IN THE MATTER OF

BEATRICE FOODS CO.

MODIFIED ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket 8864. Complaint, Oct. 1, 1971 — Modified Order, Dec. 28, 1976

Order modifying an earlier order dated July 1, 1975, 40 F.R. 33657, 86 F.T.C. 1, by deleting the words "or sale" from Paragraph IV of the original order, as required by the August 18, 1976, decision and judgment of the Court of Appeals for the Seventh Circuit, 540 F. 2d. 303 (1976).

Appearances

For the Commission: *Randolph B. Sim, William M. Sexton,* and *Richard L. Williams.*

For the respondent: *John P. Fox, Jr.,* Chicago, Ill. and *John Stack* and *Terry Grimm, Winston & Strawn,* Washington, D.C. and Chicago, Ill.

MODIFIED ORDER TO CEASE AND DESIST

Respondent, having filed in the United States Court of Appeals for the Seventh Circuit on August 20, 1975, a petition to review an order to cease and desist issued herein on July 1, 1975; and the Court having rendered its decision and judgment on August 18, 1976, affirming and enforcing the Commission's order with a modification of Paragraph IV; and the time in which to file a petition for certiorari having expired without either party having filed such a petition;

Now, therefore, it is hereby ordered, That the aforesaid order to cease and desist be, and it hereby is, modified in accordance with the decision and judgment of the Court to read as follows:

ORDER

I

It is ordered, That, subject to the prior approval of the Federal Trade Commission, respondent Beatrice, through its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, shall as soon as possible and in any event within one (1) year from the date this order becomes final, divest absolutely and in good faith all assets, rights, property and privileges, tangible and intangible, including all plants, equipment, machinery, raw material reserves, inventory, customer lists, trade names, trademarks, good will and other property of whatever description acquired by Beatrice as a result of its acquisition of Essex Graham Company (hereinafter

referred to as Essex), including all additions and improvements thereto, which are necessary to restore Essex as a separate independent and viable going concern in the lines of commerce in which it was engaged prior to said acquisition.

II

It is further ordered, That, pursuant to the requirement of Paragraph I above, none of the stock, assets, rights or privileges, tangible or intangible, acquired or added by Beatrice shall be divested directly or indirectly to anyone who is, at the time of the divestiture, an officer, director, employee, or agent of, or under the control, direction or influence of Beatrice or any of Beatrice's subsidiaries or affiliated corporations or who owns or controls more than one (1) percent of the outstanding shares of the capital stock of Beatrice.

III

It is further ordered, That, pending divestiture, respondent Beatrice shall not make or permit any deterioration in the value of any of the plants, machinery, parts, equipment, or other property or assets of the corporations to be divested which may impair their present capacity or market value unless such capacity or value be restored prior to divestiture.

IV

It is further ordered, That respondent Beatrice shall cease and desist for ten (10) years from the date this order becomes final from acquiring directly or indirectly, through subsidiaries or otherwise, without prior approval of the Federal Trade Commission, any part of the assets, stock, share capital, or other actual or potential equity interest or right of participation in the earnings of any domestic concern, corporate or non-corporate, which is engaged in the manufacture of manually powered paint applicators or engaged in the manufacture or sale of raw materials to companies engaging in the manufacture of manually powered paint applicators, or from entering into any arrangements or understandings with such a concern through which respondent Beatrice becomes possessed of that concern's market share.

For the purpose of this order, manually powered paint applicators are defined as: paint and varnish brushes; paint rollers, including pans, covers, handles, and other accessories sold separately, or as part of a paint roller kit; and miscellaneous paint applicators other than spray equipment and aerosol cans.

V

It is further ordered, That respondent Beatrice shall within sixty (60) days after date of service of this order, and every sixty (60) days thereafter until respondent Beatrice has fully complied with the provisions of this order, submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which respondent Beatrice intends to comply or has complied with this order. All compliance reports shall include, among other things that are from time to time required, a summary of contracts or negotiations with anyone for the specified stock, assets and plant, the identity of all such persons, and copies of all written communications to and from such persons.

VI

It is further ordered, That respondent Beatrice 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 change in the corporation which may affect compliance obligations arising out of the order.

ADVISORY OPINIONS

Mandatory warning statement in night aerial cigarette advertising (File No. 763 7004).

Opinion Letter

July 9, 1976

Dear Mr. Friedman:

You requested Commission advice concerning proposed measures for disclosure of the mandatory warning statement in conjunction with a method of cigarette advertising at night by means of an airborne electronic "billboard." The medium consists of an electronic seven-character lighted panel that produces moving messages, images or logos at the rate of four characters per second, seven feet high, affixed to an aircraft which moves through the air at a speed of 50 miles per hour.

Although considerable time and attention was given this matter in an effort to determine some practicable formula for a clear and conspicuous disclosure of the mandatory warning statement under these particular visual, time and traverse limitations, the Commission has reluctantly concluded that, without empirical data, it is unable to do so. The course of action proposed, or its effects, are such that an informed decision thereon cannot be made or could be made only after extensive investigation, clinical study, testing, or collateral inquiry, and therefore the Commission must consider the request inappropriate pursuant to Section 1.1(c) of its Rules of Practice.

The Commission notes that, with the limitations indicated, there is a serious question as to whether the mandatory warning statement itself is susceptible to a clear or fully intelligible communication. In addition, the Commission is unable to discern any practicable method for insuring that both the cigarette advertising and the mandatory warning statement will be communicated to the same viewers. Accordingly, the Commission is unable to determine whether, or the extent to which, a clear and conspicuous disclosure of the mandatory warning statement will, in these circumstances, result from use of a display formula directed solely to the time interval and/or sequence of display of the mandatory warning.

By direction of the Commission.

Second Supplemental Letter of Request

May 30, 1975

Dear Mr. Krug:

Many thanks for spending as much time as you did with me on the phone last Friday. Your comments gave me a greater insight as to how the Federal Trade Commission works, and what they would be looking for.

Regarding our proposal on Aerial Cigarette Advertising, I would like to offer additional information as to how we would conduct our operation, when being used to advertise a Cigarette.

The areas that are of greatest interest to us, and to advertisers, are those that have large concentrations of people in them. Ballparks, Racetracks, Amusement parks, etc. When flying over such places it is normal for us to make several passes over each area, to obtain maximum effectiveness of the advertising message. In addition to my earlier proposal of flashing the warning every fifteen minutes, we would make one complete pass over *each* area that we are reaching, with the Warning appearing in the same size letters as the normal advertising is being done in. The Warning message would take twenty four (24) seconds to run at the speed of our sign. Being the sign is visible for 35 - 45 seconds to someone on the ground, the Warning would be seen in its entirety.

When we are not flying over stadiums or ballparks, we would flash the Warning for a continuous minute every fifteen minutes of operation. This would allow more than two complete passes of the Warning considering the present speed of the message movement.

I think that this is a fair way to ensure that the Warning will be seen by the people we are flying over. If, however, you find fault with this proposal, I would appreciate knowing of your objections, so that we may then modify our operation so as to conform to your requirements. Please bear in mind, however, that our major concern is to display an advertisers message, and that to impose requirements that would make the advertiser feel he was advertising the Warning and not his product would cause him not to use our service at all.

Very truly yours,

/s/ Garrett S. Friedman
President

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First Supplemental Letter of Request

May 20, 1975

Dear Mr. Krug:

Regarding my letter to the Federal Trade Commission, requesting a ruling on Aerial Cigarette Advertising, I would like to make just one more small request.

Our advertising season is extremely limited. First by the number of months that we fly, which is usually June, July, and August, and second by the weather. The number of days that we can't fly due to weather is probably about 35%. So you can see that our season is very short.

We stand a chance of getting a good account from an Advertising Agency that handles a cigarette, however, it is all contingent on getting a favorable ruling from the FTC. It is also contingent upon getting the ruling in time for us to perform the services. Therefore, I would say that the ruling from the FTC is quite timely.

With that in mind, I respectfully request that the FTC address itself to our earlier proposal, so that the account will not be lost, as soon as possible.

Very truly yours,

/s/ Garrett F. Friedman
President

Letter of Request

April 18, 1975

Gentlemen:

My company Electronic Aero Ads, is engaged in Aerial Advertising over Metropolitan New York. What it is that we have is a lighted Electronic Sign, and we fly it over the City at night for the purpose of advertising. Actually, we are just another form of Outdoor Advertising.

