

IN THE MATTER OF
STATESMAN LIFE INSURANCE COMPANY ¹

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT

Docket 8686. Complaint, May 23, 1966—Decision, Dec. 2, 1968
Order terminating a proceeding charging a Houston, Texas, mail-order insurance company with using deceptive means of selling its insurance policies.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as that Act is applicable to the business of insurance under the provisions of Public Law 15, 79th Congress (Title 15, U.S. Code, Sections 1011 to 1015, inclusive), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Statesman Life Insurance Company, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Statesman Life Insurance Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office and place of business located at 3603 Montrose Boulevard in the city of Houston, State of Texas.

PAR. 2. Respondent is now, and for some time last past, has been engaged as insurer in the business of insurance in commerce, as "commerce" is defined in the Federal Trade Commission Act. As a part of said business in "commerce," respondent enters into insurance contracts with insureds located in various States of the United States other than the State of Texas in which

¹ Now known as Statesman National Life Insurance Company.

States the business of insurance is not regulated by State law to the extent of regulating the practices of respondent alleged in this complaint to be illegal.

PAR. 3. Respondent, in conducting the business aforesaid, has sent and transmitted and has caused to be sent and transmitted, by means of the United States mails and by various other means, letters, application forms, contracts, checks and other papers and documents of a commercial nature from its place of business in the State of Texas to purchasers and prospective purchasers located in various other States of the United States and has thus maintained a substantial course of trade in said insurance contracts or policies in commerce between and among the several States of the United States.

PAR. 4. Respondent is licensed, as provided by State law, to conduct the business of insurance only in the State of Texas. Respondent is not now, and for some time last past has not been, licensed as provided by State law to conduct the business of insurance in any State other than the State of Texas.

PAR. 5. Respondent solicits business by mail in various States of the United States in addition to the State named in Paragraph Four above. As a result thereof, it has entered into insurance contracts with insureds located in many States in which it is not licensed to do business. Respondent's said business practices are, therefore, not regulated by State law in any of those States in which respondent is not licensed to do business as it is not subject to the jurisdiction of such States.

PAR. 6. In the course and conduct of said business, and for the purpose of inducing the purchase of said policies, respondent has made, and is now making, numerous statements and representations concerning said policies by means of circulars, folders and other advertising material disseminated throughout various States of the United States. The original mailing of said advertising consists of a sealed brown-colored window envelope 7 and 5/8 inches long and 3 and 1/2 inches wide containing a printed return address and a postage permit as follows.²

The envelope described and pictured above contains a form letter (and an application form) stating in part as follows:

Dear Veteran:

This is good news if you dropped your G.I. Insurance.

The Veteran whose health is still good enough to qualify for insurance can now buy up to \$10,000 maximum life insurance at the same low basic rates used by the V.A. under the G.I. insurance program of World War II.

² Pictorial envelope omitted in printing.

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When the Government stopped selling insurance to military personnel in 1956 this company began issuing life insurance to service men throughout the United States at these rates. The success of this program for service men made it possible to extend the same program to veterans.

The policy is the same basic plan issued to millions of service men during World War II. It provides \$10,000 world-wide and unrestricted coverage in peace and war.

If you dropped your G.I. insurance, act immediately while this program is still available—mail the enclosed card today.

Sincerely Yours,

Veterans Insurance Division
Statesman Life Ins. Co.

PAR. 7. By and through the use of the aforementioned statements and representations, and others of similar import, respondent has represented, directly or by implication, that the insurance offered for sale by respondent is the same as, or is equal to, the insurance formerly made available to servicemen by the United States Government during World War II.

PAR. 8. In truth and in fact, in at least one respect the insurance offered by respondent differs from insurance made available to servicemen by the United States Government during World War II. The net cost of the government insurance is substantially lower than respondent's insurance by reason of the fact that a large amount of the premiums paid on said government policies is returned in the form of dividends.

Therefore, the statements and representations as set forth in Paragraphs Six and Seven hereof were and are false, misleading and deceptive.

PAR. 9. By and through the use of the aforementioned trade name and style "Veterans Insurance Division," by the means and in the manner aforesaid and otherwise, respondent has suggested and represented to recipients of such advertising that it has been mailed by, and that the insurance referred to therein is offered, approved, endorsed or recommended by the Veterans Administration or some other office or agency of the U.S. Government.

PAR. 10. In truth and in fact the advertising referred to in Paragraph Nine has not been mailed by, nor is the insurance referred to therein offered, approved, endorsed or recommended by, the Veterans Administration or any other office or agency of the U.S. Government.

Therefore, the statements and representations, including the use of the trade name and style "Veterans Insurance Division" as set forth in Paragraphs Six and Nine hereof, were and are false,

misleading and deceptive.

PAR. 11. In the conduct of its business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of insurance of the same general kind and nature as that sold by respondent.

PAR. 12. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's policies by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Edward F. Downs and *Mr. Robert A. Mattina* supporting the complaint.

Mr. A. Alvis Layne and *Mr. Walter T. Evans*, Washington, D.C., for the respondents.

INITIAL DECISION BY ANDREW G. GOODHOPE, HEARING EXAMINER

DECEMBER 8, 1967

The Federal Trade Commission issued its complaint against respondent on May 23, 1966, charging it with violations of Section 5 of the Federal Trade Commission Act. The respondent filed an answer in which it admitted certain allegations of the complaint but denied it had violated Section 5 of the Federal Trade Commission Act. The complaint alleged that the respondent had made certain representations in commerce pertaining to its insurance policies. The complaint alleged that these representations were false and misleading since they claimed that the insurance offered for sale by the respondent is the same as or is equal to the insurance made available to servicemen by the United States Government during World War II, and further that this insurance is offered, approved, endorsed or recommended by the Veterans Administration or some other office or agency of the United States Government.

In its answer respondent admitted its corporate existence, that

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it is licensed to conduct the business of insurance only in the State of Texas and in no other States. The answer further alleged that the Federal Trade Commission has no jurisdiction over the respondent.

This matter is before the hearing examiner for final consideration on the complaint, answer, evidence, the proposed findings of fact and conclusions and briefs filed by counsel for the respondent and counsel in support of the complaint. Consideration has been given to the proposed findings of fact and conclusions and briefs submitted by both parties, and all proposed findings of fact and conclusions not hereinafter specifically found or concluded are rejected; and the hearing examiner, having considered the entire record herein, makes the following findings of fact, conclusions drawn therefrom and issues the following order:

FINDINGS OF FACTS

1. Respondent Statesman Life Insurance Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office and place of business located at 3603 Montrose Boulevard, Houston, Texas. In May 1967 the name of the company was changed to Statesman National Life Insurance Company (Tr. 150; Resp. Ans., Para. 1).

2. The respondent is now and has been engaged as an insurer in the business of selling insurance in various States of the United States. In conducting its insurance business the respondent has sent and transmitted and has caused to be sent and transmitted, by means of the United States mails and by various other means, letters, application forms, contracts, checks and other papers and documents of a commercial nature from its place of business in the State of Texas to purchasers and prospective purchasers located in various other States of the United States and has thus maintained a substantial course of trade in said insurance contracts or policies in commerce between and among the several States of the United States (Tr. 169, 176-179; CX 12, 13; see also Appendix A attached hereto).

3. Respondent is licensed, as provided by State law, to conduct the business of insurance only in the State of Texas. Respondent is not now, and has not been, licensed as provided by State law to conduct the business of insurance in any State other than the State of Texas (Resp. Ans., Par. 4).

4. Respondent solicits business by purchasing newspaper advertising space and by mail in various States of the United

States in addition to the State of Texas. As a result thereof, it has entered into insurance contracts with insureds located in many States in which it is not licensed to do business. Respondent's said business practices are, therefore, not regulated by State law in any of those States in which respondent is not licensed to do business and it is not, therefore, subject to the jurisdiction of such States.¹ (CX 12, 13; Appendix A; see complaint, Par. Five.)

5. Respondent advertises its policy by means of newspaper ads and direct mail pieces.² The initial mailing consists of a sales letter and application card enclosed within a window envelope (Tr. 213, 262). The mailings are sent to men whose names and addresses have been obtained from telephone directories (Tr. 252, 311-12). Respondent does not use mailing lists made up exclusively of veterans or servicemen and does not know at the time of mailing whether the prospect is a veteran (Tr. 252, 311-12). If interested in the policy, the prospect then completes the application and returns it to the respondent and an acknowledgment is mailed by the respondent (CX 8). Respondent later mails, at intervals, two medical follow-up letters reminding the prospect that he must take a physical examination in order to qualify for the policy (Tr. 202-04; CX 4 B, 4 E; RX 22). If the prospect passes the physical examination, a letter (CX 6) is mailed along with a completed policy form (CX 13) and a return addressed envelope (CX 7 C) is mailed with the letter. The return addressed envelope (CX 7 C) enables the prospect to send his initial premium, and thereafter, if the prospect fails to submit the initial premium, respondent makes three further mailings, at intervals, reminding the prospect to send the premiums (Tr. 205-07, 427; CX 4 G, 4 H, 4 F; RX 23).

6. In 1964, respondent mailed to the States of Indiana, Colorado and California (Tr. 157) and has mailed to additional States since 1964 (CX 14 A-B). Mailings are used in the State of Texas but after a prospect completes the application and returns it to the respondent, further dealings with the prospect are made through company agents. Respondent's application blanks filled out by a prospect do not call for information as to whether the

¹ Prior to hearings, respondent made a motion to dismiss the complaint for lack of jurisdiction of the subject matter of the complaint by the Commission. This motion was denied by the hearing examiner. This issue is not again raised in the proposed findings or briefs and, therefore, will not again be treated here. Counsel for respondent have, however, reserved the right to present such issue to the Commission on appeal from this initial decision.

² Attached hereto as Appendix A and made a part of this initial decision are copies of two of respondent's newspaper ads (CX 36, 37) and a number of respondent's mailing pieces (CX 4A-H, 6, 7A-C, 10, 17, 38, 39).

prospect is a veteran or not (Tr. 312). The record is not clear as to whether the policy will be sold to anyone whether a veteran or not, but the indication is that the policy is available to anyone whether a veteran or not.

