

Interlocutory Order

IN THE MATTER OF

FRUEHAUF CORP.

Docket 8972. Interlocutory Order, June 22, 1978

Order denying respondent's petitions to reopen and set aside Commission's divestiture order of February 22, 1978.

ORDER DENYING PETITIONS TO REOPEN AND SET ASIDE ORDER

By motions filed on May 10 and May 15, respondent Fruehauf has petitioned the Commission to reopen this proceeding and set aside the Commission's decision of February 22, 1978 which ordered divestiture by Fruehauf of the assets of the Kelsey-Hayes Company other than those unique to Kelsey-Hayes' Aerospace and RV Agricultural groups.

The asserted bases for Fruehauf's petition are several developments in the market for antiskid braking devices (ASBD). Fruehauf cites principally the decision of the Ninth Circuit in *Paccar, Inc. v. National Highway Traffic Safety Administration*, Nos. 75-1017, 2831, 3128 (April 17, 1978) ordering suspension of FMVSS 121 as it applies, *inter alia*, to truck trailers, because of defects in the procedure by which the standard was promulgated. Fruehauf also cites the initiation of a rulemaking proceeding by NHTSA to reconsider the standard, as well as introduction of bills in Congress to repeal the standard. All these developments, in Fruehauf's view, raise the possibility of changes in the ASBD market, and accordingly Fruehauf asks the Commission to withdraw its order, take further evidence and eventually reconsider its determination that divestiture is warranted. For the following reasons we believe that such a course of action is unwarranted and not in the public interest, and accordingly, we decline to reopen this proceeding.

The Commission found that violations of law had occurred in *three* markets—heavy duty wheels, truck trailers, and antiskid braking devices. Findings of violation in the first two of these markets are in no way altered or subject to potential alteration by the new information presented by respondent. With respect to the ASBD market, the Commission's finding that the merger was unlawful when it occurred is also not disturbed. To be sure, the information presented by Fruehauf does raise a *possibility* that at some unspecified future date the merger will no longer continue to threaten competitive harm with respect to the production of antiskid braking devices. This *might* occur, for example, if Fruehauf ceased permanently to purchase any substantial quantities of ASBD. Whether this *will* occur, however, or when, is highly problematical. The Ninth Circuit's decision (which at

the present time has been stayed pending a decision by NHTSA as to whether to seek certiorari)¹ is without prejudice to the right of NHTSA to reimpose the same or similar requirements based on further hearings. Moreover, Fruehauf might remain a major purchaser of ASBD even were it under no legal obligation to use the device.

At the present time, therefore, the Commission has no basis upon which to alter any of the conclusions reached in its opinion.

It would clearly be unwise for the Commission to suspend proceedings in this matter indefinitely merely because of the possibility that further developments, whose date of occurrence cannot be forecast, might dissipate some of the effects of a merger we have concluded to be illegal.² This is especially true inasmuch as the violations found in heavy-duty wheels and the truck trailer markets are not in any way affected by the new developments. Assuming *arguendo* that the occurrences cited by respondent ultimately lead to elimination of the anticompetitive effects of the merger with regard to ASBD, the merger will still continue to exert anticompetitive effects in the heavy duty wheel and truck trailer markets. Since the market for heavy duty wheels is much larger than that for ASBD, and since Kelsey-Hayes' assets devoted to heavy duty wheels far exceed those devoted to ASBD,³ it is clear that the lion's share of harm found to have occurred will persist under any circumstances.

The Commission ordered that Fruehauf divest Kelsey-Hayes except for assets unique to its Aerospace and R-V Agricultural Groups. This order was premised upon our view that total divestiture is ordinarily the remedy to be preferred in a merger case. While we were prepared to depart from this formulation to the limited extent of exempting assets clearly unrelated to the Automotive Products Group involved in the implicated markets, we concluded that attempting to carve out any lesser entity would be unwarranted by the record before us, which reflects only that Kelsey-Hayes has been a viable company, and not that those of its assets devoted to wheel production or ASBD production could be feasibly severed and made into viable units. Assuming *arguendo* that it were to transpire in several years that injury was no longer threatened in the ASBD market, our conclusion as to the appropriate remedy in this case would remain the same,

¹ NHTSA has apparently determined to seek certiorari, and has also extended indefinitely the comment period in its rulemaking, which would appear to eliminate the possibility that it will imminently revoke the requirement of antiskid as to truck trailers *sua sponte*. 43 F.R. 24,871 (June 8, 1978)

² With regard to these "further developments," we must emphasize that they bear no relationship to the evolution of ASBD into a components market, urged upon us by respondent in its appeal from the initial decision. Our conclusions as to that remain undisturbed.

³ As we noted in our decision, Kelsey's Gunite plant, at which wheels are made, accounted for \$41 million in assets, vs. \$3-7 million for the Brighton plant which makes ASRD. (fn 35) Sales of ASRD in 1975 were around \$41 million vs.

because with respect to heavy duty wheels the record provides no basis on which to conclude that Kelsey-Hayes' market position could be transferred to another company which is not a competitor or a purchaser and which would be able to maintain Kelsey's position in the market.⁴ For these reasons, the Commission concludes:

(1) The information presented by respondent provides no grounds to warrant disturbing our conclusion that this merger violates Section 7 with respect to three markets.

(2) The information presented offers no grounds to conclude at the present time that the continuing unlawful effects of the merger will in any way be dissipated.

(3) Even if the events discussed by respondent should at some future time lead to a dissipation of the continuing anticompetitive effects of the merger with respect to the ASBD market, this would not alter the Commission's conclusion that the divestiture order entered on February 22 is appropriate.

Therefore,

It is ordered, That respondent's petitions to reopen and set aside the Commission's order of February 22 be denied.

⁴ As we noted in fn. 36 of our opinion, it does remain open for Fruehauf to demonstrate affirmatively that the divestiture ordered by the Commission is not necessary. This it may do by presentation of a purchaser to the Commission which is not a manufacturer or purchaser of wheels or ASBD and which is capable of maintaining Kelsey-Hayes' market positions in those fields. Obviously, if Fruehauf were able to couple the production of a suitable purchaser for wheels with a showing that it was no longer a purchaser of ASBD, the Commission would give serious consideration to modification of its order. However, it is wholly speculative at this time as to whether Fruehauf could produce such a purchaser, and Fruehauf could surely not show at present that it has ceased permanently the purchase of ASBD. To delay indefinitely action to redress the effects of a merger found to be illegal, merely because future developments might possibly permit the law-violator to argue that a lesser remedy is sufficient, would be gross irresponsibility on the part of this agency.

1157

Proposal for financing promotional campaign to increase onion consumption in the U.S. by soliciting contributions from companies supplying material for or manufacturing onion containers, File 783 7003.

Opinion Letter

January 16, 1978

Dear Mr. Daniel:

This responds to your request, on behalf of the National Onion Association, for an advisory opinion concerning a proposed promotion plan.

It is the Commission's understanding that the Association would contact companies that supply materials for or manufacture onion containers ("container companies"). These companies would be asked to contribute one cent per container to the Association, which would use these funds to advertise and promote onion consumption. In anticipation of the one cent contribution being passed on to the purchasers of the containers, the proposal also provides that those growers who do not wish to participate in the program may obtain refunds from the Association after presenting proof of purchase from participating container companies.

The Commission, in prior advisory opinions, has recognized the inherent prospect for coercion where a trade association contacts suppliers in order to have the suppliers follow a proposed course of action. For example, when the National Association of Sporting Goods Wholesalers requested advice on a proposal to recommend procedures for prepaid freight to the manufacturers who sold goods to the Association's members, the Commission refused to approve the plan, stating:

"Even if unaccompanied by any intent to force the manufacturers to adopt the policies set forth in the recommendation, there is implicit in such recommendation by the wholesalers too grave a danger that it will serve as a device whereby the concerted power of the members of the Association is brought to bear to coerce the manufacturers to conform their pricing policies to the restrictive standards of the recommendation, or at the very least as an invitation to enter into agreements among themselves to do so." (File No. 683 7106). [16 CFR 15.246, 73 F.T.C. 1333]

See, also, Printing Industries Association, Inc. of Southern California,

File No. 683 7002 (Commission disapproved of plan to have Association discuss proposal for paper manufacturers to guarantee that a quoted price would remain firm for a definite time) [16 CFR 15.137, 72 F.T.C. 1042]; Automotive Wholesalers of Illinois, File No. 663 7036 (Commission disapproved of plan to adopt and transmit to suppliers recommendations concerning price changes and refund policies) [16 CFR 15.15, 69 F.T.C. 1203]. These opinions recognize the implied coercion where a trade association makes "suggestions" to the suppliers of its members.

Accordingly, after careful consideration, the Commission has concluded that it cannot give its approval to the promotion plan. While the Association has represented that nothing would happen to those container companies that did not participate in the program, the common interest of the Association's members in the program's success carries with it implications of potential concert of action. There is, implicit in the program, a grave danger that it could serve as a device whereby the concerted power of the members of the Association might be brought to bear to coerce container companies into participation in the program. Accordingly, the Commission is unable, under the laws it administers, to sanction the Association's program.

By direction of the Commission.

Third Supplemental Letter Relative to Request

May 9, 1977

Dear Mr. Sheehan:

This is to confirm our recent telephone conversation and answer the question that you posed during same.

Three different types of onion containers are in general use. These are a poly-vinyl mesh material which costs 28¢ a piece in Colorado, a paper mesh material which costs 31¢ a piece in Colorado, and the cartons which are used by some growers which cost growers 42¢ a piece in Colorado. The poly-vinyl mesh and the paper mesh hold 50 lbs of onions each. The cartons hold between 40-50 lbs of onions.

During our telephone conversation I also reiterated that some of the onion grower committee members of National Onion Association as well as myself would be happy to meet with you in Washington, D.C. to discuss our project if this would be useful to you.

I also inquired of you if it would be helpful if the Department of Agriculture discussed this matter with you and let you know what their position was with regard to same. As to this latter point, you advised me that you would be back in contact with me and advise as appropriate.

1157

Your assistance is appreciated.

Yours truly,

/s/ Jerry C. Daniel

Second Supplemental Letter Relative to Request

April 20, 1977

Dear Mr. Sheehan:

This letter is in written response to your telephone request of Monday, April 18, 1977.

You asked that I advise you how National Onion Association intends to approach container suppliers and manufacturing companies and furnish you with a sample of any letter agreement we are contemplating using.

A rough draft only has been prepared of the type of letter that we are contemplating using.* It is not complete and before it is complete, will need to have language in it to the effect that onion producers can write to the National Onion Association and obtain a refund on any monies that the container manufacturer or supplier passed on to them when the producer purchased onion containers from these entities. This is a rough draft that was made up very early in these considerations and undoubtedly can be improved and made more accurate. Committee members on the promotion committee of the National Onion Association have already been putting out feelers by telephone, personal contact and letter with container suppliers and manufacturers to ascertain if they have any interest at all in going along with the plan that is being developed. Results are very sketchy at this point in time and many of these companies want to know what the FTC position is on our request for an advisory opinion before committing themselves. Of course, we are not asking for any firm commitments at this time.

You asked me what would happen if a container supplier or manufacturer did not care to participate in the program. As far as NOA is concerned, nothing would happen. They would just not be part of the program and we would hope that enough companies are part of the program that sufficient monies will be raised to do some good.

In checking with individuals on the promotion committee, they feel that there is no question but that the staff can handle any refund program and all that would be necessary for a grower to obtain a refund is to show proof of purchase subsequent to the date that the container supplier or manufacturer agreed to go along with the promotion plan of NOA.

* The draft letter is not reproduced herein.

There appears to be no information on how many individual onion growers are producing onions in the seventeen state area mentioned in my prior letter or how much tonage these onion growers are producing on an individual basis. This is not public information and apparently the statistics are not being gathered by any organization.

Again I would reiterate that I and members of the committee of the National Onion Association would be happy to come to Washington, D.C. to meet with you and fully explain the concept that we are hoping to evolve.

Thank you for your assistance in this matter.

Yours truly,

/s/ Jerry C. Daniel

First Supplemental Letter Relative to Request

April 13, 1977

Dear Mr. Sheehan:

This is in reply to your telephone request of Monday, April 11, 1977.

The information that I am furnishing you is the best that can be developed by the National Onion Association at this time, but we feel is relatively accurate.

There are seventeen states which are onion producers of both the storage and non-storage onions. Some other states grow small quantities of onions but do not ship them out of state and are not counted in our tabulation.

Of the seventeen states growing storage and non-storage onions, there are 93,962 planted acres. Of these, 38,834 acres are actually planted by NOA members – or 41%. The amount of onions handled by NOA members, however, is 72.4%.

NOA data does not show how many growers of onions there are in the United States and we do not believe it is possible to determine this number with any accuracy.

