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CLEANING INSTRUCTIONS LABELING OF IMPORTED FABRICS DOCUMENTS

GOVERNMENT

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JUL 13 1971

HEARING

BEFORE THE

THE LIBRARY
KANSAS STATE UNIVERSITY

SUBCOMMITTEE ON COMMERCE AND FINANCE

OF THE

COMMITTEE ON

INTERSTATE AND FOREIGN COMMERCE

HOUSE OF REPRESENTATIVES

NINETY-SECOND CONGRESS

FIRST SESSION

ON

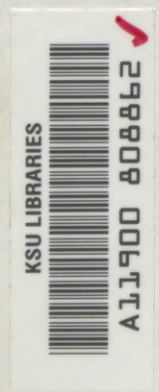
H.R. 6143

A BILL TO REQUIRE THAT CERTAIN TEXTILE PRODUCTS
BEAR A LABEL CONTAINING CLEANING INSTRUCTIONS

MAY 10, 1971

Serial No. 92-13

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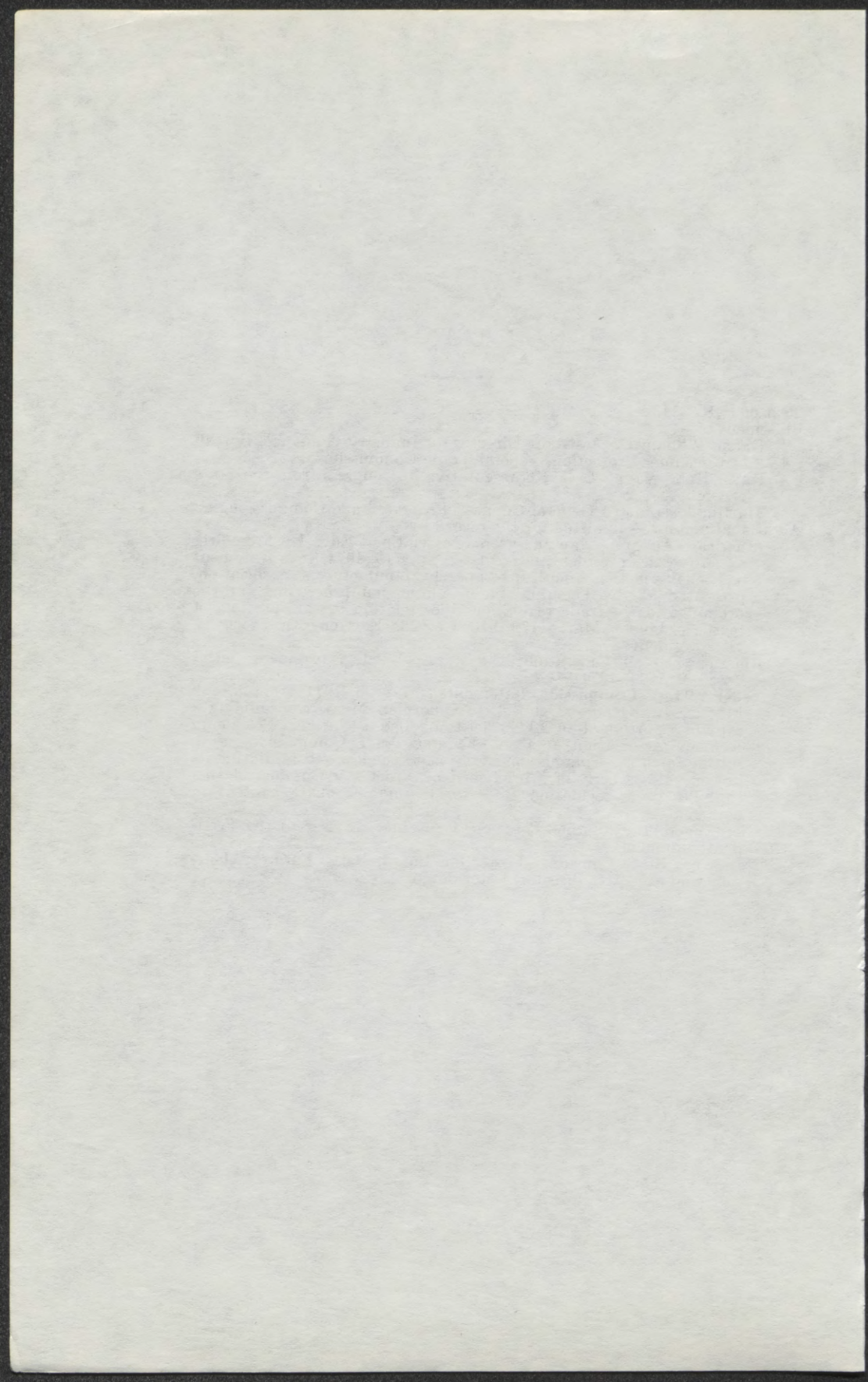
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CLEANING INSTRUCTIONS LABELING OF IMPORTED FABRICS

MONDAY, MAY 10, 1971

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COMMERCE AND FINANCE,
COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2322, Rayburn House Office Building, Hon. John E. Moss (chairman) presiding.

Mr. Moss. The subcommittee will be in order.

This morning the Subcommittee on Commerce and Finance is holding hearings on H.R. 6143. This bill was introduced by our colleague from Ohio, Mr. Wayne Hays, who will be our first witness.

Under the bill it would be unlawful to sell any textile product in commerce which was made in whole or in part of fibers, yarn, or fabrics in any section outside of the United States, unless the textile product bears a tag or label setting forth laundering or cleaning instructions. The bill is somewhat similar to trade regulations rule proposed by the Federal Trade Commission in 1969. The Commission-proposed rules, however, would apply on all textile products. It is my understanding that the Commission has held hearings on its proposed trade regulation rules but has taken no final action thereon. We shall also hear from the spokesman from the Commission too. (The text of H.R. 6143 follows:)

(1)

92^d CONGRESS
1st SESSION

H. R. 6143

IN THE HOUSE OF REPRESENTATIVES

MARCH 16, 1971

Mr. HAYS introduced the following bill; which was referred to the Committee on Interstate and Foreign Commerce

A BILL

To require that certain textile products bear a label containing cleaning instructions.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 SECTION 1. For purposes of this Act:

4 (1) The term "textile product" means any commodity,
5 made in whole or in part of fibers, yarn, or fabric manufac-
6 tured or processed outside the United States, which com-
7 modity is intended for sale or resale, in the form
8 manufactured, to consumer-purchasers.

9 (2) The term "laundering and cleaning instructions"
10 includes information with respect to dry cleaning and press-

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1 ing; washing, drying, and ironing; or other applicable pro-
2 cedures used to clean a particular textile product.

3 SEC. 2. It is an unfair method of competition and an
4 unfair or deceptive act or practice to sell any textile prod-
5 uct in commerce or to import any textile product into the
6 United States which does not have a label or tag perma-
7 nently affixed or attached thereto which accurately and
8 clearly discloses laundering and cleaning instructions for
9 such product which, if not followed, may result in the im-
10 pairment of its utility or appearance.

11 SEC. 3. (a) The Federal Trade Commission shall
12 prescribe such orders and rules as may be necessary to
13 carry out this Act.

14 (b) The Federal Trade Commission is authorized and
15 directed to prevent any person from violating the provisions
16 of this Act in the same manner, by the same means, and
17 with the same jurisdiction, powers, and duties as though
18 all applicable terms and provisions of the Federal Trade
19 Commission Act were incorporated into and made a part
20 of this Act; and any person violating the provisions of
21 this Act shall be subject to the penalties and entitled to
22 the privileges and immunities provided in the Federal Trade
23 Commission Act as though the applicable terms and pro-
24 visions of the Federal Trade Commission Act were incorpo-
25 rated into and made a part of this Act.

1 SEC. 4. Any textile product the importation of which
2 is made unlawful by section 2 of this Act shall be subject
3 to seizure and forfeiture under the custom laws of the
4 United States in the hands of the importer, his agent, or
5 any other person knowing or having reason to know of
6 such unlawful importation.

7 SEC. 5. Section 2 of this Act shall take effect on
8 the first day of the sixth calendar month beginning after
9 the date of enactment of this Act.

Mr. Moss. I am very pleased this morning to welcome as our first witness the gentleman from Ohio, Mr. Hays.

**STATEMENT OF HON. WAYNE L. HAYS, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF OHIO**

Mr. HAYS. Thank you, Mr. Chairman.

Mr. Chairman and members of the committee, first let me say that H.R. 6143 is a result of a conversation that I had in a meeting in my district with a couple of people in the drycleaning business who are constituents of mine, and I have no particular part of authorship in the exact text of the bill.

What we would like to do, very simply, is to have labels on imported textiles, especially, and I would have no objection to domestic ones also, setting forth some kind of basic cleaning instructions so that the person who does the cleaning knows what kind of a fabric he is dealing with.

This man said he had some trouble, a considerable amount of trouble, with imported fabrics, giving them a normal drycleaning that you would give a fabric made in this country. And sometimes these disintegrated, or holes would come in them: the customer then came back to him and said you did it, and, of course, he said we did it, but we did not know what kind of fabric we were dealing with, and we are more or less working in the dark.

I do not think he wanted, and I certainly do not want to penalize anybody, but it seems to me with the exotic new fabrics that are being invented almost daily, and the tremendous amount coming in something should be done. I think I got the distinct impression the ones they were having the most trouble with were the ones from Japan. Of course, I realize when you get fabrics in a bolt from any country it is not likely to tell what to do about drycleaning, but the manufacturer ought to know that and he ought to be able, without very much expense, to put some kind of label on it.

I was just talking with Mr. Martin from the Trade Commission here and I was telling him that occasionally when I go to England I buy woolen sweaters for my daughter who is high school age. I notice that the British are now putting labels in their woolen sweaters telling exactly how to launder them, use a certain temperature of water and a certain kind of soap and I assume they do this because they are very proud of their woolens and they probably want to make the customer happy so they will buy more.

I would just emphasize that there is no desire on my part to penalize anybody, but a desire to have these textiles carry some kind of a label so the people who have to clean them will know, as I said before, know what they are doing and what they are processing.

I know that the Federal Trade Commission has had hearings on this. Nothing much has happened, nothing much has happened up to now. I hope something will happen. If they can give some assurances that they are going to issue regulations that will cover this within a reasonable time, then maybe that would take care of it. As I say, I am completely openminded about it. I think there is a problem here that ought to be solved. Whether a regulation by the FTC is the

way to do it or whether legislation is, I will leave up to the good judgment of the committee.

I was kidding Mr. Martin a little bit. He said they are working on it and I said well, does that mean we will get some results in a few years and he said he hoped it would not be years. I have one of the former counsel down from the Trade Commission working on my committee, House Administration, as general counsel and he tells me anything the FTC does is a matter of years, not months. Now, perhaps having gotten that in the record, that might be some kind of stimulus to them to react a little more swiftly, and perhaps, Mr. Chairman, after you hear Mr. Martin you would stimulate him a little more, if that is the route you care to take.

Finally, let me say that if you think this bill can be amended to make it more simple, or even more precise, that is all right with me. I simply transmit my ideas of what we would like to have to the legal counsel around here and this is what they came up with, and as you know, not being a lawyer myself, I have to rely on somebody else for matters of this kind.

That is about all I have to say, Mr. Chairman. If the members of the committee have any questions I would be glad to try to answer them.

Mr. Moss. Well, I think this bill, having been drafted, shows that you have concerned yourself with a problem all of us have heard about. I know I have from the cleaners out in my own district complaining over their inability to determine the proper approach to taking care of certain types of garments that come in, and there seems to be no place they can go. I guess they can check with the National Institute of Dry Cleaners here in Washington, but sometimes the information is not accurate and the results are rather unfortunate.

Mr. Hays. If I may say so, Mr. Chairman, sometimes there is no way of knowing what to ask for because you just simply do not know what the fabric is. Now, maybe the National Institute of Dry Cleaners or maybe somebody knows what Terelyn relates to in our own nomenclature, but certainly I do not. It is just a name. It is a man-made fiber of some kind, but what it is composed of I have no idea.

Mr. Moss. The subcommittee will try to determine from the Federal Trade Commission the posture of their present rulemaking.

Mr. Broyhill.

Mr. BROYHILL. No questions. I just want to welcome Mr. Hays to the committee.

Mr. HAYS. Thank you, sir.

Mr. Moss. Mr. Eckhardt.

Mr. ECKHARDT. Mr. Hays, suppose this section 2 simply read that you cannot move such textile products in commerce if the product, (1) does not have a label or tag permanently affixed or attached thereto which accurately and clearly defines the material of which the product is made and (2) disclosed concerning such product procedures concerning laundering and cleaning instructions, et cetera, et cetera? What I am getting at is I really do not see any difference between products coming from out of the country or in the country except that there might be the necessity of some rather detailed disclosure that you could hardly put on a tag. What I am thinking of is

two conditions: (1) the definition of the product on the goods itself and, (2) a disclosure which some agency of government could require be published saying some proper place could be available to laundering and drycleaning establishments that would further disclose the nature of the product.

Mr. HAYS. I think, Mr. Eckhardt, that would work. I assume that all of these drycleaners have a handbook telling how to clean certain fabrics. If it said or told him the name of the fabric and said refer to the manual or something of that kind.

Mr. ECKHARDT. In most cases that would probably be enough, but in some cases, it might be a good safeguard to require, particularly the manufacturer in another country, to at least provide for the Bureau of Standards or some agency of the Federal Government a little more detail.

Mr. HAYS. I think that is exactly right. I think that would probably solve it. As I say, I have no particular pride of authorship in this language. I just tried to attack the problem so that the man who is doing the work will have some idea of what he is working with, and I think your suggestion would work all right. When I looked at this section I do not mind telling you that I wondered how much of a label you would have to have to carry all of the information necessary, and it might be, as you know, many manufacturers in the country put a label in that says do not launder, dryclean only. Many products bear that label, and you would assume, I guess if it said dryclean only, you could just use standard drycleaning procedures and the material would stand up. But, these people tell me some of the foreign stuff does not hold up under our standard drycleaning procedures. That is why we aimed at this. I have no objection to making it completely encompassing all fabrics as far as that is concerned, but they seem to think their big problem is with the imports with the stuff they just do not know how to handle.

Mr. ECKHARDT. Sure. Thank you, sir.

Mr. MOSS. Mr. McCollister?

Mr. MCCOLLISTER. No questions, Mr. Chairman.

Mr. MOSS. Mr. Hays, we thank you for coming here and giving us your views on the legislation. I assure you we will review it very carefully with the Federal Trade Commission.

Mr. HAYS. Thank you, Mr. Chairman.

Mr. MOSS. Mr. Martin, you and your associates—you gentlemen take a seat here.

STATEMENT OF JOSEPH MARTIN, JR., GENERAL COUNSEL, FEDERAL TRADE COMMISSION; ACCOMPANIED BY WILLIAM D. DIXON, ASSISTANT DIRECTOR FOR INDUSTRY GUIDANCE, BUREAU OF CONSUMER PROTECTION

Mr. MARTIN. Mr. Chairman and members of the committee, I would like to start out by saying that Chairman Kirkpatrick regrets that he could not be here today, but he had an appointment out of town, and the notice was rather short, and he could not break it.

Thank you, Mr. Chairman, for the opportunity to appear before

this committee to express my views on H.R. 6143, a bill to require that certain textile products bear a label containing cleaning instructions.

As you may know, the Federal Trade Commission has proposed a trade regulation rule relating to the care labeling of textile products. Such rules are designed to accomplish two objectives: (1) to furnish businessmen with specific guidance as to what the law requires; and (2) to assist the Commission in carrying out its enforcement responsibilities.

The proposed rule was issued by the Commission on November 4, 1969; public hearings were held in January and March 1970. Six days of hearings were held and 47 witnesses testified. In addition, literally hundreds of detailed statements and opinions were submitted for the public record. The public record closed in April 1970, and consists of 10 volumes, one of the largest records ever developed in connection with a proposed trade regulation rule.

Since the record closed, the Commission's staff has been working to prepare a report on the proceeding. This report has recently been completed by the staff and contains a detailed consideration of all the issues raised by the proposed rule and recommendations which the staff has made to the Commission.

The Commission has not yet had an opportunity to consider the staff report. Therefore, it would not be appropriate at this time for the Commission or its staff to comment on the substantive merits of H.R. 6143. Moreover, because the Commission has proposed a rule, has held extended hearings, and compiled a voluminous record and is about to consider a staff report, the committee may wish to give some consideration to delaying any final recommendations on H.R. 6143 until the Commission has acted on the proposed rule.

There are many similarities between the proposed rule and H.R. 6143. The definitions used in the bill seem intended to cover the same areas. However, the definition of "textile products" varies from that proposed by the Commission in that it seems to include only commodities using fibers, yarn, or fabrics produced outside the United States. Such limited coverage seems inadequate to meet the needs of consumers. The Commission's proposed rule requires labels on textile products sold in the United States and I believe it is both fair and reasonable to maintain this broad coverage.

The substantive portion of the Commission's proposed rule is in three parts. The first part would require that a permanently attached label be affixed to all textile products and that the label accurately and clearly disclose proper instructions for the laundering and cleaning of such products. Section 2 of H.R. 6143 contains essentially the same language and will have essentially the same effect.

The second part of the proposed rule would require a certification from the manufacturer to the consumer that the instructions are valid and proper. The third part of the proposed rule provides for immunity from liability for any person, such as a retailer, who relies upon a guarantee from his suppliers that the product is not mislabeled. H.R. 6143 has no similar provisions and, hence, these last two parts of the Commission's proposed rule do not concern us here.

Bearing in mind the similarities in H.R. 6143 and the first part of

the proposed rule, I believe it might be helpful to take a closer look at some of the major problems which developed during the rule-making proceedings. These same problems will, no doubt, be raised during these hearings on the subject bill.

In setting forth these problems I am going to try to give both sides and not suggest any answers.

First, I would like to direct your attention to the words "any textile products." These words indicate the product coverage of both the proposed rule and the subject bill. It seems obvious that the words would create a very broad coverage.

As you might well expect, this broad language encountered a great deal of comment. Many statements were submitted which argue that even if care labeling is a good idea, it is not necessary to label every textile product. For example, it was suggested that there are a great many textile products which only require "routine" or "normal" care and that everybody knows what that is. The logical conclusion of this contention is that the only products that really need to be labeled are those which require "special" or "exceptional" care.

Under such an approach, product coverage would depend on whether specific products were characterized as needing "exceptional" or "normal" care. The Commission would probably have to examine at least each product line and decide what "exceptional" and "normal" care was for that product line and then categorize individual products in the line. Considering the number of textile products manufactured and the varieties within textile lines, this would be a tremendous undertaking.

On the other hand, the Commission also received many statements to the effect that "total" product coverage contemplated by the proposed rule was probably the best approach. No statements, however, failed to recognize that some limitation on product coverage would be desirable in any event. It is obvious that some textile products simply are not made to be cleaned or refurbished at all. A few outstanding examples are typewriter ribbons, shoe strings, and tennis balls.

In considering this problem of product coverage, a key issue is how much consumers already know about cleaning certain fibers and other textile components. There was quite a bit of material submitted which undertook to estimate how much consumers know about care and maintenance techniques. Many industry representatives seemed to think most consumers knew quite a lot and, therefore, did not need extensive and comprehensive care labels. On the other hand, the consumer spokesmen were of the opinion that consumers really do not know much at all, and, therefore, need all the help they can get.

There was also substantial comment to the effect that it really did not make any difference what anyone "knew" about care and maintenance because it is not possible to determine by visual inspection, what components are in a particular product. And, even if a consumer could determine the product's components he cannot tell what dyeing, finishing, and other manufacturing processes the product has been subjected to. These are the very factors that determine what care and maintenance should be applied.

As you can see, product coverage alone is a substantial problem. But there are other problems just as bothersome.

For instance, a second problem is caused by the requirement that the label or tag containing care instructions be permanently attached to the textile product.

Many industry representatives objected strenuously to this requirement. They argued that it would be more costly to attach labels permanently than it would be to provide separate information and, of course, the extra cost would be passed on to consumers in the form of higher retail prices. In addition, many statements pointed out that some products do not lend themselves to permanently attached labels because of size, shape, fragility, esthetics, style, et cetera.

Why does the Commission's proposed rule require permanently attached labels anyway? What difference does it make whether the information is attached to the product or furnished separately?

Care information is most important on two occasions; when the purchase is made and when care is attempted. Obviously, at the point of sale, it makes little difference whether the care information is permanently attached or separately furnished. The important point is that the information is available to facilitate the evaluation of competing products.

It is important, however, when the time comes to clean the product. If the information is permanently attached, there is no problem. But, if it is separately furnished then, unless the consumer had saved the information and can find it and match it to the right product, the consumer is no better off then if there had been no information furnished.

There is no easy answer to the problem of how to supply the information. One answer might be to require that not all textile products have permanently attached labels, but that for certain products care information separately furnished would be sufficient.

