ADVISORY OPINION DIGESTS*

No. 157. Paying advertising allowances in selected trade area.

The Commission rendered an advisory opinion in which it advised a manufacturer of a household product that it would be permissible to pay advertising allowances to all customers in a limited trading area without offering the allowance to all of its customers.

In its opinion, the Commission said that it was a well settled principle of law that if a supplier offers advertising allowances to one customer, he is required by Section 2(d) of the Robinson-Patman Act to make those allowances available to those customers who compete in the distribution of the product for which an allowance is being paid. Under these circumstances, it follows that the supplier can limit the area in which the promotional allowance will be paid, as long as the allowance is made available on proportionally equal terms to all customers who compete in the distribution of the product being promoted.

"This means," the Commission concluded, "that if there are customers located on the periphery of the selected trade area who in fact compete with the favored customers, they must also have the opportunity of participating in the promotional program on proportionally equal terms."

Concluding its opinion, the Commission said:

> Assuming that you selected a reasonable trading area, even though limited, and assuming that you confine the duration of the program within the strict time limits absolutely necessary for you to determine the efficacy or feasibility of the program, we do not believe that your action will run afoul of any law administered by this Commission.

(File No. 683 7035, released Jan. 4, 1968.)

No. 158. Proposed trade association adoption of a pricing manual for common use by electronics servicemen members.

The Commission rendered an advisory opinion with respect to the legality of a trade association preparing and distributing a standard rate and service pricing manual for common use by electronics servicemen in dealing with the general public.

*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.

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It was represented that a major problem in the industry is the lack of guides by which the public can determine whether prices charged for various repair services are fair and equitable. This lack has led to many customer complaints and to fraudulent operations by unethical repairmen. The association took the position that a standard rate schedule would protect the public and free ethical servicemen from unjust accusations.

The Commission advised that it could not give its approval to the proposed common use of a standard rate and service pricing manual by competing electronics servicemen. While the adoption and dissemination by the association of such a manual may be motivated by a purpose to remove evils affecting the industry, it appears to go further than is reasonably necessary to accomplish the desired result. Even though use of such manual be accompanied by disclaimers, there is implicit therein too grave a danger that it will serve as a device through which service rates and fees would become uniform and stable throughout the industry. While adoption of a means likely to create competitive uniformity in terms of service pricing may be a convenience to trade association members, this factor is far outweighed by the benefits to the public of the intense competition between competing servicemen, and it is this competition which the law protects. (File No. 683 7045, released Jan. 4, 1968.)

No. 159. Advertising offering sale of treatment for athlete's foot.

The Commission rendered an advisory opinion in which it declined to give approval to advertising which offered to sell information as to a method of treatment which was represented to effect a cure for athlete's foot.

For a stated sum of money, the advertisement in question offered to send prospective purchasers complete information detailing a simple, inexpensive cure for athlete's foot "with two products probably at present in your medicine cabinet." The treatment in question involved washing the feet with water and alcohol and then applying a common household salve. The Commission advised that it could not give its approval to any advertising which represents that this method of treatment will effect a cure for athlete's foot or to any advertising which goes beyond claims that the treatment will afford temporary relief from the itching and burning associated with athlete's foot.

The opinion went on to state that the laws against deceptive advertising apply equally to those who are selling advice or information and to those who are selling products. In either case, in the Commission's view the test is whether the advice (or product) being offered will in fact achieve the results claimed for it in the advertising. If the advice recommends the use of a product, the efficacy of the product for the use recommended must of course also be considered.

Finally, the Commission advised that the opinion in no way related to the question of whether the proposal would constitute the practice of medicine nor to the legality of the requesting party doing so. (File No. 683 7047, released Jan. 12, 1968.)

No. 160. Advertising promoting sale of information and a product.

The Commission issued an advisory opinion today in regard to the legality of proposed advertising promoting the sale of information, which in turn advocated the purchase of an alleged stomach remedy. The individual requesting the opinion had no financial interest in or contractual right to advertise the product in question.

The initial advertisement offered the sale of information for 20 cents and claimed that the information would enable one "to get that nervous stomach functioning properly again." Based upon the scientific information available to it, the Commission ruled that the product being advocated in the information being sold was not in fact a cure or treatment for nervous stomach or any other stomach ailment. Under the circumstances, the Commission concluded that the claim in the initial advertisement was deceptive.

Its opinion concluded with the following statement:

> The laws against deceptive advertising apply equally to those who are selling advice or information and to those who are selling products. In either case the test is whether the advice (or product) being offered will in fact achieve the results claimed for it in the advertising. If the advice recommends the use of a product, the efficacy of the product for the use recommended must of course also be considered.
>
> This opinion in no way relates to the question of whether your proposal would constitute the practice of medicine or to the legality of your doing so.

(File No. 663 7009, released Jan. 12, 1968.)

No. 161. Advertising promoting sale of information and a product.

The Commission issued its advisory opinion concerning proposed advertising offering for sale for $1 a pamphlet which (1) advises a method for curing athlete's foot and (2) recommends the use of a specific proprietary product for this purpose. The advertiser has no financial interest in the product in question. He does not himself propose to sell the product.

The Commission stated that use of the proposed advertising would be violative of Sections 5 and 12 of the Federal Trade Commission Act in that it implies, contrary to fact, that all cases of athlete's foot can be eliminated or cured by use of the advertised method and product "within a very short time" and with "patience and a little care." The Commission believes that the proposed advertising implies, contrary to fact, that through it some new facts as to the care and cure of athlete's

foot are now available which have hitherto been withheld from the public.

Its opinion concluded with the following statement:

The laws against deceptive advertising apply equally to those who are selling advice or information and to those who are selling products. In either case the test is whether the advice (or product) being offered will in fact achieve the results claimed for it in the advertising. If the advice recommends the use of a product, the efficacy of the product for the use recommended must of course also be considered.

This opinion in no way relates to the question of whether your proposal would constitute the practice of medicine or to the legality of your doing so.

DISSENTING OPINION

BY ELMAN, *Commissioner:*

He does not agree that selling advice is in the same category as selling a product. Recognizing that a good deal of foolish and worthless advice is being peddled to the American people, and not merely in the field of medicine or health, Commissioner Elman does not believe that Congress intended that the Federal Trade Commission or any other government agency should set itself up as a board of review examining into the validity or worth of ideas, opinions, beliefs, and theories disseminated to the public. (File No. 673 7028, released Jan. 18, 1968.)

No. 162. Exchanging wage rates among association members.

The Commission rendered an advisory opinion in regard to the legality of a trade association's proposed statistical reporting plan.

Specifically, the Commission was asked to rule upon the question of whether it would be permissible for the members of an association to exchange copies of their labor contracts.

The Commission ruled that it had no objection to the proposed plan itself, provided it was not used for some illegal purpose. If the plan is used as a means for fixing or tampering with the price of milk, or for some other illegal purpose, the Commission stated it would of course have serious objection to the plan. Pointing to the antitrust hazards inherent in such a plan, the Commission said:

Statistical reporting plans which involve the collection and dissemination of data related to future prices are not illegal per se. However, experience in other cases indicates that an association's price reporting plan which involves future or advance prices, particularly when that plan invites an industrywide pricing policy, may provide the basis for an inference of an agreement or combination to fix prices in violation of Section 5 of the FTC Act. Since labor costs represent a very significant element bearing upon the future price of milk, an agreement among competitors as to wage rates would be illegal, since it would have the effect of fixing the price of milk. In essence it is the potential danger

inherent in the reporting plan which is related to future prices that prompts the Commission to suggest that it be used with extreme care.

(File No. 683 7051, released Jan. 27, 1968.)

No. 163. Publication of dealer sales standards announcing a policy of not selling to dealers who advertise sale prices.

The Federal Trade Commission rendered an advisory opinion stating its objection to a proposal by a seller of photographic products to announce to the trade its policy to sell only to dealers who advertise in a manner which will not damage the prestige of the seller, avoiding the use of characterizations such as "Sale," "Bargain," "Close-Out," "Clearance" or other similar terminology.

The seller advised that it proposed to implement the standards by delivering a copy to each existing dealer, not for the purpose of terminating any presently unsatisfactory dealers, but to upgrade them to a satisactory level. This the seller proposed to do by having its representatives work with the dealers to see that they observe the standards and contended that this is permissible since this is simply an advertising restriction, not an effort at resale price maintenance. It was further argued that although the price at which its products are sold is the prerogative of the dealer, the seller has a legitimate business interest in the manner in which its products are advertised by those dealers. The Commission also noted that the standards concluded with the statement that evaluation of the progress of dealers wil be made from time to time and those who are not keeping pace will be discontinued.

The Commission advised that it could not give its approval to this proposal for the reason that its implementation as outlined would be likely to result in an illegal restraint of trade. In the first place, the Commission advised that it could not view the proposal as a simple restriction on advertising apart from the effect which that restriction would have on the price at which those dealers sell. While there is a difference between this and a policy of selling only to dealers who maintain the prices suggested by the seller, in that the dealers are ostensibly left free to sell at any price they choose, still a restriction on their abality to advertise sale prices is certainly a grave handicap on their ability to sell at prices below those suggested. Hence the provision, if not designed to maintain suggested prices, is one which will seriously affect those prices.

The Commission further advised that its view of the present state of the law in this area was that a seller not acting to create or maintain a monopoly may make a unilateral announcement of his policy as to those with whom he will deal, including policies affecting price, and he may refuse to deal with those who do not observe that policy. However, when the seller's actions, as they would under this proposal, go

beyond a mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his policy, he is in serious danger of having put together a combination in violation of the antitrust laws. Thus, the Commission stated, the line between legal and illegal conduct here is a very narrow one and if the seller chooses to walk that line, he must do so at his peril. (File No. 683 7063, released Jan. 31, 1968.)

No. 164. Premerger clearance: No anticompetitive effects foreseeable.

The Commission issued an advisory opinion on May 14, 1964, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of a distributor by the manufacturer of products distributed.

A franchised distributor of electrical equipment sought clearance of its acquisition by the manufacturer of products he distributed. The relationship between the firms had existed for many years, was cancellable on 90 days notice, the trend in the line of business involved was to direct sales from manufacturer to purchaser and no substantial adverse competitive effects were foreseeable.

The Commission advised the requesting party that the acquisition would not violate Commission administered law; however, he was advised that the opinion was predicated on the understanding (1) that competing distributors would not be foreclosed from supplies he distributed and (2) that preexisted relationships between him and said supplier would not be altered without prior Commission approval. (File No. 643 7025, released Feb. 13, 1968.)

No. 165. Premerger clearance: Deteriorating financial condition.

The Commission issued an advisory opinion on July 30, 1964, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of a deteriorating competitor.

A national manufacturer and distributor of consumer goods sought clearance of its proposed acquisition of a smaller manufacturer and distributor of the same products. Most of the business of the smaller firm was in a limited geographical area. The industry involved could be entered with a relatively modest sum of money. The firm to be acquired had experienced declining sales, a deteriorating, nonviable financial situation, personnel problems and had made reasonable but unsuccessful efforts to sell to others.

The Commission advised that basing its belief on the information currently available to it that the proposed transaction, if consummated, probably would not violate any of the laws which the Commission administers. (File No. 653 7003, released Feb. 13, 1968.)

No. 166. Premerger clearance: Declining industry.

The Commission issued an advisory opinion July 30, 1964, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of a failing company in a declining industry.

A single-line manufacturer of a byproduct of the cotton industry desiring to be acquired by a multiproduct company in the chemical industry sought clearance of its proposed acquisition. The firms were competitors but demand for the product was declining due largely to wide fluctuations in price. There was also increasing production of competitive products made from wood pulp which could be used for the same purposes, and reasonable, but unsuccessful attempts had been made to sell to others.

The Commission, basing its belief on the information then before it, advised that the proposed sale probably would not violate any of the laws it administers.

The Commission added that the opinion should not be construed as in any way affecting any other matter involving the requesting party or the purchaser which the Commission was then or might thereafter investigate. (File No. 643 7036, released Feb. 13, 1968.)

No. 167. Premerger clearance: Deteriorating industry.

The Commission issued an advisory opinion on August 18, 1964, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of a failing competitor.

One of the larger manufacturers of industrial clay products sought clearance to acquire a smaller manufacturer of the same product. The smaller manufacturer did not have as extensive a product line as the larger company. The companies partially competed in a limited geographical area; however the smaller firm had been unable to replace key personnel and the trend in its financial condition was downward. Further, its employees, comprising about 20 percent of the work force in a small community, faced loss of jobs if the smaller company went out of business. Lastly, the other party was the only available purchaser.

Basing its belief on the information then before it, the Commission advised the proposed sale probably would not violate any of the laws which it administers. (File No. 653 7005, released Feb. 13, 1968.)

No. 168. Premerger clearance: Imminent insolvency.