The areas that have marketing orders and the purpose of the orders are as follows:

- Idaho – East Oregon – Promotion of specific onion and research.
- Michigan – Research
- New York – Research
- Texas – Quality control

National Onion Association cannot go to onion growers directly to raise funds for promotion and advertising purposes because of the logistics impossibility. NOA has neither the manpower nor the money to effect a campaign which would contact the growers, advise them of

1157

the plans and benefits and arrange the documents that would be necessary to implement such a program. In the approximate 1959-60 onion growing season, a voluntary plan of this type was attempted by the National Onion Association but failed miserably. Again, the logistics problems could not be overcome. Obviously in this type of a plan there is a need for a consistent, even flow of funds that can be relied on and the above considerations are what led to the development of the plan that we are asking an advisory opinion on from the FTC.

Thank you so much for your assistance and cooperation. If there are any questions that we can answer, please let us know. We also hope that a few of us will be able to visit you in Washington, D.C. to fully explain the concept before you.

Yours truly,

/s/ Jerry C. Daniel

Letter of Request

March 7, 1977

Dear Mr. Secretary:

The National Onion Association is starting to evolve a plan which is hoped will be effective in increasing the use and consumption of fresh onions particularly in the United States. The purpose of this letter is to ascertain from your commission if your attorneys feel that the plan of the National Onion Association steps over the line between what is permitted and what is considered as illegal under various anti-trust and other pertinent laws. The National Onion Association has proposed the following plan but it is not currently being followed.

The National Onion Association is a non-profit Colorado corporation. It is a rather loose knit organization and therefore, does not have a great deal of cohesiveness or power as such pertains to control of members within the association, but does represent 50-75% of the production of onions in the United States.

The leadership of the association has determined that it would be to the benefit of onion farmers, the association itself and manufacturers and distributors of onion containers if the consumption of onions could be increased in the United States through a promotion and advertising campaign. As a corollary to this, you might be interested in knowing that consumption of onions in the United States is far below that of most foreign countries. Since the association does not have a Federal or State marketing order and is not a cooperative and does not have viable means of raising much money, the following plan is being considered to pay for a vast advertising campaign.

The association wants to approach the container manufacturers and suppliers who furnish onion containers and have them furnish to the association, an amount equal to one cent for each container that they manufacture or supply.

There are two major suppliers of raw materials for onion containers and there appear to be approximately sixty manufacturers of onion containers.

The association estimates that the proposed plan would raise about one half million dollars per year for use in advertising the various attributes of onions. Since the association is a non-profit organization, it would use all monies for the advertising and would not profit from the venture itself. Of course, all members of the association, as well as consumers, hopefully would benefit from the proposed plan.

It is understood that the container companies would not have to pass on the one cent per container increase to its onion producers, but as a practical matter, probably would do so. Since the association does not comprise all onion producers in its membership, it is planned that any individual, member of the association or not, who desired to not participate in the plan could write to the association, show proof of the purchase he made and receive back the penny per container that would be attributable to him.

Although it would be an administrative nightmare and the association leadership does not feel it would be fair for non-members to benefit and hang on to the coattails of members' actions and expenditures, it is theoretically possible to limit the program to members of N.O.A. who purchase containers from container suppliers and companies.

Under the proposed plan, the association would act in effect, as an advertising agency and would take such actions as appear reasonable to improve the image of the onion and to promote an increase in the consumption of onions. It would use all of the funds raised in this manner for this purpose.

It would be very much appreciated if the legal department or whoever you feel is appropriate in the FTC would contact me and advise if there is any prohibition on the plan being considered by the association. If there are any limitations or any areas that you would want to caution us in, the information would be very much appreciated.

The association is anxious to implement the proposed plan in the immediate future and your prompt attention to this would be very much appreciated.

1157

Thank you for your consideration and attention to this matter.

Yours truly,

/s/ Jerry C. Daniel

"Jackpot" promotion for use in food retailing industry, involving a numbers matching protocol, is within Trade Regulation Rule for Games of Chance in the Food Retailing and Gasoline Industries, 16 CFR 419.

Opinion Letter

January 27, 1978

Dear Mr. Radcliffe:

This is in response to your request for advice concerning a "jackpot" promotion for use in the food retailing industry, involving a numbers matching protocol. Your inquiry is whether this promotion is a "game of chance" within the Commission's Trade Regulation Rule for Games of Chance in the Food Retailing and Gasoline Industries, 16 CFR 419.

As the Commission understands the promotion you propose, game pieces will be made available to potential contestants through outlets of a sponsoring food retailer (no purchase required). The game pieces will consist of small cards imprinted with twenty-five different randomly placed numbers from the series of "1" to "25". Such numbers are not immediately visible, but are hidden beneath twenty-five opaquely surfaced panels. The number that may be disclosed by scraping away the surface of any such panel, therefore, is a matter solely of chance.

The game sponsor or user will have identified nine particular numbers from the "1" to "25" series, for each run of the game. Contestants are required to prepare their cards, or game pieces, by scraping away and uncovering nine only out of the twenty-five panels thus revealing nine of the card's numbers. Contestants must turn in game pieces, so prepared, by closing time the last day of a contest month in order to be eligible. Two jack-pots are provided, one for \$40,000 and a lesser one for \$20,000.

A contestant having entered a game card matching eight of the nine designated winning numbers will win either the principal jack-pot of \$40,000, or that jack-pot will be divided equally among all contestants who submitted game cards so qualifying. The \$20,000 jack-pot will be awarded to contestants whose game cards match seven of the nine numbers designated. The reported odds of hitting eight out of the nine designated numbers is 1 in 14,190. The reported odds of hitting seven out of the nine, is 1 in 473.

The Commission concludes that the promotion is within the Rule. It is, first of all, clearly a "game of chance" as that term is used and understood in ordinary usage. It involves calculable odds of which

1164

contest of skill. It does not appear to consist of a "one-shot" sweepstakes. Rather, it is a game at least susceptible of protraction over an extended period, during which contestants may be expected to return successively to a participating retail outlet for additional game pieces, in the hopes of winning.

The Commission has determined, accordingly, that the promotion should be conducted in conformity with each of the Rule's applicable provisions. Particular provisions of the Rule which, by their nature, clearly contemplate only games that involve pre-selected winning game pieces, are not applicable to your game and, therefore, you may properly disregard them. An example would be the second requirement of Section (b)(1), requiring disclosure (after a game has extended beyond 30 days) of the number of unredeemed prizes still available and the then existing odds.

The Commission's staff will remain available to provide any assistance you may need, if you find difficulty in determining which provisions of the Rule are properly applicable to your game.

By direction of the Commission.

Letter of Request

February 2, 1977

Dear Mr. Garvey:

As a producer of games and promotions for the super market industry, we at Radcliffe Advertising, Inc. have created a new type promotion which is similar to a game, but totally different in many ways. Because this is true, we would like to get an advisory opinion on this promotional technique. We think it is a sweepstakes or similar to a drawing, not a game.

The promotion works this way:

We give every contestant a sweepstakes card free. On the card are twenty-five numbers. . . from one to twenty-five. Every card has all twenty-five numbers. . . but arranged in a randomly different order on each card. These numbers are covered with an easily scratched off material. The customer is invited to remove any nine of the covered numbers, and told to match a given nine numbers. For example, match the numbers 1, 11, 21, 3, 13, 23, 5, 15, and 25. If she matches any eight of the nine numbers, she wins or shares a monthly jackpot of approximately \$40,000. If only one person matches eight numbers (on one card), that person wins the entire \$40,000. If more than one person matches eight numbers, the jackpot is divided equally among all those contestants.

In addition to this Giant Jackpot, there is also a Junior Jackpot of

approximately \$20,000. Any contestant matching seven of these numbers out of nine, wins or shares the Junior Jackpot in the same manner.

This is how the promotion works. We feel it is totally different from a game in the following ways:

1. There are no key cards. Every sweepstakes card has the same twenty-five numbers. Every and/or any card can win. . . it is not necessary to get a key card to win.
2. Until the end of the month, we do not know how many contestants will participate in the jackpot, so therefore we cannot know how much each contestant will win. . . only that each winning contestant will share a jackpot of a predetermined amount.
3. There is no mixing necessary of the sweepstakes cards because the arrangement of the twenty-five numbers on every card is different. There are no two cards alike in the entire promotion.
4. There is no possibility of adding additional winners to the sweepstakes because the jackpots are predetermined and we intend to give out all the money in the jackpots. In the event no one picks the number correctly, the jackpots are carried over and added to the next month's jackpot ad infinitum until the jackpots are given away.
5. The size of the prize depends solely on the number of contestants who guess correctly where the winning numbers are on the card.
6. The odds of determining the size of the prizes are not under our control but are strictly based on the luck of the contestants.

Several years ago, we submitted another promotion using this same jackpot idea to the commission for an opinion. The opinion of the staff was that this promotion, entitled "Jackpot Football", did not come under the game rule. We feel that this promotion is similar in nature and would not fall under the game rule.

In the running of this promotion, there is not a way we can fail to give out all of the jackpots. There is not a way we cannot properly mix the cards because the contestants in effect mix the cards with their choice of panels to uncover. There is no way we can control the size of prizes in any way because this is determined strictly by the luck of the contestants who submit entries.

We would appreciate an opinion of the staff of the Federal Trade Commission.

Sincerely,

/s/ H. H. D. D. D.

1167

Compliance opinion as to whether a furniture manufacturer's proposed plan to grant special price quotations, under certain conditions, to dealers competing in bid situations would violate the order issued on June 30, 1967 (71 F.T.C. 1579), Dkt. C-1248.

Opinion Letter

January 31, 1978

Dear Mr. Moran:

The Commission has considered the request which is contained in your letter of April 27, 1977, as supplemented by letter of August 5, 1977, wherein you seek the Commission's advice pursuant to Section 3.61(d) of the Commission's Rules. This advice is sought to determine whether a proposed course of conduct whereby Herman Miller would grant special price quotations, under certain conditions, to dealers competing in bid situations, would be violative of the Commission's order issued on June 30, 1967, in the captioned matter.

The proposed plan would grant special price quotations to dealers in bid situations only. In order to receive the special price in a specific situation, a dealer would have to certify that it will submit a bid on that specific job. In addition, in order to obtain special pricing a dealer will have to agree that on the specific job he will not bid products competitive to those products for which he will obtain special price quotations from Herman Miller. This special pricing will be available to all dealers who carry the Herman Miller line, provided that the above conditions are satisfied, and all dealers will be so notified.

The above outlined plan is to operate in the context of bid solicitation by institutions. When an institution solicits bids for furniture, it may do so by specifying items by brand name (*e.g.*, 30 Herman Miller desk chairs), or by descriptive specifications (*i.e.*, by specifying size, color, finish, etc., for each item). Such a bid solicitation may involve a large number of different items, and, when brand names are specified, different items may call for different brands. It is the Commission's understanding that, under the proposed plan, when bids are solicited by specifying brands, and different items call for different brands, a dealer handling multiple lines who plans to quote the Herman Miller items and the non-Herman Miller items will receive special pricing from Herman Miller. It is also the Commission's understanding that when bids are solicited by descriptive specifications rather than by brand name, a multiple line dealer who wishes to bid Herman Miller products for some items and competing brands for other items will be precluded by the proposed plan from receiving

Herman Miller's special pricing on the items he wishes to bid Herman Miller.

It is the Commission's opinion, based on the facts submitted, that the proposed plan, if implemented, may raise questions under Section 5 of the Federal Trade Commission Act, and under the order issued in the above-captioned proceeding. If there are dealers who wish to quote Herman Miller products on some items and competing brands on other items, they will not be able to do so and still receive Herman Miller's special price. In effect, the Herman Miller special price might not actually be available to all dealers who wish to take advantage of it and this would constitute a discrimination against those dealers.

By direction of the Commission.

Supplemental Letter Relative to Request

August 5, 1977

Dear Mr. Rossi:

Please excuse my delay in responding to your inquiry of May 20 1977, in the above referenced matter. A combination of conflicting business trips and vacation schedules has prevented me from conferring with the necessary Company personnel to obtain the answers to your questions until now.

The following numbered paragraphs contain answers corresponding to the numbers of the questions posed in your May 20, 1977, letter

(1) If Herman Miller were the named brand, it would be impossible for the dealer to bid a competing line along with Herman Miller in many cases because the manufacturer of the competing line would not give special pricing to the dealer if that manufacturer were aware that the dealer would be bidding Herman Miller. Moreover, even if a dealer had the ability to bid two competing lines, and an institution specifies "Brand X or equivalent," it would be a rare case when any particular dealer would bid more than one brand. Usually these specifications are the result of considerable pre-bid sales activity by dealers (sometimes in active participation with the manufacturer) and the dealers generally identify themselves with a specific brand during this pre-bid activity. Even if a dealer was not involved in the pre-bid sales effort with respect to a particular customer, that dealer is unlikely to bid the specified brand because he knows that some other dealer has established a preference with the customer on that product line through the pre-bid sales effort.