7. At present respondent has in effect approximately 2,500 life insurance policies throughout the United States in States other than Texas, and approximately 2,250 such policies in the State of Texas (Tr. 251). During 1967 respondent commenced the sale of health and accident insurance, but such sales are not involved in this proceeding.

8. The first charge in the complaint is that the respondent's newspaper advertising and mail solicitations are false and misleading in that they claim that the respondent is offering for sale insurance that is the same as or is equal to the insurance formerly made available to servicemen by the United States Government during World War II. In such newspaper ads and mail solicitations, such phrases as "at the same low basic rates used by the V.A. under the G.I. insurance program of World War II" (CX 4A, 6, 17, 35, 37); "the policy is the same type policy issued by the Veterans Administration to millions of servicemen during World War II" (CX 4G, 4H, 6, 35); "at low G.I. rates" (CX 4B, 4C, 4D, 4E, 4F, 4G, 6, 10, 17, 36, 37); and "the same basic plan" (CX 22) are constantly repeated. The constant repetition of these and similar statements throughout all of this literature leaves no doubt as to their purpose. The clear import of these phrases is that the \$10,000 life insurance policy sold by respondent was the same as a veteran had had during World War II under the National Service Life Insurance (NSLI) program of the Veterans Administration.

9. Counsel for respondent contend that its mailings and newspaper ads, first, never claimed that the respondent's policy was the same as that provided by the NSLI program, and secondly, that respondent's insurance, in fact, is generally the same insurance plan as the NSLI program (Resp. Prop. Findings, pp. 14, *et seq.*, pp. 18, *et seq.*). Both of these contentions must be rejected. As found above, the clear import of respondent's claims is that respondent's policy is the same as that provided by the NSLI program during and after World War II. There are also substantial differences in both the cost of, and the coverage provided by respondent's policy when compared with the NSLI program (Tr. 379, *et seq.*).

10. The principal difference is the rate charged by Statesman as compared to the rate charged for NSLI. This difference

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arises from the fact that the Veterans Administration has regularly returned dividends to the NSLI policyholders over the years since World War II. These payments have been substantial and reduce the actual cost of the NSLI to a much lower cost than the insurance offered by respondent. An official of the Veterans Administration, Mr. Thomas Kiernan, appeared and testified and enumerated a considerable number of differences between the respondent's insurance policy (CX 11) and the coverage provided by the NSLI program (CX 16). The return of premiums to holders of the National Service Life Insurance has been approximately 80 to 85% of the total premiums paid at younger ages (Tr. 379, *et seq.*). As a veteran gets older a smaller proportion of the premium is returned, but these returns still amount to a substantial reduction in the cost of NSLI. The respondent has never paid any dividends on any of its policies (Tr. 189, 191).

11. Respondent asserts that in a number of its mailing pieces it uses the language "not counting dividends" when making its claims as to the cost of its insurance. (See Appendix A.) However, the whole emphasis in such mailing pieces is that the cost of the respondent's insurance is the same as that of NSLI and the fact that respondent in some instances inserts this disclaimer is at best confusing and therefore deceptive. The examiner finds, in view of the substantial differences in the costs of the two policies, that any comparison of the two policies which would indicate any similarity in cost must be considered to be false and deceptive (Tr. 379-383).

12. There are a number of other substantial differences in the coverage given by respondent's policy and the NSLI policy:

(A) The Statesman policy provides at least a 3 year waiting period for the payment of dividends. There is no such waiting period in the NSLI policy.

(B) NSLI pays in the event of death as a result of suicide. Respondent's policy has no such provision and will return only premiums in the event of death by suicide within 2 years of the effective date of the policy (Tr. 388).

(C) Dividends may be left in the NSLI fund to draw interest and may be used to prevent lapse of policy. Respondent's policy contains no such option (Tr. 388).

(D) Respondent's life insurance income provision for payment to beneficiaries provides a smaller monthly provision than does NSLI income provision (Tr. 390).

(E) In other than cash settlements under the NSLI policy,

payments to beneficiaries are the same regardless of sex. Under the Statesman policy, female beneficiaries receive less than male beneficiaries (Tr. 390-391).

(F) The waiver of premium provision in the event of total disability is an automatic part of the NSLI policy. There is no option to grant it. Statesman reserves the right to refuse to grant it (Tr. 391-392, 170-171).

(G) NSLI provides waiver of premium for total disability up to the 65th birthday. Statesman provides it only to the 60th birthday for males and the 55th birthday for females (Tr. 392).

(H) The Statesman policy excludes total disability resulting from willfully or intentionally self-inflicted injury. The NSLI policy covers total disability arising from such injuries (Tr. 393).

(I) The Statesman policy does not allow for total disability based on loss of feet, loss of hearing, or loss of a hand and an eye or a foot and an eye. The NSLI policy does (Tr. 393).

(J) In total disability matters the Statesman policy requires amputation or severance of both hands. NSLI only requires loss of use of both hands (Tr. 394).

(K) The Statesman premium waiver for total disability does not apply to such disability arising from service in the military, navy, air force, other country, or civilian noncombatant, serving with such forces or resulting from an act of war declared or undeclared, or while committing or attempting to commit an assault or felony. NSLI does not exclude total disability arising under these situations (Tr. 395-396).

13. The second charge in the complaint is that respondent has claimed that its life insurance policies have been approved by the Veterans Administration or some other Government agency. Counsel in support of the complaint offered evidence that established that respondent has frequently made use in its mailings of the words "Veterans Insurance Division." This has been used on respondent's envelopes in which its mailing pieces have been sent as a part of the return address. It has also been used on the letterheads and as a part of the signature of such mailing pieces (CX 4A-4H, 7A-7C, 10, 17). Respondent also makes frequent use of the terms "Veterans Insurance Information" and "For Veterans Only" and similar phrases on its envelopes and mailing pieces (CX 4A, 17, 38). Respondent is not connected in any way with the Veterans Administration (Tr. 399).

14. In addition, counsel in support of the complaint offered evidence that respondent has designed and used envelopes and

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enclosures in such envelopes so that they will closely resemble those of an official Government agency. (Compare CX 18, 19, 22, 23 with CX 25, 26, 27, 28, 29, 30, 31, 32.)

15. Counsel in support of the complaint also called as witnesses four consumer witnesses (Tr. 323-352). The testimony of one of these witnesses was stricken (Tr. 331). The testimony of the other three witnesses was vague and uncertain and in the examiner's opinion of doubtful credence (Tr. 333, *et seq.*, 337, *et seq.*, 346, *et seq.*). Consequently, no reliance or weight is given to this testimony in this initial decision.

16. Considered separately, the somewhat similar appearance of respondent's mailing pieces and application forms to that of official Government mail would be entitled to very little weight as establishing the charge of claiming to be connected with or approved by the Veterans Administration or some other Government agency. However, this similarity, the constant use of the titles "Veterans Insurance Division," "Veterans Insurance Information," "For Veterans Only" and the other contents of the advertising and mailing pieces, as found above, must be considered to be capable of, at least, giving rise to confusion in the recipient's or reader's mind. In affirming the Commission in a very similar situation, the Court in *Rhodes Pharmacal Co., Inc. v. F.T.C.*, 208 F. 2d 382 (7th Cir. 1953), *aff'd*, 348 U.S. 940 (1955), stated:

The important question to be resolved is the impression given by an advertisement as a whole. Advertisements which are capable of two meanings, one of which is false, are misleading. Advertisements which create a false impression, although literally true, may be prohibited. The Federal Trade Commission Act provides, "* * * and in determining whether any advertisement is misleading, there shall be taken into account * * * representations made or suggested * * *" [citations omitted].

In the same fashion, the documentary evidence here involved can cause confusion and is open to the suggestion that it originates with the Veterans Administration. Consequently, these mailing pieces are found to be false and deceptive since they indirectly represent or suggest that such insurance is offered, approved or recommended by the Veterans Administration.

17. In the conduct of its business, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of insurance of the same kind and nature as that sold by respondent (Tr. 194-195, 313-314, 399-400).

18. Counsel for respondent's contentions that respondent was

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denied an opportunity for voluntary compliance in this matter and that respondent has abandoned the acts and practices charged are rejected. The fact that respondent may have abandoned its use of "Veterans Insurance Division" after considerable prodding from the Texas Insurance Commission does not warrant the dismissal of this proceeding (CX 65, 66, 67). Also rejected are counsel for respondent's claims that they were denied something to which they were entitled under the Jencks Act. In all instances where such statements existed, they were produced. Only after detailed and lengthy study by the examiner, who specifically made findings on the record that counsel for respondent were not entitled to such documents since they did not qualify for production under the Jencks Act, were other documents kept from respondent's counsel (Tr. 97, *et seq.*, 442, *et seq.*).

CONCLUSIONS

1. Respondent's newspaper ads and mailing pieces used as found above are false and misleading in that they claim that the insurance sold by respondent is the same as or equal to the insurance made available by the Veterans Administration during World War II.

2. Respondent's mailing pieces used as found above are false and misleading in that they have the tendency and capacity to lead the reader thereof to believe that the insurance sold by respondent is or may be offered, approved, or recommended by the Veterans Administration or some other Government agency.

3. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's policies by reason of said erroneous and mistaken belief.

4. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted and now constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

It is ordered, That respondent Statesman National Life Insur-

ance Company (named "Statesman Life Insurance Company" in the Complaint), a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of any insurance policy or policies, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the expression "Veterans Insurance Division" or any other words or terms of similar import or meaning.
2. Representing in any manner, directly or by implication, that the literature mailed or sent to prospective purchasers is being sent to them by the Veterans Administration or any other office or agency of the United States Government.
3. Representing, directly or by implication, that respondent is, or respondent's business is, connected in any manner with the United States Government.
4. Representing, directly or by implication, that the insurance offered for sale by respondent is or has been approved, endorsed, or recommended by the United States Government.
5. Representing, directly or by implication, that the net cost of the insurance sold by respondent is the same as or equal to the insurance made available to servicemen by the United States Government during World War II, or otherwise misrepresenting in any manner the cost of the insurance offered for sale by respondent.
6. Representing, directly or by implication, that the coverage of the insurance offered for sale by respondent is the same as or equal to the coverage of the insurance made available to servicemen by the Veterans Administration during World War II.
7. Misrepresenting in any manner the cost, coverage or benefits of the insurance offered for sale by respondent.