My reason for writing is that we have just met with an Advertising Agency that handles a Cigarette company. They expressed interest in our medium, however, before they can proceed, they said that they would require some form of clearance from the F.T.C.

I do understand that along with all cigarette advertising, the advertiser

must run a Mandatory Warning message with the Ad. I would like to suggest that we display the Cigarette Mandatory in the same way that we display the Mandatory for the Alcoholic Beverage. What we have done there is to display the Mandatory at the beginning of the flight, then, every fifteen minutes during the flight, and then again at the end of the flight.

What it is that I am asking for, is a letter from the F.T.C. stating that there is no objection from you to have cigarette advertisements appear on our Billboard. We are not asking for an endorsement of our advertising service, but only a statement that you express no objection in having cigarettes advertised on our sign.

I am enclosing a picture of what our sign looks like so you may better visualize what it is that we have.* Thank you for your consideration. A reply at your earliest convenience would be greatly appreciated.

Sincerely,

/s/ Garrett S. Friedman
President

Applicability of the Magnuson-Moss Warranty Act to warranties on roof shingles, insulation, exterior siding, and underground pipe (Released August 13, 1976).

Opinion Letter

August 6, 1976

Dear Ms. Guyer:

This is in response to your letter to the Commission requesting an advisory opinion on the application of the Magnuson-Moss Warranty Act, 15 U.S.C. §2301, *et seq.* to warranties on roof shingles, insulation, exterior siding, and underground pipe. Specifically you ask:

1. Whether these products are "consumer products" within the meaning of the Magnuson-Moss Warranty Act.
2. Assuming such products are not consumer products within the meaning of the Act, whether a written warranty directed to the

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original retail purchase (*i.e.*, the homeowner) would be covered by the Act.

3. Assuming such products are consumer products, whether a written warranty expressly limited to the party purchasing from Johns-Manville (*i.e.*, a distributor or building contractor) would be covered by the Act.

Section 101 of the Act defines a consumer product as "any tangible personal property which is distributed in commerce and which is normally used for personal, family or household purposes* * *." 15 U.S.C. §2301(1). The products set forth above are used for personal, family or household purposes when they are used in connection with a consumer dwelling. The issue remains whether such products are properly classified as personal property or real property. This depends on the nature of the sales transaction entered into by the consumer. The Commission is of the opinion that such products are consumer products when they are purchased "over the counter" (such as from hardware of building supply retailers) or when the consumer contracts for the purchase of such materials in connection with the improvement, repair or modification of a home. However, where such products are at the time of sale integrated into the structure of a dwelling they are not consumer products, as they cannot be practically distinguished from realty. This analysis would also apply where a consumer contracts for the construction of a home or other realty using such products.

To answer your second and third questions, the Act only covers written warranties which satisfy two requirements:

1. the warranted product is a "consumer product" under the Act, and

2. the written warranty is "part of the basis of the bargain between a supplier and a buyer for purposes other than resale of such product." 15 U.S.C. §2301(6).

If an item is not a consumer product, the first requirement for coverage is not satisfied. Thus the Act would not apply regardless of the party entitled to enforce the warranty.

If an item satisfies the first requirement, the issue is whether the second requirement is met. Distributors and dealers are not "buyers for purpose other than resale." Warranties expressly limited to distributors or dealers would not be a basis of the bargain for the products between a supplier and a consumer, and are therefore not subject to the Act.

By direction of the Commission.

Supplemental Letter of Request

September 24, 1975

Dear Secretary:

On June 13, 1975, Johns-Manville requested an advisory opinion with respect to its proposed course of action under the Consumer Product Warranty Act. On September 10, 1975, not having received a response from you, I wrote you another letter inquiring as to the status of our request. In response to that letter, Larry Kanter of your staff phoned me on September 23 to indicate that the letter could not be found at the FTC.

We are herewith re-submitting a copy of that letter and renew our request for an advisory opinion from the Commission.

Sincerely,

/s/ Andrea M. Guyer
Attorney

Letter of Request

June 13, 1975

Dear Secretary:

Johns-Manville Corporation requests advice from the Federal Trade Commission with respect to its proposed course of action under the Consumer Product Warranty Act. The course of action hereinafter detailed is not currently being followed by Johns-Manville and is not the subject of a pending investigation or other proceedings by the Commission or any other governmental agency.

The Consumer Product Warranty Act defines what is meant by the term "consumer product." This definition when taken in the context of legislative history, statements made by governmental officials, and the stated purpose of the Act leaves the application of the Act to certain products in question. Of particular concern to Johns-Manville is the application of the Act to the following residential products.

1. Roof shingles
2. Insulation
3. Exterior siding

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4. Underground pipe leading from a street main to house.

Unlike home appliances, for example, these products become an integral part of a house in the same manner as do bricks, structural lumber and concrete driveways. A house erected on the land, by definition, is realty not personal property. These products are normally sold to commercial purchasers, such as building contractors. As a result, we are of the opinion that these products are not covered by the Act and that we need not comply with the Act with respect to them.

We respectfully request an advisory opinion from the Commission on the following questions:

1. Are these products "consumer products" within the meaning of the Consumer Products Warranty Act?

2. If they are not "consumer products" as defined by the Act, would they become covered by the Act if a warranty is directed to the original retail purchaser (*i.e.*, the homeowner)?

3. If they are "consumer products" as defined by the Act, do the provisions of the Act apply if the warranty is expressly limited to the party purchasing from Johns-Manville (*i.e.*, a distributor or building contractor)?

Sincerely,

/s/ Andrea M. Guyer
Attorney

Compliance advisory opinion as to legality of a promotional program under modified order, 73 F.T.C. 1026 (Docket 7492).

Opinion Letter

August 6, 1976

Dear Mr. Hinckle:

The Commission has considered the request in your letter of January 23, 1976 for advice as to whether your client, Fred Meyer, Inc., may engage in a proposed course of action without violating the modified order issued by the Commission in the above-captioned matter on June 13, 1968.

From your letter it appears that Fred Meyer, Inc. proposes to initiate a promotional program identical to one utilized by a competitor, Ernst Home Centers. The Ernst's "Show Me How Garden and Patio Fair" on which Meyer wants to base its program is the one that was conducted by Ernst from January 30, 1975 through February 2, 1975.

As you stated in your letter of January 23, 1976 Meyer plans to conduct an identical show. Using the pattern of the Ernst program Meyer plans to solicit many of its suppliers to participate in its promotional program. In preparation for the Fair, Meyer will send to suppliers letters of solicitation setting out the details of the program. In order to participate each supplier would agree to pay Meyer a specified sum for booth space at the Fair. Each supplier will be given the opportunity to display several products and also will be requested to distribute coupons allowing the holder to purchase a particular one of the supplier's products at a reduced price at a Meyer store. The Fair will be heavily promoted in newspaper, radio, and television advertising with Meyer identified as the sponsor of the Fair.

You are advised that it would be necessary to conduct an extensive field investigation to determine whether the program proposed by Fred Meyer, Inc. or utilized by Ernst Home Centers would be a violation of the law or order issued in Docket 7492. Consequently, pursuant to Sec. 3.61(d) of the Commission's Rules of Practice and Procedures, a request for advice is inappropriate where "the proposed course of action or its effects may be such that an informed decision cannot be made or could be made only after extensive investigation, clinical study, testing, or collateral inquiry." The Commission hereby declines to issue an advisory opinion on the facts submitted.

By direction of the Commission.

Letter of Request

January 23, 1976

Dear Sir:

This office represents Fred Meyer, Inc. ("the company"). We are writing to seek an advisory opinion, pursuant to 16 CFR §3.61, with respect to a promotional program which the company proposes to carry out, provided we can obtain an assurance of its legality.

The company is subject to a "Modified Order" issued by the Federal Trade Commission on June 13, 1968, Docket No. 7492, which became

final by operation of law on July 13, 1968. In pertinent part, that order prohibits the company from:

> Inducing or receiving anything of any value from any supplier as compensation for or in consideration of advertising, promotion, or display services or facilities furnished by or through Fred Meyer, Inc., in connection with any promotional scheme consisting of distribution of coupons to and return of coupons by consumers in connection with the purchase by consumers of products offered for resale in retail outlets of respondent Fred Meyer, Inc., or in connection with any comparable program, or in connection with any actual or purported promotion or special sale of particular products to be conducted by or on behalf of respondent Fred Meyer, Inc., when respondents know or should know that such compensation or consideration is not being offered or otherwise made available by such supplier on proportionally equal terms to all of its other customers, including retailer customers who do not purchase directly from such supplier, who compete with respondent Fred Meyer, Inc., in the sale of such supplier's products.

