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Jurisdiction is retained so that respondent may at any time hereinafter petition the Commission for construction or modification of this Order which the Commission will consider and, upon proper showing by respondent, allow to the extent it finds such construction or modification to be warranted and consistent with Section 7 of the amended Clayton Act.

IN THE MATTER OF
HMH PUBLISHING CO., INC.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2 (d) OF THE
CLAYTON ACT

Docket 8516. Complaint, June 29, 1962—Decision, Mar. 28, 1963

Order requiring the Chicago publisher of "Playboy" magazine, among others, with sales for 1960 in excess of \$3,500,000, to cease discriminating in price in violation of Sec. 2(d) of the Clayton Act by making payments to certain operators of chain retail outlets in railroad, airport, and bus terminals, and in hotels and office buildings without making comparable payments available to their competitors, and making the payments to the favored customers on the basis of individual negotiations and not on proportionally equal terms.

COMPLAINT

The Federal Trade Commission having reason to believe that the party respondent named in the caption hereof and hereinafter more particularly designated and described, has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent HMH Publishing Co., Inc., is a corporation organized and doing business under the laws of the State of Illinois, with its office and principal place of business located at 232 East Ohio Street, Chicago, Illinois. Said respondent, among other things, has been engaged and is presently engaged in the business of publishing and distributing various publications including magazines under copyrighted titles including "Playboy". Respondent's sales of publications during the calendar year 1960 exceeded three and one-half million dollars.

PAR. 2. Publications published by respondent are distributed by respondent to customers through its national distributor, Independent News Co., Inc., hereinafter referred to as Independent News.

Independent News has acted and is now acting as national distributor for the publications of several independent publishers, including respondent publisher. Independent News, as national distributor of publications published by respondent and other independent publishers, has performed and is now performing various services for these publishers. Among the services performed and still being performed by Independent News for the benefit of these publishers are the taking of purchase orders and the distributing, billing and collecting for such publications from customers. Independent News also had participated in the negotiation of various promotional arrangements with the retail customers of said publishers, including said respondent.

In its capacity as national distributor for respondent in dealing with the customers of respondent, Independent News served and is now serving as a conduit or intermediary for the sale, distribution and promotion of publications published by respondent. "Playboy" is among the most popular and widely circulated magazines in the United States and is distributed throughout various States by Independent News through local distributors to retail customers.

PAR. 3. Respondent, through its conduit or intermediary, Independent News, has sold and distributed and now sells and distributes its publications in substantial quantities in commerce, as "commerce" is defined in the Clayton Act, as amended, to competing customers located throughout various States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of its business in commerce, respondent has paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished, or contracted to be furnished, by or through such customers in connection with the handling, sale, or offering for sale of publications sold to them by respondent. Such payments or allowances were not made available on proportionally equal terms to all other customers of respondent competing in the distribution of such publications.

PAR. 5. As an example of the practices alleged herein, respondent has made payments or allowances to certain retail customers who operate chain retail outlets in railroad, airport and bus terminals, as well as outlets located in hotels and office buildings. Such payments or allowances were not offered or otherwise made available on proportionally equal terms to all other customers (including drug chains, grocery chains and other newsstands) competing with the favored customers in the sale and distribution of the publications of respondent publisher. Among the favored customers receiving payments in 1960, and during the first six months of 1961, which were not offered to other

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competing customers in connection with the purchase and sale of respondent's publications were:

Customer	Approximate Amount Received	
	1960	1961 (Jan.-June)
ABC Vending Corp., Long Island City, N.Y.-----	\$1,715.84	\$950.72
Faber-Coe & Gregg, New York City-----	1,616.43	3,517.64
Greyhound Post Houses, Forest Park, Ill.-----	5,371.10	7,118.20
Interstate Co., Los Angeles, Calif.-----	657.30	1,280.63
Union News Co., New York City-----	30,742.63	20,168.41

Respondent made said payments to its favored customers on the basis of individual negotiations. Among said favored customers such payments were not made on proportionally equal terms.