APPENDIX A

COMMISSION EXHIBIT NO. 4 A

Did You Drop Your G.I. Insurance?

DEAR VETERAN: This is good news if you dropped your G.I. Insurance. The Veteran whose health is still good enough to qualify for insurance can now buy up to \$10,000 maximum life insurance at the same low basic rates used by the V.A. under the G.I. insurance program of World War II. When the Government stopped selling insurance to military personnel

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APPENDIX A—CONTINUED

in 1956 this company began issuing life insurance to service men throughout the United States at these rates.

The success of this program for service men made it possible to extend the same program to veterans.

The policy is the same basic plan issued to millions of service men during World War II. It provides \$10,000 world-wide and unrestricted coverage in peace and war.

If you dropped your G.I. insurance, act immediately while this program is still available—mail the enclosed card today.

Sincerely Yours,

G. F. STERNE,
*Veterans Insurance Division,
Statesman Life Ins. Co.*

GX:bg

Encl.

P.S. ONLY VETERANS ARE ELIGIBLE.

COMMISSION EXHIBIT NO. 4 B

This is a final reminder that if you would like to obtain life insurance similar to your old G.I. policy *at low G.I. rates*, we must receive the medical information within the next few days.

Many veterans have taken advantage of this opportunity and are delighted with their policies at such low rates. If you will take the enclosed medical form to a doctor of your choice, chances are good that you too can have this low priced protection for your loved ones.

Make an appointment and have it taken care of this week.

Sincerely yours,

G. F. STERNE,
*Veterans Insurance Divisions,
Statesman Life Ins. Co.*

GFS:gg

COMMISSION EXHIBIT NO. 4 C

Have you seen your doctor yet for the medical examination that may enable you to obtain life insurance at low G.I. rates?

We find that we can issue policies for a high percentage of those who are examined, but we do need the medical information before we can proceed to send you your policy.

Don't miss this opportunity! Remember the policy is the same type plan you had when you were in the service—\$10,000 unrestricted coverage in peace or war—*and at low G.I. rates*.

Take the medical form this week to a doctor of your choice, so that you may have this vital protection for your family.

Sincerely yours,

G. F. STERNE,
*Veterans Insurance Division,
Statesman Life Ins. Co.*

GFS:gg

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APPENDIX A—CONTINUED

COMMISSION EXHIBIT NO. 4 D

Have you seen your doctor yet for the medical examination that may enable you to obtain life insurance *at low G.I. rates*?

We find that we can issue policies for a high percentage of those who are examined, but we do need the medical information before we can proceed to send you your policy.

Don't miss this opportunity! Remember the policy is the same type plan you had when you were in the service—\$10,000 unrestricted coverage in peace or war—and at low G.I. rates.

Take the medical form this week to a doctor of your choice, so that you may have this vital protection for your family.

Sincerely yours,

G. F. STERNE,
Veterans Insurance Division,
Statesman Life Ins. Co.

GFS:gg

COMMISSION EXHIBIT NO. 4 E

This is a reminder that you still have the opportunity to obtain life insurance at low G.I. Insurance rates.

Before we can issue your policy, however, we need the medical information requested. We recognize that it is sometimes difficult to find a convenient doctor. You might check physicians in the yellow pages of the phone book to find a convenient doctor's office. The Company will pay the fee.

Do not delay—go to a doctor today so that you can obtain this valuable protection for your family.

Sincerely yours,

G. F. STERNE,
Veterans Insurance Division,
Statesman Life Ins. Co.

GFS:gg

COMMISSION EXHIBIT NO. 4 F

We have not yet received the first premium that would automatically put into force the life insurance policy we sent for your consideration a short time ago.

Don't let this opportunity pass you by. You have taken the trouble to be examined, and you know that right now you can qualify for this insurance. Now only one more step is needed to put it into force.

Millions of veterans dropped their G.I. Insurance after World War II, and wish that they had kept it. Here is a chance that may not come again, to replace that policy with similar type coverage at low G.I. rates.

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APPENDIX A—CONTINUED

Mail your check TODAY with the enclosed notice. Your policy will become effective immediately.

Sincerely yours,

G. L. GRAVES
*Veterans Insurance Division,
Statesman Life Ins. Co.*

GLG:lb
Encl.

COMMISSION EXHIBIT NO. 4 G

Have you read the life insurance policy that we recently mailed to you? Notice that it is the same type policy issued by the Veterans Administration to millions of servicemen during World War II.

It gives you unrestricted coverage in peace or war, and at low G.I. rates.

Your coverage becomes effective as soon as you mail the first premium. Right now you know your health is good enough to qualify for this insurance. This may not always be so.

If you have not already done so, mail your check today and have the satisfaction of knowing you have provided more security for your family.

Sincerely yours,

G. L. GRAVES
*Veterans Insurance Division,
Statesman Life Ins. Co.*

GLG:lb

COMMISSION EXHIBIT NO. 4 H

Enclosed is another premium notice for your insurance policy recently mailed to you.

It is urgent that you return the premium within 30 days of the due date in order for your policy to become effective. Send in a money order or your check today. The enclosed premium notice can be used as a convenient check form if you desire.

Remember that you have the same basic policy issued by the Veterans Administration to millions of servicemen and at the same low rate schedule as G.I. insurance. Be sure to obtain this valuable protection for your family by mailing in your premium now.

Sincerely yours,

G. L. GRAVES
*Veterans Insurance Division,
Statesman Life Ins. Co.*

GLG:lb
Encl.

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APPENDIX A—CONTINUED

COMMISSION EXHIBIT NO. 6

STATESMAN LIFE INSURANCE COMPANY
3603 Montrose, Houston, Texas 77006

DEAR POLICYHOLDER: We are happy to enclose your life insurance policy issued at the same rate as the G.I. Insurance program administered by the Veterans Administration during and following World War II. This Company is not associated with the V.A. or other government agency but is an Old Line Legal Reserve Life Insurance Company which specializes in serving military personnel and veterans.

The enclosed policy is a five year renewable and convertible plan which is guaranteed renewable on the same plan or convertible to your choice of any of the Company's cash value plans. It also contains a dividend provision. Dividends depend upon mortality and should not be expected during the first few years.

After World War II many veterans "dropped" their G.I. Insurance, later realizing that this was a serious mistake. With the enclosed policy you now have very valuable protection for your family. Prompt premium payments will assure you of continued protection at the same low G.I. Insurance rates.

Please let us know at any time that we can be of service to you.

Sincerely yours,

JAMES L. GUEST,
President.

JLG:gg
encl.

*An Old Line Legal Reserve Company Specializing in Service to
Military Personnel and Veterans*

COMMISSION EXHIBIT NO. 7 A

VETERANS INSURANCE DIVISION
STATESMAN LIFE INS. CO.
3603 Montrose Blvd.
Houston, Texas 77006

COMMISSION EXHIBIT NO. 7 B

FROM _____

VETERANS INSURANCE DIVISION
STATESMAN LIFE INS. CO.
3603 MONTROSE BLVD.
HOUSTON, TEXAS 77006

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FEDERAL TRADE COMMISSION DECISIONS

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APPENDIX A—CONTINUED

COMMISSION EXHIBIT NO. 7 C

Postage
Will Be Paid
by
Addressee

No
Postage Stamp
Necessary
If Mailed in the
United States

BUSINESS REPLY MAIL

First Class Permit No. 8868

Houston, Texas

VETERANS INSURANCE DIVISION
STATESMAN LIFE INS. CO.
3603 MONTROSE BLVD.
HOUSTON, TEXAS 77006

COMMISSION EXHIBIT NO. 10

Postage
Will be Paid
by
Addressee

No
Postage Stamp
Necessary
If Mailed in the
United States

BUSINESS REPLY MAIL

First Class Permit No. 8868

Houston, Texas

STATESMAN LIFE INSURANCE COMPANY
VETERANS DIVISION
3603 MONTROSE BLVD.
HOUSTON, TEXAS 77006

YES, I WOULD LIKE MORE INFORMATION ABOUT
LIFE INSURANCE AT LOW G.I. RATES *

I AM NOW ----- YEARS OLD. MY BRANCH OF SERVICE WAS -----

For Men Who Have Been in the Military Service, Reserves or National Guard.

* Since G.I. rates may be withdrawn at any time, mail this card today!!—No obligation, of course.

1322

Initial Decision

APPENDIX A—CONTINUED

COMMISSION EXHIBIT NO. 17

Did You Drop Your G.I. Insurance?

DEAR VETERAN: This is good news if you dropped your G.I. Insurance.

The Veteran whose health is still good enough to qualify can now buy up to \$10,000 maximum life insurance—and at the same low basic rates charged by the V.A. for G.I. Insurance of World War II not counting dividends.

After the Government stopped selling insurance to military personnel this company began issuing life insurance to service men throughout the United States at these rates.

The success of this program for service men made it possible to extend the same program to veterans.

The policy is the same basic plan issued to millions of service men during World War II. It provides \$10,000 world-wide and unrestricted coverage in peace and war.

If you dropped your G.I. Insurance, act immediately while this program is still available—Mail the enclosed card today.

Sincerely yours,

G. L. GRAVES,
*Veterans Insurance Division,
Statesman Life Ins. Co.*

P.S. The V.A. has re-opened G.I. Insurance to veterans with a service-connected disability but not to veterans in good health. Veterans in good health are eligible with this company, as explained above. MAIL THE CARD TODAY!! ONLY VETERANS ARE ELIGIBLE.