The company is engaged in the retail sale of a wide range of general merchandise through a chain of 51 stores in Oregon, Washington and Montana. Ten of its stores are in the greater Seattle-Tacoma area of Washington, where one of its major competitors is the Ernst Home Centers, a division of Pay 'n Save Corporation. Since the promotional program that the company proposes to carry out is identical to promotional programs conducted each year by Ernst in the Seattle area, the following description of the Ernst program constitutes at the same time a description of the company's proposal for its own program.

The most recent Ernst promotional program was conducted in October 1975. The programs have been variously styled, but the program for which we have most complete information was carried out from January 30, 1975 through February 2, 1975, as the "Ernst Show Me How Garden and Patio Fair" (the "Fair"). This Fair was conducted in the Seattle Center Display and Exhibition Hall.

Ernst solicits many of its suppliers to participate in its promotional programs. In preparation for the Fair, for example, Ernst sent a letter of solicitation dated October 30, 1974, setting out the details of the program. A copy of this letter, with its attachments, is attached hereto as Exhibits A-1 through A-9. According to the terms of the proposal, each supplier was to pay Ernst the sum of $540 for booth space at the Fair (see Exhibit A-6). The more than 50 suppliers that participated in the Fair are listed on a chart of booth locations, attached hereto as Exhibit "B." Each supplier is given the opportunity to display several products, but is asked to distribute coupons allowing the holder to purchase a particular one of the supplier's products at a reduced price at an Ernst store. Ernst's letter of solicitation with respect to the coupon program is attached hereto as Exhibit "C," and samples of

coupons that were distributed during the 1975 Fair are attached hereto as Exhibits "D," "E," and "F." The Fair is heavily promoted in newspaper, radio, and television advertising, with Ernst identified as the sponsor of the Fair. (See Exhibit "G.")

Following the pattern of this Ernst Show Me How Fair, the company proposes to rent a large exhibit hall; invite its suppliers to participate with a booth; charge each participating supplier a certain fee for booth space at the show; carry out extensive advertising in the media prior to and during the show; and encourage its suppliers to issue coupons providing for the purchase of a product at a reduced price at a Fred Meyer store.

Fred Meyer, Inc. requests the Commission's advice as to the following:

(1) Would its sponsorship of such a home show or fair be consistent with its obligations under the 1968 Order?

(2) If the answer to (1) is in the negative, could Fred Meyer, Inc. sponsor such a home show in the Seattle area, where it is in direct competition with Ernst, on the theory that conduct which might otherwise violate the Order is permissible if it is based solely on an attempt to "meet competition"? (See *F.T.C.* v. *Ruberoid Co.*, 343 US 470 (1952), where the Supreme Court held that the defenses available under the Robinson-Patman Act "are necessarily implicit in every order" issued by the Commission based on that Act; and *Exquisite Form Brassiere, Inc.* v. *F.T.C.*, 301 F2d 499 (DC Cir 1961), cert. denied 369 US 888 (1962), where the court held that the "meeting competition" defense was available to a charge of violating §2(d).)

Thank you for your assistance.

Very truly yours,

/s/ Charles F. Hinkle

Impact of the Consumer Goods Pricing Act of 1975 on FTC's position on manufacturer preticketing. (File No. 763 7008, released August 20, 1976.)

Opinion Letter

August 11, 1976

Dear Mr. Bauman:

This is in response to your inquiry of March 4, 1976, requesting advice concerning price preticketing practices of men's sportswear manufacturers. Your letter indicates that many sportswear manufacturers affix hang tags to finished garments, and that while some of the tags show a "suggested retail price," others unqualifiedly designate a "retail price."

When manufacturers independently place resale price labels on goods that will be sold to others for ultimate resale to consumers, both antitrust and consumer protection issues can arise. A vertical agreement to fix resale prices is, of course, a violation of the antitrust laws. *F.T.C.* v. *Beech-Nut Packing Co.*, 220 U.S. 373 (1911). And the leeway permitted to a manufacturer in affirmatively implementing a restrictive resale price policy is severely limited. *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968).

The passage of the Consumer Goods Pricing Act of 1975, Pub. Law 94-145 (Dec. 12, 1975), altered neither these principles nor the Commission's basic position on the policy issues raised by price preticketing. The Act, effective March 11, 1976, repealed the McGuire Act amendments to Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. §45(a), and the Miller-Tydings Act amendments to Section 1 of the Sherman Act, 15 U.S.C. §1. As a consequence, resale price maintenance programs that were previously immunized from attack are now exposed to Federal antitrust scrutiny.

From an antitrust standpoint, the Commission does not object to manufacturer preticketing done at the request of a retailer who intends to sell the products at the price marked, or to preticketing that involves merely the designation by the manufacturer of a "suggested retail price." However, when goods are preticketed with a specific "retail price," established by the manufacturer and not qualified by the word "suggested," the effect goes beyond the mere suggestion of a price at which retailers may elect to sell. At the least, such preticketing represents a specification by the manufacturer of the price to consumers he desires or expects retailers to charge. If, as a consequence, the specified price generally prevails at retail, warrant may well exist for the institution of a Commission investigation to see if resale prices are in fact being unlawfully maintained.

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Alternatively, however, if retailers strike through such a designated "retail price" and add a different price, consumer deception issues can arise. The retailer's alteration of the "retail price" may lead consumers to believe that the retailer has changed *his own* regular or prior retail price. Unlike a "suggested retail price," a preticketed "retail price" represents itself to be the retailer's price. Thus, a preticketing program that involves a designation by the manufacturer of a specific "retail price" may raise issues of vertical price maintenance on the one hand and deceptive pricing on the other.

Other possible consumer protection considerations, such as those directly addressed under Section 3 of the Commission's present Guides Against Deceptive Pricing, 16 C.F.R. §233.3, are not here considered. Proposed revisions of those guides have been published by the Commission in the *Federal Register*, 39 F.R. 21059 (1974), and are now under review at staff level. While the Commission has not yet promulgated final revised deceptive pricing guides, such revision will not alter the Commission's position with respect to resale price maintenance as an antitrust violation.

Chairman Collier concurs in the above conclusions, but wishes to emphasize that he does not believe that, from an antitrust standpoint, it is unlawful for a manufacturer to unilaterally preticket his merchandise, so long as the manufacturer does not attempt to maintain the preticketed price through agreements with wholesalers or retailers, or through the imposition of sanctions against those who decline to sell at the preticketed price.

By direction of the Commission.

Letter of Request

March 4, 1976

Gentlemen:

The National Outerwear & Sportswear Association is a national trade association representing approximately 100 manufacturers of men's sportswear. They produce in their own factories and distribute their products through their own sales staff or outside sales organizations. Their products are in turn sold by every type of retail outlet that carries men's apparel.

Many of our member companies formerly utilized a hang tag that stated a retail price for resale of the merchandise to the consumer. These tags are affixed at the plant before shipment to the retailer.

In some instances the tags read: "Suggested Retail Price $—.

In other cases the tags read: "Retail Price $—.

With the passage of Public Law 94-145 affecting price arrangements between sellers and buyers, we would appreciate an advisory opinion regarding the legality of such price tags and/or any limitations now placed on the use of such price tags.

Very truly yours,

/s/ MORTON BAUMAN

Compliance advisory opinion respecting the propriety of an in-store broadcasting promotional program (Docket 8844, 82 F.T.C. 298)

Opinion Letter

September 14, 1976

Dear Mr. Alterman:

The Commission has considered the request made in the compliance report of Alterman Foods, Inc. (Alterman) for advice as to whether Alterman may engage in a proposed course of action without violating the order issued by the Commission in the above-captioned matter on February 12, 1973 and affirmed and enforced by the United States Court of Appeals for the Fifth Circuit on July 22, 1974.

