution would provide, among other things, that rebuilders should give wholesalers 120 days notice in writing of any change in the allowance to be granted for used products turned in for rebuilding purposes; that during this period the wholesalers should receive credit at the old rate on such return products; and that the rebuilders should incorporate a 30 percent gross profit for the wholesalers when establishing prices for the used products in view of the fact that the wholesalers give an allowance to the retailers who turn in the used product for rebuilding purposes. The association added that there was no agreement not to do business with those rebuilders who declined to follow the practices contained in the Resolution.

The Commission advised that it could not give approval to the adoption of the Resolution. Though the Resolution may be

motivated by a purpose to remove evils affecting the industry, it appears to go further than is reasonably necessary to accomplish such result. Even if it were accompanied by disclaimers, there is implicit in the Resolution too grave a danger that it will serve as a device whereby the concerted power of the members of the association is brought to bear to coerce the members of the rebuilders' trade association to conform their pricing policies to the restrictive standards of the Resolution, or at the very least as an invitation to enter into agreements among themselves to do so. (File No. 663 7036, released Mar. 8, 1966.)

No. 16. Advertising by a manufacturer in a customer-connected trade publication.

The Federal Trade Commission recently rendered an advisory opinion dealing with the proposed advertising by a manufacturer of drug items in a drug trade catalogue published by an organization of wholesale druggists.

The manufacturer was informed that several months previously the Commission had approved the organization's proposed plan of reorganization of the publication which provided that (1) the publication is to be published by a separate corporate subsidiary, (2) the advertising rates to be charged will be no higher than necessary to realize a normal profit for such a publication, and (3) in any event, the profits resulting from the publication will be donated annually to a charitable organization.

"Unless and until the Commission announces the rescission of such approval," the advisory opinion stated, "it will not take the position that any supplier's payment for advertising in * * * [the publication in question] constitutes a payment indirectly to the wholesaler members * * * [of the organization], subject to Section 2(d) of the amended Clayton Act."

However, the Commission pointed out that it will continue to regard a supplier who advertises in a publication such as this "as in effect furnishing, through the intermediary of the publisher, a promotional service to those wholesalers who make use of the publication. In order to assure compliance with Section 2(e) of the amended Clayton Act, the supplier should ascertain whether in a practical business sense the publication is available for use by all of his wholesaler customers who are in competition with the wholesaler customers who do in fact use it; if it is not so available for use by some customers, the supplier must offer those customers a reasonable alternative." (File No. 663 7007, released Mar. 16, 1966.)

No. 17. Use of descriptions "velvet" and "suede" for a flocked fabric.

A recent Federal Trade Commission advisory opinion informed a manufacturer that the unmodified terms "velvet" and "suede" could not properly be used to describe a flocked fabric.

The manufacturer had described the material in question as one formed of microcut flock fibers upstanding on end and adhered to a suitable backing. The resulting fabric, it was said, has the appearance and feel of velvet and suede.

The Commission believes the consuming public understands the unmodified term "suede" to connote leather and the unmodified term "velvet" to connote, among other things, a particular kind of warp pile fabric.

The fabric in question, therefore, may properly be designated only as "suede fabric," "suede cloth"; "velvet-like fabric" or "velvet-like cloth" or by words of similar import. The expressions "sueded fabric," "sueded cloth"; "velveted fabric" or "velveted cloth" or words of similar import are also unobjectionable. (File No. 663 7040, released Mar. 22, 1966.)

No. 18. Exclusive franchise arrangements.

A concern proposing to establish a service in principal American cities through exclusive franchises was recently advised that, with two exceptions, the Federal Trade Commission has no objections to the program as now proposed by its exclusive license agreement.

The first exception involved the contractual provision requiring the licensees to purchase their equipment, supplies and services through a central procurement office operated by the licensor.

"On the facts which you have furnished us, we are not able to make a determination as to the reasonableness" of this requirement, the Commission said. "We cannot determine, for example, which of the various products subject to that clause require such a degree of uniformity as to justify such a central procurement obligation. Similarly, as to those products where uniformity might be necessary, we cannot determine whether it could not be achieved by specifications or by some other less restrictive means than that provided for * * *. Accordingly, we cannot give you any opinion as to the lawfulness or unlawfulness of this provision.

The other exception noted in the advisory opinion concerned the article of the agreement providing that after termination,

the licensee may not, for a period of three years, and without geographic limitation, engage in business in "similar fields."

The Commission said, "While the duration and geographic scope of this article are, in our view, reasonable, the term 'similar fields' is so general and ambiguous that, unless clarified and reasonably limited, it might impose an unreasonable restraint on the licensee."

The licensor was cautioned by the Commission, "With respect to the agreement as a whole, you should bear in mind that the legality of any franchise system depends to a large extent upon the manner in which such agreements are implemented. If apparently reasonable reservations of rights by the licensor are in practice administered in an unreasonable manner so as to unfairly encroach upon the freedom of the licensees, an agreement which is legal on its face can become illegal in effect." (File No. 663 7004, released Mar. 23, 1966.)

No. 19. Advertising promotions addressed to new mothers.

In a recent Advisory Opinion announced today the Federal Trade Commission informed an advertising agency that the Plan described below would not violate Commission administered law.

The Plan

Having first made arrangements with suppliers, not retailers, an advertising agency proposes to mail to new mothers, whose names would be obtained from public sources, an envelope containing a variety of "savings" coupons advertising products such as baby foods, powder, soap, lotions and the like. By redeeming the coupons at any stocking retail outlet of her choice, the mother would save five or six cents on a purchase of the advertised product. A line might appear on the cover of the envelope calling attention to the fact that it contains a coupon for an advertiser's product but no part of the mailing would mention the name of, or contain any coupons advertising "house brands" of, any particular outlet at which a coupon might be redeemed.

It is the Commission's view that advertisers participating in such a plan would not specifically, or implicitly, be furnishing promotional assistance to a particular outlet from which the advertiser's products could be obtained by the new mother.

An advertiser in interstate commerce who offers promotional assistance to *particular* outlets, specifically or implicitly, for his

products is required under the laws administered by the Commission to make the offer to *each* of his competing customers so that the assistance is realistically available to each of them on proportionally equal terms.

The Commission's Guides for Advertising Allowances discuss the requirements for promotional assistance plans in considerable detail and will be of assistance to persons contemplating their use. Copies are available from the Secretary, Federal Trade Commission, Washington, D.C. 20580. (File No. 663 5032, released Mar. 24, 1966.)

No. 20. Necessity to disclose foreign origin of strain release device if servomotor is labeled as "Made in U.S."

The Commission has issued an advisory opinion in which it advised a manufacturer that it would be improper to label its servomotors as "Made in U.S." since that would constitute an affirmative representation they were entirely made in this country, which is not the fact, unless the label also discloses in a clear and conspicuous manner that the strain release device is imported from West Germany.

The Commission's opinion was rendered in response to a factual situation where all components of the servomotor, except the strain release device, are of domestic origin. The strain release device is to be imported in an assembled state from West Germany, and it represents approximately 5 percent of the total cost of all the components. The servomotors will be sold in the United States and in foreign countries.

In its opinion the Commission also took the position that the disclosure requirement would also be applicable, even though the manufacturer decided at a later date to import the strain release device unassembled and assemble it here in the United States.

Finally, the Commission's opinion noted that it would have authority to impose the same requirement in connection with the sale of servomotors in foreign countries, provided they were being sold in competition with other American manufacturers. (File No. 663 7041, released Mar. 29, 1966.)

No. 21. "Free" offer of merchandise.

The Federal Trade Commission recently rendered an advisory opinion on a retailer's proposal to offer a stereo record player for "absolutely nothing" with the purchase of one stereo record a week for fifty weeks.

The concern had asserted that it does not retail the record

player by itself for less than $249 and that the records are high quality stereo records which it retails for $4.98 and it does not know of anyone else selling them for less. Thus, it stated, the customer would pay $249 for the record player and the records, which is the price normally paid for the set alone.

