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ADVISORY OPINIONS

Marking of jewelry produced from a 14 karat gold sheet laminated upon sterling (File No. 773 7004).*Opinion Letter*

February 18, 1977

Dear Mr. Goldberg:

This is in response to your request for an advisory opinion concerning the marking of articles of jewelry produced from a 14 karat gold sheet laminated upon sterling, the gold sheet constituting at least 1/20th of the weight of each jewelry item's metal content. The items of jewelry contemplated for manufacture include bracelets, necklaces and earrings. You propose marking such articles "Sterling and 14K" or "Sterling + 14K," on the premise that such markings are permitted by Section 4 of Commercial Standard CS51-35, "Marking Articles Made of Silver in Combination with Gold."¹ In the Commission's opinion, the use of either marking would have the tendency and capacity to mislead consumers and thus be in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

The sample of the laminated metals submitted to the Commission might be described as having an obverse side of yellow gold and a reverse side of silver. The different metals in the sample provided are clearly distinguishable, but casual inspection cannot determine the relative thicknesses of the gold layer and the silver. The 1:20 ratio you have specified, however, does no more than meet the minimum requirements for "gold fill," "gold plate," or "gold overlay." See 16 C.F.R. 23.22(c)(2).

The markings "Sterling and 14K" or "Sterling + 14K," in the Commission's view, could suggest to consumers that the amounts of gold and silver in the articles of jewelry so marked are approximately equal or, at least, would suggest more than five percent 14K gold. Such markings, accordingly, would have the capacity to mislead consumers.

The Commission does not construe Commercial Standard CS 51-35 to justify a different conclusion. In the circumstances presented, a marking must be used which makes clear to consumers the relative

¹ The Standard, a voluntary guide developed by industry members with the cooperation of the National Bureau of Standards, was recently redesignated as PS68-76.

proportion of yellow gold to silver, either by use of a "gold plate" designation (or related designations set forth in the Trade Practice Rules for the Jewelry Industry, 16 C.F.R. 23.22(c)(2)) or by preceding the gold fineness designation with a fraction consisting of the ratio of the weight of the 14K gold to the weight of the metal in the entire article, a marking clearly not inconsistent with the Commercial Standard.

This opinion is limited to the circumstances presented by your sample, *i.e.*, where silver is combined with yellow gold and both the gold and silver surfaces are equally visible in jewelry made from the laminates.

Assuming that the sterling and 14K yellow gold meet the designated quality standards and that the 14K gold is at least 1/20th the weight of the metal in any finished article of jewelry, the following markings, in the Commission's opinion, would comply with Section 5 of the Federal Trade Commission Act:

Sterling and [or +] 14K Gold Plate*

14K Gold Plate on Sterling

Sterling and [or +] 1/20th [or other fraction] 14K Gold

* "Gold Filled," "Gold Overlay," or "Rolled Gold," or their abbreviations set out in 16 C.F.R. § 23.22(c)(2), may be used if they are appropriate for the laminating process.

By direction of the Commission.

Letter of Request

15 April, 1976

Dear Mr. Tobin:

My company has been in business three years and we manufacture jewelry for the finest retail stores in the United States.

We have developed a new process whereby we laminate, by mechanical means, a sheet of 14 karat gold directly upon sterling silver. We enclose a small sample of our product. Please note, the gold is easily distinguishable from the sterling.

The purpose of this letter is to request a formal advisory opinion under the Federal Trade Commission Act to determine whether or not this item of jewelry made from 14 karat gold and sterling can be stamped 14 karat gold plus sterling in accordance with Commercial Standard CS

51-35, Marking Items Made of Silver in combination with Gold, as recognized in the Federal Trade Commission Trade Practice Rules for the Jewelry Industry, Rule 23 (see footnote No. 4).

The weight of the 14 karat gold to the weight of the entire article will be at least 1/20th of the weight of the entire metal or better.

Commercial Standard CS 51-35, we believed, would apply, since the silver of the 14 karat gold is easily distinguishable, one part from the other part. Paragraph four of this Standard would permit, we believe, this item to be stamped "Sterling and 14K" or "Sterling + 14K".

We are currently not manufacturing this product nor selling the same and request this opinion so that we may correctly designate our jewelry to our retailers for the protection of the consumer.

Since jewelry is a fashion item, and since we would like to produce this product for our Fall market season, we would greatly appreciate your efforts in forwarding this opinion to us no later than June 30, 1976. Your cooperation within this period of time would be, as stated, greatly appreciated.

Sincerely,

/s/ VICTOR GOLDBERG
President

Association's proposed plan to provide gasoline dealer with instant identification intended to assure motorists of the credibility and reliability of such dealer's performance for fill-up customers at full service gasoline pump islands (File No. 773 7003).

Opinion Letter

March 5, 1977

Dear Mr. Houston:

This is in response to your request for an advisory opinion on a certification plan developed by your association for members of the Georgia retail petroleum industry.

Under this plan, as we understand it, participating petroleum retail dealers would provide to "fill-up" customers at designated full service islands, the services of (1) cleaning their windshields and (2) offering to check or checking under their hood. Dealers who certify their provision of the services to customers ordering a fill up of gasoline at one or more designated service islands may participate in the program and receive a seal to post indicating their participation in the program. As we understand the program, retail dealers with multi-island stations could participate on a single island basis.

For the reasons set forth below, the Commission is unable to approve the program.

With respect to the antitrust implications of your proposal, your letter states that "* * * all members of the industry may participate in the proposed plan who perform at least the minimum service for fill-up customers." Your proposed seal, however, bears the words, "Dealer Operated—An Independent Small Businessman." It is therefore unclear whether service stations not owned and operated by dealers may participate in the program. If the program is in fact open to any industry member who supplies the requisite services, regardless of ownership or operation, the Commission finds the plan unobjectionable on antitrust grounds. If a class of stations is excluded on grounds other than their failure to offer and provide those services, however, a question would be raised whether the program could have an illegal anticompetitive effect, and the Commission would be unable without a further factual inquiry, not undertaken in the context of advisory opinions, to approve it. Federal Trade Commission Procedures and Rules of Practice, 16 CFR 1.1(c).

This is not to say that such a program could not result in or facilitate

violation of the antitrust laws. The program could present occasion to fix prices or otherwise to limit competition. For example, if participants agreed explicitly or implicitly to withhold the services provided under the program from "partial fill" customers, or agreed that self-service or other kinds of sales would not be offered to the public, violations of the antitrust laws would result. That retail dealers with multi-island stations may participate on a single-island basis is an extremely important consideration in the Commission's evaluation of the plan.

Fees for participation in the program might best be structured in such a way that association members and nonmembers pay equal shares of program costs. Nonmembers of the association might be charged a higher fee than members if the differential simply insures that nonmembers, who do not pay association dues or assessments, are bearing an equal share of the costs of the program.

Section 5 of the Federal Trade Commission Act prohibits not only antitrust violations in the form of unfair methods of competition, but also unfair or deceptive acts or practices in or affecting commerce. Your proposed program is deficient in certain respects that could lead to illegal unfairness or deception.

You state in your promotional material that the Golden Triangle is "your assurance for receiving the above services when you drive up to a full service gasoline pump island and say—Fill er up." The services specifically designated are cleaning the windshield, checking tires for dangerous conditions, and offering to look under the hood, to check the oil, battery, fan belts, look for faulty or loose wiring and leaking brake or fuel systems. Yet participating dealers only agree to clean windshields and either check or offer to check under the hood. The affidavit should provide that all of the services specified in advertising material will in fact be provided. Of course, both the Association and the individual participants in the program bear the responsibility to ensure not only that the services are promised but also that they are actually provided. The Association should adopt a program of verifying compliance with the program, which should consist at least of spot-checking at appropriate intervals as well as investigating complaints.

In addition, the seal represents that the participant offers "full service at the pump island." In our view this implies that the servicing is available at the designated island to those willing to purchase gasoline. In fact, under the program, dealers commit themselves to provide "full service" only to those who order a fill up. We believe the limitation

regarding a fill up must either be prominently displayed on the seal or otherwise disclosed with prominence equal to that of the seal.

Finally, the Commission sees no problem in principle in franchising the program so that it would be available through trade associations in other states, if the objections raised in this opinion to the present form of the program are removed.

By direction of the Commission.

*Letter of Request**

October 22, 1975

Dear Sirs:

This is to request an advisory opinion on a proposed plan developed by this Association for all members of the industry.

The objective of the proposed plan is to provide the gasoline dealer with instant identification intended to assure motorists of the credibility and reliability of such dealer's performance for fill-up customers at full service gasoline pump islands.

The proposed plan is intended to insure availability of minimum performance which the consumer may expect at a full service pump when the consumer has ordered a fill-up of his tank. Only a general certification (See Exhibit A) that such minimum performance is regularly provided is proposed. Competition and public demand will continue to dictate the quality and extent of performance above the minimum described in this proposal.

This Association, recognizing that professionalism and credibility are valuable to its members, has developed the proposed plan to identify to consumers gasoline dealer locations where minimum performance is certain for fill-up customers. It is proposed that all members of the industry may participate in the proposed plan who perform at least the minimum service for fill-up customers. All participants will voluntarily and without implied or expressed coercion certify in writing to the Association of their willingness to assure such minimum performance is maintained. In return for the certification of such practices by any member of the industry the Association will make available the symbol illustrated in the copy attached (Exhibit B) for posting on his premises.

