ADVISORY OPINIONS WITH REQUESTS THEREFOR

Interpretation of language contained in an order to file special report regarding purchases of used bakery equipment. (Docket 7880, released July 18, 1975)

Opinion Letter

July 2, 1975

Gordon A. Thomas, Esquire,
Vice President and General Counsel,
ITT Continental Baking Company, Inc.,
P.O. Box 731,
Rye, New York. 10580

Re:ITT Continental Baking Company,
Docket No. 7880.

Dear Mr. Thomas:

In your letter of May 15, 1975, you requested the Commission's opinion as to whether the order entered on November 26, 1974 [84 F.T.C. 1349], requires ITT Continental Baking Company to file a special report informing the Commission of any purchase of used bakery equipment from any concern currently engaged in the production and sale of bread and bread type rolls.

After careful consideration of your request and the purpose of the order, the Commission is of the opinion that acquisition of used bakery equipment of whatever kind from another bakery is the acquisition of an "interest in any concern" engaged in the production and sale of bread and bread type rolls requiring ITT Continental Baking Company to file a special report.

By direction of the Commission.

Letter of Request

May 15, 1975

Mr. Charles A. Tobin
Secretary
Federal Trade Commission
Washington, D.C.

* For case before the Commission, see 60 F.T.C. 1183, 84 F.T.C. 1349.

Re: Docket No. 7880

Dear Mr. Tobin:

On November 26, 1974 the Federal Trade Commission issued an order in connection with the above docket number which required this company to file with the Commission a special report in the event it intends to make "any acquisitions of any interest in any concern engaged in the production and sale of bread and bread-type rolls." The words of special import in this order are "interest in any concern." It is our interpretation of that language that it is not intended to cover the purchase by Continental of items of used bakery equipment from another baking company currently engaged in the production and sale of bread.

Inasmuch as this company from time to time will be interested in making used bakery equipment purchases, we would appreciate an acknowledgment from you that our interpretation of the order is correct and that the filing of a special report is not required in that type of a transaction.

We will look forward to hearing from your office in the near future.

Very truly yours,

Gordon A. Thomas
Vice President and
General Counsel

No. 147. Granting of "back-haul" allowances to customers picking up their own orders. (72 F.T.C. 1050)

No. 483. "Backhaul" allowances advisory opinion affirmed. (File No. 683 7026, released December 26, 1973, 83 F.T.C. 1843) Statement of Clarification. (85 F.T.C.1174)

Letter of Reply

October 8, 1975

Honorable Albert Rees
Director
Council on Wage and Price Stability
Executive Office of the President
Washington, D.C. 20506

Dear Director Rees:

This is in reply to your letter of April 1, 1975 relating to the Commission's recent clarification, in a letter to Consumers Union of March 19, 1975, of the legality under Section 2(a) of the Robinson-Patman Act of backhaul allowances.

Your letter suggests that the Commission's clarification will discourage backhaul practices. It was the Commission's intention in the March 19 statement to eliminate confusion over the options available to the delivered price seller. It emphasized that the seller who uses a uniform delivered price can, in addition to the delivered price, offer his customers the option of purchasing f.o.b. his shipping point as long as the optional f.o.b. price is uniform and available to all customers on a nondiscriminatory basis. The Commission sees no reason why this clarification of the available options should discourage backhaul practices.

You further recommend that the Commission should adopt a policy of allowing backhaul allowances equal to the actual cost of transportation to each customer. Such a policy, your letter urges, can be based on the premise that the Robinson-Patman Act does not mandate uniformity as to f.o.b. prices, because that Act permits a seller to offer different prices where justified by different costs.

However, those differences in cost under the Robinson-Patman Act that justify price differentials are limited "* * * strictly to those actual differences traceable to the particular buyer for and against whom the discrimination is granted, to the different methods of serving them, and to the different quantities in which they buy." *House Committee Report No. 2287*, March 31, 1936. The cost justification provision, accordingly, was designed "* * * to leave the test of a permissible differential upon the question: If the more favored customer were sold in the same quantities and by the same methods of sale and delivery as the customer not so favored, how much more per unit would it actually cost the seller to do so, his other business remaining the same?" *Senate Committee Report No. 1502*, February 3, 1936. "There can be no doubt," the Supreme Court has stated, "that the § 2(a) proviso as amended by the Robinson-Patman Act contemplates, both in express wording and legislative history, a showing of actual cost differences resulting from the differing methods or quantities in which the commodities in question are sold or delivered." United States v. Borden Co., 370 U.S. 460, 467 (1962).

