DEVCON CORPORATION ET AL.

Docket C–607. Order and Statements, Oct. 17, 1966

Order denying request of respondents that hearings on proposed modification of cease and desist order of Oct. 11, 1963, 63 F.T.C. 1034, be deferred on the ground that Commission's extension of the effective date of its Guides Against Deceptive Labeling and Advertising of Adhesive Compositions creates uncertainty in this area of the law.

DISSENTING STATEMENT

OCTOBER 17, 1966

By ELMAN, *Commissioner:*

Re: Guides Against Deceptive Labeling and Advertising of Adhesive Compositions

These Guides were prepared without the knowledge or participation of industry members, and were promulgated by the Commission on June 30, 1965. Thereafter, a number of industry members requested the Commission to suspend and amend the Guides, and the Commission extended their effective date to

September 30, 1966. After a private meeting with counsel for certain industry members, the Commission has now decided not to amend the Guides. In view of (1) "the unpleasant legal consequences" which failure to conform with these Guides would entail for industry members, and (2) the assistance which the Commission would thereby receive in formulating useful and effective rules, I would set this matter down for an early public hearing. I would afford all industry members and the public an opportunity to be heard before these Guides—which represent an exercise of the Commission's rule-making function—become effective.

Although a formal adjudicatory-type hearing is not required, all interested persons should be given an opportunity to express their views on a proposed rule before it is finally adopted. Apart from considerations of fairness, their participation in the rule-making process is likely to assist an agency in formulating a practical and sound rule. Rule-making, as the Court of Appeals for the District of Columbia Circuit recently observed, "is a vital part of the administrative process, particularly adapted to and needful for sound evolution of policy * * *." (*American Airlines, Inc.* v. *Civil Aeronautics Board,* 359 F. 2d 624, 629.) Rule-making procedures should be designed to secure respect for, and observance of, the rule by those to whom it is directed. We should not deny a hearing to industry members merely because it is not a constitutional or statutory prerequisite. If a public hearing will serve a useful purpose in making a rule more effective, as I believe it would in this instance, it should not matter that a hearing may not be required by law.

Where industry guidance takes the form, as here, of issuing administrative rules, the desirability of a hearing is not lessened by the circumstance that the rules are not "binding" or mandatory in the sense that they have the same legal force and effect as express statutory commands or prohibitions. These Guides certainly have no such legal status. This Commission does not, and has never claimed to, possess authority to promulgate such rules under the Federal Trade Commission Act. Indeed, administrative rules having such "legislative" or "statutory" status are comparatively rare. Most rules issued by federal administrative agencies follow the classic pattern of the Chain Broadcasting Regulations issued by the Federal Communications Commission in 1941, and which were the basis of the leading decisions of the Supreme Court in the field of administrative rule-making, *Columbia Broadcasting System* v. *United States,* 316 U.S. 407; *National Broadcasting Co.* v. *United States,* 319 U.S. 190.

The FCC's Chain Broadcasting Regulations were also "merely advisory" in the sense that they were not self-executing but required subsequnt administrative action to determine their applicability to particular cases. As Mr. Chief Justice Stone stated,

> Unlike an administrative order or a court judgment adjudicating the rights of individuals, which is binding only on the parties to the particular proceeding, a valid exercise of the rule-making power is addressed to and sets a standard of conduct for all to whom its terms apply. It operates as such in advance of the imposition of sanctions upon any particular individual. It is common experience that men conform their conduct to regulations by governmental authority so as to avoid the unpleasant legal consequences which failure to conform entails. (*Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 418, 422.)