COMMISSION EXHIBIT NO. 35

VETERAN DID YOU DROP YOUR GI INSURANCE?
HERE IS GOOD NEWS!

[Picture of Veteran]

You can now buy up to \$10,000 insurance
at the same basic low rates used by the
VA under the GI Insurance Program of
World War II, exclusive of dividends.

Policy is the same basic plan issued to
millions of servicemen during World War II.

\$10,000 world-wide, unrestricted coverage
in peace or war.

Initial Decision

74 F.T.C.

APPENDIX A—CONTINUED

Exhibit No. 35—continued

YES I WANT LIFE INSURANCE AT LOW GI RATES.

For Men Who have Been in Military Service, Reserves or National Guard
Monthly Rate for \$10,000 Policy (Same as G.I. Insurance,
exclusive of dividends.)

Age		Age		Age	
17	-----\$6.40	29	-----\$7.00	41	-----\$8.70
18	-----6.40	30	-----7.10	42	-----8.90
19	-----6.50	31	-----7.20	43	-----9.20
20	-----6.50	32	-----7.30	44	-----9.50
21	-----6.50	33	-----7.40	45	-----9.90
22	-----6.60	34	-----7.50	46	-----10.30
23	-----6.60	35	-----7.60	47	-----10.80
24	-----6.70	36	-----7.70	48	-----11.40
25	-----6.70	37	-----7.90	49	-----12.00
26	-----6.80	38	-----8.10		Older Age
27	-----6.90	39	-----8.30		Rates Upon
28	-----6.90	40	-----8.50		Request

Send No Money * * * No Agent Will Call

Mail This Coupon Now!

APPLICATION FOR \$10,000* LIFE INSURANCE

TO STATESMAN LIFE INSURANCE COMPANY,
3603 MONTROSE BLVD., HOUSTON, TEXAS
FOR RENEWABLE AND CONVERTIBLE 5-YEAR TERM INSURANCE

Do not send money with this application. No agent will call. Date of birth ----- Amount of insurance applied for (Check one)

[] \$10,000 or [] \$5,000 Height ----- Weight -----

Name of Beneficiary ----- Relationship -----

Do you know of any impairment now existing in your health or physical condition? ☐ No ☐ Yes

Have you consulted a physician for any illness during the past three years? ☐ No ☐ Yes

If yes to either question give particulars, including name and address of physician, date and reason -----

Name and Address of Applicant -----

I HEREBY APPLY FOR THE INSURANCE ABOVE, Information in this application is given to obtain this insurance, and is true and complete to the best of my knowledge and belief. The Company shall incur no obligation because of this application unless and until the first premium is received subsequent to a billing therefor while the health or other conditions affecting the insurability of the Applicant are as described in this application. I hereby authorize any physician to disclose to the Company medical information relating to this application.

Date ----- Signature of Applicant -----

* Since This Offer May Be Withdrawn at Any Time —Mail This Coupon Today

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Initial Decision

APPENDIX A—CONTINUED

COMMISSION EXHIBIT NO. 36

VETERANS!

Did you drop your G. I. Insurance?

Here is good news

Same basic policy now available at the same low rates, exclusive of dividends.
Tear out this ad and mail it with your name, address and date of birth for
free information.

No salesman will call!

Statesman National Life
Insurance Company

3603 Montrose, Houston, Texas

Name _____ Date of birth _____

Address _____

City _____ State _____

COMMISSION EXHIBIT NO. 37

NOW "G.I. INSURANCE" TYPE POLICY
FOR ANYONE IN GOOD HEALTH!

[Picture of Veteran]

You can now buy up to \$10,000 insurance
or more at the same low premium rates
used by the V.A. under the G.I. Insurance
Program of World War II, exclusive of dividends.

Policy is the same type issued to millions
of servicemen during World War II.

Worldwide, unrestricted coverage, in peace or war.

Yes, I want life insurance at Low G.I. Rates—Same as V.A. rates
for G.I. Insurance of World War II, exclusive of dividends

Monthly Rate for \$10,000 Policy

Age		Age		Age	
17	----- \$6.40	32	----- \$7.30	46	----- \$10.30
18	----- 6.40	33	----- 7.40	47	----- 10.80
19	----- 6.50	34	----- 7.50	48	----- 11.40
20	----- 6.50	35	----- 7.60	49	----- 12.00
21	----- 6.50	36	----- 7.70	50	----- 12.70
22	----- 6.60	37	----- 7.90	51	----- 13.50
23	----- 6.60	38	----- 8.10	52	----- 14.40
24	----- 6.70	39	----- 8.30	53	----- 15.40
25	----- 6.70	40	----- 8.50	54	----- 16.50
26	----- 6.80	41	----- 8.70	55	----- 17.70
27	----- 6.90	42	----- 8.90	56	----- 19.00
28	----- 6.90	43	----- 9.20	57	----- 20.50
29	----- 7.00	44	----- 9.50	58	----- 22.10
30	----- 7.10	45	----- 9.90	59	----- 24.00
31	----- 7.20				

Initial Decision

74 F.T.C.

APPENDIX A—CONTINUED

Exhibit No. 37 continued

Send No Money No Agent Will Call

GUARANTEE: Policy sent on 10-day approval.
Don't pay unless it is just what you expect it to be!

Mail This Coupon Now!

PLEASE PRINT

APPLICATION FOR \$10,000 LIFE INSURANCE

STATESMAN LIFE INSURANCE COMPANY,
3603 MONTROSE BLVD., HOUSTON, TEXAS

RENEWABLE AND CONVERTIBLE 5-YEAR TERM INSURANCE

DO NOT SEND MONEY WITH THIS APPLICATION. NO AGENT WILL
CALL. Date of birth _____

Amount of Insurance applied for (Check One) ☐ \$10,000 or ☐ \$_____

Height _____ Weight _____

Name of Beneficiary _____ Relationship _____

Do you know of any impairment now existing in your
health or physical condition? ☐ No ☐ Yes

Have you consulted a physician for any illness during
the past three years? ☐ No ☐ Yes

If yes to either question give particulars, including name and address of
physician, date and reason.

Name _____

Street _____

City _____ State _____

I HEREBY APPLY FOR THE INSURANCE ABOVE. Information in
this application is given to obtain this insurance and is true and complete to
the best of my knowledge and belief. The Company shall incur no obligation
of this application unless and until the first premium is received subsequent
to a billing therefor while the health or other conditions affecting the insur-
ability of the Applicant are as described in this application. I hereby author-
ize any physician to disclose to the Company medical information relating to
this application.

Date _____ Signature of Applicant _____

COMMISSION EXHIBIT NO. 38

STATESMAN LIFE INSURANCE COMPANY
3603 Montrose, Houston, Texas 77006

Did You Drop Your G.I. Insurance?

DEAR VETERAN: This is good news if you dropped your G.I. Insurance.

The Veteran whose health is still good enough to qualify can now buy
up to \$10,000 maximum life insurance—and at the same low basic rates
charged by the V.A. for G.I. Insurance of World War II, not counting
dividends.

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APPENDIX A—CONTINUED

After the Government stopped selling insurance to military personnel this company began issuing life insurance to servicemen throughout the United States at these low rates.

The success of this program for servicemen made it possible to extend the same program to veterans.

The policy is the same basic plan issued to millions of servicemen during World War II. It provides \$10,000 world-wide and unrestricted coverage in peace and war.

If you dropped your G.I. Insurance, act immediately while this program is still available—mail the enclosed card today.

Sincerely yours,

J. L. GUEST,

President.

P.S. Only Veterans Are Eligible—apply now before these low rates are withdrawn—mail the card NOW.

OPINION OF THE COMMISSION*

DECEMBER 2, 1968

BY NICHOLSON, *Commissioner*:

This matter is before the Commission on the appeal of respondent from an initial decision of the hearing examiner holding that respondent has violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by engaging in various unfair methods of competition and unfair and deceptive acts and practices in commerce in connection with the sale of insurance.

Respondent is a corporation organized and existing under the laws of the State of Texas, with its principal place of business located in Houston, Texas. Respondent is licensed to conduct the business of insurance only in that State, and it has not for sometime past been licensed to conduct such business in any State other than Texas.¹

Statesman operates as a typical mail order insurer with respect to the business it does outside of Texas. All such business is sought by postal solicitations or local newspaper advertising.² Respondent has no offices, agents or brokers in any State but Texas, and all application forms, contracts, payments and other insurance papers are transmitted by means of the United States

* Respondent's name was changed in May 1967 to Statesman National Life Insurance Company. (Tr. 150-151.)

¹ Resp. Ans. paras. 1, 4.

² Tr. 169: See, e.g., CX 4a-h, 6, 7a-c, 17, 36-39.

mails from and to its Texas offices. Mailings are also used to make initial contact with Texas residents, but once an application from such a prospect is received, all further dealings are handled through company agents.³

Respondent reported to the Commissioner of Insurance of the State of Texas that in 1966 it had policy holders in 36 States plus the District of Columbia.⁴ The record also shows that respondent mailed solicitations to, or placed newspaper advertisements from August 1963 to July 1964 in, California, Colorado, Indiana, Kansas, Missouri, Oklahoma and Washington. From March through July 1967, it advertised in Arizona, North Carolina, New Mexico, Kansas, Florida and New York.⁵ In 1966, insureds located outside the State of Texas paid respondent \$209,778.98, compared to the \$239,330.43 received from insureds resident in that State.⁶ Mr. James Guest, the president and principal stockholder of Statesman, testified that as of June 30, 1967, the company had 4,807 policyholders, 53% of whom resided outside the State of Texas.⁷

The complaint which issued against respondent was concerned essentially with certain features of Statesman's advertising which were alleged to falsely imply, suggest or claim that the life insurance it offers is the same as or equal to that offered to military personnel by the Federal Government during World War II, and that the Veterans Administration or some other agency of government has approved, offered or recommended this particular insurance. The only specific difference alleged in the complaint between the policy offered by Statesman and that which had been offered through the government's National Service Life Insurance program (NSLI) concerned the net cost of each to the insured, although evidence was introduced comparing coverage, conditions of liability and other features.⁸ The hearing examiner concluded that the charges were sustained and issued an order appropriate to his findings.

