

Modifying Order

113 F.T.C.

IN THE MATTER OF

THE KROGER CO.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9040. Consent Order, Nov. 11, 1977—Modifying Order, Aug. 21, 1990*

This order reopens the proceeding and modifies the 1977 consent order (90 FTC 459) which, with certain limitations, required respondent to keep advertised sale items on hand and to sell them at no more than the advertised price. Respondent's petition was based on the 1989 amendment to the Commission's Retail Food Store Advertising & Marketing Practices Rule (the "Unavailability Rule"). The Commission concluded that its action in amending the Unavailability Rule constituted a changed condition of law and fact, requiring that the proceeding be reopened and the order modified.

ORDER REOPENING THE PROCEEDING AND
MODIFYING CEASE AND DESIST ORDER

On April 23, 1990, The Kroger Co., a corporation, filed a request to reopen the proceeding and modify the consent order entered against it by the Commission on November 11, 1977, in Docket No. 9040 (90 FTC 459).

The request to reopen the proceeding and modify the consent order was placed on the public record on April 23, 1990, and a press release regarding the request was issued on May 10, 1990. The public comment period ended on June 11, 1990, and no comments were filed. On July 31, 1990, petitioner withdrew its request that part III.A.(1) of the consent order be deleted. The deadline to rule on petitioner's request was August 21, 1990.

Petitioner is one of the nation's largest food retailers. The order prohibits it from failing to have advertised items readily available for sale, from failing to mark each item with a price no higher than the advertised price, and from failing to sell each item at a price no higher than the advertised price. Petitioner may, however, avoid liability for its failure to comply with these proscriptions if it discloses in its sale advertisements specific exceptions, limitations or restrictions with respect to store, item and price. Petitioner must also maintain a continuing surveillance program which entails surveys of its stores to ascertain the rates of unavailability, over price marking and over-

charging. Defenses and presumptions applicable to those defenses are based on tolerance levels of unavailability, over price marking and overcharging.

The order also requires petitioner to post in each of its stores a copy of its advertisement and a statement that all items advertised are required to be available for sale at or below the advertised price, except as specifically noted in the advertisement. The statement must also advise consumers that a raincheck may be obtained if an item is unavailable. Additionally, petitioner's advertisements for sale items must disclose that each item is required to be available, except as specifically noted in the advertisement. Petitioner is further required by the order to deliver a copy of the order to specified supervisory employees.

PETITIONER'S REQUEST

Petitioner requests that the Commission reopen and modify the order so that it is not inconsistent with the Commission's Retail Food Store Advertising and Marketing Practices Rule ("the Rule"), as amended on August 28, 1989. Petitioner states that changes in law, fact and public interest considerations warrant the requested relief.

Petitioner states that the Commission's action in amending the Rule constitutes a change of law and fact requiring that the order be reopened and modified so that it is not inconsistent with the amended Rule. Both the order and the original Rule required the petitioner to have advertised items readily available, at or below the advertised prices, and both permitted similar defenses. The amendments permit new defenses to unavailability that were not permitted under the original Rule or the order.

Petitioner relates that it filed a request to reopen the proceeding and vacate the order on July 1, 1988, which was based on similar alleged changes and public interest considerations as in the instant request. It states that the Commission denied its request on August 18, 1989, because the amendments to the Rule did not constitute changes in law or fact requiring that the order be vacated. The Commission did indicate, however, that changes in the Rule "may require that the order be modified so that it is not inconsistent with the amended Rule." Petitioner quotes from the Commission's letter advising it of its denial of the request:

"It may be in the public interest, however, to reopen and modify the order to

enable petitioner, and ultimately the consumer, to benefit from the Rule's amendments."

Under the amended Rule, petitioner says, rainchecks, items of comparable value, other compensation of equivalent value and general disclaimers of limited availability of advertised items will provide an "absolute defense" to its competitors, while petitioner will be subject to higher costs. When it consented to the order, petitioner states, it could not have foreseen that its competitors "would be relieved of any realistic concern about potential penalties and would consequently be spared from the excessive costs of ensuring compliance."