A third problem is the language "and will not impair the product's utility or appearance." It was pointed out during the hearings that every cleaning or refurbishing process will affect the appearance and utility of the product, and, hence, this language requires the impossible. Nothing, it was said, lasts forever.

In view of the complexity of the above problems and other lesser problems brought out in the hearings, it is recommended that the committee await the Commission's final action, and then evaluate this action to determine whether it is sufficient. In this respect, it may be important to point out that section 3(a) of the bill, for all intents and purposes, would require the Commission to do what it is basically doing already.

In closing, let me say again that while I endorse the objectives of H.R. 6143, I believe the committee should delay its decision on this legislation until after the Commission has acted.

Mr. Moss. Mr. Martin, when will the Commission complete its action?

Mr. MARTIN. Well, I cannot predict that, sir, with any degree of accuracy. I can say that the staff report is almost before the Commission. I would think that the Commission may have suggestions, and somebody will have to analyze the record. I would say 2 or 3

months after that staff report reaches the Commission, it would be logical to suppose that the Commission would act.

Mr. MOSS. Well, of course, there you have dealt in a lot of give. After it reaches the Commission, et cetera. When will it reach the Commission?

Mr. MARTIN. I should think it would reach the Commission within a month.

Mr. MOSS. We are talking of 4 months then?

Mr. MARTIN. I would think so, sir. That would be reasonable.

Mr. MOSS. September or October?

Mr. MARTIN. Yes, sir.

Mr. MOSS. Then do you feel at that time that the Commission will have something before it which will permit it to deal with this subject and remove from the consumer the question of how to get something cleaned or how to wash or treat a product they buy?

Mr. MARTIN. Mr. Chairman, I think Mr. Dixon, who has actually been working on the report, is probably in a better position to answer that question.

Mr. DIXON. I think yes, sir, Mr. Chairman, it will address itself to all of these problems because they are the very problems we have been dealing with.

Mr. MOSS. I am aware of that, but the thing that disturbs me is the statement itself. I think you raised many issues, very interesting issues in the statement, and I assume that it is a statement put together after some knowledge of the staff report and with a certain understanding of the proposed rule, and it seems to me that the approach is unnecessarily complicated here in attempting to do, as you, yourself, have pointed out in the statement, in some instances the impossible.

Mr. MARTIN. Let me say that one of your assumptions is not quite valid because that is not the way the Commission works. This report was put together by our office and approved by the Commission. The Commission itself has never seen the staff report at this point.

Mr. MOSS. They are aware of the 47 witnesses?

Mr. MARTIN. That is right. It knows that the staff has some solutions to this problem or suggested solutions. The Commission does not know what they are at this point, and that is the reason for both sides in this statement, sir.

Mr. MOSS. Well, I know the reluctance of many of the manufacturers to be faced with any requirements of labeling. On the other hand, I know that at some point we are going to have to solve this problem because far too many consumers buy products, and when it comes time to either wash them or to have them cleaned it is an impossible task to find out how and I know that many cleaners and launderers are losing money and damaging their reputation because of their inability to find out the fiber content of a product.

Now, we have a Fiber Labeling Act, and it seems to me that some of these problems stem from a lack of adequate enforcement of that act as to the fiber content of the products that are being sold. Well, this is back over in the law that we passed in the 85th Congress, Public Law 85-891, 15 U.S.C. 70, which you are very familiar with, I think. We are not by this law succeeding in doing what was really the objective of the law.

Mr. MARTIN. Well, I think the Commission feels that the compliance with this law is not enough and hence the trade regulation rules, sir.

Mr. Moss. Would it not be possible for the Commission to have a requirement that if an item is sold as washable, it must be so indicated, and the manufacturer is then responsible for the product if it does not take a washing? From this point, let me add that in your statement you talk about the impossible nature of the requirement if it alters the appearance or utility, and I think there that we would always be referring to other than normal wear and tear, because certainly normal wear and tear in any product which can deteriorate is considered, whether you have a house, if you rent it or lease it and your lease says normal wear and tear excepted, and I think normal wear or tear would certainly be excepted under the provisions of any law we would pass. And I would hope that any rule or regulation that the Commission might adopt would consider that also, but beyond normal wear and tear, the utility is sometimes impaired significantly.

The appearance sometimes is totally destroyed through the mere process of cleaning, and I suppose if we wanted to we could call at random a half a dozen cleaners from the Washington area into this hearing room and have everyone of them give us a whole series of instances where they tried in good faith to determine the makeup of the fibers in the garments they were going to clean or wash. Being unable to do so, they proceeded on the assumption that it would take normal cleaning procedures and it did not.

Now, if we could create categories and require at the time of offering for the market that they represent that it is washable or cleanable, and perhaps you could even have three or four coded types of washing or cleaning, and that kind of information, a coding or general category of product would reduce the size of any label required so that it can be permanently affixed rather than attempting all the detail which is available on some products.

I know, for example, and let me think a moment, I think it is London Fog, they have a woven, very detailed cleaning and washing instruction on their garment. But, I think you could cover the same amount of things if you had it coded so that you would have a standard code. The homeowner could get it out of an information booklet and the cleaner would have it automatically, and require the marketing of any product to conform to this coding and the labeling.

Mr. Dixon. We had a good bit, sir, of testimony at our hearing advocating the use of what is generally called a symbol system, which is being widely used in England and, in fact, in Europe. In fact, one of the European representatives appeared at the hearing and made a detailed statement in which he recommended that we do just that.

They also could make the argument that then the American system would be keyed into the international system so that foreign manufacturers selling in this country would still be using the same system they were familiar with in Europe. There is much to recommend that, and I think the Commission will be considering it.

There are also some problems with it in that the present symbol systems that are being used are pretty much limited to colorfastness

and what you can do to a product that might affect that characteristic; whereas, the thrust of the proposed rule, is I think the thrust of this bill, is far beyond that one characteristic, so that to cover what you can do with the printed word would call for a far more complicated symbol system than now exists.

Mr. Moss. Well, it would not be beyond the capability of the Federal Trade Commission staff to devise such a system, would it?

Mr. Dixon. I think it is possible. It could be done. I think the question the Commission has to decide though is whether or not the printed word is not superior when you are talking about all of the variations of material.

Mr. Moss. How would you use the printed word on yardage?

Mr. Dixon. You would have the same problem with symbols.

Mr. Moss. You might even have it woven into the selvage and have some so many symbols say in each yardage of fabric so that this would be available on the goods itself.

Mr. Dixon. The mechanical problems of how you label yard goods took up quite a good bit of our hearing time too, and it is incidentally something of increasing importance because sales of yard goods are increasing at a rapid rate.

Mr. Moss. Yes. You have it under the present Fabric Labeling Act as to the content and the makeup of the fibers, you have the requirement by law. I do not know what you are doing about it, but I know that you have the requirement.

Mr. Dixon. Yes, and it is very much included under our present rules.

Mr. Moss. Well, is it not true that manufacturers of yardage under present conditions include quite a bit of information along the selvage edge of the yardage, the color runs, some of the finishing material; is that not true?

Mr. Dixon. Some do and some do not.

Mr. Moss. Many do.

Mr. Dixon. Many do.

Mr. Moss. The technology is available to do it.

Mr. Dixon. I think so.

Mr. Moss. And if it was required of them, it would be done would it not?

Mr. Dixon. I do not think it is an insurmountable problem.

Mr. Moss. I think the thrust of this bill, and I think the thrust of my concern, and I assume other members will speak for themselves, is that the consuming public does have a right, not only a right, but a need to know what they are buying and how it can be cleaned or washed. I think there is an awful lot of victimizing of that consumer going on at the present time, and I do not think in many instances, I do not think it is a planned policy. It is one of overlooking the real need of the consumer. But, I think we here have a responsibility to look at that need and to try to formulate policy for protecting.

Mr. Broyhill.

Mr. BROYHILL. Thank you, Mr. Chairman. I just want to be clear on this one point, Mr. Martin. I understand that the Federal Trade Commission has sufficient authority to do everything that is included in H.R. 6143?

Mr. MARTIN. There are two cases, one in Maine and one in Houston, Tex., sir, on trade regulation rules where our authority to make rules is bitterly contested. As you know, in bills that are presently before the Congress there are provisions to specifically give us this rulemaking power. It is my personal opinion that the Commission has the power to make this rule, but until these cases are decided by the Supreme Court I would not be able to assure you of that.

Mr. BROYHILL. Would you provide for the committee record a brief on the legislative authority that the Federal Trade Commission has to promulgate rules on the subject matter?

Mr. MARTIN. Yes, sir.

Mr. MOSS. Would you like the record held to receive that at this point?

Mr. BROYHILL. Right.

Mr. MOSS. Without objection, the record will be held to receive that information.

(See letter dated May 26, 1971, p. 19, this hearing.)

Mr. BROYHILL. Thank you very much.

Mr. MOSS. Mr. Eckhardt.

Mr. ECKHARDT. Mr. Martin, it seems to me that aside from whether or not you make extensive rules, and I am inclined to think that maybe you should, concerning labeling of a product so that the consumer knows how to clean it, it seems to me it would just be a very simple, fundamental proposition that a person who buys a piece of goods ought to know whether it is cotton, or paper, or wool. Do you not agree with that?

Mr. MARTIN. I certainly do agree, sir.

Mr. ECKHARDT. It certainly does not take a great deal of study to determine that that is necessary or unnecessary, does it?

Mr. MARTIN. No, sir.

Mr. ECKHARDT. Second, it seems to me to be a very fundamental proposition that there ought to be a source somewhere that could inform the public concerning the rather exotic products whether or not they will melt when they are put in water at say 90 degrees, and it does not seem to me to take a lot of study to determine that there ought to be somewhere in the files of the U.S. Government information concerning a product of that type.

Mr. MARTIN. I believe, sir, that this was the Commission's general feeling when it proposed the rule. I think that when you get to the point of implementing this rule—given the tremendous complexity of manufacturing, and then making various products, that you try to make something that works. I think that our problem to date, is to make sure that what we do will be effective for the consumer, and at the same time will allow the textile industry to operate.

Mr. ECKHARDT. But it is not going to be effective at all for the consumer if, in fact, you may not have power to make the rule; is that not correct?

Mr. MARTIN. Well, we would certainly have the power, I believe, under any circumstances to make a guide. When you talk about the power to make the rule you are talking about really the legal effect of the rule.

Our view is that when we make the rule it does not have exactly the same effect as law, but it is an interpretation of the statute and that establishes an offense if you violate it.

There is no question—

Mr. ECKHARDT. Well, that is exactly what I want you to do. I want us to make the guides and I want you to make the rules that are enforceable.

Mr. MARTIN. Well, the private bar, Mr. Congressman, has vigorously opposed the power of the Commission to make that type of rule.

Mr. ECKHARDT. Well, let me suggest to you this; that perhaps the private bar is concerned about your making rules without any congressional guidelines.

Mr. MARTIN. This is one of the alleged concerns.

Mr. ECKHARDT. Well, do you think that is a legitimate concern?

Mr. MARTIN. I do.

Mr. ECKHARDT. Now, let me suggest something that came to my mind, and I think it is sort of predicated in my question to Congressman Hays.

I was suggesting, No. 1, that there be the requirement that the goods be labeled with respect to the material from which it is made, and I think you agree with me that that would certainly be an absolute minimum requirement.

Mr. MARTIN. Yes, sir.

Mr. ECKHARDT. And, 2, there be required that somewhere within the records of the Government, there be kept information with respect to the nature of that product with respect to what happens if it is cleaned. Now, that would seem to be clearly a minimum requirement.

Now, suppose I added to that one other, and that is that such product may not move in commerce if it does not comply with such rules concerning labeling as may be promulgated by the FTC to give reasonable warning of exceptional cleaning requirements?

Now, what I am suggesting here in the third category is the possibility of the full extent of your powers you are now studying, but it does seem to me that it is our duty to say that you ought to make the rules for a certain purpose and not for other purposes that might not be legitimate.

What would be wrong with our writing a statute that would, first, give you clear authority to make rules for that purpose and would, second, set up guidelines with respect to restricting you within legitimate purposes?

Mr. MARTIN. Well, if that is the desire of the Congress, Mr. Congressman, there is absolutely nothing wrong with it.

You have done that in many cases, in the Flammable Fabrics Act, in the Textile and Fur Act that you have before you and in the Fair Labeling and Packaging Act. That certainly is an option that is open to the Congress.

Mr. ECKHARDT. Now, with respect to another point you raise—

Mr. Moss. Mr. Eckhardt, would you hold for just a moment and yield briefly to Mr. Broyhill?

Mr. ECKHARDT. Yes.

Mr. BROYHILL. Off the record.

(Discussion off the record.)

Mr. Moss. Mr. Eckhardt.

Mr. ECKHARDT. Now, with respect to another point you were making, that is, that certain things like tennis balls and shoestrings and so forth would not really be amenable to such a labeling procedure, probably not even with respect to the contents—I mean, you could not very well write “cotton” on a shoestring—it would seem to me that you could simply define what textile products are as they are used in this act, and I would assume that the main thing we are trying to reach is garments, that we might have such things as piece-goods and awning material and things of that nature.

But, if we simply define textile products as including garments and then attempted to set down other things like, say, piecegoods and awnings, and et cetera, it seems to me that this would be a rather practical way to approach that question that you have in your testimony.

Mr. MARTIN. I would like to ask Mr. Dixon to answer that because he heard all of the testimony in the hearings, sir.

Mr. DIXON. That would narrow it down, sir, and take care of a large percentage of the problems that have been brought to our attention and are part of our record. It would not cover everything. It would not cover the whole wide range of household furnishings but—

Mr. ECKHARDT. Well, frankly, that is not where the problem is, is it?

If you are buying certain household furnishings that you ordinarily do not clean or clean very seldom, it seems to me that it is not unreasonable to expect you to be rather cautious as to the means used.

That is, for instance, suppose you have, say, a vacuum cleaner bag, and you would not just throw that in the laundry or send it out to have it cleaned. I think you would be under some obligation to go to the manufacturer and find out what is needed, or go to someone who purports to be knowledgeable.

But, it seems to me that if we simply covered all garments and then attempted to list the other specific materials we would have a very practical way of dealing with this problem, itself.

Mr. DIXON. Senator McIntyre's bill on the Senate side would do that. It would limit the requirements to wearing apparel, and he has introduced that very recently.

Again, though, I think, and it is certainly possible, it is being urged to the Commission that the Commission limit itself to this more manageable concept of wearing apparel with the possible addition of other defined products, but I would submit, sir, that you do have a wide range of textiles in the home all the way from draperies to table linens and what have you, that have also caused some problems that have been brought to our attention.

And I think a real need exists as to whether protection is not needed in that area as well.

Mr. ECKHARDT. Well, I certainly do not disagree with that, but I am simply suggesting that at least the basic portion of the definition for textile products could very well be wearing apparel, and then it would not seem a great chore to define specifically what else is covered.

In other words, I would suggest a broad definition with respect to wearing apparel, but I would use the specific definitions with respect to additional products.

Mr. DIXON. That I think is a workable approach, and I think it is one that the Commission will be considering. I would add one more caution, though, that limiting it to wearing apparel is going to narrow the products covered. It is not going to eliminate all of these problems that Mr. Martin discussed in his statement, for some of them will still be present even in a law limited to wearing apparel.

For instance—

Mr. ECKHARDT. Just a minute, please.

Please understand that I do not propose to limit it to only wearing apparel.

Mr. DIXON. I understand, yes. But, I think no matter how you limit it you are going to still have some of the same problems we encountered.

First, I agree; I think it is very easy to, by definition, eliminate products that are not cleaned, and that could include wearing apparel, disposable wearing apparel made primarily out of paper products.

But, it would also leave with us these other questions as to whether or not a particular permanent label, for instance, would impair the utility or appearance of that product.

We have had it argued quite strenuously that there are situations in which permanent labeling would unduly impair the appearances of it; the see-through garments, that type of thing.

And just as you can have the same problem in table linens, transparent table cloth, in that it does not look too attractive with a permanent label, and they have injected this into the problem.

The Commission has to consider as to whether there are not certain products that should be permitted to carry an attached label and not a permanent label affixed to it.

Mr. ECKHARDT. Well, I can see these problems with respect to a label that gives details as to cleaning, but then with respect to even the sheerest negligee it seems to me there would be the opportunity to put somewhere on it, "silk" or "cotton," without reducing its exotic appearance.

Mr. DIXON. But again we are talking about something now that may be a little longer than that, than simply a small label giving fiber contents.

We have certainly enlarged the label to some extent if we put care and washing instructions on it.

Mr. MOSS. Would you yield at that point?

Mr. ECKHARDT. Sure.

Mr. MOSS. Rather than defining it in the item, why not define it out of the item? Why not have a requirement that when you market a product, textile product, you require that the manufacturer represent whether it is washable or cleanable. If it is not, he labels it not washable or cleanable, and that eliminates an awful lot of your problems immediately, by doing it directly on his package or directly on the garment.

If you are talking about the tennis ball, for example, although if he wants to sell it as a washable tennis ball, then I think he has an obligation to see that it is a washable tennis ball, and I think that is true of the vacuum cleaner bag.

If a manufacturer decides that one of his sales features is the ready washability of the bag, then I think there should be washing instructions accompanying the bag or affixed on the bag.

Mr. HAYS. Mr. Chairman, could I just comment there?

Mr. Moss. Yes.

Mr. HAYS. It occurs to me, Mr. Chairman, that if you could, and I do not think anybody wants to make this extremely complicated, but you might say launder only or dryclean only, or launder with care only.

Everybody understands that means do not use extremely hot water. There are a million ways to approach this without getting too difficult.

For example, I was in France recently with a committee, and we were guests of the French Government, and we found ourselves in a little city, and we took a tour of the city in the morning and it turned out to be a walking tour, and it was raining, and I did not have a raincoat.

So, I went into a French shop and purchased one. It was more expensive than I really wanted, and I later sold it to a friend of mine at a reduced price.

But upon examining it that evening I saw a label in the inside coat pocket which, of course, was in French, but it was a fairly detailed label, which told exactly how to care for this coat.

It said do not dryclean, launder only in warm water. Then it said do not use high sulphate detergents.

So, I gathered from that that if you wanted to clean this coat you would launder it in medium warm water with a laundry soap, but apparently the people who made it had sufficient pride in it that they wanted it cleaned exactly right so that it would come out all right and still be waterproof.

I think it seems to me that a great deal of the problem that this bill attempted to cover is products which are sold for competitive reasons only in which the manufacturer does not really care what happens to them.

Mr. Moss. Mr. Eckhardt.

Mr. ECKHARDT. Mr. Chairman, what I am suggesting here is that there ought to be some basic requirements of letting the customer know what he is buying, not only with respect to its washability, but with respect to its durability.

I want to know when I buy an item if I am getting cotton, and I want to know if I am getting silk, or some synthetic product because presumably I know from experience, and my wife knows a good deal more about the quality of those fabrics than I.

Now, with respect to the precise labeling, it seems to me if it is a raincoat of the type Mr. Hays was discussing, it may well be that FTC may require somewhat extensive labeling on the garment.

If it is a negligee, presumably the Commission is not so unfamiliar with human affairs and salability as to take that into account, and it seems to me that is the kind of thing the Commission ought to do.

But, the question of requiring some kind of indication to the consumer what the material is, seems to me to be so patently desirable that it ought to be covered in the law.

That is all I have, Mr. Chairman.

Mr. Moss. Mr. McCollister?

Mr. McCOLLISTER. No questions, Mr. Chairman.

Mr. Moss. Mr. Broyhill, do you have any further questions?

Mr. BROYHILL. No. I would appreciate it if you could provide this information for the record.

Mr. MARTIN. The brief on our power to make these rules, yes, sir.

(The following letter and attachments were received for the record:)

FEDERAL TRADE COMMISSION,
OFFICE OF THE GENERAL COUNSEL,
Washington, D.C., May 26, 1971.

Hon. JOHN E. Moss,

Subcommittee on Commerce and Finance, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

(Attention Mr. Robert F. Guthrie)

GENTLEMEN: At the hearing on the bill relating to care labeling of textiles (H.R. 6143), Congressman Broyhill asked me to submit a discussion of the Commission's power to make trade regulation rules.

I am transmitting herewith a copy of a portion of our brief which will be filed in *National Petroleum Refiners Association et al. v. Federal Trade Commission et al.*, setting forth the Commission's view as to the law substantiating its power. In order that the Subcommittee may have the benefit of the opposition view, I am transmitting a copy of a brief filed by Procter & Gamble in the case relating to our trade regulation rules for listing phosphate content in detergents.

Very truly yours,

JOSEPH MARTIN, Jr.,
General Counsel.

The following is a portion of the Commission's draft of a brief to be submitted in *National Petroleum Refiners Association et al. v. Federal Trade Commission et al.*

This portion sets forth the legal basis for the Commission's rulemaking powers.