In urging us to reverse the examiner, respondent argues that

³ The remainder of this opinion will concern itself only with the interstate aspects of respondent's business. See Part I *infra*.

⁴ Respondent reported insureds in the following States: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington and West Virginia. (CX 42, p. 45.)

⁵ CX 12 Tr. 172, 258-9.

⁶ CX 42, p. 45.

⁷ Tr. 251.

⁸ See I.D., Finding No. 12.

that McCarran Act removes it from FTC jurisdiction; that the Commission abused its administrative discretion by initiating formal adjudicatory proceedings without affording it the opportunity to informally dispose of the matter under § 2.21 of the Rules; that its right to defend against the charges was wrongly limited by the examiner's refusal to exercise his responsibilities under the "Jencks" rule; that the record does not establish any violation on the merits; and, finally, that respondent has abandoned the bulk of the advertising challenged here and relied upon by the examiner.

I

The parties to this proceeding do not agree on the proper interpretation and application of the McCarran-Ferguson Act phrase "regulated by State law."⁹ Respondent has continually maintained that the Commission is without jurisdiction in this matter, because the States have adopted comprehensive legislation to oversee and control insurance practices within their borders. Complaint counsel, on the other hand, have argued that the mere adoption of regulatory legislation by the States does not satisfy the statute, since legislation must be "effective" to constitute regulation and that is presently not the case with respect to the application of these laws to Statesman.

On May 19, 1967, the hearing examiner ruled on a motion filed by respondent to dismiss the complaint insofar as it related to the 18 States which had enacted the Uniform Unauthorized Insurers False Advertising Process Act¹⁰ or one in effect similar thereto.¹¹ Respondent had urged that the adoption of this legis-

⁹ 59 Stat. 33, 34 (1945), 15 U.S.C.A. §§ 1011-15 (1965). Hereafter, the statute will be referred to as the McCarran Act.

¹⁰ The purpose of this act is to subject mail order insurers to the jurisdiction of the State courts and State insurance commissioners in those States where they are doing business without having secured a license. It provides that in the case of certain misrepresentations the commissioner, through notice to the offending insurer and the commissioner in the insurer's State of domicile shall give 30 days for cessation of a challenged practice, whereupon, if not stopped, he may proceed formally against the insurer pursuant to the terms of the model Unfair Trade Practices Act for the Insurance Industry. The latter Act has been adopted in some form in all 50 States. For the text of these Acts, see CX 68 and 69.

¹¹ According to respondent's motion, the following States have such a law: California (West's Ann. Calif. Code, § 1620 of Ins. Code); Illinois (Smith-Hurd Ill. Ann. Stats. Chapter 73, § 725.1); Indiana (Burn's Ind. Stats. 39-5701, *et seq.*); Kansas (Kan. Stats. Ann. 40-2415, *et seq.*); Louisiana (West's La. Rev. Stats. 1231, *et seq.* (1966 Supp.)); Maine (Me. Rev. Stats. Ann. Title 24, § 271-275); Maryland (Ann. Code of Md. Article 48A, § 235, *et seq.*); Minnesota (Minn. Stats. Ann. § 72.41, *et seq.* (1966 Supp.)); Nebraska (Neb. Rev. Stats. § 44-1801, *et seq.* (1965 Cumulative Supp.)); Nevada (Rev. Nev. Stats. § 686.480); New Hampshire (N.H. Rev. Stats. Ann. § 406A:1 (1965 Supp.)); North Carolina (N.C. Gen. Stats. § 58-54.14 (1965 Supp.)); North Dakota (N.D. Century Code § 26-09A-01, *et seq.*); Ohio (Page's Ohio Rev. Code Ann. § 3901.24, *et seq.* (1965 Supp.)); South Dakota (S.D. Ins. Laws. Chapter 13, § 25); Texas (Vernon's Tex. Civil Stats. Article 21.21-1 of Ins. Code); Utah (Utah Code Ann. § 31-36-1); Wisconsin (Wis. Ins. Code § 201.42(1) *et seq.*).

lation subjects the practices of an unauthorized foreign mail order insurer to the jurisdiction of the State insurance commissioner and State courts and thereby removed such practices from FTC jurisdiction. On the basis of *Travelers Health Ass'n v. Federal Trade Commission*, 298 F. 2d 820 (8th Cir. 1962), the examiner held that the motion was without merit and must be denied.

The examiner's ruling was treated as the definitive statement of his position, and the jurisdictional question was not again seriously urged before him. Employing the language of the Commission's complaint, he found in his initial decision that:

Respondent solicits business by purchasing newspaper advertising space and by mail in various States of the United States in addition to the State of Texas [the only State in which it is licensed]. *As a result thereof, it has entered into insurance contracts with insureds located in many States in which it is not licensed to do business. Respondent's said business practices are, therefore, not regulated by State law in any of those States in which respondent is not licensed to do business and it is not, therefore, subject to the jurisdiction of such States.*¹²

The language italicized above, appearing both in the complaint (Par. 5) and the examiner's finding, and the nature of the evidence adduced by complaint counsel at hearings clearly indicate reliance on a theory of jurisdiction which, assuming interstate commerce, looks to the simple question of whether or not a foreign mail order insurer has submitted itself to the licensing procedures of each State in which it solicits or secures business. The validity of such a theory, and, indeed, the entire question of its jurisdiction under the McCarran Act, are matters which have not received extensive Commission consideration for several years. Respondent's challenge now compels a review and restatement of our understanding of the law.

Prior to the decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), the issuing of a policy of insurance was not deemed "a transaction of commerce," and, hence, the insurance business was not subject to the commerce powers of the Federal Government. *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1868); *Hooper v. California*, 155 U.S. 648 (1895); *New York Life Ins. Co. v. Cravens*, 178 U.S. 389 (1900); *New York Life Ins. Co. v. Deer Lodge County*, 231 U.S. 495 (1913). Over the years, state regulation grew up in response to the peculiar problems which insurance presents, and the industry

¹² I.D., Finding No. 4 (emphasis added).

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shaped its activities with regard to purely local public control.¹³ It was feared that *South-Eastern Underwriters*, which declared that insurance practices crossing state lines fell under the Commerce Clause, and, thus, were subject to whatever federal regulations as might apply to interstate business, would bring chaos to the industry by overturning the traditional regulatory structure. Upon the urging of the insurance industry, Congress, in the next year, passed the McCarran Act.

The Act, known also as Public Law 15, was a statement of federal policy—in an area where federal authority is supreme—that the continued State regulation and taxation of the insurance business was in the public interest and that Congressional silence should not be construed to impose a barrier to such regulation or taxation. The regulatory framework is set forth in § 2(a)–(b) which states in relevant part:

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation of taxation of such business * * *. Provided that * * * the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law. (Emphasis added.)

It is clear that in the Congressional scheme the States are empowered to preempt the Federal Government in controlling the activities of insurers, but to the extent that any regulatory vacuum is left by the States, federal control is to fill the void.¹⁴ We believe the overriding policy of the Federal Government, relative to the business of insurance, is that that business is too affected with public interest to be permitted to operate free of public scrutiny and control.

The first Commission case to reach the United States Supreme

¹³ Historically, insurance has probably been more pervasively regulated than any other business save the public utilities. For a general treatment of the reasons for and history of governmental regulation of this business, see Patterson, *Essentials of Insurance Law* 1–61 (2d ed. 1957); Hanson and Obenberger, *Mail Order Insurers: A Case Study in the Ability of the States to Regulate the Insurance Business*, 50 Marq. L. Rev. 175, 182–191 (1966). See also *German Alliance Ins. Co. v. Lewis*, 233 U.S. 389 (1914).

¹⁴ The arrangement was described by former Michigan Insurance Commissioner Mayerson as follows: "The federal government moves into a vacuum. Federal government can't displace effective state regulation, but it can displace poor or ineffective state regulation." Address to the National Ass'n of Independent Insurers Convention, Nov. 16–19, 1964, p. 14, quoted in Hanson and Obenberger, *supra* note 13, at 180.

This apparently accords with President Roosevelt's understanding of the bill at the time he signed it into law, for he said, "[T]he antitrust laws and certain related statutes will be applicable in full force and effect to the business of insurance except to the extent that the States have assumed the responsibility, and are effectively performing that responsibility, for the regulation of whatever aspect of the insurance business may be involved." Mimeographed White House release, March 10, 1945, as quoted in Thomerson, *Federal Trade Commission Surveys State Insurance Laws*, 1950 Ins. L. J. 333, 335.

Court involving the impact of the McCarran Act on its jurisdiction was *Federal Trade Commission v. National Casualty Co.*¹⁵ There the Commission had issued an order against the respondent which sought to proscribe activities within the boundaries of States that had their own statutes prohibiting unfair and deceptive insurance practices. National was licensed to sell policies in all States. The company solicited business through agents working on a commission basis. Only an insubstantial amount of advertising was sent by mail directly to the public, and none was placed in the mass media. Nearly all of respondent's advertising materials were shipped in bulk by it to the agents for distribution locally.

The Commission argued in *National Casualty* that the general prohibition in the "Model Unfair Trade Practices Bill for Insurance," which had been adopted by about all the States in which respondent did business, was "too 'inchoate' to be 'regulation' until that prohibition has been crystalized into 'administrative elaboration of these standards and application in individual cases.'" 357 U.S. at 564. The Court, in a pre curiam opinion, said that assuming "there is some difference in the McCarran-Ferguson Act between 'legislation' and 'regulation,' nothing in the language of that Act or its legislative history supports the distinctions drawn by petitioner." 357 U.S. at 565. Thus, while the Commission did argue that legislation in the form of unarticulated and undefined standards is ineffective and is not "regulation" under § 2(b) of the Act, the Court only ruled that the specific distinctions drawn were not contemplated by the statute.