From Alterman's request, it appears that Alterman proposes to reinstate an in-store broadcasting program in 101 Big Apples, K-Marts and Food Giants, which are Alterman's retail subsidiary supermarkets. This in-store broadcasting program has been described as a "powerful promotional package" whose specially programmed music and announcements would help a supplier sell more of his products in Alterman's supermarkets. The in-store broadcasting program would offer Alterman's suppliers six 40-word announcements a day, six days a week in each of the 101 stores. The proposed contract between Alterman and the suppliers would provide for a 16 week minimum advertising period and the rate paid by the supplier to Alterman would be $180.00 a week. The proposed contract breaks the 16 week period into four 4-week periods and requires the supplier to list two products for broadcast advertising each 4-week period. The contract would contain a warranty whereby the supplier would warrant that the

payments he was making under the contract for in-store broadcasting were also made available by the supplier to all competing retailers in the marketing area on a proportionally equal basis.

The order in Docket No. 8844, *inter alia*, prohibits Alterman from:

> 1. Inducing and receiving, receiving or contracting for the receipt of, anything of value from any supplier as compensation or in consideration for services or facilities furnished by or through respondent in connection with the processing, handling, sale or offering for sale of such supplier's products, when respondent knows or should know that such compensation or consideration is not affirmatively offered and otherwise made available by such supplier on proportionally equal terms to all of its other customers, including retailer customers who do not purchase directly from such supplier, who compete with respondent in the distribution of such supplier's products.

On the basis of the facts submitted, you are advised that the Commission is of the opinion that advice as to the program proposed cannot be given since it cannot be determined in advance and without lengthy investigation, whether you would have actual or imputed knowledge that payments under the program are available to all competing customers on proportionally equal terms. You are further advised that a warranty of the type referred to above would not be a defense to a violation of the order nor would the existence of such a warranty tend to negate a showing of knowledge required to establish a violation of the order.

By direction of the Commission.

*Letter of Request**

January 30, 1975

Dear Mr. Hickey:

Pursuant to the Order of the Federal Trade Commission of February 12, 1974, affirmed by the United States Court of Appeals for the Fifth Circuit on July 22, 1974, the following is the report of Alterman Foods setting forth the manner and form in which the corporation is complying with the terms of the Commission's Order:

Introduction

Alterman Foods, Inc., while a publicly owned corporation, is primarily a family owned and operated business. Isadore Alterman is the President and Chairman of the Board; Sam Alterman is the Executive Vice

* The exhibits referred to are not reproduced herein but are available for inspection in the Public Reference Branch, Room 130 of the FTC Bldg., Washington, D.C.

President; George Alterman is the Executive Vice President in charge of buying and merchandising; Dave Alterman is the Senior Vice President in charge of the wholesale division; Max Alterman is the Senior Vice President in charge of Store Operations; Malcolm Alterman is the Vice President in charge of the institutional division; Richard Alterman is the Director of New Store Planning and Development, Retail Supermarket Division; Robert Alterman is the Director of Advertising and general merchandising, Retail Supermarket Division; Stephen Alterman is the Assistant to the Vice President of Store Operations, Retail and Wholesale Divisions; and Paul Alterman is the Director of Meat Merchandising, Retail Supermarket Division. Because of the family nature of the business, all planning and decision making is conducted on an informal basis, without the use of operational manuals, inter-office memoranda, bulletins or the like. All decisions affecting company policy in general, including those of a general promotional nature, are made by the officers and disseminated throughout the corporate structure orally. All decisions affecting any particular division are made by the respective division heads and disseminated in the same manner as general corporate decisions, either at meetings of the officers and division heads or by simply walking across the hall to another's office.

As indicated above, the operation of Alterman Foods, Inc., is by no means analogous to the large national chains which maintain national headquarters from which manuals, bulletins, memoranda and the like issue forth to regional offices, to be further disseminated by letter, bulletin or memoranda to local offices and eventually individual retail stores. With the exception of its institutional division, the management of Alterman Foods, Inc., its wholesale and retail divisions, are housed under one roof and all communications are handled as heretofore set forth.

Accordingly, there is no documentation, letters, bulletins, memoranda, manuals, or notifications to division heads or promotional program changes resulting from the Order of the Commission in Docket 8844. As will be set out hereinafter in this report, no changes other than those respecting the Food Show, which was the subject matter of Docket 8844, and one other program, to be more fully discussed and explained hereinafter, were made or necessitated in Alterman's promotional programs.

General Compliance

Immediately upon receipt of the Opinion of the Court of Appeals, a

meeting of the officers and operating personnel of Alterman Foods was held on Thursday, August 1, 1974, to discuss with the corporation attorneys, Arnall, Golden & Gregory, the general impact and effect of the Order on Alterman Foods, Inc., and its divisions, and specifically its impact on the Alterman Food Show. At that meeting the attorneys went through the Order explaining in detail its significance and effect. The entire promotional program was reviewed, and, with the exception of the Food Show and one additional promotional program to be more fully discussed hereinafter, all was found to be in full compliance with the Order.*

Upon the recommendation of counsel, a second meeting was held on August 13, 1974. In attendance at that meeting were the principal officers of Alterman Foods, Inc., and principal management personnel directly involved in the procurement of products from suppliers. The Order of the Commission was again reviewed in detail, and pursuant to the Order, copies were distributed to representatives of each operating division. All personnel present were advised that the law requires that promotional allowances or services received by Alterman Foods, Inc., from suppliers must be offered and otherwise made available by such suppliers on proportionately equal terms to its other customers competing with Alterman Foods in the distribution of grocery products. Personnel present at that meeting were advised to take special precaution to insure to the best of their ability and by the use of common business judgment that suppliers offering promotional allowances were making such allowances proportionately available to the corporation's competitors. Personnel present were further advised to pass these suggestions on to their subordinates.

Additionally, those present were instructed that if a supplier offered to them or any of their subordinates a promotional allowance or service which they felt, through their experience in the food business, could not feasibly be made available on a proportionately equal basis to competitors of the corporation, they should advise the officers as to such promotional offer in order that the officers could either make further inquiry to assure that said promotional allowance was being offered on a proportionately equal basis or to present the terms of the promotional program to counsel for Alterman Foods for further advice with respect to the legality of the promotional program. It was also

* It should be noted that one part of the Commission's complaint in Docket 8844 dealt with allowances being received by Alterman from an individual supplier, Sweet Sue Products. With respect to the receipt of these allowances, Alterman's was found by the Administrative Law Judge to be in compliance with Sect. 5 of the FTC Act and the Clayton Act, as amended by the Robinson-Patman Act. This finding was affirmed by the full Commission. Using the opinion of the Administrative Law Judge, the opinion of the full Commission, the Order of the Commission, and the dictates of Sect. 5 of the FTC Act and the Clayton Act, as amended, as guidelines, this conclusion was reached.

agreed that, should the corporation or any of its divisions desire to accept a promotional offer from one of its suppliers which counsel was not fully convinced could be feasibly made available by the supplier to Alterman's competitors, counsel would be requested under such circumstances to seek an advisory opinion of the Federal Trade Commission.

As an example of the promotional programs in which Alterman Foods, Inc., is presently engaged and the types of promotional allowances presently being received, attached hereto and made a part of this report, and marked as Exhibits 1 through 6, are exemplary copies of letters and circulars received by Alterman Foods, Inc., from various of its suppliers offering promotional allowances of different sorts. These attachments are representative of the promotional programs in which Alterman Foods now participates and the types of allowances it is presently receiving. These allowances are offered to Alterman Foods by the suppliers and not induced by Alterman.

Also attached hereto and marked Exhibit 7 is a copy of the weekly bulletin put out by the Alterman wholesale division and distributed to the independent grocers, known as the ABC Stores, who buy from Alterman at wholesale. This bulletin, sent out weekly, exemplifies the manner in which Alterman Foods passes the promotional allowances received (per Exhibits 1 through 6) on to its retailer customers.

With the aforementioned plans and concepts for assuring continued compliance with the Commission's Order in mind, counsel reviewed the corporation's general promotional programs, as set out in the Exhibits attached, and found them to presently be in compliance.