It follows, therefore, as the Commission understands these requirements, that the Robinson-Patman Act's Section 2(a) cost proviso cannot be interpreted so as to cost justify price differentials between backhaul customers purchasing f.o.b. at the seller's shipping point, if those price differentials represent only the *absence* of delivery cost differentials that *would have been incurred* had the commodities in question in fact been transported to different delivery destinations and, in that contingency, would have occasioned differing cost obligations upon the seller.

To state the matter in another way, if different backhaul customers purchase identical goods in identical quantities and according to exactly the same method of sale and delivery (*i.e.* by pick-up in their own trucks at the seller's shipping point) then, as the Commission see it, no cost differences to the seller, as contemplated under the cost justification provision of Section 2(a) of the Robinson-Patman Act, obtain. In particular, in such transactions, because no transportation of goods by the seller to affect delivery occurs, no delivery cost differentials arise such as would justify differences with respect to the f.o.b. price. Accordingly, f.o.b. price differences, in these circumstances, would not be cost justified under Section 2(a) of the Robinson-Patman Act in the Commission's view.

As the Commission heretofore has indicated, questions would not arise under the laws it administers if sellers using valid uniform zone delivered pricing systems offer to all customers, in lieu of a uniform delivered price, the option of purchasing f.o.b. the seller's shipping point, if that optional f.o.b. price is uniform and available to all customers on a nondiscriminatory basis.

The Commission does not understand that economies would not consistently be realized, through backhauling, by customers with empty trucks returning via their suppliers' factory and/or warehouse shipping points, if those suppliers make uniformly available a nondiscriminatory shipping-point price option. You suggest, in this regard, that geographically distant customers would not be able to afford to make use of such an option if the f.o.b. price is no lower than the seller's uniform zone-delivered price minus his average transportation cost for that zone. However, it appears to us that the only significant costs to the customers of backhauling in this situation are the additional wages, if any, required to be paid to the driver of the backhauling truck for the added time required to accomplish the pickup and the additional fuel cost incurred in traveling full rather than empty. Insofar as these costs were less than the difference between the supplier's delivered price and his f.o.b. price, the customer would be realizing a saving. This would be apart from any general or public economies such as a reduction in overall fuel requirements.

The Commission has carefully considered the views that you have expressed and sincerely appreciates your concern in this matter. As indicated, however, the Commission is unable to construe the cost justification proviso of Section 2(a) of the Robinson-Patman Act as justifying differing backhaul allowances on the basis of hypothetical, and not actual, delivery cost differences. While the Commission would be happy to take action which would result in the additional reduction of fuel and other costs, it is not empowered to do so except as such may be incident to the proper exercise of its statutory responsibilities and consequently it can encourage backhauling only so far as it is consistent with the Commission's interpretation of the Robinson-Patman Act.

By direction of the Commission.

Correspondence from Council on Wage and Price Stability

April 2, 1975

Charles A. Tobin
Secretary
Room 172
Federal Trade Commission
Washington, D.C. 20580

Dear Mr. Tobin:

I have enclosed copies of letters sent today to the members of the Commission by the Director of the Council on Wage and Price Stability. These letters are in response to the Commission's March 19, 1975 letter, about "backhaul" allowances, to the Consumers Union.

Please include these letters in the appropriate public docket at the Commission.

Sincerely,

/S/ Vaughn C. Williams
General Counsel

April 1, 1975

Dear Commissioner ———————:

I am writing to express my concern about the Federal Trade Commission's clarification, in a letter to the Consumers' Union issued on March 19, 1975, and publicly released on March 28, of the legality under Section 2(a) of the Robinson-Patman Act of backhaul allowances offered by a seller, who otherwise offers a uniform zone-delivered price, to customers who provide their own transportation for goods purchased at the seller's warehouse. In my view, it is important that the Commission develop a clear policy to encourage backhaul practices, in order to alleviate the fuel waste and other costs that result from unused backhaul capacity. However, the Commission's March 19 clarification is not such a policy, and may indeed further discourage backhaul.

The March 19 letter requires that the f.o.b. price offered to all backhauling customers be "uniform"—that is, be the same dollar amount in each case. It does not permit a seller to offer backhaul allowances that vary in accordance with the cost of transportation to each customer. This requirement of uniformity places a substantial restraint upon the development of backhauling—a restraint not mandated by the Robinson-Patman Act, which permits a seller to offer different prices where justified by different costs.

Under the Commission's March 19 letter, the uniform f.o.b. price offered to customers who backhaul is not likely to be lower than the seller's uniform zone-delivered price minus his average transportation cost for that zone. Sellers, at least those with substantial dominance in their product markets, cannot be expected to offer a uniform allowance in excess of their average costs. This allowance, however, will only permit backhauling by customers who can provide their own transportation at less than or equal to the seller's average cost. Customers far away enough to incur greater transportation costs will not be able to afford to make use of their empty backhaul capacity. In my view, this status will persist over time.