At this point two observations are in order. First, virtually every bid situation will attract a bid from each manufacturer either through a

manufacturer. Consequently, a refusal by any manufacturer to quote a special price to any particular dealer will not prevent the customer from obtaining a competitive price on that product line. Second, it should be noted that all dealers are not dual dealers on competitive products, and in many cases a single-line dealer or dealers will be bidding against one or more dual-line dealers. This fact causes the following problem for the Company. Assume that Dealer A is a dual dealer for Brand X and Herman Miller, and that Dealer A has succeeded in convincing an institutional purchaser to specify "Brand X or equivalent" in its bid invitation. Dealer B is a Herman Miller dealer and a single-line dealer. If Herman Miller decides to have its product bid under these circumstances, it is faced with the prospect of either: (a) extending special pricing to Dealer B to enable the dealer to bid, in which case, under its present policy, the Company would also extend the special pricing to Dealer A (the dual dealer) which has already identified itself with a competitive product (Brand X) on that bid; or (b) extending no special pricing to any dealer and bidding the project direct to the customer. This is obviously a difficult position for the Company because disclosing its bid price to Dealer A is in effect disclosure to its competition, while bidding direct jeopardizes its relations with Dealer B.

(2) The answer to this question is substantially the same as the answer to the preceding question. Whether the purchaser's request for bids identifies the product by name or by description has no material affect on the responses of the bidders.

(3) Yes.

(4) Yes.

(5) Undoubtedly there have been occasions when a dealer has mixed product lines in a bid to a nonproprietary specification, but those occasions are rare. Generally, the dealer will bid one manufacturer's line rather than mix products in the bid.

(6) In the case posed under question (4), the dealer would not be precluded from obtaining special pricing under the proposed plan. However, if it is assumed that the case posed under question (5) would occur, then in that case the dealer would be precluded from obtaining the special pricing.

We trust that the foregoing is responsive to your inquiry. However, should you require additional information please feel free to contact us either by letter or collect telephone call at your convenience.

In closing, we would like to point out that while all competitors in the office furniture industry vigorously extol the virtues of their respective product lines as opposed to those of other manufacturers, these products are for the most part functionally equivalent in the

antitrust sense. The proposed plan would have no adverse impact on interbrand competition; rather, the proposed plan would enhance the integrity of the interbrand competitive bidding process. Moreover, the proposed plan would have no significant adverse impact on intrabrand competition because the special pricing would not be denied to any dealer who had a genuine interest in bidding the Company's products. Accordingly, we believe that the proposed plan is consistent with the Commission's outstanding Order and antitrust laws generally. Cf. *Continental TV Inc v GTE Sylvania, Inc* [Current Materials Binder] Trade Reg Rptr ¶61,488 (U.S. Sup. Ct. 1977).

Thank you for your consideration.

Yours very truly,
 VARNUM, RIDDERING, WIER-
 ENGO & CHRISTENSON

/s/ J. Terry Moran

Letter of Request

April 27, 1977

Dear Mr. Tobin:

In accordance with the Commission's rules, we are writing on behalf of our client, Herman Miller, Inc., to request advice on the question of whether the following described proposed course of action will constitute compliance with the Commission's order entered with the Respondent's consent on June 30, 1967, effective December 1, 1967 in the above referenced matter.

That order provides with respect to the offer and sale of furniture products that the Respondent shall cease and desist *inter alia* from:

Discriminating, directly or indirectly, in the price of such products of like grade and quality by selling such products to any purchasers at net prices higher than the net prices charged to any other purchaser who in fact competes in the resale or distribution of such products with the purchaser paying the higher price.

* * * * *

Notifying, or otherwise communicating to, its customers, directly or indirectly that one or more of its customers will be favored in terms of price or otherwise, with respect to bargaining with, or submitting bids or otherwise quoting prices to, particular consumers or users of such products.

principally for office and institutional use since the date of that order. The Company's products are distributed mainly through independent dealers who purchase products from the Company and resell those products to office and institutional users with some occasional sales for residential use. Currently the Company has approximately two hundred authorized dealers for its products throughout the United States.

The office furniture market on a national basis encompasses an estimated \$1,450,000,000 in annual sales. There are an estimated two hundred fifty manufacturers making sales in this market principally through independent dealers. Herman Miller dealers are not exclusive dealers. Most of them handle one or more product lines competitive to Herman Miller products. In metropolitan marketing areas, the Company will typically have more than one dealer.

Herman Miller is an industry leader in terms of innovation and design. An example of the Company's leadership is its Action Office [®] product which pioneered the popular open-space office systems concept. Many competing manufacturers now market open plan systems. In recent times, the market for these products has become more price sensitive and purchasing of major quantities of these products systems by large institutions has become more bid-oriented.

These large institutional sales involve substantial design, specification and sales efforts by dealers prior to the bid process. Generally a dealer will pursue these prebid activities on behalf of one manufacturer's product line to the exclusion of other lines; in fact, the dealer may be competing for the "specification" against other dealers who are promoting a competing line of product. Frequently, when the specification is let for bid, it will encourage or permit bids for a named product line "or equal". Such specifications call for product quantities, product mixes and differing finishes and fabrics so as to preclude sales out of dealers' inventories, and dealers request special pricing and delivery quotations from manufacturers for the particular job. Manufacturers normally respond by pricing these jobs at an aggregate price lower than the sum of its regular prices for the variety of products which comprise the specification. (This is referred to as "special" pricing.) A manufacturer's pricing is predicated in large part upon its judgment of what price level it anticipates will be offered by competing manufacturers. Accordingly, price competition on such bids basically is price competition between competing manufacturers, since the product cost to the dealer has an overwhelming influence on his bid price.

In bid situations, Herman Miller makes its special prices available to all its dealers who are competing for such bids. Pursuit of this policy in

some instances has placed the Company at a competitive disadvantage. In certain cases during the pre-bid process, a dealer who is a dealer both for Herman Miller and a competitive manufacturer may promote the competitor's product line and succeed in obtaining the specification of that line. That dealer will then bid only the specified line. That dealer, however, will also request Herman Miller's special pricing for the same job as an "equal". Making Herman Miller prices available to that dealer in advance of the bid submission is tantamount to disclosing Herman Miller's prices in advance to a competing manufacturer. That dealer is able to inform Herman Miller's competitor of the exact price Herman Miller is quoting for that bid, and the bidding process if subverted to the detriment of Herman Miller and the dealer or dealers who are promoting Herman Miller's products. On the other hand, in a reverse situation where a dual dealer obtains a Herman Miller specification, the competitive manufacturer will refuse to quote special prices to Herman Miller dealers who intend to bid the Herman Miller product.

Herman Miller desires to follow a policy equivalent to that of its competitors. Herman Miller proposes to notify its dealers that special pricing for specific bids will be granted to each dealer competing for such bid upon the condition that the dealer certify in advance:

- (a) That he will submit a bid on that specific job; and
- (b) That on that specific job he will not bid products competitive to those products for which he will obtain special price quotations from Herman Miller.

As a result of this proposal, combined with existing practices by other manufacturers, a dealer with multiple product lines will decide in advance which manufacturer he will represent on that specific bid, and will receive special pricing from that manufacturer only.

It is our view that pursuit of such a policy by the Company, as well as other manufacturers, would not be a violation of the Robinson-Patman Act, nor would it constitute a violation of the aforementioned provisions of the Commission's Order. Special pricing will be offered to all Herman Miller dealers on the same terms and conditions, subject only to the dealer's election to take advantage of the offer. On this basis, the Company would not be "discriminating" against nor "favoring" any particular dealer within the meaning of the Commission's Order. We believe that this conclusion is supported by the fact that the proposed course of action does not involve any aspect of the challenged conduct which resulted in the entry of the Commission's Order in 1967, and, further, by the fact that such an interpretation of the Order would be consistent with prior determinations of the

1167

and quantity discounts do not involve "discrimination" where functionally available to all customers.

We respectfully request the Commission's advice as to whether the proposed course of action outlined above will, if pursued by the Company, constitute compliance with the Commission's outstanding Order. In the event the Commission's staff desires additional information or clarification of the proposed course of action, we will be happy to supply such information or consultation as the staff deems necessary. Thank you for your consideration.

Yours very truly,
VARNUM, RIDDERING, WIER-
ENGO & CHRISTENSON

/s/ J. Terry Moran

Use of the name of the foreign manufacturer on the label of an imported covered product is permissible under the Textile and Wool Acts and their supporting regulations, File 783 7004.

Opinion Letter

February 6, 1978

Dear Mr. Boyett:

This responds to your request for advice concerning name identification requirements relative to imported goods of Sec. 4(b)(3) of the Textile Fiber Products Identification Act and Sec. 4(a)(2)(C) of the Wool Products Labeling Act. You have inquired in this regard whether the foreign manufacturer's name on labels and hangtags in lieu of the name or tradename (where applicable) or registered identification number of the American importer or distributor, is considered sufficient name identification under these Acts.

It is the Commission's interpretation of both Acts, and their supporting Rules, that the labels of covered products imported into this country may carry the name of the foreign manufacturer or the name or tradename (where applicable) or registered identification number of a person or firm marketing the product in the United States. An election to use the name of the foreign manufacturer, accordingly, is completely permissible. The foreign manufacturer's name, if used, must be that under which the firm does business. Responsibility for any misbranding of products under these Acts, however, rests with the person or firm introducing the product into commerce in the United States.

By direction of the Commission

Letter of Request

July 6, 1977

Dear Mr. Thomas:

In enforcing the provisions of the Textile Fiber Products Identification Act and the Wool Products Labeling Act on imported merchandise, we have noted numerous instances of the use of the foreign manufacturer's name on labels and hangtags in lieu of the name or tradename (where applicable) or registered identification number of the American importer or distributor. We would appreciate an advisory opinion as to whether the name of a foreign manufacturer would be considered sufficient name identification to comply with the requirements of Sec. 4(b)(3) of the Textile Fiber Products Identification Act and Sec.

1174

4(a)(2)(C) of the Wool Products Labeling Act.

Sincerely yours,

/s/ Fred R. Boyett
Regional Commissioner of Customs

Opinion Letter

February 6, 1978

Dear Mr. Weiser:

It is the Commission's understanding that in lieu of appeal to the Commission for discretionary release of documents (your letter of May 3, 1977) you wish instead definitive Commission advice respecting the specified subject matter thereof, *viz.*, whether the name of the foreign manufacturer of an imported textile fiber product would be deemed to comply with Rules 16(a)(2) and 19(a) of the Rules and Regulations under the Textile Fiber Products Identification Act, as amended.

The Commission also has before it, at this time, a virtually identical request concerning the Textile Fiber Products Identification Act and, in addition, the Wool Products Labeling Act.

It is the Commission's interpretation of both Acts, and their supporting Rules, that the labels of covered products imported into this country may carry the name of the foreign manufacturer *or* the name *or* tradename (where applicable) *or* registered identification number of a person or firm marketing the product in the United States. An election to use the name of the foreign manufacturer, accordingly, is completely permissible. The foreign manufacturer's name, if used, must be that under which the firm does business. Responsibility for any misbranding of products under these Acts, however, rests with the person or firm introducing the product into commerce in the United States.

By direction of the Commission.

Supplemental Letter of Request

May 3, 1977

Sir:

In our initial request of March 18, 1977 (copy enclosed herewith), we asked for "all rulings, memoranda, opinions, and all other documents, published or unpublished, whereby the Federal Trade Commission's position with regard to whether the setting forth of the name of the foreign manufacturer of an imported textile fiber product would be deemed to comply with Rules 16(a)(2) and 19(a) of the Rules and

Regulations under the Textile Fiber Products Identification Act, as amended, is stated." The Commission responded by its letter of April 18, 1977 (copy enclosed) and stated that our request had been partially granted and those documents which were being withheld had been deemed to be exempt from mandatory disclosure as they were inter-agency or intra-agency memoranda or letters. As to the portion of our request which was granted, the Commission enclosed a multitude of documents which, we would assume, was responsive to our initial request.

We have now completed our review of the documents which the Commission forwarded to us and have determined that not a single one of them is at all responsive to our request of March 18th. Our request was simple and specific: we had asked whether a *foreign* manufacturer's name could be used on labels of textile products pursuant to the Textile Fiber Products Identification Act and specific regulations above cited. Not one of the advisory opinions forwarded to us had anything to do with that request (copies of all documents returned herewith).

Therefore, we are returning unpaid your bill of April 18, 1977 in the amount of \$31.10 with our comment that unfortunately a lot of time-consuming and useless work has apparently been done by a Government employee who did not have the appropriate guidance in gathering the requested information.

Furthermore, it is requested that, as to the documents which were believed to be exempt from mandatory disclosure, the Commission exercise its discretion and release the material notwithstanding its allegedly exempt status. The reason we are requesting the release of this subject matter is that our client, Frederick Atkins, Inc., an importer of wearing apparel, desires to use the name of the foreign manufacturer on a particular label of wearing apparel in lieu of an RN number.

We would appreciate your earliest advice with regard to this appeal.

Very truly yours,
SIEGEL, MANDELL & DAVID-
SON

/s/ Steven S. Weiser

1174

Responding Letter to First Request

April 18, 1977

Dear Mr. Weiser:

This is in further response to your letter dated March 18, 1977, concerning the above-captioned matter.

