connection with the importation and sale by respondent's competitors of mohair sweaters from Italy.

OPINION OF THE COMMISSION

This matter is before the Commission on the hearing examiner's certification of two requests of respondent for subpoenas: (1) a request for subpoenas ad testificandum filed July 22, 1965 and (2) a request for a subpoena duces tecum filed August 12, 1965. The Commission also has before it a motion, filed July 27, 1965, to strike the hearing examiner's certification of the request for subpoenas ad testificandum. Commission counsel, on August 2, 1965, filed an answer in opposition to respondent's request for subpoenas ad testificandum and to respondent's motion to strike the certification. Respondent filed a reply thereto August 23, 1965.

Respondent's first request was for subpoenas ad testificandum directed to three employees of the Federal Trade Commission and two employees of the United States Customs Service (Bureau of Customs, Treasury Department). The second request was for a subpoena duces tecum, which would require the Secretary of the Commission to appear and produce the following documents:

1. All memoranda or other documents transmitted to the Commission by the staff of its Bureau of Textiles and Furs relating to any investigation of any company importing mohair-blend sweaters from Italy for sale in the United States where said staff recommended closing of the file after developing evidence indicating that the company under investigation had mislabeled said mohair-blend sweaters.

2. All investigative records, including attachments, submitted by Albert Posnick, Charles T. Rose and/or Robert Scott relating to mohair-blend sweaters imported from Italy in connection with their investigation *In the Matter of R. H. Macy & Co., Inc.*, Docket No. 8650 [72 F.T.C. 894].

The only justification stated in the request for the subpoenas ad testificandum is the very general statement that it is "necessary in order to establish respondent's defenses to the charges in the complaint." The same justification is mentioned in the request for subpoena duces tecum, with the additional particularization that "the subpoenaed documents are probative of the allegations in paragraphs 8, 9 and 10 of respondent's Answer filed May 17, 1965." These paragraphs relate primarily to respondent's contention that the Commission has discriminated against it and in favor of its competitors in the enforcement of the Wool Products Labeling Act.

The hearing examiner, in certifying the application for subpoenas ad testificandum, concluded that some of the information sought, such as the Commission's administration of the law with respect to competitors and the advice and recommendations by the Commission staff to the Commission in connection with the labeling of

mohair sweaters imported from Italy (the product involved in this proceeding) is irrelevant or privileged. The hearing examiner, however, recommended that the Commission staff members should be subpoenaed for the limited purpose of testifying as to respondent's alleged efforts to voluntarily correct the charged violations and other general matters.

In certifying the application for subpoena duces tecum, the examiner concluded that the documents concerning the Commission's administration of the law with respect to competitors of respondent should not be received in this proceeding and he recommended that the requested subpoena not be authorized.

The first question to be considered will be the application for subpoenas addressed to Commission employees. The hearing examiner pointed out in his certification of the request for subpoenas ad testificandum that it was made clear during the prehearing conference respondent's counsel desired not only the testimony of Commission employees but also documents from the Commission files. Since respondent has now requested the production of documents from the Commission files, it is clear that respondent is seeking both testimony and documents; moreover, a more definite statement has been made as to the purpose for such production.

The authority of the hearing examiner to issue the subpoenas requested is not here in question. However, in situations such as are involved here, the examiner is not authorized to require a witness, after he takes the stand, to testify to, or to disclose, information designated by § 1.133 of the Commission's Rules of Practice as confidential, nor is he authorized to order the production of confidential documents in the Commission files. The procedure to be followed by a party desiring the release of confidential information is to make application to the Commission pursuant to § 1.134 of the Rules. *Postal Life and Casualty Insurance Company*, Docket No. 6276, order issued January 10, 1956 [52 F.T.C. 651]. The Commission may, upon good cause shown, direct that the confidential information requested be disclosed to the applicant. Where the request is made during the course of a proceeding before the hearing examiner, as here, the Commission will treat it as an application under § 1.134. The procedure to be followed in such a case has been clearly set out in prior Commission matters, *e.g.*, *L. G. Balfour Company*, Docket No. 8435, orders issued October 5, 1962 [61 F.T.C. 1491] and May 10, 1963 [62 F.T.C. 1541]. This in general requires that the examiner, who is in possession of a firsthand and detailed knowledge of the facts, make the initial determination on whether or not good cause has been shown and to thereafter certify the question to the Commission with his recommendation.

The procedure so outlined has been followed in this case; however, respondent, asserting that the examiner must issue a subpoena ad testificandum upon request, has attempted no specific justification in its application for subpoenas ad testificandum. Its position, essentially, is that the Commission, and the examiner on authority delegated from the Commission, have no discretion concerning the granting of a subpoena ad testificandum. This we reject, because it is clear that administrative agencies may exercise discretion as to the granting of subpoenas to the extent of requiring a statement or showing of general relevance and the reasonable scope of the evidence sought. Section 6(c), Administrative Procedure Act. Courts, both prior to and after the enactment of the Administrative Procedure Act, have held that the Commission has a quasi-judicial discretion concerning the granting of applications for subpoenas. *E. B. Muller & Co.* v. *Federal Trade Commission*, 142 F. 2d 511 (6th Cir. 1944); *Independent Directory Corp.* v. *Federal Trade Commission*, 188 F. 2d 468 (2d Cir. 1951).