The Commission informed the retailer, "Since the matter you have presented is wholly dependent upon the facts, it is difficult to render a categorical opinion. When a seller offers to supply one article 'free,' or 'at no extra cost,' or for 'absolutely nothing' in conjunction with the purchase of another article, he is thereby representing to prospective customers that the article required to be purchased is being sold at no more than the price at which it is usually sold in substantial quantities. You will note that we are not dealing here with abstract evaluations, but rather with concrete selling prices.

"Thus, if the records which are to be offered those who accept this offer are currently being sold in substantial quantities for $4.98, there could be no objection to the offer on that score. On the other hand, if such records are what is known in the trade as 'low cost,' 'cut-outs,' 'budget lines,' etc., which normally command a much lower selling price, the offer would be deceptive even though the records may be listed at $4.98 for advertising or preticketing purposes. In that event, instead of purchasing current records at the prevailing market price and receiving a record player at no extra cost, the purchaser would be paying a high, nationally advertised, price for records worth a fraction of that value, the substantial markup thereby defraying the cost of the record player.

"Although the sample of the promotion letter you furnished contains no representation of the value of the record player, the same general principles would apply if such representations are made. Thus, to avoid any basis for deception, representations of price or value of the record player must reflect the actual or prevailing market price at which sales of that product are currently being made in substantial quantities."

The Commission also noted that the promotion letter states "Have you ever been called 'Lucky'? Well Congratulations" and urges the customer to "come in before the expiration date."

"If, in fact," the advisory opinion commented, "the offer is available to more than a few selected persons, or continues for an extended or indefinite period of time, then the representations in the promotion letter would be false and deceptive." (File No. 663 7008, released Mar. 29, 1966.)

No. 22. Impropriety of description "Made in U.S.A." for kit with substantial amount of foreign components.

A recent advisory opinion made public today by the Federal Trade Commission notified a marketer of toys that it would not be permissible to use the labeling description "Made in U.S.A." for a tool kit containing two Japanese components.

The kits will contain 20 items, 18 of American origin and 2 imported from Japan which will represent 16 percent of the total value of the entire kit.

The Commission advised that "the claim, 'Made in U.S.A.' would constitute an affirmative representation that the entire kit was of domestic origin. Since a substantial portion of the components therein would be of foreign origin, the Commission is of the opinion that it would be improper to label the kits as 'Made in U.S.A.' " (File No. 653 7062, released Mar. 30, 1966.)

No. 23. Establishment of buying corporation by broker.

An advisory opinion rendered recently by the Federal Trade Commission notified a broker-distributor of fresh fruits and vegetables that either of his proposed alternative plans to establish a buying corporation would involve grave risk of illegality.

The businessman had inquired whether or not under the Perishable Agricultural Commodities Act and FTC law he may lawfully:

(1) establish a corporation as an exclusive buying company for a purchaser for resale, this corporation to buy and be billed in its own name. The purchaser for resale would own one or more shares of the common stock of the buying company and would participate in the brokerage received by that company, or

(2) establish a corporation as above for the above described purposes, the difference being that shippers would directly invoice and be paid by the purchaser for resale rather than the proposed corporation.

The Commission advised him that it had no comment on the Perishable Agricultural Commodities Act because it does not administer this law.

"The immediately applicable statute is," continued the advisory opinion, "as you know, Section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act, which makes unlawful the payment or receipt of brokerage or allowances in lieu thereof in certain commercial contexts.

"In the Commission's view, either of the plans you propose,

if adopted, would carry with them grave risk that the statute will be violated.

"Absent any indication to the contrary, they appear to amount merely to a means whereby both the letter and the spirit of the statute are to be avoided." (File No. 663 7002, released Apr. 1, 1966.)

No. 24. Food store promotional plan.

An advisory opinion made public today by the Federal Trade Commission informed a company of the "very serious possibility" that a proposed promotional plan would subject participating food supplier advertisers to a charge of law violation.

The plan involved the distribution of reprints of advertisements to the public through retail food stores, the cost of the reprints to be shared by participating suppliers. No mention would be made of any specific retailer in the advertising and 10,000,000 reprints would be offered at no cost. Each retailer would receive the number requested provided the total ordered did not exceed this available supply. If the orders exceeded 10,000,000, this number would be divided by the total number of checkstands in stores requesting copies to determine how many each store would receive.

It appears, the FTC's advisory opinion stated, "that no problem would arise under the laws administered by this Commission unless and until the requests for reprints exceed the available supply of 10,000,000. In such event, it is doubtful that the basis chosen for distribution of the reprints among competing retailers would result in the proportional equality required by the law [Section 2(e) of the Robinson-Patman Act]. While the Act does not specify any single standard for proportionalizing merchandising services and facilities, it does not appear that the required result will be achieved when the standard selected is the number of checkstands in the stores requesting copies. This standard bears no ascertainable relation to the volume of business which any of the retailers involved might conduct with any of the participating suppliers. In fact, it could result in a situation in which retailers who have a small volume with the participating suppliers would receive more reprints than competing retailers with a much larger volume solely because of a greater number of checkstands. We cannot conclude then that the plan as it is presently proposed would necessarily result in the proportionally equal treatment of all competing customers that the law requires. Consequently, there is a very serious possibility

that it would subject the participating suppliers to a charge of violation of Section 2(e) of the Robinson-Patman Act." (File No. 633 7018, released Apr. 1, 1966.)

Tripartite Promotional Program Amendment*
July 11, 1968

This is in reference to the above-numbered matter and to the Commission's advisory opinion dated April 1, 1966, in which you were advised as to the Commission's view with respect to the proposed promotional program there involved.

The Commission has been reexamining this and other advisory opinions rendered in recent years concerning three-party (supplier, promoter, customer) promotional assistance plans which have received its full or partial approval and has decided to modify this opinion.

This step is necessary because information which has subsequently come to the Commission's attention in connection with many such opinions which have been issued indicates that in some instances the customers of the participating suppliers have not been adequately advised as to the availability of the opportunity to participate in these plans or have not been advised as to the alternatives which are supposed to be available to those who are unable to use the basic plan. This step is, of course, absolutely essential to the legal operation of such proposal, for a promotional assistance plan cannot be said to be available to customers who do not know of its existence or who do not understand its terms. It is not the Commission's desire at this time to rescind any of the opinions which have been issued, but, in view of these developments, it is the Commission's view that, as a condition of its continued approval of your plan, reasonable steps must be taken to see that the required notice is given to each customer who is entitled to participate, and that participants in your plan are put on notice of their obligations under the laws administered by the Commission.

Accordingly, the advisory opinion in the above-numbered matter is hereby modified to provide that:

(a) The promoter must make it clear to each supplier and each retailer that even though an intermediary is employed in this plan, it remains the supplier's responsibility to take all reasonable steps so that each of the supplier's customers who

*To the following Advisory Opinion Digests: No. 24, p. 1210; No. 34, p. 1216; No. 35, p. 1217; No. 50, p. 1226; No. 51, p. 1227; No. 52, p. 1228; No. 53, 1229; No. 56, p. 1231; No. 65, p. 1236.

compete with one another in reselling his products is offered either an opportunity to participate in the promotional assistance plan or proportionally equal terms or a suitable alternative if the customer is unable as a practical matter to participate in the plan; if not, the supplier, the retailer and the promoter participating in the plan may be acting in violation of Section 2 (d) or (e) of the Clayton Act and/or Section 5 of the Federal Trade Commission Act.

(b) You are directed to submit a written report to the Commission within six months from the receipt of this letter indicating the manner and extent of your compliance with the requirement outlined in the preceding paragraphs.

No. 25. Impropriety of description "14 K" for item not entirely gold.

The Federal Trade Commission recently rendered an advisory opinion that it is improper to mark or describe an earring as having a "14 K post" when the post is not entirely gold.

"Under Rule 22 (c) (1) of the Trade Practice Rules for the Jewelry Industry," the Commission advised, "an article may not be so designated unless it is 'composed throughout of an alloy of gold'; since this article will contain substantial electroplatings of base metals, it plainly is not composed throughout of gold."

The requesting party had stated that the earring in question would be constructed as follows:

1. The ornamental front part would be basically brass, but no quality claim is contemplated as to this part of the article.

2. The front part is attached to a post made for penetration of pierced ears and held in place by a clutch type back made basicaly of brass. No quality claim for the clutch type back is contemplated.