The Statute Specifically Grants Rulemaking Authority

The literal language of Section 6 of the Federal Trade Commission Act, 15 U.S.C. 46, grants the Commission express authority to promulgate rules and regulations:

"The Commission shall also have power * * * (g) to make rules and regulations for the purpose of carrying out the provisions of this Act."²

The Administrative Procedure Act, 5 U.S.C. 551(4), defines the term "rule," in part, as:

"* * * the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy * * *."

The Commission's Rule clearly falls within this definition.

Plaintiffs (Complaint, pp. 6-8, 24) contend that the Commission's authority to proceed against unfair methods of competition and unfair or deceptive acts and practices is limited to the adjudicative means specified in Section 5(b) of the Act (15 U.S.C. 45(b)). This contention is wholly without merit.

² Indeed, even if the power were not expressly conferred by statute it would be implied from the Commission's prosecuting power under Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. See, *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); Davis, *Administrative Law Treatise* (1970 Supp.) § 504 at 260-216.

The Commission's rulemaking power is clear from the very purpose of the Act. Congress determined to create a new administrative body to define and deal effectively and completely with unfair methods of competition and unfair or deceptive acts or practices. The Commission was created by Congress " * * * with the avowed purpose of lodging the administrative functions committed to it in a body specifically competent to deal with them by reason of information, experience and careful study of the business and economic conditions of the industry affected * * *." S. Rep. No. 597, 63d Cong., 2d Sess., pp. 9-11 (1914). Senator Newlands, sponsor of the Federal Trade Commission Act, explained:

"My belief is that this phrase [unfair methods of competition] will cover everything that we want, and will have such an elastic character that it will meet every new condition and every new practice that may be invented * * *"
[Cong. Rec. 11598, 63d Cong. 2d Sess. (1914)].

The courts have recognized the Commission's authority and responsibility to determine, subject to judicial review, the application and interpretation of [u]nfair methods of competition * * * [and] unfair or deceptive acts or practices" as proscribed by Section 5(a) of the Federal Trade Commission Act. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 384 (1965); *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 394 (1953); *FTC v. R. F. Keppel & Bro., Inc.*, 291 U.S. 304 (1934).³

Section 5(a) (1) of the Federal Trade Commission Act (15 U.S.C. 45(a) (1)) broadly declares unlawful unfair methods of competition and unfair or deceptive acts or practices; and Section 5(a) (6) (15 U.S.C. 45(a) (6)) grants the Commission general authority to prevent such practices. These provisions, however, do not define or establish the procedures by which the Commission may proceed in the discharge of the responsibilities delineated therein.

Section 5(b) of the Act is narrower. It directs issuance of complaints only when the Commission "has reason to believe" that the party charged "has been or is using" the proscribed practices and when it appears issuance of a complaint would be "to the interest of the public." This section delineates the Commission's adjudicative procedures for issuance of cease-and-desist orders. Nothing in this section, however, indicates that it was intended to limit or restrict the broad grant of power in Section 5(a) (6).

The Commission's authority to prevent unfair or deceptive methods and practices is thus broader than the adjudicatory provisions of Section 5(b). The Section 5(b) adjudicatory procedure is but one method of preventing unfair or deceptive practices. An equally appropriate method is by rulemaking, as specified in Section 6(g).⁴

Court Precedents Show That the Commission Has Discretion To Proceed by Rulemaking Rather Than by Adjudication

Court decisions applying similar regulatory statutes establish that the administrative agency has discretion to proceed either by adjudication or rulemaking to implement the provisions of the statute. See, *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *FPC v. Texaco Inc.*, 377 U.S. 33, 39 (1964); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203 (1956); *American Trucking Ass'ns v. United States*, 344 U.S. 298 (1953); *SEC v. Chenery Corp.*, 332 U.S. 194, 201 (1947); *NBC v. United States*, 319 U.S. 190 (1943); *NLRB v. Beech-Nut Life Savers, Inc.*, 406 F. 2d 253, 257 (2d Cir. 1968), cert. denied, 394 U.S. 1012; *Pacific Coast European Conf. v. FMC*, 376 F. 2d 785, 789 (D.C. Cir. 1967); *Pacific Coast European Conf. v. United States*, 350 F. 2d 197, 204-205 (9th Cir. 1965), cert. denied, 382 U.S. 953; *Air Line Pilots Ass'n v. Quesada*,

³ As one of the leading authorities on the Federal Trade Commission commented, "[T]he very creation of the Commission betokened a congressional dissatisfaction with procedures and techniques of the judicial system; otherwise the task of enforcement could have been delegated to the courts and the Department of Justice." Handler, *Unfair Competition*, 21 Iowa L. Rev. 175, 251 (1936).

⁴ Cf. *Moog Indus., Inc v. FTC*, 355 U.S. 411, 413 (1958), holding that:

"* * * [W]hether all firms in the industry should be dealt with in a single proceeding or should receive individualized treatment are questions that call for discretionary determination by the administrative agency. * * * Furthermore, the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically."

And see, *Atlantic Ref. Co. v. FTC*, 381 U.S. 357 (1965), where Mr. Justice Goldberg, dissenting, at pp. 390-91, stated, "The Commission has the general power to choose to proceed * * * through either rulemaking or the process of case-by-case adjudication."

276 F. 2d 892, 896 (2d Cir. 1960), *cert. denied*, 366 U.S. 962 (1961); *Logansport Broadcasting Corp. v. United States*, 210 F. 2d 24, 27 (D.C. Cir. 1954); *Borden Co. v. Freeman*, 256 F. Supp. 592, 598 (D.N.J. 1966), *aff'd*, 369 F. 2d 404 (3d Cir. 1966), *cert. denied*, 386 U.S. 992.⁵

Statutory Provisions Similar to Section 6(g) of the Federal Trade Commission Act Have Been Deemed To Grant Rulemaking Authority to Other Regulatory Agencies

In *NLRB v. Wyman-Gordon Co.*, *supra*, the issue was whether the Board could in an adjudicated case, establish a requirement on employers, to be enforced in the future, to furnish a list of names and addresses to unions engaged in elections. While the majority of the Court disapproved the Board's practice of promulgating rules through individual case adjudications, the Court was of the unanimous opinion that the Board could have issued such rules under its rulemaking authority.

Mr. Justice Fortas, writing for the plurality of the Court, cited criticism of the Board for never having exercised its rulemaking authority, 394 U.S. at 765, n. 3, as did Mr. Justice Douglas, dissenting, 394 U.S. at 779, n. 2.

This decision has a direct bearing on the question of the Federal Trade Commission's rulemaking authority since the language of Section 6 of the National Labor Relations Act authorizing rulemaking, 29 U.S.C. 156,⁶ is substantially the same as Section 6(g) of the Federal Trade Commission Act.

In *Chenery*, *supra*, the Supreme Court reviewed an order of the Securities and Exchange Commission under the Public Utility Holding Company Act, holding that stock owned by management could not be converted into stock of a reorganized company. While recognizing that the S.E.C. might have proceeded by rulemaking rather than by adjudication, the Court emphasized that the choice between proceeding by rule and by *ad hoc* adjudication is one primarily in the discretion of the agency (322 U.S. at 202-203):

"Since the Commission, unlike a court, does have the ability to make new law prospectively through the exercise of its rulemaking powers, it has less reason to rely upon *ad hoc* adjudication to formulate new standards of conduct within the framework of the Holding Company Act. *The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future.* * * * principles must await their own development, while others must be adjusted to meet particular, unforeseeable situations. In performing its important functions in these respects, therefore, *an administrative agency must be equipped to act either by general rule or by individual order.* To insist upon one form of action to the exclusion of the other is to exalt form over necessity.

"* * * [T]he choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." [Emphasis added.]

Significantly, the rulemaking authority of the Securities and Exchange Commission under the Public Utility Holding Company Act⁷ considered in *Chenery* is similar to that of Section 6(g) of the Federal Trade Commission Act.

In *Texaco*, *supra*, the Supreme Court sustained the authority of the Federal Power Commission to promulgate rules requiring summary rejection, without an adjudicatory hearing, of contracts containing certain price escalation clauses. Section 16 of the Natural Gas Act, 15 U.S.C. 717o, granted the Federal Power Commission power to prescribe such regulations "as it may find necessary or appropriate to carry out the provisions of this Act." The Court held (377 U.S. at 41,44):

⁵ Passage of the Administrative Procedure Act, with its provisions for procedural safeguards for rulemaking, has been relied upon in upholding the authority of an agency to engage in substantive rulemaking. *Transcontinent Television Corp. v. FCC*, 308 F. 2d 339, 343 (D.C. Cir. 1962).

⁶ "The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act."

⁷ The Act, 15 U.S.C. 79t, provides:

"(a) The Commission shall have authority from time to time to make, issue, amend and rescind such rules and regulations and such orders as it may deem necessary or appropriate to carry out the provisions of this Chapter * * *."

"The rulemaking authority here, as in *Storer*, is ample to provide the conditions for applications under § 4 or § 7. Section 16 of the Natural Gas Act gives the Commission power to prescribe such regulations "as it may find necessary or appropriate to carry out the provisions of this Act." * * *

"To require the Commission to proceed only on a case by case basis would require it, so long as its policy outlawed indefinite price changing provisions, to repeat in hearing after hearing its conclusions that condemn all of them. * * * We see no reason why under this statutory scheme the processes of regulation need be so prolonged and so crippled." [Emphasis added.]

In *Storer, supra*, the Supreme Court upheld the power of the Federal Communications Commission to promulgate a rule limiting the number of radio stations that could be held under common ownership. The Commission had applied the rule in rejecting an application for a radio station license because the applicant already owned the maximum number of stations permitted by the rule (351 U.S. at 202-03):

"We do not read the hearing requirement, however, as withdrawing from the power of the Commission the rulemaking authority necessary for the orderly conduct of its business. * * * The challenged Rules contain limitations against licensing not specifically authorized by statute. But that is not the limit of the Commission's rulemaking authority. 47 U.S.C. § 154(i) and § 303(r) grant general rulemaking power not inconsistent with the Act or law." [Emphasis added.]

In *American Trucking Ass'ns, supra*, the Supreme Court found that the Interstate Commerce Commission was authorized to issue regulations applicable to certain leasing agreements. The Court held that the authority was necessary to carry out the agency's statutory duties, and that the rulemaking authority of the Interstate Commerce Commission⁸ (which is similar to that conferred by Section 6(g) of the Federal Trade Commission Act) is not limited to agency procedures and administration, 344 U.S. at 311.

Strikingly parallel to the language employed in Section 6(g) of the Federal Trade Commission Act is that of Section 43 of the Shipping Act of 1916, which provides that "[t]he [Federal Maritime] Commission shall make such rules and regulations as may be necessary to carry out the provisions of this chapter," 46 U.S.C. 841a. This language was recently construed as conferring "broad rulemaking power" upon the Maritime Commission. *Pacific Coast European Conf. v. FMC*, 376 F. 2d 785, 789 (D.C. Cir. 1967).

The Maritime Commission had promulgated a regulation which articulated specific requirements under Section 15 of the Shipping Act, 46 U.S.C. 814, which generally requires shipping conference agreements to provide "reasonable and equal terms and conditions" respecting membership. Plaintiff failed to comply with the regulation, and the Commission withdrew its approval of the agreement. The Conference argued that the Commission could not appraise the agreement in light of the requirements formulated by the regulation. The Court flatly rejected this argument" * * * as wholly out of keeping with the Congressional purpose underlying the grant of [rulemaking] authority * * *."

Still another statutory grant of rulemaking authority in language similar to that of Section 6(g) of the Federal Trade Commission Act was construed in *Borden Co. v. Freeman*, 256 F. Supp. 592 (D.N.J. 1966), *aff'd*, 369 F. 2d 404 (3d Cir. 1966), *cert. denied*, 386 U.S. 992. There, the court (256 F. Supp. at 598) held that the authority to adjudicate on a case-by-case basis, when dealing with potentially false or misleading labels, in violation of the Poultry Products Inspection Act, did not limit the rulemaking power of the Secretary of Agriculture since the statute:

"* * * grants to the Secretary the power to "promulgate such rules and regulations as are necessary to carry out the provisions of this chapter"; [accordingly] the Secretary has a general legislative power concerning matters covered by the Poultry Act in addition to whatever adjudicative power is conferred by particular provisions thereof." [Emphasis by the Court.]

It is also significant that the statutory authority of the Commissioner of Foods and Drugs to issue the regulations that were involved in both *Toilet*

⁸ "To administer, execute, and enforce all provisions of this chapter, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration * * *." 49 U.S.C. § 304(a) (6).

Goods Ass'n v. Gardner, 387 U.S. 158 (1967), and *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967), provided simply that the Commissioner may "promulgate regulations for the efficient enforcement" of the Act (Color Additive Amendments of 1960, 21 U.S.C. 371(a))—an authority comparable to that contained in Section 6(g) of the Federal Trade Commission Act. The opinions in both cases were based upon the assumption that the Commissioner had thus been afforded rulemaking authority.

The Courts Have Recognized That the Federal Trade Commission Has Rule-making Authority

While dissenting in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967, on other grounds, Mr. Justice Fortas, joined by Chief Justice Warren and Mr. Justice Clark, recognized the rulemaking authority of the Federal Trade Commission (387 U.S. at 198);

"* * * But the fact of the matter is that the dilemma is no more than citizens face in connection with countless statutes and with the rules of the SEC, FTC, FCC, ICC, and other regulatory agencies."

In *Atlantic Ref. Co. v. FTC*, 381 U.S. 357 (1965), the Court upheld a Commission order prohibiting use of certain sales-commission agreements. Mr. Justice Goldberg dissented on the ground that the Commission's findings did not support so broad an order, but emphasized the rulemaking authority of the Federal Trade Commission (at pp. 390-91):

"The Commission has the general power to choose to proceed in this field, as in others, through either rulemaking or the process of case-by-case adjudication."

Since institution of the Trade Regulation Rule procedure in 1962, the Commission has promulgated 16 Trade Regulation Rules, not including the one here challenged (16 C.F.R. 400 *et seq.*). These rules deal with such subjects as misbranding of leather content of belts, labeling of dry cell batteries, advertising of lubricating oils, advertising the size of television set pictures and use of games of chance in the food retailing and gasoline industries. It is significant that none of the Commission's currently effective Trade Regulation Rules has been judicially challenged.

Since at least 1920, the Commission has interpreted the Act to authorize it to conduct rulemaking proceedings designed to prevent unlawful practices on an industry-wide basis. *See*, 29 Fed. Reg. 8370. The Commission's Rules have long provided for "Trade Practice Rules" which are "designed to foster and promote the maintenance of fair competitive conditions in the interest of protecting industry, trade, and the public." 16 C.F.R. 17.1(b). The Commission has issued approximately 160 Trade Practice Rules. *See* 16 C.F.R. Subchapter B. Such rules have been relied upon by the Commission in adjudicative proceedings to support findings of unlawfulness, and the courts have upheld the Commission in so relying.⁹

The Rule Does Not Constitute an Unlawful Exercise of Legislative Authority

Plaintiffs (Complaint, pp. 6, 21, 23-24) assert that the Commission's Rule constitutes an unlawful exercise of legislative authority. But it is obvious that the Rule is not legislative in the sense of adding new substantive rights or obligations. The Rule merely defines the application of Section 5 of the Federal Trade Commission Act to specific practices in the oil industry within the jurisdiction of the Commission.

The process of adjudicating cases under Section 5(b) of the Act also involves a form of legislative interpretation, concededly valid. *See, FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965), where the Court said (at pp. 384-85):

"Congress amended the Act in 1938 to extend the Commission's jurisdiction to include 'unfair or deceptive acts or practices in commerce'—a significant amendment showing Congress' concern for consumers as well as for competitors. It is important to note the generality of these standards of illegality * * *."

⁹ *See, e.g., Prima Prods, Inc. v. FTC*, 209 F.2d 405, 408 (2d Cir. 1954): "That it is within the competence of the Federal Trade Commission to promulgate these [Trade Practice] Rules in the public interest is not challenged. * * * As these Rules are applicable alike to all members of the industry, petitioner must comply with them." *And see, Burton-Dixie Corp. v. FTC*, 240 F. 2d 166 (7th Cir. 1957); *Lazar v. FTC*, 240 F. 2d 176 (7th Cir. 1957); *Northern Feather Works v. FTC*, 234, F. 2d 335, 338 (3d Cir. 1956); *Buchwalter v. FTC*, 235 F. 2d 344 (2d Cir. 1956).

"This statutory scheme necessarily gives the Commission an influential role in interpreting § 5 and in applying it to the facts of particular cases arising out of unprecedented situations. Moreover, as an administrative agency which deals continually with cases in the area, the Commission is often in a better position than are courts to determine when a practice is "deceptive" within the meaning of the Act. This Court has frequently stated that the Commission's judgment is to be given great weight by reviewing courts."¹⁰

Trade Regulation Rules are simply another form of legislative interpretation, which the Commission deems vital in fulfilling its statutory responsibilities. And as the Supreme Court stated in *SEC v. Chenery*, 332 U.S. 194, 202 (1946), "The function of filling in the interstices of the Act should be performed, as much as possible, through this quasi-legislative promulgation of rules to be applied in the future."

Resort to Legislative History Is Not Necessary or Proper; In Any Event, the Legislative History Supports the Commission's Position

Petitioners erroneously assert (Complaint, pp. 8-9, 21) that the legislative history shows that the Commission lacks authority to issue substantive rules. In view of the clear, unambiguous rulemaking authority contained in Section 6(g) of the Federal Trade Commission Act—language similar to that which has consistently been held by the courts to authorize agencies to engage in substantive rulemaking (*see, supra*, pp. 10, 13-20)—there is no need to resort to legislative history.¹¹

If the Court, however, deems it appropriate to consider the legislative history, attached for the Court's information is an Appendix which sets forth the legislative history of the Commission's rulemaking authority in pertinent detail. As this Appendix reveals, there is little in the legislative history of the Federal Trade Commission Act that is relevant to the rulemaking authority bestowed by Section 6(g). This is so because the original House bill and the bill as initially passed by the House would have created a commission with functions strictly *investigative* in nature. While that bill contained a rulemaking provision, it is obvious that this provision could only pertain to "house-keeping" or procedural matters, since the Commission would have had no authority to prevent unfair methods, acts and practices. Debate concerning the rulemaking authority of such a commission, therefore, has no pertinence to the rulemaking authority of the Commission as ultimately established.

When the House enactment was forwarded to the Senate, it was referred to the Senate Committee on Interstate Commerce. That Committee reported a substitute bill which, unlike the House bill, would have created a "Federal Trade Commission" with a quasi-judicial function. The Senate committee bill contained no rulemaking provisions. Consequently, the Senate debates on this bill also have no application to the Section 6(g) rulemaking authority as ultimately enacted.

Significantly, following passage of the Senate bill, the differing Senate and House versions were referred to a Conference Committee. That Committee reported out a compromise bill which was subsequently enacted into law. The "rules and regulations" provision of the Conference bill was a modification of that contained in the House enactment. Thus, it was not until the Conference Report was considered by the House and Senate that the Commission's present rulemaking authority was before the entire Congress.

The Senate passed the Conference bill on September 8, 1914, after very little discussion on the bill as a whole and *none* on the "rules and regulations" provision of Section 6(g). The House received the Conference bill on September 10, 1914, and passed it on the very same day. House debate on the rulemaking provision of Section 6(g) was limited. Considered overall, however, the conclusion is inescapable that Section 6(g) was intended by Congress to provide substantive rulemaking authority.

¹⁰ And *see, Borden Co. v. Freeman*, 256 F. Supp. 592, 598 (D. N.J. 1966), *aff'd*, 369 F. 2d 404 (3d Cir. 1966), *cert. denied*, 386 U.S. 922; *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 394 (1953); *FTC v. R. F. Keppel & Bro., Inc.*, 291 U.S. 304 (1934).

¹¹ When a statute is clear, the courts refrain from resorting to legislative history. *United States v. Oregon*, 366 U.S. 643, 648 (1961). Concurring opinions of Mr. Justice Jackson in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 395-96 (1951), and *United States v. Public Utils. Comm'n of Calif.*, 345 U.S. 295, 319 (1953); 2 Sutherland, *Statutes and Statutory Construction* (3d ed., Horack, 1943), § 4502.

It is significant that in *United States v. Morton Salt Co.*, 338 U.S. 632, 647-51 (1950), the Court held that, while some of the language of Section 6 of the Federal Trade Commission Act appeared in the prior House bill at a time the Commission was to have been created solely with investigative authority, the section as ultimately enacted should not be afforded such a limited reading since the present Act, including Section 6, must be read as an integrated whole.

Plaintiffs' assertion (Complaint, p. 8), that the Commission lacks trade regulation rulemaking authority because of its failure to utilize or claim such authority prior to 1962, is wholly without merit. See, e.g., *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969), where the Court was of the opinion that the Board had the power to issue rules, even though such authority had never been exercised. See also, *FTC v. Dean Foods*, 384 U.S. 597, 609-611 (1966); *United States v. Morton Salt Co.*, 338 U.S. 632, 647 (1950).