The Commission issued an advisory opinion on October 27, 1964, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of a failing competitor in financial distress.

A firm in a local service business requested clearance to merge with a competitor, with whom it was aligned in its activities, and to form a new corporation. The service firm had experienced declining earnings for the past eight years and there was strong competition from other service businesses in the area in which both did business. The requesting party had experienced an increase in operating costs and expenses in relation to sales, was in a critical financial condition and apparently could not long continue to operate as a solvent and going concern. A national chain was the only other possible purchaser.

The Commission basing its belief on the information then available to it advised that the transaction would not violate any of the laws which it administers. (File No. 653 7025, released Feb. 13, 1968.)

No. 169. Premerger clearance: Financial distress.

The Commission issued an advisory opinion on May 26, 1965, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of an integrated competitor in poor financial condition.

A large diversified manufacturer of closures with less than 3 percent of its total sales accounted for by a specialty closure product, sought to acquire the second largest integrated manufacturer of such products, in an industry dominated by another fully integrated company. The first four firms in the industry accounted for about 55 percent of the market. The company to be acquired was in poor financial condition, and it was doubtful whether its credit standing could support the new financing necessary for plant improvement and extension of product lines which were needed to improve its competitive position.

The Commission basing its opinion on the information available to it advised (1) that it would not challenge the acquisition if consummated, but (2) that such advice was given without prejudice to the right to reconsider in the event anticompetitive effects causally connected to the acquisition were manifested in the future. (File No. 653 7058, released Feb. 13, 1968.)

No. 170. Premerger clearance: De minimis competitive effect.

The Commission issued an advisory opinion on June 8, 1965, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of a competitor's unprofitable operating division.

A large manufacturer of a diverse line of aeronautical supplies sought Commission approval for the disposition of one of its operating divisions which was an unprofitable part of its total business. The proposed purchaser was another diversified corporation also engaged to a small degree in the same line of commerce. It was evident that although

these two companies ranked high in market shares, there were many others in the business, and that restrictive licenses were often used by customers to exercise an effective consumer-control of the survey market. The total dollar value of the business being sold was small and it appeared there would be a liquidation of the assets if the sale was not made.

The applicant was advised that based on the available information a proceeding would not be initiated by the Commission to challenge the acquisition. The Commission added that the advice was being given without prejudice to its right to reconsider the questions involved in the event substantial anticompetitive effects attributable to the acquisition were manifested in the future. (File No. 653 7060, released Feb. 13, 1968.)

No. 171. Premerger clearance denied: Adverse competitive effects probable.

The Commission issued an advisory opinion on June 10, 1965, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was denied because of the existence of probable adverse competitive effects.

A manufacturer/retailer of consumer leather goods requested clearance for its proposed acquisition of a major regional retailer of products produced by the manufacturer. The horizontal and vertical implications of this proposed merger were similar to those which were declared unlawful in the case of *United States* v. *Brown Shoe*, 370 U.S. 294 (1962). However, the market shares were smaller and probable adverse competitive effects somewhat less than were present in the *Brown Shoe* case.

The Commission advised there existed a substantial probability that the proposed acquisition would be a violation of the Clayton and Federal Trade Commission Acts. The application for premerger clearance was denied.

Thereafter, the acquisition was consummated. A complaint issued and a consent settlement effected whereby the acquiring company agreed to make no further acquisitions of retailers or manufacturers of the product involved for a period of several years without prior Commission approval. (File No. 653 7051, released Feb. 13, 1968.)

No. 172. Premerger clearance: Adverse competitive effects not discernible.

The Commission issued an advisory opinion on July 23, 1965, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was given limited approval because it did not appear that the acquisition would result in the requisite adverse competitive effects.

A diversified processor, wholesaler and retailer sought clearance for its proposed acquisition of an independent food supplier which sold a major portion of its products to a subsidiary of the acquiring company. The isolated transaction did not appear to have the requisite substantial adverse competitive effects called for by the statute, but in view of pending investigations of additional acquisitions by the acquiring company, an unrestricted clearance could not be approved by the Commission.

The Commission advised that it would take no action solely as to the proposed transaction if it was consummated. The Commission added that it conditioned its advice on assurances that by accepting and acting upon the opinion, the acquiring company would not use the opinion as precedent or argument in the investigation, or in the formal or informal hearings, of any matter involving the acquiring company then pending or which might come before the Commission or any other court or agency.

The Commission added that if at some future date the acquiring company was required to divest the subsidiary which was actually taking over the independent company, the parent company would not object to divestiture of the independent food supplier on terms set by the Commission or other court or agency. (File No. 653 7057, released Feb. 13, 1968.)

No. 173. Premerger clearance denied: Lack of competitive information.

The Commission issued an advisory opinion on October 29, 1965, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was denied for lack of competitive information concerning competition in the line of commerce involved.

A leading manufacturer of dispensing machines sought approval of its proposed purchase of a smaller, family held manufacturer of dispensing machines which were complementary to the product line of the acquiring company.

The Commission declined to render an opinion because of (1) the paucity of competitive information concerning competition in the line of commerce with which the acquired company's machine was identified, and (2) the short time period available between the date of the request and the closing date agreed upon between the parties. This short time precluded a more complete investigation and analysis. (File No. 663 7014, released Feb. 13, 1968.)

No. 174. Premerger clearance denied: Vertical merger would raise questions.

The Commission issued an advisory opinion September 8, 1966, in which a request for premerger clearance from liability under Sec-

tion 7, amended Clayton Act, was denied because the competitive implications of the acquisition would raise economic questions resolvable only by investigation.

A leading construction material producer applied for clearance of its proposed acquisition of a diversified company having a large share of a regional market in the sale of raw materials such as sand, gravel and stone, which were complementary to its principal product line. The requesting party offered to dispose of certain producing plants now operated by the company, and to continue appropriate leases of other such plants as the company owned.

The Commission advised the requesting party that the competitive implications of the integration of construction material distributors with sources of raw materials were such that an investigation to assess the economic effects of the acquisition, if it was consummated, would be necessary. (File No. 673 7004, released Feb. 13, 1968.)

No. 175. Interpretation of request for premerger clearance: Declining industry.

The Commission issued an opinion October 8, 1965, in connection with a request for advice by two respondents as to whether a proposed merger, if consummated, would be in violation of an outstanding order prohibiting them from, among other matters, uniting facilities so as to eliminate competition.

One respondent, a small company in the coin operated machine business, desiring to be acquired by the other, a larger company in the same industry, applied for clearance of the proposed acquisition under Commission established procedures. It was reported that the smaller respondent was in financial difficulties to the point where it was approaching failure. Further reasons advanced to support the proposed merger were that demand for the product was on the decline, the industry easy to enter, and reasonable efforts to locate another purchaser had been unsuccessful.

On the basis of available information, the Commission advised that if the smaller respondent sold its business to any company, the Commission did not intend to initiate proceedings with regard to such sale. (File No. D–6124, released Feb. 13, 1968.) (Opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).)

No. 176. Premerger clearance: De minimis competitive effects.

The Commission issued an advisory opinion on November 29, 1966, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of a company in financial distress.

A dairy products processing company in financial difficulty desiring to be acquired by a larger company in the same field applied for clearance of the proposed acquisition. The companies competed to a limited extent; however, the applicant had losses for a number of years, could not obtain long term financing and had made numerous unsuccessful attempts to sell to others.

The requesting party was advised that, relying on his representations as to the hopeless financial condition and unsuccessful efforts to sell, the Commission would not challenge the proposed acquisition if it were consummated. (File No. 671 0615, released Feb. 13, 1968.)

No. 177. Compliance interpretation of request for premerger clearance: Imminent insolvency.

The Commission issued an opinion February 14, 1964, in connection with a request for advice as to whether a proposed merger, if consummated, would be in violation of an outstanding order prohibiting the acquiring company from making certain acquisitions.

A small company manufacturing food products applied for clearance of its acquisition by a larger producer engaged in operations in the same product line. The larger producer was subject to a Commission order prohibiting certain acquisitions for a designated period of time without prior Commission approval.

Both producers competed in the same general trading area. It was presented that the smaller company was in imminent danger of insolvency and that it had exhausted every possibility of locating another purchaser without success.

On the basis of available information, but primarily because of the equities affecting the smaller company's position in the industry, the Commission gave its approval to the proposed acquisition. (File No. D–6651, released Feb. 13, 1968.) (Opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).)

No. 178. Compliance interpretation of request for premerger clearance: Denied, other purchasers available.

The Commission issued an opinion April 2, 1964, in connection with a request for advice as to whether a proposed merger, if consummated, would be in violation of an outstanding order prohibiting the acquiring company from making certain acquisitions.

A large company in the food products field applied for clearance, of its proposed acquisition of a smaller company engaged in operations in the same product line. The larger company was subject to a Commission order prohibiting certain acquisitions for a designated period of time without prior Commission approval.

Both companies were in substantial competition in the same general trading area. It was determined that other prospective purchasers were

available and that the smaller company was of considerable size when compared with other regional producers.

The Commission advised that the proposed merger could not be approved under the circumstances. (File No. D–6495, released Feb. 13, 1968.) (Opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).)

No. 179. Compliance interpretation of request for premerger clearance: Imminent bankruptcy.

The Commission issued an opinion October 28, 1964, in connection with a request for advice from a small company as to whether its proposal to merge with any other company in the same field would, if consummated, be in violation of Section 7, amended Clayton Act.

A small food products manufacturer applied for advice from the Commission regarding the possibility of selling out to any other company operating in the same field, particularly to a large processor in the same products line. The larger producer was subject to a Commission order prohibiting such acquisitions for a designated period of time without prior Commission approval.

It was presented that the requesting company had made reasonable but unsuccessful attempts to locate a purchaser other than the larger company, and moreover was on the verge of bankruptcy.

On the basis of available information, but primarily because of the equities affecting the requesting company's position in the industry, the Commission advised that an acquisition by another producer in the same field would not be in viloation of Section 7; amended Clayton Act, and in the event a sale is made to a company which is under Commission order requiring approval of such acquisition, said approval would be granted.

In clearing the proposed sale the Commission pointed out that the approval might be reconsidered, revoked or rescinded if it subsequently appeared the facts submitted were inaccurate, incomplete or that they had changed at the time a sale was made. (File No. D–6652, released Feb. 13, 1968.) (Opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).)

No. 180. Compliance interpretation of request for premerger clearance: Imminent insolvency.

The Commission issued an opinion September 24, 1965, in connection with a request for advice as to whether a proposed merger, if consummated, would be in violation of an outstanding Commission order prohibiting the acquiring company from making certain acquisitions for a designated period of time without prior Commission approval.

A small food products manufacturer applied for clearance of its proposed acquisition by larger company under Commission order and which was much more extensively engaged in the same product line.

The requesting company was experiencing a decline in annual profits to the point of insolvency. It was reported that refinancing was not available and the smaller company was not, for a number of reasons, a viable concern in the context of the particular market. Exhaustive efforts to locate another purchaser had been unsuccessful.

On the basis of available information, the Commission gave its approval to the proposed acquisition. (File No. D–6651, released Feb. 13, 1968.) (Opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).)

No. 181. Compliance interpretation of requests for premerger clearance: De minimis competitive effects; one request denied.

The Commission issued opinions on February 9, 1966 and January 26, 1967, in connection with requests for advice as to whether several proposed mergers, if consummated, would be in violation of an outstanding Commission order prohibiting future acquisitions by respondent for a designated period of time without prior Commmission approval.

A large automatic machine company under Commission order sought approval for the proposed acquisition of two smaller, local companies engaged in the same line of business. In one metropolitan area respondent and the first smaller company were in competition, and in the other trading area respondent and the second smaller company did not compete to any significant degree. In the first area there were a substantial number of local and national competitors involved, and in the other area a substantial number of local competitors and one national competitor were involved.

In these two instances the Commission approved the proposed acquisitions.

In a third request for advice involving a different trading area, the respondent sought clearance for the proposed acquisition of a smaller, local company engaged in the same line of business in direct competition with the larger company. There was a concentration in the line of commerce involved. The Commission denied the request for clearance because it was incompatible with the objectives of the order prohibiting such acquisitions. (File No. C–809, released Feb. 13, 1968.) (Opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).)

No. 182. Compliance interpretation of request for premerger clearance: Liquidation probable.

The Commission issued an opinion May 24, 1966, in connection with a request for advice as to whether a proposed acquisition, if consum-

mated, would be in violation of an outstanding order prohibiting respondent from making certain acquisitions for a designated period of time without prior Commission approval.

A large manufacturer of food products sought clearance of its proposal to acquire a smaller manufacturer engaged in the same general line of commerce. The requesting manufacturer was, and is now, subject to a Commission order prohibiting, among other things, the making of certain acquisitions for a designated period of time without prior Commission approval. The two manufacturers were not in competition in the same geographical trading area, but to a very limited extent the requesting manufacturer was a supplier to the smaller company.