3. The post will be 14 karat gold. After being soldered to the ornamental front the entire article will be electroplated with copper, then electroplated with nickel, and finally electroplated with high karat gold. (File No. 663 7003, released Apr. 2, 1966.)

No. 26. Paying advertising allowances based upon certain percentage of purchases from the supplier.

The Commission announced today it had given approval to a proposed promotional plan which called for the payment of advertising allowances to all competing customers based upon 5 percent of the customer's annual dollar volume of purchases from the supplier paying the allowance. Its approval was granted

after it had pointed out several steps which must be followed in the implementation of the plan.

Under the terms of the plan which is designed to stimulate the sale of couch throws, the customer must place local advertisements promoting the sale of said products before he is entitled to the advertising allowance. Noting that no single way to proportionalize is prescribed by law and that any method which treats competing customers on proportionally equal terms may be utilized, the Commission pointed out that one of the most widely used and acceptable methods is to base the payments on the dollar volume of goods purchased during a specified period of time. Since that is precisely what the party requesting the advisory opinion proposes to do, namely, make advertising payments which amount to 5 percent of the customer's annual dollar volume of purchases of couch throws, the Commission gave its approval to the plan. (File No. 663 7046, released Apr. 8, 1966.)

No. 27. Affirmative misrepresentation of domestic origin.

The Commission was requested to advise whether or not it would be permissible to label boxes containing toy sets as "Made in U.S.A." when some of the parts or components inside the box were imported.

The Commission advised that it would not be proper to label these boxes as made in U.S.A. since that would constitute an affirmative representation that the contents were entirely made in this country, which is not the fact, unless, of course, the label also discloses in a clear and conspicuous manner the fact that certain of the contents are imported. (File No. 663 7042, released Apr. 8, 1966.)

No. 28. Selection of customers by a single trader.

A recent Federal Trade Commission advisory opinion informed a publisher that no actionable trade restraints appeared to be involved in his proposal to select the customers to whom he will sell a menu and recipe pamphlet.

As explained by the requesting party, the pamphlet will be published weekly and will contain authoritative information on buying, preparing and serving food products. It will be sold to selected food chains operating fewer than 500 retail outlets, whose general trading areas do not overlap. Copies of the pamphlet will be given free to customers of the food chains as a promotional device. The pamphlet will not mention any products by brand name, and will not be available as a medium for advertising by any supplier or association of suppliers, nor will

any of them contribute financially towards its publication or distribution.

The Commission pointed out that the antitrust laws do not restrict the right of a seller who does not have monopoly power to select those customers to whom he will sell his product, provided that the right is not exercised for the purpose of monopolization or is otherwise linked to an unlawful course of conduct in restraint of trade. (File No. 663 7045, released Apr. 12, 1966.)

No. 29. Affirmative domestic origin representation on products containing imported components.

An American concern proposing to market shaving brushes containing plastic handles imported from England has been informed by the Federal Trade Commission that it will not be necessary to disclose the English origin of the handles, assuming there is no affirmative representation they are domestic.

The Commission added that its advisory opinion, of course, "does not relieve one from complying with any applicable statutes or regulations administered by the Bureau of Customs."

The company intends to insert and cement the bristle into the imported handles here in the United States. The cost of the completed brush is $2.25 and the cost of the imported handle will be 35¢. (File No. 663 7006, released Apr. 12, 1966.)

No. 30. Origin disclosure on package for Canadian-made automotive part.

An American concern has been advised of the Federal Trade Commission's disapproval of its proposal to use a modified version of its present cardboard containers to distribute in this country a replacement automotive part to be manufactured in Canada.

The advisory opinion noted that the part will be marked "Made in Canada" but that, under normal conditions, the ultimate purchaser is not likely to observe this marking prior to purchase. On the cardboard container appear the company's American address plus a legend which it proposes to obliterate, "Made in USA."

The Commission's advice was that permanent obliteration of this legend "on the outside of the cardboard containers would not be sufficient since the presence of your company's address on the container may lead many persons to believe that the * * * [products] were manufactured in the United States. Thus it would also be necessary to disclose the Canadian origin on the container in a clear and conspicuous manner." (File No. 663 7001, released Apr. 13, 1966.)

No. 31. Rebate pricing plan.

The Federal Trade Commission has informed a photoengraving company that its proposed rebate pricing plan granting a ten percent discount to all purchasers to whom it provides photoengraved plates through advertising agencies will not violate Section 2(a) of the amended Clayton Act.

As it understands the plan, the Commission said, the concern will offer a direct year-end across-the-board rebate of ten percent of the dollar value of purchases of photoengraved plates to all purchasers to whom it provides photoengraved plates through advertising agencies. The rebate is to be contingent upon the advertisers specifying the use of the engraver's facilities to their respective advertising agencies. The concern will provide photoengraved plates to the extent of its facilities to all purchasers classified as buying photoengraved plates through advertising agencies, and will affirmatively disclose and offer this rebate to all customers and prospective customers in this classification. (File No. 633 7006, released Apr. 13, 1966.)

No. 32. Advertising by manufacturer planning to make both wholesale and direct mail sales.

The Federal Trade Commission has made public an advisory opinion on whether a supplier selling by direct mail, to a retail chain and to individual retailers, all of whom are located 10 or more miles from any chain outlet, may properly feature only his own direct mail operations and his chain customer in his national advertising.

The applicant specifically queried as to whether or not the 10 miles or more distance between the individual retailers and the chain outlets negates the possibility of competition between them.

"As a general rule," the Commission said, "a supplier's ordinary unilateral advertising expenditures are not subject to the Clayton Act, as amended by the Robinson-Patman Act. In consequence, a supplier's advertising which makes clear the direct mail availability of a particular item through the supplier, without more, would raise no questions under the Act.

"Whether or not the chain outlets and the other retailers supplied are competitive, however, is a matter of fact to be determined by the facts. A particular distance between them is not determinative of whether they do or do not compete. If they in fact compete then under the statute the advantages to be accrued from the supplier's advertising program, if accorded at all, must

be proportionally accorded. If they do not in fact compete, then otherwise."

Under the circumstances, the Commission concluded, "it is not practicable" to answer that part of the applicant's question dealing with mention of chain store availability in his national advertising. (File No. 633 7008, released Apr. 15, 1966.)

No. 33. Affirmative misrepresentation of domestic origin.

The Federal Trade Commission has rendered an advisory opinion that it would not be permissible to label dental X-ray film as "Made in U.S.A." if it consists in part of a raw safety base film imported from a foreign country, the remaining ingredients to be made in the United States.

The Commission's advice was that the imported raw safety base film "is the principal and essential component of the finished product. Without it there can be no X-ray picture." The manufacturing and packaging processes described in the letter from the requesting party "would not change the basic structure or composition of the imported film to such an extent that its identity would be lost. It is concluded, therefore, that it would not be proper under Section 5 of the Federal Trade Commission Act to label the dental X-ray film as 'Made in U.S.A.'" (File No. 633 7014, released Apr. 15, 1966.)

No. 34. Promotional assistance; Use of sales message announcing device in retail stores.

In an advisory opinion made public today the Federal Trade Commission gave qualified clearance to the proposal by a manufacturer of an electronic device to offer selected manufacturers an opportunity to present a sales message to the public in retail stores by means of the device.

The proposed plan provides that any manufacturer contracting for use of this device will supply its manufacturer with a list of all retailers of his products in a geographic area to be selected by him. The device producer, upon receiving such list, will within a reasonable time effectively offer all retailers located in the selected geographic area an opportunity to avail themselves of the use of the electronic device at equal rates daterminded by the number of units to be installed in a particular location.

The advisory opinion called attention to the admonition in the FTC's Guides for Advertising Allowances that a seller must be careful not to discriminate against customers located on the

fringes but outside the area selected for the special promotion, since they may be actually competing with those participating.

With this caveat, the Commission advised, "the above-outlined plan will not offend Section 2(e) of the Clayton Act, as amended by the Robinson-Patman Act. * * * Since under the facts available to us we have no way of knowing whether or not fringe area competing customers will exist in the actual operation of your proposed plan we expressly exclude this point from our opinion that your proposed plan is unobjectionable." (File No. 633 7022, released Apr. 23, 1966.)