B. THE COMMISSION'S TRADE REGULATION RULE PROCEEDING DID NOT DENY PLAINTIFFS DUE PROCESS

Plaintiffs are in error when they contend (Complaint, pp 6-8, 10-13, 15, 21-22, 24) that the trade regulation rule proceeding has deprived them of due process inasmuch as they were not afforded trial-type rights such as compulsory process, testimony under oath, cross-examination of witnesses, and conduct of hearings by a hearing examiner followed by his initial decision, as in an adjudicative proceeding.

There Is No Constitutional Right to an Adjudicative Hearing in Rulemaking

It is well established that there is no constitutional right to adjudicative procedures in rulemaking proceedings.¹² In *Willapoint Oysters, Inc. v. Ewing*, 174 F.2d 676 (9th Cir. 1949), cert. denied, 338 U.S. 860 (1949), rehearing denied, 339 U.S. 945 (1950), the court rejected an argument that the agency must provide a "fair hearing," in rulemaking stating (at p. 694):

"[I]n legislation, or rulemaking, there is no constitutional right to any hearing whatsoever. * * * Thus the requirements of any hearing are to be tested solely by the statute so providing, which may or may not import constitutional concepts.

The court found the applicable statute to be the Administrative Procedure Act. Finding no violation of that Act, the court concluded that no constitutional or statutory rights had been violated.

There Is No Statutory Right to an Adjudicative Hearing in Rulemaking

Since there is no constitutional requisite for adjudicative procedures in rulemaking, we turn to the controlling legislation—the Administrative Procedure Act, 5 U.S.C. 533(c):

"After notice required by this section, the agency shall give interested persons an opportunity to participate in the rulemaking through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection."

This statute does not require adjudicative procedures,¹³ and plaintiffs' com-

¹² *FPC v. Texaco Inc.*, 377 U.S. 33, 39 (1964); *California Citizens Band Ass'n v. United States*, 375 F. 2d 43, 50 (9th Cir. 1967), cert. denied, 389 U.S. 844; *Alaska S.S. Co. v. FMC*, 356 F. 2d 59, 61 (9th Cir. 1966); *Pan American Pet. Corp. v. FPC*, 352 F. 2d 241, 244 (10th Cir. 1965); *Superior Oil Co. v. FPC*, 322 F. 2d 601, 609 (9th Cir. 1963), cert. denied, 377 U.S. 922; *Air Lines Pilots Ass'n Int'l v. Quesada*, 276 F. 2d 892, 896 (2d Cir. 1960), cert. denied, 366 U.S. 962 (1961); *Forte, Fair Hearing in Administrative Rulemaking: A Recent Experience Under the Federal Food, Drug, and Cosmetic and Fair Packaging and Labeling Acts*, 1968 Duke L. J. 1, 3.

¹³ For cases holding that an agency, in rulemaking, need merely comply with the non-adjudicative procedural requirements of 5 U.S.C. 553, see, e.g., *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969); *FPC v. Texaco Inc.*, 377 U.S. 33, 39 (1964); *California Citizens Band Ass'n v. United States*, 375 F. 2d 43, 50 (9th Cir. 1967), cert. denied, 389 U.S. 844; *Alaska S.S. Co. v. FMC*, 356 F. 2d 59, 61 (9th Cir. 1966); *Pacific Coast European Conf. v. United States*, 350 F. 2d 197 204-205 (9th Cir. 1965), cert. denied, 382 U.S. 958.

plaint does not allege that the Commission failed to comply with any of the above-stated statutory provisions.¹⁴

In holding that the agency need only comply with the nonadjudicative requirements of 5 U.S.C. 553, the court in *American Airlines, Inc. v. CAB*, 359 F.2d 624, 629-30 (D.C. Cir. 1966), cert. denied, 385 U.S. 843 stated:

"* * * [R]ule making is a vital part of the administrative process, * * * such rule making is not to be shackled, in the absence of clear and specific Congressional requirement, by importation of formalities developed for the adjudicatory process and basically unsuited for policy rule making.

"* * * The need for and importance of policy rule making made on the basis of a procedure appropriate thereto is clearly identified in the Administrative Procedure Act * * *. In general, the APA establishes a dichotomy between rule making and adjudication. For adjudication a formal system is provided.

"Rule making, however, is governed by § 4 [5 U.S.C. 553], which essentially requires only publication of notice of the subject or issues involved, an opportunity for interested persons to participate through submission of written data, and the right of petition in respect of rules. These more limited requirements are geared to the purpose of the rule making proceeding, which is typically concerned with broad policy considerations rather than review of individual conduct. * * *" [Emphasis added.]

The Fact That the Commission Could Have Instituted Adversary Adjudicative Proceedings Under Section 5(b) of the Federal Trade Commission Act Does Not Require That it Afford Adjudicator Rights in Rulemaking Proceedings

As demonstrated, *supra*, pp. 10-27, the Commission may proceed initially under its general rulemaking authority rather than resorting in the first instance to an adversary proceeding as provided by Section 5(b) of the Federal Trade Commission Act. In *FPC v. Texaco Inc.*, 377 U.S. 33, 44 (1964), it was held that adjudicative procedures need not be followed in rulemaking merely because the agency could have instituted an adjudicative proceeding against a party under a different section of the statute.¹⁵ And see, *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969), where the nonadjudicative rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. 553, were deemed appropriate when rulemaking was utilized rather than adjudication.¹⁶

Plaintiffs, therefore, were not entitled to trial-type rights in the rulemaking proceeding merely because the Commission could have issued a complaint under Section 5(b).

In the instant case, the essential procedural requirements for rulemaking are being fully satisfied, indeed exceeded. Plaintiffs have been afforded complete opportunity to make known in the administrative proceeding all their views, data, documents and arguments and to rebut all contrary positions. The Commission has established a public record containing over 1600 pages of relevant material. The Commission "[o]n the basis of the Record * * * concluded that the issuance of a Trade Regulation Rule requiring the posting of minimum research octane ratings on gasoline dispensing pumps is required by that record and is in the public interest" (Defendants' Exhibit B, p. 39).

After all interested parties were given the opportunity to file written data, views and arguments and to orally present data, views and arguments concerning the proposed rule (and all such data, views and arguments were made available for examination) (Exhibit C attached to complaint), the record was kept open for 30 days for the receipt of any additional statements or rebuttal material which might be submitted (Defendants' Exhibit A-1, p. 421). And,

¹⁴As Section 6 (g) of the Federal Trade Commission Act does not require that Commission rules be made on the record after opportunity for agency hearing, the requirement for Section 556 and 557 adjudicative proceedings set forth in the last sentence of Section 553(c) is inapplicable here. See, *Siegel v. AEC*, 400 F.2d 778, 787 (D.C. Cir. 1968).

¹⁵It is well established that general rulemaking may be effectuated without adjudicative procedures even though the agency could have proceeded initially against individual respondents pursuant to adjudicative proceedings provided for by the controlling statute. See, *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202-03 (1956); *Total telecable Inc. v. FCC*, 411 F. 2d 639, 641 (9th Cir. 1969); *Pacific Coast European Conf. v. United States*, 350 F. 2d 197, 204-05 (9th Cir. 1965), cert. denied, 382 U.S. 958.

¹⁶Mr. Justice Black, concurring, joined by Justices Brennan and Marshall, also recognized that the Labor Board need not follow adjudicative procedures if it chose to proceed by rulemaking, 394 U.S. at 771-2. And Justices Douglas and Harlan dissenting, 394 U.S. at 775 and 780, respectively, both were of the opinion that the agency had to follow the procedures specified by the Administrative Procedure Act when making rules, 5 U.S.C. 553, a procedure which does not afford adjudicative rights.

after promulgation of the Rule, when Texaco Inc., requested that the record be reopened so that further information might be submitted concerning the propriety of using research octane number as the basis for posting, the Commission did, on April 13, 1971, postpone the effective date of the Rule from June 28, 1971, to September 1, 1971, and did reopen the record, inviting all interested persons to submit written data, views and comments regarding the appropriateness of reliance upon the research octane method including suggestions of alternate methods (Pres Release, April 13, 1971, Defendants' Exhibit C; 36 Fed. Reg. 7309, April 17, 1971).

APPENDIX

LEGISLATIVE HISTORY OF FEDERAL TRADE COMMISSION ACT WITH EMPHASIS ON SECTION (6g)

I. INTRODUCTION

In making this review, a basic distinction should be noted which will render inapposite for analysis here the congressional debates which preceded the consideration by the Congress of the Conference Report. The House debates which occurred pursuant to the original House bill were directed in entirety to the creation of an "Interstate Trade Commission," the function of which was strictly *investigative* in nature. The new commission was to act as a primary source of information which would supply to the Congress and the President that material required for the purpose of new legislation. The commission was to have no quasi-judicial authority through which it could act affirmatively. Such an investigational organization was obviously not a body which required, or indeed should have had, "substantive" rulemaking authority. Rather, at this juncture as an investigator for the executive and legislature, the commission would have been authorized by the House bill to promulgate mere "housekeeping" rules and regulations.

When the House bill was passed and forwarded to the Senate for consideration, it was referred to the Senate Committee on Interstate Commerce. That committee completely revised the form and tenor of the bill by recommending the passage of a substitute bill, the thrust of which was the creation of a "Federal Trade Commission" with quasi-judicial function. The Senate version contained no provision granting rulemaking authority to the commission. Thus, it is obvious that the Senate debates on this bill also have no application to the Section 6(g) rulemaking authority as it was ultimately enacted.

Subsequent to the Senate's passage of its own version of the bill, both houses of Congress agreed to a conference on the two bills to resolve the acute differences inherent in them. The conferees agreed upon an entirely new bill which, upon referral to the House and Senate, was passed and ultimately approved by the President. Since it was only at this time that the Federal Trade Commission of today was finally envisioned in its entirety, the congressional debates which followed the report of the conferees alone have any relevancy to the intent of Congress in creating the Commission.

II. BACKGROUND

The amended bill which was ultimately to be enacted to create the Federal Trade Commission was not the first bill proposed in either the House or the Senate in this connection. Several unsuccessful attempts were made prior to 1914 to create a similar commission. On July 5, 1911, Senator Newlands of Nevada introduced a bill to create an interstate trade commission which would have been granted broad regulation-making authority:

"That the said commission shall have power to make *any and all regulations* necessary and proper to carry out the purposes of this act, and at any time to alter, amend, or repeal the same or any part thereof." [S.2941, 62d Cong., 1st Sess. § 17 (1911) (emphasis added).]

This bill, however, was never reported out of the Senate Committee on Interstate Commerce.

Another bill proposing to grant a similar rulemaking authority to a trade commission was introduced in the House on January 25, 1912, by Representative Morgan of Oklahoma. This bill contained a detailed rulemaking provision:

"The commission is hereby authorized and empowered to *make and establish rules and regulations*, not in conflict with the Constitution and laws of the

United States, to aid in the administration and enforcement of the provisions of this act, and may, by such rules and regulations, prohibit any particular or specific act or acts, practice, method, system, policy, device, scheme, or contrivance that is contrary to any of the provisions of this act." [H.R. 18711, 62d Cong., 2d Sess. § 9 (1912) (emphasis added).]

Mr. Morgan thereafter stated the force and effect of the rulemaking authority which his bill would have sanctioned:

"Under the authority given it, *the commission may by rule or order prohibit any specific act or practice* that is not in harmony with the general rules of conduct promulgated by the Act of Congress." [49 CONG. REC. 2240 (1912) (emphasis added).]

On November 15, 1911, hearings were initiated before the Senate Committee on Interstate Commerce to determine "what changes [were] necessary or desirable in the laws of the United States relating to the creation and control of corporations engaged in interstate commerce." S.Res. 98, 62d Cong., 1st Sess. (1911). It became clear during these hearings that a commission was required which would have rulemaking power to prohibit acts and practices which violated the proposed statute. The Committee's report recommended that specific trade practices be declared unreasonable restraints of trade, and that a procedure be evolved which could remedy subsequent unlawful trade practices. Further, the report urged the establishment of a "commission for the better administration of the law and its enforcement." S.Rep. No. 1326, 62d Cong., 3d Sess. 12 (1913).

Shortly after this report, Representative Morgan reintroduced H.R. 18711 (discussed *supra*), which was redesignated as H.R. 1890. See H.R. 1890, 62d Cong., 3d Sess. (1913). This bill apparently was never reported out of committee.

III. THE COVINGTON BILL (H.R. 15613)

Following these early legislative bills, President Wilson, on January 20, 1914, addressed the Congress and requested that it establish a commission to serve as an investigative body of business, to promote competition between and discourage monopoly by businesses, and to assist business in better understanding the law.

Pursuant to this request, Representative Covington of Maryland introduced H.R. 15613 (hereinafter referred to as the Covington Bill) on April 13, 1914. The bill provided for an "Interstate Trade Commission" which would assume all powers, authority, and duties of the old Bureau of Corporations, an investigative body, which had been established by Congress in 1903. Additionally, the bill made annually statistical reporting to the proposed commission mandatory for all corporations having capital exceeding \$5 million, and further provided:

"That the commission may from time to time *make rules and regulations* and classifications of corporations *for the purpose of carrying out the provisions of this Act*: [H.R. 15613, 63d Cong., 2d Sess. § 8 (1914) (emphasis added).]

Mr. Covington expressed his interpretation of the rulemaking authority to be conferred upon the commission by his bill when he referred to a case which the Supreme Court had decided in January 1914:

"In *United States v. Antikamnia Chemical Company* (231 U.S., 654) it was held that section 3 of the pure food and drugs act (34 Stat., 768), giving the Secretaries of the Treasury, of Agriculture, and of Commerce, and Labor the power "to make uniform rules and regulations for carrying out the provisions of the act," authorized them to make a regulation requiring the labels on packages of drugs containing any derivative of the substances named in section 8 of the act to state the name of the parent substance as well as the derivative. It was held that while the power given to the secretaries was "undoubtedly one of regulation—an administrative power only—not a power to alter or add to the act," the *regulation in question* was "*administrative of the law*" and not "*additive to it.*" * * * If it fulfills the purpose of the law it cannot be said to be an addition to the law. . . . (pp. 666-667)." [51 CONG. REC. 8844 (1914).]¹

¹In *Antikamnia Chemical Co.*, the Supreme Court made even more explicit the rule-making authority conferred by the provision "to make uniform rules and regulations for carrying out the provisions of the act." It stated (231 U.S. at 666):

"The extent of the power however, must be determined by the *purpose of the act and the difficulties its execution might encounter*. The fact that [the secretaries were] given the power to make rules and regulations for the execution of the law shows how complex the matters dealt with were considered to be, and the care that was necessary to be taken to guard against their defeat or perversion." (Emphasis added.)

Thus did Mr. Covington interpret the rulemaking authority of the proposed commission, notwithstanding the fact that he proposed only an investigative agency.

On April 14, 1914, the House Committee on Interstate and Foreign Commerce favorably reported out the Covington Bill, stating that the proposed trade commission should *investigate* the business community and *report* to Congress so that necessary legislation would be prompted and enacted:

"It is largely the experience of the independent commission itself that will *afford Congress the accurate information* necessary to give to the country from time to time the additional legislation which may be needed." [S. Rep. No. 533, 63d Cong., 2d Sess. 8 (1914) (emphasis added).]

The primary thrust of the bill was the creation of an agency possessing strictly *investigatory* and *information-gathering powers*. To this end, Section 3 of the Covington Bill would have transferred to the proposed commission the "powers, authority, and duties of the Bureau of Corporations and of the Commissioner of Corporations." *Id.* at 5. What led to the proposal was the belief that these powers should be exercised by an independent commission, and that "the investigations conducted and the information acquired by the commission under the authority heretofore exercised by the Bureau of Corporations or the Commissioner of Corporations" should be "remove[d] entirely from the control of the President and the Secretary of Commerce. . . ." H.R. Rep. No. 533, 63d Cong., 2d Sess. 3 (1914).

Since the type of commission proposed by the Covington Bill was to be merely a fact-finding agency with no quasijudicial functions, logic dictated that such an agency would have required no authority to promulgate rules for the purpose of declaring specific acts or practices to be unlawful methods of competition. In fact, the Covington Bill did not even declare "unfair methods of competition" to be unlawful, as does Section 5 of the present Federal Trade Commission Act, 15 U.S.C. § 45.

While a number of amendments were offered in the House which, if adopted, would have had the effect of creating a commission with powers closely aligned to those authorized in the FTC Act as ultimately enacted, the House at that time had no inclination to establish a commission with a quasi-judicial function. An amendment which would have created such a commission was proposed by Representative Lafferty, who was a member of the House Interstate and Foreign Commerce Committee which reported out the Covington Bill. Lafferty filed a minority report in which he proposed to establish a commission with *enforcement* as well as investigative powers. This commission would have had authority to make regulations defining unfair trade practices. The primary provisions in the Lafferty proposal included:

"SEC. 19. That unfair or oppressive competition and unfair trade practices in commerce among the several states and with foreign nations as hereinafter defined are hereby declared unlawful.

"SEC. 20. That the Commission is hereby empowered and directed to prevent all corporations or associations subject to the jurisdiction of said Commission from engaging in such unfair or oppressive competition or unfair trade practices.

* * * * *

SEC. 22. That the Commission is empowered to *make, alter, or repeal regulations further defining more particularly unfair trade practices or unfair or oppressive competition made unlawful by this or any other Act.*" [H.R. Rep. No. 533, Part 3, 63d Cong., 2d Sess. 19-22 (1914) (emphasis added).]

The Lafferty amendment also proposed that the commission be empowered to issue an order restraining a corporation which it found to be violating the Section 19 proscriptions. This order was to be enforceable in the Federal district courts. *Id.* §§ 23, 24.

It is interesting to note that Section 20 of the Lafferty proposal was substantially the same as Section 5(a)(6) of the FTC Act, and that Sections 23 and 24 were the equivalent of the present Section 5(b), 15 U.S.C. § 45. Thus, it appears that Mr. Lafferty, based upon his concept of the type of commission necessary to remedy the evils at which the legislation was aimed, had the foresight to anticipate the substance of the bill which was to be finally enacted. The House Commerce Committee was not disposed to adopt the Lafferty proposals, and reiterated its intent to create a commission having *only investigatory* powers by rejecting the Lafferty amendment.

When the Covington Bill reached the floor, there were several additional indications that any grant of substantive rulemaking authority to the proposed commission was not what the House intended. For the House majority view at that time was that an agency the exclusive function of which was to investigate and compile information for the use of the legislative and executive branches of government had no need of any substantive rulemaking authority. Since there were neither proscriptive provisions in the bill nor any provision for the enforcement thereof by the commission, the House reasoned, and understandably so, that no substantive rulemaking authorization was warranted.

Another bill (H.R. 1990), which authorized the commission to prohibit by the promulgation of rules and regulations any acts and practices which were contrary to the Act, was not acted on by the House. 51 CONG. REC. 8856 (1914). The House thus adhered to its intention to create an investigative agency with no substantive rulemaking authority. In a subsequent House debate, Representative Morgan made another attempt to modify the Covington Bill by replacing Section 8 thereof with a provision that:

"The Commission is hereby authorized and empowered to *make and establish rules and regulations* not in conflict with the Constitution and the laws of the United States in aid of the administration and enforcement of the provisions of this act, and *may by such rules and regulations* prohibit corporations subject to the provisions of section 9 of this act in conducting their business *from engaging in any practice* or from using any method or system, or from pursuing any policy or from resorting to any device, scheme, or contrivance *that constitutes unfair competition or unjust discrimination* as between competitors, individuals, or communities." [51 CONG. REC. 9047 (1914) (emphasis added).]

In explaining his proposed amendment, Morgan made a statement making explicit the limited rulemaking powers which would have been granted to the commission by the Covington Bill:

"Mr. Chairman, under section 8, which says that the commission, from time to time, may make rules and regulations and classifications of corporations for the purpose of carrying out the provisions of this act—under that section the commission has very limited power to make rules and regulations, *because under the provisions of the act the commission virtually has no power to enforce laws or to regulate the practices of corporations* subject to the provisions of the bill." [51 CONG. REC. 9049 (1914) (emphasis added).]

Morgan continued by stating that *his* proposal would declare unfair competition and unfair discrimination to be unlawful, and would give the commission the power to promulgate rules which would prohibit specific acts or practices as violative of the act. The force and effect which the commission's rules would have had under the Morgan proposal was clarified by his comparison of these rules with rules promulgated by the Secretary of Interior:

"I have had considerable experience in the administration of the public-land laws. The statute gives to the Secretary of the Interior the power to make rules and regulations to govern the disposition of the public lands, and the Supreme Court of the United States has held that the rules and regulations made by the Secretary of the Interior, an executive officer, *have the force and effect of law.*" [51 CONG. REC. 9050 (1914) (emphasis added).]

The Morgan amendment was rejected by the House, thereby reaffirming the intent of that body to establish a commission the only function of which would have been to conduct investigations. *Id.* Thus, it is again readily apparent that the quasi-judicial and enforcement functions of the commission as it was ultimately established were *not intended* by the House as a whole in these debates.

