By Jones, *Commissioner*:

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Respondents filed a motion with the hearing examiner seeking a dismissal of this complaint. The hearing examiner denied the motion and we granted respondents' request for an interlocutory appeal.

The grounds urged by respondents in support of their motion are essentially two: (1) that the Commission in issuing its complaint violated its own Procedures and Rules of Practice and (2) that counsel supporting the complaint will be relying on illegally obtained evidence

in the proof of the instant adjudicative proceeding and hence will be violating respondents' Fourth Amendment rights. (RB, pp. 3, 5–6).[1]

The basis for both of these contentions by respondents rests on the circumstances surrounding the Commission's issuance of Advisory Opinion No. 128 [71 F.T.C. 1735; 16 C.F.R. § 15.128].[2] This Advisory Opinion was issued on May 22, 1967, at the request of these respondents and other members of the magazine subscription sales industry. It advised that the Commission found no illegality under the antitrust laws of the industry's proposed self-regulatory program designed to eliminate abuses in the sales practices of this industry.

Respondents argue that this opinion: (1) approved practices alleged as illegal in the instant complaint served on respondents on January 21, 1971; (2) committed the Commission not to institute adjudicative proceedings against these respondents while the advisory opinion was in effect; and (3) bound the Commission not to use any information received during the course of investigations in connection with the advisory opinion in any subsequent adjudicative proceedings brought against them. We will deal with these various contentions in the course of our consideration of respondents' two principal grounds for its appeal.

RESPONDENTS' CONTENTIONS THAT ISSUANCE OF THE COMPLAINT VIOLATES COMMISSION PROCEDURES AND RULES OF PRACTICE

Respondents contend that the Commission's issuance of this complaint violated its own Section 1.3(b) of the Commission's Procedures and Rules of Practice and that, therefore, it must be dismissed in its entirety.

Section 1.3(b) of the Commission's Procedures and Rules of Practice provides that following issuance of an Advisory Opinion the Commission will not:

> * * * proceed against the requesting party with respect to any action taken in good faith reliance upon the Commission's advice under this section, where all relevant facts were fully, completely, and accurately presented to the Commission and where such action was promptly discontinued upon notificaton of rescission or revocation of the Commission's approval.

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[1] RB refers to respondents' Interlocutory Appeal From Order Denying Motion to Dismiss Complaint (hereinafter cited as RB).

[2] The Advisory Opinion was conveyed to respondents' counsel in a letter from the Secretary of the Commission. Under then existing rules, the text of this letter was held confidential. A "digest" or paraphrase of the substance of the opinion was issued in a press release May 23, 1967. Respondents have placed the text of the letter on the record as Respondents' Exhibit 3 to the Deposition of Sidney Harris, submitted for consideration with this appeal (hereinafter cited as Harris Deposition). Accordingly, all references to and quotations from this opinion will be to the original text of the letter and not to the digest.

Respondents argue that all of the sales practices challenged in the instant complaint were either approved or permitted by the Commission's Advisory Opinion or were prohibited by their own industry self-regulatory Code which was approved by the Advisory Opinion. They argue further that in issuing its Advisory Opinion, the Commission expressly committed itself not to sue the respondents or other industry members subject to the Code for any of the practices which they claim were prohibited or permitted while the Code was in effect, and that, therefore, all of their activities were undertaken in reliance on this commitment and could not be challenged, until the Advisory Opinion was rescinded.

The answer to all of respondents' assertions, understandings and beliefs concerning the Advisory Opinion must be found squarely within the four corners of the industry request for a Commission Advisory Opinion and the text of the Commission's response. It is necessary, therefore, to examine this opinion in order to deal fully with respondents' contentions.

The Commission's opinion and the industry's original request show clearly that the magazine subscription sales industry came to the Commission for the express purpose of receiving an *antitrust* clearance for a self-regulatory program which the industry desired to institute in order to clean up its own sales practices in the solicitation and sale of magazine subscriptions.[3]

The Commission's Advisory Opinion stated unequivocally that with the modifications contained therein, the Commission believed the antitrust obstacles to the Code could be overcome and the Code approved so as to enable the industry to carry out its self-regulatory program. The Commission's opinion makes clear its almost total preoccupation with the antitrust problems which were raised by the industry's proposals to levy sanctions against Code violators.[4] Thus the Commission's Advisory Opinion pointed out:

> The Commission has given this matter very careful consideration in view of the magnitude of the problems which confront the industry and the obvious sincerity of the [PDS Agency] Committee in attempting to devise ways to cope with those

[3] The industry's preoccupation with the antitrust implications of its self-regulatory program is borne out by the fact that originally it had gone to the Antitrust Division of the Department of Justice for a railroad release and had been referred by the division to the Federal Trade Commission. (See, letter, Zimmerman to Kintner, August 24, 1966, Ex. 7, Harris Deposition).