Backhauling by a seller's more distant customers can most simply be encouraged by a seller's offer of an allowance that is equal to his actual cost of transportation to any particular customer. With such an allowance, any customer who can ship as efficiently as the seller would be encouraged to use his empty truck capacity to do so. While different customers would be paying different prices for the same goods, the difference would only reflect differences in the seller's actual transportation costs to those customers.

While Section 2(a) of the Robinson-Patman Act generally prohibits price differentials for a single product, it expressly permits "differentials which make only due allowance for differences in the cost of manufacture, sale, or *delivery* * * *." This language can certainly be interpreted to refer to such price differentials as would result from a backhaul allowance measured by actual transportation costs. Additional discriminations may be inherent in the uniform zone-delivered price from which such a backhaul allowance would be deducted. However, that fact makes it no less true that the price differentials resulting from an actual cost allowance would be justified by the differences in the seller's transportation costs to different customers.

Uncertainty about the legality of actual-cost backhaul allowances has significantly impeded the negotiation of backhaul agreements. The Commission's disapproval of actual cost allowances in its March 19 letter will of course further discourage backhaul practices by customers far enough away from a supplier to exceed his average transportation costs. The encouragement of backhaul, on the other hand, would not only save fuel and other costs as noted above, but would also increase competition among suppliers and customers with respect to the transportation of purchased goods. I therefore recommend that the Commission issue a statement that Section 2(a) of the Robinson-Patman Act permits actual cost backhaul allowances.

Sincerely,

/S/ Albert Rees
/S/ Director

Joint venture for the production and marketing of cresols, cresol derivatives and certain other related products. (File No. 753 7007, released November 3, 1975)

Opinion Letter

October 9, 1975

John Bodner, Jr., Esquire
Howrey, Simon, Baker & Murchison
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Re: Advisory Opinion Request of Hercules Incorporated and Koppers Company, Incorporated, File No. 753 7007

Dear Mr. Bodner:

This is in response to your letter of February 11, 1975 requesting an advisory opinion concerning a proposed joint venture between Hercules, Incorporated and Koppers Company, Inc. for the production and marketing of cresols, cresol derivatives and certain other related products. You have requested that the Commission approve the venture as consonant with the laws it administers.

The Commission has given careful consideration to your request and the supplemental data provided. On the basis of the information presently available to it, the Commission has concluded that it is unable to approve the joint venture.

Based upon information presently available, the Commission is seriously concerned that a consequence of the joint venture, if consummated, may be substantially to lessen competition in particular, already concentrated, product markets. In the Commission's opinion, substantial anticompetitive effects in such markets may result because the venture, on the one hand, would appear to position an existing major factor in such markets, Koppers, to gain significant further market shares, entrench and solidify its market position and to obtain monopolistic market control, while on the other, the venture would appear to operate substantially to lessen potential competition by eliminating an apparent strong potential competitor, Hercules, from independent entry, or from entry in conjunction with a partner not already significantly present in any of the affected markets.

Acquisitions are proscribed where their effect may be substantially to lessen competition in any line of commerce in any section of the country, 15 U.S.C. §18; *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158 (1964). The elimination of a potential entrant may substantially lessen competition in violation of the Act. *United States* v. *Penn-Olin Chemical Co., Supra.*

A number of facts lead us tentatively to conclude, based on the information presently available to us, that Hercules is a potential entrant into cresol production generally, and BHT and meta-para cresol production in particular, two markets in which Koppers already has substantial market shares. Not only was Hercules present in the BHT and paracresol markets during the period 1958 to 1972, but the firm appears to possess the technical expertise required for cresol production. Its technical know-how has, from time to time, been offered under license to others. Furthermore, it is clear from your submission that Hercules possesses a new and apparently commercially valuable production process for cresols. The firm has a continuing internal need for one of the venture products, BHT, and has available an idle plant which can be readily converted to cresol production. The firm's financial resources; interest in investment; investment history; and the market opportunity in cresols, apparent from supply and anticipated demand profiles, are also factors indicating that Hercules stands as a viable independent potential entrant. Hercules, additionally, does not appear to us to be foreclosed from entry because of a lack of any necessary capabilities or skills.

At the same time, Hercules' venture partner, Koppers, is a substantial producer of meta-para cresol in a domestic market of only five producers and the leading domestic producer of BHT with approximately a 33 percent market share in a four producer market. In both of these markets, Hercules appears as a likely potential entrant. The venture accordingly presents serious issues under Section 7 of the Clayton Act.