As the Supreme Court was careful to point out, the FCC "did not bind itself inflexibly to the licensing policies expressed in the Regulations. In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the 'public interest, convenience, or necessity.' If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations." *National Broadcasting Co.* v. *U.S.*, 319 U.S. 190, 225; *U.S.* v. *Storer Broadcasting Co.*, 351 U.S. 192, 202–205. The same is true of the rules issued by the Federal Trade Commission. In each case that comes before this Commission where a violation of law is charged, we may not treat violation of a rule as a *per se* violation of law. We must still exercise an ultimate judgment whether the particular acts or practices, as found on the record, constitute a violation of the Federal Trade Commission Act. But this does not mean that the rule is any less valid or effective as a rule. Although a substantive rule issued by the Federal Trade Commission is neither a statutory prohibition nor an adjudicatory injunction or order, it "is addressed to and sets a standard of conduct for all to whom its terms apply," it "operates as such in advance of the imposition of sanctions upon any particular individual," and it should be anticipated that businessmen will "conform their conduct" to the rule "so as to avoid the unpleasant legal consequences which failure to conform entails." The Commission's objective, like that of industry members, should be to achieve compliance with the law without litigation or controversy. That objective is furthered by administrative rule-making. But the advantages of rule-making in achieving fair and effective admin-

istration should not be lost by an agency's failure to make full use of available rule-making procedures. See, generally, Shapiro, *Choice of Rulemaking or Adjudication in the Development of Administrative Policy,* 78 Harv. L. Rev. 921; Fuchs, *Procedure in Administrative Rule-Making,* 52 Harv. L. Rev. 259. The most important of these procedures is the elicitation of the views of the public and all industry members affected by a proposed rule.

Throughout its history this Commission has issued substantive rules defining and particularizing the requirements of the Federal Trade Commission Act as applied to specific trade practices and prescribing standards of conduct for businessmen to whom the rules apply. While such rules are not self-executing and violation of them is not a *per se* violation of law, they are still an exercise of the administrative rule-making function. Whatever their nomenclature—"trade regulation rules," "trade practice rules," or "guides"—they express the Commission's considered determination, based on facts of which it has knowledge, of the substantive requirements of the Act as applied to the practices or conduct involved. As such, these rules or guides may be—and frequently are—relied upon by the Commission and the courts in subsequent adjudication. See, for example, *Prima Products, Inc.* v. *F.T.C.,* 209 F. 2d 405 (2d Cir. 1954); *Northern Feather Works, Inc.* v. *F.T.C.,* 234 F. 2d 335 (3d Cir. 1956); *Buchwalter* v. *F.T.C.,* 235 F. 2d 344 (2d Cir. 1956); *Lazar* v. *F.T.C.,* 240 F. 2d 176 (7th Cir. 1957); *Burton-Dixie Corp.* v. *F.T.C.,* 240 F. 2d 166 (7th Cir. 1957); *Vanity Fair Paper Mills, Inc.* v. *F.T.C.,* 311 F. 2d 480 (2d Cir. 1962); *Helbros Watch Co.* v. *F.T.C.,* 310 F. 2d 868, 869, n. 3 (D.C. Cir. 1962); *Heavenly Creations, Inc.* v. *F.T.C.,* 339 F. 2d 7, 9 (2d Cir. 1964); *Gimbel Bros., Inc.,* 61 F.T.C. 1051, 1072–73; Comment, *Trade Rules and Trade Conferences: The FTC and Business Attack Deceptive Practices, Unfair Competition, and Antitrust Violations,* 62 Yale L. J. 912, 935, 941–43 (1953); Comment, *FTC Revised Guides Against Deceptive Pricing Limit Manufacturer Liability,* 39 N.Y.U. L. Rev. 884 (1964); Statement of Basis and Purpose of Trade Regulation Rule on Labeling of Cigarettes, 29 Fed. Reg. 8325, 8364–73 (1964).

To be sure, the Administrative Procedure Act imposes no mandatory requirement of notice and hearing with respect to "interpretative rules" and "general statements of policy." Sec. 4(a), 5 U.S.C. 1003(a). The scope of these categories is not well-defined, however, and in marginal cases an agency should resolve the doubt in favor of giving the public and industry

members an opportunity to comment on a proposed rule before it is finally adopted.