In-Store Broadcasting

One promotional program which was being conducted by Alterman Foods, Inc., is called in-store broadcasting. The program was introduced to Alterman by General Broadcasting Company, Inc. (See Exhibit 8). The program is gaining wide-spread attention and acceptance throughout the country. At a substantial cost to Alterman, in-store broadcasting equipment was leased from General Broadcasting Company, Inc., and placed in 101 Big Apples, K-Marts and Food Giants, the Alterman retail subsidiaries. In coordination with General Broadcasting Company, Inc., the program was introduced to Alterman's suppliers (See Exhibit 9). Suppliers were given the opportunity to present selling messages or announcements over the in-store broadcasting system to the shoppers right in the supermarket. Each participant is entitled to a 40-word announcement, which is broadcast six times a day in each

store, or six hundred and six times a day. A copy of the written agreement between participating suppliers and Alterman is attached as Exhibit 10. The agreement contains a warranty, which had to be executed by each supplier in order to participate in the program, attesting to the fact that the participating supplier was making available to all competing retailers in the marketing area promotional payments on a proportionately equal basis.

In view of the nature of the program; the coordination of the program by General Broadcasting Company, Inc., an independent advertising concern; the benefit to the supplier; the substantial cost to Alterman; and the warranty of proportionally equivalent payments being offered by participating suppliers, Alterman feels that the program complied with the Clayton Act, as amended, and the Order of the Commission in Docket 8844. However, in a good-faith effort to comply with the letter and the spirit of the Commission's Order, Alterman has terminated this program. Alterman would, however, respectfully request the Commission to issue an advisory opinion respecting the propriety of the program as outlined herein and in the Exhibits attached, so that Alterman might reinstate the program if the Commission agreed with the aforestated conclusion of compliance.

Food Show

As of the writing of this report, Alterman has not yet decided whether or not to continue to conduct a food show. If it is determined that Alterman will continue to conduct a food show, prior to the organization, direction, sponsorship, or participation by Alterman in such a show, Alterman will supply the Commission with the names and addresses of the prospective invitees and copies of all correspondence and enclosures used in the invitations. Additionally, in the event Alterman should decide to continue with its food show, Alterman will seek an advisory opinion of the Federal Trade Commission as to whether the format of the show and the manner in which participants are invited to participate in the show and the manner in which any profits, surplus or funds remaining at the conclusion of the show are to be distributed are in compliance with the Order of the Commission.

Additionally, at such time as a decision to organize, direct, sponsor, or participate in any such show is made, Alterman will supply all details to the Commission as to the manner to be utilized in delivering a copy of the Order to each invitee and as to the accounting methods to be followed to assure the Commission that Alterman will bear its proper

share of the show's operating expenses and distribute any profits, surplus or funds remaining at the conclusion of such food show.

Conclusion

Alterman Foods, Inc., is complying with the Order of the Commission and intends to continue to do so in the future. If any further information is desired by the Commission to supplement this compliance report in general or as it specifically relates to the food show, the Commission is invited to notify Alterman Foods, Inc., or its attorneys, Arnall, Golden & Gregory, 1000 Fulton Federal Building, Atlanta, Georgia 30303, of any such information or documentation desired.

Respectfully submitted,

ALTERMAN FOODS, INC.

By: _____
/s/ David Alterman
Senior Vice President

Compliance advisory opinion as to whether proposed contents labeling on certain garments would violate consent order to cease and desist, 87 F.T.C. 1339 (Docket C-2823, released November 5, 1976).

Opinion Letter

October 22, 1976

Dear Mr. Silton:

The Commission has considered the request in your letter of July 16, 1976, for advice as to whether you may engage in a proposed course of action without violating the cease and desist order issued by the Commission in the above-captioned matter on March 1, 1976.

You state that you are in possession of some 12,600 garments which you wish to sell with the following contents labeling:

Contents

Miscellaneous fibers composed chiefly of linen, polyester, acrylic, and other non-woolen fibers, with minimum of 17% reprocessed wool.

You append laboratory tests which you had caused to be performed on samples of the said garments and which form the basis for the proposed labeling.

On the basis of the facts submitted, you are advised that the Commission is of the opinion that the use of the above contents labeling on those garments in your possession on the effective date of the order, and as to the contents of which the said laboratory tests are representative, would not violate the order issued in this matter.

By direction of the Commission.

*Letter of Requests**

July 16, 1976

Dear Mr. Tobin:

In connection with the above-captioned matter, we have heretofore forwarded to your local office, a report of Compliance with respect thereto, and assume that the same has been accepted by your office. The purpose of this letter is to request advice from the Commission, pursuant to rule 3.61(d), whether the following proposed course of action if taken by us will constitute compliance with the Order made in this matter.

By way of background and as your local office is aware, the problem which gave rise to your issuance of the complaint arose out of purchases made by us from an Italian source to be shipped to the Far East for manufacturing and, thereafter, transhipped to the United States for resale. We have been doing business with this source of supply in Italy (along with other importers of similar merchandise from this source), and had no reason to believe that the goods which we were ordering and for which we were paying a price based upon the represented fabric content as shown on their invoice was not only erroneous but was a fraud practiced upon us.

As soon as the mislabeling problem was brought to our attention, we immediately met with the local office of the Federal Trade Commission to attempt to comply with the law and to attempt to resolve the problem of merchandise still on hand and for which no orders were available.

All merchandise carrying the mislabeling has been relabeled in a

* The exhibits referred to are not reproduced herein but are available for inspection in the Public Reference Branch, Room 130 of the FTC Bldg., Washington, D.C.

manner which appeared to be satisfactory to the local office, as indicated in enclosed copy of their informal advisory letter of December 15, 1975 (Exhibit A), and enclosed copy of laboratory tests based upon which the recommended relabeling was made (Exhibit B).

We have since the letter of December 15, and prior to entry of the final Order, been operating in accordance with the recommendations contained therein. We have taken all feasible steps to dispose of this merchandise, as a result of which we have sustained substantial losses, (representing the difference between our cost and the price at which this merchandise was ultimately disposed of). Notwithstanding everything we have done to dispose of this problem, we find that we still retain an inventory of approximately 12,600 units, which we have relabeled but which cannot be disposed of in any substantial quantities immediately. However, as the fall selling season is approaching, we feel confident that our sales effort will be more successful.

Accordingly, we hereby request advice from your office whether the continuance of our sales activity related to these remaining products, if continued in accordance with the informal advice contained in the letter of December 15, will in fact constitute compliance with the Order and thereby be acceptable.

In view of the fact that we would like to dispose of the remaining inventory as quickly as possible, and orders for this type of product would normally be received within the next 30-60 days, your prompt action on the request contained herein would be greatly appreciated.

Very truly yours,

SILTON BROTHERS, INC.

/s/ Fred Silton
President

Magnuson-Moss Warranty Act—Compliance of Microfiche System with 16 CFR 702.

Opinion Letter

November 16, 1976

Dear Mr. London:

This is in response to your request for an advisory opinion concerning compliance with the Commission's Rule on Pre-Sale Availability of Written Warranty Terms, 16 CFR 702. Specifically you ask whether a microfiche reader system would satisfy Part 702.3(a)(1)(ii), which requires a retailer to maintain a binder "or [other] similar system* * *" giving consumers "convenient access to * * * warranties." 16 CFR 702.1(g).

Under the system you propose, warranties on consumer products would be reproduced on microfiche cards. A microfiche "reading" machine, or viewer, would display on its viewing screen the warranty from the greatly reduced photographs on the card. To examine a particular warranty a consumer need only place the appropriate part of the card over the viewer lens.

The Commission has carefully considered the matters set forth in your letter. It is the Commission's conclusion that the pre-sale availability system you propose would satisfy the Commission's Rule if:

(1) the warranties appear on separate microfiche cards which contain all warranties for a given product class, and only that product class (*e.g.*, vacuum cleaners), and which do not contain any other product information; in addition, these cards must be properly indexed for consumer use;

(2) simple, complete instructions for use of the system are posted on each microfiche viewer; and

(3) personnel in each selling establishment familiar with the operation of the system are available to assist consumers should the need arise.

These conditions must be met to ensure that consumers have "convenient access" to warranties, unhindered by non-warranty information or lack of familiarity with the operation of microfiche systems.

By direction of the Commission.

Letter of Request

September 13, 1976

Dear Mr. Secretary:

The National Retail Hardware Association, a trade association representing over 20,000 retail hardware stores and home centers, requests an advisory opinion whether warranty microfiche cataloging will

satisfy the requirements of 16 CFR 702.3(1)(ii) (Pre-Sale Availability of Written Warranty Terms) (40 *Federal Register* 60189, December 31, 1975).