The fact that in the ordinary and customary way of doing business of both National Casualty Company and American Hospital Company nearly all of their advertising was distributed by resident agents was of controlling significance in leading the Court to the conclusion that the States had "ample means" to regulate their advertising, for it said:

Respondents' advertising programs require distribution by their local agents, and there is no question but that the States possess ample means to regulate this advertising within their respective boundaries. Cf., e.g., *Robertson v. California*, 328 U.S. 440, 445, n. 6, 461.¹⁰

Moreover, the Court emphasized the importance of the resident agents by directing attention to *Robertson v. California*, where

¹⁵ 357 U.S. 560 (1958), affirming *National Casualty v. F.T.C.* 245 F. 2d 883 (6th Cir. 1957), and *American Hospital and Life Ins. Co. v. F.T.C.*, 243 F. 2d 719 (5th Cir. 1957).

¹⁰ 357 U.S. at 564.

it upheld the power of a State to punish the unlicensed agent of an unlicensed foreign insurer, without reliance upon the McCarran Act, on the ground that inherent in the State's police power is the power to protect its residents against unlicensed out-of-State insurers, until Congress denies such power.

We therefore do not agree with respondents here that *National Casualty* enunciates the broad doctrine that "it is the existence of State regulatory legislation, and not the effectiveness of such regulation, that is the controlling factor."¹⁷ On the contrary, we believe the case decides little more than that the Commission is precluded from acting against the activity of resident agents of an insurer licensed to do business in the States where it operates when those States have passed legislation (conceded to be effective) to oversee insurance practices therein.¹⁸

In the only other Commission McCarran Act case to reach the Supreme Court, *Federal Trade Commission v. Travelers Health Ass'n.*, 362 U.S. 293 (1960), the respondent operated an interstate mail order insurance business with residents of every State. All business was carried on by direct mail from respondent's Omaha, Nebraska, office. Nebraska, the domiciliary and licensing state, had a statute prohibiting unfair or deceptive practices in the insurance business in that State or in any other State. The Court of Appeals had ruled that "with every activity of the [respondent], in the conduct of its business, subject to the supervision and control of the Director of Insurance of Nebraska, we think that the [respondent's] practices in the solicitation of insurance by mail in Nebraska or elsewhere reasonably and realistically cannot be held to be unregulated by State law." 262 F. 2d 241, 244 (8th Cir. 1959). In that court's view, there was no controlling distinction between the case there at bar and *Federal Trade Commission v. National Casualty Co.*, *supra*, and the Commission's order was vacated.

The Supreme Court, seizing upon Judge Vogel's dissent that it was "impractical and ineffective" to "force the citizens of other States to rely upon Nebraska's regulation of the long distance

¹⁷ Resp. Br. 16.

¹⁸ We recognize that our reading of *National Casualty* is contrary to that set forth in Justice Harlan's dissent in *F.T.C. v. Travelers Health Ass'n.*, 362 U.S. 293, 305 n. 4 (1960). However, we believe that we are being consistent with the position taken in our Brief to the Court in that case, where we said, "The case is not controlled by the holding in *F.T.C. v. National Casualty Co.*, 357 U.S. 560, that there is state regulation which ousts the Federal Trade Commission from jurisdiction if the states in which a company is doing business have enacted legislation proscribing unfair insurance advertising and have ample means to regulate this advertising 'within their respective boundaries.'" (p. 1348.) (Emphasis added.)

advertising practices [of respondent]" (362 U.S. at 296), reversed. The Court distinguished *National Casualty* as presenting a quite different question. That case involved "the effect of State laws regulating the advertising practices of insurance companies which were licensed to do business within the States and which were engaged in advertising programs requiring distribution of material by local agents." 362 U.S. at 297. "In those circumstances," the Court said, "[we] found there was 'no question but that the States possess ample means to regulate this advertising within their respective boundaries.' 357 U.S. at 564." In the *Travelers* situation, however, the Court said there is no regulation by the States where respondent is not licensed, but "in which the deception is practiced and has its impact." Therefore, the Court ruled that that Commission's authority had not been supplanted and concluded:

[W]hen Congress provided that the Federal Trade Commission Act would be displaced to the extent that the insurance business was "regulated" by State law, it referred only to regulation by the State where the business activities have their operative force.¹⁹

The Supreme Court's decision in *Travelers* left open the question of whether there could be regulation by State law, within the meaning of the McCarran Act, by States in which an insurer was not licensed and had no agents, place of business or other reachable assets. 362 U.S. at 298 n.4. On remand, however, *Travelers* argued that in fact there did exist in each of the States in which it did business legislative provision for local control, "with means for effective enforcement thereof," over any improper advertising material sent into such States, and so the Eighth Circuit Court of Appeals addressed itself to the issue.

To begin, the court said, it must be recognized that the Commission has jurisdiction over respondent with regard to any sending of advertising into other States, for soliciting purposes, "except in the case of such states as have 'regulated' the situation—that is, have adopted legislative provisions which are in legal concept sufficient in their form and in their enforceability to be capable of controlling the mailing of deceptive or other unfair soliciting material by the Association into the state."²⁰

The court had no problem with the sufficiency of the statutes of the 48 States in which respondent operated on an unauthorized basis to protect the public interest as to unfair or deceptive insurance practices of firms licensed and with agents resident

¹⁹ 362 U.S. 301-302.

²⁰ 298 F. 2d 820, 822 (1962).

therein. It was the prospect of enforcement difficulties with respect to situations where an insurer, like Travelers, was not licensed in a particular State and did not operate through resident agents that troubled the court. The court noted that "such states are able to engage in enforcement of their regulatory provisions only by means of reach against [such insurers] outside their own borders," and this circumstance raised in the court's mind the "crucial" question of whether these States are able to "exercise such fullness of compulsion" as to legally provide them with local control.²¹

The problem, the court said, was not that a State would be unable on Constitutional grounds to subject an unauthorized insurer like Travelers to its judicial jurisdiction or to provide adequate notice of proceedings through proper service of process. The Supreme Court's decisions in *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), and *Travelers Health Ass'n. v. Virginia*, 339 U.S. 643 (1950), would seem to eliminate such concern, but there still remained the practical inability of the State to subject the unauthorized insurer to legal processes beyond that point. The court said:

Processive means for exerting pressure against person or through property to effectuate orders, decrees and judgments which have been rendered are inherently a part of the legal concept of control. If they do not exist, or if they are not capable of being given exercise and application so that the element of legal compulsion can be provided by them, there is not conceptually present such power on the part of a state to effect control as to entitle it to be declared that [Travelers'] situation in the state is "regulated by State law."²²

While in *National Casualty*, the court said, States could look to a "[c]ompany's license to do business, its agency structure, its accounts and balances . . . and the fact that the agents themselves were the persons who were making distribution of the advertising material" as affording means of effectuating orders (298 F. 2d at 824), in the circumstances of the *Travelers* case, the States had no "ample means" for exercising the necessary control. Therefore, the Commission's authority to act was not displaced.

It is apparent to us from this review of the case law that the Commission's jurisdiction over respondent can be limited or supplanted only by State regulatory machinery which is capable of controlling Statesman's promotional practices through its own devices and without resort to the enforcement apparatus of

²¹ *Id.* at 823.

²² *Id.* at 824.

another State. We would concede that no Constitutional barrier stands to the regulation of foreign mail order insurers like respondent by the States in which such firms solicit and secure business. See *Ministers Life and Casualty Union v. Haase*, 30 Wis. 2d 339, 141 N.W. 2d 287, *appeal dismissed*, 385 U.S. 205 (1966), and *People v. United National Life Ins. Co.*, 58 Calif. Rptr. 599, 427 P. 2d 197, *appeal dismissed*, 389 U.S. 330 (1967). However, despite such jurisdiction, if an insurer, like Statesman, is not present in a State through agents or attachable assets, and if it has not submitted voluntarily to the State's licensing procedures,²³ enforcement of a statute prohibiting deceptive advertising against it is likely to depend upon the willingness of a State of domicile to lend its powers of compulsion for the protection of another State's citizens. Because it is problematical whether such assistance will be forthcoming, the Supreme Court has favored provisions whereby citizens are not deprived of protection by the governmental institutions which are politically responsible to them. Compare *F.T.C. v. Travelers, supra*, with *Travelers v. Virginia*, 339 U.S. 643, 649 (1950), and *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957).²⁴

To demonstrate that a severe problem of enforcement exists and that this particular respondent is generally not being regulated, one need only look to the fact that Statesman persists in operating on an unauthorized basis whenever it does business outside of Texas. To so operate violates the compulsory licensing laws which respondent tells us exist in all states,²⁵ and yet respondent generally feels no compulsion or compunction to conform to these State statutory demands.

²³ The license to conduct an insurance business within the boundaries of a given State is viewed as a discretionary franchise enabling the State to exercise a maximum of control over an insurer's operations therein by virtue of the power to revoke or to refuse renewal of the certificate. As Prof. Patterson has written, "Control of the state over insurers is exercised chiefly through the licensing power." *Supra* note 13, at 19 (emphasis added). Commonly, the ground for revocation or renewal refusal is the insurer's violation of some aspect of the insurance code, including, of course, fraud and deception.

²⁴ For a discussion of the barriers to effective enforcement of decrees and judgments against foreign mail order insurers, see Dean, *The Foreign Unauthorized Insurer: A State Regulatory Gap*, 32 Ins. Counsel J. 432, 440-445 (1965); Note, 64 Harv. L. Rev. 482 (1951); Hanson and Obenberger, *supra* note 13, at 272-311.

²⁵ Resp. Br. 18. See, e.g., § 700 of the California Insurance Code which states in relevant part:

"A person shall not transact any class of insurance business in this State without first being admitted for such class. Such admission is secured by procuring a certificate of authority from the commissioner. Such certificate shall not be granted until the applicant conforms to the requirements of this code and of the laws of this State prerequisite to its issue. After such issue the holder shall continue to comply with the requirements as to its business set forth in this code and in the laws of this State * * *."