You have stated that initially the venture will not market any meta-para cresol other than that presently produced by Koppers. However, regardless of whether the venture chooses initially to market such meta-para cresol, the venture would appear to have the effect of increasing Kopper's market power as to meta-para cresol, and would appear to provide Koppers, already a substantial producer, with an opportunity substantially to increase its share of that market any time the venture chooses to do so.

Koppers is the sole domestic producer of MBMC. Joining with Hercules in continued MBMC production and in the production of raw materials for MBMC will be likely to solidfy Koppers' position in this market. Because Koppers has a monopoly in MBMC, the proposed venture would appear to raise questions under Section 5 of the Federal Trade Commission Act and Section 2 of the Sherman Act.

A joint venture or merger may substantially lessen competition both in eliminating a potential entrant and by entrenching the position of a firm in an oligopolistic market. *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568 (1967); *General Foods Corp.* v. *Federal Trade Commission*, 386 F.2d 936 (3rd Cir. 1967), cert. denied, 391 U.S. 919 (1968). The substitution of a larger more powerful competitor for a smaller already dominant firm may reduce a competitive structure by raising entry barriers and by dissuading smaller firms from aggressively competing. *Federal Trade Commission* v. *Procter & Gamble Co.*, supra.

The presence of Hercules-Koppers in the relevant markets, substituted for Koppers alone, may entrench the position of Koppers, rigidifying present oligopolistic structures and raising barriers, both actual and psychological, to entry by others. Koppers' position in the already concentrated BHT and MBMC markets would solidified by vertical integration into raw materials. Firms considering entry would face the combined strength and resources of two major firms instead of Koppers alone. Accordingly, competition could be substantially lessened within the meaning of Section 7 of the Clayton Act not only by the elimination of Hercules as a potential entrant, but also by the entrenchment of Koppers in the BHT, meta-para cresol and MBMC markets.

The competitive consequences outlined in this letter are not conclusive. Nonetheless, based upon the information presently available to the Commission, we are unable to approve the proposed joint venture; accordingly the Commission advises that it will undertake a formal investigation if Hercules, Incorporated and Koppers Company, Inc. enter into said joint venture.

By the direction of the Commission.

*Letter of Request**

February 11, 1975

Dear Mr. Tobin:

Re: Hercules Incorporated-Koppers Company, Inc.'s Proposed Jointly-Owned Company To Produce Cresols and Cresol Derivatives

This is a request by Hercules Incorporated and Koppers Company, Inc. to the Commission for an Advisory Opinion under Section 1.1 *et seq.* of the Commission's Rules that the creation and operation of a proposed jointly-owned company by the requesting parties to produce and market cresols and cresol derivatives is permissible under the antitrust laws of the United States.

In support of this request, Hercules and Koppers submit the enclosed memorandum showing that the proposed joint venture for the specialty chemicals involved will benefit both competition and the public interest. The memorandum describes the parties and the chemical products involved, sets forth the nature and basic terms of the joint venture, and then discusses the probable effects on competition of the joint venture.

As further pointed out in the memorandum, Hercules and Koppers

* For reasons of economy, the large volume of supporting materials is not reproduced in this volume. It is available for public inspection in the Division of Legal and Public Records, Room 130, Federal Trade Commission Building, Washington, D.C. 20580.

must decide very soon whether they will consummate the proposed joint venture, and for commercial reasons they wish to make that decision without giving advance notice. Accordingly, we ask that this request be handled with all possible dispatch and that all the information submitted to the Commission by the parties be accorded confidential treatment. If the Commission decides to release any of the submitted information, we request that we receive reasonable notice before the release date.

In order to expedite this matter, Hercules and Koppers on their part stand ready to discuss the memorandum with the staff of the Commission and, if necessary, to provide supplemental information.

We further wish to advise the Commission that the proposed course of action is not currently being followed by the requesting parties and is not the subject of a pending investigation or other proceeding by the Commission or any other governmental agency.

Sincerely yours,

/S/ John Bodner, Jr.

Warranties—Interpretation of obligation under a full warranty to provide installment or replacement materials in event of a defect in an "installed product." (File No. 763 7001, released December 1, 1975)

Opinion Letter

November 7, 1975

L. A. Pulkrabek, Esquire
Legal Department
Armstrong Cork Company
Lancaster, Pennsylvania 17604
Dear Sir:

This is in response to your letters to the commissioners dated May 29, 1975 concerning the Magnuson-Moss Warranty Act, Public Law 93-637. You request the Commission's opinion whether a "full (statement of duration) warranty" for what you term an "installed product" must include an obligation to provide installation of replacement materials in the event of a defect.