Respondent, on its motion to strike, requests the Commission to direct the issuance of the subpoenas ad testificandum and presumably to defer resolution of the issue as to the propriety of the questions to be asked of the witnesses until the time of the return date of these subpoenas. It would be a vain act for the Commission to resolve this issue piecemeal. Since these subpoenas are admittedly requested to search for the same information which is sought by respondent's subpoena for documents, we will treat the two requests together at this time. For the purpose of this motion, therefore, we reject respondent's argument that in this situation the Commission cannot refuse to authorize issuance of the subpoenas ad testificandum.

Respondent's claim to broad access to information respecting the internal operations of the Commission is grounded on its asserted need to prove its defense contained in paragraphs 8-10 of its Answer that "The Commission has openly discriminated against respondent and in favor of its competitors in the enforcement of the Wool Products Labeling Act, and has arbitrarily, unfairly and inequitably administered the statute." The claimed factual basis for this charge is that the Commission rejected respondent's offer "to comply with any procedure proscribed by the Commission for accurately labeling Italian mohair-blend sweaters which would also be applicable to its major competitors," and that the Commission made certain administrative compliance procedures available to respondent's competitors which were not made available to respondent for the same violations.

Respondent also claims, somewhat inconsistently with its asserted offer to comply with any Commission-imposed labeling procedures

applied to its competitors, that the standards of labeling which the Commission permitted respondent's competitors to follow is expressly contrary to the statute and are, in respondent's opinion, "substantially inferior to [labeling] procedures adopted by respondent." It is this alleged "failure" by the Commission to proceed in an identical fashion against all companies assertedly violating the wool labeling statute with respect to mohair sweaters which respondent claims in its answer "is contrary to the public interest, unfair harassment of respondent and a denial of due process." In its reply brief, respondent additionally charges, as we understand its statement, that the Commission has exercised a "bias" and has "intentionally" discriminated against it.

Thus, the only showing which respondent has made to support its discovery request is that respondent has been treated differently from its competitors. But this, without more, does not amount to the "bias" and the "intentionally" discriminatory action which respondent claims as a basis for its request. All that the respondent is challenging in effect is the Commission's authority to exercise its discretion in the issuance of a complaint in this matter while administratively closing investigations in other matters with related charges. The Commission, however, is vested with discretion in bringing a complaint. *Moir* v. *Federal Trade Commission*, 12 F. 2d 22, 28 (1st Cir. 1926). It has the administrative discretion to decide whether or not to proceed against individual respondents or on an industry-wide basis, and it alone is "empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress." *Moog Industries* v. *Federal Trade Commission*, 355 U.S. 411, 413 (1958). Also, respondent has no "right" to the administrative treatment it here apparently seeks. *Coro, Inc.* v. *Federal Trade Commission*, 338 F. 2d 149 (1st Cir. 1964). Clearly, an assertion of a difference in treatment alone does not create an issue of the denial of due process.

Respondent's claim of alleged difference of treatment does not create or even suggest any inference or even a suspicion that the Commission's action was in any way the result of discrimination or bias, conscious or unconscious, intentional or unintentional. The mere assertion of such a plea, without more, cannot enable a respondent to interrogate Commission employees or to rummage through investigative reports and staff memoranda in the hope that something will turn up to support the claim. In *Coro, Inc.* v. *Federal Trade Commission*, *supra*, respondent asserted error in the Commission's denial of their application for a subpoena seeking records from the Commission's files under circumstances somewhat similar to those in this proceeding. Respondents in that case asserted that

the refusal by the Commission to dispose of their case by stipulation was arbitrary and capricious and that they could prove this only by a general exploration of the Commission's action in other cases. The court held, however, that subpoenas are not issued on bare suspicion and that they are "not licenses for extended fishing expeditions in waters of unknown productivity in the vague hope of 'catching the odd one'." *Id.* at 153.

Finally, it should be pointed out that the files in question, to the extent they exist, will ordinarily contain a variety of documents, all relating to the internal operations of the Commission, such as letters of complaint, reports on investigations, staff memoranda with advice and recommendations to the Commission, Commission directives and other like working documents. Not only will some of these records contain strictly privileged information such as trade secrets, they will primarily be the "work product" of the Commission's staff. Documents of this kind, *i.e.*, those in the work product category, are the essence of the internal administrative process, and they are ordinarily privileged against disclosure in an adjudicative proceeding.

The hearing examiner, in certifying the question of the issuance of the subpoenas ad testificandum to the Commission, stated, as indicated above, that the asserted efforts of the respondent to cooperate with the Commission might be a proper subject of inquiry in connection with the need for or scope of the order if one should be entered. Such evidence, however, can be readily developed by the testimony of respondent's own representatives and without calling the Commission witnesses.

In all of the circumstances, we conclude that respondent has not shown good cause for the release of confidential information as required by § 1.134 of the Commission's Rules of Practice and has not otherwise shown itself to be entitled to the issuance of the subpoenas which it is seeking.