Still another rulemaking proposal was made by Representative Dillon whereby Section 8 of the Covington Bill would have been retained, but an additional section would have been added providing as follows:

"[T]he commission is hereby empowered to make all necessary rules, regulations, orders, and decrees for the enforcement of the powers herein granted, and the rules, regulations, orders, and decrees of such commission in any such matter shall be binding and conclusive against all persons, firms, and corporations." [51 CONG. REC. 9056 (1914).]

The Dillon amendment was explained by its proponent:

"Give the trade commission powers, not to report the facts, but to decide the facts; not to become an adjunct of the judiciary, but independent of the judiciary, and provide that its determination of the facts shall be conclusive, and leave the courts to declare the law upon the finding of the commission and upon

the undisputed facts. Give the commission the power to enforce its rules, its regulations, and its decrees and the trade commission will be able to restore competition." [51 CONG. REC. 9057 (1914).]

Here again, a proponent of an amendment envisioned a commission which would be not only investigative, but quasi-judicial as well. The House as a whole, however, was not so disposed at that time and rejected the amendment in favor of the creation of a purely investigative commission.

Thus, the legislative history clearly shows that the House was determined to withhold substantive rulemaking authority from a commission which was contemplated to be merely a source of information for the Congress and the President. The legislative history also shows that in all instances where amendments were proposed which, if adopted, would have established an agency strikingly similar to the commission of today, with substantive rulemaking authority to proscribe violations of the act was an integral part of these amendments. This would indicate the realization of the House that a commission with quasi-judicial and enforcement functions could more effectively administer the law if it had substantive rulemaking authority.

IV. SENATE BILL (S. 4160)

On June 5, 1914, the Covington Bill was passed by the House. 51 CONG. REC. 9911 (1914). The following day it was received by the Senate and referred to the Senate Committee on Interstate Commerce. 51 CONG. REC. 9929 (1914). On June 13, 1914, the Senate Commerce Committee reported out the Covington Bill by recommending the passage of a substitute bill (S. 4160). 51 CONG. REC. 10376 (1914).

The substitute bill provided for the creation of a "Federal Trade Commission." In addition to authorizing the commission to investigate corporate activities and require information, statements, and records from corporations engaged in interstate commerce, this bill also declared "unfair methods of competition in commerce" to be illegal and authorized the commission to prevent such competition. 51 CONG. REC. 10377 (1914).

The thrust of the Senate bill, in contrast to that of the House bill, was to create a commission with *quasi-judicial* functions. The Commerce Committee Report clarified the purpose of the commission:

"[T]he committee has aimed to provide a body which will have sufficient power ancillary to the Department of Justice to aid materially and practically in the enforcement of the Sherman Act and to aid the business public as well, and, *incidentally*, to build up a comprehensive body of information for the use and advantage of the government and the business world.

* * * * *

"The committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would, by a general declaration condemning unfair practices, *leave it to the commission to determine what practices were unfair*. It concluded that the *latter course would be the better*, for the reason . . . that there were too many unfair practices to define and after writing 20 of them into the law it would be quite possible to invent others." [S. Rep. No. 597, 63d Cong., 2d Sess. 13 (1914) (emphasis added).]²

This substitute bill conferred a power upon the commission to determine what practices were "unfair," and the clear intent of the Senate was that this power be exercised prospectively.

V. CONFERENCE REPORT

On August 7, 1914, both houses of Congress agreed to a conference on the two bills (H.R. 15613 and S. 4160) to resolve the differences. 51 CONG. REC. 13438, 13450 (1914). The conference committee quickly reached agreement and

² It should be noted that the debates in the Senate were restricted to the complaint and cease-and-desist order procedure for purposed of commission enforcement of the mandate of Congress, since the Senate bill *contained no rulemaking provision*. Hence the lack of discussion thereof.

its report was presented to the Senate on September 4 and to the House on September 10, 1914. The text of the draft bill which was recommended by the conference committee, and which ultimately was enacted as the Federal Trade Commission Act, incorporated provisions of both H.R. 15613 and S. 4160. The "rules and regulations" provision was a modification of that contained in the Covington Bill. The new provision read:

"Sec. 6. That the commission shall also have power—

* * * * *

"(g) From time to time to classify corporations and to make *rules and regulations* for the purpose of carrying out the provisions of this Act." [H.Rep. No. 1142, 63d Cong., 2d Sess. (1914) (emphasis added).]

It was not until this *Conference Report* was considered by the House and Senate that the Commission's present rulemaking authority was before the Congress for discussion. Thus, any congressional debates prior to the conference bill are clearly irrelevant to a determination of the force and effect of this rulemaking authority.

Of vital importance to the interpretation of the Commission's rulemaking authority is the wording of Section 6(g) as the conference committee reported it. By a stroke of the pen that committee could have substituted the word "section" for "Act" in Section 6(g), thereby limiting the application of subsection (g) to the Section 6 informational and investigative powers. But the word "Act" was used, and the plain meaning of the wording of the subsection is that the Commission may promulgate rules for the purpose of carrying out the provisions of the *entire* Act. To restrict the application of such unambiguous language to less than the entire Act would be to subvert the purpose and intent of Congress. This was confirmed by the holding in *United States v. Morton Salt Co.*, 338 U.S. 632, 647-51 (1950).

The Conference Report recommended that "unfair methods of competition in commerce" be declared unlawful, thereby broadening the proscription of the bill from the more narrow "unfair competition" contained in the Senate version:

"It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. . . . If Congress were to adopt the method of definition, it would undertake an endless task. It is also practically impossible to define unfair practices so that the definition will fit business of every sort in every part of this country. Whether competition is unfair or not generally depends upon the surrounding circumstances of the particular case." [H.Rep. No. 1142, 63d Cong., 2d Sess. (1914).]

Thus, the Conference Report evidences a clear intent that those unfair practices not extant when the statute was enacted but later invented could be condemned as "unfair methods of competition" under the statute.

On September 8, 1914, the Senate passed the bill recommended by the conference committee. 51 CONG. REC. 14802 (1914). There was very little discussion on the bill, and *none on the "rules and regulations" provision of Section 6(g).*

House debate on the conference bill was more extensive generally, but for purposes of interpreting the rulemaking provision, was ambiguous and of little value when considered in toto. While Mr. Covington stated that the Commission would have "no power to prescribe the methods of competition to be used in the future" [51 CONG. REC. 14932 (1914)], reference to his subsequent expressions places this statement in the proper context—that Covington was referring to Commission Section 5 *cease and desist* orders. There was nothing in this statement by Mr. Covington which would indicate that he was referring to the rulemaking authority vested in the Commission by Section 6(g):

"The Federal trade commission [sic] will have no power to prescribe the methods of competition to be used in future. *In issuing its orders* it will not be exercising power of a legislative nature. The basis, therefore, upon which the validity of the "narrow" court review provided by the Hepburn Act rests will be lacking." [51 CONG. REC. 14932 (1914) (emphasis added).]

Further, it should be noted that Covington was the author of the House version of the act which would have conferred only investigatory authority on the Commission, and that he was naturally thinking in terms more confining and stringent than his colleagues. Indeed, had it been Covington's decision, the Commission would have been vested with *no* quasi-judicial or law-enforcement functions, and it is clear from the legislative history of the Covington

Bill that its author did not envision the Commission which was ultimately created—with broad investigative, quasi-judicial, law-enforcement, and rule-making powers. See Federal Trade Commission Bill, Comparative Print, S. Doc. No. 573, 63d Cong., 2d Sess. (1914).

Representative Stevens, a member of the Conference Committee, thereafter described the type of commission that committee intended to create:

"* * * In this measure there is not one single function of public importance which is not now performed by some public authority, either by the executive or the legislative or by the judicial branches of our Government—not one single new subject in it.

"The only thing this bill does or attempts is to correlate the different functions now performed by the different public authorities into one organization and make it a practical, efficient, harmonious organization of our Federal Government to work out a conceded beneficial purpose. *A commission of this broad scope must necessarily embrace within itself functions or powers belonging to the three different departments of our Government—the executive, the legislative, and the judicial. That is the very purpose of its existence, else the work could be done, as now, by the separate bureaus or courts or committees having public powers. It is because they have not succeeded that this combination of functions is made.*" [51 CONG. REC. 14934 (1914) (emphasis added).]

Mr. Stevens further summarized the expectations of the conference committee by discussing what it hoped would be the result of the legislation. It should be noted that he refers not only to the evolution of "a body of law," but to "rules" as well:

"It is to be hoped that there will be gradually evolved a *body of law and rules* upon this subject which shall be comprehensive and wise and enlightening, and which, while amply protecting the general public and its interests, may at the same time encourage the struggling and worthy who seek to make a place for themselves in the commercial world, and be the basis for a higher standard and such a consistent and practical standard for our business that it shall lead the commerce of the earth.

"This bill will thus help by information, encouragement, admonition, advice, and, if necessary, restraint. No power is lacking." [51 CONG. REC. 14937 (1914) (emphasis added).]

However, a colloquy between Representatives Sherley and Stevens exemplifies some ambiguity of the House debate on the conference bill. In this exchange, Mr. Stevens appears to assume the position that the commission would be granted no power to prescribe future violations of the act:

"Mr. SHERLEY [Ky.]. If the gentleman will permit, the Federal trade commission [sic] differs from the Interstate Commerce Commission in that it has no affirmative power to say what shall be done in the future?

"Mr. STEVENS of Minnesota. Yes. The gentleman is entirely right. We desired such as is exercised by the Interstate Commerce Commission?

"Mr. STEVENS of Minnesota. Yes. The gentleman is entirely right. We desired clearly to exclude that authority from the power of the commission. We did not know as we could grant it anyway. But the time has not arrived to reconsider or discuss such a question." [51 CONG. REC. 14938 (1914).]

Subsequently, Mr. Stevens reiterated the *opposite* view as he more succinctly stated his position:

"I have already stated that it is to be hoped that a body of commercial rules may be evolved which may be a safe and wise guidance on the high plain for the business concerns of the country. They should not be technical merely, but, amplified with breadth and experience may be safely accepted as the best expression of the business world.

"This measure, for the first time in the country, attempts an administrative regulation of commerce itself. We have regulated the instrumentalities such as transportation and finance, but here we attempt to rule and help commerce. An executive alone with power of enforcement merely, or even a wise discretion, could not do it. The courts under their ruling could not wisely and liberally accomplish the needed results. *The legislative branch can only prescribe rules for the future. It requires a combination of all of those powers in one organization, with the highest obtainable talent well and thorough to work out the difficult problems which will be met. Because it is in a sense permanent and without partisanship, and can lay down a policy which can be pursued or*

changed as may be wise and necessary, without the charge of personal or political advantage, must this important commission perform such work." [51 CONG. REC. 14938-39 (1914) (emphasis added).]

Thus, an overall consideration of these statements by Mr. Stevens makes it clear that the Commission would be authorized to promulgate rules interpreting and implementing the statute.

VI. CONCLUSION

In conclusion, while the legislative history of the Federal Trade Commission Act is irrelevant in large part to a consideration of the Commission's rule-making authority, and while some inconsistent views were expressed in the House debates on the report of the conference committee, there is nevertheless substantial support in that history for the proposition that Section 6(g) was intended to confer a substantive rulemaking authority on the Commission.

In the United States District Court for the District of Maine, Southern Division
Civil Action No. 12-82

LEVER BROTHERS COMPANY, PLAINTIFF, and THE PROCTER & GAMBLE COMPANY,
INTERVENOR,

v

FEDERAL TRADE COMMISSION, MILES W. KIRKPATRICK, PAUL RAND DIXON, DAVID
S. DENNISON, JR., A. EVERETTE MACINTYRE, MARY GARDINER JONES, MEMBERS OF
THE FEDERAL TRADE COMMISSION, DEFENDANTS

CROSS MOTION FOR SUMMARY JUDGMENT OF INTERVENOR, THE PROCTER & GAMBLE
COMPANY

Intervenor, The Procter & Gamble Company, moves for summary judgment and issuance of an injunction directing the defendants to withdraw the Commission's notice initiating the proceeding for the promulgation of a Trade Regulation Rule concerning the advertising and labeling of synthetic detergents, which proceeding was noticed to commence on April 26, 1971, and restraining the defendants and all persons acting under their direction and authority from filing or conducting any further proceedings with respect to said Rule.

The grounds for this motion, all of which appear more fully in intervenor's complaint and in its memorandum in support of this motion, are as follows:

1. The Commission has not been delegated by Congress authority to promulgate substantive legislative-type Trade Regulation Rules having the effect of law, as asserted in the Commission's Regulations and Notice of Rulemaking;
2. The objective which the proposed Rule seeks to achieve, by discouraging the use of certain products and encouraging the use of others, lies outside the Commission's jurisdiction and has been entrusted by Congress to other Federal agencies specially charged with environmental and public health responsibilities;
3. Further proceedings in connection with proposed Rule would result in irreparable injury to intervenor and to the public, and there is no valid reason to defer judicial review of the legal authority asserted by the Commission.

Respectfully submitted.

ROGER A. PUTNAM,

Verrill Dana Philbrick Putnam & Williamson, 57 Exchange Street, Portland, Maine, Attorney for Intervenor, Procter & Gamble Co.

Of Counsel:

DANIEL M. GRIFFON, JOHN S. KOCH, CHARLES LISTER,
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888 Sixteenth Street NW,
Washington, D.C.

Dated April 15, 1971

CERTIFICATE OF SAVINGS

I certify that I have served the foregoing Cross Motion for Summary Judgment of Intervenor, The Procter & Gamble Company, and accompanying Memo-

randum of Intervenor, The Procter & Gamble Company, in Opposition to Defendants' Motion to Dismiss or for Summary Judgment and in Support of Its own Cross Motion for Summary Judgment and Appendices on all parties to the action by causing copies thereof to be delivered or sent by certified mail to the following persons, at the address indicated:

Honorable John N. Mitchell
Attorney General of the United States
Department of Justice
Washington, D.C.

Honorable S. Peter Mills
U.S. Attorney for the District of Maine
United States District Court House
157 Federal Street

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

Honorable Miles W. Kirkpatrick
Federal Trade Commission
Washington, D.C.

Honorable Paul Rand Dixon
Federal Trade Commission
Washington, D.C.

Honorable David S. Dennison, Jr.
Federal Trade Commission
Washington, D.C.

Honorable A. Everette MacIntyre
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ROGER A. PUTNAM.

APRIL 15, 1971.

In the United States District Court for the District of Maine, Southern Division
Civil Action No. 12-82

LEVER BROTHERS COMPANY, PLAINTIFF, and THE PROCTER & GAMBLE COMPANY,
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v.

FEDERAL TRADE COMMISSION, MILES W. KIRKPATRICK, PAUL RAND DIXON, DAVID
S. DENNISON, JR., A. EVERETTE MACINTYRE, MARY GARDINER JONES, MEMBERS OF
THE FEDERAL TRADE COMMISSION, DEFENDANTS

MEMORANDUM OF INTERVENOR, THE PROCTER & GAMBLE COMPANY, IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT AND IN SUPPORT OF
ITS OWN CROSS MOTION FOR SUMMARY JUDGMENT

ROGER A. PUTNAM,
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land, Maine, Attorney for Intervenor, The Procter & Gamble Co.*

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APRIL 15, 1971.

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In the United States District Court for the District of Maine, Southern Division
Civil Action No. 12-82

LEVER BROTHERS COMPANY, PLAINTIFF, and THE PROCTER & GAMBLE COMPANY,
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V.

FEDERAL TRADE COMMISSION, MILES W. KIRKPATRICK, PAUL RAND DIXON, DAVID
S. DENNISON, JR., A. EVERETTE MACINTYRE, MARY GARDINER JONES, MEMBERS OF
THE FEDERAL TRADE COMMISSION, DEFENDANTS

MEMORANDUM OF INTERVENOR, THE PROCTER & GAMBLE COMPANY, IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS OR FOR SUMMARY JUDGMENT AND IN SUPPORT OF
ITS OWN CROSS MOTION FOR SUMMARY JUDGMENT

This memorandum is directed not to plaintiff's motion for a preliminary injunction, but rather to the lawfulness of the proposed Trade Regulation Rule. The Commission's basic authority to act as it has, which has been put in issue by its motion to dismiss or for summary judgment and Procter's cross motion, raises the following questions:

"1. Did Congress in 1914 give the Commission power to legislate with respect to trade practices, through the promulgation of substantive and binding "Trade Regulation Rules" having the force and effect of law?

"2. May the Commission, on the basis of its authority to prevent "unfair methods of competition in commerce" and "unfair or deceptive acts or practices in commerce," attempt to achieve environmental objectives by discouraging the use of some products and encouraging the use of others?

"3. Must a manufacturer that can show immediate and irreparable injury to its business and property as a result of the illegal assertion against it of unauthorized jurisdiction by the Commission await the termination of the unauthorized proceedings before securing judicial consideration of the jurisdictional issue?"

I. CONGRESS HAS NOT AUTHORIZED THE COMMISSION TO LEGISLATE THROUGH THE
ISSUANCE OF TRADE REGULATION RULES

The threshold legal question raised by the Commission's notice of rulemaking exists wholly apart from the content or asserted factual basis of any particular Rule. That question, purely a question of law, is whether the Commission has the authority to legislate with respect to trade practices through

the promulgation of Trade Regulation Rules. We submit that the answer is no, and that the Commission should accordingly be enjoined from proceeding.

A. The Nature and Purpose of Trade Regulation Rules

Trade Regulation Rules are a device invented by the Commission in 1962 for the avowed purpose of making it easier to find that persons have committed unfair methods of competition or unfair or deceptive acts or practices in commerce—such methods, acts or practices being unlawful under Section 5(a) of the Federal Trade Commission Act, which the Commission is responsible for enforcing.

As the Commission explained, in announcing the birth of new procedural shortcut in its 1962 Annual Report (p. 36)—

"Where litigation is unavoidable, the availability of a Trade Regulation Rule on the subject saves both time and the expenditure of funds in proceeding against the unlawful practice in question. In such a case it would only be necessary to present proof that the alleged violator had engaged in the banned practice. It would not be necessary to present evidence that the practice itself was violative of law since the respondent could not challenge the validity of the rule as such."

So far the Commission has managed to avoid any judicial determination of its asserted authority to issue Trade Regulation Rules. Should that asserted authority ultimately be sustained, there is no doubt that the Commission would have accomplished its purpose of making enforcement proceedings quicker and cheaper. The Commission would be able to enter cease and desist orders—orders exposing respondents to civil penalties for violation in the amount of \$5,000 per day—without having to prove unfair or deceptive conduct on the part of the respondent; without exposing itself to the annoyance and possible embarrassment of having its witnesses cross-examined; without the inconvenience of submitting to pre-trial discovery; without the formality and inefficiency of having to make a decision on the record, supported by substantial evidence; and with full access to secret and *ex parte* communications by those seeking to prohibit what was previously allowed or to compel what was previously not obligatory.¹

Whatever may be said as to the administrative "efficiency" of such a result, it would drastically curtail the rights of those subject to Federal Trade Commission action and fly squarely in the face of the clear commands of both the Federal Trade Commission Act and the Administrative Procedure Act. Those statutes, together with the Due Process Clause of the Fifth Amendment, guarantee precisely the rights that the Commission would sacrifice in its zeal for administrative efficiency.

B. The Basis on Which the Commission Claims the Authority To Issue Trade Regulation Rules

There are currently pending in Congress, as there have been in previous Congresses, proposals to give the Commission the authority to regulate trade practices through the issuance of binding, legislative-type Rules.² None has been enacted, however, and the power the Commission asserts must be found in the Federal Trade Commission Act as it exists today.

The Commission purports to find such authority buried in Subsection (g) of Section 6 of that Act, a provision that authorizes the Commission "to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of . . . [the Federal Trade Commission Act]." 15 U.S.C. § 46(g).³

That the Commission is forced to invoke an obscure subsection of a provision dealing essentially with investigations and reports, that the Act is utterly silent as to any procedural formalities to be observed by the Commission in formu-

¹ See pages 7-9 and note 8 *infra*.

² *E.g.*, S. 968 ("Consumer Product Warranties and Federal Trade Commission Improvements Act of 1971"), introduced by Senator Magnuson, 92d Cong., 1st Sess.; S. 3201 ("Consumer Protection Act of 1970"), also introduced by Senator Magnuson, 91st Cong., 2d Sess.