Pointing out the inconsistencies between the order and the amended Rule, petitioner states that, if the order is not modified, it will be left in the position of violating the order by complying with the amended Rule or violating the amended Rule by complying with the order. As an illustration, petitioner says that parts I and III of the order would not permit it to follow the amended Rule's standards regarding advertising items in limited supply. Conversely, it says that it would violate the amended Rule if it refused to offer substitutes for out-of-stock items even though such refusal would be in compliance with the order if it was within the tolerance levels permitted by the order.

Petitioner is also asking that specified provisions of the order that were never part of the Rule be stricken from the order. It argues that the advertising disclosure and store notices relating to availability, which are required by the order, are inconsistent with the amended Rule since they do not reflect the defenses to unavailability provided by the amendments.

Petitioner states that the provisions of the order requiring a surveillance program, entailing surveys of its stores to determine levels of unavailability, will not be needed if the order is modified so that it is not inconsistent with the amended Rule. Under the amended Rule, petitioner maintains, compliance may be achieved through advertising disclosures of limited availability, or by offering rainchecks, comparable items or other compensation for unavailable items.

Petitioner argues that surveillance and surveys of pricing impose heavy burdens that are inconsistent with the "fundamental functions" of the amended Rule to eliminate costs. Because of the widespread use of scanners, petitioner says, it "would necessitate examination, correlation and recordation of every 'identification code' and associated 'display' prices for many, if not most advertised items." "In

addition", petitioner continues, "audits would be needed to calculate and document the 'ultimate price' in transactions involving total dollar purchase, couponing or other promotional items."

Arguing that it is in the public interest to reopen and modify the order as requested, petitioner notes that it estimated in its prior request that the order be vacated that compliance with the original Rule and the order costs it approximately \$7 million per year and that, if it were required to comply only with the amended Rule, these costs could be reduced by \$3 to \$4 million. If it is compelled to endure these "costly compliance measures while other food retailers are free of them", petitioner states, "its competitive effectiveness will be impaired." The consequences, it says, will be detrimental to consumers served by its 11,400 supermarkets throughout the United States.

THE COMMISSION'S DECISION

Under Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), the Commission must reopen an order to consider whether it should be altered, modified or set aside if a respondent files a request that makes a satisfactory showing that changed conditions of law or fact require the order to be altered, modified or set aside in whole or in part. This provision also permits the Commission to reopen an order for the purpose of altering, modifying or setting aside some or all of its terms whenever it believes that such an action would be required in the public interest. Rule 2.51(b) of the Commission's Rules of Practice implements this provision of law and states that to be satisfactory, a request may not be "merely conclusory" but must "set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modifications."

The Commission has concluded that its action in amending the Retail Food Store Advertising and Marketing Practices Rule constitutes a changed condition of law and fact, requiring that the order be reopened and modified. When petitioner entered into the consent order, the original Rule was in effect and it and its competitors were subject to civil penalty liability for failing to have advertised specials available at or below the advertised prices. Similar defenses were provided for petitioner under the order and for its competitors under the Rule. With the amendments to the Rule, which it could not have foreseen when it entered into the consent order, petitioner is no longer in the same position as its competitors because it may not avail itself

of the same defenses that they may invoke. In addition, the amendments to the Rule have brought the terms of the order into conflict with that Rule.

On August 28, 1989, the Commission amended the Rule in order to reduce costs on the retail food store industry that are passed along to consumers. The Commission concluded that the amended Rule would not significantly reduce consumer protection because instances of unavailability would be mitigated by the amended Rule's requirement that consumers be offered rainchecks or comparable substitute items. The Commission believes that it is in the public interest that petitioner, and ultimately its customers, should be entitled to the cost savings that the amended Rule will provide.

A separate prohibition in the original Rule against failing to have advertised specials available at or below the advertised prices was omitted from the amended Rule. However, over pricing continues to be prohibited by the amended Rule since it is implicit in the requirement that products offered for sale at a stated price be available. This will be true even if the pricing provisions of the order are eliminated to coincide with the amended Rule. The order also has pricing proscriptions. The order also requires petitioner to maintain a program of surveillance, including surveys of its individual stores, with tolerance levels for over price marking and overcharging. The Commission believes that such costly procedures are inconsistent with the amended Rule's stated purpose of reducing compliance costs.