As their text shows, these Guides express the reasoned judgment of the Commission, based on evidence, as to the legality of certain trade names and representations used generally in the industry. The Guides recite that they were adopted by the Commission to assist manufacturers "in avoiding deceptive advertising and labeling representations concerning their products and in the interest of protecting the public from such deception." Continuing, the Guides state: "Consumers have a right to expect that products are as represented and it appears that claims made for products of this industry have resulted in widespread consumer deception. A Commission investigation of practices in the industry and tests of industry products disclosed that many adhesive compounds were being misrepresented both as to their contents and capabilities. In many instances the descriptive name of a product was itself misleading."

Guide 1, for example, is cast in the same terms as an industry-wide cease and desist order requiring the excision of established trade and brand names. It reads as follows:

> Products which do not, after application, have the same physical and chemical properties of metal, or of a particular represented metal, shall not be represented as metal or as having the intrinsic characteristics of metal, or of the particular metal indicated. Thus, neither the term "metal" nor the terms "iron," "steel," "aluminum" or other names of metal shall be used to designate in brand names or otherwise any product of the kind herein described. While the Guide does not prohibit truthful representations in advertising and labeling of the percentage of content of any metallic substances in such products (e.g., contains 20% powdered aluminum) it does prohibit with respect thereto the use of representations such as, but not limited to, the following:
>
> "Plastic Steel"
> "Dries to steel"
> "Hardens into metal"
> "Steel in paste form"
> "Liquid aluminum"
> "Instant aluminum"
> "Real metallic putty"
> "Fluid Steel"

These requirements and prohibitions of the Guides, and the terms in which they are expressed, cannot be dismissed as "merely advisory." The only differences between these Guides and an order to cease and desist are that (1) the Guides are addressed to industry members at large, while an order would be directed to named parties; (2) the Guides are issued *ex parte* while an order would be based on a record made in a formal

adjudicatory proceeding; and (3) violation of the Guides requires further administrative proceedings before sanctions may be imposed, while violation of an order is immediately subject to judicial penalties.

The Guides expressly put industry members on notice that violations of the Guides will be treated as violations of Section 5 of the Federal Trade Commission Act against which the Commission will proceed:

> The Guides prohibit all the deceptive representations made for products of this industry as disclosed by the investigation and tests conducted and by other available pertinent information. The Commission concludes that the practices proscribed by the Guides are violative of Section 5 of the Federal Trade Commission Act, and that the public interest in preventing their use is specific and substantial.
>
> The Guides are intended to encourage voluntary compliance with the law by those whose practices are subject to the jurisdiction of the Commission. Proceedings to enforce the requirements of law set forth in the Guides may be brought under the Federal Trade Commission Act (15 U.S.C., Secs. 41-58).

In short, the Guides reflect the Commission's considered determination of

(1) questions of fact (the meaning of the representations made to the public, and whether such representations are false and misleading);

(2) questions of law (whether such representations violate Section 5 of the Federal Trade Commission Act);

(3) questions of administrative policy (whether it is in the public interest to bring Section 5 (b) proceedings against persons violating the Guides); and

(4) questions of remedy (whether excision of established trade and brand names is required).

An industry member who fails to conform his conduct to the requirements of these Guides is not merely put on notice that the Commission will proceed against him; he also knows that on each of the above questions, as it may arise in subsequent adjudication, the Commission has already reached a considered determination. Although the Guides are characterized by the Commission as "merely advisory," they are nonetheless substantive rules. Even though—like the FCC's Chain Broadcasting Regulations—they do not inflexibly bind the Commission to their express provisions, they represent "a valid exercise of the rule-making power [which] is addressed to and sets a standard of conduct for all to whom its terms apply." A businessman cannot lightly ignore or disregard such "advice" from a regulatory

agency. Industry members cannot afford to treat the prohibitions contained in these Guides as having no more substantive legal significance or effect than a press release.

The Commission has a choice here between (1) denying a hearing, and treating these Guides as "merely advisory" and having no force or effect whatsoever in subsequent adjudication, or (2) granting a hearing, and treating the Guides as a valid exercise of the rule-making function. The latter course would seem to me to be clearly preferable. It would result in the issuance of Guides more likely to command industry respect and observance and to achieve a greater degree of voluntary compliance with the law. Perhaps it is necessary to downgrade the status of the Guides in order to justify the refusal to hold a hearing. In the long run, however, this seems to me to weaken, rather than strengthen, the Commission's industry guidance program. I think it is too high a price to pay in order to avoid holding a public hearing here. Even if the Guides are nothing more than Commission "advice" to industry members—which they may freely follow or disregard, as they see fit—the advice we give them would probably be wiser and better informed if a hearing were to be held.