Your request is hereby partially granted, and copies of the documents are enclosed. Portions being withheld are deemed to be exempt from mandatory disclosure pursuant to 5 U.S.C. 552(b)(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

You may petition the Commission within thirty (30) days for access to the material which is being withheld. You may petition either because you believe that the material is not exempt under the law, or because you believe the Commission should exercise its discretion and release the material notwithstanding its exempt status. If requesting discretionary release, you should state your interest in the subject matter and the purpose for which it would be used if access were granted. The request should be addressed to Freedom of Information Act Appeal, Office of the General Counsel, Federal Trade Commission, Sixth Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580.

Please include a copy of your original request and this response by the Secretary with your appeal.

The first portion of your request, concerning the position taken by the Commission in the instant matter, is answered in the enclosed advisory opinions. Regarding the Commission's present posture, I suggest that you submit a request for an Advisory Opinion. I am enclosing a copy of Part 1, Subpart A - Industry Guidelines of the Commission's Rules of Practice, which describes the procedure for requesting an Advisory Opinion.

The duplication fees incurred in the processing of your request amounted to \$31.10. Please remit this amount, payable to the Treasury of the United States, to Mr. Glenn Goodnight, Supervisor, Public Reference Branch, Room 130, Federal Trade Commission, Sixth Street and Pennsylvania Avenue, N.W., Washington, D.C. 20580.

The undersigned is deemed the sole official responsible for the denial contained herein.

Sincerely,

Letter of Request

March 18, 1977

Re: Freedom of Information Act
Request
Textile Fiber Products
Identification Act

Gentlemen:

Pursuant to the Freedom of Information Act (5 USC §552), request is hereby made for all rulings, memoranda, opinions, and all other documents, published or unpublished, whereby the Federal Trade Commission's position with regard to whether the setting forth of the name of the foreign manufacturer of an imported textile fiber product would be deemed to comply with Rules 16(a)(2) and 19(a) of the Rules and Regulations under the Textile Fiber Products Identification Act, as amended, is stated.

In addition to the foregoing, it is requested that you kindly advise us as to what is your present posture with regard to this question.

Very truly yours,

SIEGEL, MANDELL & DAVID-
SON

Steven S. Weiser

1179

Proposed "raw material reporting system"—a statistical reporting program to be undertaken by an association of independent wire drawing companies, File 783 7005.

Opinion Letter

February 9, 1978

Dear Mr. Wasserman:

This letter is in response to your request for an advisory opinion concerning a proposed "raw material reporting system"—a statistical reporting program—to be undertaken by the Independent Wire Producers Association ("IWPA"), an association of independent wire drawing companies. Your request, in this connection, for confidential treatment is denied.

It is the Commission's understanding that under the proposed "raw material reporting system" each participating IWPA member would report on a regular basis to the statistical branch of the IWPA's management firm or to an independent economic analysis firm the following details of each applicable raw materials offer the member receives: the quantity, type, weight, foreign country of origin and price of carbon steel wire rod offered, the date the offer was received and the date terminated, and the calendar quarter of offered shipment.

The name of the foreign offeror and acceptance or rejection of the offer would not be reported. The IWPA's management firm or the economic analysis firm would collate the collected information and issue aggregate figures on a monthly basis to all participating members. The aggregate information would reveal neither the names of the reporting member companies, the specific prices offered, nor the names of the foreign offerors.

The Commission would not initiate proceedings against the IWPA if such a program were adopted provided that (1) the reported data is collected by a firm independent of the IWPA and its members, (2) no individual member's data is disclosed to any other member, and (3) none of the disseminated aggregate data reveal, directly or indirectly, the identity of foreign wire rod suppliers. You are cautioned, in particular, that the program must not be used in such a manner that it leads to a boycott, to the blacklisting of certain suppliers or groups of suppliers, or to any other unlawful trade restraint.

In its consideration of this matter the Commission does not wish to be understood as approving or agreeing with any economic or competitive aspect of the subject proposal unrelated to those features that specifically bear upon its lawfulness under the statutes administered by the Commission.

By direction of the Commission.

Staff Memo to the File

June 21, 1977

FROM: Harry Hull

SUBJECT: IWPA Advisory Opinion Request

Today, June 21, 1977, I called Beth Ring, one of the attorneys handling the IWPA request, and asked her to clarify the statement in her March 7 letter that because "there are relatively few suppliers of wire rod, the independent wire producers are greatly dependent on these few sources." She explained that what was meant was that there are few suppliers of wire rod *compared to the number of wire producers* and that independent wire producers, which are not capable of producing their raw material (wire rod), are, of course, dependent upon wire rod suppliers to fill their raw material needs.

Staff Memo to the File

June 20, 1977

FROM: Harry Hull

SUBJECT: IWPA Advisory Opinion Request

I have initiated several phone conversations with Beth Ring and Jack Wasserman about their client's (the IWPA's) advisory opinion request.

June 9, 1977 (Beth Ring). Responding to my inquiry, Ms. Ring informed me that the TSUSA nos. of the wire rods imported by IWPA members were as follows: 608.7000, 608.7100, 608.7300, 608.7500. She also indicated that IWPA members dealt with wire rod suppliers from the following countries—Belgium, Netherlands, U.K., W. Germany, France, and Japan—and that there were more than one supplier for each country. Domestic prices of wire rod are generally higher than foreign, which accounts for the "dependence" of IWPA members on the foreign supply of wire rod, she said. Ms. Ring promised to send some IWPA testimony that might be of some help in understanding the world market for wire rod.

June 10, 1977 (Ring). I asked Ms. Ring to clarify an apparent conflict between a statement in her letter of March 7, (p. 2) which states that "American independent wire producers have been required to purchase wire rod at high, *virtually uniform prices* * * *" (emphasis mine) and a statement in the original request letter (p. 5) which represents that in

injustifiably higher price for wire rod than such producers in other areas of the country. Ms. Ring explained that in referring to uniformity of prices in her letter of March 7 she meant that wire rod purchasers in a given geographic area of the country were paying virtually identical prices, not that all quotations for rod throughout the U.S. were identical. *June 10, 1977 (Wasserman)*. In response to my questions Mr. Wasserman explained that independent wire producers must purchase rod from steel companies that are either "integrated" or "affiliated" with wire producing divisions or companies. This modifies, somewhat, the statement on page 1 of Ms. Ring's March 7 letter to the effect that independents must purchase rod from only *integrated* steel companies.

Mr. Wasserman also estimated that of the domestic wire rod produced, about 50% was sold to independent wire producers and about 50% used by the steel companies producing the rod. [Available statistics give only quantities of wire rod *shipments* and do not reflect total production. See, e.g., AISI Annual Statistical Report, Table 12 (1975); Bureau of the Census, Current Industrial Reports: Steel Mill Products, Table 4 (1975).] He also characterized the wire rod industry as oligopolistic, with 60-70% of total domestic production being supplied by three U.S. companies, and characterized the demand for wire rod as inelastic.

In response to the question of how the export price of foreign wire rod could be relevant to an antidumping proceeding concerning wire or wire products, Mr. Wasserman noted that it was frequently necessary in such proceedings to *construct* the foreign market value of the wire or wire product involved using the export price of foreign wire rod as a starting point. [See 19 U.S.C. § 165.] He said he would send a copy of a recent antidumping complaint concerning upholstery spring wire as an example of how foreign market values are determined in such proceedings.

June 13, 1977 (Wasserman). If foreign wire rod is sold at considerably lower prices to foreign wire producers (integrated, affiliated or even independents), doesn't this explain the lower price of foreign wire and wire products exported to the U.S. as compared to domestic wire and wire products? How, then, can a dumping charge reasonably be made under such circumstances? In answer to these questions Mr. Wasserman pointed out that the difference in price between foreign wire rod sold in this country and abroad does not preclude the possibility of dumping by foreign wire producers. He said that what might appear to be irrational pricing in such dumping contexts was, in economic terms, quite rational. The Japanese, for example, are often content to let their marginal cost equal marginal

revenues. Since this discussion was getting over my head he referred me to a white paper by the AISI on Japanese export steel pricing. [I have obtained a copy of that paper from AISI.]

Fourth Supplemental Letter Relative to Request

June 10, 1977

Dear Harry:

Pursuant to your conversation today with Jack Wasserman and myself, I enclose herewith a copy of the 1972 antidumping complaint against upholstery spring wire from Japan.¹

If you have any further questions do not hesitate to call me at your convenience.

Sincerely,

/s/ Beth C. Ring

Third Supplemental Letter Relative to Request

June 8, 1977

Dear Harry:

Pursuant to our telephone conversation today, I enclose herewith a copy of the presentation made by the Independent Wire Producers Association in December 1976 before the Office of The Special Representative for Trade Negotiations concerning the bilateral agreement between the European Coal and Steel Community and the Japanese Ministry of International Trade limiting exports of Japanese steel to Europe.¹ I refer you specifically to pages 4-14, and to Exhibit 1, which contains the relevant TSUSA numbers for carbon steel wire rod.

Should you have any further questions, please contact me at your earliest convenience.

Sincerely,

/s/ Beth C. Ring

Second Supplemental Letter Relative to Request

May 19, 1977

Dear Harry,

This is to confirm our telephone conversation today concerning the relationship between the Independent Wire Producers Association

¹ Not reproduced herein.

¹ Not reproduced herein.

1179

("the Association") and the management firm of Smith, Bucklin & Associates, Inc. ("Smith Bucklin"). It was your concern that the closeness of this relationship might jeopardize the anonymity of the member companies in their submitting data to Smith Bucklin pursuant to the proposed reporting system.

Brian Cassedy, an employee of Smith Bucklin, acts as the managing director of the Association. Mr. Cassedy functions as the managing director under authority granted by the Board of Directors of the Association. Since Mr. Cassedy would be under instructions by the Board not to disclose the identity of any reporting member company to any other reporting member company, it would be a violation of his employment and his fiduciary duty to violate such instructions.

Mr. Cassedy has advised me that he will recommend to the Board of Directors that the Association engage the services of Tyson, Belzer & Associates, Inc. to make the statistical compilations and dissemination for the Association. Enclosed herewith is a brochure from Tyson, Belzer & Associates, Inc., which explains the nature of their services and confirms that the information to be reported would be kept on a confidential basis.* This brochure states:

"It is our policy to work only at the Association level. No consultations are ever provided to individual firms. No information is ever released. *To avoid even accidental data disclosures, many of our analyses contain tight security provision for processing data and presenting results.*" (Emphasis added).

I have also enclosed a description of an example of the type of project conducted to Tyson, Belzer & Associates, Inc.* This description shows that economic and statistical analysis were compiled to form the basis of a presentation before the United States Tariff Commission (now the United States International Trade Commission).

It was very nice meeting you yesterday. Should you have any further questions, do not hesitate to call me at your convenience.

Sincerely,

/s/ Beth C. Ring

First Supplemental Letter Relative to Request

March 7, 1977

Dear Mr. Hull:

I refer to your letter of February 4, 1977, in which you requested

* Not reproduced herein.

additional pertinent information in support of Jack Wasserman's request for confidential treatment of his January 3, 1977 request for an advisory opinion.

Specifically, the "retaliatory action" which Mr. Wasserman mentioned referred to the "dual distribution" nature of the wire producing industry discussed in our Request for an Advisory Opinion. As explained therein, an independent wire producer must purchase its raw material (carbon steel wire rod) from an integrated steel company which produces both wire rod and wire. Thus, the integrated steel companies are suppliers as well as competitors of those companies which purchase the raw material from them. Since there are relatively few suppliers of wire rod, the independent wire producers are greatly dependent on these few sources.

Industry sources indicate that in recent years integrated steel producers located in the European Community, in other European countries and Japan significantly increased the price of wire rod for export to purchasers in the United States. The export prices quoted by these steel producers have been fairly uniform if not identical.

At various times, wire and wire products manufactured in Europe and Japan were imported into the United States at prices substantially below prices which should have prevailed if any reasonable costs of conversion were added to the export price of the rod. Thus, it appears that foreign wire drawers, whether integrated or independent, were acquiring wire rod at prices substantially below the export price of identical wire rod.

Accordingly, American independent wire producers have been required to purchase wire rod at high, virtually uniform prices in order to produce wire and wire products in the United States, but must compete with imported wire and wire products drawn from much lower prices — but identical — wire rod. This, "squeeze" is potentially ruinous to many independent American wire producers.