PAR. 6. The acts and practices of respondent as alleged above are in violation of the provisions of subsection (d) of Section 2 of the Clayton Act, as amended.

Mr. Stanley M. Lipnick for the Commission.

Mr. G. Duane Vieth and *Mr. Stuart J. Land*, of *Arnold, Fortas & Porter*, of Washington, D.C.,

Mr. Maurice Rosenfield, of Chicago, Ill. for respondent.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

FEBRUARY 5, 1963

The complaint herein was issued by the Commission on June 29, 1962, wherein the respondent is charged with having made discriminatory payments to some of its customers in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. The respondent filed its answer on September 4, 1962, admitting in part and denying in part the allegations of the complaint and asserted an affirmative defense that any payments made by it were granted to meet equal and comparable payments of one or more of its competitors. On September 11, 1962, counsel for the parties met with the hearing examiner for a prehearing conference and an order was issued reciting the results of the conference. The order contained a directive to each party to prepare a trial brief setting forth a statement of anticipated issues and disclosing, among other things, the names of the witnesses and the documentary exhibits which the party plans to introduce. The order further provided that a party may not introduce any testimony or exhibits which have not been referred to in his trial brief. Complaint counsel was to submit his trial brief on or before October 1, 1962, and the respondent on or before October 22, 1962. Complaint counsel complied with such directive and submitted a trial brief which was prepared in a commendable manner.

A motion of respondent that the time to file its trial brief be extended to November 9, 1962, was granted. On November 9, 1962, respondent filed a motion for leave to withdraw the answer to the complaint filed on September 4, 1962, and to file a substitute answer submitted with the motion. The substitute answer read: "Pursuant to Section 4.5 (b) (2) of the Commission's Rules of Practice, respondent admits all material allegations of the complaint. Respondent reserves the right to submit proposed findings and conclusions and the right to petition for review under Section 4.20 of the Rules of Practice."¹ Complaint counsel filed answer to the motion wherein he did not oppose respondent's motion to file the substitute answer with the reservation that such answer should not foreclose him from putting into the record evidence relating to the scope of the order which should be issued.

On November 20, 1962, counsel for the parties again met with the hearing examiner, at which time the hearing examiner announced that he would issue an order granting leave to the respondent to file the substitute answer. Thereupon complaint counsel stated that he wished to present certain evidence which would bear upon the scope of an order to be entered herein. Respondent's counsel opposed the request. After some discussion, it was agreed that complaint counsel would file a motion requesting that the matter be set for hearing for the stated purpose and respondent would be given the opportunity to file answer to such a motion. At the conference, complaint counsel stated specifically the type of evidence that he intended to present and the meeting was adjourned with the understanding that counsel for the parties would confer with the view of attempting to enter into a stipulation which would make it unnecessary to have any hearings in this proceeding. An order was entered granting leave to respondent to file the aforementioned substitute answer. There was submitted to the hearing examiner a stipulation, dated November 23, 1962, executed by counsel for the parties and on November 29, 1962, an order was issued receiving the said stipulation into the record herein, closing the record for the receipt of evidence and fixing January 4, 1963, and January 21, 1963, for the filing of proposed findings and replies thereto, respectively. Proposed findings of fact, conclusions of law and order were filed by counsel for the parties.

The hearing examiner has given consideration to the proposed

¹ Section 4.5(b)(2) of the Commission's Rules reads:

"(2) *Admitting allegations of complaint.* If the respondent elects not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that respondent admits all material allegations to be true. Such an answer shall constitute a waiver of hearings as to facts so alleged, and an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding shall be issued by the hearing examiner. In such answer, the respondent may, however, reserve the right to submit proposed findings and conclusions and the right to petition for review under § 4.20."