* The exhibits mentioned in the requesting letter are not reproduced herein but are available for inspection at Public Reference Branch, Room 130, Federal Trade Commission, Washington, D.C.

With reference to the illustration depicting the symbol for performance, it is proposed that the non-member of the Association will be supplied the identical signing with the exception that the word "member" shall be removed and the words "sponsored by the" shall be substituted. To fulfill the credibility intended under the proposed plan for public confidence in performance at locations where such symbol is displayed, it is deemed necessary to use the Association name in said signing. In the alternative, said symbol could be provided without other wordage to avoid any objection to the use of the Association name should the Commission feel this is necessary.

To insure consistency and quality in the use of the symbol and/or signing, it is intended that the Association will retain all rights for reproduction of authorized signing under this plan. Only approved designs as may from time to time be developed by the Association will be permitted in the use of said symbol.

By certification to performance as provided in this proposed plan, it is the intention of the Association to provide the symbol as a distinguishable basis for consumer decisions which might not otherwise be apparent.

In addition to providing the member of the industry who chooses to participate in the proposed plan with adequate signing as described above, it is the intention of the Association to provide from time to time promotional pieces it designs for use of said participating members of the industry. Such proposed promotional pieces as are illustrated by the attached sample (Exhibit C) are intended to develop public confidence in the proposed plan. In addition, such promotional pieces will serve as educational tools to inform consumers of the valuable and essential services performed at the pump island by the full service dealer when the customer says to fill his tank. Participating members of the industry would be encouraged to provide non fill-up customers with the best service performance they can provide to the extent it is economically feasible under their individual circumstances.

The use of the proposed promotional piece is intended for participating member dealers to hand to their fill-up customers. Upon receipt by the Association of complaints against any participating dealer, notice is to be given to the participating dealer complained of as a matter of information. In the event substantial numbers of complaints by consumers are received advising non-compliance with minimum performance certified to for participation in the purposed plan, said participating dealer shall be given an opportunity to appear before the Board

of Directors of the Association. The Board of Directors, acting as a committee which shall have the duty to examine the circumstances, shall hear the participating dealers' views and will make judgment whether the facts merit withdrawal of the right to participate in said program. Among the committee's other duties shall be the responsibility for insuring non-discriminatory access to the program by non members of the Georgia Association of Petroleum Retailers.

To effectively focus public attention upon the symbol and the participating industry members, it is intended that the Association may require all participating industry members to contribute to a cooperative advertising campaign to be conducted through public media. At the option of the Association, it is proposed that either a voluntary contributory plan will be implemented or that an assessment for each participating member of the industry will be implemented to support said intended advertising campaign. A Sample copy of the initial ad (Exhibit D) proposed for use in this connection is attached.

It is intended that non members of the Association will receive all promotional materials and the use of the symbol at a cost no greater than those imposed upon comparable Association members for whom comparable services have been rendered.

The Commission is requested to provide an advisory opinion on the general conditions of the proposed plan as outlined above in addition to the specific questions which follow:

1. Can the proposed plan be implemented as above described without danger of the Association being charged with anticompetitive activity?
2. Could the Association establish an annual charge for the use of the symbol and waive payment by members of the Association?
3. Would the Commission view as anticompetitive activity of this Association if as owner of the symbol and above plan this Association attempted to franchise said plan through other gasoline dealer Associations across the Nation with agreements with other Associations requiring uniformity in operation as described above?
4. If the Commission finds one phase of the above described plan to be improper or anticompetitive the Commission is respectfully asked to comment as to the effect of such finding on the remaining parts of said plan.

Thank you for your attention and for your best effort to expedite this request for an advisory opinion.

Sincerely,

/s/ Jack W. Houston
Executive Director

**Magnuson-Moss Warranty Act—Compliance of Ultrafiche System
with 16 C.F.R. 702, (File No. 773 7005).**

*Opinion Letter**

March 18, 1977

Dear Mr. Raymond:

This is in response to your request for an advisory opinion concerning a proposed method of complying with the Commission's Rule on Pre-Sale Availability of Written Warranty Terms, 16 C.F.R. 702. Your request was made following the Commission's advisory opinion of November 10, 1976, to the National Retail Hardware Association (NRHA) approving use of a microfiche reader system to satisfy Part 702.3(a)(1)(ii) of the Rule. 41 F.R. 53472. The Rule requires a retailer to maintain a binder "or [other] similar system* * *" giving consumers "convenient access to * * * warranties." 16 C.F.R. 702.1(g).

Specifically, you ask whether an ultrafiche viewing system would also satisfy Part 702.3(a)(1)(ii) of the Rule. In addition, you ask whether a retailer wishing to use an ultrafiche system under the Rule must comply with the condition set forth in the advisory opinion to the NRHA that:

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* * *.

The system you propose is substantially similar to the NRHA microfiche system. Information is stored on cards in greatly reduced photographic form. The cards can then be inserted into a viewing machine which magnifies the information and displays it in readable form on a screen.

The basic difference between the two systems is that an ultrafiche card contains 2,800 pages of information while a microfiche card typically contains less than 100. You argue that requiring a separate ultrafiche card for the warranties relating to each class of products would defeat the purpose of an ultrafiche system.

The Commission has carefully considered the matters set forth in your letter. It is the Commission's conclusion that the ultrafiche system you propose will satisfy the Commission's Rule if:

* Published in the *Federal Register*, 42 F.R. 15679.

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- (1) Simple, complete instructions for use of the system are posted on each ultrafiche viewer; and
- (2) Personnel in each selling establishment familiar with the operation of the system are available to assist consumers should the need arise; and
- (3) Ultrafiche cards used to display warranties contain only warranty information.

The Commission further concludes that the warranties relating to more than one product class may be stored on a single ultrafiche card provided the conditions listed below are met. Moreover, the Commission has reconsidered the requirement set forth in its opinion to the NRHA that the warranties for each product class be displayed on separate microfiche cards. Therefore, the Commission concludes that the warranties relating to more than one product class may be displayed on either a single ultrafiche or a single microfiche card if:

- (1) All warranties relating to a product class are grouped together on the same ultrafiche or microfiche card; and
- (2) All warranties relating to a particular product class appear on the same row or column of the ultrafiche or microfiche card; and
- (3) Each ultrafiche or microfiche card contains a clear product index.

These conditions are required to ensure that consumers have the "convenient access" to warranties required by the Rule.

By direction of the Commission.

*Letter Revising Conditions on Use of Microfiche System**

March 18, 1977

Dear Mr. London:

This is to advise you of a revision of the Commission's conditions on the use of microfiche viewing systems to satisfy the Commission Rule on the Pre-Sale Availability of Warranty Terms, 16 C.F.R. 702.

In its advisory opinion to the National Retail Hardware Association of November 10, 1976, the Commission required separate microfiche cards. Upon reconsideration, the Commission concludes that warranties from

* Opinion letter published in 88 F.T.C. 1027, and 41 F.R. 53472.

more than one product class may be displayed on the same microfiche card so long as the warranties relating to any particular product class all appear on the same row or column of the card and the card contains a clear index of the warranties it contains. A letter setting out the new conditions is enclosed.

By direction of the Commission.

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"Hiatus" requirement of the Trade Regulation Rule of Games of Chance in the Food Retailing and Gasoline Industries (16 C.F.R. 419.1(f)) (File No. 773 7010).

Letter of Response

March 25, 1977

Dear Mr. Rogal:

This is in response to your March 16, 1977, request for an advisory opinion respecting the so called "hiatus" requirement of the trade regulation rule for Games of Chance in the Food Retailing and Gasoline Industries (16 C.F.R. 419.1(f)).

The Commission has recently directed its staff to initiate a rulemaking proceeding for amendment of said rule, specifically to include consideration of repeal of Paragraph (f), the "hiatus" requirement. As your request seeks, in effect, individual exemptions from the "hiatus" requirement of the rule, it is not deemed appropriate for advisory opinion.

By direction of the Commission.

Letter of Request

March 16, 1977

Honorable Commissioners:

The undersigned was orally informed today by attorney Edwin F. Dosek of the Commission's Bureau of Consumer Protection that the Bureau's staff has determined to advise the undersigned that the proposed courses of action described in the two attached Requests for Staff Advisory Opinion would violate the Commission's trade regulation rule governing games of chance in the food and gasoline retailing industry. He stated that it was the staff's opinion that extensions of the games for additional thirteen week periods would violate section 419.1(f) of the rule which reads as follows:

Promote or use any new game without a break in time between the new game and any game previously employed in the same establishment equivalent to the duration of the game previously employed.

Mr. Dosek further advised me that it is the staff's view that under the circumstances presented, *i.e.*, when some of the independent stores which participated in the first run of the game do not wish to participate in the extension or when stores which did not participate in

the first run will participate in the second run, the second run constitutes a "new game" and falls within the quoted rule provision. According to Mr. Dosek the second run is a "new game" because the geographic area will change and the total number of prizes and game chances distributed will change. The staff was not persuaded by the fact that all other aspects of the game will remain exactly the same including the odds or chances of winning a prize in each separate prize category.