The Independent Wire Producers Association desires to implement the reporting system on which an advisory opinion was sought. This reporting system would contemplate the dissemination of information among member companies concerning offers received for imported carbon steel wire rod from foreign suppliers. Such an exchange of data would permit documentation of any anti-competitive pricing policies by foreign suppliers, which could then be used in support of one or more actions against such unfair or restrictive trade practices (such as proceedings pursuant to the Antidumping Act of 1921,¹ the Counter-

¹ 19 U.S.C. §160 *et seq.*

1179

vailing Duty Law of 1922² or the unfair import practice provision).³ Pursuant to the mandate in Section 337(b)(2) of this latter provision that the United States International Trade Commission should seek advice from the Department of Justice in Section 337 investigations, the Justice Department has recently taken the position that charges filed with the International Trade Commission must be documented with specific evidence:

"* * * the vagueness and non-specificity in the [Welded Stainless Steel Pipe and Tube] complaint does not appear to comply with the Commission's rules requiring 'a statement of the facts constituting the alleged unfair methods of competition and unfair acts,' 19 CFR §210.20(a)(2) and a description of 'specific instances of alleged unlawful importations and sales,' 19 CFR §210.20(A)(3). The broad charges in the complaint * * * unsupported by specific allegations * * * is [sic] not sufficient to meet the tests for a properly specific §337 complaint found in the Commission's rules."⁴

The Association has requested confidential treatment for the FTC's consideration of the proposed reporting system in order to prevent any possible retaliatory action by the foreign suppliers of wire rod in the form of exacerbation of the price squeeze or direct or indirect threats to cut off sources of their raw material (wire rod). Further, since Japanese steel producers each deal through one trading house, they would be very concerned to learn that the American independent producers were discovering the difference or identity between the prices they were quoting to the Americans.

I hope that this information is helpful to you, and if you have any further questions, do not hesitate to call me at your convenience.

Sincerely,

/s/ Beth C. Ring

Staff Letter Relative to Request

February 4, 1977

Dear Ms. Ring:

This is to confirm our telephone conversation of February 3, 1977, in which I requested that your firm provide this office with additional pertinent information in support of Mr. Wasserman's request for confidential treatment of his January 3, 1977, advisory opinion request.

² Tariff Act of 1930, §303, as amended (19 U.S.C. §1303).

³ Tariff Act of 1930, §337, as amended (19 U.S.C. §1337).

⁴ Letter to Hon. Daniel Minchew, Chairman U.S.I.T.C., from Jonathan C. Rose, Deputy Assistant Attorney General, Antitrust Division, Department of Justice (January 25, 1977).

In particular, it is important, in my opinion, that you explain the nature, form, probable extent and impact of the "retaliatory action" which Mr. Wasserman mentioned in his letter as a justification for confidential treatment. In this regard, as I have advised you, there are limits on the Commission's authority to withhold from the public, in whole or in part, agency records—particularly agency "opinions"—under the Freedom of Information Act, 5 U.S.C. 552, and Section 6(f) of the Federal Trade Commission Act, 15 U.S.C. 46(F).

In addition, I requested in our conversation that your firm provide this office with as thorough an explanation as practicable of the use to which the information disseminated to participating members will be put. Such an explanation should include a description of how the information disseminated will alert participating members to "anti-competitive pricing policies" as well as what actions you believe those members are likely to take in the event such "anti-competitive pricing policies" are "discovered". (See page 6 of Mr. Wasserman's advisory opinion request.)

Please feel free to call me if you have any questions about this matter ((202) 523-3496).

Very truly yours,

Harry Hull
Attorney
Office of the General Counsel

Letter of Request

January 3, 1977

Gentlemen:

On behalf of the Independent Wire Producers Association (hereinafter the "Association"), we hereby request, pursuant to Section 1.2, Title 16, Code of Federal Regulation, (19 CFR 1.2), an advisory opinion by the Commission as to the legality under the antitrust laws of a proposed course of action by the Association. The course of action in question (a "raw material reporting system") is not currently being followed and is not the subject of a pending investigation or other proceeding by the Commission or any other governmental agency.

In order to understand the purpose of the proposed course of action to be taken by the Association, it is necessary to explain, briefly, the relatively unusual economic structure of the carbon steel wire producing industry.

The member companies of the Association consist of "independent

1179

company which converts carbon steel wire rod into wire. Wire rod — the raw material — is a steel mill product which is hot rolled from molten slabs of steel (“billets”) which are made in giant blast or electric furnaces. Only steel companies with substantial capital assets have the ability to produce the basic steel from which the vital raw material, wire rod, is made.

A wire drawer manufactures wire by “drawing” wire rod through a series of dies. After wire has been produced through this drawing process, the wire is used (either by the wire drawer or other fabricators) to produce thousands of different wire products such as nails, barbed wire, fences, fabric for reinforcing concrete, and hundreds of other products.

Throughout the world, wire drawing companies are described as “integrated”, “affiliated” or “independent”.

An “integrated” wire drawing company describes a company which has basic steel-making facilities, wire rod rolling facilities and wire drawing facilities.

An “affiliated” wire drawing company does not have the capacity to produce steel or wire rod, but is related directly or indirectly, to an integrated steel company through common ownership or participation in a cartel. Because of the United States antitrust laws, there are few affiliated wire drawing companies located in the United States.

An “independent” wire drawing company has neither steel making capacity, wire rod making capacity nor an affiliation with an integrated steel company. Accordingly, an independent wire drawer must purchase its raw material, wire rod, from steel companies.

Thus, integrated steel companies that produce wire rods and manufacture wire and wire products are — at the same time — suppliers of wire rod as well as competitors of those companies which purchase this raw material from them.*

In light of the above-described nature of this industry, the Association is considering the implementation of an “imported wire rod reporting system,” which would consist of the member companies of the Association reporting, on a regular basis, certain information to the statistical branch of a management firm, Smith, Bucklin & Associates, Inc. (“Smith-Bucklin”). Smith-Bucklin has recently entered into an agreement to manage the affairs of the Association.

As contemplated, each member company would be permitted to

* Economists describe an industry where suppliers are also competitors of their customers as a “dual distribution” industry. “Dual distribution” is an uncommon, but recognized economic concept. See “Dual Distribution” in *Report to the President on the Economic Position of the Steel Industry* (Cabinet Committee on Economic Policy, Washington, July 6, 1971) at page 41, containing special mention of the independent wire drawers. Also, see *Dual Distribution*, Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 89th Cong., 1st Sess. (1966); *United States v. Aluminum Co. of America*, 148 F.2d, 416 (1945).

elect, in its sole discretion, whether or not to report the requested information. A member company which elects to participate would report the following information (on the Form attached hereto as Exhibit A)** concerning each offer it receives for imported carbon steel wire rod:

- (i) the quantity of wire rod offered,
- (ii) the foreign country of origin of such wire rods,
- (iii) the date on which the offer was received and the date on which the offer was terminated,
- (iv) the diameter, carbon content and coil weight of such wire rods,
- (v) the calendar quarter of shipment, and
- (vi) the f.o.b. (foreign port of exportation) price of the c.i.f. (United States port of importation) price.

The member company reporting this information would not report the name of the offerer or its acceptance or rejection of the offer.

Thereafter, Smith-Bucklin would compile such information on an aggregate basis and would reveal neither the names of the specific member companies which supply the information nor the specific prices offered nor the name of the proposed seller. This aggregate information would then be provided on a monthly basis, free of charge, to all member companies of the Association that submitted data for that month.

The Association desires to implement the reporting system in order to survey the pricing policies of foreign steel producers. America's independent wire producers are frequently at a competitive disadvantage in the worldwide markets for wire and wire products because of the "dual distribution" nature of the industry. America's independent wire producers have long suspected (based upon the price of imported wire and wire products) that foreign steel producers have been selling wire rods to related or affiliated foreign wire drawing companies at prices lower than the prices at which they sell similar wire rods to non-related wire drawing companies. Furthermore, in certain areas of the United States where an insufficient amount of wire rod is produced to meet the demand, independent wire producers appear to pay a higher price for wire rod than independent wire producers located in other

1179

areas of the country, without justification and despite the absence of similar price differences between imported wire and wire products.

The Association believes that the dissemination of the information described in the proposed report is necessary to enable the member companies to act in the event of anti-competitive pricing policies by foreign suppliers.

We would appreciate the Commission's opinion concerning the legality of the proposed reporting system. Should you require further information, please do not hesitate to contact us.

Respectfully,

/s/ Jack Gumpert Wasserman

Lawfulness under the antitrust laws administered by the FTC of a voluntary Code of Advertising Standards proposed by the Wine Institute, File 783 7006.

Opinion Letter

March 31, 1978

Dear Mr. DeLuca:

This is in response to your letters of September 23 and October 11, 1977, requesting an advisory opinion regarding the lawfulness under the laws administered by the Commission of a voluntary Code of Advertising Standards proposed by the Wine Institute. The Wine Institute is a trade association of the California wine industry representing wineries accounting, in 1976, for more than half of all wines sold in the United States. You have stated that the purpose of the Code is to encourage advertising reflecting the industry's concern with maximum social responsibility and high standards in wine advertising. You also request Commission advice regarding proposed circulation of the Code by the Institute, if approved, to nonmember wineries and other wine associations for their information and solicitation of various media organizations for their adoption of a code embodying the principles contained in the subject Code of Advertising Standards.

The Commission understands that adherence to the Code by the wine producer members of the Institute will be completely voluntary. Individual members will determine for themselves whether to comply with the Code and whether their advertising conforms to its requirements. No sanctions will be imposed, directly or indirectly, for noncompliance with the Code's provisions. The Institute has given assurances to the Commission that its by-laws concerning suspension, expulsion or termination of membership or the imposition of fines and penalties, have no application to voluntary compliance or noncompliance with the proposed advertising Code. The Code does not apply to wholesalers or retailers of wine products and, as represented, is non-discriminatory among wine producers insofar as limitations upon advertising opportunities are concerned.

The Commission has not considered, and therefore expresses no opinion regarding, the ethical concerns addressed by the Code. Accordingly, the advice rendered by the Commission pertains solely to the propriety of the proposed actions under the antitrust laws.

In the Commission's view, the antitrust laws do not prevent a completely voluntary forbearance by industry members from the use of advertising themes perceived as socially undesirable.

1190

undue restraint of trade ensues. The Wine Institute's objective of encouraging the promotion of wine products by domestic wine producers in a socially responsible manner may well be laudable. Particular care must be taken, however, to assure that limitations on advertising, even voluntary ones, do not operate anticompetitively or in such manner as unreasonably to restrict competitive alternatives or foreclose competitors in any market.

In addition to reviewing the submitted proposal to assure that effective competition in the domestic wine industry not be adversely effected, the Commission has considered possible downstream consequences, as well, of Code provisions that could secondarily operate to limit particular media markets or the commercial opportunities of persons associated with affected aspects of media advertising. To assure that limitations of this nature are minimized, the Institute has informed the Commission that the Code will be amended to eliminate a specific age designation for show models and personalities by omitting the words "are or" from Guideline 4(a), as well as in Guideline 4(c) to add the words "children's or juveniles' " before "magazines."

The Commission has decided it should interpose no objection to presentation of the proposed Code by the Wine Institute to its members. This decision is based on the Institute's assurance that no coercion, direct or indirect, will attend the decision by any member as to whether it will or will not comply with the provisions of the Code, the Code's clearly noncommercial purposes and the limited nature of secondary restrictive effects on persons or entities engaged in businesses allied to advertising or to wine distribution and sale. The Commission, however, maintains the right to withdraw its approval in accordance with § 1.3(b) of the Rules of Practice in the event implementation of the Code results in coercion or competitive foreclosure or should the public interest otherwise so require.

In view of the foregoing considerations, the Commission has decided to reserve opinion at this time concerning overtures to nonmember wine producers to adopt the Code, including unsolicited initial contacts with specific nonmembers for such purpose. A basic qualification to the Commission's affirmative opinion regarding presentation of the Code by the Wine Institute to its members is that the Code be completely voluntary. Nonmembers of the Institute will be free to communicate interest in the Code if they so desire and the Code will undoubtedly receive sufficient publicity to enable their doing so.

A special problem is presented by the Institute's proposal to request media organizations to adopt parallel advertising guidelines. Such activity on the part of the Wine Institute, if fully successful, could as a practical matter render compliance with the Code's provisions compul-

sory rather than voluntary from an individual wine producer's perspective. Because pressures in this direction possess a significant potential for coercively inducing modifications in the advertising practices of competitors that could be commercially advantageous to those responsible for formulation of the Code, Commission approval cannot be extended to this aspect of the proposal.

By direction of the Commission.

Supplemental Letter Relative to Request

October 11, 1977

Dear Mr. Garvey:

In connection with our request of September 23, for an advisory opinion, we are hereby requesting a Commission opinion rather than a Staff opinion.

We wish to stress that there is no application of the provisions of Article VII, Section 6, of the Wine Institute By-Laws relating to "Suspension, Expulsion and Termination of Membership" to this proposed voluntary Wine Institute Code of Advertising Standards.

I am enclosing a newly revised proposed voluntary Wine Institute Code of Advertising Standards which makes clear that "These guidelines shall apply only to the voluntary subscribers to this Code of Advertising Standards".¹

This revised document should be considered by the Commission in lieu of the version submitted with our letter of September 23.

Thank you for your interest.

Sincerely,
WINE INSTITUTE

By
/s/ Arthur H. Silverman
Washington Counsel

Letter of Request

September 23, 1977

Dear Mr. Thomas:

Pursuant to 16 CFR 1.1 *et. seq.*, I am requesting an informal advisory

1190

opinion whether the attached proposed voluntary Wine Institute Code of Advertising Standards violates any statutes, rules or regulations administered by the Federal Trade Commission.* The proposed Code will not be adopted until receipt of a favorable Federal Trade Commission informal advisory opinion. To our knowledge, we are not the subject of a pending investigation or proceeding by the Federal Trade Commission or any other federal or state government agency.