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findings filed by the parties hereto and all findings of fact and conclusions not hereinafter specifically found or concluded are herewith rejected. Upon consideration of the entire record herein, the hearing examiner makes the following findings of fact and conclusions:

The material allegations of the complaint in this proceeding, which are admitted by the respondent in its substitute answer, read:

PARAGRAPH ONE: Respondent HMH Publishing Co. Inc., is a corporation organized and doing business under the laws of the State of Illinois, with its office and principal place of business located at 232 East Ohio Street, Chicago, Illinois. Said respondent, among other things, has been engaged and is presently engaged in the business of publishing and distributing various publications including magazines under copyrighted titles including "Playboy". Respondent's sales of publications during the calendar year 1960 exceeded three and one-half million dollars.

PARAGRAPH TWO: Publications published by respondent are distributed by respondent to customers through its national distributor, Independent News Co., Inc., hereinafter referred to as Independent News.

Independent News has acted and is now acting as national distributor for the publications of several independent publishers, including respondent publisher. Independent News, as national distributor of publications published by respondent and other independent publishers, has performed and is now performing various services for these publishers. Among the services performed and still being performed by Independent News for the benefit of these publishers are the taking of purchase orders and the distributing, billing and collecting for such publications from customers. Independent News also had participated in the negotiation of various promotional arrangements with the retail customers of said publishers, including said respondent.

In its capacity as national distributor for respondent in dealing with the customers of respondent, Independent News served and is now serving as a conduit or intermediary for the sale, distribution and promotion of publications published by respondent. "Playboy" is among the most popular and widely circulated magazines in the United States and is distributed throughout various States by Independent News through local distributors to retail customers.

PARAGRAPH THREE: Respondent, through its conduit or intermediary, Independent News, has sold and distributed and now sells and distributes its publications in substantial quantities in commerce, as "commerce" is defined in the Clayton Act, as amended, to competing customers located throughout various States of the United States and in the District of Columbia.

PARAGRAPH FOUR: In the course and conduct of its business in commerce, respondent has paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished, or contracted to be furnished, by or through such customers in connection with the handling, sale, or offering for sale of publications sold to them by respondent. Such payments or allowances were not made available on proportionally equal terms to all other customers of respondent competing in the distribution of such publications.

PARAGRAPH FIVE: As an example of the practices alleged herein, respondent has made payments or allowances to certain retail customers who operate chain retail outlets in railroad, airport and bus terminals, as well as outlets located in hotels and office buildings. Such payments or allowances

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were not offered or otherwise made available on proportionally equal terms to all other customers (including drug chains, grocery chains and other news-stands) competing with the favored customers in the sale and distribution of the publications of respondent publisher. Among the favored customers receiving payments in 1960, and during the first six months of 1961, which were not offered to other competing customers in connection with the purchase and sale of respondent's publications were:

Customer	<u>Approximate Amount Received</u>	
	1960	1961 (Jan.-June)
ABC Vending Corp., Long Island City, N.Y.-----	\$1,715.84	\$950.72
Faber-Coe & Gregg, New York City-----	1,616.43	3,517.64
Greyhound Post Houses, Forest Park, Ill.-----	5,371.10	7,118.20
Interstate Co., Los Angeles, Calif.-----	657.30	1,280.63
Union News Co., New York City-----	30,742.63	20,168.41

Respondent made said payments to its favored customers on the basis of individual negotiations. Among said favored customers such payments were not made on proportionally equal terms.

PARAGRAPH SIX: The acts and practices of respondent as alleged above are in violation of the provisions of subsection (d) of Section 2 of the Clayton Act, as amended.

By stipulation of November 23, 1962, entered into by counsel supporting the complaint and counsel for respondent, it was agreed that the evidentiary record herein, in addition to the complaint and the substitute answer, shall include the following:

1. Respondent made the following payments to the following persons in addition to the payments listed in Paragraph 5 of the Complaint. The payments were made on substantially the same terms applicable to the payments listed in the said Paragraph 5:

	<u>Approximate Amount Received July 1961 to July 1962</u>
ABC Vending Corp., Long Island City, New York-----	\$2,097.04
Union News Co., New York, New York-----	56,300.16

2. The Federal Trade Commission has never issued a cease-and-desist order against Respondent under Section 2(d) of the Clayton Act or under any other statute administered by the Commission. Prior to the Complaint herein, no complaint charging a violation of any of such statutes had been issued against Respondent.