Modified July 11, 1968, p. 1211 herein.

No. 35. Promotional plan in selected areas.

A sales promotion company has been advised by the Federal Trade Commission that with one reservation its proposed promotional plan is not violative of law.

Under the plan, the promoter will sell to food processors booklets containing recipes featuring the processors' products together with additional promotional and advertising materials. The promoter will directly or indirectly give all food retailers within a selected geographic area an effective opportunity to obtain a continuing supply of such booklets plus file boxes and a display rack at what amounts to administrative costs.

"With one reservation," the FTC's advisory opinion stated, "the plan does not appear to offend the provisions of Section 2(e) of the Clayton Act, as amended by the Robinson-Patman Act. From the facts presented, however, it is impossible to determine the nature and extent of the competition, if any, which may exist between retailers close to, but on different sides of, the boundaries of the selected geographic area. As to this particular point therefore, we withhold our opinion."

Noting that the plan may be extended to manufacturers of household and housekeeping items other than food, the Commission said it is impracticable to provide an opinion on this point because "the nature, importance and extent of competition between food retailers and non-food retailers selling the same items is unknown to us and cannot readily be ascertained." (File No. 633 7032, released Apr. 23, 1966.)

Modified July 11, 1968, p. 1211 herein.

No. 36. Functional discounts, meeting competition.

The Federal Trade Commission announced today that it has recently answered inquiries from a manufacturer of items used

in the automotive, trucking and marine trades regarding functional discounts and meeting competition.

The Commission advised the inquirer that:

It may sell to fleet truck operators at regular jobber prices, but that competing truck fleet operators must be accorded nondiscriminatory treatment.

It might establish a "specialized" classification for jobbers selling to fleet operators—entitling such jobbers to discounts which the manufacturer's distributors are afforded—but that it may not discriminate against any of its other resale customers which compete with the "specialized" jobbers.

It could offer such discounts to meet the lawful price of a competitor provided the offer is in response to an individual competitive situation rather than in response to a pricing system. (File No. 633 7030, released Apr. 26, 1966.)

No. 37. Affirmative Misrepresentation of Domestic Origin.

The Commission was requested to advise whether or not it would be permissible to describe as "Made in U.S.A." imported black angle iron which had been cleaned in this country and then galvanized to required specifications by means of submerging in hot molten zinc, the finished product to be known as galvanized angle iron.

The Commission advised that it would not be proper to describe the finished galvanized angle iron as "Made in U.S.A." since that would constitute an affirmative representation that the entire product was made in this country, which is not the fact, unless, of course, the fact is also disclosed in a clear and conspicuous manner that the black angle iron is imported. (File No. 663 7047, released Apr. 29, 1966.)

No. 38. Promotional allowance program.

The Federal Trade Commission announced today that it has advised a men's clothing manufacturer that a proposed two-part promotional allowance program "would satisfy the requirements of the law," but that a subsequently proposed modification of one part of the plan "would be clearly illegal."

Under one part of the originally proposed plan—participation in cooperative advertising allowances—the manufacturer would offer an advertising allowance of 2 percent of net sales at regular prices up to a maximum of 50 percent of the actual cost of advertising its products in newspapers, magazines and other printed media. New accounts and customers of less than one

year would be offered the same allowance based upon their first quarter's purchases. If this offer is made known and offered to all competing customers, the Commission said, this part of the plan would not violate the law.

Under the other part of the plan—participation in sales or promotions—the manufacturer would make available to all customers a total of 20 percent of their net purchases of basic products at regular prices at a special reduced price of $4 off the net price, which the customer may accept at one time or in two installments during the year for sales in January and/or June. In other words, if a customer purchased $1,000 worth of such products during the year at regular prices, he would be entitled to purchase 20 percent or $200 worth of this product at the stated reduction for sales purposes during January and/or June. Likewise, this would not violate the law, the Commission said.

However, subsequent to Commission approval of the plan, the manufacturer proposed a modification of its cooperative advertising program. The concern proposed to increase its advertising payments by offering a 3 percent allowance to accounts whose yearly volume is $50,000 minimum, a 4 percent allowance to accounts whose yearly volume is $75,000 minimum and 5 percent to those whose yearly volume is $100,000 and over. To receive the increased payment, the customer would have to match the allowance and use either the manufacturer's label or that label in combination.

The Commission said that "under no circumstances can a program which pays a higher percentage to larger volume buyers when buyers in smaller quantities receive smaller percentage of net sales be held to meet the proportionally equal requirement of Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act. Substantially identical programs have previously been held illegal." (File No. 633 7021, released Apr. 29, 1966.)

No. 39. Cooperative advertising program.

The Federal Trade Commission announced today that it has advised a manufacturer of women's wear that its proposed cooperative advertising allowance program and a furnishing of services or facilities, "if in practice worked out as presented, would be unobjectionable under Sections 2(d) and (e) of the Clayton Act, as amended by the Robinson-Patman Act."

Under the supplier's first offer, all vendees (who are to be effectively informed of the offer) will be paid, on request and on proof made, for one-half their cost of cooperative advertising.

Supplier's contribution at any one time will be limited to, and will amount to, 10 percent of the dollar value of a single sale to a requesting vendee. Over a year's time, however, supplier's contribution is to be restricted to 2.5 percent of the dollar value of a vendee's annual purchases. Any vendee who has received in excess of this amount will be billed therefor and a refund will be required.

The Commission cautioned the manufacturer, however, "that should one or more, but not all, competing vendees fail to refund an excess allowance as determined by your plan, Robinson-Patman Act questions would arise."

Upon supplier's second offer, statement enclosures will be provided, the number furnished being based on the number of items purchased by a vendee. Enclosures will be imprinted for those entitled to quantities of 5,000 or more; unimprinted enclosures will be furnished to those entitled to fewer than 5,000 enclosures. (File No. 633 6020, released April. 30, 1966.)

No. 40. Sales promotion plan a lottery.

The Federal Trade Commission announced today that it has advised processor of a grocery item that its proposed sales promotion plan would constitute a lottery and its use would be actionable under Section 5 of the FTC Act.

Under the plan, the concern proposed to insert at random either certificates of no value or of varying redeemable cash values in containers of its product to be sold at retail. At the time of retail sale, equivalent certificates in equal proportions would be made available at wholesale distributors to the general public without cost or obligation.

The Commission said that "In our view the existence of the free certificates will not cure the difficulty presented by the transactions at the retail level which, standing alone, clearly involve a lottery in the sale of merchandise of a kind often heretofore made subject to a Commission order." (File No. 633 7029, released Apr. 30, 1966.)

No. 41. Additional discount to mail order seller of paperback books.

A seller of paperback books planning to obtain additional discounts from publishers for selling through a mail order catalogue has been advised of the possible law violations involved in the plan and that the Federal Trade Commission is unable to give him an unqualified opinion on its legality.

The Commission pointed out that any plan which results in discriminations in price or allowances between different resellers immediately raises problems of possible violation of the Robinson-Patman Act, and that on the basis of the information supplied, there appear to be two possible ways of viewing this plan.

Firstly, the Commission said, "If the plan involves simply the granting by the publishers of a lower price to you than to their other customers, its legality from the publishers' point of view would be governed by Section 2(a) of the Robinson-Patman Act which prohibits discriminations in price which may adversely affect competition. In spite of the fact that your sales would not be made through the same channels of distribution as those of other purchasers of paperback books, it seems likely that you would nevertheless compete with these purchasers to some extent, and that this competition might be lessened by the proposed price discriminations, in violation of Section 2(a). Although price discriminations otherwise unlawful under Section 2(a) may be justified by cost savings on the part of the seller, the information which you have submitted does not indicate the presence of such 'cost justification' in your plan. If the discounts granted to you by sellers should violate Section 2(a), your knowing inducement or receipt of such discriminations would also violate Section 2(f) of the Act."

Continuing, the Commission said the problem would be somewhat different if the discounts granted to the requesting party were considered as promotional or advertising allowances for his listing of the publishers' books in his catalogue.