The smaller manufacturer had made reasonable but unsuccessful attempts to sell to others in the industry and in the circumstances liquidation apparently was the only alternative to the proposed sale.

The Commission advised that, in reliance on the information submitted by the parties, if the proposed acquisition was made, the Commission would not proceed against the acquiring company. (File No. D–7880, released Feb. 13, 1968.) (Opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).)

No. 183. Compliance interpretation of request for premerger clearance: Denied, competitive considerations.

The Commission issued an opinion July 20, 1966, in connection with a request for advice as to whether a proposed merger, if consummated, would be in violation of an outstanding order prohibiting the acquiring company from making certain acquisitions.

A large manufacturer of industrial products sought clearance for its proposed acquisition of a smaller company in the same as well as in a complementary product line. The requesting manufacturer was, and is now, subject to a Commission order prohibiting, among other things, the making of certain acquisitions for a designated period of time without prior Commission approval.

Both manufacturers were competitors and the smaller was quite capable of growing and developing in the industry. Further, no efforts had been made to locate other possible purchasers.

The Commission advised that approval for the proposed acquisition would not be in the public interest because it would entail the acquisition of a competitor and further increase concentration in the industry. (File No. D–6608, released Feb. 13, 1968.) (Opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).)

No. 184. Compliance interpretation of request for premerger clearance: Bankruptcy imminent.

The Commission issued an opinion September 1, 1966, in connection with a request for advice as to whether a proposed merger, if consummated, would be in violation of an outstanding order prohibiting the acquiring company from making certain acquisitions.

A small processor of food products applied for clearance of its proposed acquisition by a larger processor engaged in operations in the same general product line. The larger processor was, and is now, subject to a Commission order prohibiting, among other matters, the making of certain acquisitions for a designated period of time without prior Commission approval.

The requesting processor was on the verge of bankruptcy and had made reasonable but unsuccessful attempts to locate another purchaser within the industry.

The Commission advised that, in reliance on the information and data supplied, it would approve the request for clearance of the proposed acquisition. (File No. D–6651, released Feb. 13, 1968.) (Opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).)

No. 185. Compliance interpretation of request for premerger clearance: De minimis competitive effect.

The Commission issued opinions September 29, 1966, and January 26, 1967, in connection with requests for advice from a small company as to whether a proposal to merge, if consummated, would violate an outstanding order prohibiting either purchasing company from making certain acquisitions.

A small processor of food products which was tightly held, having declining profits, increasing expenses, a loss of key personnel, a plant too small to compete efficiently, and an owner-manager who was determined to sell, applied for clearance for its proposed acquisition by either of two larger processors in the same general line of commerce. Both of the larger processors were subject to a Commission order prohibiting certain acquisitions for a designated period of time without prior Commission approval.

On the basis of supplied information, the Commission cleared the request for acquisition by either of the two larger processors. Subsequently, however, partial acquisition by a third processor was approved, as was a partial acquisition by one of the larger concerns. (File No. D–6651 and D–6652, released Feb. 13, 1968.) (Opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).)

No. 186. Compliance interpretation of request for premerger clearance: De minimis competitive effect.

The Commission issued an opinion December 23, 1966, in connection with a request for advice as to whether a proposed merger, if consummated, would violate an outstanding order prohibiting the purchasing company from making certain acquisitions.

The estate of a very small retailer of food products applied for clearance of its proposed acquisition by a larger processor engaged in operations in the same general product line. The larger company was, and is now, subject to a Commission order prohibiting certain acquisitions for a designated period of time without prior Commission approval. The retailer, a negligible factor in the industry and in the relevant geographical market, was not capable of development in the estate status.

The Commission cleared the proposed acquisition. (File No. D–6651, released Feb. 13, 1968.) (Opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).)

No. 187. Compliance interpretation of request for premerger clearance: Imminent insolvency.

The Commission issued an opinion September 25, 1964, in connection with a request for advice as to whether a proposed merger, if consummated, would be in violation of an outstanding Commission order prohibiting the purchasing company from making certain acquisitions.

A large integrated company manufacturing commercial products applied for clearance to acquire a smaller company engaged in operations in the same product line in the Western States. The larger company was, and is now, subject to a Commission order prohibiting certain acquisitions for a designated period of time without prior Commission approval.

Both manufacturers were in direct competition in the geographical trading area. However, each held a relatively small share of the market involved. It was represented that the small concern had exhausted all other possibilities of selling to another purchaser, save to one or more of the other integrated manufacturers in the industry. The seller, who was suffering personal hardships because of illness in his family, had to leave the business and the area which is served.

On the basis of the information and data supplied, the Commission cleared the request for clearance of the proposed acquisition. (File No. C–751, released Feb. 13, 1968.) (Opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).)

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No. 188. Premerger clearance denied: Merger of firms in same industry would raise questions.

The Commission issued advisory opinions on September 27, 1962, March 28, 1963, and September 12, 1963, in which commutual requests for premerger clearance from liability under Section 7, amended Clayton Act, by a small dairy in financial difficulty were denied as to acquisition by a larger company in the same industry, but were finally approved permitting acquisition by a diversified corporation in another industry.

A small dairy in financial difficulty desiring to be acquired by a larger company in the same field applied for clearance of the proposed acquisition. The larger company, an integrated processor and distributor of dairy products, was the respondent in a complaint in litigation with the Commission.

The applicant was advised the proposed acquisition would raise questions similar to those involved in the proceeding and that the pendency of the proceedings made it inappropriate to express any further views. Reconsideration was requested. In response, the Commission informed the applicant of the decision in the Foremost Dairies case, Docket 6495 and again advised that the acquisition would raise serious questions under Section 7 of the Clayton Act. Further, the Commission pointed out that it recognized the problems of small dairies and suggested further efforts to sell to a local or regional purchaser.

Later, the small dairy requested consideration of its proposed acquisition by a large, diversified corporation in the food industry. The Commission advised it would contemplate no action if the transaction was consummated. The Commission added its advice should not be construed as affecting any position it had previously taken against the acquiring corporation nor as in any way prejudicing any pending or future action it might take against the acquiring corporation regarding other acquisitions. (File No. 633 7015, released Feb. 13, 1968.)

No. 189. Premerger clearance: Precarious financial condition.

The Commission issued an advisory opinion on March 20, 1963, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of a company on the verge of insolvency.

A manufacturer of consumer goods desiring to be acquired by a larger producer in the same field requested clearance of the proposed acquisition. His company had suffered declining sales for a number of years and was in a precarious financial condition to the point of being on the verge of insolvency. Further, reasonable attempts to sell to others had been made but there was no other purchaser which could preserve the competitive force possessed by the requesting manufacturer.

The requesting party was advised that if the sale were consummated, the Commission would contemplate no action based on this transaction alone. The Commission added that its decision was based on representations that the smaller firm was in such dire financial straits that it faced impending bankruptcy. Further, the Commission stated it was expressing no opinion regarding prior acquisitions or on restrictive practices, if any, by the purchaser or any other company which may have contributed to the requesting party's failing condition. (File No. 633 7040, released Feb. 13, 1968.)

No. 190. Random distribution of "bonus certificates" with purchase.

The Commission in an advisory opinion stated that the random inclusion of "bonus certificates" in egg cartons would be violative of Section 5 of the Federal Trade Commission Act.

The seller proposed to include "bonus certificates" in cartons of eggs offered for sale. The certificates were described as being worth "so many eggs or $5 in cash." They would be randomly distributed so that some cartons would contain eggs plus a bonus certificate of value, while others would contain eggs only, or eggs plus a certificate of little or no value.

The Commission was of the view that this would be merchandising by lottery, a practice which the Commission has long held to be unfair within the meaning of Section 5 of the Federal Trade Commission Act. (File No. 683 7065, released Feb. 16, 1968.)

No. 191. Advertisements which appear in news format.

The Commission rendered an advisory opinion involving the question of whether it is deceptive to publish an advertisement in the format of a news article without disclosing it is an advertisement, as required in the Commission's press release of November 28, 1967.

The factual situation presented to the Commission involved the publication of a column in a newspaper which advertised the cuisine facilities of several restaurants. Written in narrative form, the writeup about each restaurant usually identified the chef and/or head waiter, gave a brief description of how a certain meal is prepared, and contained other factual information concerning the hours during which meals are served, whether dancing is permitted, whether cocktails are served, and some general indication of the price range of the meal.

In its opinion, the Commission concluded:

* * * the column uses the format and has the general appearance of a news feature and/or article for public information which purports to give an independent, impartial and unbiased view of the cuisine facilities of a particular restaurant. Since the column in fact consists of a series of commercial messages

which are paid for by the advertisers, the Commission is of the opinion that it will be necessary to clearly and conspicuously disclose it is an advertisement, as outlined in the aforementioned press release. This conclusion would not be altered even though the column carried the exact cost of each meal being advertised, or if it listed the price range of the various meals.

(File No. 683 7080, released Feb. 16, 1968.)

No. 192. Clearance denied for merger of competing milk companies.

The Commsision rendered an advisory opinion in which clearance was denied to an applicant to sell its milk processing and dairy products distribution assets to a large, integrated food producing, processing, wholesaling and retailing concern. The proposed purchaser has a dairy products subsidiary in actual or potential competition with the applicant in the same market.

The Commission noted that the proposed merger would combine the firm now appearing to rank fourth in sales in the market with the eighth to result in a firm in second or third position. It also appears that the present top four firms have about forty percent of the sales in the market and therefore the proposed merger would further increase the market concentration.

Because the proposed merger raises such serious questions of possible violations of Section 7 of the amended Clayton Act, the Commission advised the applicant that premerger clearance cannot be granted. The Commission further stated that, if the merger occurs, the Commission may take the action it deems necessary to protect the public interest and prevent anticompetitive effects. (File No. 683 7078, released Feb. 20, 1968.)

No. 193. Substitution of merchandise unlawful even though equivalent in grade, quality, and appearance to that ordered by customers.

The Commission was requested to render an advisory opinion with respect to the legality of substituting, on customer orders for a particular fabric, a fabric produced by another manufacturer without notifying customers of the intended substitution.

It was represented that customers had long been supplied with a specific fabric and that sample display cards had been distributed to them advertising the availability of this fabric. The supplier recently discontinued production of the fabric and another supplier was located who will furnish a similar product said to be identical in pattern and of better quality. It was proposed to supply customers with the new product without resampling their display cards or otherwise advising them of the substitution, the cost of which, it was asserted, would be prohibitive.

The Commission advised that it could not give its approval to this proposed business practice. A foreseeable result of substituting the product of one manufacturer for that of another would be to mislead customers into purchasing an article which they might not wish or intend to purchase, and which they might or might not purchase if they were informed as to its origin. Nor would the prejudice thus engendered be confined to customers; other distributors and manufacturers of a competing product would be injured when orders that would normally have come to them if the fabric were rightly named are diverted to the offending firm. (File No. 683 7081, released Feb. 20, 1968.)

No. 194. Use of uniform delivered pricing system effected by deducting freight allowances from f.o.b. price.

The Commission advised a west coast manufacturer of industrial parts that it would not be illegal to use either a conventional uniform delivered pricing system based on average cost factors or a uniform delivered pricing system which will be effected by granting so-called freight allowances to be deducted from the manufacturer's f.o.b. factory price.

The facts with respect to the second alternative were that the manufacturer proposed to establish an f.o.b. factory price of, for purposes of illustration, $99.50. Actual freight to west coast customers may be $0.50 and such customers would receive no allowance. Thus they would pay the manufacturer $99.50 and the carrier $0.50, making a total of $100. Then, again using hypothetical figures for purposes of illustration, actual freight to a Denver customer may be $1. The manufacturer would grant such a customer a $0.50 freight allowance to be deducted from the f.o.b. price, thus leaving the customer paying the manufacturer a price of $99 and the carrier $1, making a total of $100. Continuing east, actual freight to a Kansas City customer may be $1.50. The freight allowance would be $1, leaving the customer paying the manufacturer $98.50 and the carrier $1.50, for a total again of $100. This would continue in graduated steps across the country to where an east coast customer with actual freight costs of $3 would receive an allowance of $2.50, leaving him also paying a total of $100. The manufacturer advised that it was considering this alternative for administrative reasons, since it wished to pass title to the customers upon delivery to the carrier and have the customers handle all freight bills.

With repect to the first question, the Commission advised that it was of the view that there could be no question of the manufacturer's right to unilaterally employ a uniform delivered pricing system, since if each buyer pays the same delivered price no question under the Clayton

Act, as amended by the Robinson-Patman Act, would arise. While the factual situation under the second alternative is somewhat more complicated, the Commission was further of the view that it also would not result in a violation of law if implemented exactly as outlined above. In the Commission's view, the difference between the two systems is one of form rather than of substance and that it would make no legal difference whether the manufacturer computes its factory price and adds to it an amount equal to the average freight costs for delivering to all customers, as is done in the usual uniform delivered pricing system, or whether it accomplishes the same result by deducting an amount from the factory price which would have the effect of leaving each buyer paying an amount roughly equal to the same freight factor. In either event, it would seem that the manufacturer would have made freight a part of the price, so that each buyer's out-of-pocket costs would be exactly the same.