The sole question involved is the appropriate order to be entered herein. In the complaint, there is set forth the form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint. Counsel in support of the complaint proposes such order. It reads:

IT IS ORDERED that respondent HMH Publishing Co., Inc., a corporation, its officers, employees, agents and representatives, directly or through any corporate or other device, in connection with the distribution, sale or offering for sale of publications including magazines in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

Paying or contracting for the payment of an allowance or anything of value

to, or for the benefit of, any customer as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the handling, offering for sale, sale or distribution of publications including magazines published, sold or offered for sale by respondent, unless such payment or consideration is affirmatively offered and otherwise made available on proportionally equal terms to all of its other customers competing with such favored customer in the distribution of such publications including magazines.

The word "customer" as used above shall be deemed to mean anyone who purchases from HMH Publishing Co., Inc., acting either as principal or agent, or from a distributor or wholesaler where such transaction with such purchaser is essentially a sale by such respondent, acting either as principal or agent.

In the instant case, the facts are found to be as alleged in the complaint. It is the opinion of the hearing examiner that under such circumstances it is incumbent upon him to adopt the order proposed by the Commission unless he can find or the parties can demonstrate the impropriety of any of its provisions.

Respondent proposes that the following order be issued:

IT IS ORDERED that Respondent HMH Publishing Co., Inc., a corporation, its officers, employees, agents and other representatives, directly or through any corporate or other device, in connection with the distribution, sale or offering for sale of "Playboy" magazine in commerce, as commerce is defined in the amended Clayton Act to forthwith cease and desist from:

Paying or contracting for the payment of any allowance or anything of value to or for the benefit of any customer who operates chain retail outlets in railroad, airport or bus terminals, and hotels or office buildings, or similar locations, as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the handling, offering for sale, sale or distribution of "Playboy" magazine, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such magazine.

The respondent's objections to particular provisions of the order proposed by counsel in support of the complaint present the following questions:

- (1) Whether the order should apply to all publications distributed, sold or offered for sale by respondent, or only to "Playboy" magazine.
- (2) Whether the order should prohibit discriminatory allowances in favor of any customer, or only in favor of a customer who operates chain retail outlets in railroad, airport or bus terminals, and hotels or office buildings, or similar locations.
- (3) Whether any allowances paid by respondent must be affirmatively offered and otherwise made available to all competing customers, or whether they must merely be made available.
- (4) Whether the order should include a definition of the word "customer" or whether no such definition should be included.

The respondent in objecting to the inclusion of all "publications" sold or offered by respondent and in advocating that the order be re-

stricted to "Playboy" magazine, in its brief in support of its proposed findings, had this to say:

The Complaint in this proceeding alluded specifically only to Respondent's principal publication, "Playboy" magazine, which the Complaint acknowledged to be one of the "most popular and widely circulated magazines in the United States." The Commission has ruled that an order now issued in Section 2(d) proceedings should be limited to the category of products specifically challenged in the proceeding, rather than to extend to all products made by a respondent. See *Vanity Fair Paper Mills, Inc.*, Docket No. 7720 (decided March 21, 1962) (order restricted to "paper products" and reference to "other merchandise" eliminated) and *Quaker Oats Co.*, Docket No. 8119 (decided April 25, 1962) (order restricted to "cat food and related products").