STATEMENT

OCTOBER 17, 1966

By REILLY, *Commissioner:*

Re: Guides Against Deceptive Labeling and Advertising of Adhesive Compositions

The dissenting Commissioner's statement advances the argument that these Guides are an exercise of the administrative rule-making function and should not be promulgated without notice and opportunity to be heard being afforded the industry and public. It is my position, and I believe that of the Commission majority, that these Guides are interpretive advice to the industry as to what the Commission considers is industry conduct which might violate Section 5 of the Federal Trade Commission Act; that they have no controlling force whatever in subsequent adjudication; that the Commission has so stated in unequivocal terms both as to these Guides and as to its Guides generally; that they thereby fall within the exemption of Section 2(c) of the Administrative Procedure Act whereby notice and hearing are not required and that to upgrade such interpretive rules to the status of binding substantive rules is to parade a sheep in wolf's clothing.

For years critics both within and without the Commission have accused it of leaving the businessman in the dark as to what is expected of him and then gleefully pouncing when he stumbles into a violation. The Commission has established advisory machinery designed to correct this. It has carefully differentiated these advisory procedures from more formal rule-making activities and has done everything but shout from the rooftops to convey to those affected that the Guides and advisory opinions are purely advisory, do not seek to bind and are not therefore substantive rules within the meaning of the Administrative Procedure Act. Now the Commission is told that despite its assertion to the contrary this creature of its own making is not what it clearly intended it to be.

Over the years the Commission has painstakingly developed a hierarchy of substantive and interpretive rules designed to procure the widest possible compliance with the statutes it administers. They consist, in ascending order of persuasive effect, of press releases, advisory opinions, guides, trade practice rules and trade regulation rules.

In the exercise of its administrative responsibilities and weighing in each case the necessity for economy, speed, the gravity and prevalence of the practices involved and the immediacy of the need for deterrents, or alternatively the sufficiency of advice, the Commission must make a judgment as to which of these devices is appropriate in a given situation. Here it determined that an advisory statement would provide sufficient guidance and it chose the Guides here involved.

That Guides are advisory and nothing more is obvious from the way they have been established and treated by the Commission since the first Guides were issued in 1958.

Initially conceived as communications of Commission policy to the Commission's staff, they have subsequently been communicated to the industry for its enlightenment and assistance. They are *ex parte* in nature although in some instances the Commission has found it helpful to solicit industry participation in their preparation.

Anyone desiring to assay their character, that is, whether they are substantive or interpretive, would be well advised to examine the Commission's treatment of them rather than emphasize the incidental prohibitory form of their expression. Form, in my opinion, should never be elevated above substance.

First, Guides have consistently been treated by the Commission as not requiring public or industry participation because they are interpretive rules. In recent years the Commission has

promulgated without notice and hearing, and without the dissent of anyone presently on the Commission, Guides dealing with debt collection deception, mail-order insurance, deceptive use of the word "mill," advertising of radiation monitoring instruments, advertising of shell homes and the labeling and advertising of shoe content.

On June 30, 1965, the Commission adopted the adhesive composition Guides here involved without notice and hearing and again without dissent.

In the Commission's General Procedures and Rules of Practice, guides, along with advisory opinions, are set forth under Subpart E—Industry Guidance, not under Subpart F—Rules and Rulemaking. Section 1.55 of the Commission's Rules describes guides and their purpose:

> Guides are administrative interpretations of laws administered by the Commission for the use of the Commission's staff and guidance of businessmen in evaluating certain types of practices.