The undersigned is at a loss to understand the staff's negative views on these simple proposals. There is absolutely no chance of consumer confusion or deception. The independent stores are scattered widely over a three state area in one instance and an eleven state area in the other. Newspaper advertising is the only medium employed since the rule bans the use of radio or television advertising. The stores prepare and disseminate their own advertising on a town-by-town or area by area basis.

This request points up the anti-competitive nature of the rule provision quoted above. Here we have independent grocery stores blocked in a competitive fight with large retail food chains. I do not have any current information as to the competition which faces the Malone and Hyde Stores but as the attached Request on behalf of Associated Grocers of Colorado points out, that group is faced with competition from two large chains which together control in excess of 80 percent of the food retail market in that three state area. What possible public interest is served by denying to these independent grocers the right to employ this completely lawful method of competition?

In closing I wish to point out that this request differs from the request submitted by Fox Grocery Company in that we are not requesting the opportunity to engage in an entirely new and different game but merely requesting the opportunity to extend the same promotion with slightly different participants.

Finally, it is urgently requested that the Commission handle this request with all possible speed. A refusal to respond within the next ten days will, in effect, constitute a denial for orders for printing the game materials must be in the hands of the printer by March 25, 1977.

Respectfully submitted,

/s/ Willaim W. Rogal

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First Attachment

March 8, 1977

Dear Mr. Dosek:

This request for a staff advisory letter is submitted on behalf of Glendinning Companies, Inc. Glendinning is a marketer of game of chance promotions utilized by food retailers and others in connection with advertising their goods and services.

On January 12, 1977, approximately 293 retail stores affiliated with Malone and Hyde commenced a thirteen weeks game promotion marketed by Glendinning. The 293 stores are located in the states of Alabama, Arkansas, Indiana, Illinois, Kentucky, Louisiana, Mississippi, Tennessee, Texas, Virginia and West Virginia. The Malone and Hyde stores are grouped into divisions for purposes of organization. The 293 stores now engaged in the game promotions comprise five distinct Malone and Hyde divisions.

Glendinning has recently been notified that some, but not all, of the five divisions wish to renew the game promotion for an additional thirteen weeks when the original promotion terminates in April. Of course, this means that the promotion will be somewhat smaller during the contemplated second run. The odds of winning each separate prize will remain exactly the same but the total number of tickets and the total number of prizes will diminish in proportion to the diminished retail store participants.

It is important to realize that each of the divisions of Malone and Hyde are geographically distinct and separate. The stores in each division prepare and disseminate their own advertising, thus consumers in one division do not see advertising disseminated in another division or divisions. Thus, there is absolutely no chance of consumer confusion by reason of the fact that one or more of the five divisions may decide not to renew the game for an additional thirteen weeks.

In compliance with the Trade Regulation rule, Glendinning and Malone and Hyde have been mixing game chances and making the requisite disclosures over the entire eleven state area encompassed by the Malone and Hyde divisions. They will follow the same procedure during the second run. The new advertising will properly disclose the new diminished area in which the game will be played.

Glendinning requests advice as to whether the procedure outlined above is acceptable. Of course all provisions of the Trade Regulation

rule will be scrupulously followed. Time is of the essence in this request, since advance orders and commitments for the new tickets and game material must be placed within the next few weeks.

Sincerely,

/s/ William W. Rogal

Second Attachment

March 3, 1977

Gentlemen:

This request for a staff advisory letter is submitted on behalf of Glendinning Companies, Inc. and Associated Grocers of Colorado. Glendinning is a marketer of game of chance promotions utilized by food retailers and others in connection with advertising their goods and services. Associated Grocers of Colorado is a cooperative group of independent food retailers operating in Colorado, part of Wyoming and part of New Mexico.

The market area in which Associated Grocers operates is dominated by two large chain retailers, Safeway Stores and King Soopers. Together these two large retailers account for in excess of 80 percent of the food retail market in the relevant area. The combined market shares enjoyed by these two large chains has steadily increased in recent years at the expense of independent grocers such as Associated Grocers of Colorado.

For approximately the last seven weeks 28 Associated stores have employed a Glendinning game of chance promotion known as "Shoppers Sprée Bingo". The game has been successful in the sense that the participating stores have enjoyed increased sales and have regained a small part of the business lost to the larger competitors. Because of this favorable experience most of 28 stores wish to extend or renew the game for an additional 13 weeks. In addition, a substantial number of Associated stores which elected not to participate during the initial run of the game now wish to participate during the 13 week extension. Thus the mix of stores would change during the second run with a few of the original stores dropping out and an undetermined number of new stores entering.

During the extension period the prize structure will remain the same, i.e., the odds or chances of winning in each separate prize category will remain the same. Only the market area, the number of participating

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stores and the number of prizes in each category will increase depending upon the number of stores which elect to participate.

It is important to realize that this is a scattered market area and not a homogeneous, easily defined metropolitan market. The stores are scattered in various small towns and cities. Apparently each separate area or store places its own advertising but the consuming public is free to play the game at any outlet. Glendinning provides all of the stores with assistance in preparing advertising to make certain that all disclosures mandated by the Commission's trade regulation rule are made.

It is not economically possible to provide a unique and separate game for individual stores. The game materials must be mass produced and mixing must be done on a market-wide basis. Moreover, separate games with different prizes and different termination dates would hopelessly confuse consumers.

It seems apparent that an extension of this game in the manner outlined above would not deceive or confuse consumers. It is also apparent that the extension would be in the public interest in that it would enable this group of relatively small food retailers to better compete with their large, chain competitors. And, conversely, a refusal to permit the Associated stores to engage in this method of competition would adversely affect competition in this market area.

Thus, Glendinning and Associated request a staff opinion advising them that an extension of the game in the manner outlined in this letter would not be considered by the Commission as a violation of its trade regulation rule. Unfortunately, time is of the essence in this matter. Plans must be made immediately for the printing and distribution of game materials. Commitments and orders for materials must be placed within two weeks from today in order to permit the extension to commence when the original game terminates.

Sincerely,

/s/ William W. Rogal

Proposed plan to establish a training and certification program for "moving consultants" and a "code of ethics" for certified "moving consultants" and moving company members of an Institute (File No. 773 7001).

Opinion Letter

April 5, 1977

Dear Mr. Brodsky:

This is in response to your request for advice concerning whether the "organization and activities" of the National Institute of Certified Moving Consultants ("Institute") would be lawful under the statutes administered by this Commission.

The Commission has carefully reviewed the Institute's certificate and articles of incorporation, by-laws, and rules of practice, together with the supporting memorandum and supplementary letters. The proposal about which you seek advice is understood to entail (1) establishment of a training and certification system for "moving consultants" employed by household goods moving companies and (2) administration of a code of ethics for certified consultants and moving company members of the Institute. The program covers "moving consultants" and moving companies engaged in both local and interstate moves. The term "moving consultants" is used by the Institute to refer to the estimator-salesmen employed by moving companies to deal with, and provide price estimates to, prospective customers. See *By-Laws*, Art. II, § 3(A), *as amended*. The Institute asserts that the purpose of the program is to "upgrade and professionalize the competency and integrity of estimators and salesmen employed in the household goods moving and storage industry." *Application* at 14.

The Commission has concluded that it cannot approve the Institute's plan. Your application indicates that, in interstate moves, consumer deception could occur when a moving consultant underestimates the price that will in fact be charged under the carrier's tariff. While sympathetic to this problem, the Commission is nevertheless of the opinion that the proposed estimator training and certification procedures necessarily entail a severe risk that unlawful restraints on price competition will be introduced into areas of commerce not subject to the regulatory jurisdiction of the Interstate Commerce Commission.

Article II, Section 4 of the *By-Laws* states that the Institute will develop and administer programs to train moving estimators with

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respect to “moving costs,” “industry services at origin and destination,” and “best methods of moving and storage.” See also *Rules of Procedure*, § 9 and *Application* at 1-3. The emphasis on moving costs is heavy in both the *By-Laws* and the *Application*, and, in context, it is plain that the repeated references to “costs” mean costs to customers (*i.e.*, price), rather than costs to carriers.

Section 3 of the Code of Ethics, as amended, prohibits any Institute member from granting “any rebate either directly, indirectly, or in any form whatsoever, to customers or shippers for services rendered.” This section would operate to prohibit the use of rebates in any form to grant price reductions to customers.

The proposal contemplates that failure to comply with the Institute’s regulatory requirements could result in the denial of initial certification to estimators, and in the revocation of certification and Institute membership from estimators already certified. Membership could also be stripped from moving companies found to be participating in disfavored conduct.

In light of these elements, the Commission has concluded that approval of the Institute’s program is foreclosed because of manifest conflicts with the antitrust laws. The plan will operate, in part, to establish and enforce a common method for calculating price estimates. This can only result in narrowing of the range over which prices for any given job will be quoted. Joint activity among competitors to implement a uniform system for determining price estimates approaches price fixing far too closely to sanction. Further, it is difficult to imagine a more fertile field for outright price collusion than a training program for price estimators run jointly by competing companies. A concerted elimination of price rebates would, of course, also violate the antitrust laws.