[4] Indeed it was this precise issue of private police power which gave rise to Commissioner Elman's dissent. However, there is no doubt that even Commissioner Elman had no concept that in approving the self-regulatory program, the Commission was abdicating its own law enforcement responsibilities to the industry. See, for example, Chairman Weinberger's opening statement at the Commission's 1970 hearing concerning the operations of the PDS Code and Commissioner Elman's interchange with industry counsel on this precise point. See note 7 *infra* for citations.

problems. Even taking all these factors into consideration, however, the Commission is unable to give its approval to those sections of the Code which apply to the salesmen as those sections are now written. While the Code now provides that the action to be taken with respect to the salesmen found to be in violation would be on the basis of a recommendation by the Administrator rather than by agreement among the signatory agencies, the Commission believes the probable result of that recomemendation would be to substantially interfere with those individuals' right of employment and their right to have their fate decided by their individual employers uninfluenced by virtually mandatory recommendations from the Administrator. However, the Commission does not believe that this would call for outright rejection of the Code, since it *is believed the Code can be amended so as to achieve the legitimate objectives of the Committee without running afoul of the antitrust laws.*

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The Commission is further of the opinion, now that greater participation of the independent agencies has been insured, *that it is possible to apply the Code as now written to the publishers and agencies in such a manner as not to do violence to the antitrust laws,* particularly if the element of coercion can be truly eliminated insofar as the independent agencies are concerned when they are arriving at their decision as to whether to join or whether to remain under the Code after having joined. It should be made clear, however, that this conclusion is a tentative one since there is little recorded experience upon which to predicate such a judgment. Therefore, this opinion is based on the understanding that there will be no coercion of any agency to subscribe to the plan, no coercion of any agency to remain in it after it has subscribed and no retaliation of any kind against any agency which does not choose to join or which subsequently elects to leave after having joined. (Emphasis added)

Indeed the Commission was so concerned with the antitrust implications of the industry's assertion of sanction power over its members that it was reluctant to make its approval unconditional. Therefore, it advised the industry that its approval was limited to a trial period of three years and that during this period the industry was to provide it with detailed reports on the operations of the Code so that the Commission could observe for itself the way in which the Code enforcement provisions were actually implemented.

There is not the slightest indication either in the opinion or in the record before us on this motion that the Commission in approving the organization and enforcement machinery of the Code from an antitrust viewpoint also granted clearance for any proposed types of selling practices or in any way surrendered any right or power to proceed against unfair or deceptive acts and practices engaged in by members of this industry. The industry's request clearly shows that no immunity from prosecution for selling practices was sought. Although the Commission's opinion noted that the proposed Code contained substantive provisions setting out the practices prohibited by the Code, the Commission observed that in its view these provisions merely at-

tempted to restate the substantive law respecting practices in the selling of magazine subscriptions and as such it had no objection to them.[5] This clearly affords no basis for the contention that the Commission thereby "approved" any or all selling practices not specifically prohibited by the Code.[6]

Nor is there anything in the Commission opinion or the papers before us which indicates an intention on the part of the Commission to delegate exclusive policing authority to the industry. Not only did the Commission not surrender any such rights, it could not have done so legally. The Commission has no power to delegate even temporarily to private parties its statutory duties to enforce the law. It did not do so in this case.

Respondents suggest in their papers that their alleged understanding of the immunity purportedly granted to them by the Advisory Opinion was supported by statements made by members of the Commission and by its staff. We have no indication of what these statements might be, but in any event respondents' assertions on this point are legally and factually irrelevant.[7] The Commission is a collegial

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[5] The sentences containing this observation in the Advisory Opinion read as follows:

It is noted that the Code incorporates a number of provisions which attempt to restate the substantive law applicable to this method of field selling of magazine subscriptions. The Commission herewith advises you that it sees no objection to these provisions as presently worded.

[6] Respondents argue that Paragraphs 4(a), 5(a), 6(a), 6(e) and 7 of the complaint challenge practices which were permitted under the Code and that the Commission therefore approved of those practices. Aside from the fact that the Commission did not "approve" any selling practices, we have examined the Code and fail to find any indication that such practices are permitted. Indeed, the Code appears to prohibit the practices alleged in Paragraphs 4(a), 5(a), and 6(a). Paragraph 7 of the complaint has been modified subsequent to the issuance of the complaint so that it no longer asserts that failure to provide a 72-hour cooling-off period constitutes a *per se* violation of Section 5. See Commission Opinion, May 26, 1971.

[7] Commissioner Elman in his dissent [71 F.T.C. 1738] from the Commission's decision to issue the Advisory Opinion deplored the fact that the Commission's Opinion permitted the industry to exercise what he termed the regulatory powers of government. But nothing in his statement can possibly be interpreted or implied to be a representation that in his view the Commission's opinion was allowing the industry to exercise any powers to the exclusion of the Commission's right and duty to do so. Again, there is simply nothing in this statement which could form any reasonable basis for respondents' present claims in this regard. See also Commissioner Elman's interchange with counsel for the industry during the public hearing on the operations of the PDS Code. *Infra* note 7.

The only other "statement" contained in respondents' appeal papers by a Commissioner or Commission staff members is an oblique reference in a letter by respondents' counsel to the Special PDS Agency Committee which requested the Advisory Opinion about a meeting he had had with then Commission Chairman Dixon in which counsel reported that Chairman Dixon intimated that complaints would issue against industry leaders unless the code "developed" into operation. (Letter, Kintner to Campbell, February 21, 1967, Ex. 13, Harris Deposition.) Whatever encouragement the Chairman reportedly gave to the industry to go forward with their own efforts to clean up abuses in their industry can hardly be translated by hindsight into a commitment or understanding given to respondents that approval of their self-regulatory program constituted a formal Commission commitment not to proceed adjudicatively against industry members prior to revocation or expiration of the Advisory Opinion.