Wine Institute, the non-profit trade association of the California wine industry, represents 240 wineries whose members account for approximately 91% of the wineries in California. In 1976 Wine Institute members accounted for 72.5% of total California wine shipments. California, in turn, produced about 71.6% of the wine sold in the United States, while other states produced 12.7%. Imports accounted for 15.7% of the American wine market.

The proposed Code of Advertising Standards would apply to the advertising of all wines produced by member wineries. Thus, in addition to grape table wine, the advertising of dessert wines, flavored wines, sparkling wines, wines produced from fruit other than grapes, and all other wines would be subject to the Code.

The proposed course of action involves a program that is totally voluntary and carries no sanctions whatsoever against any member not in compliance. Each winery would determine if its own advertising is in conformity with the Code, and whether it desires to follow the Code. There are no enforcement provisions.

We believe the proposed Code to be absent of anti-competitive features at both the vertical and horizontal levels.

The Code does not refer to, nor would it apply to, wholesalers or retailers. There are thus no problems at the vertical level.

Similarly, at the horizontal level, the Code contains no provisions which could in any way imply price fixing, territorial allocation, or any other prohibited areas. In fact, there is no provision for any agreement among any member wineries as to whether they would (or would not) comply with the Code. In addition, we can discern no elimination of competitive prerogatives in other ways, such as if the provisions of the Code applied in an obviously restrictive manner to certain types of producers while innocuous to most.

* Not reproduced herein.

Moreover, we cannot foresee any possible discrimination in advertising opportunities.

We ask that the Commission advise us on the substance of the Code and assure us that it is satisfactory in that it includes no anti-competitive measures.

With regard to the substance of the proposed Code, please advise us on the following:

Do we address ourselves to the issues and types of concerns of interest to the Federal Trade Commission in wine advertising?

With regard to the non anti-competitive area, please advise us on the following:

1. May the members of Wine Institute agree to this totally voluntary Code which carries no sanctions whatsoever?
2. After approval by the members of Wine Institute, would it be a violation of the statutes, rules and regulations administered by the Federal Trade Commission to submit the Code to non-member wineries and other wine associations for their information?
3. After approval of the Code by the members of Wine Institute would it be a violation of the statutes, rules and regulations administered by the Federal Trade Commission to request various organizations, such as the National Association of Broadcasters, to adopt a code embodying the principles contained in the proposed Wine Institute Code of Standards?

I would appreciate acknowledgement of the receipt of this request.

Thank you for your interest.

Very truly,
/s/ John A. De Luca
President

1195

Compliance advisory opinion as to whether nine proposed advertisements* if published, would comply with the order issued on March 16, 1970 (77 F.T.C. 277), Dkt. 8792.

Opinion Letter

April 20, 1978

Dear Mr. Lamberson:

This is in response to your letters of July 25, 1977, September 2, 1977 and September 8, 1977, on behalf of your clients, Golden Fifty Pharmaceutical Co., Inc., and Michael Posen requesting an advisory opinion as to whether nine proposed advertisements comply with an order of the Commission issued on June 29, 1970 [sic]. The requests were made pursuant to Section 3.61(d) of the Commission's Rules of Practice.

This is to advise you that the Commission has determined that none of the nine proposed advertisements, if published, would comply with the 1970 order.

The nine proposed advertisements are identified as follows:

<i>Submission Number</i>	<i>Date Submitted</i>	<i>Product Line</i>	<i>Identified by You as</i>
1	7/25/77	Golden Fifty	(unnumbered)
2	9/2/77	Golden Fifty	Exhibit A
3	9/2/77	Cosmetique	Exhibit B (COS-01)
4	9/2/77	Cosmetique	Exhibit C (COS-02)
5	9/2/77	Cosmetique	Exhibit D (COS-03)
6	9/2/77	Cosmetique	Exhibit E (COS-04)
7	9/2/77	Cosmetique	Exhibit F (COS-05)
8	9/8/77	Golden Fifty	GF-02
9	9/8/77	Golden Fifty	GF-03

Paragraph 1(b) of the Commission's order prohibits your clients from "Disseminating or causing the dissemination of . . . any advertisement which: . . . (b) Represents directly or by implication that any product is offered free or under any other terms when the offer is used as a means of enrolling those who accept the offer in a plan whereby additional supplies of the product are shipped at an additional charge *unless all of the conditions of the plan are disclosed clearly and conspicuously and within close proximity to the "free" or other offer.*" (emphasis added)

At the bottom of Submission 1 there is a coupon which includes the statement: "I may cancel at any time by sending in the cancellation card included with each shipment." The top part of the advertisement

* Not reproduced herein.

which contains the "\$3.00 Bottle of Vitamins Free" offer makes no mention of the cancellation card requirement. It is the opinion of the Commission that the failure to disclose the cancellation card requirement in close proximity to the free offer would constitute a violation of Paragraph 1(b).

Each of Submissions 2 through 7 are designed to be folded in thirds. When folded each of them contain a "free" or other offer on the cover. None of them adequately disclose the full conditions of the monthly or bi-monthly program on the cover. Instead, a prospective customer would have to open the advertisements and read the conditions either in the body of the advertisements or on the attached reply coupon. It is the Commission's opinion that the failure to disclose all of the conditions of the plan on the cover of Submissions 2 through 7 in close proximity to the "free" or other offer would be a violation of Paragraph 1(b) of the order.

The Commission also believes that the conditions disclosed in Submission 2 are contradictory and unclear in violation of Paragraph 1(b) and may also violate Paragraph 1(c). The letter included in the top of Submission 2 implies that the customer has an option to decide in advance whether he wants additional supplies of Golden Fifty tablets. The coupon implies that additional supplies will be sent automatically. This contradiction violates Paragraph 1(b) in that the conditions of the plan are not clearly disclosed and may also violate Paragraph 1(c) which prohibits any representation that an offer is made without obligation when in fact there is an obligation to receive additional monthly supplies.

Submission 2 also fails to explain what is meant by the "10-day approval" language which appears solely in the coupon and not in close proximity to the free offer on the cover or on the middle of the page above the coupon. Furthermore, the "I may cancel at any time. . ." language in the coupon is confusing when compared to the "10-day approval" language. These failures would be a violation of Paragraphs 1(b) and 1(c) and may also be a violation of Paragraph 1(d) which prohibits an offer for a limited period of time unless such limitations are actually imposed.

The Commission is also of the view that the conditions of the plan utilized in Submission 3 are unclear and confusing in violation of Paragraph 1(b). It is not clear from the language in this proposal whether the special annual "\$100 Prestige Perfume Collection," if accepted by the consumer counts towards the four kits that need to be purchased over the next two years. The cover and body of Submission 3 and the coupon attached to the proposal make the representation that the "\$74 Beauty Kit for Only \$1" is yours if you join the club and come

1195

to buy four kits over the next two years. The Commission is of the opinion that unless the proposal adequately discloses what is the penalty for failing to buy four kits, it is not in compliance with Paragraph 1(b).

The reply coupons in Submissions through 7 use the term "on approval" and also state "I may return any kit for full credit (or refund)" without any limitations. Unless the advertisement clearly explains what is meant by "on approval" it does not comply with Paragraph 1(b). The Commission also notes that the return privilege (Cosmetique pays postage) is not set out on the cover or in the body of the flyer above the reply coupon in close proximity to the offer. This may constitute another failure to comply with Paragraph 1(b).

The reply coupons in Submissions 3 through 7 contain the limitation that only one introductory kit is offered per household; that the offer is void if previously accepted; and that the offer is good only in the USA. It is the Commission's view that these limitations are conditions of the plan and in order to comply with Paragraph 1(b) should be set out on the cover and in the body of the ad in close proximity to the offer.

Submissions 3 through 7 each contain photographs of various identifiable cosmetic items. In order to comply with Paragraph 1(f) of the order, the Commission is of the opinion that the "\$74 Beauty Kit for Only \$1" sent to customers must contain these identifiable items. The advertisements also contain representations that customers receive "full-size" cosmetics, "*never* any samples." It is not possible to determine from the photographs if the cosmetic items so displayed are full size and not samples. Therefore, the Commission is of the opinion, that the advertisements would violate Paragraph 1(g) of the order if the photographed items and the items actually included in your client's kits are less than regular commercial size or are "trial" or "sample" size.

Submissions 6, 7, 8 and 9 all use the term "trial membership" yet there is no explanation as to whether a trial membership differs from a regular membership. In order to comply with Paragraph 1(b), the Commission is of the opinion that the conditions of the trial membership should be disclosed clearly and conspicuously and within close proximity to the free or other offer. Continued use of the term, without explanation, would be confusing and a violation of Paragraph 1(b).

The top and back of Submissions 8 and 9 contain the "\$3.00 Bottle of Vitamins Free" offer followed by the conditions of the plan. Both advertisements contain "Dear Friend" letters explaining that additional monthly supplies will be shipped automatically. The Commission is

of the view that the conditions mentioned on the top and back fail to disclose the automatic aspect of the monthly shipments. This could cause confusion in the minds of some customers and would therefore be a violation of Paragraph 1(b).

Finally, the Commission advises you that the opinion expressed herein apply solely to the question as to whether the nine proposed advertisements comply with the Order of the Commission issued June 29, 1970. The Commission has made no determination concerning the legality of any other representations, contained in the proposed advertisements, which do not come within the terms of the order, Docket 8792. In taking this action, the Commission has not considered the various advertisements which have been submitted to the Commission's staff pursuant to the Court's Injunction of June 6, 1977.

By direction of the Commission.

Second Supplemental Letter Relative to Request

September 8, 1977

Dear Sir:

On behalf of our clients, Golden Fifty Pharmaceutical Co., Inc. and Michael A. Posen, we are herewith requesting, pursuant to §3.61(d) of Subpart G of Part 3 of Subchapter A of Chapter 1 of the 16th Volume of the Code of Federal Regulations, advice from the Federal Trade Commission as to whether a proposed course of action, if pursued by our clients, will constitute compliance with an outstanding Commission Cease and Desist Order.

On June 29, 1970, the Federal Trade Commission issued an Order, FTC Docket No. 8792, against our clients, pursuant to the provisions of Section 5 of the Federal Trade Commission Act, prohibiting the continued use of certain methods and forms of advertising. In order to secure continued compliance with this Order, our clients herewith submit two (2) advertisements of Golden Fifty Pharmaceutical Co., Inc. (marked Exhibits GF-02 and GF-03) intended for publication in the near future. We would ask the Commission to kindly consider the proposed advertisements and inform our clients whether or not the advertisements, if published, would comply with the Order.

Should the Commission need additional information concerning either the proposed advertisements or their distribution, please do not hesitate to contact us, for our clients wish to fully cooperate with the Commission in order to prevent future difficulties of any kind.

It should be noted that this request for an advisory opinion is in addition to, and not in place of, the two prior requests submitted by us

1195

on July 25, 1977 and September 2, 1977.

Very truly yours,

CHAPMAN AND CUTLER

By

/s/ Harry P. Lamberson

First Supplemental Letter Relative to Request

September 2, 1977

Dear Sir:

On behalf of our clients, Golden Fifty Pharmaceutical Co., Inc. and Michael A. Posen, we are herewith requesting, pursuant to §3.61(d) of Subpart G of Part 3 of Subchapter A of Chapter 1 of the 16th Volume of the Code of Federal Regulations, advice from the Federal Trade Commission as to whether a proposed course of action, if pursued by our clients, will constitute compliance with an outstanding Commission Cease and Desist Order.

On June 29, 1970, the Federal Trade Commission issued an Order, FTC Docket No. 8792, against our clients, pursuant to the provisions of Section 5 of the Federal Trade Commission Act, prohibiting the continued use of certain methods and forms of advertising. In order to secure continued compliance with this Order, our clients herewith submit one (1) advertisement of Golden Fifty Pharmaceutical Co., Inc. (marked Exhibit A) and five (5) advertisements of Cosmetique Beauty Club, Inc. (marked Exhibits B, C, D, E and F) intended for publication in the near future. We would ask the Commission to kindly consider the proposed advertisements and inform our clients whether or not the advertisements, if published, would comply with the Order.

Should the Commission need additional information concerning either the proposed advertisements or their distribution, please do not hesitate to contact us, for our clients wish to fully cooperate with the Commission in order to prevent future difficulties of any kind.

It should be noted that this request for an advisory opinion is in addition to, and not in place of, the request submitted by us on July 25, 1977. We understand that our request of July 25, 1977 has been referred to the Federal Trade Commission Regional Office in Chicago, Illinois, and our clients await the Commission's response to this earlier request.

Very truly yours,

CHAPMAN AND CUTLER

By

/s/ Harry P. Lamberson

Letter of Request

July 25, 1977

Dear Sir:

On behalf of our clients, Golden Fifty Pharmaceutical Co., Inc. and Michael A. Posen, we are herewith requesting, pursuant to §3.61(d) of Subpart G of Part 3 of Subchapter A of Chapter 1 of the 16th Volume of the Code of Federal Regulations, advice from the Federal Trade Commission as to whether a proposed course of action, if pursued by our clients, will constitute compliance with an outstanding Commission Cease and Desist Order.