The Commission is aware that the Motor Carrier Act of 1935 prohibits household goods movers both from allowing rebates and from deliberately underestimating moving charges. 49 U.S.C. 317(b). The Commission is also aware that, under the Reed-Bullwinkle Act, competing motor carriers may establish uniform rates and obtain ICC approval immunizing those rates from the operation of the antitrust laws. 49 U.S.C. 5b(9). However, both the statutory injunction in Section 317(b) and the statutory exemption in Section 5b(9) apply only to the extent that the Interstate Commerce Commission has jurisdiction over the commerce involved. 49 U.S.C. 302(a), 303(a)(10), 5b(1)(A). In addition, the Institute’s program will plainly affect commerce *not* within the

ICC's regulatory ambit as well as commerce within the ICC's jurisdiction. The commerce subject to ICC regulation is not as broad as that susceptible to Federal Trade Commission jurisdiction. *Compare* 15 U.S.C. 45(a)(1), *as amended, with* 49 U.S.C. 302(b)(1), 303(b)(8).

Moreover, with respect to the Reed-Bullwinkle Act, Section 5b(6) of that statute limits immunity to *voluntary* price-fixing agreements. In the Commission's view, the Institute's proposal presents ample opportunity for coercive activity designed to force uncooperative competitors into compliance with a uniform rate schedule.

The Commission also notes in passing that the proposal appears to involve other potentially anticompetitive elements undesirable in industry codes of ethics, such as vague standards for refusing and revoking certification, failure to adopt less restrictive alternative methods, and inadequate attempts to minimize opportunities for abuse of the disciplinary processes.

Finally, Section 10 of the Code of Ethics requires that participating estimators hold themselves out to the public as "certified moving consultants." When employees who essentially operate as salesmen (such as do moving estimators) are designated as "consultants," deception may result. Cf. Guide 7(b) for *Private Vocational and Home Study Schools*, 16 C.F.R. 254.7(b).

With respect to the problem of consumer deception caused by underestimation of moving charges, the Commission notes that on August 6, 1976, the Interstate Commerce Commission directed the opening of a proceeding to consider problems associated with moving cost estimation. The ICC's report states that, in light of extreme consumer dissatisfaction with the present cost estimating system, "an exhaustive analysis of existing practice coupled with an intensive review of existing Commission regulations should now be undertaken." Ex Parte No. MC-19 (Sub-No. 23): *Practices of Motor Common Carriers of Household Goods* (Experiment for Improving Accuracy of Estimates—Reentitled—Investigation of Estimating Practices), 125 M.C.C. 307, 316 (1976). Among the question specifically proposed for resolution are the following:

- (e) Should estimators be required to register with this Commission and/or be certified? Should standards be developed to which estimators would be required to conform? Should the methods of training and compensation for estimators be regulated? If so, what methods should be prescribed? What would be the pitfalls of such requirements? *Id.* at 317.

Accordingly, it appears that the ICC will have before it for considera-

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tion, *inter alia*, issues respecting consumer deception and possible solutions in the form of certification, performance standards, and training programs for moving estimators.

The Federal Trade Commission, of course, considers in this opinion only so much of your request as may fall within its own jurisdiction.

By direction of the Commission.

Letter of Request

June 17, 1975

Gentlemen:

Enclosed please find original application and five copies for informal advisory opinion upon the validity, under the Federal Trade Commission Act, 15 U.S.C., Sec. 1 *et seq.*, of the organization and activities of the National Institute of Certified Moving Consultants, organized under the General Not for Profit Corporation Act of the State of Illinois.* This application is submitted in accordance with FTC, Procedures and Rules of Practice, Section 1.1.

I would appreciate acknowledgment of the receipt of said application.

Very truly yours,
BRODSKY, LINETT and ALT-
MAN
/s/ David Brodsky

* The material submitted is not reproduced herein but is available for inspection at Public Reference Branch, Room 130, Federal Trade Commission, Washington, D.C.

Compliance advisory opinions as to whether truck driver training schools have properly determined which of their former students are eligible for partial tuition refunds under a consent order (88 F.T.C. 55, Dkt. 9026).

Opinion Letter

April 8, 1977

Gentlemen:

This is to advise you that the Commission has given consideration to your submission, under cover of your letter of January 26, 1977, of questionnaires which you have sent out pursuant to the order in the above-referenced matter and the determinations you have made with respect thereto regarding eligibility for tuition refund as prescribed by said order. In accordance with said order, you have submitted said questionnaires for review by the Commission and an advisory opinion as prescribed in Section 3.61(d) of the Commission's Rules of Practice.

Except as noted below, the Commission has determined that your submission represents compliance with the applicable order provisions regarding eligibility of former New England Tractor Trailer students for partial tuition refunds.

As a preliminary observation, the Commission has noted that a number of the questionnaires are payable because, under item 6, the former students did not attain employment as tractor trailer drivers after leaving your school, and such students met the other criteria for eligibility contained in the Commission's order.

Several questionnaires, however, were determined by you to be payable even though item 6 was answered in the affirmative, indicating that the former student successfully attained a job as a tractor trailer driver after leaving your school. The Commission's order defines "eligible class member" to comprise those students who *did not* attain the stated employment. Accordingly, the Commission is of the opinion that those questionnaires which contain an affirmative answer to the question in item 6 — Have you ever attained a job as a tractor trailer driver after you left the school? — are not payable.

The Commission has also noted that a second category of questionnaires were determined by you to be payable even though the former students provided information under item 2 showing that they enrolled in your courses either before January 1, 1973 or subsequent to December 31, 1973. The Commission's order defines "eligible class member" as those

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students who enrolled during the period of time from January 1 to December 31, 1973 in your tractor trailer courses. Accordingly, the Commission is of the opinion that under the terms of its order, students who do not meet this requirement are not eligible for partial refunds of tuition. Also, the Commission is of the opinion that your determination of date of enrollment should not be based exclusively on a student's response to item 2 of the questionnaire but should take into account documentation submitted with the questionnaire, or otherwise in your possession, reflecting the actual date of enrollment.

It is the opinion of the Commission, based upon the information furnished that with the two exceptions noted hereinabove, your eligibility determinations under Part III, paragraph 5 of the Commission's order represent compliance with that provision to the extent that your obligations under other order provisions have been fulfilled. This opinion is not intended to apply to any other duties or obligations imposed upon you by the order other than your responsibility under Part III to make initial determinations as to who constitutes eligible class members for purposes of the required tuition refunds.

Chairman Collier continues to object to the rules which govern eligibility for refunds in this case and which are the subject of this request for advice.

The student questionnaires are being returned to you under separate cover.

By direction of the Commission.

Letter of Request

January 26, 1977

Dear Mr. LaDue:

We are submitting the enclosed questionnaires* in accordance with docket #9026. These questionnaires are separated as to the Corporations and are also in alphabetical order.

After careful review of the 567 questionnaires, 1 of which is a duplication, it is our opinion that every 1973 enrollee who answered the questionnaire is eligible for refund.

Please return the questionnaires, along with your comments, timely, so

* Not reproduced herein.

that we may issue checks in accordance with rules and regulations of docket #9026.

Sincerely,

New England Tractor Trailer
Training of Connecticut, Inc.

/s/

Arlan Greenberg
President

P.S.

Please note that any address changes were recorded on the bottom of the questionnaire, therefore the questionnaires are needed for mailing out refunds.

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Trade Regulation Rule on Preservation of Consumers' Claims and Defenses, 16 C.F.R. 433, does not create new rights for the consumer against the seller but merely preserves claims and defenses a consumer may assert against a seller so that he may raise them against the holder of the contract when the contract is negotiated or transferred (File No. 773 7007).

Opinion Letter

April 6, 1977

Dear Mr. Ambrose:

This is in response to your letters of January 28, March 17 and May 12, 1976, concerning the Trade Regulation Rule on Preservation of Consumers' Claims and Defenses, 16 C.F.R. 433. Specifically, you request: (1) that the rule be repealed or amended to conform to the Commission's authority; and (2) an advisory opinion as to whether the rule confers any rights on consumers to withhold payment either from the original holder of a consumer credit contract or from a subsequent holder of the contract.

In considering the rule the Commission provided a substantial opportunity for interested parties to file written data, views and arguments. In addition ample opportunity was provided for interested parties to testify at public hearings. A history of the rulemaking proceeding appears at 40 F.R. 53506 (1975). The rule was promulgated pursuant to and in accordance with Section 6(g) of the Federal Trade Commission Act, Sec. 202(c) of the Federal Trade Commission Improvement Act (Pub. Law 93-637) and all other applicable law. A legally sufficient Statement of Basis and Purpose for the rule was published with the rule. *See* 40 F.R. 53506 - 53529 (1975). Your requests for repeal or amendment of the rule are accordingly denied.

The Trade Regulation Rule, in pertinent part, provides that it is an unfair or deceptive practice for a seller, directly or indirectly, to take or receive a consumer credit contract which fails to provide a notice, as specified, that holders of the contract are subject to all claims and defenses which the debtor (consumer) could assert against the seller.

The rule does not create new rights for the consumer against the seller. Claims and defenses of a consumer, assertable against a seller under state law, remain unchanged under the rule. When a consumer contract is negotiated or transferred, the rule, through the required contract notice, merely preserves the claims and defenses a consumer may assert

against a seller so that he may raise them against the holder of the contract. Accordingly, if the consumer, under applicable law, is entitled to withhold payment from the seller, he may, pursuant to the notice, withhold payment from the holder.