The Commission further cautioned, however, that since this opinion deals in a projected manner with hypothetical figures chosen for illustrative purposes, the computations later to be made based upon actual cost factors must in practice achieve the result claimed in that each buyer will pay exactly the same net price including the freight. Any other result, the Commission stated, would be outside the scope of this opinion. (File No. 683 7077, released Feb. 24, 1968.)

No. 195. Notice to magazine dealers as to availability of display allowance.

The Federal Trade Commission advised a seller of magazines that it could see no objection to its proposed method of notifying dealers of the availability of a display allowance program on the assurance that all dealers would receive notice by the method selected.

Under the proposal, the display allowance plan would be offered to all retailers on the same basis. Under the method of notification proposed, an advertisement would be published in a trade publication of general circulation among dealers announcing the main details of the proposal. A one inch reminder advertisement would then be published in three subsequent issues. Then the seller proposed to work with the distributor of the publications and the wholesalers to reach every retailer competing in the distribution of the publications.

The Commission advised that while Section 2(d) of the amended Clayton Act does not specifically require that all competing customers be individually notified regarding the particulars of a promotional program, it has repeatedly held that the statute contemplates that all competitors shall be accorded equal opportunity to particiate. This construction has been incorporated in the Commission's Guides for Advertising allowances, where sellers are advised that they should take some action to inform all customers competing with any partici-

pating customer that the plan is available. This may be done by any means the seller chooses, including letter, telegram, notice on invoices, salesmen, brokers, etc. While the Guides do add that if a seller wants to be able to show that he did make an offer to a certain customer, he is in a better position to do so if he made it in writing, the Commission added that it is clear that other methods are permitted if notice to all competing customers is given.

The Commission concluded that it could see no objection to the proposed program of notification based on the assurance that it will reach all competing dealers of the publications. In this connection, however, the Commission further advised that whenever a seller selects any method of notification short of actual notice to each dealer, he bears full responsibilty under the law for seeing that the method selected gives each dealer the notice to which he is entitled. (File No. 683 7082, released Feb. 24, 1968.)

No. 196. Commission holds not objectionable the advertising phrase "It works * * * or we'll fix it free."

The Commission rendered an advisory opinion whereby it concluded that a proposed phrase "It works . . . or we'll fix it free." is not objectionable and thus may be used in advertising, and on boxes containing, products of a certain manufacturer. The Commission took account of information that the particular manufacturer does, in fact, repair without question and without charge of any kind (*e.g.*, for parts, labor, "handling," or return postage) all of its products sent to it directly by owners or through retailers. (File No. 683 7089, released Feb. 27, 1968.)

No. 197. Use of term "Hand Made" to describe boot with a sealed sole.

The Commission rendered an advisory opinion to the effect that the unqualified term "Hand Made" could not be used to describe a boot with a sealed sole.

The requesting party is currently selling a completely hand made boot in which all parts are cut by hand and stitched together to form the uppers. It is hand lasted and then the sole is built up and stitched together by hand. The boot is labeled "Hand Made." The seller is now considering putting on a sealed sole to replace the leather sole. Other than that all operations will be identical, including the hand sewing of the heel counter. An opinion was requested as to whether a boot so constructed could still be labeled "Hand Made."

The opinion advised that in the Commission's view the seller could not use the unqualified term "Hand Made" to describe a boot with a sealed sole. He could, however, use the term to describe the part or parts which are sewn by hand in such manner as to make it clear,

by use of an appropriate disclosure, that the sealed sole is not hand sewn. (File No. 683 7087, released Feb. 27, 1968.)

No. 198. Truckload discount for quantity purchases.

The Commission rendered an advisory opinion involving a 5 percent discount that a manufacturer proposed to offer to all customers purchasing in truck-lot quantities. The manufacturer requesting the opinion is subject to a cease and desist order prohibiting price discrimination under Section 2(a) of the amended Clayton Act.

The manufacturer operates a single factory located in the Midwest and ships its products on a uniform delivered price basis to wholesale customers located throughout the continental United States. The manufacturer desires to pass on to its customers cost savings due to lower freight rates for full truckload-lot quantities, by means of a uniform discount applicable to all truckload orders. For a recent six-month period, the manufacturer determined that its average freight saving on such orders was in excess of 5 percent. It thereupon requested an advisory opinion as to whether the Commission would approve a uniform 5 percent truckload discount.

The Commission advised the manufacturer that it could not approve the proposed 5 percent discount for truckload-lot orders because, based on the submitted data, the proposed discount would not appear to be uniformly cost justified. Accordingly, the use of such a discount could result in violation of the order in question, by producing price discriminations between customers qualifying for the discount and competing customers not able to qualify for it. The Commission noted that the alleged cost savings depend upon averaging the savings in the freight rates for truckload-lot shipments to all of the manufacturer's truckload customers in the United States and that, although the freight saving increase with the distance of customers from the manufacturer's plant, the freight savings on sales to nearby truckload customers is considerably less than 5 percent. (File No. D–7851, released Mar. 5, 1968.) (Opinion issued under authority of Section 3.16(c) of the Commission's Rules of Practice (1967).)

No. 199. Agreement by processors to sell at prices higher than minimums set by State regulation.

The Commission rendered an advisory opinion advising a State official that it would be illegal to hold a meeting at which the processors of milk within the State would agree to sell at prices higher than the minimum prices set by the State milk control agency.

The official pointed out that the State milk control agency had performed its function of setting minimum prices pursuant to State law, but that it was felt that it would be difficult for many processors to

maintain a profitable operation at these minimums in the outlying areas and towns due to higher delivery costs. The official also advised that this proposed action would not be taken pursuant to State law, but would instead be as a result of voluntary agreement among the processors involved.

The opinion advised that it was the Commission's considered opinion that such an agreement among the processors would be subject to serious question under well-settled principles of antitrust law. The Commission stated the law is clear that a State may, in the exercise of its sovereign power, itself conduct such regulation of business activities within its borders as its own legislature shall properly deem necessary in the public interest. So long as the resulting regulation is a State as opposed to individual activity, those subject to the regulation would not be subject to a charge of violating the antitrust laws by reason of their compliance with the State's orders, including orders setting minimum prices for milk.

Here it appeared that the State, speaking through its milk control agency, had already performed its regulatory function and set minimum prices for milk within its borders. While any individual processor may sell at higher prices if he so desires, for them to combine together to agree to sell at higher prices would, in the Commission's view, present an entirely different question and would be a situation which would enjoy no part of the immunity afforded by State regulation. The prices to be charged within the State may be raised or lowered only by the State itself, the opinion added. They may not be altered by agreement among those subject to the State's regulation without being fully subject to the antitrust laws, under which no principle is more firmly established than that which holds that any agreement among competitors as to the prices at which they will sell is illegal per se. (File No. 683 7085, released Mar. 5, 1968.)

No. 200. Promotion and sponsorship of price catalogs by trade association.

The Commission was requested to render an opinion with respect to an outstanding order to cease and desist which, among other things, proscribed agreements to suggest resale prices. The issue involved the legality of a covered Trade Association's sponsorship of catalogs for its member-dealers, which catalogs would contain manufacturers' suggested resale price.

The Commission advised that under an outstanding Commission order covering the Trade Association and its members such sponsorship by the Association may well violate said order. (File No. D–5979, released Mar. 11, 1968.) (Opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).)

No. 201. Specialized automotive repair association wants to publish flat rate manual for its members.

The Commission issued an advisory opinion stating that it cannot approve the publication by a specialized automotive repair association of a flat rate repair manual for use by its members in determining labor charges.

The Commission commented that there is implicit too grace a danger that the association's manual would facilitate price fixing between competing repair shop operators. The Commission pointed out the well-established antitrust principle that price fixing by competitors is illegal *per se*. The public expects to derive benefits from different prices offered by competing service operators. (File No. 683 7090, released Mar. 11, 1968.)

No. 202. Definition of jobbers and wholesalers for functional pricing purposes.

The Commission issued an advisory opinion to an applicant who (1) asked for a definition of the words "jobber" and "wholesaler," and (2) asked the Commission's views as to the propriety of a proposed revision in price lists.

In response the Commission stated:

As a working rule, one might suppose that, in a three level system, wholesalers are closer to producers and jobbers are closer to retailers in the distribution of a producer's goods. Traditionally, producers sell to wholesalers who sell at a higher price to jobbers who sell at a higher price to retailers.

The controlling element in your problem, however, as in similar problems arising under the amended Clayton Act, is whether or not resale competition actually exists as between and among these various resellers rather than the names they use to describe themselves. If in fact a so-called wholesaler competes with a so-called jobber in the redistribution of goods, the difference in names is of no consequence; the fact of competition is.

In *F.T.C. v. Ruberoid*, 343 U.S. 470, (1952) the Supreme Court stressed that actual competition in resale operations is decisive rather than nomenclature and approved the Commission's disregard of "ambiguous labels, which might be used to cloak discriminatory discounts to favored customers."

What you plan, as we understand it, is to sell your middlemen, whether "wholesalers" or "jobbers," at one price, while selling certain selected retailers at a higher price.

In the circumstances you present, you may properly do this provided the "wholesalers" and "jobbers" are functioning at the same distribution level and are not themselves engaged in retail operations competitive with the selected retailers.

(File No. 683 7092, released Mar. 14, 1968.)

No. 203. Common selling organization.

The Commission advised a group of geographically scattered, relatively small public warehousemen that it would not object if they were

to establish a jointly owned selling agency under the conditions described.

The Commission understands that the identified public warehousemen propose to establish, as a separate corporation, a single service organization, nationwide in scope. Each participating public warehouseman would periodically provide the service organization with information about the kind of storage space he has available, where such space is available, the times at which such space might be available and the terms and conditions under which such space would be available. The information provided is to be processed by electronic data processing equipment for use by storage space salesmen employed by the service organziation. Only generalized information developed by the service organization will be made available to participants jointly.

Each participating public warehouseman is to retain and affirmatively maintain local autonomy in administration, storage, rates, and customers to be serviced. The Commission notes that, under the statutes it administers, each participating public warehouseman is required independently to set his own rates and his own terms and conditions of sale. Any use of the service organization to effect concert of action as to rates, terms, or conditions of sale would expose participants to a charged violation of Section 5 of the Federal Trade Commission Act.

The Commission would not object to the establishment of a cooperative enterprise, as above described, operating as above set forth.

The following proviso, however, was added to the opinion:

> Unless the Commission has previously rescinded this approval, you are directed that at the end of three years from the date of this opinion to submit to the Commission a complete report on your membership, terms and conditions under which the cooperative is operating, including a statement for each member on the sales territory of such member, the volume of business and percentage of such members business.

(File No. 683 7088, released Mar. 14, 1968.)

No. 204. Use of terms "unconditional" and "lifetime" guarantee.

In an advisory opinion rendered to a watch manufacturer, the Commission ruled that a guarantee which has conditions and limitations, other than as to time, may not be represented as an "unconditional" guarantee. It also advised the requesting party that a guarantee which lasts for only three years cannot be described as a "lifetime" guarantee. Moreover, the Commission objected to the guarantee being described as "4-Ever."

With respect to the claim "unconditional," the Commission said that it would be proper to claim that a product is "Unconditionally guaranteed for three years" if in fact no other conditions existed. However,

where there are conditions other than time, such as were present in the case presented for review, the Commission said that it would be improper under Sec. 5 of the FTC Act to claim that the guarantee is "unconditional." The reason for this, it was concluded, is that the term "unconditional" means there are no conditions attached, and it is a contradiction in terms rather than an attempt at modification to permit use of the claim "unconditional" provided the conditions are disclosed.

Under the terms of the guarantee which was the subject of the Commission's opinion, the purchaser of the watch had the option to renew the original guarantee which expired at the end of three years by paying a service fee of $5 on an annual basis. By having to pay the $5 service fee, the Commission said, the purchaser no longer has a "lifetime guarantee" but a service or insurance policy which is renewable at his expense on an annual basis.

The Commission also ruled that it is necessary to disclose the life being referred to whenever it is claimed that the duration of the guarantee is for a "lifetime." For example, is it the life of the original purchaser, the original user, or the life of the product, etc.? Thus, even if the requesting party resolved the first objection and offered a guarantee for life rather than for three years, it would still be necessary to disclose clearly and conspicuously the life to which reference was being made.

In the opinion the Commission also objected to the term "4-Ever" because, contrary to fact, the product was not guaranteed forever.