As indicated above, respondent's request for subpoenas ad testificandum include subpoenas directed to two employees of the United States Customs Service. Respondent has made no attempt to justify the issuing of such subpoenas other than to state that it is necessary to establish its defenses to the charges in the complaint. The examiner's authority to issue subpoenas to officers or employees of other Government agencies is not here in question. However, as with any subpoena, he has discretion in the granting or denying of such applications. The Commission's policy in this connection is that the examiner first certify the question to the Commission for its information and for such appropriate action as the Commission may deem advisable. The Commission considers this policy necessary where a subpoena affects Government operations beyond the sphere of the

Commission's activities to assure a coordinated policy in such matters. Prior instances of the Commission's disposition of such extra-agency subpoenas include *Dean Milk Company*, Docket No. 8032, order quashing subpoena duces tecum issued March 7, 1963; *Foremost Dairies, Inc.*, Docket No. 6495, order quashing subpoena duces tecum issued February 11, 1959. The examiner, therefore, correctly certified the question on the issuing of these subpoenas to the Commission.

He recommended that subpoenas addressed to officials of the United States Customs Service be authorized for the same reasons he gave to justify the subpoenas to Commission employees. The Customs officials would apparently testify regarding that agency's restrictions or regulations on the importation and testing of mohair-blend sweaters imported from Italy and the relationship with the Federal Trade Commission and importers. However, the regulations of the Bureau of Customs and the Federal Trade Commission, so far as the importation of goods is concerned, are separate and distinct. Conformity with the requirements of the Bureau of Customs is not a defense to a charge of a violation of the Acts administered by the Federal Trade Commission. *L. Heller & Son, Inc.* v. *Federal Trade Commission*, 191 F. 2d 954 (7th Cir. 1951); *Baldwin Bracelet Corporation* v. *Federal Trade Commission*, 325 F. 2d 1012 (D.C. Cir. 1963). It is difficult to see how a development of respondent's relations with Customs will be relevant to the charges in this proceeding. Nevertheless, in paragraph 6 of its Answer, respondent makes some extremely broad assertions as to its claimed voluntary participation in a program of testing designed by the Bureau of Customs, a program which it further claims was to ensure proper labeling of Italian mohair-blend sweaters imported into this country. Respondent additionally states that it believes the program was adopted at the request or with the approval of the Federal Trade Commission. In view of such sweeping assertions, though we are doubtful of the relevance, the Commission does not disapprove of the issuance of such subpoenas. The examiner, however, is not precluded from exercising his sound discretion concerning the granting or denying of these subpoenas should there be a subsequent motion to quash or concerning the propriety of individual questions insofar as answers to them might be in conflict with our decision here. We are similarly not expressing any opinion nor attempting to indicate any views on whether or not respondent is entitled to the information which it seeks under any regulations which may exist with respect to testimony by employees of Customs or access to information respecting its operations.

Having found that the examiner properly certified the question on the issuance of the subpoenas ad testificandum requested by the

respondent, we will deny respondent's motion to strike such certification.

An appropriate order will be entered.

Commissioner Elman dissented and has filed a dissenting opinion.

Commissioner MacIntyre concurred and has filed a concurring opinion.

Commissioner Reilly's views are set forth in a separate statement.

Dissenting Opinion

By Elman, *Commissioner:*

I do not concur in the disposition being made of this matter.

The Commission, misconceiving the basic character of respondent's claim, demolishes a straw man. Respondent does not dispute "the Commission's right to proceed against some members of an industry without proceeding against all members," or that the Commission "has the administrative discretion to decide whether or not to proceed against individual respondents or on an industrywide basis, and it alone is 'empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress.' " Nor does respondent disagree, as I do not, with the general proposition that "an assertion of a difference in treatment alone does not create an issue of the denial of due process."

Respondent's claim cuts much deeper. It contends, in essence, that the Commission, in issuing a formal complaint against respondent while accepting informal assurances of voluntary compliance from competitors engaged in the same practices, made a purposeful discrimination and exercised a bias against respondent; and that the issues of fact raised by its claim of unconstitutional discrimination and bias cannot be resolved unless pertinent records and testimony of Commission employees are made available.

I think respondent's claim should be squarely met, and not brushed aside as frivolous or irrelevant. It is not a sufficient answer to say that issuance of a complaint is a matter of "administrative discretion" and that respondent has no "right" to one form of administrative treatment rather than another. To be sure, there are some areas of official action—some within the rubric of "administrative discretion"—which as a practical matter are sheltered from court review. But constitutional limitations on the exercise of power are no less binding on federal agencies or officials because effective judicial redress may not be available. Indeed, it is especially where a constitutional claim is addressed to an agency or official who, for all practical purposes, will be the final arbiter of the claim that concern for constitutional rights should be greatest. No matter how much

unreviewable "discretion" is involved in an administrative action, the Constitution forbids that it be taken arbitrarily, discriminatorily, or unfairly; and one who feels aggrieved by an allegedly unconstitutional administrative action surely has the right to assert his claim and to have it considered on the merits by the agency members. We should be the last, not the first, to turn such a claim away as affording a respondent no defense.