By direction of the Commission.

Third Letter of Request

May 12, 1976

Dear Mr. Tobin:

Thank you for your telephone call on May 10, 1976 to notify me of the decision to deny the ICCA's petition for repeal of its trade regulation rule on preservation of consumers' claims and defenses. We appreciate that thoughtful effort.

Today I received your lengthy letter of the same date, which misidentified the International Consumer Credit Association as the International Consumer Finance Association. Presuming that this error arose from pressure of time in preparation of the letter rather than actual confusion between our organization and the National Consumer Finance Association, I and the ICCA's legal counsel are concerned because your letter states that the Commission considered only one letter from the ICCA and only one petition among several under Section 553(e) of the Administrative Procedure Act.

Although your letter of May 10 explains reasons for denial of those petitions filed by other associations it names, it does not seem to address itself to any of our petitions. Since we do not regard it as complying with the requirements of Section 555(e) of the Administrative Procedure Act, we hope that you will agree that we have a legitimate concern regarding whether our petitions have received due process of law and that you will therefore act promptly to relieve that concern.

My letter of January 28, 1976 to Acting Chairman Dixon requested a Commission interpretation of its trade regulation rule on preservation of consumers' claims and defenses. Failure of the Commission to respond to that petition led to a second petition on March 3, 1974, addressed to Mr. Christofer W. Keller, urging repeal of or amendment of the trade regulation rule on grounds of denial of due process of law for this and other stated reasons.

As a result of receipt of Ms. Dewey's letter of March 3, 1976, I wrote

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again to Acting Chairman Dixon on March 17, 1976. That letter again protested denial of due process of law, and it certainly should have been considered by the Commission in connection with both of the earlier petitions, not only because of bearing on the earlier petitions, but because that letter closed with a request for postponement of the effective date by the Commission until it had acted on our other petitions, which we regarded at that time and now as essential in affording us due process of law. Consequently, our request for postponement is quite different from those petitions for postponement filed by other trade associations.

We believe that your letter of May 10, 1976 did not provide reasons for denial of our petition for repeal or postponement and did not address itself at all to our petitions for interpretation and amendment of the rule.

Section 555(e) of the Administrative Procedure Act states: "prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

This letter is not intended as an appeal with regard to any denial of our petitions, but rather to seek clarification of the status of the following petitions and a brief statement of the grounds for denial of any that have been denied by the Commission with identification of the date of Commission action:

- 1) Our petition for interpretation by the Commission of whether this trade regulation rule is intended to confer any right on the consumer to withhold payment either from an original creditor or any subsequent holder in due course. We have been informed that the Commission's general counsel is preparing an advisory opinion in response to this petition. We are compelled to comment that delay in the issuance of an interpretation of a rule promulgated so many months ago should not be occurring if the Commission and its staff understand their own rule, the purposes for which it was issued, and its probable legal effects.
- 2) Our petition for repeal of the trade regulation rule on grounds of lack of statutory authority to issue it, especially since it is intended to abrogate and/or pre-empt the laws of most if not all states.
- 3) Our petition for amendment of the rule to conform to the Commission's authority to prevent unfair and deceptive acts or

practices, to conform to the requirement of the Magnuson/Moss Act relating to specificity of prohibited acts or practices and to conform to a requirement that the rule include a statement of findings and purpose as required by law. This petition alleged that the Commission has no authority to preserve consumer claims and defenses, per se, nor to issue a trade regulation rule for such a purpose.

4) Our petition for postponement of the effective date of the trade regulation rule was conditioned only on the need of the Commission itself for time to adequately consider and respond to the above three petitions.

This and other correspondence which I have transmitted to the Commission and its staff was written to meet the responsibilities of the Board of Directors of the International Consumer Credit Association to nearly 45,000 American members. May I have an early reply so that I can provide an accurate report of the Commission's actions on our petitions as soon as possible. Thanks for your cooperation.

Sincerely yours,

/s/ JAMES A. AMBROSE
Secretary-Treasurer

Second Letter of Request

March 17, 1976

Dear Mr. Dixon:

On January 28, 1976, I wrote to you on behalf of the International Consumer Credit Association to formally request interpretation by the Commission of its trade regulation rule on preservation of consumers' claims and defenses. The purpose of that letter was to raise and hopefully settle at least one question of constitutionality as part of the official record of the proceedings.

Failing to receive anything but a form letter acknowledgment of this request by March 3, 1976 from Mr. Christofer W. Keller, presiding officer for the proceedings on this rule, I wrote on that date to Mr. Keller to petition the Commission under Section 553(e) of the Administrative Procedure Act, a part of the Commission's statutory authority for promulgation of its rule on consumers' claims and defenses. In response, as of this date, we have received another fill-in form letter from Mr. Keller identical to the acknowledgment of my letter of January 28.

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Attached is a copy of a letter dated March 3, 1976, which I received on March 8, 1976 from Anne E. Dewey, Division of Special Projects, apparently as a result of improper referral to her for a reply.* We asked for an interpretation from the Commission itself, which would be binding thereafter not only on the Commission but on the federal courts as well. We did not ask for an informal staff opinion, which has no legal standing of any kind.

Under due process of law, our request required either its denial by the Commission itself or issuance of an interpretation by the Commission itself. We recognize that the Commission had an option, but also a duty either to deny our request or to respond to it affirmatively through issuance of an interpretation. Unless the referral of my letter to Ms. Dewey was inadvertent, that referral was denial of due process of law, because the Commission did not have the option of a staff opinion letter.

Despite that fact, I am compelled to comment in respect to several statements in Ms. Dewey's letter. A copy of that letter is attached for your convenience.*

Any present or even past authority which the Commission has in promulgating trade regulation rules is limited to prevention or prohibition of specific unfair and deceptive acts or practices in or affecting commerce. Any act or practice covered by a trade regulation rule must in fact be unfair and deceptive in all instances. Rules promulgated under P.L. 93-637 may include requirements, but only as corollaries to stated provisions of such rules which prohibit specific acts or practices. The Commission has no authority to legislate generally, nor to pre-empt or repeal or annul either statutory or common (decisional) laws of the states. If the Commission does not agree with that view of its authority, I will appreciate information on its interpretation of P.L. 93-637 and/or the Federal Trade Commission Act.

The second paragraph of Ms. Dewey's letter specifically states that it is the intention of the trade regulation rule on consumers' claims and defenses to repeal the holder-in-due-course doctrine. She specifically used the legal term "abrogate," which means to annul by an authoritative act, to abolish or to repeal, revoke or cancel. The Commission has no such authority.

Ms. Dewey states that it is the intention of this rule to abrogate the

* Not reproduced herein.

doctrine which permits the separation of the duty to pay from the duty to perform in the context of consumer credit transactions. Neither this rule nor any other promulgated by the Commission has declared that failure in performance by a seller is an unfair or deceptive act or practice. Further, the promulgated rule would make a holder in due course liable for any claim or defense which a consumer could assert against a seller, even when the seller has not been involved in any unfair or deceptive act or practice, fraud or any other form of misconduct. Consequently, the rule sets a requirement which is not a corollary of any prohibition, other than the taking or receiving of a contract which does not meet that requirement.

Ms. Dewey's letter, in its third paragraph states, quite incorrectly, that the rule permits a consumer to withhold payment from a subsequent holder of his contract if state law grants him the right to withhold payment in that situation from his immediate seller. It is clearly the intention of the Commission through promulgation of this rule to abrogate, as Ms. Dewey stated, the holder-in-due-course doctrine, which gives a third party holder immunity from all claims and defenses which a consumer may have against a seller. The rule even abrogates or pre-empts the laws of those states which have either abridged or outlawed the holder-in-due-course doctrine as codified in the Uniform Commercial Code.

If it is the intention of the Commission to merely preserve consumers' claims and defenses, then it can do so by amending its rule to prohibit the inclusion in credit contracts or agreements of any provisions which would grant immunity to any holder in due course from any claim or defense which the buyer may assert, either affirmatively or defensively, against a seller under state laws. But even if the Commission would amend its rule in this fashion, it would still lack statutory authority of any kind to promulgate the rule because it would not serve to prohibit any specific unfair or deceptive act or practice. The consumer problems which the Commission intends to resolve or alleviate through this rule are problems which cannot be properly handled through rulemaking, but which the Commission can appropriately handle on a case by case basis where its acts against a seller for unfair or deceptive acts or practices, such as in the case of Main Street Furniture, Inc., FTC Docket No. 2772, announced on January 28, 1976.

Ms. Dewey's letter asserts that the Commission has both a duty and authority to enforce state statutes and decisional law through promulgation of a rule which is intended to preserve consumer rights and remedies established under such laws. We disagree, and our position is

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supported by that of the National Association of Attorneys General, as expressed in two resolutions it adopted at its recent Mid-Term Meeting in Scottsdale, Arizona, and transmitted to Congress.

However, the Federal Trade Commission does have a duty to taxpayers to use the funds appropriated by Congress in proper exercise of its duties and responsibilities under federal laws, one of which is to uphold and defend the Constitution of the United States as the supreme law of the land and therefore involves supreme duties and responsibilities. It was in recognition of this that the International Consumer Credit Association has asked the Commission for a formal interpretation of its trade regulation rule, and why the Association has subsequently petitioned the Commission for amendment or repeal of its rule.