In the complaint it is stated that the violations were committed "in connection with the handling, sale, or offering for sale of publications sold to them by respondent" and there is nothing in this record to establish that the violations were limited to the sale of "Playboy" magazine. In *Vanity Fair* [60 F.T.C. 568, 573], the order contained in the initial decision related broadly to "paper products or other merchandise." The facts therein, as stipulated, disclosed that respondent manufactured and sold "household paper products." The record did not reveal whether respondent made or sold any other products so the Commission struck the words "or other merchandise" from the initial decision of the hearing examiner. However, the Commission refused to limit the order to "household paper products" as requested by the respondent therein but made it apply to "paper products" although the latter is more comprehensive than the former. This was held proper by the United States Court of Appeals for the Second Circuit [7 S. & D. 583] (CCH 1962 Trade Cases p. 70, 569). In the opinion of the Commission in *Vanity Fair* [60 F.T.C. 577], which is regarded as a guiding light in the framing of Section 2(d) orders, it is said:

It must be remembered that a cease and desist order of the Federal Trade Commission does not punish or impose compensatory damages for past acts. Its purpose is to prevent illegal practices in the future. Thus, where a violation has been uncovered, it is reasonable and necessary that the order, if it is to have the desired preventative effect, be broad enough so that its terms may not be easily evaded. This proposition is supported by a long line of cases, including *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470 (1952); *E. Edelmänn & Company v. Federal Trade Commission*, 239 F. 2d 152, 156 (7th Cir. 1956), *cert. denied* 355 U.S. 941 (1958); *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 428-429 (1957); *Federal Trade Commission v. Mandel Brothers, Inc.*, 359 U.S. 385, 392 (1959); *P. Lorillard Company v. Federal Trade Commission*, 267 F. 2d 439, 445 (3rd Cir. 1959), *cert denied* 361 U.S. 923 (1959), and many others.

Notwithstanding this authority, the 1959 amendments to the Act, which will govern the enforcement of this order, introduce a new factor to be considered in the formulation of orders. The Supreme Court in its recent opinion in

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Federal Trade Commission v. Henry Broch & Company, 30 LW 4105 (January 15, 1962), stated that the severity of possible penalties prescribed by the amendments for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application. See also, *Swanee Paper Corporation v. Federal Trade Commission*, 291 F. 2d 833 (2nd Cir. 1961).

The opinion further stated [60 F.T.C. 578]:

Orders under the Clayton Act should be made as definitive as possible, but the fact remains that Section 2(d) of that Act is in itself a very narrow definition of an illegal trade practice. The court in *P. Lorillard Company v. Federal Trade Commission*, *supra*, observed that Section 2(d) is much narrower in scope than Section 2(a). Because Section 2(d) covers a limited area in which forms of violations are like or related, it appears that in most circumstances a Section 2(d) order should not be confined to the exact forms of the violations found. In *Shulton, Inc.*, Docket No. 7721 (July 25, 1961), a Section 2(d) case, we rejected an argument for limiting the order, stating that the narrow order requested would be virtually worthless since it would do little more than prohibit respondent from engaging in the illegal practice by the same means previously employed. The narrow order requested in this proceeding as to the forms of violations to be prohibited would be objectionable for the same reason.

In the opinion of the Commission in *Quaker Oats* [60 F.T.C. 798, 807], it is said:

The Commission's view on the framing of Section 2(d) orders in light of the amendments to Section 11 of the Clayton Act (Public Law 86-107, 86th Cong. 73 Stat. 243), and recent court decisions involving this question is set forth in detail in our opinion in *Vanity Fair Paper Mills, Inc.*, Docket No. 7720.

The order therein is explained [60 F.T.C. 807, 808]:

We believe that the limitation in this order to "cat food and related products" is fully justified. The Quaker Oats Company conducts the grocery trade portion of its business through two divisions: the Coast Fisheries Division and the Grocery Products Division. The Coast Fisheries Division produces and markets Puss 'n Boots Cat Food only. The Grocery Products Division markets a number of packaged products but it does not sell Puss 'n Boots Cat Food. There are many differences in the distribution systems between the two divisions. The violation found consisted of a \$250.00 payment by the Coast Fisheries Division to the Benner Tea Company. In the particular circumstances of this case, we see no reason for extending the scope of the order to products other than those marketed by the Coast Fisheries Division, i.e. cat food, and to products related to cat food. Cf. *The Bankers Securities Corporation v. Federal Trade Commission*, 297 F. 2d 403, 30 LW 2294 (3rd Cir. 1961).