The application of this law to foreign mail order insurers was ruled Constitutional in *People v. United National, supra* 12.

It must be acknowledged that respondent does claim to have a sufficient respect for the regulatory capacities of California and Wisconsin to presently refrain from mailing into those States. The Attorney General of California secured a default judgment against Statesman permanently enjoining it from engaging in the insurance business there by mail or otherwise unless and until a license is obtained.²⁶ As to its reasons for not mailing into Wisconsin, respondent's president testified:

We never have mailed in the State of Wisconsin because of the Wisconsin type of legislation they have had for several years there. I understand that has been adopted in Colorado. We will not mail into that state nor will we mail into any other state that adopts this type of legislation.²⁷

However, whether one could say, in the case of Statesman, that these two States are effectively regulating it so as to remove from FTC jurisdiction its activities in those States is academic. So long as respondent continues to solicit no business there, it does nothing in those States which would concern the Commission. If it commences to seek business there again in violation of an injunction or compulsory licensing law, this contemptuous or casual disregard of the States' regulatory machinery would stand as persuasive evidence that the machinery is too defective for McCarran Act purposes to supplant the Federal Trade Commission.

In any event, to suggest, as respondent does, that the Commission's jurisdiction over an unauthorized mail order insurer is displaced by local regulatory measures which, as a practical matter, are unenforceable and, hence, incapable of effecting compliance therewith, is to suggest that such an insurer be left to operate free of public scrutiny and control. This, we believe, is not what Congress had in mind when it passed the McCarran Act. We therefore decline respondent's invitation to remove from the protection of the Federal Trade Commission Act the citizens of those States where a particular mail order insurer has no permanent agents or reachable assets and which have not succeeded in submitting the insurer to their licensing procedures.

²⁶ Tr. 253; RX 21.

²⁷ Tr. 255. The Wisconsin insurance code is examined in depth in Hanson and Obenberger, *supra* note 13, and its Constitutionality with respect to its application to unauthorized mail order insurers was sustained in *Ministers Life & Casualty Union v. Haase*, *supra*. Legislative developments in various States since the passage of Wisconsin's code are discussed in Manders, *Ministers Life & Casualty Union v. Haase: The New Trend in State Regulation of Unauthorized Mail-Order Insurance Companies*, 43 Notre Dame Lawyer 157, 178-180 (1967). Possibly, the solution to the whole problem of what must be done by the States to effectively assume the task of regulating foreign mail order insurers lies with the adoption of a program like Wisconsin's.

II

The Commission is sensitive to its great responsibilities under the statutes which it administers and under the Constitution. In administering the various statutes, we endeavor to conform our official acts to the demands of fundamental fairness, to base the exercise of our authority on reason and to purge our processes of the arbitrary and the capricious. We believe, in the words of Justice Frankfurter, that, "The history of liberty has largely been the history of observance of procedural safeguards."²⁸ In the case before us, however, respondent argues that we have fallen short of the standard.

Respondent calls into question the right of the Commission to institute formal, adjudicatory proceedings without having offered it the opportunity to modify its practices on a voluntary basis pursuant to Section 2.21 of the Rules of Nonadjudicative Procedures,²⁹ because of the fact that the FTC had in the past closed an investigation of its predecessor (Cosmopolitan Mutual) involving the same representations without seeking corrective action. According to respondent's counsel, Statesman has been "plainly entrapped" by the Commission into continuing the use of the advertising in question, and the decision to issue a complaint in place of an invitation to settle the matter informally constituted an abuse of discretion.

Complaint counsel, while pointing out that respondent was given every opportunity to enter into a formal consent settlement and that protracted consent negotiations were indeed conducted, reply that nothing in the Administrative Procedure Act³⁰ requires an agency to accept a settlement when it believes that such action will not insure future compliance with the law. Respondent, as complaint counsel correctly demonstrate, have cited no remotely persuasive authority for the position it advances.

It must be clear to anyone who reads the cited sections that under no stretch of the imagination can § 5(b) of the Procedure

²⁸ *McNabb v. United States*, 318 U.S. 332, 347 (1943).

²⁹ This section, entitled "Voluntary Compliance," provides in part:

"(a) The Commission, when it has information indicating that a person or persons may be engaging in a practice which may involve violation of a law administered by it, and if it deems the public interest will be fully safeguarded thereby, may afford such person or persons the opportunity to have a matter disposed of on an informal nonadjudicatory basis." (Emphasis added.)

³⁰ Section 5(b) of this Act, 60 Stat. 239; 5 U.S.C. 554, provides a basis for the Commission's voluntary compliance procedure. It requires the agencies to make available opportunities for such settlements "where time, the nature of the proceeding, and the public interest permit." (Emphasis added.)

Act or § 2.21 of the Commission's Rules be construed to deprive the Commission of the power to institute formal proceedings when it appears that the public interest so requires. (In issuing its complaint in this docket the Commission clearly stated its determination that this proceeding was in the public interest.) Moreover, there are a host of reasons not involving the merits of a given case which would lead to the Commission's administrative decision to take no further action at the time with respect to a pending investigation. Budgetary considerations, policy and planning determinations, manpower allotments, incomplete or faulty factual information in hand, and the prospects of remedial action coming at the instance of another governmental agency are but a few examples.

So that no business firm subject to an investigation will have reason to conclude that the Commission's decision to take no further action against it at that time does not constitute a judgment with *res judicata* effect, such firms are specifically apprised that the Commission may take whatever action in the future that the public interest might require. Statesman's predecessor was so informed.³¹

While respondent's counsel does not suggest that the closing of the investigation in question had *res judicata* effect, it does in essence urge that the Commission is completely estopped from exercising its power to make a judgment that the public interest will only be served by the institution of formal proceedings. It is not surprising that counsel can direct our attention to no case supporting such a rule, for, were that the law, the agency would become indistinguishable from a court. Each matter that was presented to it would, for all practical purposes, necessitate a judgment on the merits. Bereft in this manner of its prosecutory discretion, the Commission would be powerless to choose its cases, plan its operations or allocate its resources. It would no longer administer; it would only adjudge. Therefore, seeing no merit in law, fact or reason in respondent's challenge, we are not persuaded by it.

Respondent raises a related argument that the Commission has denied it "equal protection" by choosing to institute formal proceedings against it, while having accepted informal assurances of voluntary compliance from other mail order insurers. However, it is settled law that so long as the Commission's decision to seek a formal order is not patently arbitrary or capricious,

³¹ Admission of counsel at oral argument (May 15, 1968; Tr. 24).

the exercise of its discretion to so proceed is within the legitimate scope of its authority.³²

Respondent's challenge, we believe, falters at the starting gate, for the practices of only one of the firms listed (Resp. Br. 34) bears even a remote relationship to the allegations of the complaint here. Indeed, we find as somewhat astonishing the contention that the Commission must deal on the same basis with every member of a given industry with respect to wholly dissimilar practices. While respondent has not been able to set forth any facts in support of its argument, we are of the opinion that the gravity of the particular misrepresentations alleged in the complaint and their central relationship to Statesman's entire promotional program provide a reasonable basis for the deliberate decision to proceed formally.

III

Respondent's final procedural objections relate to the hearing examiner's performance of the duties imposed upon him by the Jencks rule.³³ Specifically, respondent contends that the examiner (1) failed to inspect a memorandum prepared by complaint counsel reporting on a conference held with three representatives of the Veterans Administration, one of whom, Thomas Kiernan, appeared as a government witness, and (2) incorrectly refused to recall the same witness after the close of trial to permit a determination of whether he, Mr. Kiernan, had adopted or approved any statement contained on a piece of paper bearing notes jotted down by a Commission trial attorney regarding a different meeting (held on August 18, 1966) with Kiernan and his associates and which was not discovered by complaint counsel until after the close of the record, but voluntarily submitted to the examiner shortly thereafter. Neither objection will demand lengthy treatment, for the requirements of the Jencks rule in the circumstances of each incident presented in the appeal are clear.

To begin with respondent's second objection, the record

³² Cf., e.g., *Federal Trade Commission v. Universal-Rundle Corp.*, 387 U.S. 244 (1967); *Moog Industries, Inc. v. Federal Trade Commission*, 355 U.S. 411 (1958); *Rabiner & Jontow, Inc. v. Federal Trade Commission*, 386 F.2d 667 (2d Cir. 1967); *Clinton Watch Co. v. Federal Trade Commission*, 291 F.2d 838 (7th Cir. 1961), cert. denied, 368 U.S. 952; *R. H. Macy & Co.*, Docket 8650 (Interlocutory opinion of September 30, 1965), 68 F.T.C. 1179.

³³ Essentially, the Jencks rule requires that upon proper demand defense counsel is entitled to inspect, for the purposes of aiding his cross-examination, all the written statements of government witness in the possession of the prosecution, made, signed or otherwise adopted or approved by the witness, or any recording thereof which is a substantially verbatim recital of an oral statement. See the Jencks Act, 18 U.S.C. 3500; *Jencks v. United States*, 353 U.S. 657 (1957). The Commission has spoken at length on the applicability of the Jencks rule to its proceedings. See *Inter-State Builders, Inc.*, Docket No. 8624 69 F.T.C. 1152; and *L. G. Balfour Co.*, Docket No. 8435 (Interlocutory Orders of April 22, 1966), 69 F.T.C. 1118.

shows that after the examiner received word from complaint counsel of the existence of the notes on the August 18, 1966, conference, he called counsel for both sides together and inspected the piece of paper.³⁴

In his judgment, the status of everything in the notes under the Jencks rule was clear. He had no doubts that the notes were devoid of anything which might be within the rule, and he decided that he would not recall Mr. Kiernan for assistance in making the determination.³⁵ We hold that where the examiner finds that he is "able to determine from its face" that nothing in a writing could be within the coverage of the Jencks rule, he has no duty to inquire further by conducting voir dire of the witness involved, and the simple refusal to do so does not constitute error.³⁶

Moving to respondent's first objection, we note that the examiner entertained respondent's request for production of any statements covered by the Jencks rule during a prehearing conference.³⁷ At a later conference, while respondent was being provided with such statements, complaint counsel indicated that he had a memorandum of an interview with Messrs. Moore, Kiernan and Ogle, which complaint counsel denied was a Jencks statement after inquiry by respondent's counsel.³⁸ The examiner declined to examine the statement.