Consequently, we will appreciate early formal action by the Commission on both our request for an interpretation and our petition for amendment or repeal. If the Commission cannot take quick action in either instance, then we also request a postponement in the effective date of its trade regulation rule beyond May 14, 1976, until such time as the Commission will have acted.

Sincerely yours,

/s/ JAMES A. AMBROSE
Secretary-Treasurer

First Letter of Request

January 28, 1976

Dear Mr. Dixon:

On January 26, 1971, the Federal Trade Commission proposed a trade regulation rule on preservation of consumers' claims and defenses, which it promulgated on November 14, 1975 to become effective on May 14, 1976. Because of a recent press release sent out by Rep. Frank Annunzio (D-Ill.), chairman of the House Subcommittee on Consumer Affairs, the International Consumer Credit Association requests interpretation of this trade regulation rule before its effective date to clarify whether or not it confers any right on consumers to withhold payment from either any original creditor or subsequent holder in due course.

When the Commission announced this proposed trade regulation rule, the ICCA filed a strong protest with both the Commission and Congress on grounds that such a trade regulation rule would be unlawful and

unconstitutional exercise of legislative powers, particularly because it would pre-empt both the Uniform Commercial Code and other statutes carefully considered by the legislatures of the various states. It was and continues to be our view that, if federal intervention is necessary in the law of contracts, only Congress (and not the FTC) has authority to legislate. It is our view that promulgation of this trade regulation rule by the Commission is a violation of the Civil Rights Act of 1964 per se.

Our Association has not taken a position with regard to any proposal at the state level of government to either outlaw or abridge the so-called holder-in-due-course doctrine. These proposals have been constitutional exercise of the police powers and duties of the states, and not efforts to reallocate losses arising from misconduct by sellers to ultimate creditors and thus to consumers in general. If any such laws confer on a consumer the legal right to withhold payment either to the original holder of a credit contract, agreement or note or to a holder in due course, we do not interpret them in such a manner.

However, in his press release on January 8, Congressman Annunzio indicated that the Commission's trade regulation rule will confer such a right. If that is a correct interpretation of the rule, a new question of constitutionality with regard to this rule emerges—one where there are related court decisions.

In recent years, many courts and the U.S. Supreme Court have given a great deal of cognizance to the need for hearings and due process of law in connection with replevins, garnishments and other activities of creditors conducted "under color of law." Replevins and garnishments have been declared unconstitutional for lack of hearings and due process of law. The Commission should be aware of such decisions and the basis for them. But it should be also aware that, unless the Supreme Court ultimately decides otherwise, so-called "self-help" repossession has been regarded by a number of state and federal courts as constitutional because the property was not taken by the creditor under color of law. We do not believe that the courts will deny creditors the same rights as consumers.

When a consumer buys goods or service from a retailer who remains the creditor, he does not exercise any right under color of law if he refuses to pay this creditor in the event of dissatisfaction arising from the purchase. Consumers frequently do this in disputes with retailer creditors where there is no element of deceit, dishonesty, fraud or misconduct on the part of the retailer. They do it in connection with simple disputes. But when they do it, they do so at their own risk. It

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gives them an unfair leverage in having a dispute resolved in their favor. The retailer will often give them their way even when his cause is just, because the cost will be less than the nuisance and cost of resolving the dispute in court.

We disagree with the Commission's view that the common law holder-in-due-course doctrine arose solely in commercial credit and has no application in consumer credit transactions. To have immunity from buyers' claims and defenses, a holder in due course under the doctrine had to be dealing "at arm's length." It did not include the commercial situations leading to the abuses which the Commission is attempting to correct until the doctrine was codified and corrupted through the Uniform Commercial Code, which grants immunity if the third party financing source is merely "dealing in good faith." We made that point unsuccessfully with the National Conference of Commissioners on Uniform State Laws through correspondence before the Commission proposed its rule.

Section 5 of the FTC Act authorizes the Commission to prevent unfair and deceptive acts and practices in commerce. The Commission proposed its trade regulation rule on preservation of consumers' claims and defenses under that authority. If the Commission's proposal or even the much simpler and briefer one it finally adopted were limited to situations involving fraud, deceit, deception or any other clear form of misconduct by sellers, its authority and the constitutionality of the rule would hardly be in question. But the final rule more frequently will apply to simple, uncomplicated disputes between buyers and sellers involving a third party financing source, who sometimes will be as powerless as either of the other two parties to equitably resolve the dispute. Further, the rule will apply to many situations in which the seller is a totally innocent party and there is misconduct on the part of the buyer.

The brief rule published on page 53506 of the issue of the *Federal Register* for November 18, 1975 places a clear duty on sellers. It is limited to giving a prescribed notice. But the rule is totally moot on the rights of buyers arising "under color" of this law. And the effect of the rule on creditors, as that term is defined in the rule, is indefinite. The term "creditor" includes both retailer creditors and third party financing sources, such as banks and time sales finance companies. The required notice states "any holder," so it would seem to apply to any retail credit contract, not just those that will be sold to third parties. So the question of how "creditors" may violate this rule and thus become

subject to FTC action is open to a great deal of both uncertainty and speculation.

In his press release, Congressman Annunzio said that this rule will hurt only disreputable businesses. That does not appear to be the case.

When a consumer buys goods or services from a retailer on credit and the retailer remains the creditor, the consumer may withhold payment to exercise his rights and remedies. His situation is analogous to that of a creditor who engages in self-help repossession, except for one factor. The consumer exercises his rights and remedies at his own risk, and he may not be aware of the extent of that risk.

The Commission's rule will apply to retail sellers who remain as creditors and to those who transfer their contracts to third parties. It will also apply to those third parties and to consumers. The required notice states: "Any holder of this consumer credit contract is subject to all claims and defenses which the debtor could assert against the seller of goods or services obtained pursuant hereto or with the proceeds hereof. Recovery hereunder shall not exceed amounts paid by the debtor hereunder."

Any holder, including a retailer seller, is prohibited under the rule from taking or receiving, etc., any contract which does not bear this notice. The exception is retail sellers who remain creditors as credit card issuers.

The rule purports to preserve consumers' claims and defenses, but whether or not the seller continues to be a holder, the rule appears to cut off or limit claims of any type, such as damages, because the notice also says: "Recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder." Thus, the rule could result in graver injury to consumers than the abuses it seeks to correct.

If the rule confers a right on the consumer to withhold payment to a creditor and that right is exercised, the exercise is "under color of law." The creditor is deprived of money or other property without a hearing and due process of law. The creditor would be denied constitutional rights in a situation which is analogous to *Fuentes v. Shevin*, in which the U.S. Supreme Court outlawed replevin statutes of many states. This denial would result solely from the Commission's rule, in conflict with the Civil Rights Act of 1964.

Consequently, we urge the Commission to interpret its own trade regulation rule before it becomes effective to determine whether or not

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it is intended to confer a right to withhold payment and, if so, under what circumstances.

Through the Fair Credit Billing Act, Congress has exerted its authority to regulate holder in due course matters relating to credit cards. In this, it exercised authority to pre-empt state laws. That authority has not been challenged to date. Perhaps the Commission should reconsider its position regarding issuance of a trade regulation rule on preservation of consumers' claims and defenses by referring the matter to Congress for appropriate legislation. None of the Commission's efforts would be wasted if Congress would accept such a recommendation.

Sincerely yours,

/s/ JAMES A. AMBROSE
Secretary-Treasurer

Obtaining only the signature of the insured party on personal insurance form when personal insurance is selected or the signature of either co-maker if personal insurance is declined constitutes compliance with the requirements of the order to cease and desist (82 F.T.C. 1841, Dkt. C-2420).

Opinion Letter

May 6, 1977

Dear Sirs:

The Commission is in receipt of the communications from your counsel, James H. Rowe, Esquire, dated December 23, 1976, and January 21, 1977, with attached exhibits, which you have filed as a supplemental report showing the manner and form of your compliance with the order to cease and desist issued on June 26, 1973, in the above case.

The Commission has reviewed the supplemental report of compliance and has concluded, on the assumption that the information submitted is accurate and complete, that no compliance action by the Commission is indicated at this time. The Commission will not be precluded, however, from instituting appropriate action should it subsequently appear that such information is inaccurate or incomplete. In addition, the Commission may at any time reconsider, revoke, or rescind such determination should it subsequently appear that such information is inaccurate or incomplete, or if action had been taken in violation of the terms of the order.

In his letter of January 21, 1977, Mr. Rowe contends that the notification he made in that letter of Commercial Credit Company's acquisition of Great Western Loan & Trust Company and its subsidiary, Great Western Finance Company, does not appear to be required by the Commission's order since these companies require the purchase of credit insurance and, as required by law, therefore include the credit insurance premiums in the amount of the finance charge in consumer loans. The Commission wants to make it clear that the notification was required by the order. First, the provisions of the order are not limited to requirements concerning the inclusion or non-inclusion of credit insurance premiums in the amount of the finance charge. Paragraphs 3 through 6 of the order impose additional requirements in connection with the granting of consumer loans. Secondly, a policy of an acquired subsidiary to require credit insurance does not remove the acquisition from the notification requirement of the order since the acquisition of a corporation engaged in the making of consumer loans and the sale of

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credit insurance may affect compliance obligations under any provision of the order.