Respondent argues that the impropriety of making the order applicable to payments made by respondent to "any customer" is clearly established by the Commission's decision in *Transogram Company, Inc.*, Docket No. 7978 [61 F.T.C. 629] (Opinion dated September 1962). There is nothing in the cited case which would merit such a

conclusion. In the opinion of the Commission therein, it is said [61 F.T.C. 701]:

The reason for the Commission's reference to the facts in each case is simple. The purpose of an order is to prevent statutory violations, the occurrence of which in the future appears likely on the basis of reasonable inference from events that have already taken place. This does not mean that the Commission is so tightly bound to the facts that it must disregard accumulated experience, or that it must draft its prohibitions so narrowly that only the precise acts previously undertaken by a respondent are proscribed for the future. It does mean that our objective in drafting orders must be to restrain unlawful acts and practices "whose commission in the future, unless enjoined, may fairly be anticipated from the [respondent's] conduct in the past." *National Labor Relations Board v. Express Publishing Co.*, 312 U.S. 426, 435.

It is further said [61 F.T.C. 702]:

The argument, advanced by some of the respondents, that the order should apply only to publications of jobber customers is untenable. The distinctive feature in this case is the mode of advertising, not the class of customer by whom that advertising facility was provided. There is no basis, either in logic or in the record, for supposing that an offer by, say, a retail customer, or group of retail customers, to furnish respondents with space in an advertising catalogue would have been turned down on the ground that it came from retailers rather than from jobbers. Nor is there merit to the claim that a limitation to jobber customers is required by the need for specificity in the order's provisions. This need is satisfied by narrow and precise definition of the practice involved. An offer to engage in that practice will be recognizable no matter what kind of customer makes it.

And following the last quoted paragraph, there is reference to a note reading [61 F.T.C. 702]:

Federal Trade Commission v. Henry Broch & Co., 368 U.S. 360. There the respondent, a broker, carried a variation of the customer-limitation argument to the extreme of requesting that the order be applied to two named buyer and seller clients. The Supreme Court rejected this contention, stating that the Commission did not exceed its discretion in banning repetitions of the violation in connection with transactions involving *any* seller and buyer.

The respondent considers the provision prohibiting respondent from making a payment which is not "affirmatively offered and otherwise made available" to competing customers as being unusual and unique and it goes on to state that such a requirement goes far beyond the terms of Section 2(d) which direct only that the payments be "made available" to competing customers.

The Commission has held in a number of cases that a customer must be informed of an allowance before it can be deemed to be available. In *Kay Windsor Frocks, Inc., et al.*, 51 F.T.C. 89, 95 (1954), in rejecting respondents' contention that the hearing examiner erred in concluding in effect that the Act requires that sellers must inform customers as to the terms under which they may receive compensation for

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services or otherwise offer such credits when they have been made available to sellers competing with such customers, the Commission stated:

Although the word "available" rather than "offered" appears in the relevant subsection of the Act, the statute contemplates that customers competing in the resale of a seller's merchandise be afforded equal opportunity to share in payments for promotional services in the event the seller elects in the first instance to provide it to one of their competitors. A course of conduct under which a seller fails to inform respecting such compensation or make known his terms or otherwise to offer them to one customer while granting payment for services to his rival reseller essentially represents concealment. In such case, the credit or allowance is not "available" to the unfavored competitor, for all practical purposes a withholding and denial of opportunity to share occur, and the law is violated.

In *Henry Rosenfeld, Inc., et al.*, 52 F.T.C. 1535, 1548 (1956), the Commission said:

The respondents' advertising allowances have not been granted by them on proportionally equal terms to their competing customers; and there is clear record showing that their failure to inform all accounts as to the terms under which allowances were being accorded has deprived those so disfavored of equal competitive opportunities in reselling the dresses. It follows, therefore, that respondents' promotional allowances were unavailable, as a matter of law, among competing customers. Under the Act, an allowance cannot be deemed "available" to a reseller, and a denial of opportunity to share therein occurs, when a seller fails to inform or otherwise offer promotional allowances to a customer while granting such payments for similar services to the reseller's rivals. In *the Matter of Kay Windsor Frocks, Inc., et al.*, Docket No. 5735.