Granting or receiving such allowances would be unlawful "if they were not made available on proportionally equal terms to competing customers," the Commission advised. "Thus, if your suppliers of paperback books granted proportional advertising or promotional allowances or facilities, such as cooperative advertising allowances, display racks and the like, to their other purchasers, their granting to you of an allowance for the listing of their books in your catalogue would not be unlawful." (File No. 633 7041, released May 10, 1966.)

No. 42. Advertising service disclosing where manufacturers' products are sold.

The Federal Trade Commission today made public its advice that a plan to furnish manufacturers a new form of advertising service disclosing where their products are sold would not be illegal.

Under this proposed plan, a manufacturer will publish an advertisement in a national magazine, and will furnish to the proposed corporation represented by the requesting party a complete listing of all retailers selling the advertised product, classified according to the major shopping areas throughout the country. The advertisement will contain a descriptive symbol for the proposed service, with a reference to the page in the same publication containing a telephone number list, also classified according to the major shopping areas throughout the country. Each answering service included in this list will be equipped by the proposed corporation with the manufacturer's list of his retailers in that trade area, which will be given to any consumer who reads the advertisement and calls the number provided to learn where he can purchase the product. The cost of the entire service will be borne by the manufacturer.

The FTC's advisory opinion said, "Since it appears that any potential customer calling will be furnished with the names and addresses of all dealers handling a particular product in a trade area, it is our opinion that the proposed plan described would not subject participating manufacturers or your client to a charge of violating the law. We should caution, however, that great care must be exercised in defining the boundaries of the various trade areas into which the country is to be divided so as not to discriminate against customers located on the fringes but outside the area served by the answering service, since they may be in actual competition with those who are within the area and thus receive the benefit of the service." (File No. 633 7045, released May 10, 1966.)

No. 43. Goods of like grade and quality.

The Federal Trade Commission announced today that it had advised a manufacturer producing iron castings to special order of its customers that such goods are not of like grade and quality within the meaning of that section of the amended Clayton Act prohibiting price discriminations.

The Commission was informed by the manufacturer that:

Its castings are produced in accordance with individual customer specifications;

It submits samples to the customer for approval;

The customer further processes the casting prior to use; and

Castings are not shipped off the shelf but are produced to order with several weeks lead time. (File No. 633 7035, released May 11, 1966.)

No. 44. Agreement among retailers for uniform store hours.

A retail dealers association of a certain city of substantial size has been advised that a proposed agreement among downtown retailers to establish uniform store hours would not, under the circumstances presented, be in violation of any laws administered by the Federal Trade Commission.

The stated existing downtown shopping hours are 9 a.m. to 5:30 p.m. with Monday and some Thursday hours from 9 a.m. to 9 p.m. The proposed change would make the hours from 11 a.m. to 8 p.m. weekdays and 9 a.m. to 5:30 p.m. Saturday.

The basic reason advanced for the proposed change in hours is to place the downtown retailers in a more effective competitive position with suburban shopping centers by establishing more convenient shopping hours for office workers and by enabling spouses to meet for dinner and shop. Any business establishment will have the free choice as to wehther or not to conform to the proposed change in shopping hours. (File No. 633 7037, released May 11, 1966.)

No. 45. Merchandising by means of a chance or gaming device.

The Commission was recently requested to furnish an advisory opinion with respect to a proposal to distribute prizes to users of trading stamp books. Under this proposal, distributors of trading stamps would receive from the stamp company not only trading stamps that are to be pasted in the books but the books as well. The books would bear a seal which when broken after the book is completely filled and presented to the store manager would reveal a prize ranging from $1.50 to $100.00. Books carrying prizes larger than $1.50 would represent approximately 10 percent of the total books distributed. The stamp user would also have the option of not breaking the seal and receiving $2.00 in cash or $2.15 in merchandise.

It was contended that of the three essential elements of a lottery, namely, consideration, chance and prize, the first would be missing since merchants would distribute the stamps not only to their customers in proportion to purchases made, as is normal for trading stamp operations, but also to anyone who would register in the merchant's store whether a purchase was made or not. Extensive advertising would inform the general public that they may receive eighty stamps per week by just registering with the merchants without the necessity of making a purchase.

The Commission advised that it did not need to decide the question of whether or not consideration would exist, so that the proposal could be held to constitute a technical lottery, for it was still of the view that the plan would involve an illegal effort to sell or dispose of merchandise by means of a chance or gaming device. In the Commission's view, lotteries are not the only method by which the public's gambling instinct may be aroused, for other methods are comprehended within the general concept of merchandising by gambling. This proposal appeared to fall into that category, for even though each participant would always receive something of value if he persisted long enough to fill the book with stamps, the amount of his return would vary greatly with his willingness to "take a chance." Consequently, the Commission declined to give its approval to the proposed plan.

Commissioner Elman did not concur. (File No. 663 7049, released May 18, 1966.)

No. 46. Common sales agency.

The Federal Trade Commission has advised a manufacturers' agent that its proposed plan to be the sales agent for a number of producers of the same product involves grave risk of illegality because one of its stated objectives is marketing stabilization.

"The mere use of a common sales agency will not, in and of itself, result in a violation of law," the FTC's advisory opinion stated. However, it continued, in view of the requesting party's statement that one of the plan's purposes is to stabilize the market, "it is reasonable to conclude that the use of a common marketing agency by a number of different producers of the same product would inevitably lead to a violation of the Federal Trade Commission Act as well as the Sherman Act. This is especially true when the common agent would be quoting a common price for all the producers he represents."

The Commission pointed out it is common experience that any arrangement aimed at stabilizing the market, "even if not initially so designed, has within it the seeds of price fixing, allocation of markets, or restriction of production, all of which are classic antitrust violations." (File No. 633 7050, released May 18, 1966.)

No. 47. Leather terms may not be used for nonleather gloves even if true composition is disclosed—manner and place of disclosing foreign origin.

The Federal Trade Commission has made public its advice

to a marketer of gloves that it would be improper to use a leather-connoting description for gloves which in fact contain no leather, even though qualifying language is used to describe their true composition.

Noting that the gloves are to be imported from Japan and the requesting party intends to disclose their origin on the paper bands and box labels, the Commission further advised that to avoid possible deception, disclosure of the Japanese origin must also be made on each pair of gloves by marking or stamping or on a label or tag affixed thereto. This disclosure must be readily visible upon casual inspection of the gloves and of such permanence as to remain on them until consummation of sale to the ultimate purchaser. (File No. 633 7058, released May 19, 1966.)

No. 48. Legality of licensee and sub-licensee selling to competing jobbers.

An exclusive licensee of a patented article has requested advice from the Federal Trade Commission concerning the legality of his sales and those of a manufacturing sublicensee to competing jobbers.

The licensee proposed to sublicense a manufacturer to produce the article and sell it to its own jobbers. At the same time, the licensee, on his own account, would sell the same article under a different name to his own jobbers. The sublicensee manufacturer would ship direct to customers of the licensee, some of which may be in competition with its own jobbers, and bill the licensee at an agreed price.

The Commission advised that in general, the Robinson-Patman Act "does not apply unless there is a discrimination attributable to the *same* seller in dealing with different purchasers."

Consequently, it said, if the manufacturer, a separate business entity, has and exercises sole and independent control over the prices at which it sells and the licensee has and exercises sole and independent control over the prices at which he sells, "questions cannot well arise under Section 2(a) of the Robinson-Patman Act."

However, the Commission pointed out that on the basis of the facts available it is unable to say that the plan "would not violate *any* of the trade regulation laws. For example, we do not know what, if any, price agreements are contemplated between * * * [the licensee] and the manufacturer or the nature thereof or whether such agreements may hereafter come into being." (File No. 633 7059, released May 19, 1966.)

No. 49. Cooperative advertising plan with no ceiling on suppliers' payments.

A retailer has been advised by the Federal Trade Commission that its proposed standard cooperative advertising agreement with its suppliers is not objectionable.

The contemplated agreement states that the supplier (1) agrees to pay a fixed percentage of the requesting retailer's cost of advertising and (2) is offering proportionally equal allowances to the retailer's competitors.