The Commission has carefully considered the matters set forth in your letter pertaining to the obligations required under a full warranty. The Commission has treated your letter as a request for an advisory opinion under §§ 1.1-1.4 of the Commission's rules, 16 C.F.R. §§ 1.1-1.4. Section 104 of the Act, 15 U.S.C. 2304, provides that a full warranty must, at a minimum, affirm or promise to "remedy" such product "without charge". Section 101(10), 15 U.S.C. 2301(10) defines the term remedy to include, at the warrantor's option, repair or replacement. Replacement is defined in § 101(11), 15 U.S.C. 2301(11), as "furnishing a new consumer product which is identical or reasonably equivalent to the warranted consumer product." Applying this definition to the case of flooring or other products having utility only when installed, the Commission is of the opinion that installation of substitute materials is within the Act's definition of replacement. Uninstalled materials cannot be deemed "identical or reasonably equivalent" to the installed product. Therefore, the consumer could not be charged for such installation.

It should be noted that a full warrantor could impose on the consumer a duty to remove, return, and reinstall a consumer product, if such duty met the test of reasonableness under § 104(b)(1), 15 U.S.C. 2304(b)(1). The duty would be on the warrantor to show that the cost and inconvenience to consumers of such a duty were outweighed by corresponding benefits to individuals or to the public. *See* "Implementation and Enforcement Policy" for the Magnuson-Moss Warranty Act, 40 Fed. Reg. 25721, 25722 (June 18, 1975).

By direction of the Commission.

Letter of Request

May 29, 1975

Dear ———————:

Re: Title I-P. L. 93-637 Consumer Product Warranties

Representatives of Armstrong Cork Company met with Christian S. White of the Commission's staff in mid-April for the purpose of discussing interpretative views of the warranty provisions of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act. For the most part, Armstrong agrees with Mr. White's interpretation of those provisions of the Act which were discussed. However, there was disagreement in interpretation in an area we consider significant in view of the nature of our business. Mr. White suggested our addressing that issue direct to the Commissioners through appropriate expression of our views. That issue is, whether the new legislation *requires* warrantors of consumer products which are intended to be installed in the home by an independent third party installer, to provide for removal of defective goods and the installation of replacement goods in order to extend a full warranty on the product.

Armstrong Cork Company, a Pennsylvania corporation, is engaged primarily in the manufacture of resilient flooring, carpeting, and residential and architectural ceilings. Most of the products Armstrong manufactures are intended to be installed in the home, and in public and commercial buildings. The installation of these products is performed by independent flooring, carpeting, and ceiling retailers, contractors, and in some instances, on a do-it-yourself basis. These "installers" are generally several steps removed from the manufacturing process. Most of the products sold by Armstrong, with the notable exception of ceiling systems, are complete in themselves, that is, they have no component parts. Before the consumer has what might be called an "installed product," ready for use, there are two undertakings: one for the product, the other for the installation of that product. In addition to labor, the installation of the product may include use of sundries, underlayment, etc. which may or may not be of Armstrong manufacture.

There are essentially four different situations involving defects in products installed in the home:

(1) A product has been improperly installed; for example, flooring material is ripped or gouged during installation—clearly, in this instance, the dealer whose mechanic was performing the installation must provide the necessary remedy.

(2) The dealer installs defective goods and the defect was apparent at the time of installation; for example, there is an apparent bubble or discoloration, and instead of properly procuring replacement material prior to installation, the mechanic installs the defective material. In those situations, clearly the dealer should provide the remedy to the consumer.

(3) A product defect may not be readily perceived, or is not discovered until after installation. When such a defect becomes apparent, it is Armstrong's policy to undertake either repair of those areas found defective or provide replacement goods. This undertaking is performed without any charge being assessed by Armstrong to the consumer. Currently, in the case of carpet and ceiling materials, and after a specified period in the instance of flooring materials, we do not provide compensation for the labor charges incidental to the removal of the

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defective goods or installation of the replacement goods. In regard to our carpet and ceiling materials, we follow general industry practice. In the case of our flooring materials, we currently provide a consumer warranty which we believe does more for the consumer than industry practice. Neither our carpet nor our ceiling materials currently carry a written consumer warranty.

(4) The consumer undertakes to perform the installation of a do-it-yourself product and save the costs incident to a professional installation. Product defect claims may arise from the consumer's failure to follow installation instructions, from non-recommended use, or from defective goods. If the manufacturer who fully warrants his product is required to professionally install replacement goods for the do-it-yourselfer, the consumer receives a better bargain than he initially paid for.