Nowhere does the Commission state or intimate that they are for any purpose other than information and guidance. They have never been accorded weight in the disposition of subsequent proceedings. At most they have been alluded to only to the extent that they were indicative of the Commission's attitude or interpretation of its statutes. Certainly they have never been given substantive effect. *Vanity Fair Paper Mills, Inc.* v. *Federal Trade Commission*, 311 F. 2d 480, 485 (2d Cir. 1962); *Heavenly Creations, Inc.* v. *Federal Trade Commission*, 339 F. 2d 7, 9 (2d Cir. 1964).

Moreover, the Commission has said in reference to the very Guides here involved—

> Guides are designed to inform. They are persuasive or compulsive only according to the subjective response of industry members. They are not injunctive and are not of themselves an adequate instrument for procuring compliance with the statutes administered by the Commission. *Devcon Corporation, et al.*, Docket No. C-607, Order and Opinion Denying Motion to Suspend, January 19, 1966 [69 F.T.C. 1092, 1093].

The Commission has repeatedly described Guides as administrative interpretations having no force or effect as substantive law. *Arnold Constable Corporation*, 58 F.T.C. 49, 62 (1961); *Gimbel Brothers, Inc.*, 61 F.T.C. 1051, 1073 (1962).

In the statements of purpose in particular guides adopted by the Commission it is repeatedly set forth that they are administrative interpretations designed to inform and assist the businessman and to encourage voluntary compliance.

Such statements are designed to convey, and since 1958 have been apparently successful in conveying, the idea that they have no binding force, with the result that anyone choosing to act counter to the announced Commission interpretation can be held accountable only after formal complaint and hearings conducted pursuant to the requirements of the Administrative Procedure Act.

Moreover, it seems to me it does the Commission a disservice to suggest that in promulgating these Guides it acted in disregard of industry interests and arbitrarily imposed its will on the industry on the basis of inadequate facts which should have been subjected to industry scrutiny and criticism. The fact is these Guides were adopted only after 25 investigations of individual firms in the course of which industry members had ample opportunity to furnish the Commission with whatever data they felt might assist the Commission in addressing itself to industry problems.

Furthermore, the Commission had the benefit of scientific analysis by the Bureau of Standards.

Finally, although there was no formal notice and hearing for industry members prior to adoption of the Guides on June 30, 1965, the Commission, responsive to industry desires, deferred the effective date of these Guides to September 30, 1966, and granted industry representatives speaking for the principal firms, by whom observance of the Guides will be most keenly felt, an opportunity to file written submissions commenting on the Guides. Furthermore, the same industry representatives were granted opportunity to appear personally before the Commission for purposes of commenting on the Guides as adopted.

I fail to see any irregularity in the Commission's handling of this matter.

Commissioners Dixon, MacIntyre and Jones have authorized me to state that they join in this statement.

STATEMENT

OCTOBER 17, 1966

By MACINTYRE, *Commissioner:*

In re: Guides Against Deceptive Labeling and Advertising of Adhesive Compositions

In our effort to avoid confusion regarding this situation we should keep in mind the problem presented. Here counsel for a party requested "An *Advisory Opinion,* pursuant to Rule 1.51 of

the Commission's General Procedures, as to the lawfulness of proposed revised labels." It was indicated that the labels were expected to be attached to adhesive compositions offered for sale. Previously a statement on "Guides" had been distributed by the Commission reflecting the Commission's interpretation of applicable law to deceptive practices in the sale of adhesive compositions. In that connection the Commission has made it clear that it "considers these 'Guides' to be merely advisory."

In response to the request "for an Advisory Opinion, pursuant to Rule 1.51 of the Commission's General Procedures, as to the lawfulness of proposed revised labels," the Commission advised that the labels submitted would appear to be inconsistent with the advice set forth in the Guides and therefore inconsistent with the requirements of the law regarding the use of deceptive acts and practices. The recipient of this advice, of course, is free to disregard it. If in disregard of this advice, deceptive acts and practices should be used and brought to the attention of the Commission, the probabilities are that it would have reason to believe that Section 5 of the Federal Trade Commission Act was violated in that respect and perhaps issue a complaint to that effect. If so, the person charged with any wrongdoing would be provided with an opportunity for a hearing for the purpose of demonstrating that the challenged conduct was not deceptive and was not violative of Section 5 of the Federal Trade Commission Act.