The Commission noted that the plan provides for promotional payments without limitation as to amount and that it is more customary for suppliers to limit their obligation by a percentage of a dealer's purchases.

"However, this might be," the advisory opinion said, "the Commission has concluded that no objection will be raised if suppliers decide to eliminate * * * [this] limitation and undertake to pay a stated percentage of all the advertising conducted by their dealers. This presupposes, of course, that the suppliers will make the same offer available to all competing customers and that the offer is functionally usable by all competing customers."

The plan, the advisory opinion added, "does contain features which might conceivably be used to greater advantage by larger retailers. But these prospects appear so remote, the Commission is not inclined to object unless and until future experience should produce presently unexpected evidence that some customers actually received favored treatment. Objection then would be taken only after proper and adequate notice that the plan had not developed as anticipated." (File No. 633 7060, released May 20, 1966.)

No. 50. Furnishing and servicing projection equipment in grocery outlets.

A marketer of projection equipment has been advised by the Federal Trade Commission that his proposed plan to lease equipment and furnish associated services to suppliers of grocery products for advertising purposes in grocery outlets would not subject him to a charge of violation of law.

Suppliers would lease space from grocery store operator-customers they select. The marketer would prepare advertising of the supplier's product and install and maintain the equipment in the selected stores. He would take no part in the selection of retail stores and would not act as agent or intermediary for the

suppliers in making the necessary contracts or agreements for the placement of leased projection equipment in the stores.

The Commission advised the marketer that his leasing of the projection equipment plus the preparation of advertising material and performance of installation and maintenance services would not subject him "to a charge of violation of Sections 2 (d) or (e) of the Robinson-Patman Amendment to the Clayton Act, which sections are set forth in the Commission's Guides for Advertising Allowances."

However, the Commission said that it "should be clearly understood * * * that participation in this plan by suppliers may involve a violation of Law on their part unless the payments made and the services or facilities furnished, are made available to all competing purchasers in a non-discriminatory manner." (File No. 633 7061, released May 20, 1966.)

Modified July 11, 1968, p. 1211 herein.

No. 51. Discount stamp advertising plan.

The Federal Trade Commission has advised that a proposed promotional plan involving the use of discount stamps would not be illegal if properly implemented.

The requesting party proposes to issue a set of stamps to customers in grocery stores and other types of retail outlets in certain trading areas. The stamps will feature particular brands of products. When forwarded affixed to labels, wrappers or box-tops of the products featured, the requester will send a check to the customer in an amount equal to ten cents for each stamp plus ten cents additional if an entire set has been forwarded.

Suppliers or products featured would pay the requester for managing the promotion. Grocery store and other operators of retail outlets competing in and on the fringes of the trading areas in which the plan is attempted would be offered the opportunity to participate. To this end, such retail outlet operators would be furnished the stamps, promotional kits and money allowances on the basis of their annual dollar volume of sales.

The advisory opinion said it is the Commission's understanding that although the requesting party would concentrate its promotional efforts on operators of grocery stores it would also offer the plan to operators of other types of retail outlets competing in the sale of the products of supplier-advertiser-participants in the promotion and would admonish all such supplier-advertiser-participants of their responsibility to accord proportionaly equal treatment to *all* of their competing customers, whether

engaged in grocery retailing or other fields. The Commission further assumed that the proposed notices would adequately inform all prospective participants of all details of the offer.

The Commission advised that its opinion is that "implementation of the plan as outlined would not be violative of Sections 2 (d) or (e) of the Robinson-Patman Amendment to the Clayton Act." (File No. 643 7004, released June 1, 1966.)

Modified July 11, 1968, p. 1211 herein.

No. 52. Food manufacturer, retailer promotion program.

In an advisory opinion, the Federal Trade Commission has informed a promotional concern that its proposed advertising program to be utilized by food manufacturers and retailers would not be in violation of existing law if the program is modified to take into account "exceptions and caveats" pointed out by the Commission.

The promoter proposed to design a number of aisle-end displays, each promoting the name of a food manufacturer and a seasonal recipe incorporating a product of that manufacturer. Displays for twelve participating manufacturers and decorative material would be packaged in a kit (which may be divided into 12 segments) for distribution to retail stores taking part in the program.

According to the plan, each manufacturer would pay a proportionate share of the cost of the program, retailers would bear none of the cost but must agree to provide aisle ends for displays and stack the manufacturers' products, and the number of kits each retailer would receive would be determined by the number of retail stores each owns.

The Commission advised the promoter, among other things, that if all retailers sell the products of all the manufacturers and all can use the entire kit, he would not be required to break down the kit just because a particular retailer so desired. However, the Commission said, if there are certain customers who do not sell the products of all the manufacturers or who cannot, because of space limitations, use the entire kit, then the law would be violated if the promoter insists the retailer take the entire kit or nothing.

After pointing out the requirements concerning notice to all competing customers that the plan is available, the Commission said participating manufacturers would not be obligated to meet the demands for cash by retailers, who could utilize the program,

simply because they refuse the kit or sell products of only one manufacturer.

As to manufacturers requiring signed agreements from retailers who wish to receive the kits, the Commission advised that the law permits manufacturers to require that dealers who are to receive the benefit of such promotions must agree to reasonable display requirements so that the purposes of the promotion may be carried out. However, it noted, retailers desiring less than the full kit could not be expected to sign an agreement which would require them to accept the full display kits.

Concerning a manufacturer limiting the program to only one of his products and his responsibility to retailers who handle his products only on a "sporadic basis," the Commission said the law imposes no requirement that a seller must give advertising allowances or services on all his products if he elects to accord them on one or more articles. Problems concerning products of like grade and quality which differ in only minor respects or trade names can be avoided if the suppliers include entire product lines and thus avoid fine distinctions between products. As to the second query, the Commission stated that it would not be safe to exclude any retailer who was in fact a customer of one or more of the manufacturers during the course of this promotion.

The Commission pointed out that if there are some grocery outlets which are too small to use the entire kit—or that part of it which represents all the manufacturers with whom they do business—because of actual space limitations, then some alternative must be provided to keep the plan from being one which is tailored primarily for larger retailers. If the plan results in any of the manufacturers furnishing facilities to some customers which are not readily usable by others, the suppliers are likely to find themselves in violation of the law. By furnishing an alternative method of participation to the smaller customers, such as posters and counter displays, this result can be avoided. (File No. 633 7062, released June 1, 1966.)

Modified July 11, 1968, p. 1211 herein.

No. 53. Self-locating shopping guide promotional program.

The Federal Trade Commission has advised a sales promotion company that its proposed plan, to furnish self-locating shopping guides to wholesalers for redistribution to their competing retail customers, would not be objectionable provided that smaller retailers are able to obtain proportionally equal treatment.

The Commission noted that some of the aspects of the plan are of interest only to relatively large retailers, and that it appears likely that some, at least, of a participating wholesaler's competing customers may be quite small retailers for whom the proposed plan would have little practical value.

The Commission advised that the "statute requires that any services or facilities made available to the larger of two competing customers must be made proportionally available to the smaller."

Assuming the existence of small competing customers, the Commission said, "it appears clear that if [the] plan is to conform to statutory requirements some provisions should be included therein which would provide for the needs of the smaller customers." (File No. 633 7064, released June 2, 1966.)

Modified July 11, 1968, p. 1211 herein.

No. 54. Promotional assistance; Newsstand display.

The Federal Trade Commission recently rendered to the publisher of a magazine a favorable advisory opinion regarding his promotional assistance plan providing basically for payments of 99¢ per issue, per newsstand and alternatively, at the newsstand operator's option, payment at a rate of ½¢ per copy sold, per issue. Payments would be subject to a $75 maximum per issue to any single newsstand operator. Payments would be made quarterly provided the operator had reported daily sales and permanently displayed the magazine in a high traffic location full cover exposed within easy reach of customers. The plan would be offered each calendar quarter by a notice on the magazine's cover with details printed on an inside page.

Plans such as this come within the purview of Section 2(d) of the Robinson-Patman amendment to the Clayton Act. Section 2(d) provides in essence that it is unlawful for a supplier in interstate commerce to offer promotional assistance to his reselling customer unless a proportionally equal offer also is made to the customer's competitors who sell the same product.