The Commission is persuaded by the petitioner's argument that the order's costly compliance procedures to protect against unacceptable levels of unavailability will not be needed when the order is modified so that it is not inconsistent with the amended Rule. The amendments will enable petitioner to comply with the order by disclosing limited availability in its advertising or by offering "rainchecks", comparable items or other compensation in unexpected instances of unavailability. Petitioner has shown that provisions of the order requiring disclosures in advertisements and the posting of statements in petitioner's stores concerning unavailability and pricing are inconsistent with the amended Rule and should be stricken from the order.

CONCLUSION

Petitioner has demonstrated that changed conditions of law and fact, and public interest considerations require that the proceeding be reopened and the order modified as requested.

It is therefore ordered, That the proceeding is hereby reopened and the Decision and Order issued on November 11, 1977, is hereby modified to read as follows:

ORDER

DEFINITIONS

For purposes of this order, "*respondent*" means The Kroger Co., a corporation, its successors or assigns, its officers, agents, representatives and employees.

For purposes of this order, "*retail food store*" shall mean all of respondent's food stores, but shall not include convenience stores (stores less than 4,000 square feet in total area) and drug stores.

I. PROHIBITED ACTIVITIES

It is ordered, That respondent, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of food or grocery products or other merchandise, hereafter sometimes referred to as items, offered or sold in its retail food stores, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from, directly or indirectly:

Offering any such products for sale at a stated price, by means of an advertisement disseminated in an area served by any stores which are covered by the advertisement, if these stores do not have the advertised products in stock and readily available to customers during the effective period of the advertisement, unless the advertisement clearly and adequately discloses that supplies of the advertised products are limited or the advertised products are available only at some outlets;

Provided, however, that no violation of this modified order shall be found if respondent

(a) Ordered the advertised products in adequate time for delivery in quantities sufficient to meet reasonably anticipated demand;

(b) Offers a "raincheck" for the advertised product;

(c) Offers at the advertised price or at a comparable price reduction a similar product that is at least comparable in value to the advertised product; or

(d) Offers other compensation at least equal to the advertised value.

II. ADDITIONAL OBLIGATIONS OF RESPONDENT

It is further ordered:

A. That throughout each advertised sale period in each of its retail food stores covered by an advertisement, respondent shall post a copy of the advertisement conspicuously (1) at or near each doorway affording entrance to the public, and (2) at or near the place where customers pay for merchandise.

B. Respondent shall forthwith deliver a copy of this order to each of its operating divisions and to each of its present and future officers and other personnel in its organization down to the level of and including assistant store managers who, directly or indirectly, have any supervisory responsibilities relating to (a) availability or price marking of advertised items in respondent's retail food stores, and (b) check stand operations, or who are engaged in any aspect of preparation, creation, or placing of advertising, and respondent shall secure a signed statement acknowledging receipt of said order from each such person.

C. Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the respondent which may affect compliance obligations arising out of this order.

D. At such times as the Commission may require, respondent shall file a report in writing setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF
THE VONS COMPANIES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3302. Complaint, Aug. 27, 1990—Decision, Aug. 27, 1990

This consent order prohibits, among other things, a Mich. based corporation that operates grocery stores in Calif. and Nev. from misrepresenting the extent to which any food contains pesticides and from making any representation concerning the presence or health effects of any pesticide applied to or present in any food, unless respondent possesses and relies upon competent and reliable scientific evidence substantiating such representation.

Appearances

For the Commission: *Steven A. Shaffer* and *Jeffrey A. Klurfeld*.

For the respondent: *Robert P. Bermingham*, El Monte, CA.

COMPLAINT

The Federal Trade Commission, having reason to believe that the Vons Companies, Inc. has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Vons Companies, Inc. ("Vons") is a corporation organized, existing, and doing business pursuant to the laws of the State of Michigan. Its principal office or place of business is at 10510 Lower Azusa Road, El Monte, California.

PAR. 2. Respondent has advertised, promoted, offered for sale, sold, and distributed to the public various products, including fruits, vegetables and other produce ("Vons produce") which constitute "food" as defined in Section 15 of the Federal Trade Commission Act. Respondent's offering for sale, promotion, sale and distribution of Vons produce constitutes the maintenance of a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of its business, respondent has