On June 29, 1970, the Federal Trade Commission issued an Order, FTC Docket No. 8792, against our clients, pursuant to the provisions of Section 5 of the Federal Trade Commission Act, prohibiting the continued use of certain methods and forms of advertising. In order to secure continued compliance with this Order, our clients herewith submit an advertisement of Golden Fifty Pharmaceutical Co., Inc. intended for publication in the near future. We would ask the Commission to kindly consider this proposed advertisement, and inform our clients whether or not the advertisement, if published, would comply with the Order.

Should the Commission need additional information concerning either the proposed advertisement or its distribution, please do not hesitate to contact us, for our clients wish to fully cooperate with the Commission in order to prevent future difficulties of any kind.

We eagerly await the Commission's response.

Very truly yours,

CHAPMAN AND CUTLER

By

/s/ Harry P. Lamberson

1201

**Development and sale of market data to marketers of food products
would not violate order of June 1, 1961 (58 F.T.C 977), modified,
307 F.2d 184, Dkt. 6459.**

Opinion Letter

May 1, 1978

Dear Mr. Solomon:

The Commission has considered your request for advice as to whether Giant Food Inc. ("Giant") may engage in a proposed course of conduct whereby Giant would develop market data for business entities engaged in the marketing of food products without violating the order issued by the Commission on June 1, 1961.

By order of the Commission, 58 F.T.C. 977 (1961), *modified*, 307 F.2d 184 (D.C. Cir. 1962), Giant may not knowingly induce and receive discriminatory display or promotional allowances. Giant proposes to collect and disseminate market data collected through use of computer assisted checkout systems. Giant intends to contract with marketers of products, including its own suppliers, for preparation of this data. You state that the availability of this service would not be conditioned on the contracting party's status as a Giant supplier, and that Giant will not induce any party to purchase the market data.

On the basis of the facts submitted, you are advised that the Commission is of the opinion that the offer and sale of the market data would not violate the Commission's order in Docket No. 6459. We would advise you that any attempt by Giant to condition its patronage with suppliers upon their purchase of the information service might well constitute as illegal and anticompetitive trade practice.

The above advice in no way affects a given supplier's or seller's responsibility to adhere to the requirements of the Robinson-Patman Act, or to Giant's responsibility to adhere to the provisions of the order in its dealings with any of its suppliers.

By direction of the Commission.

Letter of Request

December 2, 1977

Dear Mr. Thomas:

This petition is filed pursuant to Section 3.61(d) of the Commission's Rules of Practice which provides that any respondent subject to a Commission order may request advice from the Commission as to whether a proposed course of action, if pursued by it, will constitute compliance with such order.

Giant Food Inc., hereinafter referred to as Giant, is giving serious consideration to a proposal which involves the sale of its services to various parties and seeks timely advice from the Commission to insure that its actions will not contravene the provisions of the Cease and Desist Order.

The Commission issued a complaint against Giant on November 21, 1955 charging a violation of Section 5 of the FTC Act, as amended. The Commission's decision issued on June 1, 1961 required Giant to cease soliciting and accepting as compensation for advertising and promotional services, discriminatory payments from its suppliers which it knew, or should have known, were not made available on proportionally equal terms to all its competitors in connection with an "anniversary sale" (58 FTC 977).

The decision of the Commission was affirmed by the United States Court of Appeals for the District of Columbia on June 14, 1962 (307 F.2d 184). In affirming the decision of the Commission, however, the Court of Appeals stated that "The order should be directed toward prohibition of a knowing inducement and receipt of, or contracting for, the receipt of discriminatory display and promotional allowances." Thus, the Court of Appeals limited the order and the scope to the general practices involved in the complaint.

In recent years, Giant has developed extremely sophisticated and technical information which could be of great value to persons engaged in the marketing of food products. This information is collected from Giant's computer assisted checkout systems and permits it to develop data on a given product and anticipate trends as to shelf-space allocation, advertising or special sales. Data can be retrieved from each store so equipped and the movement on any item can be analyzed. In addition, reports can be generated for a given brand, including comparisons, with the movements of similar or competitive products. Projections can be made as to the frequency at which products will be ordered and the frequency of movements from a variety of designated positions on the shelf can be studied. Further, Giant has the capability of conducting spot tests by studying the pattern of placement and handling of products and in this manner report on the effects of juggling either location, number of products, placement in other departments to determine the best sales position. In short, the capabilities of Giant in this regard permit a number of variables and the information can be generated if a determination is made to expend the funds necessary to retrieve the information.

Many marketers of products, including Giant suppliers, are familiar with the unique capabilities that Giant possesses to produce information of this kind. This information is of proven value. Giant is being

1201

asked to produce the information and has been offered payment to cover its expenses and anticipates some profit in this regard. Because this may involve, in some instances, the receipt of funds from suppliers who are presently selling merchandise to Giant, even though not connected with purchase or resale, the program raises a question as to the applicability of the Order to Cease and Desist.

We believe that the present Cease and Desist Order does not inhibit the practice of producing and selling information sought by parties in those instances where the parties involved may also happen to be a supplier. Giant does not intend to induce anyone to purchase information but will, to the extent of its capacity, develop information for anyone including present suppliers or their competitors who do not sell to Giant. The Robinson-Patman Act does not prohibit any and every transaction no matter how remote between a customer and a supplier, and we believe the course of action proposed will not contravene the provisions of the order.

We solicit the advice of the Commission and urge that the request be processed as soon as possible because Giant is postponing its decision to pursue this course of action until it hears from the Commission.

Sincerely,

/s/ Lawrence P. Solomon

Proposed establishment of a program for certifying individuals who fit prescription footwear (pedorthists), and facilities which provide pedorthic services, File 783 7008.

Opinion Letter

June 15, 1978

Dear Mr. Krill:

This is in response to your request for an advisory opinion concerning a certification program proposed by the Board for Certification in Pedorthics (BCP). After considering your request, the Commission has determined that it cannot approve the program.

According to your submission, the BCP proposes establishment of a program for certifying individuals who fit prescription footwear (pedorthists) and facilities which provide pedorthic services. Certified individuals would be required to fulfill certain continuing education obligations, pay an annual fee, and adhere to a code of ethical professional conduct. Facilities would be certified upon a demonstration that they meet certain minimum requirements.

The Commission recognizes that certification programs can be helpful to consumers by informing them that practitioners (and establishments) meet meaningful levels of occupational competency. All such programs, however, must be carefully structured and implemented so that (1) consumers are not misled or unfairly affected, (2) potential entry restraints are held to a minimum; and (3) competition is not otherwise unreasonably restricted. The Commission is of the opinion that several facets of the BCP program fail these tests.

First, the requirements for qualification of applicants are too indefinite, and the purpose of certain standards for facility certification are too uncertain. For example, the requirements that an applicant have had "sufficient" clinical experience and that a facility maintain "adequate" staff and have a "professional" appearance are too subjective and could lead to arbitrary limitations on certification.

Second, although an appeal process is available to rejected applicants, to facilities denied certification and to other aggrieved parties, ultimate decisions are made by the same Board which was responsible for initial adverse decisions. Moreover, although the composition of the governing Board of Directors would include directors nominated by outside organizations, such as an orthopedic medical group, a majority would consist of Prescription Footwear Association members, who are competitors of candidates for certification.

1204

"ethical" obligations, imposed by "Canons of Ethical Conduct" and promulgated by the Prescription Footwear Association. These provisions impose significantly increased potential for unfair or anticompetitive practices. The Canons can be construed to impose, for example, prohibitions against advertising the availability and prices of pedorthic services. This is couched in terms of distinguishing between so-called "professional" and "commercial" aspects of pedorthic practice.

The Canons forbid, as well, open criticism of the services provided by a competitor. All fee sharing, presumably for shared servicing, is also unreasonably prohibited. No disclosed commercial or ethical justification for these restrictions appears.

The Commission, for each of the reasons noted herein, cannot advise the BCP that its proposed certification plan is acceptable. In summary, the Commission believes that no certification program should be so structured that competing practitioners can determine who is or is not to be certified, based upon subjective, undefined criteria. Nor can the Commission approve a plan which permits ultimate certification decisions to be made, even in part, by persons not distinct and separate from the initial certification decision-makers. Finally, there is no place in such a program for rules, codes, or understandings the effect of which are to place unreasonable limitations upon effective competition.

By direction of the Commission.

Letter of Request

June 17, 1976

Dear Mr. Lewis:

On May 31, 1973 Mr. Thomas J. Segal, Attorney, Office of General Counsel commented on a proposed certification program for the fitters of prescription footwear. This letter of comment followed a request on behalf of the Prescription Footwear Association that the pending request for an advisory opinion be held in abeyance, pending certain revisions of the proposed program. At this time, we wish to bring you up to date regarding the development of this program and to reinstate our request for advisory opinion or, in lieu thereof, additional staff comments, regarding this certification process.

We believe that we have met or exceeded all requirements made known to us in correspondence, such as Mr. Segal's letter, and staff conferences. More recently, we sought additional staff advice by means of a conference with Mr. Ben Burman of your office. As a result of that conference, certain additional changes were made in the organizational structure of the entity which will conduct the certification program for individuals and for facilities.

What has transpired since our initial submissions is that a separation has occurred between the trade association of prescription shoefitters and the credentialing organization. The trade association, formerly an Indiana corporation, has been reorganized and has become a non-profit corporation under the laws of the District of Columbia. Copies of the merger and the reorganization agreement which achieved this restatement of the trade association's character are attached. In connection with this statutory merger, the By-laws of the P.F.A. were amended; these are also appended to this letter.

For the last several years, the Prescription Footwear Association has concentrated on publications for the purpose of informing its members and on the conduct of educational seminars to improve their skills, background and scientific understanding of the fitting of prescription footwear. Examples are attached hereto.

On October 4, 1974 the Board for Certification in Pedorthics, Inc. had its first organizational meeting of its Board of Directors. At that time, the program to initially certify an individual as a "Certified Pedorthist" (C.Ped.) was developed. At that time modifications were approved, amending the criteria for certification to conform to Mr. Segal's recommendations:

- a) The five-year experience requirement for certification as a Pedorthist has been eliminated.
- b) The educational prerequisites for certification as a Pedorthist have been eliminated.
- c) The inventory requirements for Facility Accreditation have been reviewed, modified and substantiated as to cost and reasonableness.
- d) Due process safeguards, including opportunities for a fair hearing, have been incorporated throughout the Individual and Facility Certification program.

Every effort has been made to insure that this credentialing program will have as its sole purpose the provision of a reasonable level of assurance to orthopaedic surgeons and other prescribers of prescription footwear that prescriptions will be filled with a degree of skill and accuracy which is adequate to provide the necessary service to the patient on an effective and efficient basis. This is the whole point of the credentialing program. It is not to restrict the numbers of persons authorized to fill prescriptions for footwear, but on the other hand, it is a response to a need expressed by the Foot Society of the American Academy of Orthopaedic Surgeons.

In most areas of the United States a prescription for footwear for a diabetic, rheumatoid, arthritic, injured, deformed or insensitive foot

1204

purport to offer absolute assurance that each holder of the certified status will provide skilled and knowledgeable services on each and every occasion. But it is a distinct improvement over the completely unpredictable situation in prior years.

We would be pleased to discuss this matter at an informal conference arranged at your offices. Should you require additional information, that would be supplied promptly.

In the event that you wish to provide us with information concerning the activities of credentialing and professional organizations and societies, particularly in view of your recent activities in connection with the American Medical Association, would you kindly forward such information to us.

Thank you sincerely for your cooperation in this matter. Please let me know if there is anything further that I might do to facilitate your consideration of this program.

Very truly yours,

/s/ Edward J. Krill

Magnuson-Moss Warranty Act—Interpretation of Section 102(b) of the Act, 15 U.S.C. 2302(h), and the Commission's Rule on Pre-Sale Availability of Written Warranty Terms, 16 CFR 702, as they apply to certain situations that arise in the home building industry; and the applicability of Section 111(d) of the Act, 15 U.S.C. 2311(d), to a warranty required on all FHA/VA financed housing, File 783 7009, 43 F.R. 35684.

Opinion Letter

June 21, 1978

Dear Mr. Colton:

This is in reply to your request of September 28, 1977, on behalf of the National Association of Home Builders, for an advisory opinion concerning Sections 102(b) and 111(d) of the Magnuson-Moss Warranty Act, 15 U.S.C. 2301, *et seq.*, and the Commission's rule on the Pre-Sale Availability of Written Warranty Terms, 16 C.F.R. 702, as they apply to the home building industry.