Obviously no provision of the Constitution, of statutory law or rule of fairness in or remotely related to due process requires a hearing at this time on the question of whether the Commission provided faulty advice in its Advisory Opinion or in its Guides. To think otherwise would blur distinguishing requirements applicable to utterances and actions by government agencies and government officials and would promote confusion regarding provisions of law making distinctions in the requirements applicable to one utterance or action when compared with other utterances or actions.

FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580
OFFICE OF THE SECRETARY

October 17, 1966

Robert L. Wald, Esquire,
Wm. Warfield Ross, Esquire,
Wald, Harkrader & Rockefeller,
1225 Nineteenth Street, N.W.,
Washington, D.C. 20036.

Re: Guides Against Deceptive Labeling and Advertising of Adhesive Compositions.

Dear Sirs:

The Commission has received and duly considered your letter of June 8, 1966, concerning the Guides Against Deceptive Labeling and Advertising of Adhesive Compositions, the accompanying scientific and engineering data relating to metal-filled resin compounds, and your request on behalf of the Devcon Corporation, Magic American Chemical Corp., Marson Corp., Ross Chemical & Manufacturing Company, and Woodhill Chemical Sales Corp. for an advisory opinion as to the propriety of two proposed labels for adhesive products.

You are advised that the subject Guides reflect the Commission's interpretation of applicable legal requirements and no change in such Guides is deemed to be warranted by the material you submitted.

The Commission is of the opinion that the labels submitted are inconsistent with applicable provisions of the Guides. You are hereby further informed that although these guides are cast in the language of express prohibitions, the Commission considers these guides to be merely advisory.

By direction of the Commission. Commissioner Elman dissented and his dissenting statement is attached. Commissioner Reilly has filed the attached statement, joined in by Commissioners Dixon, MacIntyre and Jones. Commissioner MacIntyre's separate statement is attached.

/s/Joseph W. Shea
Joseph W. Shea,
Secretary.

Enclosures.

ORDER RULING ON HEARING EXAMINER'S CERTIFICATION

By order of April 7, 1966, the Commission directed that this matter be assigned to a hearing examiner for purposes of re-

ceiving evidence on the question whether the Commission's cease and desist order of October 11, 1963 [63 F.T.C. 1034], should not be modified in accordance with the Commission's show cause order dated October 25, 1965, so that the proscription of the order is directed against misrepresentation of the applied properties of the products in question rather than the metallic content thereof, and

The hearing examiner on May 20, 1966, having pursuant to § 3.6(a) of the Commission's Rules certified to the Commission respondents' motion to defer hearings filed May 6, 1966, and

The grounds for said motion being that the Commission having extended the effective date of the Guides Against Deceptive Labeling and Advertising of Adhesive Compositions to September 30, 1966, and the Guides having an important bearing on the factual issues in this case, and the fact that the Commission extended the effective date of the Guides suggests a possibility that the Guides may be rescinded or modified with a consequent effect upon the issues raised in the hearings herein, and

The Commission now having determined that the effective date of said Guides will not be further altered and neither rescission nor modification is contemplated.

It is ordered, That the motion of respondents to defer hearings filed May 6, 1966, and certified by the hearing examiner on May 20, 1966, be, and it hereby is, denied.

Commissioner Elman dissented and has filed a dissenting statement. Commissioner Reilly has filed the attached statement, joined in by Commissioners Dixon, MacIntyre and Jones. Commissioner MacIntyre has filed the attached separate statement.

MISSISSIPPI RIVER FUEL CORPORATION

Docket 8657. Order, Oct. 21, 1966

Order staying further proceedings before hearing examiner until further order and granting each counsel time to submit briefs on the question of the alleged unfairness of conducting legislative-type hearings while adjudicative proceedings are pending.

ORDER PROVIDING FOR CONSIDERATION AND DETERMINATION OF RESPONDENT'S MOTION TO VACATE THE COMPLAINT, ETC.