³ The Commission also claims support from Section 5(a)(6), 15 U.S.C. § 45(a)(6). The basis for the Commission's reliance on the latter provision is somewhat mysterious, particularly since nothing in its terms or legislative history either mentions the subject of rules or otherwise offers the slightest support for the assertion of rulemaking authority. Both Sections 5 and 6 of the Federal Trade Commission Act are set forth in their entirety in Appendix A to this memorandum.

lating such rules and regulations as are in that subsection authorized, and that the Act nowhere purports to relate such rules and regulations to either the substantive standards of Section 5(a) or the enforcement provisions of Section 5(b) seriously undermine the Commission's reliance upon Section 6(g).⁴

The error of the Commission's position becomes inescapable in the light of these further relevant considerations: (1) the Commission advanced its current interpretation of Section 6(g) for the first time 48 years after the statute's enactment; (2) this interpretation is squarely at odds with the Act's legislative history (which shows that Congress considered and rejected proposals to give the Commission substantive or legislative-type rulemaking authority;⁵ (3) until 1962 the Commission consistently denied it possessed such authority;⁶ (4) when Congress has chosen to confer such power, it has fashioned its grant of substantive or legislative-type rulemaking power in a wholly different manner;⁷ and (5) acceptance of the Commission position would effectively eliminate the procedural safeguards guaranteed by Section 5(b) and the Administrative Procedure Act.⁸

In addition, the enactment by Congress in 1966 of the Fair Packaging and Labeling Act, 15 U.S.C. §§ 1451 *et seq.*, demonstrates, in and of itself, the error of the Commission's position. That Act authorizes the Commission in specified circumstances to issue regulations requiring the disclosure of product ingredients, as the Rule proposed here would (among other things) do. But the FPLA requires the Commission to follow a carefully prescribed series of procedural steps, whose purpose is to protect and provide due process to those affected.⁹ If, as the Commission now claims, it has general authority under the house-keeping language in § 6(g) of its organic Act to issue Trade Regulation Rules of the kind proposed here, not only would the procedural safeguards of the FPLA be obliterated, but enactment of the FPLA itself will have been proved wholly supererogatory.

The Commission's assertion of substantive rulemaking authority gains no support from the fact that other agencies, such as the Federal Communica-

⁴ As for the absence of procedural formalities, compare the carefully prescribed procedures to be followed by the Commission under the Fair Packaging and Labeling Act, discussed at pages 7-8 *infra*. As for the absence of enforcement provisions, see note 8 *infra*.

⁵ A summary of the pertinent portions of the legislative history is attached as Appendix B to this memorandum.

⁶ The instances in which the Commission itself, during the first half-century of its existence, affirmatively denied the possession of substantive or legislative-type rulemaking power are numerous; examples are reproduced as Appendix C to this memorandum.

⁷ Where Congress has given the Commission substantive or legislative-type rulemaking power it has, after defining the purpose and permissible scope of authorized rulemaking, specifically declared that violation of duly promulgated regulations is unlawful and an unfair practice under Section 5(a) of the Federal Trade Commission Act, thereby imparting to such rules their substantive or legislative force. See Wool Products Labeling Act, 15 U.S.C. § 68f; Fur Products Labeling Act, 15 U.S.C. § 69h(b); Textile Fiber Products Labeling Act, 15 U.S.C. § 70h(b); Fair Packaging and Labeling Act, 15 U.S.C. § 1456(b).

⁸ The Commission's Procedures and Rules of Practice do not authorize adjudicative procedures in hearings for the promulgation of Trade Regulation Rules, 16 C.F.R. § 1.12. Therein, of course, lies Trade Regulation Rules' "efficiency." Unlike the Rules of Practice for adjudicative proceedings, 16 C.F.R. §§ 3.1 *et seq.*, there are no provisions for cross-examination, objection, argument "and all other rights essential to a fair hearing." *Id.* at § 3.41(c). Nonetheless, both the Commission's statements of policy and its Rules of Practice provide that a Trade Regulation Rule may be employed by the Commission to "resolve" any issue in an adjudicative hearing to which it is asserted to be relevant. *Id.* at § 1.12(c). See also the Commission's 1962 Annual Report, *supra* at 36. The Commission's Rules indeed provide that the respondent in such an adjudicative proceeding shall be given a hearing only on the "applicability of the rule to the particular case." 16 C.F.R. § 1.12(c). The net effect is to deny a respondent the procedural rights guaranteed him under Section 5(b) of the Federal Trade Commission Act and the Administrative Procedure Act—a result so anomalous as to be itself a conclusive indication that Congress did not confer upon the Commission the broad powers that it now claims.

⁹ The Commission must first find that regulations are needed either to prevent the deception of consumers or to permit value comparisons. The Commission must then proceed according to the requirements of Section 701 of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 371, i.e., it must solicit comments with respect to its proposed regulations from interested persons, provide a hearing with adjudicative procedures if exceptions have been taken to the regulations, and issue a final order which is thereupon subject to judicial review.

tions Commission and the Federal Power Commission, have been granted such authority.¹⁰ In the case of each agency, the controlling question is one of congressional intent. Where Congress has delegated comprehensive regulatory authority, including licensing, over a particular industry, ancillary rulemaking power is almost a necessity to enable the agency to carry out its central objectives. The Federal Trade Commission is a wholly different type of agency. It has no licensing authority of any kind. Its activities are most nearly comparable to those of the Antitrust Division of the Department of Justice, and it has never been seriously suggested that the Division has, or should have, law-making as distinct from law-enforcing authority.

II. THE OBJECTIVE OF THE PROPOSED TRADE REGULATION RULE IS BEYOND THE SCOPE OF THE COMMISSION'S AUTHORITY; ENVIRONMENTAL PROTECTION IS THE RESPONSIBILITY, BY ACTS OF CONGRESS, OF OTHER FEDERAL AGENCIES

Even were it assumed that Congress has authorized the Commission to utilize substantive or legislative-type rules for purposes of implementing Section 5(a), clearly Congress did not authorize the use of such procedures to promote changes in consumer buying and using habits such as those which the Rule proposed here would bring about. The Commission's Rule is obviously designed to reduce or eliminate entirely the use of phosphate detergents. Stated pejoratives and founded on factual inaccuracies, the Rule is clearly calculated not to provide consumers with meaningful information about phosphate detergents but to encourage consumers to curtail their use of such detergents and to turn to substitutes.

A. *Scope of Commission Jurisdiction and "Expertise"*

To assume that the Commission was given power to achieve these results would be to assume that Congress in 1914 conferred upon the Commission a grant of legislative authority comparable in scope to the constitutional authority of Congress itself. Such an assumption must obviously be rejected, both as a matter of legislative intent and constitutional law.¹¹

Were the words "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce" encountered in, say, the Constitution, they might be interpreted to confer powers as broad as those the Commission asserts here. For example, the Congress's authority to regulate commerce among the several states has been held to authorize it not only to limit the amount of wheat that a farmer may grow for his own consumption but to forbid racial discrimination at a restaurant serving food which has moved in interstate commerce.¹² But we assume that even the Commission would concede that, however "unfair" or contrary to public policy may be the practice of racial discrimination, the Commission could not have adopted as a Trade Regulation Rule the substantive provisions of the Civil Rights Act of 1964.

Wholly apart from the question of *procedure*, therefore, we submit that there are matters that the Commission cannot regulate, directly or indirectly, through the exercise of its powers to prevent unfair methods of competition and unfair or deceptive acts or practices. In the area of concern here, advertising and labeling, the Commission is empowered to prevent deception or falseness. But the Commission is clearly not empowered to attempt to reshape consumer buying preferences and habits to conform with the Commission's views as to what may be desirable from the standpoint of the environment. The Commission's

¹⁰ See, e.g., *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943); *FPC v. Texaco, Inc.*, 377 U.S. 33 (1964).

¹¹ Elementary rules with respect to the delegation of authority make clear that any such delegation of comprehensive rulemaking powers, bereft of standards for their exercise, would be constitutionally impermissible. Compare *Yakus v. United States*, 321 U.S. 414 (1944); *United States v. Rock Royal Co-op*, 307 U.S. 533, 574 (1939); *United States v. Robel*, 389 U.S. 258, 273 (1967) (concurring opinion).

¹² See *Wickard v. Filburn*, 317 U.S. 111 (1942), and *Katzenbach v. McClung*, 379 U.S. 294 (1964).

role in the marketplace is that of a referee, not a promoter.¹³ And no attempt to articulate the proposal in the rhetoric of a traditional false and misleading advertising case can disguise the fact that the plain purpose and effect of the Rule would be to bring about a drastic reduction in the purchase and use of phosphate detergents and a significant increase in the use of substitute products.

That the Commission has entered the marketplace in the cause of environmental protection, rather than a less noble cause, does not help in any way to sustain its action. As we shall presently show, it makes even clearer that the Commission is acting in excess of its delegated authority.

B. Congress Has Delegated to Other Federal Agencies Responsibility for Environmental Protection

The Congress has considered the complex problems involved in protecting and improving the environment and has determined that Federal agencies other than the Commission should be charged with responsibility: the Council on Environmental Quality and the Environmental Protection Agency. These agencies have been directed "to mount an effectively coordinated campaign against environmental degradation in all of its forms." Message of the President relative to Executive Reorganization Plans No. 3 and 4 of 1970, 1970 U.S. Code, Cong. and Admin. News 3007. The Council is to formulate "what our broad policies in the environmental field should be," *id.* at 3007, while the Agency is to focus "on setting and enforcing pollution control standards." *Ibid.* Together they reflect the conviction both of Congress and of the President that the "time has come" to organize the Federal Government's environmental efforts "rationally and systematically," *id.* at 3003, (and, in short, that federal agencies should not set out unilaterally to deal with environmental problems according to their own lights but should await review and direction by those agencies specifically charged with the development of federal environmental policy.

The Commission's proposed action here would fly squarely in the face of that command. In setting out to discourage the use of phosphate detergents the Commission disregards the primary jurisdiction and expertise of the Council on Environmental Quality and the Environmental Protection Agency in the development of national environmental policy. In taking steps to cause the substitution for phosphate detergents of alternative products whose effectiveness, safety and environmental effects are unknown, the Commission acts directly in conflict with the efforts of Congress and the President to organize federal decision-making with regard to environmental and public health issues

¹³ Section 5 of the Act as originally passed declared unlawful only "unfair methods of competition." 38 Stat. 719. As the Supreme Court subsequently held, this language was carefully selected by Congress to encompass methods which "threatened to drive . . . competitors out of business. . . ." *FTC v. Raladam Co.*, 283 U.S. 643, 650 (1931). The section was thus intended "to supplement and bolster" the antitrust laws, *FTC v. Motion Picture Adv. Co.*, 344 U.S. 392, 294-95 (1953), by offering remedies against acts that, although not immediately antitrust violations, might ultimately result in a substantial lessening of competition. Justice Brandeis emphasized that the section was intended to reach those acts or practices that "would tend to aid or develop into a restraint of trade. . . ." *FTC v. Gratz*, 253 U.S. 421, 435 (1920) (dissenting opinion).

Nothing in the terms or purposes of the Wheeler-Lea Amendment, 52 Stat. 1028, which gave the Commission authority with respect to deceptive practices, suggests that Congress there intended to give the Commission any radically new specie of authority. To the contrary, the Senate report on the proposed amendment indicates that the revision of Section 5 was "sole[ly]" intended to relieve the Commission of the burden of proving monetary damage to competitors. S. Rep. No. 2271, 75th Cong., 1st Sess. 2 (1937). This same point was made by Representative Lea on the floor of the House. 83 Cong. Rec. 547 (1938). The Section's essential purpose remained to strengthen the Sherman and Clayton Acts by stopping "in their incipency acts and practices which, when full blown, would violate those Acts." *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966). We do not suggest that the Commission was not given discretionary authority under section 5 to define and deal with unfair or deceptive acts or practices. But, as Professor Handler has emphasized, the section's terms and history indicate that "there are metes and bounds even to flexible interpretation. There is no general authority in the Commission to formulate codes of permissible business behavior or to introduce into the fabric of competitive regulation its personal predilections of what is good or bad for the economy." Handler, Recent Antitrust Developments, 71 Yale L.J. 75, 95 (1961). If the Commission lacks such authority with respect to the regulation of competition, *a fortiori* it lacks authority to attempt to regulate consumer buying preferences in order to achieve environmental goals wholly unconnected with the prevention of deception or the preservation of competition and our free market economy.

"rationally and systematically." That no Federal agency has the authority to act precisely as the Commission proposes to act is no answer. Congress, in recognition of the complexities of environmental regulation, has directed that study and full consideration precede action. In so doing, however, it has just as effectively pre-empted this area of regulation, as if it had decreed a ban on all products that have any adverse environmental consequences.

III. THE LEGALITY OF THE COMMISSION'S ACTION CAN AND SHOULD BE ADJUDICATED NOW

If, as we have shown, the promulgation of this proposed Trade Regulation Rule would exceed the Commission's authority, the only question remaining is whether the Commission may, nonetheless, avoid or postpone judicial review.

Although courts have in the past hesitated to intercede until the administrative process has exhausted itself and all others concerned, compare *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), that attitude has now significantly altered. Two lines of authority control here. First, it has repeatedly been held that, whatever the more general standards of ripeness, courts can and should intervene whenever an administrative proceeding is "void and so irrevocably tainted that any final determination which might flow from such proceedings will be invalid." *Amos Treat & Co. v. SEC*, 306 F.2d 260, 263 (D.C. Cir. 1962). See also *Elmo Div. of Drive-X Co. v. Dixon*, 348 F.2d 342 (D.C. Cir. 1965); *Knoll Associates, Inc. v. Dixon*, 232 F. Supp. 283, 285 (S.D.N.Y. 1964). Here, as in *Amos Treat*, the "asserted infirmity is fundamental," *supra* at 265, and the Commission's proposed proceeding is "void" and "irrevocably tainted." Courts should intervene where, in Professor Jaffe's phrase, there is a "fundamental question of law" that cuts "sharply to the heart of the whole procedural regulation." L. Jaffe, *Judicial Control of Administrative Action* 442 (1965). In these circumstances, it is proper, indeed imperative, that courts act to prevent the costs and injuries of unlawful proceedings.¹⁴

Second, recent Supreme Court decisions require a more realistic and pragmatic standard with respect to questions of ripeness. See *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967); *Frozen Food Express v. United States*, 351 U.S. 40 (1956); *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956); *Bantam Books v. Sullivan*, 372 U.S. 58 (1963). The controlling question is now viewed as whether the issues presented involve administrative action that has had a "direct and immediate" impact, felt "in a concrete way" by the challenging party. *Abbott Laboratories v. Gardner*, *supra* at 148, 152.

What is required is a "pragmatic approach." *Upjohn Co. v. Finch*, 303 F. Supp. 241, 255 (W.D. Mich. 1969), involving a "realistic appraisal of the consequences" of the challenged administrative action. *Istbrandtsen Co. v. United States*, 211 F.2d 51, 55 (D.C. Cir. 1954). The assertion of authority that is challenged here is not a press release or a request for "cooperation" (*Bantam Books v. Sullivan*, *supra*). It is considered Commission action, formalized not only in the Federal Register but in the Commission's permanent Regulations, that stands as a threat that the Commission will, at a time and with respect to a subject matter of its own choosing, exercise authority beyond that delegated to it by Congress.

There can be no doubt that the Commission's proposed proceeding will have a "direct," "immediate," and "concrete" impact upon Procter.¹⁵ Procter would be compelled to suffer the costs and prejudices of informal and possibly lengthy hearings, in which any and all persons would be permitted to utter such claims or allegations as they may think proper. Under the Commission's Procedures and Rules of Practice, Procter would not be accorded those procedural rights that would be imperative for a full and fair assessment of those claims and allegations. 16 C.F.R. §§ 1.11 *et seq.* In substance and effect, the manufacturers

¹⁴ The opinion of the Court of Appeals for the District of Columbia in *Bristol-Myers Co. v. FTC*, 424 F. 2d 935 (D.C. Cir. 1970), should not be read to require differently. The Court there was confronted principally by issues arising under the Freedom of Information Act. It is submitted that the brief reference in the Court's opinion to ripeness does not reflect the state of the law on this question and overlooks significant decisions by that very court. Compare *Elmo Div. of Drive-X Co. v. Dixon*, *supra*; *B. F. Goodrich Co. v. FTC*, 208 F. 2d 829, 834 (D.C. Cir. 1953).

¹⁵ Indeed, to a degree not subject to quantification, Procter's interests may already have been irreparably injured. The announcement and pre-hearing press reporting of the Commission's unlawful proceeding have undoubtedly led some consumers, as well as many state and local officials, to conclude that phosphate detergents are pollutants and should be banned and that safe and effective alternatives are available, factual assumptions which in both cases are erroneous.

of phosphate detergents are to be placed on trial, without fundamental procedural protections, and in a proceeding patently in excess of the Commission's authority.

It is little comfort that a court might later require the Commission to permit a challenge of the basis of any Trade Regulation Rule issued as a consequence of this rulemaking proceeding. The Commission's views, together with the views of consumers and of state and local officials, will to a significant degree have been shaped and hardened by the unlawful proceeding. It is pure fiction that this rulemaking proceeding may be erased from the Commission's memory, or from the memories of consumers or state and local officials.

Any "realistic appraisal" demands the conclusion that Procter is suffering "direct" and "immediate" injury, well within the standard of *Abbott Laboratories* and *Bantam Books*. Moreover, even if the Court should hold that standard unsatisfied here, it must, under the cases which concern the review of tainted or unlawful proceedings, deny defendants' motion and grant Procter's cross-motion. As the foregoing sections of this memorandum clearly demonstrate, the promulgation of this proposed Trade Regulation Rule is beyond the Commission's present authority.

If Procter's cross-motion is granted, it will impede neither the Commission's exercise of its lawful authority nor appropriate action by other agencies with respect to the nation's environmental problems. The objection here goes instead to "the process by which [the Commission] has chosen" to act. *Elmo Div. of Drive-X Co. v. Dixon*, *supra* at 344. The Commission has selected a method patently beyond its legal authority, in hopes of achieving environmental purposes outside the area of its statutory responsibilities. In this situation, courts should not, as Judge McGowan has emphasized, "rebuff at the courthouse door those affected by the rule who seek an appropriate, albeit early, test of its validity." *National Motor Freight Ass'n v. United States*, 268 F. Supp. 90, 94 (D.C. 1967). See also *B. F. Goodrich Co. v. FTC*, 208 F. 2d 829, 834 (D.C. Cir. 1953).

CONCLUSIONS

Defendants' motion to dismiss or for summary judgment should be denied, and Procter's cross-motion for summary judgment should be granted.

Respectfully submitted.

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APRIL 15, 1971.

Appendices, Consisting of Certain Statutory Materials and Related Authorities

List of Appendices

Appendix A—Sections 5 and 6 of the Federal Trade Commission Act, 15 U.S.C. §§ 45, 46 (6 pages).

Appendix B—The Legislative History of the Federal Trade Commission Act Insofar as It Bears on the Question Whether Congress Conferred on the Commission Substantive or Legislative-type Rulemaking Authority (20 pages).

Appendix C—The Commission's Own Past Interpretations of Its Powers (12 pages).

APPENDIX A

Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45—

§ 45. *Unfair methods of competition unlawful; prevention by Commission—Declaration of unlawfulness; power to prohibit unfair practices*

(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated

prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 227(a) of Title 7, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

Proceeding by Commission; modifying and setting aside orders

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation, a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41-46 and 47-58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the

proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however*, That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

Review of order: rehearing

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the records in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28.

Jurisdiction of court

(d) Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

Precedence of proceedings; exemption from liability

(e) Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the Commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

Service of complaints, orders and other processes; return

(f) Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.

Finality of order

(g) An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the court of appeals; or

(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.

Same; order modified or set aside by Supreme Court

(h) If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

Same; order modified or set aside by Court of Appeals

(i) If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

Same; rehearing upon order or remand

(j) If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

Definition of mandate

(k) As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

Penalty for violation of order

(l) Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than \$5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense. Sept. 26, 1914, c. 311, § 5, 38 Stat. 719; Feb. 13, 1925, c. 229, § 2, 43 Stat. 939; Mar. 21, 1938, c. 49, § 3, 52 Stat. 111; June 23, 1938, c. 601, § 1107(f), 52 Stat. 1028; June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Mar. 16, 1950, c. 61, § 4(c), 64 Stat. 21; July 14, 1952, c. 745, § 2, 66 Stat. 632; Aug. 23, 1958, Pub.L. 85-726, Title XIV, § 1411, 72 Stat. 809; Aug. 28, 1958, Pub.L. 85-791, § 3, 72 Stat. 942; Sept. 2, 1958, Pub.L. 85-909, § 3, 72 Stat. 1750; June 11, 1960, Pub.L. 86-507, § 1(13), 74 Stat. 200.

Section 6 of the Federal Trade Commission Act, 15 U.S.C. § 46—

§ 46. Additional powers of commission

The commission shall also have power—

Investigation of corporations

(a) To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any corporation engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, and its relation to other corporations and to individuals, associations, and partnerships.

Reports by corporations

(b) To require, by general or special orders, corporations engaged in commerce, excepting banks and common carriers subject to the Act to regulate commerce, or any class of them, or any of them, respectively, to file with the commission in such form as the commission may prescribe annual or special, or both annual and special, reports or answers in writing to specific questions, furnishing to the commission such information as it may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective corporations filing such reports or answers in writing. Such reports and answers shall be made under oath, or otherwise, as the commission may prescribe, and shall be filed with the commission within such reasonable period as the commission may prescribe, unless additional time be granted in any case by the commission.