The record indicates that respondent's counsel, complaint counsel and the examiner had reached an understanding that all Jencks statements were to be furnished respondent's counsel by virtue of a general demand prior to commencement of hearings.³⁹ The adoption of such a procedure by agreement of the parties can facilitate the conduct of the hearings, and is not beyond the discretion of complaint counsel. In such event, a respondent has the right to have the examiner himself inspect all purported Jencks statements so that an informed determination may be made. *Cf. Ernest Mark High*, 56 F.T.C. 625, 633 (1959). The examiner may not delegate his ultimate responsibilities under the Jencks rule to complaint counsel, and we therefore find that the memorandum in question should have been inspected by the

³⁴ See Tr. 442-444.

³⁵ While the notes in question were not examined until after the close of trial, complaint counsel's typewritten interview report of the August 18, 1966, meeting was inspected by the examiner at a prehearing conference. He found no Jencks statements in that memorandum. See Tr. 120-129.

³⁶ *Cf. Inter-State Builders, supra; Palermo v. United States*, 360 U.S. 343, 354-355 (1959).

³⁷ See Tr. 30-31, 35-39.

³⁸ Tr. 111.

³⁹ Tr. 35-39.

examiner.

Mr. Kiernan's testimony was that of an expert, and it is crucial to complaint counsel's case. Ordinarily, a determination that the examiner has committed error of the sort involved here would lead the Commission to remand the case for appropriate action to cure the procedural defect. It is possible that the examiner in this case would find, after inspecting the memorandum, that it contained absolutely nothing which should be produced under the Jencks rule, and we would then be free to use the Kiernan testimony without further delay. However, because of the disposition we make in the following section, we have decided against a remand.

IV

In approaching respondent's advertising and sales solicitation program, as it is set forth in this record, we believe that the important question to be resolved concerns the impression which is created as a whole.⁴⁰ While respondent has, at the insistence of the Texas Insurance Commissioner, discontinued using the phrase "Veterans Insurance Division,"⁴¹ it continues to direct its appeal to veterans or to those who are aware of the fact that a very attractive insurance policy was offered to servicemen and veterans by the Federal Government. The sales letter in use at the time of trial⁴² is addressed, "Dear Veteran" even though the addressee's name was probably picked out of a telephone book.⁴³ (None of respondent's application forms inquire whether the applicant is indeed a veteran.⁴⁴) It asks, "Did you drop your G.I. Insurance?", and then informs the recipient that he "can now buy up to \$10,000 maximum life insurance—and at the same low basic rates charged by the V.A. for G.I. Insurance of World War II, not counting dividends. * * * The policy is the same basic plan issued to millions of servicemen during World War II."⁴⁵

⁴⁰ Cf., e.g., *Charles of the Ritz Corp. v. Federal Trade Commission*, 143 F.2d 676, 679 (2d Cir. 1944); *Rhodes Pharmacal Co. v. Federal Trade Commission*, 208 F.2d 382, 387 (7th Cir. 1953) *aff'd.*, 348 U.S. 940 (1955); *Spiegel, Inc.*, Docket No. 8708, Commission opinion p. 12 (July 15, 1968) [p. 211 herein].

⁴¹ See CX 66-67.

⁴² RX 12; Tr. 232. See also RX 9-10, which are white window envelopes bearing in the upper left corner "Veterans Insurance Information" and "For Veterans Only" in the same blue print and type face as used by various federal branches and agencies.

⁴³ Tr. 252.

⁴⁴ Tr. 312.

⁴⁵ Newspaper advertisements used by respondent in 1967 had the same approach. A soldier is depicted, and the reader is asked if he dropped his G.I. Insurance. He is told, "You can now buy up to \$10,000 insurance at the same basic low rates used by the VA under the G.I. Insurance Program of World War II, exclusive of dividends. Policy is the same basic plan issued to millions of servicemen during World War II" (CX 34; Tr. 260).

We find that the total impression created by representations and statements of this nature is that Statesman offers the prospective purchaser a policy that is the same as, or equal to, the World War II NSLI policy of the Federal Government. It appears to us that respondent has tried to come as close to saying that its policy and the VA's were equivalents as it possibly could, without using those words. We think it has tripped over the edge.⁴⁶

The question has now become whether the Statesman policy is in fact the same as, or equal to, the one offered by the government. Here the testimony of Mr. Kiernan would be invaluable. To assay its worth, one need only look at the complete reliance placed upon that witness by the examiner in his findings relative to this issue.⁴⁷

The principal difference in the policies, as alleged in the complaint, is the net cost of the insurance. Complaint counsel attempted to demonstrate on the record that the dividends paid out to policy holders under the NSLI program are substantial in relation to the amount of the premium.⁴⁸ Statesman has never paid a dividend on its policy,⁴⁹ and so even if its premiums are the same as those which are required by the government, the net cost to the insured is materially different.

Respondent argues that its advertising is perfectly clear in representing only that the premium amounts, and not the dividends, are the same as those of the NSLI policy. Typically, its material will contain a statement that its insurance is available "at the same low basic rates charged by the V.A. for G.I. Insurance of World War II, not counting dividends," or "at the same basic low rates . . . , exclusive of dividends."⁵⁰ Respondent placed in evidence a letter of April 28, 1964, from the Texas Commissioner of Insurance approving its addition of the phrase "not counting dividends" to its advertising and expressing the opinion that "this change will eliminate any possible basis of confusion" regarding the two insurance programs.⁵¹

On the basis of our own examination of respondent's material, we believe that this very crucial difference in the two policies is not adequately disclosed. The simple insertion of "not counting

⁴⁶ Compare *Bristol-Myers Co.*, Docket No. 8726, Commission opinion pp. 6-7 (Order Vacating Initial Decision, September 23, 1968) [p. 780 herein].

⁴⁷ See I.D., Finding Nos. 10-12. Mr. Kiernan's testimony appears at Tr. pp. 352-415.

⁴⁸ Relying on Mr. Kiernan's testimony, the examiner found that NSLI insureds at younger ages received 80 to 85% of total premiums paid in dividends (I.D. pp. 1328-1329).

⁴⁹ Tr. 189.

⁵⁰ See, e.g., RX 12; CX 34.

⁵¹ RX 13.

dividends" into the promotional material does not strike us as sufficient to overcome the total effect or impact of the advertising. The total impression, we believe, is that if a person buys the Statesman policy, he will be in essentially the same position relative to insurance as he would be under the plan "issued to millions of servicemen during World War II." If Mr. Kiernan's testimony were properly in this record, we could find that this is a substantial misrepresentation.

With regard to the differences in coverage between the policies, we think that there is a serious question as to whether respondent can continue to represent that it sells the "same basic plan" as the government did with the NSLI program. Mr. Kiernan listed numerous areas where Statesman's policy gives less protection,⁵² and we believe that a careful review of the entire Statesman "G.I. Insurance" plan is warranted.⁵³

Throughout these proceedings, respondent's counsel have endeavored to impress upon the Commission the fact that Statesman has cooperated and wants to cooperate in curing its operation of anything which might be illegal. According to counsel, respondent has fully cooperated with this Commission, the Texas Insurance Board, and the Insurance Commissioners of all States. The record does show some voluntary abandonment or modifications of challenged practices by respondent.

The Office of the Commissioner of Insurance of the State of Texas is an effective one. It seems to be concerned with the character of insurance advertising that flows out of its State with its apparent approval. We think the Commissioner should be provided with a copy of the initial decision and the opinion in this case. As we noted earlier, respondent does do a substantial amount of business with Texas citizens, and the Commissioner will undoubtedly want to insure that they are not induced to purchase insurance through deception.

We believe that changes are required in respondent's promotional materials, and we believe that this record, upon the curing of the Jencks problem, would clearly support an order to cease and desist. To a greater extent than was true in *Bristol-Myers*,

⁵² Tr. 388-396.

⁵³ We note our essential concurrence in the examiner's findings that Statesman's advertising materials have at times been so similar to government materials as to be likely to create confusion regarding their origin. (See *e.g.*, CX 7a, 15, 18, 19, 29 and 32.) The steps taken by respondent to eliminate the possible confusion have not been great. (See CX 7a, 15, 66-67; RX 6-8.) However, we do not believe that there is a significant danger that materials shown by the record to be current will lead a reader thereof to believe the insurance sold by respondent is or may be offered, approved, or recommended by the Veterans Administration or some other Government agency.

supra note 47, this respondent has tried to tip-toe on the edge of illegality. However, we are willing to see whether the necessary changes can be made in Statesman's veterans insurance program without the compulsion of an order by this Commission.

Therefore, rather than remanding the case, we shall vacate the examiner's order and strike everything in his initial decision that is inconsistent with this opinion. From time to time, the Commission, through its staff, will seek to review Statesman's promotional material so that a determination might be made as to whether further action is necessary.

An appropriate order will issue.

Commissioner Elman concurs in the result. Chairman Dixon approves the findings and conclusions contained in the foregoing opinion but would have preferred the issuance of an order to cease and desist. Commissioner MacIntyre does not concur.

ORDER TERMINATING PROCEEDING

Upon consideration of the appeal of respondent from the initial decision filed on December 8, 1967, and for the reasons stated in the opinion accompanying this order,

It is ordered, That the order to cease and desist issued by the hearing examiner be, and it hereby is, stricken, and that the proceeding be, and it hereby is, terminated.

Commissioner Elman concurs in the result. Chairman Dixon approves the findings and conclusions contained in the opinion but would have preferred the issuance of an order to cease and desist. Commissioner MacIntyre does not concur.