Finally, the Commission stated that it was not ruling upon the "waterproof" claim because it currently has under consideration a possible revision of trade practice rules relating to the term "Waterproofing" as applied to watches. (File No. 683 7058, released Apr. 3, 1968.)

No. 205. Use of a computer system to collect and disseminate marketing data.

The Commission issued an advisory opinion concerning the legality of a proposal to employ computer and data processing equipment to collect and disseminate certain information in connection with marketing of ice-pack broilers. Sellers would feed into the system their asking prices and quantities available, and later report on actual sales, giving the prices and quantities sold. This information would be available to subscribers of the service, whether the subscribers are sellers, buyers, or members of the public. Subscribers would obtain the information by calling in to the central computer. Identity of all parties (sellers and buyers) would be kept secret from each other and from the public.

The Commisison advised the applicant that it has no objection to the proposed plan, provided it is not used for some illegal purpose. If the plan is used as a means for fixing or tampering with the price of poultry, or for some other illegal purpose, then the Commission would of course have serious objection to the plan.

The Commission continued:

Statistical reporting plans which involve the collection and dissemination of data related to future prices are not illegal per se. However, experience in other cases indicates that a price reporting plan which involves future or advance prices, particularly when that plan invites an industrywide pricing policy, may provide the basis for an inference of an agreement or combination to fix prices in violation of Section 5 of the FTC Act. In essence, it is the potential danger inherent in the reporting plan which is related to future prices that prompts the Commission to suggest that it be used with extreme care.

Unless the Commission has previously rescinded this approval, you are directed, at the end of three years from the date of this opinion, to submit to the Commission a complete report on the actual operation of the program, describing how identity protection was maintained, and to include copies of your printed-out periodic reports and audits.

(File No. 683 7103, released April 3, 1968.)

No. 206. Marking requirements for apparel of U.S. components assembled abroad.

The Commission advised an apparel manufacturer that Section 4(b)(4) of the Textile Fiber Products Identification Act would require an affirmative disclosure of the particulars of foreign origin under the following facts:

The fabric of which the apparel will be made is entirely of domestic origin. This fabric will be cut into shapes and forms. The cut fabric, together with buttons, trimmings, threads, labels, in short all findings, also of domestic origin, will be shipped abroad to be assembled and sewn into the product. The assembled product will be returned to the United States where it will be finished, pressed, folded, and packaged.

The Commission advised the requesting party that a label or other mark denoting the particulars of foreign origin would be required in the following terms: "Assembled and sewn in [name of foreign country where assembled and sewn] of American-made materials." (File No. 673 7095, released Apr. 4, 1968.)

No. 207. "Made in U.S.A." label on answering machine composed of domestic and foreign made components.

The Commission rendered an advisory opinion today in response to a question concerning the origin of a telephone answering machine which was composed of both domestic and foreign made components.

The basic machine is manufactured in a foreign country, but modifications to be performed in the U.S., including both labor and parts,

will represent approximately 70 percent of the total cost of the finished product. Numerically, approximately half of the components are domestic and the remaining half are imported.

Concluding that such a product should not be unqualifiedly marked as "Made in U.S.A.," the Commission said:

> * * * a "Made in U.S.A." mark would constitute an affirmative representation that the finished product was made in its entirety in the United States. Since the end product would in fact contain foreign made components of a substantial nature, it would be improper to describe the finished product as "Made in U.S.A." without a clear and conspicuous disclosure of the identity and foreign country of origin of the imported components.

(File No. 683 7093, released Apr. 4, 1968.)

No. 208. Disclosure of origin of golf clubs made in this country from imported parts.

The Commission was requested to render an advisory opinion concerning the proper labeling as to origin of golf clubs made in this country using imported component parts. The cost of materials and labor in this country with respect to the four clubs in question will range from a low of 63 percent to a high of 92 percent.

The opinion advised that in the absence of any affirmative representation that the products are made in the United States, or any other representation that might mislead the public as to the country of origin, and in the absence of any other facts indicating actual deception, the Commission was of the opinion that, under the facts as presented, the failure to mark the origin of these golf clubs will not be regarded by the Commission as deceptive. Accordingly, no marking is required on these clubs with references to the country of origin. (File No. 673 7109, released Apr. 4, 1968.)

No. 209. Disclosure of foreign origin of component used in drawer slide assembly.

The Commission was asked to render an advisory opinion as to the labeling requirements applicable to a slide assembly for cabinet and desk drawers which will be made in this country using an imported rail member. The imported component will make up less than half the cost of the completed assembly.

The opinion advised that in the absence of any affirmative representation that the product is made in the United States, or any other representation that might mislead customers as to the country of origin, the Commission was of the opinion that, under the facts as presented, the failure to mark the origin of the product would not be regarded as deceptive.

However, the Commission was also of the opinion that it would not be proper to describe the completed slide assembly as "Made in U.S.A."

since that would constitute an affirmative representation that the entire assembly 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 rail member is imported. (File No. 683 7095, released Apr. 4, 1968.)

No. 210. Disclosure of foreign origin of imported mechanical pencil action.

The Commissioner rendered an advisory opinion in regard to the question of whether it is necessary to disclose the origin of imported mechanical pencil actions which are to be assembled with an American made barrel and clip.

In the absence of any affirmative representation that the product is made in the United States, or any other representation that might mislead the public as to the country of origin, and in the absence of other facts indicating actual deception, the Commission expressed the opinion that, under the facts as presented, the failure to mark the origin of these goods will not be regarded by the Commission as deceptive. (File No. 673 7002, released Apr. 4, 1968.)

No. 211. Disclosure of country of origin of imported FM tuners.

The Commission was requested to render an advisory opinion concerning the proper marking of small FM tuners imported from a foreign country. The tuners are disassembled in this country and a number of domestic components are installed to replace their foreign counterparts to change the tuning frequency and narrow the bandpass.

With regard to the proposal to omit any statement on the label concerning the origin of the product, and instead to include a brochure with each unit that would accurately explain its origin, the Commission believes that such proposal would not violate any of the laws administered by it. (File No. 683 7010, released Apr. 4, 1968.)

No. 212. No foreign origin disclosure required of imported shower head components.

The Commission rendered an advisory opinion concerning the proper labeling as to the origin of shower head components to be imported from a foreign country. Under the terms of the proposal the imported components will represent approximately 40 percent of the total cost of the completed unit, with American labor and material representing the remaining 60 percent.

In the absence of any affirmative representation that the product is made in the United States, or any other representation that might mislead the public as to the country of origin, the Commission ex-

pressed the opinion that, under the facts as presented, the failure to mark the origin of these goods will not be regarded by the Commission as deceptive. Accordingly, the Commission ruled that no marking is required on the imported shower head components beyond what is imposed by the Bureau of Customs. (File No. 663 7015, released Apr. 4, 1968.)

No. 213. Country of origin disclosure on bicycles assembled with some imported parts.

The Commission was requested to render an advisory opinion concerning the proper labeling as to origin of bicycles which were to be produced in the Virgin Islands using parts to be imported from a foreign country together with other parts from the United States. The value of the imported parts in relation to the total value of the finished bicycle will be around thirty-five percent.

The opinion advised that in the absence of any affirmative representation that the product is made in the United States, or any other representation that might mislead the public as to the country of origin, the Commission is of the opinion that, under the facts as presented, the failure to mark the origin of these bicycles will not be regarded by the Commission as deceptive. (File No. 673 7056, released Apr. 4, 1968.)

No. 214. Country of origin labeling on lamp containing an imported wooden base.

The Commission rendered an advisory opinion concerning the proper labeling as to the origin of lamps containing a wooden base imported from Japan, which represents approximately 20 percent of the total cost of the completed unit. The remaining components will be of American origin and the lamps will be assembled here in the United States.

Two questions were ruled upon by the Commission in the advisory opinion. First, would it be proper to label the lamps as "Made in U.S.A."? Second, if not, must the wooden base be labeled as "Made in Japan"?

In response to the first question, the Commission said that the claim, "Made in U.S.A.," would constitute an affirmative representation that the entire lamp was of domestic origin. Since a substantial portion of the lamp would be of foreign origin, the Commission ruled it would be improper to label the lamps as "Made in U.S.A." without a clear and conspicuous disclosure in the label that the wooden base is made in Japan.

In regard to the second question the Commission said that, if the lamps are not labeled as "Made in U.S.A." and no other representation

is used which might mislead the public as to the country of origin, and in the absence of other facts indicating actual deception, under the facts as presented the failure to mark the origin of the goods will not be regarded by the Commission as deceptive. Accordingly, the Commission said that no marking is required on the imported wooden base with reference to the country of origin. (File No. 673 7077, released Apr. 4, 1968.)

No. 215. Misrepresenting hoist as "Made in U.S.A."

The Commission rendered an advisory opinion today in response to a question involving the origin of a hoist which is to be made in part of both domestic and foreign made components.

Specifically presented to the Commission was the question of the percentage of domestic material which must be present in the finished product in order for it to be properly described as "Made in U.S.A."

In response to the foregoing question, the Commission said:

* * * a "Made in U.S.A." mark would constitute an affirmative representation that the product was made in its entirety in the United States. If the product was made of foreign components and assembled in the United States, it would be improper to describe the finished product as "Made in U.S.A." although a legend "Assembled in U.S.A. [name of country] components" would be proper.

(File No. 683 7091, released Apr. 4, 1968.)

No. 216. Affirmative misrepresentation as to origin of photographic accessories.

The Commission rendered an advisory opinion today in regard to the proper labeling of the origin of photographic accessories which are imported in whole or in part from a foreign country.

In the opinion the Commission ruled upon the following three questions which were presented to it. First, what percentage of foreign made components can a product contain and still be properly labeled as "Made in U.S.A."? Second, in the absence of a "Made in U.S.A." claim, when is it necessary to disclose the foreign country of origin of an imported product? Third, does the Commission have any specific regulations as to size, material and location whenever it is necessary to disclose the origin of an imported product?

In response to the first question, the Commission said:

* * * the "Made in U.S.A." mark would constitute an affirmative representation that the product was made in its entirety in the United States. If the product did in fact contain foreign made components of a substantial nature, it would be improper to label the finished product as "Made in U.S.A." without a clear and conspicuous disclosure indicating the identity of the imported components and the foreign country of origin thereof.

With respect to the second question, the Commission stated that it is somewhat hypothetical in that it does not involve a specific proposed

course of action, and therefore it is not the proper subject for an advisory opinion.

In regard to the third and final question, the Commission stated that it had no specific regulations as to the exact size, etc., of the disclosure. The Commission said that it would have to state the rule in general terms because the facts of each case may be different. The basic requirement, the Commission said, is that the disclosure must be of such conspicuousness as to be likely observed by prospective purchasers making casual inspection of the merchandise and of such degree of permanency so as to remain thereon until consummation of the consumer sale thereof. (File No. 683 7084, released Apr. 4, 1968.)

No. 217. Manufacturer may not mark "Made in U.S.A." on imported blades of cutlery finished and assembled in the United States.

The Commission issued another advisory opinion in a series concerning commodities of partial or total foreign origin.

The Commission advised a manufacturer in this country, the applicant for an advisory opinion, that he may not mark "MADE IN U.S.A." on imported blades of cutlery to be finished and assembled in the United States. The Commission noted that a blade is a significant component of cutlery. The Commission called attention to the danger that the contemplated marking might violate Section 5 of the Federal Trade Commission Act. (File No. 683 7038, released Apr. 4, 1968.)

No. 218. Country of origin labeling on food machinery containing imported components.

The Commission rendered an advisory opinion in regard to representations concerning the origin of goods which are produced domestically but which contain imported components.

Specifically, the Commission ruled that food machinery may not be represented affirmatively as being of domestic origin unless it is made in its entirety in the United States.

Under the factual situation presented to the Commission, the requesting party proposes to produce a food machine here in the United States which will contain some components imported from a foreign country. Specifically, the requesting party wanted to know what percentage of the machine must be made in the United States before it can be affirmatively represented as an American-made product.

Although the Commission ruled that such a machine could not be affirmatively represented as being of domestic origin, it further stated the ruling does not prevent the vendor from making a factual disclosure of the percentage of American-made parts as contrasted with the percentage imported, should the vendor desire to make such a representation. (File No. 683 7009, released Apr. 4, 1968.)

No. 219. Disclosure of foreign origin of contents on package bearing name suggesting domestic origin.

The Commission issued an advisory opinion dealing with the failure to disclose the foreign origin of imported switchplates. The packages containing the switchplates was labeled with a company name suggesting that the product was of domestic origin.

Under these circumstances, the Commission required that the foreign origin of the product be disclosed in conjunction with the company name. (File No. 672 3717, released Apr. 4, 1968.)

No. 220. Foreign country of origin disclosure on imported tools.

The Commission rendered an advisory opinion in regard to the proper labeling of the country of origin of certain imported tools.

Specifically, the requesting party wanted to know whether it would be necessary to disclose the country of origin on the tools and in advertising.