Investigation of compliance with antitrust decrees

(c) Whenever a final decree has been entered against and defendant corporation in any suit brought by the United States to prevent and restrain any violation of the antitrust Acts, to make investigation, upon its own initiative, of the manner in which the decree has been or is being carried out, and upon the application of the Attorney General it shall be its duty to make such investigation. It shall transmit to the Attorney General a report embodying its findings and recommendations as a result of any such investigation, and the report shall be made public in the discretion of the commission.

Investigations of violations of antitrust statutes

(d) Upon the direction of the President or either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation.

Readjustment of business of corporations violating antitrust statutes

(e) Upon the application of the Attorney General to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order that the corporation may thereafter maintain its organization, management, and conduct of business in accordance with law.

Publication of information; reports

(f) To make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest; and to make annual and special reports to the Congress and to submit therewith recommendations for additional legislation; and to provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use.

Classification of corporations; regulations

(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of sections 41-46 and 47-58 of this title.

Investigations of foreign trade conditions; reports

(h) To investigate, from time to time, trade conditions in and with foreign countries where associations, combinations, or practices of manufacturers, merchants, or traders, or other conditions, may affect the foreign trade of the United States, and to report to Congress thereon, with such recommendations as it deems advisable. Sept. 26, 1914, c. 311, § 6, 38 Stat. 721.

APPENDIX B

THE LEGISLATIVE HISTORY OF THE FEDERAL TRADE COMMISSION ACT INsofar AS IT BEARS ON THE QUESTION WHETHER CONGRESS CONFERRED ON THE COMMISSION SUBSTANTIVE OR LEGISLATIVE-TYPE RULEMAKING AUTHORITY

The Federal Trade Commission Act, which became law in 1914, during President Wilson's administration, was significant, innovative legislation. Its precise terms were carefully considered and thoroughly debated. The reported history is full enough to shed light on what Congress meant by what it finally enacted.

Insofar as the history of the Federal Trade Commission Act bears on the question whether the Commission was given power to promulgate substantive or legislative-type rules, its import is unmistakable. Congress repeatedly rejected proposals to supply what is lacking in the Act—a provision conferring substantive or legislative-type rule-making authority on the commission. The rejection was deliberate and unambiguous.

The first rule-making amendment was offered by Congressman Lafferty, a member of the House Interstate and Foreign Commerce Committee, which had reported a bill similar to the one that later passed the House. That bill created a Commission only to investigate and gather information. See Federal Trade Commission bill, Comparative Print, S. Doc. No. 573, 63rd Cong., 2nd Sess. (1914). Congressman Lafferty filed a minority report in which he proposed to give the Commission enforcement powers as well. See H.R. Rep. No. 533, Part 3, 63rd Cong., 2nd Sess. 19-22 (1914).

The specific provisions he proposed included:

"Sec. 19. That unfair or oppressive competition and unfair trade practices in commerce among the several States and with foreign nations as herein-after defined are hereby declared unlawful.

"Sec. 20. That the Commission is hereby empowered and directed to prevent all corporations or associations subject to the jurisdiction of said Commission from engaging in such unfair or oppressive competition or unfair trade practices.

"Sec. 21. That unfair or oppressive competition and unfair trade practices as used in this Act are hereby defined to include the following:

* * * * *

"(j) Any other methods involving unfair or oppressive competition or unfair trade practices, contrary to the provisions of this Act, or contrary to the provisions of any of the antitrust Acts now existing or which may hereinafter be enacted.

"Sec. 22. *That the Commission is empowered to make, alter or repeal regulations further defining more particularly unfair trade practices or unfair or oppressive competition made unlawful by this or any other Act.*" (Emphasis supplied.)

Sections 23 and 24 of the Lafferty amendment went on to provide that the Commission could find a corporation to be engaged in unfair competition and issue an order restraining the unfair competition which it could if necessary petition a United States district court to enforce.

The Lafferty amendment would also have left intact the provision in Section 8 of the original House bill that empowered the Commission to "from time to time make rules and regulations and classifications of corporations for the purpose of carrying out the provisions of this Act." See H.R. Rep. No. 533, Part 3, 63rd Cong., 2nd Sess. 12 (1914).

The Lafferty amendment thus contained the basic statutory provisions that were eventually enacted, as well as a specific provision authorizing general substantive or legislative-type rule-making by the Commission. It included in Section 19 (taken together with Section 21(j)) the equivalent of what is now codified Section 5(a)(1).

Section 20 was a close equivalent to the present Section 5(a)(6) and Sections 23 and 24 were the equivalent of the present Section 5(b). Section 8 of the original House bill as retained in the Lafferty amendment is the forerunner of the present Section 6(g). Included also in the Lafferty amendment was Section 22, a specific authorization to the Commission "to make, alter, or repeal regulations further defining more particularly unfair trade practices or unfair or oppressive competition."

This piece of history alone makes untenable the Commission's reliance on Sections 6(g) and 5(a)(6) as authority for its rule-making power. For when the predecessors to these provisions first appeared it was thought necessary that they should be accompanied by an explicit provision granting to the Commission rule-making authority. The House committee rejected Congressman Lafferty's proposal and reported the original bill granting only investigatory powers to the Commission.

Thus, the subsequent appearance of provisions similar to present Sections 6(g) and 5(a)(6) without the accompanying section explicitly granting to the Commission substantive or legislative-type rule-making power demonstrates both that Congress rejected the proposal that the Commission should be granted the power here asserted and that these other provisions cannot be interpreted to grant that authority.

When the House bill reached the floor (without the Lafferty amendments described above) there were a number of additional explicit indications that any grant of substantive or legislative-type rule-making authority to the Commission was unacceptable to Congress. During the debate on May 19, 1914, reference was made to another House bill, H.R. 1890, which would have provided:

"The Commission is hereby authorized and empowered to make and establish rules and regulations not in conflict with the Constitution and laws of the United States to aid in the administration and enforcement of the provisions of this act, and may, by such rules and regulations, prohibit any particular or specific act or acts, practice, method, system, policy, device, scheme, or contrivance that is contrary to any of the provisions of this act." 51 Cong. Rec. 8856 (1914).

No such provision became part of the Act.

Later in the debates Representative Morgan sought to replace Section 8 of the House bill with a provision that—

"The Commission is hereby authorized and empowered to make and establish rules and regulations not in conflict with the Constitution and laws of the United States to aid in the administration and enforcement of the provisions of this act, and may by such rules and regulations prohibit corporations subject to the provisions of section 9 of this act in conducting their business from engaging in any practice or from using any method or system, or from pursuing any policy or from resorting to any device, scheme, or contrivance that constitutes unfair competition or unjust discrimination as between competitors, individuals, or communities." 51 Cong. Rec. 9047 (1914).

The proposed amendment was then explained by its sponsor as follows:

"Mr. Chairman, under section 8, which says that the commission, from time to time, may make rules and regulations and classifications of corporations for the purpose of carrying out the provisions of this act—under that section the commission has very limited power to make rules and regulations, because under the provisions of the act the commission virtually has no power to enforce laws or to regulate the practices of corporations subject to the provisions of the bill. Now, the amendment which I have offered gives to the commission the power to make rules and regulations that would prohibit specifically the particular practices which constitute unfair competition or unfair discrimination. The amendment is drawn on the idea that some place along the line Congress will prohibit in general terms unfair competition and unfair discrimination. Then, of course, unfair competition or unjust discrimination would be unlawful. Then we give the commission power to make rules and regulations that would prohibit a specific practice that constitutes unfair competition. Now, then, gentlemen, we never will control the corporations of this country properly by simply prohibiting certain acts. I believe it is well enough where there is some conspicuous practice that is well known to be obnoxious and dangerous to the people to prohibit that, and perhaps at this session of Congress in all of our antitrust legislation we may prohibit one or two or three or four things; but then Congress adjourns. Business will comply with these prohibitions, will abstain from the few things we prohibit; but the next day, the next month, or the next year business concerns will invent other practices which are unfair and destructive of competition, which are dangerous to the people, and which enable the big corporations to go on in the same course as before.

"Therefore, the proper thing to do is to legislate in general terms, to comprehend and include all kinds of acts and practices which are objectionable. Then give this great commission, to be composed of men of the highest grade and character, the authority to make rules and regulations that will prohibit specific acts and practices coming within the general classes prohibited by the general terms of the act. I have had considerable experience in the administration of the public-land laws. The statute gives to the Secretary of the Interior the power to make rules and regulations to govern the disposition of the public lands, and the Supreme Court of the United States has held that the rules and regulations made by the Secretary of the Interior, an executive officer, have the force and effect of law." 51 Cong. Rec. 9049-50 (1914).

Representative Morgan's amendment was rejected by a division vote. 51 Cong. Rec. 9050 (1914).

Yet another unsuccessful substantive or legislative-type rule-making proposal was put forward by Representative Dillon. He would have left Section 8 of the House bill intact but added to another section a provision that—

"[T]he commission is hereby empowered to make all necessary rules, regulations, orders, and decrees for the enforcement of the powers herein granted, and the rules, regulations, orders, and decrees of such commission in any such matters shall be binding and conclusive against all persons, firms, and corporations." 51 Cong. Rec. 9056 (1914).

Representative Dillon defended his proposal as follows:

"Give the commission power to enforce its rules, its regulations, and its decrees and the trade commission will be able to restore competition . . . The commission should be given the right to give standards of conduct in corporate affairs and to prepare a moral code in the conduct of corporate affairs . . . Congress has the power to enact rules for the regulation of future conduct, future rights, and future controversies. Give the trade commission the

full power to make rules, regulations, and decrees and full power to enforce its mandates . . ." 51 Cong. Rec. 9057 (1914).

Once again, however, this time by voice vote, the amendment was rejected. *Ibid.*

The record thus shows clearly and unmistakably that the House was determined not to grant substantive or legislative-type rule-making authority to the commission. The Senate did not disturb this determination. The Senate added to the House bill provisions similar to those parts of the Lafferty amendment which are the forerunners of present Sections 5(a)(1), 5(a)(6), 5(b), and 6(g); it did not add, as the Lafferty amendment would have, any provision authorizing rule-making by the Commission.

The Senate bill provided:

"Sec. 5. That unfair competition in commerce is hereby declared unlawful.

"The commission shall have authority to prevent such unfair competition in commerce in the manner following, to wit:

"Whenever it shall have reason to believe that any person, partnership, or corporation is violating the provisions of this section it shall issue and serve upon the defendant a complaint stating its charges in that behalf and at the same time a notice of hearing upon a day and at a place therein fixed.

"The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint." See Federal Trade Commission Bill, Comparative Print, S. Doc. No. 573, 63rd Cong., 2nd Sess. (1914).

It will be noted that this provision explicitly restricted the Commission, in carrying out its mandate, to the complaint and cease and desist order procedure. It is clear, moreover, that the Senate Commerce Committee meant that the complaint and cease and desist order procedure should be exclusive. Its report states:

"One of the most important provisions of the bill is that which declares unfair competition in commerce to be unlawful, and empowers the commission to prevent corporations from using unfair methods of competition in commerce by orders issued after hearing, restraining, and prohibiting unfair methods of competition, which orders are enforceable in the courts." S. Rep. No. 597, 63rd Cong., 2nd Sess. 13 (1914).

Similarly, Senator Newlands, when introducing the bill in the Senate, stated:

"We have added several provisions to the Senate bill which will enlarge the sphere of the trade commission's power and usefulness, among them the power after hearing, to prevent unfair competition by order enforceable in the courts, also to investigate and report upon foreign trade practices which interfere with the fair marketing of American products, and also to investigate and report upon combinations between foreign and American producers for the control of prices. These powers, in addition to those previously provided for in the Senate bill, covering investigation and report from such corporations as the trade commission may designate, publicity, aid to the courts and to the Attorney General in framing and enforcing decrees dissolving corporations, if wisely exercised, will make the trade commission as useful and effective in building up a system of administrative law regarding trade as the Interstate Commerce Commission has been in matters of transportation." 51 Cong. Rec. 10376 (1914).

Later Senator Newlands, during an extensive description of the bill, stated:

"One of the most important provisions of this bill, Mr. President, is that which relates to unfair competition. Unfair competition is made unlawful, and the commission is authorized, when any case of unfair practice or unfair method is brought to its attention, to summon the party charged and to have a hearing, and if it decides that the practice or method is unfair, to issue an order compelling its discontinuance, and if that order is not obeyed it can carry the matter into court and secure a judgment of the court compelling obedience to the commission's order." 51 Cong. Rec. 11084 (1914).

Thus, the Senate, while adding to the legislation under consideration provisions making the Commission an agency with enforcement powers and adding the forerunner of Section 5(a)(6), withheld substantive or legislative-type rule-making power from the Commission.

In conference the form of Section 5 was changed from the form in the Senate bill to read:

"Sec. 5. That unfair methods of competition in commerce are hereby declared unlawful.

"The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

"Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint." See Federal Trade Commission Bill, Comparative Print, S. Doc. No. 573, 63rd Cong., 2nd Sess. (1914).

The later renumbering of Section 5 made by the conferees was an incidental result of the redrafting necessary to add the bank and common carrier exemption and the limitation upon the power of Commission to proceed to those cases where it appeared that a proceeding would be "to the interest of the public." See pp. 33-34, *supra*.

There is no discussion in either the Conference report, or in the debates, of the significance of this change. The House, both in committee and on the floor, had rejected provisions authorizing substantive or legislative-type rule-making. Before the Senate passed the bill, it had been assured that the Commission would not have that power. In these circumstances if it had been intended by the elimination of the words "in the manner following, to wit:" in Section 5 to broaden the Commission's powers to include such rule-making such an intention would not have gone unmentioned.

Even with the changes made by the conferees Section 5 remained a single unitary provision without separate, designated subsections. This is in contrast to Section 6, where the intention was to make a series of separate grants of power, and the form employed was that of lettered subsections.

Although Section 5 today also contains separately lettered paragraphs that development came about some 38 years after the original passage of the statute and for reasons wholly unrelated to the question under consideration.* Thus the fact that the declaration of the unlawfulness of unfair competition and unfair and deceptive acts and practices and the provision for adjudicatory enforcement now appear in separately numbered paragraphs of Section 5 in no way supports an argument that Section 5(b) is merely one of alternative methods open to the Commission of implementing Section 5(a)(6).

In addition to the conferees' silence concerning the change in the form of Section 5, there is a passage in the House Conference Report that is consistent only with the proposition that the Commission's enforcement procedure was to be that prescribed in the Senate bill. Section 5 is summarized in the report as follows:

"Section 5 declares unfair methods of competition to be unlawful and empowers the commission, after hearing, to order the discontinuance of the use such methods." H.R. Rep. No. 1142, 63rd Cong., 2nd Sess. 18 (1914).

This summary shows that the House conferees conceived of Section 5 as a self-contained unit, embodying both a grant of power and an exclusive procedure for exercising that power.

When the Conference bill reached the House floor, it was explained by Congressman Covington, a member of the Conference Committee, who was called "the author of the bill. 51 Cong. Rec. 14925 (1914). Congressman Covington dealt expressly with the nature of the powers that the bill granted the Commission:

* This separate numbering did not come into the Act until the 1952 McGuire amendments, 38 years after the Act's original passage, and appeared for reasons wholly unrelated to the question under discussion. The 1952 amendments embodied extensive additions to Section 5 and the addition of lettering no doubt was made simply for purposes of clarity because of the substantial physical expansion of the terms of the section.

"The Federal trade commission will have no power to prescribe the methods of competition to be used in future. In issuing its orders it will not be exercising power of a legislative nature. . . .

"The function of the Federal trade commission will be to determine whether an existing method of competition is unfair, and, if it finds it to be unfair, to order the discontinuance of its use. In doing this it will exercise power of a judicial nature. . . .

"For the reason stated, there is no analogy between the power of the Interstate Commerce Commission under the Hepburn Act and the power of the Federal trade commission in regard to unfair competition. There is, however, a perfect analogy between the former power of the Interstate Commerce Commission under the Cullom Act and the power of the Federal trade commission. Under the Cullom Act the Interstate Commerce Commission had the power only to determine whether an existing rate was unreasonable, and, if it so found to order the railroad to cease and desist from charging that rate. The Federal trade commission will have precisely similar power in regard to an existing method of competition." 51 Cong. Rec. 14932 (1914).

The same point was repeated by Congressman Stevens, also a member of the Conference Committee:

"Mr. SHERLEY. If the gentlemen will permit, the Federal trade commission differs from the Interstate Commerce Commission in that it has no affirmative power to say what shall be done in the future?"

"Mr. STEVENS of Minnesota. Certainly.

"Mr. SHERLEY. In other words, it exercises in no sense a legislative function such as is exercised by the Interstate Commerce Commission?"

"Mr. STEVENS of Minnesota. Yes. The gentleman is entirely right. We desired clearly to exclude that authority from the power of the Commission. We did not know as we could grant it anyway. But the time has not arrived to consider or discuss such a question." 51 Cong. Rec. 14938 (1914).

Congressman Covington also explained the provision, introduced by the conferees, whereby the Commission was to institute a proceeding only where it found that such a proceeding "would be to the interest of the public." He said:

"As the bill passed the Senate there was not, however, any limitation in section 5, relating to unfair competition, directing the trade commission to deal with cases only where a public interest is involved, so the conferees agreed to insert a provision that the commission shall act—if it shall appear to the

"That prevents the Commission from becoming a clearing house to settle commission that a proceeding by it in respect thereof would be to the interest of the public."

the everyday quarrels of competitors, free from detriment to the public, which should be adjusted through the ordinary processes of the courts." 51 Cong. Rec. 14930 (1914).

This limiting language is so placed that, if the Commission indeed has authority to proceed against unfair methods of competition other than by an adjudicatory hearing looking to a cease and desist order, the limitation would not apply to its proceeding. It is clear from Congressman Covington's remarks that the Commission was not meant to have available to it modes of enforcement free from the "public interest" limitation.

Such were the provisions of the bill and such had been the explanation of them when the two houses adopted the Conference report and sent the bill to the President for his signature. See 51 Cong. Rec. 15190 (1914). Nothing in this history supports the view that Congress meant the Commission to have substantive or legislative-type rulemaking power. Every relevant feature of the history is to the contrary.

There is one aspect of the legislative history that is touched upon in the foregoing chronology but warrants fuller development. That is the evolution of what is now Section 6(g) of the Act, the principal section on which the Commission relies for its authority to make binding rules.

The original House bill, as we have said, would have created an agency possessing solely investigatory and information-gathering powers. See Federal Trade Commission Bill, Comparative Print, S. Doc. No. 573, 63rd Cong., 2nd Sess. (1914). To this end, Section 3 of the House bill would have transferred to the Commission the "powers, authority, and duties of the Bureau of Corporations and of the Commissioner of Corporations." *Id.* at 5. What led to the

proposal was the belief that these powers should be exercised by an independent commission, and that "the investigations conducted and the information acquired by the commission under the authority heretofore exercised by the Bureau of Corporations or the Commissioner of Corporations" should be "remove[d] entirely from the control of the President and the Secretary of Commerce . . ." H.R. Rep. No. 533, 63rd Cong., 2nd Sess. 3 (1914).

Because there was thought to be a "serious question . . . whether regular annual reports from corporations engaged in interstate commerce could be required under the powers of the Bureau of Corporations," H.R. Rep. No. 533, *supra* at 3, Section 9 of the House bill was inserted specifically to deal with this question. Section 9 would have required "every corporation . . . which . . . has a capital of not less than \$5,000,000" to furnish annual reports to the Commission. See Federal Trade Commission Bill, Comparative Print, S. Doc. No. 573, 63rd Cong., 2nd Sess. 14 (1914). The House recognized, however, that a smaller corporation could also have "an organization or financial condition or a system of practices that requires publicity to bring about lawful methods in its business" and, therefore, should also file annual reports.

At the same time, the requirement of submitting annual reports was also recognized to be a significant burden for smaller corporations. H.R. Rep. No. 533, *supra*, at 3-4. The solution was to require, in Section 9 of the House bill, annual reports not only from corporations with a capital in excess of \$5,000,000, but also from "every corporation . . . having a less capital [which] belongs to a class of corporations which the commission may designate . . ." Comparative Print, *supra*, p. 14. The specific power of the Commission to classify corporations was contained in Section 8 of the House bill, which provided:

"That the commission may from time to time make rules and regulations and classifications of corporations for the purpose of carrying out the provisions of this Act." Comparative Print, *supra*, p. 15.

Section 6(g) of the statute ultimately enacted is worded almost identically:

"That the Commission shall . . . have power— . . . from time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act." Comparative Print, *supra*, p. 10, 12.