By direction of the Commission.

Supplemental Letter Relative to Request

January 21, 1977

Dear Mr. Howerton:

Please note the penultimate paragraph of the Consent Order in the above-entitled proceeding which reads in full:

IT IS FURTHER ORDERED that respondent notify the Commission within thirty (30) days of any change in the corporate respondent which may affect compliance obligations with regard to the extension of consumer loans arising out of this order, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation with regard to the extension of consumer loans which may affect compliance obligations arising out of this order.

As of January 1, 1977, Commercial Credit Company acquired a new subsidiary, Great Western Loan & Trust Company, 1000 North Alamo, San Antonio, Texas. The new subsidiary, and one of its subsidiaries, Great Western Finance Company, at the same address, engage in the making of consumer loans and the sale of credit insurance.

However, as permitted by Texas law, credit insurance is *compulsory* for the consumer loans made, and all credit insurance charges are *included* in the finance charge. Hence, notification to the Commission of the foregoing acquisition does not appear to be required. Notification is required of only such corporate changes "which may affect compliance obligations with regard to the extension of consumer loans *arising out of this order.*" (Emphasis supplied). The Consent Order itself, and accompanying complaint are concerned with the *non-inclusion* in finance charges of credit insurance on consumer loans.

Nevertheless, the Commission is welcome to this advice of the new acquisition.

Sincerely,

/s/ James H. Rowe, Jr.

Counsel for Commercial Credit
Company

Letter of Request

December 23, 1976

Dear Sirs:

Enclosed, as requested, are two tables showing penetration rates on credit life and credit accident and health for October 1976, the latest month for which such rates are available.* In Arkansas which is listed on both tables as "0," the Company does no business. Eleven states are left blank on the table for credit accident and health because the Company does not offer credit accident and health in those states.

As I understand it from our conference, you will now submit to the Commission the question of whether, under the Consent Order, the Personal Insurance Authorization form must be presented for the signatures of both husband and wife where both are to be obligated for a consumer loan but only one of them is to be insured, and you will recommend that only presentation to, and the signature of the spouse to be insured is required.

Your courtesy and consideration are much appreciated.

Greetings of the Season to you.

Sincerely,

/s/ James H. Rowe, Jr.

* Not reproduced herein.

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When needed pharmaceuticals are unavailable or difficult to obtain, non-profit hospital may resell the needed pharmaceuticals to the general public as humanitarian gesture during emergency caused by medicaid strike (File No. 773 7009).

Opinion Letter

May 27, 1977

Dear Mr. Iseman:

This is in response to your letter of December 20, 1976, requesting advice concerning the exemption to the Robinson-Patman Act found in the Non-Profit Institutions Act, 52 Stat. 446, 15 U.S.C. 13c.

The Commission understands that your client, St. Peter's Hospital of the City of Albany, is a not-for-profit corporation currently receiving preferential price treatment in its purchases of pharmaceuticals as permitted by the above-cited exemption of the Robinson-Patman Act; that your client would like to resell pharmaceuticals, at cost, to a neighboring, not-for-profit nursing home which currently purchases its drug needs at retail from local druggists; and that your client would like to resell pharmaceuticals to the general public during the medicaid strike, should pharmaceuticals become otherwise difficult or impossible to obtain. You seek advice on whether such resales are permissible under the Robinson-Patman Act.

The Non-Profit Institutions Act exempts from the Robinson-Patman Act "purchases of their supplies for their own use by * * * hospitals, and charitable institutions not operated for profit." The Supreme Court in *Abbott Laboratories v. Portland Retail Druggists Ass'n. Inc.*, 426 U.S. 1 (1976), held that the phrase "for their own use" limited the classes of individuals to whom the supplies could be resold. However, the Commission does not believe these limitations were intended to apply to resales of supplies, at cost, by one charitable institution to another that are limited, in turn, to the latter charitable institution's own use. A resale of this nature would constitute a not-for-profit transfer of supplies from one institution, eligible under the exemption, to another such institution, also eligible under the exemption. In the Commission's view, the exemption was intended to insulate from Robinson-Patman application all purchases of supplies (for their own use) by the designated classes of institutions not operated for profit. The transactions, as above described, would not appear in conflict with such a purpose. The Commission, accordingly, would regard the resale, at cost, of pharmaceuticals by your client to the nursing home as not altering

its exempt status under the Non-Profit Institutions Act. Such pharmaceuticals must be acquired for the nursing home's "own use" as that language was interpreted in *Abbott Laboratories, supra*, for the exemption to apply.

The question of whether a non-profit hospital such as your client may open its pharmacy to the general public in an emergency situation was addressed specifically by the Supreme Court in the *Abbott Laboratories* case. We direct your attention to that portion of the decision which states that:

[W]hen the hospital pharmacy is the only one available in the community to meet a particular emergency situation [,] * * * [s]o long as the hospital pharmacy holds [that] situation within bounds, and entertains it only as a humanitarian gesture, we shall not condemn the hospital and its suppliers to a Robinson-Patman violation * * *. [*Id.* at 18.]

Accordingly, the Commission is of the opinion that if needed pharmaceuticals are not available or difficult to obtain, your client may resell the needed pharmaceuticals to the general public as a humanitarian gesture during the emergency caused by the medicaid strike.

By direction of the Commission.

Letter of Request

December 20, 1976

Dear Sir:

I represent St. Peter's Hospital of the City of Albany, (hereinafter the Hospital), a not-for-profit corporation organized and existing under the Not-for-Profit Corporation Law of the State of New York. Pursuant to 16 C.F.R. §1.1 *et seq.*, I am hereby requesting an advisory opinion from the Commissioner with regard to the following proposed sales of pharmaceuticals by the Hospital. I certify that the proposed courses of action herein described have not been and are not now being followed by the Hospital and upon information and belief, they are not the subject of a pending investigation or other proceeding by the Commission or any other governmental agency.

The Hospital operates its own pharmacy, and as a not-for-profit entity it enjoys the preferred price treatment permitted to such organizations by virtue of the non-profit institution exception to the Robinson-Patman Act. 15 USC §13c.

Geographically adjacent to the Hospital is the Villa Mary Immaculate

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Nursing Home (hereinafter the Nursing Home) which is also a not-for-profit corporation. The Hospital and the Nursing Home are completely separate corporate entities, but both are sponsored and controlled by different Orders of Religious Women under the canonical jurisdiction of the Bishop of the Roman Catholic Diocese of Albany. In this regard, the Hospital is sponsored by the Religious Sisters of Mercy, Albany, and the Nursing Home is sponsored by the Sisters of Allegheny.

The Hospital would like to sell its pharmaceuticals to the Nursing Home for the same reduced cost that the Hospital receives from its supplier. The Nursing Home does not have its own pharmacy and it is currently being supplied by local retail druggists. Is this a permissible sale under the not-for-profit exemption contained in the Robinson-Patman Act? If it is not a sale deemed to be for the Hospital's "own use," can it be justified on the grounds that the Nursing Home would itself be entitled to the preferential price treatment if it elected to operate its own pharmacy?

The second question concerning which I am seeking guidance relates to the impact of a medicaid strike being conducted by certain retail pharmacies in New York State. If needed pharmaceuticals are not available or difficult to obtain because of such a strike, is it permissible for the Hospital to sell these items to the general public?

Very truly yours,
DeGRAFF, FOY, CONWAY and
HOLT-HARRIS

/s/ Robert H. Iseman

89 F.T.C.

General audience film featuring, in the period-setting of contemporaneous news events, selections from the first 25 years of television commercials (File No. 773 7012).

Opinion Letter

May 27, 1977

Dear Mr. Sweda:

This is in response to your request for advice concerning production by your company of a general audience film to feature, in the period-setting of contemporaneous news events, selections from the first 25 years of television commercials.

The selections, as your request appears to presuppose, might include television ads involving advertising methods or representations against which, in the course of corrective enforcement actions, the Commission has issued inhibiting orders (*e.g.*, order proscriptions involving the use of deceptive mock-ups, misleading demonstrations, camera tricks that magnify, minimize or distort, cigarette advertising not appropriately disclosing the prescribed health warning, or the like).

Your request, in substance, seeks pre-clearance from the Commission for use of any such television commercials in the context of the proposed film. You have reported that no sponsoring relationship exists between the film and any product or service supplier whose past television commercials may be subject to selection for the film.

The Commission desires to assure you that, as to matters within its jurisdiction, it has no objection to the proposed feature film project. Please be advised, however, that this Commission assumes no position respecting possible applicability of any laws or regulations not within its enforcement authority.

Because the Commission may have taken enforcement action against and prohibited some of the advertisements which will be included in your feature film, the Commission hopes that you will consider including in the film a short, general disclosure to that effect.

By direction of the Commission.

Supplemental Letter Relative to Request

April 4, 1977

Dear Mr. Garvey:

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This letter is to confirm our telephone conversation of 31 March, 1977 regarding our request for the use of old television commercials in a feature film project.