The underlying thread of the Act, as well as the legislative history, is to advise consumers, clearly and conspicuously, of written warranty terms, so that educated decisions can be made in the marketplace. The legislative intent is borne out by the statutory language in Section 102: "* * * to improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products." House Report No. 93-1107 clearly indicates that "The purpose of the legislation is (1) to make warranties on consumer products more readily understood * * *." The legislators were attempting to avoid a situation where "the bold print giveth and the fine print taketh away." We do not read the Act as requiring the manufacturer to assume the costs of installation of replacement goods if he fully warrants only his product and makes it clear that the remedy is to provide replacement goods. The opposite reading would, we believe, result in an unintended substantive change in warranty law and practice for it would preclude a manufacturer from fully warranting its product with the remedy being product replacement and requires the manufacturer either to offer its product with a limited warranty or not provide any written warranty. Considering that installation and installation costs are not within the manufacturer's control and that such costs may approach or even exceed the product costs, it is likely that few manufacturers of installed products will, as a practical matter, be able to offer full warranties after July 3, 1975, at least to the degree theretofore.

Should the Commission not ultimately concur with our interpretation of the Act as expressed above, we believe that the Commission should consider establishing under Section 103(c) or perhaps Section 104(b)(3) a special category of warranty entitled "FULL (Statement of Duration) WARRANTY - INSTALLATION NOT INCLUDED." Such a category would permit exclusion by the manufacturer of the responsibility for removing the defective product and installing replacement material. Appropriately the consumer would then look to the local dealer—his seller and installer—for a warranty of installation attendant to a product defect. This is clearly the most efficient and least expensive way of handling the problem and properly places upon the installer not only the responsibility to carefully select from whom he purchases, but also avoids the too recurrent theme of the installer avoiding responsibilities by simply passing them along to a remote manufacturer.

The clear legislative purpose and intent under the Act's warranty provisions is to clearly and conspicuously advise the consumer of the terms of written warranties. If the consumer is so advised that purpose is fulfilled.

We would welcome the opportunity to further address ourselves to this matter should you or any of your associates so desire.

Very truly yours,

/S/ L. A. Pulkrabek
Assistant Secretary and
General Manager
Legal Department
Secretary's Office

Compliance advisory opinion as to whether a proposed quantity discount, if implemented, would constitute compliance with the amended Clayton Act Subsection 2(a) Order (72 F.T.C. 412). (Docket No. 8599, released December 5, 1975)

Opinion Letter

November 19, 1975

Thomas E. Quay, Esquire
Secretary and Counsel
William H. Rorer, Inc.
Fort Washington, Pennsylvania 19034
Re: William H. Rorer, Inc., Docket No. 8599

Dear Mr. Quay:

This is in response to your request on behalf of William H. Rorer, Inc., for an advisory opinion concerning whether a proposed quantity discount, if implemented, would constitute compliance with the amended Clayton Act Subsection 2(a) Order in the above-captioned matter. According to your letter of March 13, 1975, and attachments thereto, Rorer proposes granting to all direct-buying retail customers a 3.5 percent discount from the list price of Maalox products with any purchase of $250 or more of Maalox products at net prices. Rorer bases the proposed discount on a showing of savings in its costs of delivery and sale.

According to your letter, Rorer currently employs a nationally uniform delivered pricing system in the sales of its products. The net price to direct-buying retail customers, according to the letter, is the suggested price from wholesaler to retailer less 15 percent. To maintain the direct account status, however, the retail customer must purchase in terms of net prices at least $125 of any Rorer products in each order and a total of $500 for an entire year. The letter adds that Rorer products are delivered to direct-buying retail customers by common carrier from warehouses in Fort Washington, Pennsylvania; Tucker, Georgia; Hammond, Indiana; and San Leandro, California.

The Commission understands that the proposed discount would amount to a 4.12 percent reduction in the net price of Maalox products to participating direct-buying retail customers. According to your letter, the discount would not be applicable to non-Maalox products. Finally, it is understood that the discount would be offered to all direct-buying retail customers.

To determine the savings in the cost of delivery, Rorer focuses on savings in the cost of shipping its products to customers located closest to its points of distribution. Sufficient savings to justify the discount to these customers would arise, according to Rorer, by shipping a typical order containing $250 worth of Maalox products instead of shipping two or more typical minimum $125 orders. Rorer reasons, relying on facts previously submitted, that if the discount is qualified to the near-by customers then it would be uniformly cost justified to all customers.

To determine the savings in the cost of sale, Rorer divides its total 1974 operating cost for processing orders by the total number of invoices written to find the average cost of processing an individual order. Rorer contends that by processing an order containing $250 worth of Maalox products rather than two more minimum $125 orders it would save the cost of processing at least one invoice.

The Commission after reviewing the materials submitted in support of the proposed discount hereby advises that, based on the cost justification submitted, the discount would not be uniformly cost justified and would therefore be violative of the above-captioned order. Several erroneous assumptions made in the cost study concerning the costs of delivery and sale require that the justification be rejected.

The cost justification is improperly based on a cost comparison which relies on the cost of handling a minimum $125 purchase without having established that this size order would be substantially representative of the class of all purchases not earning the discount. A cost justification must reflect the true cost of transacting business and the actual pattern of sales experienced.