In the advisory opinion which was issued, the Commission concluded that it would be necessary to disclose the foreign country of origin of the tools in a clear and conspicuous manner at the point of sale. It also ruled that it would not be necessary to disclose the origin of the tools in advertising. (File No. 663 7034, released Apr. 4, 1968.)

No. 221. Foreign country of origin disclosure on imported metal spring clamps.

The Commission rendered an advisory opinion in regard to the proper marking of metal spring clamps imported from a foreign country. The clamps are to be imported in bulk, prepackaged and resold in the United States. They will be used to hold glass to the backing of frames, on cardboards and other accessories, in temporary bookbindings, office ledgers, etc.

The Commission advised the person requesting the advisory opinion that it would be necessary to mark the imported clamps with the foreign country of origin in a clear and conspicuous manner. (File No. 673 7026, released Apr. 4, 1968.)

No. 222. Disclosure of foreign origin of component part of ice cream spade assembled in this country.

The Commission was requested to render an advisory opinion with respect to the necessity for disclosing the country of origin of the imported metal portion of an ice cream spade manufactured in this country.

The opinion advised that in the Commission's view the country of origin of the imported metal portion of the ice cream spade should be disclosed wherever the name of the company appears and that it should

be disclosed in a clear and conspicuous manner on the package or the ice cream spade itself. (File No. 673 7070, released Apr. 4, 1968.)

No. 223. Necessity for disclosing foreign country of origin of imported gloves.

The Commission was requested to furnish an advisory opinion as to the necessity for disclosing the country of origin of imported gloves which will be packaged in this country.

The opinion advised that in the Commission's view it will be necessary to disclose the country of origin of the gloves in a clear and conspicuous manner at the point of sale. (File No. 683 7072, released Apr. 4, 1968.)

No. 224. Domestic origin marking for product containing foreign made components.

The Commission issued an advisory opinion dealing with the propriety of using the marking "MADE IN U.S.A." on a product, a significant component of which is in fact manufactured or produced in a foreign country.

The Commission was of the opinion that the proposed marking would constitute an affirmative claim that the product was entirely of domestic origin and such claim would be manifestly incorrect and actionable.

An article assembled or processed in the United States as above described, however, might properly be marked "MADE IN U.S.A." if the marking is accompanied by appropriate qualifying words (*e.g.* "of 'X' country components" or "of 'X' country materials") provided this additional disclosure is made as conspicuously as the claim "MADE IN U.S.A." and in close proximity thereto. (File No. 683 7013, released Apr. 4, 1968.)

No. 225. Labeling of material composed of leather fibers imported in their entirety.

The Commission rendered an advisory opinion in regard to the legality of the following five terms to label material composed of pulverized leather:

1. Pulverized Leather.
2. Reconstituted Leather.
3. Imported Bonded Leather-Fibres.
4. Bonded Leather-Fibres.
5. 100% Leather-Fibres.

Imported from Europe, the material will be sold to manufacturers of luggage, handbags and various other leather goods. The pulverized leather will be bonded with an adhesive and coated either with some type of lacquer or vinyl coating.

In its opinion, the Commission ruled that it had no objection to labels which describe the material as "Pulverized Leather" or "Bonded Leather-Fibres." It rejected, however, the term "Reconstituted Leather" since the word "Reconstituted" creates the impression that the material is leather which has been reprocessed in some manner, when in fact it is nothing more than pulverized leather held together by an adhesive.

With respect to the third proposed label, the Commission expressed the opinion that it would be deceptive to use the word "imported" without disclosing the specific country of origin of the material. Even though the word "imported" is not used, the Commission said that it would still be necessary to disclose the origin of the material since it is entirely imported.

According to its opinion, the Commission also ruled that it would be improper to represent that the material consists of "100 percent" leather fibres, since it contains a substantial amount of adhesive as well as being coated either with a lacquer or vinyl coating. The requesting party was further advised, however, that there would be no objection to using a percentage figure which factually portrays the amount of pulverized leather present in the material.

With further reference to the fifth and final proposed label, the Commission stated that the words "Leather-Fibres" either standing alone, or when coupled with the leather appearance of the material, could create the impression that the material is wholly the hide of an animal or at least something more than pulverized leather. To dispel this erroneous impression, the Commission said it would be necessary to use qualifying language, such as "Bonded Leather-Fibres." "Leather fibres and an adhesive," etc., in connection with the words "Leather-Fibres."

Finally, if the seller decided not to reveal the composition of the material, the Commission pointed out that it would be necessary to disclose that it is not leather by such language as "Not Leather," "Imitation Leather," or "Simulated Leather." The reason for this, the Commission said, is that the material has the appearance of leather, and in order to remove the potential deception inherent through its appearance it is necessary to disclose the fact that it is not leather. (File No. 683 7055, released Apr. 4, 1968.)

No. 226. Necessity for disclosing foreign country of origin of imported honing stones.

The Commission was requested to furnish an advisory opinion as to the necessity for disclosing the country of origin of imported honing stones which will be affixed to plastic handles in this country. The name of the applicant, an American company, would appear on the handle.

The opinion advised that in the Commission's view the country of origin of the honing stone must be disclosed in a clear and conspicuous manner on the product itself. (File No. 673 7046, released Apr. 4, 1968.)

No. 227. Necessity for disclosing foreign country of origin of repackaged imported nails.

The Commission was requested to furnish an advisory opinion as to the necessity for disclosing the country of origin of imported nails, which will be imported in bulk and repackaged in this country.

The opinion advised that in the Commission's view the country of origin of these nails must be disclosed in a clear and conspicuous manner on the package in which they are sold and that neither directly nor indirectly could the importer imply that the nails are made in the United States. (File No. 673 7017, released Apr. 4. 1968.)

No. 228. Country of origin labeling on bubble-packed imported switchplates.

The Commission was requested to render an advisory opinion in regard to the proper marking of the origin of imported switchplates, which are to be packaged in a plastic bubble and sealed to a display card for resale to the general public.

In the opinion the Commission advised the requesting party that it would be necessary to clearly and conspicuously disclose the foreign country of origin of the imported switchplates on the front of the display card. (File No. 673 7090, released Apr. 4, 1968.)

No. 229. Country of origin disclosure of imported braids used in production of braided rugs.

The Commission was requested to render an advisory opinion with respect to the necessity of disclosing the country of origin if imported braids which are stitched together in the United States to produce a braided rug.

The opinion advised that in the Commission's view there should be a clear and conspicuous disclosure that the rugs were assembled and sewn in the United States of imported materials. (File No. 673 7093, released Apr. 4, 1968.)

No. 230. Foreign country of origin disclosure on mounting cards displaying imported eyelashes.

The Commission was requested to render an advisory opinion concerning the proper labeling as to the foreign country of origin of imported false eyelashes. All of the other components, such as the mounting card, directions for use, plastic box, adhesive, etc., will be made and printed in the United States.

In its opinion the Commission concluded that it would be necessary to disclose the foreign country of origin of the imported eyelashes. The Commission also said that it would be acceptable for the disclosure to be made on the back of the mounting card, provided the disclosure is prominent and conspicuous. (File No. 673 7075, released Apr. 4, 1968.)

No. 231. Foreign country of origin disclosure on containers of repackaged imported chemicals.

An advisory opinion was rendered by the Federal Trade Commission in regard to the question of whether it is necessary to disclose the foreign country of origin on containers of imported chemicals which are repackaged in the U.S.

In the opinion, the Commission advised the requesting party that it would be necessary to disclose the foreign country of origin of the imported chemicals on the repackaged containers in a clear and conspicuous manner. (File No. 683 7069, released Apr. 4, 1968.)

No. 232. Foreign country of origin disclosure of imported knife blades.

The Commission rendered an advisory opinion concerning the proper marking of the origin of knife blades imported from a foreign country. The imported blades will be assembled with handles of domestic origin.

The Commission advised the party seeking the opinion that it would be necessary to make clear and conspicuous disclosure of the foreign country of origin of the imported blades. (File No. 673 7059, released Apr. 4, 1968.)

No. 233. Foreign country of origin disclosure of imported radios at point of sale.

The Commission rendered an advisory opinion in regard to the question of whether it is necessary to disclose the foreign country of origin on the container of an imported two-way radio. The equipment itself will be stamped or labeled to denote the foreign country of origin.

Citing the general rule in matters of this nature, the Commission stated that a clear and conspicuous disclosure of the foreign origin of the product must be made at the point of sale. This means, the Commission added, that it may be necessary to make the disclosure on each individual container, if the prospective purchaser does not have the opportunity to inspect the merchandise prior to purchase thereof in order to be apprised of its origin. (File No. 683 7046, released Apr. 4, 1968.)

No. 234. Labeling partially imported product as "Made in U.S.A."

The Commission rendered an advisory opinion in regard to the question of whether it would be permissible to label the container of a polishing cloth as "Made in U.S.A." if approximately 38% of the cost of the finished product is imported from a foreign country, the remainder being of domestic origin.

The polishing cloth is composed of two separate cloths sewn together, one which is impregnated and is used for polising and the other is untreated flannel which is used as a finishing-off cloth. It is the impregnated cloth which will be imported, and the untreated flannel will be obtained from a domestic source. Because the greater portion of the cost of the finished product is of domestic origin, the requesting party seeking the opinion wanted to know whether it would be proper to label the container as "Made in U.S.A."

In its advisory opinion, the Commission said:

* * *the claim, "Made in U.S.A.," would constitute an affirmative representation that the entire polishing cloth was of domestic origin. Since a substantial portion of the finished product is of foreign manufacture, it would be improper to label the container as "Made in U.S.A." However, if you wish to do so, you may make the following claim: "Made in U.S.A. of impregnated cloth imported from * * *."

(File No. 683 7071, released Apr. 4, 1968.)

No. 235. American manufacturer may not place labels "Made in U.S.A." on garments manufactured in this country from imported cloth.

The Commission issued another advisory opinion among several recently dealing with products of foreign origin or containing significant components originating in foreign countries.

In reply to a request, the Commission advised an American manufacturer that he may not place labels "Made in U.S.A." on garments manufactured in this country from cloth produced in a foreign country. The Commission noted that the cloth is a signficant component of the finished garment. The Commission stated that "Made in U.S.A." means made in the United States of America completely and accordingly cannot be applied where a significant component originated in a foreign country. The Commission suggested that such labels on the proposed garments might violate Section 5 of the Federal Trade Commission Act. (File No. 673 7102, released Apr. 4, 1968.)

No. 236. Foreign country of origin disclosure of imported picture components.

The Commission rendered an advisory opinion concerning the proper marking of the origin of various imported picture components. The opinion involved two specific factual situations.

In the first situation, the frame is imported from one foreign country, the picture is from another and the glass, mat and other finishing of the product motif is of U.S. origin. Second, all of the components are of domestic origin, except the picture motif which is imported.

In the absence of any affirmative representation that the finished product is made in the United States, or any representation that might mislead the public as to the country of origin, the Commission expressed the opinion that, under the facts as presented, the failure to mark the origin of the imported components in either of the two factual situations would not be regarded by the Commission as deceptive. Accordingly, the Commission ruled that no marking is required on the imported components beyond what is imposed by the Bureau of Customs. (File No. 663 7061, released Apr. 4, 1968.)

No. 237. Foreign disclosure on containers of repackaged toy kits.

The Commission rendered an advisory opinion in regard to the question of whether it is necessary to disclose the foreign origin on the container of various imported toys packaged therein.

Under the factual situation presented to it, the requesting party imports plastic articles in bulk which are, whenever possible, marked as to their foreign origin. Moreover, the imported articles are repackaged in the United States for resale, and sometimes domestically made components are added, and at other times components from another foreign country are also added. The imported components come principally from two foreign countries. There is no fixed percentage of imported components in each kit and the amount may vary as much as 1–75 percent, and only a few of the toy kits contain wholly imported components. The toys are sealed in the container and prospective purchasers cannot examine the goods prior to the purchase thereof in order to be apprised of the foreign origin markings thereon.

Based upon its understanding of the facts and because of the special circumstances presented by the product and the packaging thereof, the Commission expressed the opinion that it would be appropriate to mark the container in substance as follows: "Some items or components of items are made in (Name of foreign country) and (Name of foreign country)." (File No. 663 7038, released Apr. 30, 1968.)

No. 238. Clearance denied for proposed merger of substantial local independent producer of a food product and a leading national processor and distributor of the same product.

In an advisory opinion the Federal Trade Commission denied clearance to a substantial local independent producer of a particular food product to sell its assets or capital stock to a leading national processor and distributor of the same product.