The Commission is under obligation, whenever a cloud is cast on the fairness of its processes, to assure itself, as well as the parties and the public, that the law has not been administered with "an evil eye and an unequal hand" (*Yick Wo* v. *Hopkins*, 118 U.S. 356, 373). Whenever such a claim is presented seriously and in apparent good faith, it is a mistake for a government agency to dismiss the claim summarily. Those within the agency may feel sure that the allegations are without substance and that the claim of discriminaton and bias has no basis in fact; but the public, too, needs assurance that no injustice has been done. Such assurance is doubly necessary where administrative action is so largely insulated from external scrutiny and review. No agency can afford to weaken the confidence of the public in the fairness and integrity of its processes.

Of course, no agency likes to hear itself or its staff accused of gross impropriety; and the instinctive reaction is to say: "The charge is plainly frivolous, and we shouldn't pay any attention to it." But here too, the quick response is not necessarily the wisest. If a claim of purposeful discrimination and bias is to be rejected, such rejection should be supported on grounds that will assure the public that the matter was treated with utmost, perhaps even excessive, concern for the constitutional limitations on all government action, including "administrative discretion."

I agree that in this case the requested subpoenas should not issue, and that respondent should not be given *carte blanche* to rummage through the Commission's confidential files. The practical and legal objections to such a procedure are obvious. Evidence of bias and prejudice is hardly likely, in any event, to make its appearance in staff memoranda or investigative reports; its existence will rarely, if ever, be demonstrable from written records. To put an extreme case, even if agency members were motivated by racial or religious prejudice in taking an action, only the most naive would expect this to be reflected in official minutes. Nor is bias likely to be confessed in testimony given by a staff member in obedience to a subpoena.

However, I would not stand, as the Commission does here, on any so-called privilege against disclosure of agency records. In circumstances where elementary fairness so requires (see Section 1.133(a) of the Commission's Rules of Practice), disclosure may be a price

that has to be paid for obtaining an adjudication of guilt; and in such a case the "privilege" goes out the window. But even justifiable refusal to issue the requested subpoenas, on grounds of privilege or otherwise, cannot be an end of the matter. If, in practical terms, the merits of a claim of bias and prejudice can be ascertained only through intramural inquiry conducted by agency members, this imposes on them an even heavier responsibility. In short, I do not see how agency members can escape the burden—onerous though it be —of satisfying the parties and the public that they have taken a serious charge seriously, and have canvassed the matter in all its ramifications and particulars.

From my point of view, however, the Commission need not undertake such a burden in this case—because it is even more clear now than it was on November 13, 1964, when the complaint against respondent was issued, that this proceeding will serve no useful purpose, is not in the public interest, and should be dismissed without further ado.

The problem of mislabeled imported wool products is not limited to Macy's, or to mohair-blend sweaters, or to imports from Italy or any other particular country. Issuance of a cease and desist order against respondent alone will contribute nothing to the solution of the broad and vexing problem of enforcing the Wool Act against mislabeled wool imports—a problem which, representatives of the domestic wool and textile industry have recently advised the Commission, cannot be handled effectively merely by policing American retailers, like respondent.

It has been pointed out to the Commission that the conditions of manufacture in some countries are such that it may be impossible "to trace the ingredient fibers of every end product to their original fiber lots"; that manufacturers of imported wool products are not subject to the "elaborate and expensive record-keeping requirements" imposed upon domestic manufacturers; that "such assurances as an importer may receive from sources abroad concerning fiber contents are not within the cognizance of the [Wool] Act," and, in any event, are not "reliable as a practical matter because the usage of terms abroad is commonly different from definitions recognized here"; and that "even if the foreign manufacturer sought to meet American standards of labeling, he would lack supporting guaranties or even adequate information from his suppliers abroad." Thus, since effective enforcement of the Act by the Commission is not possible "after the imports have been admitted through customs and are scattered over retail counters throughout the country and the mischief has been done," these representatives of the industry state that the problem can be solved only "at the source" by legislation or regulations re-

quiring the testing of wool imports prior to their introduction into domestic commerce.

In its answer to the complaint, respondent asserts:

(4) Major competitors of respondent have sold and are selling mislabeled mohair-blend sweaters (in many cases purchased from the same manufacturers) with the full knowledge of the Commission, and in part with the express approval, with no action taken by the Commission against such competitors.

(5) The Commission has sanctioned procedures for testing the mohair content of mohair-blend sweaters imported from Italy by some of respondent's major competitors which give no assurance that such sweaters are properly labeled.

(6) In proceeding against this respondent and failing to give due consideration to the industry-wide problem of insuring correct labeling on all mohair-blend sweaters imported from Italy, the Commission has failed to provide adequate protection for the consuming public.

(7) Since the Commission has not and presumably cannot devise a means for assuring that all mohair-blend sweaters imported from Italy are properly labeled, any order directing respondent to label every mohair-blend sweater imported from Italy with the precise fiber content would infringe upon respondent's right to compete, would lessen competition, and place respondent [at] an unfair competitive [dis]advantage with its major competitors. Moreover, if the only proper method for labeling mohair-blend sweaters imported from Italy is to test each sweater, such a requirement of compliance would be a denial of due process since in order to test a sweater its commercial value must be destroyed.

(8) The proposed order accompanying the Commission's complaint would deny respondent the right to import mohair-blend sweaters from Italy, would be harmful to the commercial relationship with the Italian government, and contrary to the foreign policy of the United States.