The cost justification is in further error because it attempts to qualify the discount in part by savings in the cost of handling the order's undiscounted non-Maalox products. Since these non-Maalox products would not benefit from the proposed discount it is unacceptable to justify the discount with savings attributable to their cost of delivery or processing in the order. The only savings which can be properly considered in supporting a discount on Maalox products are those which would reflect due allowances for differences in the costs of shipping and processing orders for Maalox products in differing quantities.
Additionally, the cost justification erroneously assumes that the entire cost incurred in order processing can be the basis for establishing cost savings. Only that portion of the operating cost which varies with the size of orders processed is suitable for consideration in the cost justification. That portion of the cost which depends on the total volume of business transacted without regard to the size of orders on which that business is divided would not be relevant to a cost justification * * *.

By direction of the Commission.

Letter of Request

March 13, 1975

Re: New Request for Advisory Opinion Pursuant to FTC Rule 3.61(d); Ref. Docket No. 8599

Dear Sir:

1. As general counsel, I hereby request, on behalf of William H. Rorer, Inc., an advisory opinion pursuant to FTC rule 3.61(d) as to whether the proposed quantity discount, if implemented, would be in compliance with the Commission's Order, as modified, August 21, 1967,

32 *Federal Register* 12844, Docket No. 8599. As modified, the Order's application was limited to competing retail customers.

2. We also understand that the Order, as modified, does not *require* us to seek this advisory opinion from the Commission prior to instituting a quantity discount compatible with the terms of the Order. Nevertheless, Rorer voluntarily elects to seek the Commission's opinion in advance.

3. Rorer proposes to offer only to its retail customers a quantity discount of three and one-half percent (3-1/2%) from the list price on each single order of $250 (net) or more of its leading antacid product, Maalox (suspension or tablets). There is adequate transportation cost justification for this discount as set forth in the attached schedules (see Index of Schedules). Rorer makes prepaid shipments from four locations: Fort Washington, Pennsylvania; Tucker, Georgia; Hammond, Indiana; and San Leandro, California.

4. Rorer's "list price" is our suggested price from wholesaler to retailer. (see General Price List, Schedule F.) Our price to wholesalers reflects a 20% discount from that "list price;" to retailers who buy on a direct basis, our price reflects a 15% discount. Our proposed 3-1/2% quantity discount to retailers only, on Maalox products only, would provide a direct retail discount of 18-1/2% from the list price. The non-Maalox portion of the order will continue to bear a 15% discount. Rorer additionally offers retailers a 2% discount for prompt payment.

5. Effective January 1, 1975, a retailer, in order to maintain his direct account status, must purchase $500 (net) worth of Rorer products annually. Each order must be for $125 (net) or more of our products.

6. Previous studies of transportation savings made and discussed with a representative of the Bureau of Competition of the FTC have revealed that there are three examples that show a *minimum* savings: from our Tucker, Georgia, branch warehouse to Atlanta, Georgia; from our San Leandro branch warehouse to Oakland, California; and from the San Leandro location to Los Angeles, California. Therefore, we have computed transportation savings on the basis of typical orders shipped from our Tucker and San Leandro branches to those locations.

7. Although transportation savings more than justify the proposed 3-1/2% quantity discount, we also assert a cost justification based upon administrative savings to be gained (Schedule E(a) and (b)). It is our contention that the proposed 3-1/2% discount is also justified entirely by this analysis alone.

8. Based upon experience during the last six months of 1974, we know that more than 50% of orders shipped to direct buying retailers contained $200 (net) or more worth of Maalox products. It is our firm conviction that under our new terms and prices in effect since January 1, 1975, the 50% figure will be valid for orders containing $250 (net) or more worth of Maalox products.

9. Enclosed in Schedule G are copies of four sets of published tariff schedules applicable to all four of our shipping points, although the examples cited refer only to our Tucker, Georgia and San Leandro, California branches. The tariff schedules are provided in order to facilitate the evaluation of our submission.

10. Schedules A through E, inclusive, contain calculations and data based on a "typical" order which is a competitive trade secret within the meaning of FTC Rule §4.10(a)(2). Therefore, Rorer expressly asserts a claim of confidentiality to Schedules A through E, inclusive. If the Commission renders a favorable advisory opinion, Rorer's implementation of the proposal would, of course, be in strict compliance with all the terms of the Order including prompt notification to the Commission and adequate and regular notice to all retail customers together with reasons and details of the discount.