1. The feature film project described in our request of 3 March, 1977 is for national and international distribution to movie theatres.
2. As producer of the film project, I alone am the final judge of what films and commercials will be used.
3. The investor, whether private or corporate, will have no creative control of the film, except to the extent of judging what film should *not* be used in the project on the basis of objectionability to the financial success of the film.
4. The primary and singular aim of the project is as a film of entertainment and documentation of the world of the T.V. commercial. In no way is the project to be used as an advertising vehicle for an investor.
5. There will be no intentional use of misleading ads in the film project. I am considering a section from the 90-minute length to show the glaring deception practiced by some unscrupulous advertisers.

May I again stress the urgency for an early ruling as I want to release the film sometime in December of this year. As we cannot begin to work even on the selection of 100-200 commercials from the more than 200,000 commercials in existence, I think you can understand my need for expediency.

Sincerely,

/s/ F. Wendell Sweda
President

Letter of Request

March 3, 1977

Dear Mr. Secretary;

Subject: Request for an advisory opinion ruling.

Petitioner: SSE Communications

Re: Feature film project, tentatively titled, "And Now A Word From Our Sponsor* * *."

We at SSE Communications are working on a feature film project for national theatre distribution. We are putting together the best of the first 25 years of the American television commercial. Cooperating with us in this project are the Museum of Modern Art and the Screen Actors' Guild.

Television commercials represent a cross-section of the entire lifestyle of our generation. They epitomize the tastes, jobs, personal identities, conveniences, entertainment, leisure, desires and fantasies which reflect this television age.

The film is best described as a compilation of some of the best television commercials put together as an entertainment vehicle. It will be a General Audience feature production.

From nearly 200,000 commercials to choose, approximately 100 of the best will be included. Many are regarded as classics for their techniques, approach, interpretation, and reflection of our times. They are classics in entertaining the viewer.

We plan to use noteworthy filmed news events, i.e., the first space shot, Krushchev using his shoe at the U.N., etc., to re-orient the viewer to the various time periods within the 25-year history.

Because the Film Department of the Museum of Modern Art classifies the television commercial as an art form unto itself with genuine artistic and historic merit, we are donating a percentage of the gross to the Museum's Film Archives Department for the further preservation of films. We are also donating an equal percentage of the film's gross to the Screen Actors' Guild for a special fund for old actors' homes in New Jersey and California.

Therefore, SSE Communications respectfully requests an affirmative ruling to the use of old television commercials (including those, because of their age, that no longer conform to current F.T.C. regulations) for this specific project.

Sincerely,

/s/ F. Wendell Sweda
President

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**Proposed advertising and sale of information concerning the
Taxpayers' Service of the Internal Revenue Service (File No. 773
7011).**

Opinion Letter

June 9, 1977

Dear Mr. Chasnoff:

This letter is in response to your request for an advisory opinion on behalf of your client, Information Foundation, Inc., concerning the proposed use of submitted advertising copy. For a fee, your client anticipates sending to persons responding to the proposed advertisement information about the Internal Revenue's Taxpayers' Service, including services available under that governmental program, and advice about how to use that program effectively.

Because, in the Commission's view, the advertisement has the capacity to mislead the public into believing that your client itself is offering to provide, for the \$5 fee listed, both tax advice and tax preparation services, the Commission cannot approve the advertisement in its present form. With appropriate changes, however, the Commission believes your marketing proposal would comply with laws it administers. Please be advised that the Commission has not reviewed, and therefore does not endorse, the accuracy of any of the technical information and advice your client proposes to send to consumers.

By direction of the Commission.

Letter of Request

February 8, 1977

Gentlemen:

This office represents Information Foundation, Inc. which has requested that I obtain from you an advisory opinion respecting the advertisement they will be placing in various printed media, including newspapers, magazines, journals, and printed flyers. Also enclosed, in addition to the advertisement, is the printed material they will be forwarding to persons responding to the advertisements.*

It would be appreciated if you would submit an advisory opinion to me respecting the legality of the advertisement in accordance with Federal

* Not reproduced herein.

Trade Commission rules and regulations. I shall be happy to be of any assistance to you should you desire additional information.

Sincerely,

/s/ Joel Chasnoff

PROPOSED ADVERTISEMENT

GET TAX ADVICE AND YOUR FEDERAL RETURN PREPARED FREE BY EXPERTS. FOR DETAILS ABOUT THIS LITTLE-KNOWN U.S. GOVERNMENT PROGRAM, SEND \$5.00 TO INFORMATION FOUNDATION, INC., P.O. BOX 246, BURTONSVILLE, MARYLAND 20904.

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Compliance advisory opinion that proposed use of a "Confidential Dealer Cost List" would not violate Commission order (88 F.T.C. 24, Dkt. C-2828).

Opinion Letter

June 17, 1977

Dear Mr. Schwab:

The Commission has considered the request for advice as to whether United Audio Products, Inc. (United) may engage in a proposed course of action, whereby United would issue a "Confidential Dealer Cost List," without violating the order issued by the Commission on July 12, 1976, in the captioned matter.

The proposed "Confidential Dealer Cost List" would have a cover sheet notifying the retail dealer that United does not maintain any fair trade programs, prices are for informational purposes only, the approximate nationally advertised values are for informational purposes only, all retail dealers are free to set their own resale prices, no employee or representative has authority to advise or suggest to a retail dealer any resale price, no favorable or unfavorable treatment will be given to a dealer based on his selection of a resale price, and United does not intend to sanction any deceptive practices.

The proposed cost list is a multi-column list containing a column for item description, item cost to the retail dealer, gross margin price columns ranging from 15 percent to 45 percent which reflect the price a retail dealer would charge to obtain a specific gross margin on the sale of United's products, an "Approximate Nationally Advertised Value" column, and a blank "Your Price" column.

On the basis of the facts submitted, you are advised that the Commission is of the opinion that the proposed use of the "Confidential Dealer Cost List" would not violate Commission order No. C-2828.

By direction of the Commission.

Second Supplemental Letter Relative to Request

May 9, 1977

Gentlemen:

Responding to your letter of May 3, 1977, we would advise as follows:

United Audio Products, Inc. is about to introduce a completely new product line of record players which will be launched in June and will be nationally advertised in the manner as shown on the enclosed advertisement.*

It is therefore essential that we have prepared a dealer price list such as we submitted to you which is in every respect similar in form to dealer price lists used by competitors with your knowledge and approval.

The approximate nationally advertised value is predicated upon the comparative values of similar products in the market place consistent with the cost thereof to the dealer. The dealer has the unrestricted right to fix his own margin of profit and selling price.

We do trust to receive a response as soon as possible since we must have our dealer price list ready for distribution by June 1, 1977.

Very respectfully yours,
UNITED AUDIO PRODUCTS,
INC.

/s/ By

Rudolph Taplitz

First Supplemental Letter Relative to Request

April 25, 1977

Gentlemen:

United Audio Products, Inc., the marketer of Dual Audio Products, which is operating under the Federal Trade Commission Consent Order of July 12th, 1976, finds itself under a distinct competitive disadvantage in refraining from communicating to its dealers the nationally advertised values of its products, a practice indulged in by all its competitors, including those operating under an identical F.T.C. Order.

The practice is not intended to suggest or dictate to the dealer the resale prices of the products as is indicated in the cost sheet of the enclosed proposed notice to dealers, but is intended to show the comparative value of Dual products in the marketplace.

* Not reproduced herein.

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The enclosed form of cost list* is identical with that authorized by the F.T.C. in the case of competitive products operating under similar F.T.C. consent orders and it is submitted that we, in fairness, should have the same privilege.

Under the circumstances, pursuant to the provisions of Paragraph 3.61 D of the Rules of The Commission; we respectfully request advise from the Commission as to whether the proposed course of action as indicated in the form annexed hereto, will constitute compliance with the order of July 12th, 1976. We wish to add that:

1. The course of action indicated is not being followed by us and is proposed for the future.
2. The course of action indicated is not under investigation and is not nor has it been the subject of a current proceeding, order, or decree initiated or obtained by the Commission or any other government agency.

We trust to receive an early response.

Respectfully,
UNITED AUDIO PRODUCTS,
INC.
/s/ By

Rudolph Taplitz

Letter of Request

April 14, 1977

Dear Mr. Cohen:

United Audio Products, Inc., the marketer of Dual Audio Products, which is operating under the Federal Trade Commission Consent Order of July 12th, 1976, finds itself under a distinct competitive disadvantage in refraining from communicating to its dealers the nationally advertised prices of its products, a practice indulged in by all its competitors, including those operating under an identical F.T.C. Commission Order.

The practice is not intended to suggest or dictate to the dealer the

* Not reproduced herein.

resale prices of the products as is indicated in the preamble to the enclosed proposed notice to dealers,* but is intended to show the comparative value of our products in the market place.

We enclose herewith a copy of a Pioneer Confidential Cost List,* which includes an approximate nationally advertised value. As we have indicated above, Pioneer and Dual are subject to identical F.T.C. orders.

We also enclose a Dual confidential cost list* containing a reference to the nationally advertised approximate values which is proposed to be used.

While we believe that such use is not in violation of the F.T.C. Order, we would like to discuss the matter with you at your office, at your earliest convenience.

We would appreciate your advice as to when we may have an appointment.

Very truly yours,
TAPLITZ & TAPLITZ
/s/ Rudolph Taplitz

* Not reproduced herein.

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