Your request contains five topics of discussion, each posing questions for Commission consideration. The Commission has rephrased your request in eight questions in order to clarify the issues posed. It has determined that the rephrased questions numbered 1 through 3 (below) are not appropriate for an advisory opinion under Part 1, Subpart A of the Commission's Rules of Practice; instead these questions are treated as a request for an exemption from Rule 702, 16 C.F.R. 702. Where the Commission has granted an exemption from Rule 702, that exemption applies to all affected home builders and wholesale suppliers.

The rephrased questions and the Commission's answers are as follows:

1. When a builder gives the purchaser an allowance to select various fixtures or appliances (consumer products) from a third party supplier, is it the builder or the third party supplier who must comply with the pre-sale availability of warranties requirements for "sellers" under 16 C.F.R. 702.3(a) in each of the following situations:

- (a) The purchaser makes selections from stock purchased wholesale by, and in the possession of, the builder, and makes payment to the builder for any items selected in excess of the allowance.

- (b) The purchaser makes selections in the showroom of the builder's supplier, from items not yet purchased by the builder, and makes payment to the builder for any items selected in

1208

- (c) The purchaser makes selections from items not yet purchased by the builder, and makes payment directly to the supplier for any items selected in excess of the allowance.
2. What are a custom builder's duties as a "seller" under 16 C.F.R. 702 when the purchaser can choose from among virtually all brands of appliances available in the marketplace?
 3. If the builder has made the pre-sale warranty information available to the purchaser for all appliances from which the purchaser can choose, does the builder have any obligation under 16 C.F.R. 702 to make warranty information available, after a contract is signed, for substitute appliances which the purchaser must select due to a manufacturer's discontinuation or replacement of the appliance initially chosen by the purchaser?
 4. Does the Magnuson-Moss Warranty Act require that all builders' warranties contain a clause assigning the manufacturers' warranties on consumer products to the purchaser, or does the Act have the effect of automatically making all manufacturers' warranties on such appliances run to the ultimate purchaser?
 5. Is the builder or the purchaser the proper party to complete and return the warranty registration cards for consumer products installed in the home?
 6. Does Section 111(d) exempt the mandatory FHA/VA warranty from the requirements of the Magnuson-Moss Warranty Act?
 7. Is a builder who gives only the mandatory FHA/VA warranty required to comply with 16 C.F.R. 702 for those consumer products sold with warranties that are covered by the Act?
 8. If a builder both gives the mandatory FHA/VA warranty, and voluntarily offers an additional warranty not required by any Federal law (e.g., a one year warranty against defects in materials and workmanship), to what extent is the additional warranty subject to the Magnuson-Moss Warranty Act?

The Commission has carefully considered the matters set forth in your letter. It is the Commission's determination that:

1. (a) When a builder gives a purchaser an allowance to select consumer products, and the purchaser makes selections directly from the builder's stock, the builder *must* comply with the seller's duties under 16 C.F.R. 702.3(a) to make warranty terms available prior to sale.
- (b) & (c) When a builder gives a purchaser an allowance to select consumer products from the stock of the builder's supplier, the builder is exempted from compliance with 16 C.F.R. 702.3(a). In this latter situation, the builder's supplier is also not required to comply with the seller's pre-sale duties under the rule if the

supplier's sales are totally wholesale, including builder-referred sales.

2. When a purchaser contracts to have a custom home built, and pursuant to the contract can choose appliances from among virtually all of those available in the marketplace, the builder is exempted from compliance with the seller's duties under 16 C.F.R. 702.3(a) to make the text of written warranties available prior to sale.

3. A builder must make warranty terms available for inspection by a purchaser if, after a contract is signed, the purchaser must make a second selection because originally selected items have become unavailable. The builder is not exempted from compliance with 16 C.F.R. 702.3(a) in this situation.

4. The Magnuson-Moss Warranty Act does not govern the issue of whether a manufacturer's warranty on a consumer product must be assigned by a builder to the home purchaser. This question is governed by state law.

5. Registration cards would be prohibited for all full warranties under the Commission's rule on Reasonable Duties Under a Full Warranty, as proposed in 43 F.R. 39223 (August 3, 1977); see also the Commission's Interpretations of the Act, 16 C.F.R. 700.7(b). However, registration cards are permitted for limited warranties. When a limited warranty offered on a consumer product by a manufacturer includes the registration card, the home purchaser is the proper party to complete and return the card, unless the warranty specifically requires this of retailers.

6. Section 111(d) of the Magnuson-Moss Warranty Act exempts the mandatory FHA/VA warranty offered by a builder from the requirements of the Act (except for Section 102(c)).

7. A builder who gives only a FHA/VA warranty must still make available under 16 C.F.R. 702 those warranties that are covered by the Act; the fact that the FHA/VA warranty is generally exempt from the Act does not affect the builder's status as a "seller" of consumer products covered by warranties that are governed by the Act.

8. Any warranty offered by a builder on a consume product that is not required by Federal law is subject to the provisions of the Magnuson-Moss Warranty Act.

By direction of the Commission.

1208

Letter of Request

September 28, 1977

Dear Mr. Thomas:

This firm represents the National Association of Home Builders of the United States (NAHB). On behalf of that organization and pursuant to Part I, subpart A of the Commission's Rules of Practice, we hereby request an advisory opinion on the following questions relating to the application of Title I of the Magnuson-Moss Act to the home building industry.

The Commission will no doubt recall that it, NAHB and Home Owners Warranty Corporation have had extensive discussions over the last several years concerning the difficulty of applying to the building industry a statute which was drafted with an eye to the customary retail consumer transaction where both the product and the details of the transaction are far less complicated than are a new dwelling and its transfer. NAHB sponsored several seminars in various parts of the country to inform and educate builders about the Act and to discuss questions arising from the nature of dwelling sales. These questions were repeatedly asked; none of those present, including representatives of our industry who have intensively studied the Act, and observers from the Commission, were certain of the answers.

I. FIXTURE AND APPLIANCE ALLOWANCES

It is a common practice in the home building industry for the purchaser of a new home to request and to be granted an allowance for the purchase of appliances, light fixtures, carpeting, and/or other items, some of which might be considered consumer products. Under this practice, the purchaser is permitted to select (either from stock in the builder's possession or at the warehouse or showroom of the builder's supplier of such items) up to a certain dollar amount of specified items. The builder will install the selected items (in substitution for similar items normally provided) in the home with no addition to the purchase price. If the purchaser selects items costing more than the allowed dollar amount, the purchaser must pay the difference.

For example, the purchaser of a \$50,000 home might be given a \$300 allowance for light fixtures of purchaser's selection. The builder would direct the purchaser to the showroom of the builder's electrical supplier. If the purchaser selected \$400 worth of light fixtures at the showroom, the builder would install them in the home provided that (depending upon the arrangement between the builder and the supplier) (a) the purchaser paid \$100 (the excess over the allowance) to the supplier at the time he made his selections or (b) the purchaser paid \$50,100 for the house, so that the builder could pay the additional \$100 to the supplier.

The specific question is the application to such a practice of Section 102(b) of the Act and Part 702 of the Commission's Regulations. Under an allowance arrangement such as that outlined above, is it the builder or his supplier who must maintain copies of warranties on consumer products which can be selected by the purchaser under each of the following circumstances:

1. The purchaser makes his selections from stock purchased wholesale by, and in the possession of, the builder, and makes payment to the builder for any items selected in excess of the allowance.

2. The purchaser makes his selections at the showroom of the builder's supplier, from items not yet purchased by the builder, and makes payment to the builder for any excess (with the builder in turn paying the supplier).

3. The purchaser makes his selections in the showroom of the builder's supplier from items not yet purchased by the builder, and makes payments direct to the supplier for any excess (the builder, of course, paying the supplier the amount of the allowance).

In our view, presale availability of these warranties in situations 2 and 3 should be the responsibility of the supplier rather than the builder because it is at the supplier's facility that the consumer compares the available items and makes his selections, and it is there that he should have the opportunity to compare the written warranties on those items as well. The fact that in situation number 2 the title to the items may technically have passed to the builder does not alter the fact that the convenience of the consumer is best served, and the comparison shopping intended by the Act's drafters is most strongly stimulated, if the presale display of written warranties takes place at the supplier's facility.

II. CUSTOM BUILDER

In contrast to the usual consumer product transaction where the purchaser buys an already completed item from the stock of a retailer, or (as in the case of an automobile) orders an item from a catalog and selects from among a limited number of available options, many new homes are constructed on a truly custom basis according to the purchaser's specifications (which may be either general in nature or a complete design prepared by the purchaser's own architect), generally on land already owned by the purchaser. In such custom building transactions, the selection of brand and model of appliances is not made until long after the construction contract has been signed and construction is under way - in the context of a \$50,000 to \$100,000 transaction involving countless decisions as to structural materials

1208

brands of dishwashers does not loom large. In addition, in such a situation, the purchaser's choice is not among a few brands or models maintained in inventory by the builder or provided by those suppliers with whom the builder has a continuing relationship. The builder will generally obtain and install whatever appliance the purchaser asks for, and the purchaser's choice is among virtually all the appliances available in the marketplace.

It should be noted that this is a selection which the purchaser may in fact be reluctant to make prior to signing the contract, (a) because of its comparative unimportance in the context of the much larger construction transaction and (b) because he may want to wait until late in the construction process, when the final cost of the home can accurately be estimated, before selecting the types (and hence the cost) of appliances to be installed.

Advice is requested as to the following question: What, if anything, must the custom builder do under Part 702 of the Commission's Regulations when the question of the type, brand and model of appliances does not arise until construction is under way pursuant to a binding construction contract? In our opinion, it is impossible for the custom builder to have available the written warranties on all the consumer products from which his purchaser might choose, because, since the custom builder does not maintain an inventory of appliances or equipment but rather procures on an *ad hoc* basis whatever his customer requests, the alternatives (and hence the number of warranties that would have to be placed in a binder and kept up to date) number in the hundreds or thousands.

III. NECESSARY SUBSTITUTION

Another common practice in the industry is for the purchaser to view a model home and sign a contract with the builder for the purchase of a lot on which, by the time of closing, the builder will have constructed a home similar to the model. In such a situation, because the builder is constructing a number of similar homes, the purchaser has available either (a) only a single brand of appliances which the builder offers or (b) a selection, allowed by the builder, among two or three equivalent, alternative brands and models. The appropriate time for installation of the appliances selected by the purchaser will not arrive until the dwelling is nearly completed, several months after the purchaser has made his selection and the binding contract has been signed. By that time, one or more of the models selected by the purchaser may either have been discontinued by the manufacturer or been replaced by a more recent model having different features.

Advice is requested as to the following question: If in the above

situation the builder has (in compliance with Part 702) maintained available, for inspection by the purchaser before he signs the contract, the warranties on those appliances from which the purchaser was invited to make his selection, does the builder have any obligation under Part 702 with regard to availability of warranties on substitute appliances which the purchaser must select because of the discontinuance or replacement of the chosen appliance by the manufacturer?

IV. WARRANTY REGISTRATION CARDS

Prior to the advent of the Magnuson-Moss Act, there was some question as to whether manufacturers' warranties on appliances which were installed in new homes ran to the builder or to the ultimate purchaser of the home. To deal with this problem, the builder's warranty frequently contained a clause formally assigning benefits of those warranties to the purchaser, and the builder delivered to the purchaser at closing, for completion by the purchaser, whatever warranty registration cards the appliance manufacturers required to be completed and submitted to the manufacturer as a precondition to warranty effectiveness.

Advice is requested as to the following two questions:

1. Does the Magnuson-Moss Act require that all builders' warranties contain such an assignment clause, or does it have the effect of automatically making all manufacturers' warranties on such appliances run to the ultimate purchaser?
2. Who is the proper party to complete such warranty registration cards and send them to the manufacturer?

V. VA/FHA WARRANTY

Both the Veterans Administration and the Federal Housing Administration (a part of the Department of Housing and Urban Development) require, as a condition to their guaranty or insurance of the purchaser's mortgage on any new dwelling, that the seller of the dwelling (the builder) warrant in writing that it has been constructed in substantial conformity with the plans and specifications which were used by the agency as the basis for its determination that the dwelling was of sufficient value to constitute adequate security for it and the lender. For your information, a copy of the standard form suggested by these agencies for this warranty is attached to this letter as Exhibit A.

Section 111(d) of the Act provides that (with one exception) Title I does not apply to whatever portion of a written warranty is contained

1208

1. Are the form and content of the mandatory FHA/VA warranty exempt from the requirements of the Act?

2. If a builder gives a written warranty consisting of two parts, one of which is the mandatory FHA/VA warranty language while the other is an additional warranty not required by either agency (e.g., a one-year warranty against defects in materials and workmanship), to what extent are its form and content subject to Title I of the Act?

3. Is a builder who gives only the mandatory FHA/VA written warranty required to maintain copies of manufacturers' warranties on appliances and equipment available for inspection by purchasers before they sign binding contracts to purchase homes?

In our opinion, these questions provide a further illustration of the difficulty of regulating new home warranties and the home purchase transaction in the same way as more conventional retail transaction in purely personal property. We would appreciate the Commission's advice and assistance in furnishing definitive answers to these questions.

Very truly yours,
COLTON AND BOYKIN

/s/ Herbert S. Colton