In essence, respondent is only telling the Commission what the representatives of the domestic wool and textile industry have recently advised us: that, unless and until effective action is taken generally "at the source" against mislabeled wool imports *before* their introduction into domestic commerce, proceeding against individual Amercan retailers will accomplish nothing. Respondent's candid exposition of the dilemma in which the Commission has placed it, and its recital of the legal and practical objections to the course of action followed by the Commission in singling out respondent for complaint, should cause us to pause and reexamine the wisdom of that course—and not to regard respondent's answer as manifesting a defiant or contumacious attitude towards the Commission. A respondent who is confronted with conditions which make it difficult, if not impossible, for him to comply with the law in good faith deserves our help more than our condemnation.

In the light of the representations which have been made to the Commission by the representatives of the wool and textile industry, and in view of the present posture of this proceeding, the Commission should welcome this opportunity to correct the mistake that was

made in issuing the complaint, and to concentrate its resources on finding an effective solution to the general enforcement problem which this case reflects. From the Commission's standpoint (not to mention respondent's), it would seem imprudent to continue spending time, money, and manpower on so pointless a proceeding.

CONCURRING OPINION

BY MACINTYRE, *Commissioner:*

I fully concur in the majority opinion; however, in view of the curious approach to this matter taken by the dissenting Commissioner, I wish to add my own comments. The dissent, going way off course, in my opinion, takes this occasion to suggest that the Commission's present method of regulating the labeling of imported wool products is ineffective and, further, to call for dismissal of the complaint regardless of what the proof might ultimately show as to the alleged violations.

There is one fundamental question dividing the Commission at this time, namely, should the law be enforced as it is written or should a large department store be permitted to insulate itself from the requirements of the Wool Products Labeling Act because it chooses to act as an importer.

In this proceeding the Commission has issued a complaint in which it states it has reason to believe that the respondent, R. H. Macy, has introduced into commerce, and sold in this country, wool products not labeled or otherwise identified in accordance with the provisions of the Wool Products Labeling Act. This law, applicable to all manufacturers and sellers of wool products residing in the United States, provides in Section 9(a) that no person shall be guilty if he establishes a guaranty received in good faith, signed by and containing the name and address of the person residing in the United States, by whom the wool product guaranteed was manufactured and/or from whom it was received, that such wool product is not misbranded. As shown by admitted facts, R. H. Macy did not choose to buy its wool products and secure a guaranty from anyone residing in the United States and subject to the provisions of the Wool Products Labeling Act; instead, it chose to buy wool products from manufacturers in foreign countries and then to act as the importer and seller of such products in the United States. Thus, if evidence should be introduced in this proceeding showing that the wool products in question are misbranded as alleged, the only person who can be held accountable for such misbranding would be the respondent, R. H. Macy.

Nevertheless, Macy argues that it should not be held accountable.

Its reasoning, as I construe its statements, is that it has initiated no misrepresentation but has relied upon the representations made to it by manufacturers in foreign countries and that it has no feasible means by which to test the accuracy or inaccuracy of such representations. This, of course, is not established fact; it is merely respondent's claim. Respondent itself, in its answer to the complaint, demonstrates that the Commission does have an established procedure for determining accuracy and to assist importers in complying with the law. Respondent's disagreement with the operation of such procedure does not establish its ineffectiveness. If this procedure is questionable and such a matter is shown to be relevant, this could be developed in the course of the trial. But the mere claim of inadequacy or inefficacy is scarcely a ground for dismissal of the complaint.

However, even if respondent can establish that it has no means of knowing the accuracy of the labeling of imported goods, such would not justify the alleged violations in this proceeding. Where a retailer makes the choice of importing the foreign wool garments, he must be held responsible for their proper labeling. The Commission cannot look to anyone else for compliance with the law if the statute is to be enforced. Congress has unmistakably expressed its intent that wool products be truthfully labeled. The public, as well as domestic manufacturers who comply with the law, looks to the Commission for enforcement of this statute.

In emphasizing the role of the retailers, the dissent overlooks the fact that R. H. Macy is the importer; it is not merely a domestic seller. R. H. Macy in this instance is the only "source" against which the Commission can proceed in the regulation of the labeling of wool products received from abroad.

The dissent focuses on procedural recommendations made by certain industry representatives on the administration of the Wool Products Labeling Act, a matter which, by the way, is wholly outside this record. The industry representatives appear to be concerned with what they regard as widespread violations in the importation of misbranded wool goods. They propose a regulation whereby tests would be made in designated laboratories and the results filed with the Commission prior to the introduction of such goods into commerce. Regardless of the merits of this proposal, I do not think that in this proceeding we should assume the Commission has been presented a more effective way to administer the Wool Products Labeling Act. At this point any such claim is wholly speculative and patently presents no basis for the dismissal of the complaint.

The dissent suggests that the problem involved in this matter should be solved by legislation or regulation requiring testing of the

wool products before their introduction into commerce. The fact is that there is now no such legislation or regulation and I have considerable doubts about the authority of the Commission to promulgate any such regulation. The present applicable regulatory provision is the Wool Products Labeling Act. I see no reasonable alternative available to the Commission other than to enforce the requirements of that Act. It is no answer to assert that other measures or other regulations might be preferable. Congress, in the Wool Products Labeling Act, has provided for the regulation of the practices alleged by the issuance of a complaint where the Commission has reason to believe that a violation has taken place. This the Commission has done and it is properly proceeding to hear the case on its merits.