The Commission's Guides for Advertising Allowances discuss the requirements for such promotional assistance Plans in considerable detail and will be of assistance to persons contemplating their use. Copies of the Guides are available from the Secretary, Federal Trade Commission, Washington, D.C. 20580. (File No. 663 7020, released June 11, 1966.)

No. 55. Dissemination of uniform warranty plans by trade association to its members.

In an advisory opinion announced today the Federal Trade Commission informed a trade association of manufacturers that its dissemination to members of a bulletin outlining two warranty plans and encouraging each member to adopt its own individual warranty would not be violative of any laws administered by the Commission, provided the association uses no coercion for the adoption of either plan. (File No. 633 7063, released June 11, 1966.)

No. 56. Legality of plan to display signs at newsstands calling attention to advertisements in magazines.

An advisory opinion made public today by the Federal Trade Commission informed an advertising company that its plan for display on newsstands of signs relating to specific magazine advertisements will not subject the company itself or participants to adverse action by the Commission, if the plan is carried out as outlined below.

It is proposed that the requesting company will arrange for the display of advertising promotional signs directly below or adjacent to copies of magazines on newsstands in high traffic areas, which will remain on the newsstand for the same period of time as the magazine. This sign will direct attention to an advertisement which appears in the magazine in question. The cost of the signs will be borne by the manufacturer or seller of the product advertised, who will also assume the cost of rental payments to the operators of the newsstands for the display of the signs. All payments are to be made through the requesting company, which will act as an intermediary between the advertisers and the newsstands. All signs will be of a uniform three and one-half inches in height and of the same width as the magazine involved.

It is understood, the Commission advised the requesting party, "that there will be no business relationship, direct or indirect, between you and the magazines involved, other than may be necessary to secure permission to refer to the magazines in your signs; it is further understood that you in no way participate in any price concessions, direct or indirect, made to your advertisers by the magazines as a result of your program." (File No. 643 7005, released June 16, 1966.)

Modified July 11, 1968, p. 1211 herein.

No. 57. Sales promotion plan disapproved—Lottery.

An advertising company has been informed by the Federal Trade Commission that implementation of its proposed sales promotion plan would result in several law violations.

The requesting party explained it would sell paper bags to retail grocery outlets for use in bagging customers' purchases. There would be no variation in price between customers purchasing the same quantity; however, purchase of different quantities would result in different prices. The bags would have advertising of products sold in the store, plus a serial number, printed on them. A drawing would be held periodically and the holder of the "lucky number" would win a prize. Advertiser-suppliers would pay the requesting company for the advertising and it would make the bags available to any grocery operator wishing to purchase them. Grocery store operators would provide the bags free to customers.

In its advisory opinion the Commission raised the following objections to the plan:

The fact is that competing purchasers of different quantities of the bags would be paying varying prices apparently arrived at on the sole basis of the quantity purchased rather than on differences in the cost of manufacture, sale or delivery of the bags. Unless the differences were cost or otherwise justified it is likely that implementation of the plan would be violative of Section 2(a) of the amended Clayton Act.

Advertiser-suppliers would be furnishing a service or facility within the meaning of Section 2(e) of the same statute to those of their customers purchasing bags from the requesting party, and thus would be under an obligation to provide customers which compete with those buying the bags with a realistically available alternative. "The feasibility of participating advertiser-suppliers fulfilling this requirement is believed remote."

The "lucky number" feature of the plan would constitute a lottery, since consideration (the customer's patronage), chance (the periodic drawing) and prize (the reward to the "lucky number" holder), make up all the essential elements of a lottery; hence an unfair trade practice violating Section 5 of the FTC Act. (File No. 643 7006, released June 16, 1966.)

No. 58. Foreign origin—Toy balloons.

The Commission was recently requested to furnish an advisory opinion concerning the labeling as to origin of toy balloons

mounted on display cards. The balloons were to be imported from England mounted on 8"x16" display cards, with either 36 or 72 balloons to a card, which will sell for 5¢ or 10¢ per balloon. The card is to be clearly marked as "Made in England," but the individual balloons will not be so marked.

The Commission advised that if the display card is clearly marked "Made in England," no real purpose would be served by requiring each individual balloon to be similarly marked so long as the balloons are not removed from the card prior to sale. (File No. 663 7051, released June 17, 1966.)

No. 59. Disapproval of private group advertising review board.

The Federal Trade Commission today announced an advisory opinion disapproving a proposed private group advertising review board to control advertising practices in a particular locality.

The requesting party stated that the review board is to consist of not more than 20 representatives of business and trade groups in the area, and its function is to consider complaints of violations of advertising standards established by the organization representing such business and trade groups.

Hearing on such complaints are proposed to be held by a panel of 7 or more members of the review board, none of whom shall be in direct competition with the advertiser. This procedure is to be invoked only after other efforts to correct the practice have been exhausted. Decisions on the merits of each case will be made by the panel and shall be considered as setting precedent for succeeding panels. Where an advertiser has been cited by a panel for violating the standards and fails to comply within a specified time, a letter is to be sent to local media requesting them to require the advertiser to comply with the decisions of the panel.

Although expressing sympathy with the laudable motives of the requesting party, the Commission advised that "approval cannot be given the proposed Advertising Review Board in its present form. Long ago the courts recognized that voluntary action to end abuses and to foster fair competitive opportunities were in the public interest and could be even more effective than legal processes. However, the law has also long recognized that this right of businessmen to police themselves is not without limitations and is certainly not a license for private groups to employ illegal methods in the pursuit of desirable objectives."

The Commission pointed out that "absolute regulation of all advertising practices down to and including the determination of individual rights and the imposition of a penalty in the form of

interference with the individual's right to advertise * * * is the ultimate authority which can only be exercised pursuant to legislative grant and subject to proper judical review.

"Were a private group to assert this power for itself it would mean that the judicial process of interpretation and enforcement would be carried on without the carefully developed safeguards which the law normally imposes upon the process. Unlike the government agency and the courts, the only restrictions private bodies are subject to are those restrictions they see fit to impose upon themselves." (File No. 643 7015, released June 17, 1966.)

No. 60. Advertising of diamonds as "clear, pure, color."

The Federal Trade Commission has advised a jewelry firm proposing to advertise diamonds as "clear, pure color" that a substantial segment of the purchasing public would understand the claim to mean a top grade white (or colorless) diamond, and that it should not be used to describe a diamond which shows any color when viewed under normal, north daylight or its equivalent. (File No. 643 7020, released June 18, 1966.)

No. 61. Improper use of terms such as "gold filled" or "rolled gold plate."

The Federal Trade Commission has informed a marketer of jewelry that it would be improper to use terms such as "gold-filled" or "rolled gold plate" in describing gold filled jewelry articles which are electroplated with nickel and finished with either gold flash or gold electroplate.

The Commission said that a purchaser of such an article would not get the type of performance expected from gold filled articles because points of wear would expose the coating of white nickel at a very early stage and the ornamental value would be seriously reduced.

"Being electroplated with nickel," the Commission said, the "gold filled material would not serve its function and a person buying the article on that basis would not get what he had been led to believe he was getting. In fact, Rule 22(b)(4) of the Trade Practice Rules for the Jewelry Industry specifically contemplates that the *surface* coating, not the inner portion, be made of 'gold filled' or 'rolled gold plate'." (File No. 643 7024, released June 18, 1966.)

No. 62. Suppliers and grocery chain exhibition, in-store promotion.

The landlord of an exhibition building has been advised by

the Federal Trade Commission that a proposed promotional plan in which suppliers and a grocery chain would lease exhibition display space with the chain also providing in-store promotion of suppliers' displayed products would probably result in violation of Commission administered statutes.

According to the proposed plan, part of the exhibit in the building would be displays provided and maintained by manufacturers, processors and distributors of food products and grocery store items. These exhibitors, the suppliers, may give away samples, take orders for "off premise" delivery and sell at retail. The grocery chain's contract with the landlord would provide that the chain would conduct one-week, chain-wide, in-store promotions of the exhibitors' products; that exhibitors may be required to furnish the chain with materials for the promotion; that the landlord and the chain would cooperate in setting up the exhibitors' displays; and that the chain would have the right to approve only exhibitors whose products are sold in its stores.