The Commission noted that, while the two companies do not now sell their product in each other's markets, they appear to be potential competitors of each other. The national company appears to rank as fourth largest distributor nationally of the product involved, and first in several cities with very substantial shares of the markets. The local company ranks second among all sellers of this food product in one principal metropolitan market, first there among the independents, and has enjoyed a substantial share of the market for many years. The merger would be a (geographic) market extension for the national company, eliminating each as a potential competitor of the other and removing the local independent from competition. The proposed merger would appear to violate Section 7 of the Clayton Act and consequently the Commission must refuse to grant the premerger clearance requested. (File No. 683 7107, released Apr. 30, 1968.)

No. 239. Net weight labeling of mesquite chips.

The Commission rendered an advisory opinion to a manufacturer of mesquite chips, a product designed to flavor food cooked with charcoal.

In the advisory opinion, the Commission dealt with two questions. The first question involved Sec. 5 of the FTC Act and the propriety of such claims in labeling as whether the product will impart "real western barbeque" flavor to food and whether it may properly be labeled as mesquite chips. Second, under Sec. 4 of the Fair Packaging and Labeling Act, is it proper to state the net weight as "32 OZ. (2 LBS.)" if the weight may vary as much as 2 ounces either way after it is shipped into interstate commerce, depending upon the presence or absences of humidity, and the package in fact contains 32 ounces when it is packed?

Passing upon the first question, the Commission said that it had no objection to the proposed claims in the labeling insofar as Sec. 5 of the FTC Act is concerned.

With respect to the second question, the Commission ruled that the proposed declaration of net weight complies with Sec. 4 of the Fair Packaging and Labeling Act and comes within the variations in stated weight permitted under Sec. 500.22(b) of its regulations. This section permits:

> Variations from the stated weight . . . when caused by customary and ordinary exposure, after the commodity is introduced into interstate commerce, to conditions which normally occur in good distribution practice and which unavoidably result in change of weight or measure.

In arriving at this conclusion, the Commission said that it has assumed that good distribution practices will be followed in the marketing of the product which unavoidably result in the change of weight

in a relatively small percentage of cases, and that an overage is as likely to occur as often as a loss in weight.

The Commission's opinion also advised the requesting party of certain technical requirements of its regulations, such as the location of the declaration of net weight, the exact size of the declaration in relation to the area of the principal display panel, and other information relating to the identity and location of the manufacturer of the product. (File No. 683 7111, released Apr. 30, 1968.)

No. 240. Use of symbols and names having fur-bearing animal connotations in labeling textile fiber products.

The Commission was requested to render an opinion with respect to the labeling of textile fiber products manufactured so as to simulate a fur or fur product.

The requesting party proposed to use a word closely resembling the name of a fur-bearing animal, the fur of which is commonly used in the manufacture of garments, in association with a pile fabric simulating that fur.

In the Commission's view, the use of the proposed term to describe such a fabric would be violative of that part of Section 5 of the Federal Trade Commission Act which makes deceptive acts or practices in commerce unlawful. (File No. 683 7100, released Apr. 30, 1968.)

No. 241. Proposed promotional allowance program based on pyramiding sales of customers rejected.

The Commission advised a requesting party that violation of Section 5 of the Federal Trade Commission Act would result from the adoption of a proposed sales promotion plan described in essence as follows:

A certain sum of money would be reserved from the proceeds of a sale to a first customer. That customer, if he wished to participate in the sales promotion program, would be paid up to one quarter of the reserved sum as commission on sales to ten additional customers. The first customer would also be paid up to one quarter of the reserved sum on sales made by his customers to yet another generation of customers and so through a fourth generation.

The tabulation distributed to potential purchasers of the requesting party's merchandise showed that the original participant, in theory, might benefit from the efforts of 11,100 salespersons.

This in the Commission's judgment was beyond the realm of possibility. The return to any given participant would unquestionably be a great deal less than the theoretically achievable amount set forth: more often than not it would be negligible. The initial purchaser would not surely benefit beyond that amount, if any, which he can gain

through his own efforts. Any further amount which he might receive would accrue to him sheerly through chance. (File No. 683 7116, released May 7, 1968.)

No. 242. Necessity for disclosing the country of origin of imported ink.

The Commission was requested to render an advisory opinion with regard to the necessity for disclosing the foreign origin of ink which is imported from Germany. The ink is imported in 50 liter drums and resold to the consumer in ¾ and 2 ounce bottles.

The opinion advised that in the Commission's view the country of origin of this ink must be disclosed in a clear and conspicuous manner on the bottles in which it is sold and, if the ink is packaged in separate boxes, on the boxes themselves in such a manner as to be readily seen by prospective purchasers. The opinion added that neither directly nor indirectly could it be implied that the ink is manufactured in the United States. (File No. 683 7114, released May 7, 1968.)

No. 243. Receipt of discount in lieu of brokerage by respondent wholesale food distributor.

A wholesale food distributor under order for having violated Section 2(c) of the amended Clayton Act has been advised by the Federal Trade Commission that if he received or accepted a discount offered by one of his suppliers for rendering certain "special services," he would be in violation of order entered against him.

The Commission noted that the 5 percent discount offered to the distributor was equal to commissions normally paid by the supplier to brokers; the services to be rendered by the distributor were services normally performed by brokers in connection with sales to other distributors; other circumstances and statements clearly indicated that both parties to the transaction considered the discount as compensation for elimination of brokerage expense, and the discount therefore amounted to an allowance in lieu of brokerage.

Commissioner Elman did not concur. (File No. C–1201, released May 7, 1968.) (Opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).)

No. 244. Disclosure of foreign origin of nasal cannula required.

The Commission advised a requesting party that a medical device manufactured in a foreign country from domestic designs and made on domestic machinery furnished by the U.S. seller should be marked clearly and conspicuously with the name of the foreign country. The marking could be on the device itself or on the package but in any event the disclosure must be made or attached with such perma-

nence to remain on the product or container until bought by the ultimate purchaser. (File No. 683 7104, released May 15, 1968.)

No. 245. Commission denies approval of proposed joint venture corporation composed of five competing manufacturers to bid on prime contract to furnish products of uniform specification.

The Commission issued an advisory opinion denying approval of a proposed joint venture corporation to be composed of five manufacturers to bid on a large contract that would require more extensive facilities than possessed by any one of them. The actual work on the contract would be performed by the five participating companies and by others on a subcontract basis. The five are now actual or potential competitors.

In the opinion of the Commission, the proposed joint venture corporation composed of the competing companies would appear to be illegal under Federal antitrust laws as a combination to fix prices in contract bids. (File No. 683 7118, released May 15, 1968.)

No. 246. Trade association publication recommending procedures for freight prepayment by manufacturers.

The Commission rendered an advisory opinion informing a trade association of wholesalers that it could not give its approval to a proposal to conduct a study of various policies for prepaying freight being used by manufacturers and to publish the results as a recommended procedure for prepaying freight.

The Association advised that a certain number of manufacturers who sell to its members have a "paid freight" policy whereby they will pay the freight, on one of a number of bases, on orders above a certain quantity which are shipped to the members. Many manufacturers do not have such a policy. Among those that do, there are fifteen to twenty different procedures for handling payment, most of which involve a lapse of time of from sixty days to six months before the wholesaler can collect the allowance. The Association is interested in conducting a study of these practices with the ultimate view of reducing the fifteen or twenty procedures now in effect to perhaps two or three and also to reduce the time period for the recovery of the funds to no more than sixty days, thus eliminating the long period in which capital of the members is tied up in what is supposedly prepaid freight.

The Association stated that these efforts are not in any way intended to coerce manufacturers into giving freight allowances they do not care to give, but are solely to reduce the complexity and cost of doing business. It definitely plans to publish the results as a "recommended procedure for prepaying freight," but does not plan any

efforts to enforce this recommendation or to put any pressure on the manufacturers to adopt the recommendation beyond the simple publication of the results of the study and the recommended procedure.

The Commission advised that even though the study and published recommendation 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 unaccompanied by any intent to force the manufacturers to adopt the policies set forth in the recommendation, there is implicit in such recommendation by the wholesalers 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 manufacturers to conform their pricing policies to the restrictive standards of the recommendation, or at the very least as an invitation to enter into agreements among themselves to do so. The Commission would, however, have no objection to the preparation by the Association of an objective study of these practices for the members of the Association provided the study did not contain any recommendations. (File No. 683 7106, released May 15, 1968.)

No. 247. Disclosure of origin of crib mattresses, etc., made in this country using imported outside covers.

The Commission was requested to render an advisory opinion concerning the proper labeling as to origin of crib mattresses, play pen pads and bumpers which will be manufactured in this country using imported outside covers. The manufacturer advised that the relative manufacturing cost of the imported part to the American parts will be from $\frac{1}{5}$ to $\frac{1}{7}$ and that a comparison of the cost of the imported sheeting to the selling price will run about $\frac{1}{7}$ to $\frac{1}{12}$.

The opinion advised that in the absence of any affirmative representation that these products are made in the United States, or any other representation that might mislead the public as to the country of origin, the Commission is of the opinion that, under the facts as presented, the failure to mark the origin of these goods will not be regarded by the Commission as deceptive. (File No. 683 7105, released May 15, 1968.)

No. 248. Validation of guarantee—time requirement.

The Commission interpreted for a requesting party one aspect of the Commission's Guides Against Deceptive Advertising of Guarantees. These Guides, in general, provide that any guarantee used in advertising shall clearly and conspicuously disclose (a) the nature and extent of the guarantee; (b) the manner in which the guarantor will perform; and (c) the identity of the guarantor.

The language proposed for the guarantee of a product sold by mail was: "If for any reason you are not satisfied with your purchase, return it to us at once . . . ." In the Commission's view the expression "at once" was too vague and accordingly the proposed guarantee did not conform to the Guides.

The Commission approved the proposed guarantee when it was modified to read: "If for any reason you are not satisfied with your purchase, return it to us within x days," "x" being a number of days certain. (File No. 683 7101, released May 15, 1968.)

No. 249. Trade association code providing that members will not advertise sales below cost.

The Commission rendered an advisory opinion informing a trade association that there could be no objection to its proposed "Guide to Ethical Advertising Practices," with the exception of one provision relating to advertising of sales below cost.

The Guide set forth a number of prohibitions of various advertising practices which the Commission deemed to be in accord with applicable law and the Commission also noted that the association did not contemplate any efforts of its own to enforce the Guide, but instead planned to publish it solely for the education and guidance of the members. The one provision questioned by the Commission provided that since below cost pricing is predicated on additional sales, members shall not advertise merchandise or services or a combination of both below their total cost.

The opinion advised that while the mere adoption and dissemination of this Guide by the association may not be considered the equivalent of an agreement not to advertise below cost prices, still if it had the effect of persuading substantial numbers of the members of the association to refrain from so advertising, it would, the opinion stated, raise a serious inference of such an agreement and hence would be of questionable propriety under the antitrust laws. Since sales below cost can be a legitimate method of competition, depending upon the circumstances, any agreement among competitors to refrain from such advertising to that extent restricts competition. Hence, it was stated that any provisions which would have a tendency to bring about that result could not meet with Commission approval.

The Commission further advised that this conclusion would not in any way be altered by the existence of the many State laws on the subject. These laws vary greatly in their coverage and application and, in any event would not provide a legal basis for an agreement among the members of an industry to refrain from the practice in question. (File No. 683 7097, released May 21, 1968.)

No. 250. Formation of local trade associations by statewide trade association.

In an advisory opinion disapproving a proposal by a State trade association desiring to establish a statewide network of local clubs or trade associations in the same industry the Commission advised that, on the basis of presented facts, it was unable to determine with any degree of accuracy their precise purpose and objectives.

The advisory opinion pointed out that the Commission does not generally disapprove the proposed formation of industry groups or trade associations for purposes which are not anticompetitive. If the purpose for such formation is the dissemination of information on local or State legislation, the improvement of individual businesses, or the establishment of sound accounting principles and bookkeeping practices or similar activity, the Commission would voice no objection.

If, however, the purpose or effect of such groups and their policies is the unlawful suppression of competition, the promotion of unlawful price stability or so-called orderly marketing practices, their formation could not be approved under any circumstances.

Since these latter effects would not be inconsistent with the general statement of purpose submitted with the factual presentation, the Commission disapproved the proposal in its present form. (File No. 683 7099, released May 21, 1968.)

No. 251. Disclosure of country of origin of imported fasteners.

The Commission was requested to render an advisory opinion with respect to the necessity for disclosing the country of origin of metal fasteners which will be imported from Japan. The fasteners will either be imported in bulk and repackaged in small cardboard cartons in this country or will be packaged in individual cartons in Japan.

The opinion advised that in the Commission's view the country of origin of these fasteners must be disclosed in a clear and conspicuous manner on the package in which they are sold and that neither directly nor indirectly could the importer imply that they were made in the United States. (File No. 683 7120, released May 21, 1968.)

No. 252. Location of foreign origin disclosure.

Responding to a request for an advisory opinion, the Commission said that the disclosure of the foreign country of origin of imported fishing reels must be made in a location where it would be readily observed by prospective purchasers.