On September 2, 1976, representatives of this association and the National Micrographics Association met with Christian S. White and members of his staff to demonstrate warranty microfiche cataloging. At that time we noted the importance of the pertinent FTC regulations concerning pre-sale availability of warranty terms to retailing in general, and hardware retailing in particular. In requesting this advisory opinion we would urge the Commission to accept warranty microfiche cataloging as being a "* * * system which will provide the consumer with convenient access to copies of product warranties." [16 CFR 702.1(g)].

Microfiche acceptance within the retail hardware industry has been remarkable. An NRHA survey (1976) indicates that there are an estimated 15,000 retail hardware firms with microfiche capability. This group represents 46 percent of the stores in our industry and accounts for 70-80 percent of the annual sales of all retail hardware and home center firms. A series of recent articles from *Hardware Retailing* describes the phenomenal growth of microfiche communication in the hardware industry; copies of the articles are enclosed with this letter.*

Section 702.3(1)(ii) requires retailers to perform four affirmative tasks in order to bring a "binder" system into compliance, they are:

a. to provide copies of the warranties,
b. to provide customers with ready access,
c. to provide warranties indexed by product or warrantor, and
d. to keep current all material contained therein.

Warranty microfiche cataloging meets every one of these criteria. Warranty microfiche cataloging, furthermore, possesses inherent advantages that may make it superior to a binder system by:

a. minimizing the accidental or deliberate removal of warranty information,
b. permitting greater uniformity in the presentation of warranty material to customers,
c. increasing the opportunity for cross indexing, and
d. increasing the likelihood of maintaining access to warranties for older or out of production consumer products.

* Not reproduced herein for reasons of economy, but available for inspection and copying in the Public Reference Branch, Room 130 of the FTC Bldg., Washington, D.C.

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When the final Part 702 Rules were published, the Commission acknowledged that modifications to Section 702.3 had been made and stated: "The final Rule heeds the retailers' cry for flexibility." In requesting the Commission to accept warranty microfiche cataloging as being within the ambit of a "binder," we are asking the Commission to maintain this "flexibility."

We are confident that warranty microfiche cataloging will be an exciting and effective way to communicate to customers pre-sale information on warranted consumer products. We urge the Commission to expeditiously render this advisory opinion so that we can be in a position to assist our industry to be in full compliance by the December 31, 1976 effective date.

Sincerely yours,

/s/ Sheldon I. London
Director of Government
Relations

Application of Magnuson-Moss Warranty Act to consumer products sold in new homes.

Supplemental Letter of Response

November 26, 1976

Dear Mr. Canavan and Mr. McMahon:

This letter supplements the Commission's letter to you of October 20, 1976, responding to your request of September 28, 1976, for an interpretation of the application of the Magnuson-Moss Warranty Act, Pub. Law 93–637 ("the Act") to warranties on new housing. As noted in the Commission's earlier letter, your request has been treated as an application for an advisory opinion under Sections 1.1–1.4 of the Commission's Rules of Practice.

This is also in response to Mr. Canavan's letter of November 1, 1976 to Chairman Collier, seeking reconsideration of the Commission's decision to extend the effective date of the rule on Informal Dispute Settlement Procedures to May 1, 1977, rather than October 1, 1977 as HOW and NAHB had requested.

Your request for reconsideration is denied. These provisions of the Act

became effective on July 1, 1976. On June 10, 1976, in response to HOW's request for an extension of time because of "logistical problems, the unique characteristics of the industry's product and unanswered legal questions," the Commission extended the effective date until January 1, 1977. Your most recent request again cited logistical problems and what you described as continuing uncertainty as to the Act's application as reasons for a further delay, and that request was granted in part.

The Commission has granted these requests on the understanding that HOW would need additional time to comply with the Act. It did not grant them to accommodate HOW's efforts to obtain legislation exempting itself from the Act's coverage.

The Commission believes that the 10 months delay already granted is fully adequate for good faith compliance. This letter also provides HOW with the further guidance you have requested regarding specific product coverage. Ample time should remain thereafter for HOW to comply with the law's requirements by May 1, 1977.

With respect to product coverage, the definition of "consumer product" limits the applicability of the Act to personal property, "including any such property intended to be attached to or installed in real property without regard to whether it is so attached or installed." This provision brings under the Act separate items of equipment attached to real property such as air conditioners, furnaces and water heaters.

The coverage of separate items of equipment attached to real property includes, but is not limited to, appliances and other thermal, mechanical and electrical equipment. (It does not extend to the wiring, plumbing, ducts and other items which are integral component parts of the structure.) State law would classify many such products as fixtures to, and therefore a part of, realty. The statutory definition brings such products under the Act regardless of whether they may be considered fixtures under state law.

To provide further specificity, attached to this letter is Appendix A, containing a list of items which the Commission believes are covered by the Act when sold with a home. The list also specifies products which the Commission believes are not covered. The list does not exhaust the possible items of equipment that may be purchased as part of a home; it is offered as guidance rather than as a definitive, exhaustive listing.

The key to understanding the attached list lies in the distinction between the physical separateness of an item and the separate function

of an item. For example, both roofing shingles and furnaces may be physically separate items at a given point in time. However, physical separateness of an item is not determinative. Rather it is the *separateness of function* which distinguishes the two. A furnace has a "mechanical, thermal or electrical function" apart from the realty, whereas roofing shingles have no function apart from the realty. Such items as humidifiers, burglar alarms, smoke detectors, water heaters and kitchen appliances are separate items of equipment which have separate functions of their own. However, such items as wiring, ducts, gutters, cabinets, doors and shower stalls are not *functionally* separate from the realty.

We expect that the attached list will provide the specificity needed to make decisions concerning the drafting and coverage of the HOW warranty.

By direction of the Commission.

APPENDIX A

THIS APPENDIX MUST BE READ TOGETHER WITH THE ATTACHED ADVISORY OPINION LETTER.

THE FOLLOWING SEPARATE ITEMS OF EQUIPMENT ARE "CONSUMER PRODUCTS" COVERED BY THE MAGNUSON-MOSS WARRANTY ACT WHEN SOLD AS PART OF A HOME:

Heating and Ventilation

Boiler
Heat Pump
Electronic air cleaner
Exhaust fan
Thermostat
Space heater
Furnace
Air conditioning system
Humidifier

Mechanical/Electrical

Central vacuum system
Smoke detector

Fire alarm
Fire extinguisher
Garage door opener
Chimes
Water pump
Intercom
Burglar alarm
Electric meter
Water meter
Gas meter
Gas or electric barbecue grill

Plumbing

Whirlpool bath
Garbage disposal
Water heater
Water softener
Sump pump

Appliances

Refrigerator
Freezer
Trash Compactor
Range
Oven
Kitchen center
Dishwasher
Oven hood
Clothes washer
Clothes dryer
Ice maker

THE FOLLOWING ARE NOT CONSUMER PRODUCTS UNDER THE MAGNUSON-MOSS WARRANTY ACT WHEN SOLD AS PART OF A NEW HOME:

Heating and Ventilation

Radiator
Convector
Register

Duct

Mechanical/Electrical

Garage door
Electrical switch and outlet
Light fixture
Electric panel box
Fuse
Circuit breaker
Wiring

Plumbing

Sprinkler head
Water closet
Bidet
Lavatory
Bathtub
Laundry tray
Sink
Shower stall
Plumbing fittings (shower head, faucet, trap, escutcheon, and drain)
Medicine cabinet

Miscellaneous Items

Cabinet
Door
Shelving
Window
Floor Covering (includes carpeting, linoleum, etc.)
Wall or wall covering
Ceiling
Vanity
Gutter
Shingle
Chimney and fireplace
Fencing

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THE FOLLOWING SEPARATE ITEMS OF EQUIPMENT ARE NOT CONSUMER PRODUCTS UNDER THE MAGNUSON-MOSS WARRANTY ACT WHEN SOLD AS PART OF A CONDOMINIUM, COOPERATIVE OR SIMILAR MULTIPLE-FAMILY DWELLING, AS THEY ARE NOT NORMALLY USED FOR "PERSONAL, FAMILY OR HOUSEHOLD PURPOSES" WITHIN THE MEANING OF THE ACT:

Fusable fire door closer
Emergency back-up generator
Elevator
TV Security monitor
Master TV antenna
Institutional trash compactor

Supplemental Letter of Request

November 1, 1976

Dear Chairman Collier:

This acknowledges the FTC's October 20 letter on our request to extend the effective date of the rule on informal dispute settlement mechanisms. We appreciate the FTC's expeditious handling of this matter prior to HOW's Board meeting on October 21.