The Commission advised the landlord that implementation of the plan probably would result in violation of Section 2(d) and (e) of the Robinson-Patman Amendment to the Clayton Act and Section 5 of the FTC Act unless promotional payments or services were made available to the exhibitor-suppliers' competing customers on proportionally equal terms.

The 2(d) and (e) aspects, the Commission said, stem from the fact that exhibitor-suppliers would be vulnerable to a charge that they were illegally discriminating between their customers in according promotional benefits. The Section 5 aspects involve questions as to whether the chain and the landlord would be inducing a violation of Section 2(d) by participating exhibitor-suppliers. (File No. 643 7022, released June 21, 1966.)

No. 63. Disclosure of terms and conditions in guarantee advertising.

A television station has been advised by the Federal Trade Commission that it would be improper in commercials it produces for local automobile dealers to mention the manufacturer's guarantee but to refer viewers to the manufacturer's national advertising for a description of the guarantee's terms.

"In brief," the Commission's advisory opinion stated, "the law requires that when a guarantee is mentioned in the advertising of a product all the material terms and conditions of the guarantee must be clearly and conspicuously disclosed in the same advertisement. The objective is to avoid the possibility of

a reader or hearer being misled by concluding, erroneously, that the guarantee is broader or affords more protection than is in fact the case, and, obviously, this objective is not attained by a mere reference in the advertisement to the fact that one may ascertain the terms and conditions of the guarantee by looking elsewhere.

"The Commission is aware of the fact that the advertising of automobile guarantees may present complications because of the numerous conditions which the guarantees contain. But this factor alone makes the disclosure all the more important in order to avoid deception of consumers." (File No. 643 7028, released June 22, 1966.)

No. 64. Pledge of adherence to FTC trade practice rules as a condition to membership in trade association.

A trade association proposing to require applicants for membership to certify to it that they are following the Federal Trade Commission's Trade Practice Rules for the industry involved, as a condition of membership, has been advised by the Commission that this would not be illegal.

The association informed the FTC it is aware of the fact that it is not authorized to enforce the law, but that it feels those who do not observe the rules are not operating their businesses in a manner which is strictly in the public interest and therefore should not be eligible for membership. It stated that it contemplates no enforcement program beyond requiring the pledge and referral of appropriate cases to the Commission.

"On the basis of the information you have presented," the FTC's advisory opinion said, "the Commission has concluded that the inclusion of this pledge on the application for membership would not, in and of itself, appear to violate any of the laws administered by the Commission. This, of course, assumes that the pledge will be required of all applicants alike." (File No. 643 7030, released June 22, 1966.)

No. 65. Broadcast of suppliers' commercials in retail stores conditionally approved.

In an advisory opinion announced today, the Federal Trade Commission has given conditional approval to the proposal of a promotional concern to arrange for the broadcast of suppliers' commercials in retail stores.

The concern presently provides—for a monthly charge—re-

tailers with a tape player unit, necessary speakers and tapes for retailer controlled in-store background music.

The concern proposes to add on the tapes commercial messages of various manufacturers who supply products sold by retailers. The commercials will play at timed intervals. The concern will solicit various manufacturers for the commercials on a contract basis, record the messages, retain all money paid by suppliers for the service, and offer the background music-commercial tapes and equipment free of charge to all retailers on a nondiscriminatory basis in particular classifications of retailers in each geographic area in which the promoter markets his service.

The Commission said the issue here "is whether this particular program is likely to result in the discriminatory furnishing of services or facilities by the manufacturers who might participate. The answer is wholly dependent upon the manner in which it is administered."

The Commission pointed out that the proposal as submitted would not be subject to objection if (1) all customers entitled to participate are notified of the program's availability, (2) the selection of trade areas and the definition of the same, in fact, include all customers competing in the distribution of the products of all participating manufacturers, and (3) the classification of retailers chosen to participate, such as food stores, does not exclude any retailers in another classification who in fact compete in the distribution of the products of the participating manufacturers.

"Simply stated," the Commission said, "the law in this area requires a seller to treat his customers with fairness, whether in respect to the prices he charges, the allowances he pays, or the services he furnishes. This objective cannot be achieved by resort to mechanical formulas, but only by constant attention to the prevailing facts in any given situation. What may look fair on the drawing board may be found unfair in the market and, if so, the market must prevail. With the reservations above as to actual market conditions, it is the Commission's opinion that this proposal is not otherwise subject to objection." (File No. 643 7031, released June 25, 1966.)

Modified July 11, 1968, p. 1211 herein.

No. 66. Magazine publisher's promotional allowance program approved.

In an advisory opinion announced today, the Federal Com-

mission approved a promotional allowance program proposed by the publisher of a magazine.

The publisher intends to grant newsstand operators an allowance of ten cents per copy sold upon their certification that the magazine in question was displayed flat on a magazine stand or full cover vertical in a rack at each checkout position. The publisher will communicate this offer to magazine retailers by printing the display offer on an inner page of the magazine with an appropriate and conspicuous notice or "slug" on the outside cover alerting the retailer to the availability of the plan, details of which may be found on a page specified.

"Since it appears," the Commission advised, "that all newsstand operators handling your publication would be alerted to the availability of the display allowance by reason of the conspicuousness of the 'slug,' it is our opinion that your promotional program, so long as it is implemented as described, complies with the requirements of Section 2(d), amended Clayton Act, and newsstand operators receiving payments thereunder would not be liable to a charge of violating the law. In reaching this conclusion the Commission has assumed that the promotional allowance offer will be repeated in like manner from time to time so that its availability will be made known to newsstand operators who begin selling your magazine subsequent to the date of the initial offer." (File No. 643 7033, released June 25, 1966.)

No. 67. Functional discount to "premium" book jobbers.

The Federal Trade Commission today announced that it has advised a publisher of soft cover books that its proposed plan—if implemented as outlined—to grant an extra discount to "premium jobbers" would not violate the law.

The publisher distributes its books through retailers, wholesalers and book jobbers and grants identical discounts to the latter two who are in competition with each other.

According to the plan as submitted to the Commission, the publisher proposes to grant an extra discount to all premium jobbers who sell books to institutional customers (savings banks, insurance companies, industrial corporations, etc.) for use as promotion pieces, premiums or prizes on a giveaway basis. To the extent that any premium jobber also sells to the regular trade in competition with other wholesalers and retailers, the publisher will either refuse to fill orders or grant only a normal wholesale discount.

The proposed extra discount, the Commission advised, "is obviously functional in nature" and while the Clayton Act, as amended by the Robinson-Patman Act, "does not mention functional pricing the Commission has held that a seller is not forbidden to sell at different prices to buyers in different functional classes provided that injury as contemplated in the law does not result.*** Applying the law to the facts presented by this request, it would appear that the granting of the extra discount to the premium jobbers would not result in a violation of law if the facts are exactly as represented * * * and if the proposal is implemented precisely as outlined."

The "discount must be granted only for those sales made to the institutional customers described who use the books as giveaways and not for resale" and the "discount must be made available" to all customers of the publisher who in fact compete with each other in the resale of the publisher's books to insitutional accounts, the Commission continued.

It cautioned, however, that if the publisher should classify "certain distributors or wholesalers as premium jobbers and permits no one else to sell to the institutional customers, which could be accomplished by granting the extra discount only to those so classified, a serious question could be raised if the so-called premium jobbers also sell to regular retailers in competition with other wholesalers." (File No. 643 7027, released June 28, 1966.)

No. 68. Clearance given for use of pseudonym for doctor's real name on radio programs.

The Federal Trade Commission has issued an advisory opinion that it would not object to the use of a pseudonym in lieu of the doctor's real name on radio programs under the following circumstances.

The requesting party proposes to produce two radio feature programs offering medical advice to be written and supervised by licensed physicians whose ethics prohibit the use of their real names. Both programs will be sponsored commercially but the commercials will be separated distinctly and clearly from the medical advice being given, and there will be no endorsement, express or implied, of the product by the doctor. (File No. 643 7035, released June 28, 1966.)

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