It may be that what respondent is suggesting and wants is a regulation or a statute which would in effect grant Governmental approval to the labeling prior to the introduction of the goods into commerce, based on a testing procedure established for the purpose. This would apparently assure that the importer and the seller could make representations in the United States in accordance with the foreign manufacturers' claims where the goods have passed the tests without fear of challenge under the Wool Products Labeling Act. If this is the intention, it seems to me that this is a matter for Congress and not for the Commission. Our mandate is clear under the Wool Products Labeling Act and we are properly proceeding to enforce that statute.

Let there be no mistake: American manufacturers are subject to the requirements of this Act and when a retailer purchases from a domestic manufacturer, he is entitled to rely on the latter's representations as to content, because the law is enforced as to the manufacturer. In this connection, it may be noted that American manufacturers have been required to comply with this statute. Even *Northfield Mills, Inc., et al.* (the Bernard Goldfine matter), 53 F.T.C. 672 (1957), was not allowed to escape these requirements. The dissent, by pleading for nonenforcement of the statute in this instance, would, in effect, hold domestic manufacturers and their customers at the mercy of the vagaries of the manufacturing processes in foreign mills. Nothing could be more unfair.

Finally, I note that the dissent argues at some length and with considerable eloquence that the Commission should not brush aside charges of bias made by respondents at whom enforcement proceedings have been directed. However, the dissent in effect concedes that here it would not grant respondent subpoenas to rummage through the Commission's files on the basis of the showing made. As a result, the dissent apparently would insure the fairness of these

proceedings by the simple expedient of dismissing the complaint. Stripped of all its verbiage, I can only infer the dissent suggests that in view of the charges of bias made, whatever their foundation, the Commission can best protect its reputation for fairness and even-handed dealing by dismissing the enforcement procedure under consideration. This is a novel suggestion, but should it become the rule, it would, in effect, preclude the Commission from taking any effective action under the laws which it is required to administer.

SEPARATE STATEMENT

BY REILLY, *Commissioner:*

I agree fully with the majority opinion. I am compelled however to file a separate concurring statement. A homily on the constitutional requirements of due process such as that contained in the dissenting Commissioner's statement is always valuable, particularly in a situation where a public official or agency has engaged in conduct inconsistent with due process. That is not the case here however and I would not want the dissenting statement to impart vigor to what is obviously a frail allegation.

Respondent charges that the Commission when confronted with a number of cases involving the same violation and similar products must, in determining which administrative remedy will best serve the public interest, treat all respondents alike. I agree that if all of the considerations determining the Commission's decision apply equally to all proposed respondents, even rudimentary fair play would require that the same course be followed as to each.

In determining whether to issue complaint or accept assurances of voluntary discontinuance the Commission is influenced by a number of factors apart from the product and the nature of the violation. These may appropriately include considerations such as: the degree of cooperation which respondent has shown in preliminary dealings with the Commission's staff; the degree of credibility attaching to promises or assertions of discontinuance; the weight to be accorded to attempts at discontinuance *in advance* of the Commission's first contact with respondent; the prior record of the respondent in other cases and whether in light of the Commission's experience with a particular respondent and other respondents, the advantages to the particular respondent of voluntary discontinuance outweigh the public interest in having a more effective deterrent.

These are value judgments which are the essence of administrative discretion. The Commission weighs such considerations as pertain to a case, some admittedly more elusive than others, in arriving at a determination that the public interest will be best served by is-

suance of complaint. Not all of the Commissioners will answer them the same way but the fact that one Commissioner feels differently is no reason to question how well attuned to constitutional requirements the other Commissioners are.

As to respondent, it is not in a position to know the answers to the questions the Commissioners put to themselves, particularly as these questions relate to the "favored competitors," without examining the mental processes of the Commissioners. All respondent knows is that the central product and issue might be the same as to all.

If a mere *ipse dixit* assertion of partiality with limited knowledge such as that available to respondent is sufficient to require an inquisition into the processes whereby the Commissioners arrived at one result rather than another, the formula for completely frustrating Commission effectiveness is clear.

Moreover, in point of fact respondent has received the same treatment as have other respondents. If the proceedings herein result in an order to cease and desist, Macy will join the company of a significant number of other respondents now under order covering the labeling of imported mohair blend sweaters. The fact that complaint issued against respondent herein and not as to the others is due to Macy's having declined to enter into a consent settlement. Furthermore, far from discriminating against Macy, the Commission has bent over backward in waiving its rules upon respondent's own motion and suspending the proceedings herein to permit respondent and the Commission's staff to negotiate a consent order. These negotiations having failed, the proceedings were reinstated.

The Commission in issuing complaint against Macy felt that the public interest would be best served thereby. I cannot delineate all of the considerations such as those cited above which influenced the other Commissioners because I cannot examine their minds. I know however that they were responsibly and conscientiously considered.

The dissenting statement sets forth arguments for a different disposition of this matter than that voted by a majority of the Commission. Thoroughly aware of the factors cited in these arguments the Commission in its administrative discretion decided that the public interest required issuance of a complaint. Whether or not an order issues remains to be seen. I see no reason however for a continuing debate at Commission level as to the merits of this administrative decision. I favor getting on with the trial of this matter.