However, we are deeply disappointed that the extension is only to May 1 and not October 1 as requested. The question of the length of extension, you may recall, came up during our meeting in your office. At that time, you too indicated you were dubious that even a six-month extension would be sufficient to get Congressional clarification on the intent regarding coverage of new home warranties. That lent support, in our minds at least, to the request for a longer extension period.

The FTC letter states that this extension is being provided because of logistical problems in bringing the HOW program into compliance with the proposed interpretations published in the Federal Register on August 16, 1976. The informal dispute settlement procedure visualized by the regulations is totally counter to what we believe is an effective approach in the field of new housing. This same view was expressed in detail to the FTC by the American Arbitration Association, Better Business Bureau and others over a year ago.

If the definition of "consumer products" in a new home were clear (we still do not have the final interpretation), we might be able to bifurcate and operate with different systems depending on the nature of the complaint. From our conversations with the FTC staff, it seems that bifurcation is the procedure they believe we should follow.

However, if the final interpretation is similar to the August 16 proposed interpretation (and all indications are that it will be little different) the course of bifurcation would be impossible. The system we would be faced with would be no more and no less than "Rube Goldberg" contrivance. It would be impossible of description in readily understandable language.

HOW, therefore, is confronted with an extremely risky predicament. And we still cannot understand why. The insurance backing of our warranty is a totally and distinctly different feature, different than any other industry program in existence. Our dilemma is that on one hand we have FTC and Magnuson-Moss with jurisdiction over warranties but not insurance, and on the other hand we have state insurance commissioners who have jurisdiction over insurance but not warranties. In our program, the two are inseparable.

So, given an extension only to May 1, we must in this limited time:

> Attempt to get Congressional action on clarification. If we fail or if the action is short of an exemption for new housing, we must then refile an amendment in all state insurance departments.
>
> After two and one-half years from the date of the first filing in all fifty states, there are still four states where we have not yet gotten approval. We have no idea what kind of time will be required to get an amendment approved.
>
> Once insurance commission approval is gotten, we must then reprint all our documents. Numbered documents require special facilities, so we are looking at four to six weeks under ideal circumstances.
>
> We must then retrieve over 100,000 numbered forms scattered throughout the U.S. and replace these forms with new, revised, like-numbered documents.
>
> We then have a major training job, not only with local HOW Council staff, but with participating builders and their staffs.

During this period, any growth is likely to be compromised and both

consumer and industry will suffer. We are trying to make this program truly beneficial to the consumer. We have constantly been completely open with government at all levels. We have sought advice and guidance from knowledgeable consumer groups, consumer affairs officers, and other government officials.

Congressman Moss has continued to support our efforts before the FTC; it must be apparent that the principal sponsor in the House would like to see the problem resolved in a way that is not disruptive. I earnestly urge you to review the four-month extension and as a minimum first step in obtaining an equitable resolution of this situation to consider an extension until October 1, 1977. We would be pleased to discuss this further with you at the earliest possible date.

Sincerely,

/s/ Richard J. Canavan

Letter of Response

October 20, 1976

Dear Mr. Canavan and Mr. McMahon:

This is in response to your letter of September 28, 1976 concerning the Magnuson-Moss Warranty Act, Public Law 93–637 (the Act), requesting a postponement in the effective date of the rule on Informal Dispute Settlement Mechanisms (16 C.F.R. 703) so that it will not apply to warranties on new homes except those for which contracts of sale are entered into after October 1, 1977. You also requested that the Commission issue its decision on the final application of the Act to warranties on new housing before October 20, 1976.

We have carefully considered your uncertainty about the application of the Act, and the logistical problems you face in bringing the HOW program into compliance with the proposed interpretations published in the *Federal Register* on August 16, 1976 (41 F.R. 34654). Because of those logistical problems, we have determined to grant an additional postponement of the effective date of the rule on informal dispute settlement mechanisms as it applies to warranties on consumer products sold with new homes.

The additional postponement will extend until May 1, 1977. You had requested a longer extension, until October 1, 1977. Although we are well aware that certain changes in the HOW program must be submitted for approval in each of the states where the program is in

operation, we feel that the additional time will be sufficient and that a longer extension cannot be justified. The Commission has already granted a six-month postponement, until January 4, 1977 (41 F.R. 27828); the nine months more you request would mean a delay of a year and three months in the application of the rule. Therefore, we conclude that such a lengthy extension would not be in the public interest. Naturally, notice of this postponement will be published in the *Federal Register* as soon as possible.

We have also given serious consideration to the difficulties of interpretation you discern in the application of the Act to consumer products sold with new homes, including the comments filed by HOW and NAHB on the proposed interpretations. Although the interpretations are not yet ready to be issued in final form, we have concluded that the general standard contained in the proposal—that the Act applies to separate items of equipment attached to real property, such as air conditioners, furnaces and water heaters—is the correct one.

The Act, of course, embraces certain kinds of personal property "including any such property intended to be attached to or installed in real property without regard to whether it is so attached or installed." We believe that the separate item of equipment test is more consistent with the statutory standard than is the test proposed by HOW and NAHB, that is, whether the product in question is "free-standing" or "easily removable."

The HOW/NAHB test simply applies traditional law on the distinction between real and personal property, while the statute specifically rejects such a differentiation by directing that the determination must be made "without regard to whether (the property) is so attached or installed (in the real property)." The separate item of equipment test, by contrast, looks to separateness of function, not ease of removal. It follows the legislative history of the definition as articulated by Congressman Moss in the House debate. He said that the definition includes separate items of equipment such as heating and air conditioning systems, as distinct from dry wall, pipes, and wiring, which he described as "integral components of a home."

We know that you would like a specific enumeration of the various products the Commission feels are or are not covered by this definition. Accordingly, we will treat your September 28 letter as a request for an advisory opinion under Secs. 1.1–1.4 of the Commission's Rules of Practice, and we will furnish you with a listing of covered and non-

covered products in the form of an advisory opinion within the next few days.

In accordance with this letter, therefore, the Commission's Rules on Informal Dispute Settlement Mechanisms, 16 C.F.R. Sec. 703, will not apply to written warranties on consumer products offered with the sale of new homes for which a contract of sale is signed after July 4, 1976 but before May 1, 1977. This rule will become applicable to warranties on the sale of new homes, contracts for the sale of which are entered into after May 1, 1977. As you are doubtless aware, this postponement in no way affects private rights of action under Section 110 of the Act.

By direction of the Commission.

Letter of Request

September 28, 1976

Dear Mr. Chairman:

Home Owners Warranty Corporation (HOW) and the National Association of Home Builders (NAHB) on April 28, 1976 requested through our legal counsel a postponement of the effective date of the Commission's Regulations regarding informal dispute settlement mechanisms (16 C.F.R. Part 703). In a letter of June 10, 1976, amended by a letter of June 28, the Secretary of the Commission informed us that the Commission had granted such a postponement and that these Regulations would apply only to warranties given on new home contracts for the sale of which were entered into after January 4, 1977. Notice of this postponement was published in the Federal Register of July 7, 1976.

This extension was requested because (a) uncertainties as to how the Act applies to warranties on new housing had to be resolved before the industry could begin to alter its practices in accordance with the Act and (b) logistical problems existed such that, even with an immediate resolution of those uncertainties, it would have been physically impossible for the necessary changes to be made before the originally designated effective date.

We now request that the Commission consider further postponing the effective date of Part 703 so that it will apply only to warranties given on new dwellings contracts for the sale of which are executed after October 1, 1977. We believe that we must make this request for the following reasons.

1. *Continuing Uncertainty as to the Act's Application.* It is still

unclear just how the Act applies to new home warranties. First, the Commission has not as yet issued its Interpretation on this question (proposed 16 C.F.R. Section 700.1(d)-(g)) in final form. Second, if the final Interpretation, when issued, is as different from present real estate law and custom as the proposed, there will be widespread confusion in the industry which will take time to clear up. Third, the proposed Interpretation offers no solution to the fundamental problem which we have been discussing with the Commission's staff for many months — *the disclosure regulations require that a builder who wishes to provide different warranty coverage for consumer and non-consumer products explain those differences, and hence identify the line between the two types of products, in "simple and readily understood language," even though no one to date has been able to produce a construction of the definition which can be reduced to such language.* Even the language of the Commission's proposed Interpretation would require the consumer to perform "an analysis of the transaction."