Very truly yours,

/S/ Thomas E. Quay

Advertising and selling as "new," cars used for emission control tests (85 F.T.C. 1171). (File No. 753 7005, released January 7, 1976)

Opinion Letter

December 4, 1975

Mr. Richard H. Johnson
Acting Assistant Administrator for Enforcement
United States Environmental Protection Agency
Uashington, D.C. 20460

Re: Sale of Vehicles Used to Perform Emission Control Tests Required by the State of California

Dear Mr. Johnson:

This is in reply to your letter of May 12, 1975 requesting the Commission's opinion regarding the status "of those vehicles sold in the

State of California which have been tested in accordance with the provisions of the California Air Resources Board (CARB) Assembly Line testing requirements." Your letter indicates that for the 1974 model year, CARB required automobile manufacturers to subject about 20,000 vehicles to an emission control test identical to the "standard Federal testing procedure." It is the Commission's understanding that this standard procedure is the same as that described in your prior letter of September 16, 1974. Your May 12th request further indicates that auto manufacturers also have the option under California law to accumulate any desired mileage on test vehicles prior to testing in order to stabilize emission performance. The question posed is whether vehicles used to accomplish the CARB tests may be advertised and sold as "new."

On March 7, 1975, the Commission responded to your prior request for advice dated September 16, 1974 by advising you that each manufacturer's emission testing could raise unique questions and that the Commission would therefore prefer to respond to individual requests from manufacturers on a case-by-case basis. Your letter of May 12th, including its references to CARB test vehicles, fails to include individualized testing data, and in any event is not from an individual manufacturer. The Commission requires an affected party to make its own advisory opinion request, 16 C.F.R. §1.1, and without the benefit of comprehensive submissions by the real parties in interest the Commission is unable to issue a definitive opinion in elaboration of the March 7th reply.

It has come to the Commission's attention, however, that the March 7th letter has been interpreted in some quarters to constitute a Commission determination that emission test vehicles cannot legally be sold as "new" under any circumstances. Such an interpretation is incorrect, and the Commission wishes to emphasize that its previous reply did not involve any determination that emission test vehicles may or must be sold as either "new" or "used".

By direction of the Commission. Commissioner Hanford dissented, believing that the issuance of an advisory opinion was appropriate under the circumstances.

Letter of Request

May 12, 1975

Dear Mr. Tobin:

On March 7, 1975, the Commission provided an opinion, in response to our request of September 16, 1974, on the right of automobile manufacturers to advertise and sell as "new" those test automobiles used to demonstrate compliance with air pollution control standards.

The opinion responded to the issue as to "whether manufacturers would have the right to advertise and sell any of these test vehicles as 'new' " by stating that the "Commission * * * cannot conclude, as a matter of law, that automobile manufacturers have the right to sell such test vehicles as 'new.' Each manufacturer's testing may raise unique questions. Therefore, the Commission would prefer to defer a more definitive opinion until it receives a request from an auto manufacturer."

In order for us to relate the general opinion to our pending rulemaking, we request your definitive opinion regarding the status of those vehicles sold in the State of California which have been tested in accordance with the provisions of the California Air Resources Board (CARB) Assembly Line testing requirements. In model year 1974, the CARB required that a statistical sample of approximately 20,000 production vehicles (2% of one million vehicles sold in California) be selected and tested by American and foreign manufacturers using the standard Federal testing procedure. The test itself results in the accumulation of approximately 15 miles per vehicle. The CARB procedures permit manufacturers, at their option, to accumulate any desired mileage on vehicles prior to testing to accommodate those particular manufacturers who claim that a new vehicle exhibits erratic emission performance during the first few miles of use until the engine and emission control system settle into more predictable modes. Manufacturers claim that new vehicles of some model lines require mileage accumulation prior to testing. Accordingly, based on CARB information, 20-40 miles are accumulated prior to testing which could result in a total accumulation of 55 miles or 70 miles in the event of a retest. The totals would be 58.2 and 76.4 for 1975 and later models because the FTP is extended for 3.2 miles. One foreign manufacturer accumulates 200 miles on a selected vehicle prior to testing for a total accumulation of 218.2 miles. We are requesting that you provide the Commission's opinion on the status as "new" or "used" of these test automobiles used to demonstrate compliance with air pollution control standards in California.

We would appreciate your response as soon as possible.

Sincerely yours,

/S/ Richard H. Johnson
Acting Assistant Administrator
for Enforcement (EG-329)

TABLE OF COMMODITIES*

*Commodities involved in dismissing or vacating orders are indicated by *italicized* page reference.

INDEX*

DECISIONS AND ORDERS

*Covering practices and matters involved in Commission orders. References to matters involved in vacating or dismissing orders are indicated by *italics*.

217-184 O - 76 - 105

INDEX

List of Advisory Opinions

U. S. GOVERNMENT PRINTING OFFICE : 1976 O - 217-184