ORDER RULING ON QUESTIONS CERTIFIED AND DENYING MOTION TO STRIKE CERTIFICATION

This matter having come before the Commission upon the certification of questions by the examiner as to the issuance of subpoenas ad testificandum and a subpoena duces tecum and the motion of the respondent to strike the certification of the subpoenas ad testificandum, and the Commission having determined that some of the subpoenas should be issued and some of them not issued and that respondent's motion to strike should be denied:

It is ordered, That the hearing examiner be, and he hereby is, instructed not to issue the subpoenas ad testificandum requested by respondent July 22, 1965, requiring Henry D. Stringer, Charles F. Canavan and Eugene H. Strayhorn to appear and testify.

It is further ordered, That the hearing examiner be, and he hereby is, instructed not to issue the subpoena duces tecum requested by respondent August 12, 1965, requiring Joseph W. Shea to appear and to produce certain Commission documents.

It is further ordered, That the hearing examiner be, and he hereby is, instructed to issue the subpoenas ad testificandum requested by respondent July 22, 1965, requiring Irvin Fishman and Harry Freumess to appear and testify.

It is further ordered, That respondent's motion to strike the hearing examiner's certification of the request for subpoenas ad testificandum, filed July 27, 1965, be, and it hereby is, denied.

It is further ordered, That the hearings in this matter, postponed by the Commission by order issued August 17, 1965, be re-scheduled by the hearing examiner for the earliest possible date.

Commissioner Elman dissented and has filed a dissenting opinion, Commissioner MacIntyre concurred and has filed a concurring opinion, and Commissioner Reilly's views are set forth in a separate statement.

TEXAS INDUSTRIES, INC., Docket No. 8656
MISSISSIPPI RIVER FUEL CORPORATION, Docket No. 8657

Order and Opinion, Oct. 8, 1965

Order denying respondents' request for suspension of hearings at end of case-in-chief because respondents need time to obtain discovery for their defense.

OPINION OF THE COMMISSION

The hearing examiner has certified to the Commission that it is necessary for the Commission to authorize the examiner to suspend the hearings in this case at the conclusion of complaint counsel's

case-in-chief in order for respondents to obtain discovery necessary for their defense.

The hearing examiner's certification is not joined in by either counsel supporting the complaint or respondents' counsel. There are presently pending before the examiner various motions to quash some 20 subpoenas issued by him upon respondents' application. The movants are third parties on whom the subpoenas were served. The information demanded is claimed by them to be burdensome and to involve competitively sensitive information which they are reluctant to disclose. Respondent has opposed the motions to quash, contending that all of the information requested is relevant to its defense. Complaint counsel is not a party to these motions and did not interpose any objection to respondents' discovery requests at the time they were initially presented to the examiner.

The examiner bases his certification to the Commission for suspension of the hearings on the sole ground that in his judgment he might be better able to limit the information which respondent is seeking and thus reduce the burdensomeness of the request on the movants if he can defer ruling on respondents' various discovery requests directed to third parties until the conclusion of counsel's case-in-chief.

The hearing examiner in his certification has outlined in great detail the discretion available to an examiner in ruling on discovery requests of a respondent, especially where the information is to be furnished by third parties who are also competitors and is of a competitively sensitive and confidential nature. Indeed the examiner indicates that the instant motions and answers thereto provide a basis for alleviating much of the burdensomeness of the present subpoenas now being challenged and for limiting disclosure of much of the competitive information being sought. His concern is that the subpoenas cannot be sufficiently narrowed to eliminate all of the burdensomeness and confidentiality objections now directed to them in the present motions. He is of the belief that further avenues for narrowing the scope of the discovery might present themselves at the conclusion of complaint counsel's case-in-chief. For example, he points to the fact that there might be a "material failure of proof" which would of course, as he points out, "result in material limitations in the amount and scope of defense evidence which will be required." Moreover, he also notes that complaint counsel might present evidence which upon development in cross examination supply or render unnecessary information which respondent now considers necessary. However, he does admit that complaint counsel's evidence might also reveal the necessity for other information not yet requested.

It appears to us that in effect the only basis for the examiner's request here is his hope that at the conclusion of complaint counsel's case some lesser amount of discovery might be required than now appears to be the case. We very much doubt that this will prove to be the case.

In our judgment, the examiner has available to him all of the techniques and procedures necessary to enable him to be as informed about the issues and the nature of complaint counsel's proof as he will be at the conclusion of complaint counsel's case-in-chief (with the exception of forecasting whether there will be a material failure of proof which could never realistically be accepted as a ground for deferring discovery until the prima facie case has been ruled on).

There is no doubt that ruling on the relevance and necessity for voluminous discovery entails heavy responsibilities and that granting unduly broad discovery which later turns out to have been unnecessary can seriously prejudice reaching an expeditious determination of the issues raised by the complaint—a matter of great importance both to the respondents' business and to the administration of the law. Moreover, in this case the prejudice can also extend to the independent companies who are protesting the burdensomeness and invasions of confidentiality posed by these subpoenas.