2. *Logistical Problems.* These also remain. In the brief time between issuance of a final Interpretation and the effective date of Part 703, staff members of NAHB, HOW, and individual builders must be retrained; complex warranty documents must be revised; advisory materials must be supplied by NAHB and HOW to 30,000 member builders; over 600 local home builders' associations and 82 HOW Local Councils; and documents and instructions must be distributed by builders to personnel at many points of sale. All of this must be completed several weeks *before* the effective date, as new home warranties are given at closing and many closings after the effective date will be pursuant to contracts of sale, entered into before that date, which legally commit the builder to give a particular warranty.

There is an additional overriding problem in the case of HOW. First, state laws will require that the insurance policies that form the core of the HOW program be revised and re-approved by the insurance authorities of the 46 states where the program is now active. As the original approvals took 2 years to obtain, the process could not possibly be completed by January 4 even if it could be started now. Therefore, if relief is not granted we expect the HOW program will have to suspend operations in several key states on January 4, 1977.

3. We believe it is now clear to all of us that the application of the Act to housing is uncertain and that the uncertainty creates genuine difficulties for the industry. We would like the Congress to have an opportunity to review the matter and perhaps to provide legislative

clarification before irrevocable damage is done to HOW and our industry's relationship to its consumers.

Work on the above tasks *cannot even begin* until the Commission's Interpretation is published in a clear and final form, and definitely cannot be completed by January 4.

The problems posed by this statute are in fact so serious that there is strong sentiment among members of the HOW Board of Directors favoring the termination of the program unless there is adopted an official construction of the consumer product definition which takes cognizance of those problems. Our future course of action will have to be decided at a meeting of the Board on October 21. This meeting was scheduled with the hope that the final Interpretation would be available by then.

In light of the above, NAHB and HOW, on behalf of the home building industry, urgently request that the Commission take the following actions:

1. Postpone the effective date of the Regulations on informal dispute settlement mechanisms (16 C.F.R. Part 702) so that those Regulations will apply only to warranties on new homes *contracts for the sale* of which are entered into after October 1, 1977.

2. Issue its decision as to this postponement request and its final Interpretation of the application of the Act to warranties on new housing before October 20, so that both can be available to the HOW Board of Directors at its crucial October 21 meeting.

3. If the postponement is granted, publish notice of it in the Federal Register. (While we recognize that this may not eliminate the risk of civil liability for builders, it will place them in the best possible position should that issue arise.)

We thank you and the other Commissioners for your continuing assistance.

Very truly yours,
HOME OWNERS WARRANTY CORPORATION

By: /s/ Richard J. Canavan
President

NATIONAL ASSOCIATION OF HOME BUILDERS

By: /s/ Charles P. McMahon

Senior Staff Vice President

Effect of FTC's Trade Regulation Rule for Door-to-Door Sales on 28 D.C.C. § 3811, the home solicitation sales law for the District of Columbia (File No. 773 7002).

Opinion Letter

December 17, 1976

Dear Mr. Offen:

This is in response to your request of June 4, 1976, for an opinion by the Commission respecting the effect on 28 D.C.C. § 3811, the home solicitation sales law for the District of Columbia, of the Commission's Trade Regulation Rule for Door-to-Door Sales. Specifically, you have asked: "Does the Commission contend that its trade regulation rule preempts a prior Act of Congress?"

Two previous opinions by the Commission involving the subject rule were concerned with the question of conflict between notice language prescribed under state or local law and that specified in the Rule. The first of those opinions, issued May 20, 1975, was in response to a request by Melville W. Feldman. The second, issued May 4, 1976, was in response to your request made on behalf of the Direct Selling Association. Among other issues, the latter opinion dealt with contract notice language, inconsistent with the Rule, prescribed in states that have adopted the Uniform Consumer Credit Code (UCCC).

In both of those opinions the Commission premised its position on the principle that duly promulgated trade regulation rules, like other substantive federal administrative regulations, may operate to supersede conflicting state laws or municipal ordinances.

The doctrine of preemption, deriving as it does from the Supremacy Clause of the Constitution, clearly has no application to conflicts that may arise between congressionally mandated federal administrative regulation, on the one hand, and a separate prior congressional enactment, on the other. *Silver* v. *New York Stock Exchange*, 373 U.S. 341 (1963); cf. *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware*, 414 U.S. 117 (1973). In either situation a determination of the controlling intent of Congress depends upon a careful examination of the indicated scope and purpose of each of the regulatory schemes in ostensible conflict.

The subject Rule was issued under explicit authority delegated to the Commission by Congress to define and prevent unfair or deceptive acts or practices. That delegation, moreover, reflects Congress' plenary power over the District of Columbia in addition to congressional authority emanating from the Constitution's commerce clause.

The subject Rule, intended to be nationwide in its application, need not be construed as subordinate to an earlier enactment by Congress in legislating locally for the District of Columbia. In the Commission's view, uniform nationwide application was what was contemplated by Congress, as well as by the Commission, in the formulation and issuance by the agency of trade regulation rules. On the other hand, the earlier District of Columbia statute, insofar as the Commission can discern, was intended to be local in scope, in like sense to enactments by a state or municipal government in legislating for state or local purposes.

Accordingly, to the extent that the home solicitation law notice provisions of the District of Columbia Code do not provide consumers the full protection of the Commission's nationwide Rule, it is the Commission's view that the supervening congressional purpose is that local notice requirements, if inconsistent, should give way to the Commission's nationwide Rule. The Commission is unable to conclude that it was the intent of Congress that the benefits of a nationwide trade regulation rule of this nature should not be equally accorded the citizens of the District of Columbia.

The Commission does not regard 28 D.C.C. § 3816, captioned "Inconsistent laws: What law governs," to have been intended by Congress to invalidate subsequent conflicting federal statutes or regulations of nationwide applicability. Rather, the legislative history of this section appears to the Commission to reflect a purpose only to clarify the circumstances of repeal of any prior conflicting local laws for the District of Columbia touching the affected transactions or practices.

The Commission regards it as essential that buyers nationwide, in transactions subject to the Rule, not be misinformed of their rights under the Rule. Accordingly, so much of the notice language provided in Section 3811 of the District of Columbia Code as would misinform buyers of their rights under the Rule, in the Commission's view, should be deemed superseded by the notice language prescribed in the Rule. (Commission opinion of May 4, 1976, to DSA.) This would not include the contract notice heading specified in 28 D.C.C. § 3811 or the language, consistent with the Rule, that: "If you cancel, the seller may not keep any of your cash down payment."

By direction of the Commission.

Letter of Request

June 4, 1976

Dear Secretary Tobin:

Thank you for responding to my advisory opinion request concerning the preemptive effect of the Commission's Trade Regulation Rule Concerning A Cooling-Off Period For Door-to-Door Sales. The purpose of this letter is to request an advisory opinion in regard to a statement contained in your May 20, 1976, letter which presents a continuing problem for those attempting to comply with conflicting laws and regulations in this area.

Specifically, the Commission stated that "all provisions of the *body* of the UCCC form of notice are preempted by the requirements of the Commission's rule." Enclosed is a copy of Public Law 92-200, the District of Columbia Consumer Credit Protection Act of 1971. Please note that section 28-3811 of the Act is entitled "Home solicitation sales" and contains cooling-off language virtually identical to the body of the UCCC form of notice. DSA therefore requests an advisory opinion in response to the following question: Does the Commission contend that its trade regulation rule preempts a prior Act of Congress?

If the answer to the question above is affirmative, it is apparent that the Commission believes that only the Commission's notice form may be used in the District of Columbia. However, if the answer is in the negative may companies then use the statutory notice language in the District of Columbia but would UCCC language still be unacceptable in all other jurisdictions?

The question of preemptive effect of Federal regulatory agency rules and regulations is a matter of major concern to not only DSA, but to the entire business community. By making this advisory opinion request, DSA hopes not only to provide needed answers to questions facing our member firms, but to also focus the attention of the Commission and the Congress on the preemption issue and the problem of diverse and/or conflicting Federal, State and local law, and Federal, State and local rules and regulations.

It took 23 months for the Commission to reply to our last advisory opinion request. DSA sincerely hopes that the Commission will be able to respond more expeditiously to this request.

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Thank you for your cooperation.

Very truly yours,

/s/ Neil H. Offen
Senior Vice President
and Legal Counsel

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