Under the factual situation presented to it in the advisory opinion, the imported fishing reels are plainly marked as to their specific foreign country of origin. It is anticipated, however, that the reels will be packaged for resale in the United States in a vinyl zipper case and

then placed inside a cardboard carton. Information as to the exact manner in which the reels will be displayed at the point of sale was not available.

The question presented to the Commission was whether it would be necessary to make the foreign origin disclosure of the reels on the case or the outside of the cardboard carton, or on both.

After pointing out that it could not give a specific answer as to the exact location of the foreign origin disclosure because it had not been advised of the exact manner in which the reels would be displayed at the point of sale, the Commission stated:

> Whenever an affirmative disclosure of origin is required in order to prevent deception, the general rule is that the marking must be legible and must be placed in a location where it would be readily observed by prospective purchasers making a casual inspection of the merchandise prior to, and not after, the purchase thereof. This means, of course, that if the reels are displayed at the point of sale in a cardboard carton, a conspicuous disclosure would have to be made on the outside of the carton. A similar disclosure would be required on the vinyl case, if the reels are displayed only in the case. On the other hand it follows that the disclosure on the reels would be sufficient, provided that the reels are displayed at the point of sale in such a manner that prospective purchasers could readily observe the disclosure thereon prior to the purchase of the merchandise.

(File No. 683 7121, released May 21, 1968.)

No. 253. Extended credit terms for newly established stores in impoverished urban areas approved.

The Commission advised an apparel manufacturer that under the circumstances described his proposed plan would not likely contravene laws administered by the Commission.

The manufacturer proposes to give extended credit terms to one class of his customers, excluding other classes. Those to whom extended credit are to be given are described as follows:

(1) The business is a newly established business located within an urban, inner core, ghetto-type area,

(2) The proprietor or principal owner of the business is a resident of the urban, inner core, ghetto-type area within which the business is located,

(3) In light of its ownership, management, and location the business stands a reasonable chance of survival.

To such customers the following extended credit terms will be offered:

(1) One year's credit on orders placed during the first month of operation.

(2) Six months credit on all orders placed thereafter.

The extended credit given is to be limited to the first five years of a new store's operations. It was also proposed that such new firms be given on an introductory basis certain in-store and point-of-sale ad-

vertising materials, not to exceed in total value (*i.e.*, cost to the requesting party), the sum of $500.

The Commission felt that there would be little, if any substantial competition between the favored and disfavored customers.

The Commission announced that it would not, currently at least, challenge the requesting party's proposal.

The Commission noted further that if changed circumstances required a change in the Commission's present views, the requesting party would be given ample opportunity, as provided by the Commission's Rules of Practice, to modify or abandon, without penalty, the presently approved proposal.

One year subsequent to the initiation of this program the requesting party was requested to submit to the Commission a report describing the details of the implementation of the plan together with any objections it may have received. (File No. 683 7115, released May 25, 1968.)

No. 254. Operation of exclusive check-cashing concessions in retail stores.

The Commission rendered an advisory opinion to the effect that it would not be illegal for a company to operate a proposed check-cashing program pursuant to which it would function as the check-cashing concessionaire within subscribing retail establishments.

Under the plan as presented, the company would charge check-cashing customers a ten cent fee for all checks drawn for sums greater than the amount of the purchase and would pay to the subscribing retailers a portion of that fee as consideration for the grant of concession rights. The company would assume the entire burden of bad-check risks and collection efforts.

The subscribing retailers and their employees would act as agents of the company by performing the actual check-cashing function, following procedures required by the company utilizing the company's information system. Money used in cashing checks for sums greater than the amount of the purchase would be the retailers' money and the retailers would deposit all checks and fees collected by them in their own banks. Out of the fees so collected and deposited, the subscribers would remit to the company seven cents per check cashed, including checks drawn in the amount of the purchase, although no fee would be charged the customer for such checks. The company would pay the subscriber the full amount of all bad checks and would assume the function and risks of attempting to collect on such checks.

The subscribing retailers would retain the difference between the amount paid the company and the aggregate fees collected as their basic consideration for granting the concession rights and could realize additional consideration from a reserve to be maintained by

the company. The company would run its own credit check of all applicants for and holders of check-cashing courtesy cards, issue cards inscribed with the retailer's name, keep the credit information up to date and operate, using moneys and employees of the subscriber and at locations within subscriber's outlets, check-cashing concessions which would be furnished with on-line telephone reports of information contained in the company's records.

The agreements to be executed with the subscribers would give the company the exclusive check-cashing concession rights within the stores for a period of twenty-four months, subject to an initial right of cancellation by the subscriber at the end of the first five months. The only cost to the subscriber in exercising this latter privilege would be the loss of the initial setup charge paid upon installation of the concession in the store. After the expiration of the twenty-four months period, the agreements would be renewable for one year periods at the option of the parties. The company also advised that to its knowledge no one else is presently engaged in operating such check-cashing concessions.

The company expressed primary concern with two legal issues created by this proposed plan. The first had to do with whether the company's separate agreements with subscribers, each providing for the collection of a ten cent fee, would be deemed a horizontal price-fixing conspiracy. Second, the company inquired as to whether the exclusive aspect of the agreements makes them objectionable under Section 5 of the Federal Trade Commission Act.

With respect to the first question, the opinion advised that in the Commission's view, based upon the facts presented, the only price involved is the company's own price for the service rendered and hence no question of a price fixing agreement should arise. With regard to the second question, the Commission was of the opinion that the time periods involved in these exclusive agreements should not result in unreasonable restraints of trade considering the fact that this is a small company seeking to establish itself in a new field of endeavor where there are no existing competitors and where a substantial outlay of capital and the assumption of considerable risk will be required. Here, the Commission was influenced by the fact that subscribers have the opportunity to terminate the arrangement at the end of the first five months and again at the expiration of the twenty-four months period and that renewals will be for one year periods only.

The Commission also cautioned that this opinion was being rendered in the light of the competitive situation which now exists and that in that light it could see no objection to the form of the agreements and the proposed manner of implementing the program. The Commission could not, of course, forsee in all particulars the impact

of this program upon future competitive conditions which might conceivably require a different view of the exclusive provisions contained therein. (File No. 683 7125, released May 30, 1968.)

No. 255. Misrepresentation as to origin of flatware.

The Commission rendered an advisory opinion today in regard to the proper marking of the origin of flatware which is imported in substantial part. Specifically, the following three questions were ruled upon by the Commission.

First, can flatware which is gold plated in the United States be marketed without disclosing the foreign origin of the imported stainless steel blanks, if it is sold under a trade name consisting of a company name suggesting domestic origin hyphenated with the word "American"? (The gold plating will cost from 30–50 percent of the total cost of the finished product.)

Second, if the trade name referred to above in the first question is not used, will it then be necessary to disclose the foerign origin of the imported stainless steel blanks?

Third, if a disclosure is required, must it be stamped on the flatware itself or can it be placed on a string tag attached to the flatware or on the container?

In response to the first question, the Commission said that the use of the proposed trade name would constitute an affirmative representation, contrary to fact, that the entire product was made in the United States. Since a substantial portion originates in a foreign country, it will then be necessary to clearly disclose the country of origin of the imported stainless steel blanks in immediate connection with the trade name wherever it is used, both in advertising and labeling.

In response to the second and third questions, the Commission said that disclosure of the origin of the imported components would be required even though the company elected not to market the flatware under the proposed trade name. The Commission also stated that the disclosure may be made on the flatware itself, or on a string attached thereto, or on the container, provided the disclosure is of that degree of conspicuity and permanency as will likely be observed by prospective purchasers making a casual inspection of the merchandise prior to, not after, the purchase thereof. (File No. 683 7109, released May 30, 1968.)

No. 256. Use of unqualified word "Diamond" to describe abrasive discs containing other materials.

The Commission was requested to render an advisory opinion concerning the legality of describing abrasive discs or laps containing diamond and other abrasives as "Diamond Discs."

The manufacturer presently produces diamond coating laps which are a single layer of diamond held in a plated nickel bond and uses only diamond as the abrasive. It now plans to produce a companion product line and add another abrasive particle as a filler. For example, it would mix aluminum oxide with the diamond, with the ratio of diamond to aluminum oxide being as low as one to ten and, in any event, the filler would be more than 50 percent.

The opinion advised that in the Commission's view such an abrasive disc or lap could not truthfully be described as simply a "Diamond Disc." The opinion further advised that nothing in the law would prevent use of the word "Diamond" as part of a truthful description of the product, but that if the manufacturer did elect to use it, considering the low percentages of diamond which were contemplated, it should only be used as a part of a full disclosure of all the abrasive materials used, including the percentages of each. (File No. 683 7122, released June 11, 1968.)

No. 257. Legality of trade association suggesting rental rate for containers in which industry products are sold.

The Commission was requested to render an advisory opinion concerning the legality of a trade association suggesting a rental rate for the containers in which the product of the industry is sold if such rate is lower than the standard charge now being made.

The members of the association are engaged in the sale of a product in returnable containers many times the value of the product itself. The practice in the industry today is to charge a daily or monthly rental for the time during which the containers are held beyond thirty days. Some of the members would now like to go to a straight rental and feel the best way to do this would be through the association.

The Commission advised that implementation of this proposal by the association would be likely to result in a violation of law without regard to the ultimate rental set, whether higher or lower than the existing rate. Even though couched in the form of a suggestion, the natural and probable result of such an action would, the opinion stated, be to persuade substantial numbers of the members to charge the rate suggested, thus leaving an almost inescapable inference of an agreement among competitors to charge a common rate. Such an agreement would be a clear restraint of trade under existing law, the Commission added.

It was the Commission's opinion that the rental rates to be charged by the members should be determined by the natural forces of competition, not by concerted activity on the part of the members acting through their trade association or otherwise. (File No. 683 7130, released June 11, 1968.)

No. 258. Promotional assistance plan limited in value to percentage of purchases.

The Commission approved, with modifications, a proposed promotional assistance plan.

The requesting party will be offering cooperative advertising allowances under the program in question for a limited period of time. The dollar value of the allowance offered is to be measured at 12 percent of the dollar value of a particular account's purchases for the calendar year 1967. Certain new accounts will also be able to participate, if they will. The 12 percent limitation for new accounts will be based on an estimate of the annual dollar volume of business reasonably to be expected from such new accounts.

The offer specifically provides for an allowance of 60 cents per unit purchased.

The requesting party will require the following performance from those accepting its offer:

1. The product must be promoted with an advertised price that is below normal shelf price.

2. The ad must be at least 3 column inches.

3. The advertisement must run in all paid circulation newspapers normally used by the Account, and in no event may those newspapers cover less than 75 percent of the Account's marketing area.

4. Eligible advertising must be an integral part of the Account's omnibus advertisement and not set apart from the regular advertisement.

5. Advertisement must run before a specified date.

6. Advertising placed under this agreement will not be accepted as performance under any other cooperative advertising program for the same period.

7. If the account is unable to utilize newspaper advertising, a representative should be contacted to arrange for an alternative proportionately equal method of performance.

Proof of performance under the offer will be required from participants.

Notwithstanding the statement of the requesting party that the offer will be made to "certain" new accounts, the Commission understands that the offer will in fact be made to all entitled customers. Furthermore all customers who in fact compete on the same functional level will be afforded an opportunity to participate whether they buy direct from the requesting party or through an intermediary.

The plan as above outlined was acceptable to the Commission provided promotional funds are not disbursed in excess of the actual cost of the advertising. Without such a limitation larger participants in the promotion, buying in larger quantity, might enjoy a cash overage not

available to smaller competitors thereby occasioning possible violation of Sections 2 (a) and (d) of the amended Clayton Act. (File No. 683 7117, released June 11, 1968.)

No. 259. Commission has no objection to proposed merger of two noncompeting quarry and building materials companies.

The Commission issued an advisory opinion telling applicants it has no objection to their proposed merger.

According to the information submitted in connection with the application for an advisory opinion, the two companies do not sell to the same customers nor do they sell in the same geographic markets in their distribution of certain building materials. Both companies are of modest size. (File No. 683 7126, released June 25, 1968.)

No. 260. Synthetic emeralds.

Responding to a request for an advisory opinion, the Commission took the position that it would be improper to use the term "X Grown Emeralds" as descriptive of synthetic stones.

In expressing the opinion that the proposed phrase would not constitute a proper disclosure of the nature of the product and the fact that it is not a natural stone, the Commission said:

> The conclusion is based upon the belief that most consumers would probably ascribe to the word "grown" its more commonly accepted meaning, namely, one of natural growth, and thus conclude, contrary to fact, that the product is a cultured stone. Under these circumstances, therefore, the Commission is of the opinion that use of the proposed term would not be in compliance with Sec. 5 of the FTC Act because the stones are synthetic, not cultured.

(File No. 683, 7128, released June 25, 1968.)

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