In *Chestnut Farms Chevy Chase Dairy*, 53 F.T.C. 1050, 1059, 1060 (1957), it is said:

The Commission's interpretation of the word "available" used in Section 2(d) as requiring an offer has been clearly expressed in the matters of *Kay Windsor Frocks, Inc., et al.*, Docket No. 5735, and *Henry Rosenfeld, Inc., et al.*, Docket No. 6212. It is that, under the Act, an allowance cannot be deemed "available" to a reseller, and a denial of opportunity to share therein occurs, when a seller fails to inform or otherwise offer promotional allowances to a customer while granting such payments for similar services to the reseller's rivals.

It is further stated:

Once a seller determines upon a plan of advertising allowances, the plan must be affirmatively made known to every customer. Whether or not a customer participates therein is a decision for the customer. The customer obviously must know the specific terms of a plan before he can determine whether he is interested in participating. In this respect the seller's offering of a plan serves a worthwhile purpose.

In the initial decision in *Exquisite Form Brassiere, Inc.*, Docket No. 6966 [57 F.T.C. 1036, 1039], adopted by the Commission on October 31, 1960, it is said:

It is settled law, and indeed respondent's counsel concedes, that the term "available" as used in § 2(d) means that the payment must be offered, and the terms made known, to all competing customers.

The foregoing pronouncements interpreting the statutory term "available" leave no doubt that an affirmative offering to each and every competing customer must be made by the seller once the latter decides to grant advertising allowances to any. It should be apparent that respondent's objections to the use of the words "affirmatively offered" are groundless, in that it does not involve any obligation on the respondent which is not imposed by the statute as construed by the Commission.

Respondent contends that the concluding paragraph of the order proposed by counsel supporting the complaint, which defines the word "customer," should be deleted for the reason that it goes far beyond the terms of Section 2(d), its inclusion is completely unjustified on this record and the definition is so vague as to be virtually meaningless. The hearing examiner is unable to follow the respondent's reasoning in this connection. As disclosed by the complaint, the respondent sells its publications through Independent News which acts in the capacity as national distributor for respondent in dealing with the customers of respondent. The purpose of the definition is to include within the term "customer" the type of customer referred to in the complaint.

CONCLUSIONS

1. The acts and practices of respondent, as described hereinbefore, are in violation of the provisions of subsection (d) of Section 2 of the Clayton Act, as amended.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.
3. The order proposed by counsel supporting the complaint is appropriate in this proceeding.

ORDER

It is ordered, That respondent HMH Publishing Co., Inc., a corporation, its officers, employees, agents and representatives, directly or through any corporate or other device, in connection with the distribution, sale or offering for sale of publications including magazines in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

Paying or contracting for the payment of an allowance or anything of value to, or for the benefit of, any customer as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the handling, offering for sale, sale or distribution of publications including magazines published, sold or offered for sale by respondent, unless such payment or consideration is affirmatively offered and

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otherwise made available on proportionally equal terms to all of its other customers competing with such favored customer in the distribution of such publications including magazines.

The word "customer" as used above shall be deemed to mean anyone who purchases from HMH Publishing Co., Inc., acting either as principal or agent, or from a distributor or wholesaler where such transaction with such purchaser is essentially a sale by such respondent, acting either as principal or agent.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF
COMPLIANCE

Pursuant to Section 4.19 of the Commission's Rules of Practice, effective June 1, 1962, the initial decision of the hearing examiner shall on the 28th day of March 1963, become the decision of the Commission; and, accordingly:

It is ordered, That respondent herein shall, within sixty (60) days after service upon it of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with the order to cease and desist.