It is for precisely this reason that pretrial techniques and procedures have been developed over the years to compel the parties to narrow the issues, stipulate undisputed facts and in general pare their cases down to their essentials. It is incumbent upon the examiner to bend every effort to achieve such a narrowing of the issues in advance of trial, not only to keep discovery in proper bounds but also to ensure that the case will be tried as concisely and expeditiously as possible and the record kept to a minimum. Thus it is before, not after, complaint counsel's case has been put in that this narrowing of the issues must take place if all of these objectives are to be achieved. To this end, the examiner should make sure that respondents have negotiated in good faith with the third parties in an effort to reduce the burden to them of the discovery requests. For example, a frequent source of burden to a company complying with discovery requests arises from the fact that the data sought is not requested in the form in which the data is recorded in the company's files. Minor revisions in the request can frequently save a company substantial time and expense in assembling the data desired. Use of sampling techniques for essential data is another important way of reducing the burden involved in complying with discovery demands. Moreover, agreement on the use of sample data is equally important to reduce the eventual trial time as well as the size of the record. The examiner should also be alert to preventing the gathering of

data from multiple companies which in the last analysis can only be cumulative. In short, the examiner is correct in his concern not to permit unnecessary time-consuming discovery which in this case carries the additional problem of imposing substantial burdens of time and expense on third parties. But we believe that this concern imposes on the examiner a duty to make certain that the requests pending before him are granted only to the extent that he has satisfied himself, first, that the parties have in fact narrowed and delineated the precise factual and legal issues on which evidence will be presented; and, second, that the discovery requests have in fact been reduced by the parties and that thereafter the examiner has satisfied himself that the data sought is not only relevant but necessary to the defense of the issues. If after complaint counsel's case has been put in, it becomes apparent that data excluded by the examiner in pretrial was in fact relevant and necessary, the examiner can always submit to the Commission at that time a certification for suspension of the hearings in order to permit additional discovery. At that time the Commission will be in a much better position to determine whether under the particular circumstances of that request a suspension is necessary in order to prevent a denial of justice.

The authority to suspend hearings at the conclusion of complaint counsel's case is accordingly denied.

Commissioner MacIntyre did not concur.

ORDER DENYING AUTHORITY FOR LIMITED SUSPENSION OF HEARINGS

These matters having come before the Commission on the examiner's certificate of necessity for the suspension of hearings at the conclusion of the case-in-chief in the respective dockets for the stated purpose of affording the respondent in each case the reasonable opportunity to obtain information, insofar as it has heretofore been unable to do so, which may then be necessary to its defense, and

The Commission having determined for the reasons set forth in the accompanying opinion that there is insufficient warrant now in the circumstances detailed by the examiner as to the reasons why the authority to suspend hearings at the close of the case-in-chief of complaint counsel in each matter should be granted:

It is ordered, That authority to suspend hearings at the close of complaint counsel's case-in-chief in Docket No. 8656 and Docket No. 8657 not be granted at this time, without prejudice to renewal by the hearing examiner of this request at a later date if, in his judgment, circumstances warrant.

Commissioner MacIntyre not concurring.

S. DEAN SLOUGH TRADING AS STATE CREDIT CONTROL BOARD

Docket 8661. Order, Oct. 8, 1965

Order denying respondent's request for dismissal of the complaint on the grounds that the purpose of the proceeding is to put him out of business.

ORDER DENYING RESPONDENT'S MOTION TO WITHDRAW OR DISMISS COMPLAINT AND DENYING REQUEST FOR PERMISSION TO FILE INTERLOCUTORY APPEAL

This matter is before the Commission upon the hearing examiner's certification, under § 3.6(a) of the Commission's Rules of Practice, of respondent's motion, filed September 30, 1965, requesting that the complaint be withdrawn or dismissed. The basis for the request is an allegation that the primary purpose of the proceeding is to deny respondent the right to engage in interstate commerce and to put him out of business, a purpose for which he claims the Federal Trade Commission Act cannot be used. The hearing examiner recommends that the motion be denied, indicating in his statement that the charge is unbelievable and frivolous. Complaint counsel, on October 5, 1965, filed an answer to respondent's motion, stating that he, complaint counsel, has neither "stated nor implied, directly or indirectly, that the purpose of these proceedings was other than to enjoin the continuance of acts and practices which are violative of the Federal Trade Commission Act." Additionally, respondent has, on October 5, 1965, requested permission to file an interlocutory appeal from the hearing examiner's order denying his request for postponement of the hearings until 30 days after the Commission has ruled on the present motion for withdrawing or dismissing the complaint.

As support for his motion, respondent refers to various remarks made during the course of the prehearing conference held on September 13, 1965, particularly those of complaint counsel. The recorded comments fail to indicate the alleged "avowed purpose of putting the respondent out of business." The Commission, of course, has no power to close the doors of any business. Its proceedings under Section 5 of the Federal Trade Commission Act are directed strictly to the elimination and prevention of unfair methods of competition and unfair or deceptive acts or practices in commerce. The elimination and prevention of the practices charged in the complaint, if the charges are sustained by the evidence, is the sole purpose here. Respondent has made no showing to justify his request for dismissal of the complaint. As to the postponement issue, the Commission's action herein renders it moot. Accordingly,

It is ordered, That respondent's motion to withdraw or dismiss the complaint be, and it hereby is, denied.

It is further ordered, That respondent's request for permission to