The origin of Section 6(g) indicates that such rule-making authority as is conferred by that section is limited to the promulgation of rules concerning corporate classifications for the purpose of requiring the submission of reports to the Commission. This limitation is confirmed by statements made on the floor of the House during the debate on the House bill. Congressman Covington summed up a discussion of the reporting requirements and the Commission's power, in Section 8, to "make rules and regulations and classifications of corporations," by saying:

"The Congress has itself fixed two broad classes [of corporations], those with more than \$5,000,000 capital, which are arbitrarily required to file reports, and those with less than \$5,000,000, which, under rules and regulations of the commission, may or may not report." 51 Cong. Rec. 8845 (1914).

He then referred to "the regulation classifying certain corporations from which reports must be filed . . ." *Ibid*.

The limited nature of the regulation power conferred by Section 8 of the House bill—now Section 6(g)—is unmistakably apparent from the debate on an amendment offered by Congressman Towner to authorize the Commission to require a uniform system of accounts by reporting corporations. 51 Cong. Rec. 9047 (1914). Congressman Stephens asked Congressman Towner—

"if he does not think that section 8 [now Section 6(g)] is sufficiently strong to permit the commission to make rules and regulations as to the manner in which the accounts shall be kept?" 51 Cong. Rec. 9048 (1914).

Representative Towner replied:

"No, I do not. I have examined section 8 carefully, and it is not within the power of the commission under the language of that section to make rules and regulations for the commission. That is not what is intended. It is only with regard to the classification of corporations for the purpose of carrying out provisions of the act. *The rules and regulations which the commission may make are limited to the classification.* The gentleman can at once see that that language could not possibly authorize an accounting necessary upon which to report the business. The rules and regulations are only with regard to the classification of corporations and can have no reference whatever to the requirements for reports." *Ibid*. (Emphasis supplied.)

APPENDIX C

THE COMMISSION'S OWN PAST INTERPRETATIONS OF ITS POWERS

For the first half century of the Commission's existence, it conceded that it had no power to issue substantive or legislative-type rules. This concession is independently persuasive evidence that the Commission's current expansive view of its authority is unfounded.

One of the earliest recognitions by the Commission of its lack of substantive or legislative-type rule-making power was its use of Trade Practice Submittals, a device that later gave way to the Trade Practice Conference Procedure. By 1919, the Commission had received numerous complaints of allegedly unfair practices occurring on an industry-wide basis. In reasoning similar to that frequently advanced in support of its asserted Trade Regulation Rule authority, the Commission said that to proceed against all members of the industry would be expensive and time consuming and to proceed against only a few would be unjust.

"It soon became, therefore, a matter of anxious consideration by the commission what means it could employ within the scope of its powers to aid in bringing about the abandonment of any unfair practices before it had made an investigation or determined whether in the interest of the public a complaint should issue The Commission's organic act made no provisions for such contingencies, and it was apparent that whatever procedure was devised would have to conform to the limitations imposed by that act and be enforceable by the procedure there laid down." Federal Trade Commission, Trade Practice Submittals 1 (1925).

Under the procedure devised, the Trade Practice Submittal, members of an industry met under the guidance of the Commission and decided what they considered to be unfair methods of competition. The decisions of the industry were then submitted to the Commission. If the Commission approved, they were issued as rules with which the individual members could agree to comply. The effect of such rules was uncertain during the first few years. The report of one of the earliest of these conferences stated that—

"It was understood that the judgment of the industry, as expressed, should be for the guidance of the commission and should be regarded as, *prima facie*, law merchant for the industry." *Id.* at 7.

The report also stated that—

"Until testimony to the contrary is produced, however, the commission will regard as conclusive the judgment of the trade in declaring such practices to be in fact unfair." *Id.* at 9.

Ultimately, however, the Commission apparently determined that it did not have the power to declare such expressions of the industry as even "*prima facie* law merchant"—much less as a body of binding, mandatory Rules, enforceable by cease and desist order upon a mere showing that the respondent violated the Rule. The report of a later conference stated that—

"The expression of the industry as here given is advisory to the commission with respect to the issuance of a complaint, but upon a trial of the complaint the respondent will come in entirely without prejudice on the part of the commission and any practice which is challenged will be examined from the beginning." Trade Practice Submittals, p. 22 (1925).

When the Commission could not accept an industry determination that a certain practice was "fair," it would issue a statement that it disapproved of that particular practice and then "proceed in individual cases as they come before it on this basis, with due regard to the merits of any particular case." *Id.* at 37.

Not only does the general theory of the Trade Practice Conference procedure negate the notion that the Commission possesses substantive or legislative-type rule-making power, but also individual Commissioners and members of the Commission staff, over the years, have recognized the lack of such power in public statements.

The report of the conference on Sheffield Silver-Plated Hollow Ware, held in 1922, contains a specific denial.

"It was explained to those who desired the commission to state and enforce a standard definition or meaning that the commission was without power to do this; that it could only look to see whether the terms actually in use were deceptive to the purchasing public." *Id.* at 36-37.

Similarly, the Commission in its annual report to Congress for 1922 denied it had power to issue substantive or legislative-type rules:

"One of the most common mistakes is to suppose that the commission can issue orders, rulings or regulations unconnected with any proceeding before it . . . [T]he commission can not and will not function by any method not authorized in its organic act . . ." 1922 FTC Ann. Rep. 36.

In 1928, in a statement before a conference of publishers of periodicals, Commission Chairman William E. Humphrey explained the powers of the Commission and the function of the conference in the light of those powers as follows:

"The commission receives its powers as to the suppression of unfair methods of competition from section 5 of the Federal Trade Commission act. That statute fixes what practices are lawful or unlawful. The commission has power to do neither. The authority of the commission is now just what Congress gave it, and it will remain exactly the same as it is until Congress changes it . . .

"The purpose of this conference is not in any degree to establish a censorship over the press. It is not intended to place any additional burden whatever upon the publisher. It is not intended to tell the publisher what he shall or shall not publish. The law as it is now written tells him that. It is not intended to enlarge the jurisdiction of the commission. The commission does not desire in any way to increase its power. It could not do so even if such power was its wish. The commission's sole desire is to stop practices that are now prohibited by law.

"Any plan adopted by this conference will be an expression only of the judgment, conscience, and the purpose of those who adopt it. It can not make any practice lawful and it can not make any practice unlawful." Federal Trade Commission, Trade Practice Conference 170-71 (1929).

Ten years later at the Trade Practice Conference for the Wool Industry, Mr. Henry Miller, then Assistant Director of Trade Practice Conferences for the Federal Trade Commission, repeated Mr. Humphrey's theme.

"[T]he Commission is not a law-making body and in trade practice conferences we do not pressure to make law. In the group I rules we do undertake to catalogue what we consider to be legal requirements.

"Now, the retailer's responsibility is entirely one of law. We cannot make him more responsible than the law makes him, nor can we give him any dispensation or exemption from what the law requires." *Proceedings of the Trade Practice Conference for the Wool Industry*, 308 (March 16, 1938)*

In 1942, Mr. Henry Ward Beer, then Special Trial Counsel to the Commission, wrote in his book, *Federal Trade Law and Practice*:

"The only way that the lawfulness of a practice may be settled is by a formal proceeding and subsequent review by a Circuit Court of Appeals and perhaps by the Supreme Court." Beer, *Federal Trade Law and Practice* § 225 (1942).

As previously indicated, the position of the Commission that it lacks substantive or legislative-type rule-making power, consistently held until at least 1961 or 1962, also appears in the legislative histories of those statutes enacted after the Federal Trade Commission Act that do confer on the Commission, in limited areas, substantive or legislative type rule-making power.

The Wool Products Labeling Act was passed in 1940 with the active support of the Commission. The Commission's support was an important factor in passage of the law, and this fact was used to refute the argument by the bill's opponents that the Commission could handle the problem with its existing powers. As stated by Congressman Case—

"The second argument . . . is that the evils of false labeling are being curbed and gradually cured by the Federal Trade Commission. If that were so the Federal Trade Commission itself would not be on record in favor of the passage of the bill and the Federal Trade Commission did testify in favor of the bill. It testified that something like this was needed to put teeth into their recommendations to the trade." 86 Cong. Rec. 11320 (1940).

* Over the years there have been proposals to give Trade Practice Rules the force of law, see e.g., Senator Nye's proposal, S. 2626, 72d Cong., 1st Sess. (1932), but of course no such proposal ever became law. That Trade Practice Rules do not have substantive or legislative-type effect is still conceded by the Commission.

In 1951 Congress passed the Fur Products Labeling Act and in 1958 the Textile Fiber Products Identification Act. Both of these enactments were likewise supported by the Federal Trade Commission. One reason the Commission desired these two laws was to provide it with jurisdiction over deceptive labeling and advertising at the local level, but equally important was that the Commission did not believe that it had the power affirmatively to require members of an industry to adopt practices not otherwise required by Section 5. Henry Miller, Assistant General Counsel for the Commission, testified in favor of the Fur Products Labeling Act as follows:

"[O]ur trade practice rules do not require mandatory labeling because we have felt that we have not the power to require it." *Hearings on H.R. 2321 Before the House Committee on Interstate and Foreign Commerce*, 82d Cong., 1st Sess. 160 (1951).

Continuing, Mr. Miller testified:

"Under the trade practice rules Mr. Gold [a previous witness] said he is very much in favor of our making those rules do what is intended in this bill. That is all well and good, but if there is no legal authority to do it, neither Mr. Gold nor his clients can do it, nor can we." *Id.* at 161.

At hearings on the proposed Fair Packaging and Labeling Act the Chairman of the Commission, as recently as 1966, candidly acknowledged the difference between the type of power that that bill would confer and the power the Commission possessed under the Federal Trade Commission Act. At one point, testifying before the House Interstate and Foreign Commerce Committee, he stated:

"So it [the procedure prescribed under the packaging and labeling bill] would be quite a different procedure. Here it is very clearly rule-making authority if these limited fields are granted. We have no ultimate rule-making authority across the board on deceptive practices as such." *Hearings on H.R. 15440 before the House Interstate and Foreign Commerce Committee*, 89th Cong., 2d Sess. 990 (1966).

The Chairman also explained how the rule-making power under the Fair Packaging and Labeling Act would operate. Once a regulation was promulgated, he said, a violation "would be a per se violation of section 5 [of the Federal Trade Commission Act] and all we would do is say, 'You violated the regulation which was duly promulgated under this legislation.'" *Id.* at 991. See also *id.* at 69-70, 184, 202, and *Hearings on S. 985 Before the Senate Commerce Committee*, 89th Cong., 1st Sess. 81, 84, 88-89 (1965).

The Chairman, in pleading the Commission's lack of substantive or legislative-type rule-making power, was merely reflecting a position he had taken three years earlier in supporting the proposed fair packaging legislation (then S. 387). He testified on that occasion as follows:

"[W]hat is encompassed in S. 387 was basically in the four consumer acts that I referred to. This was a legislative grant by Congress, certainly in the four acts I referred to, to the Federal Trade Commission, operating under the mandate of the law and in accordance with the limits that are set there, to in effect promulgate rules which have the effect of law. That is writing substantive law once it is done.

"Now, I do not think we have the power to write substantive law down there unless you give us the power.

* * * * *

"I don't ever want to be dragged up here and be told that I am down there writing laws. I just don't think that it would be a very good operation, myself.

* * * * *

"Without S. 387 the answer is, I believe, we have no authority. I still read the Constitution now and then.

* * * * *

"Senator, it has been argued that in section 6(g) of the Federal Trade Commission Act, the language appears there that—6(g) reads as follows:

'From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act.'

"Some have read that with the belief that perhaps we could do this. But I think—we never did at the Federal Trade Commission undertake this and I think the Congress obviously must have recognized it in 1940 when they passed

the Wool Act, because if we could have done that, you did not have to pass the Wool Act.

"Now, frankly I just—we are called and we do have many—we are called quasi-legislative. Now, this would be a true example of quasi-legislative function if the Congress delegates under certain restrictions the right to promulgate regulations that have the substantive effect of law, that is, a bit of legislation, but I have never read that section within the meaning that they could do what Congress [sic] has to do. I think that it is the job of Congress; not ours.

* * * * *

"I didn't say nor did I infer to anybody, I hope, that we have the right to pass laws down at the Federal Trade Commission. I think that is the responsibility of the Congress, not the Federal Trade Commission." *Hearings on S. 387 Before Senate Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary*, 88th Cong., 1st Sess. 281-82 (1963).

The Commission's representations, in the context of requests for new legislation, that it lacks the power to issue substantive or legislative-type rules except pursuant to specific statutory grant of such power have been consistently accepted by Congress. For example, the foreword to the Committee Report on the bill (H.R. 944) that later became the Textile Fiber Products Identification Act states:

"As to textile fiber products other than wool products there is no requirement in the Federal law for affirmative disclosure of the fiber content of such products in labeling and advertising. . . ." H.R. Rep. No. 986, 85th Cong., 1st Sess. 2 (1957).

The Report adds:

"The Federal Trade Commission, through its trade practice conference procedure has promulgated rules with respect to the labeling and advertising . . . These rules, as such, do not have the force and effect of law but are rather advisory interpretations . . ." *Id.* at n. 1

A more recent indication of Congressional acceptance of the view that the Commission lacks substantive or legislative-type rule-making power, and one of obviously special relevance here, can be found in the House Report on H.R. 15440, the fair packaging and labeling legislation. In a section comparing the provisions of the Federal Trade Commission Act with that provision of H.R. 15440 which would grant the Commission substantive or legislative-type rule-making power with respect to the subject matter of that bill, the Committee stated:

"(Under sec. 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45) unfair methods of competition and unfair acts or practices in commerce are declared unlawful.)

"The Federal Trade Commission Act does not grant the Commission specific authority to issue such a regulation [prescribing standards for package labeling].

"Under the aforementioned sec. 5(a)(1) of the Federal Trade Commission Act, the Commission in a case-by-case proceeding against individual manufacturers may, where it has jurisdiction, require the disclosure of the information specified in this subsection, if the Commission finds that the failure to disclose affirmatively such information is deceptive or likely to be deceptive.

"The authority of the Commission to issue trade regulation rules, as the Commission did with reference to cigarette labeling and advertising, has never been passed on in the courts." H.R. Rep. No. 2076, 89th Cong., 2d Sess. 22 (1966). See also Truth In Packaging, Report of the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee, 88th Cong., 2d Sess. 11-12 (1964).

Mr. Moss. Mrs. Esther Peterson, consumer adviser to Giant Food Stores has asked permission to file a statement for the record at this point.

Is there objection?

Hearing none, so ordered.

(The following statement was received for the record:)

STATEMENT OF ESTHER PETERSON, CONSUMER ADVISOR TO THE PRESIDENT OF
GIANT FOOD, INC.

I am Esther Peterson, Consumer Advisor to the President of Giant Food, Inc., a chain of 91 supermarkets serving the Maryland, Virginia, and the District of Columbia.

In our company's Consumer Bill of Rights, we strongly support the public's right to be informed about the products they buy. There is a particular need to give more meaning to this right in the textile and apparel industry.

My familiarity with this problem as it applies to the textile and apparel industry goes back a long time, to the early days of my association with the Amalgamated Clothing Workers Union. I am vividly aware of it at Giant, where we operate department stores and combination food-general merchandise units.

During my years at the White House, when I served as Special Assistant to President Johnson for Consumer Affairs, I worked closely with a volunteer committee from the textile and apparel industries and retail to produce a voluntary guide for care labeling. I have always believed that the voluntary approach is preferable to legislation or other governmental action, if it will work. I wish I could say that our voluntary code—which was, in my opinion, a good one—was adopted widely throughout the industry. Unfortunately, it was not. In this instance, the voluntary approach was tried and found wanting. I must therefore reluctantly conclude that we have no other recourse than to require uniform and mandatory permanent care labeling for all textile products designed for consumer purchase.

Any person who has purchased clothing—and that includes all of us—is puzzled by the proliferation of fibers, fabrics and finishes that are continually arriving on the market. Each increase in variety merely compounds the confusion. Surely, each person who purchases a garment ought to be able to know how to wash or to dry clean it. It is a constant source of amazement to me that the manufacturers themselves profess not to know this information about their own products. There are ways to find out and it is not too much to expect that each garment should carry a permanent label that offers clear and understandable laundering and cleaning instructions.

I am disappointed that it has become necessary to invoke mandatory labeling when a good, workable voluntary program has been available to the industry. But I know a definite timetable must be set to accomplish our goal. Since becoming associated with Giant Food, I have seen that there is almost no limit to what a socially responsible company can do in the best interests of its customers and the community in which it is located. I have seen that it is possible to have a cordial, ongoing dialogue between the consumer and the corporation, a dialogue that results in prompt, broad, and effective action. At Giant, we are committed to care labeling on a voluntary basis. We have asked our suppliers to so label our products, and we will move forward as rapidly as the appropriate arrangements can be made.

I wish that the apparel industry had seen fit to seize the opportunity to move voluntarily, bringing great benefits to the American public and gaining for itself the best public relations in the world—the public relations of good performance publicly appreciated. That road is now closed, regrettably. We must therefore meet our responsibilities utilizing the tools of government. The consumer has an inherent right to know what she is buying and how to care for it. We need legislation now to assure that manufacturers provide it. I strongly urge this distinguished Committee to report out a bill that will require an effective program of permanent care labeling for all textile products.

Mr. Moss. Well, gentlemen, that concludes the hearing this morning, and I want to express the appreciation of the committee to each of you for coming here.

We will hold the record to receive the material requested of the Federal Trade Commission.

The committee will stand adjourned.

(The following letters and attachments were received for the record:)

STATE OF NEW YORK,
EXECUTIVE CHAMBER,
STATE CONSUMER PROTECTION BOARD,
New York, N.Y., May 7, 1971.

Mr. W. E. WILLIAMSON,
Clerk
Committee on Interstate and Foreign Commerce,
Rayburn House Office Building,
Washington, D.C.

DEAR MR. WILLIAMSON: I am very sorry that I received notice of the hearing on care labeling too late to rearrange my schedule. I would very much have liked to testify. In lieu of that, however, I would like to submit for the record an article I wrote on the subject in 1970 for McCall's magazine.

That article elicited over three hundred responses—all of them favoring some form of permanent care labeling and most favoring exception labeling. Because at the time the article was written, the Federal Trade Commission was considering a regulation making permanent care labeling mandatory in every textile product used by consumers, I forwarded those letters to the FTC and your Committee will find them there.

My position, succinctly stated, is that we have long needed such labeling, it is inevitable, and I strongly urge its adoption.

Sincerely,

BETTY FURNESS,
Chairman and Executive Director.

[From McCall's Magazine, October 1970]

THE COST OF LIVING

BY BETTY FURNESS

MIRACLE FABRICS ARE GREAT. BUT WHY CAN'T CLOTHING MANUFACTURERS TELL US HOW TO TAKE CARE OF THEM—ON LABELS THAT WILL LAST?

Grandma may have had her problems as a housekeeper, but knowing how to get the family's clothes clean wasn't one of them. In her day, it was possible to look at a fabric across a room and know what it was and how to take care of it. Cotton, linen, silk, or wool—that's all there was.

If it was cotton or linen, you washed it and hung it on the line to dry. If it was a silk dress, you sent it to the dry cleaner; silk underwear was hand washed. (You never heard of silk underwear? You haven't lived.) Wool suits and dresses were dry-cleaned. Wool sweaters got hand washed in luke-warm water and dried flat on a terry towel. It was about as simple as that.

But today you can feel, buy, and wear an article of clothing without the slightest idea of how to take care of it—unless the manufacturer has voluntarily chosen to hang a tag on it with care and cleaning instructions.

When man-made fibers came into our lives, they brought with them many advantages and a lot of confusion. Sometimes we ruined new clothes because we simply didn't know how to take care of them. We were told that nylon was a miracle (it was) and that it was strong and would wear well (also true) but we had to find out on our own that it would also melt.

After several excellent—but confusing—synthetic fibers were developed, a law was eventually passed requiring permanent labeling of certain textile products as to fiber content. Fine—after we'd learned the hard way how to take care of them.

But we still have problems. Nylon, for example, is a generic name, and depending on who makes it, it's also called Antron, Blue C, Cantreze, Caprolan, Qiana, Vivana, or a number of other names—and that's just the beginning. Besides nylon, there are now 18 other man-made fibers—with a total of 161 trade names.

And those are just the fibers themselves, before the fabric makers start combining them with one another or with natural fibers (cotton, silk, wool). Add varying knitting and looming processes, different methods of dyeing,

printing, and finishing, and—Do you know how many kinds of fabric are for sale today? You don't, because no one does, but it's estimated there may be ten million.

And we're supposed to know how to get them clean?

Recognizing our problem, many clothing manufacturers put care instructions on the containers the clothes come in. Even more put this information on what they call hangtags, paper tags attached directly to the clothing. Theoretically we're supposed to keep these tags and, at cleaning time, remember which tag came with which item, referring to it each time we wash or clean the piece of clothing. Conscientiously done, this tag-keeping would turn the laundry room of a family of four into a filing cabinet and the woman of the house into a frantic file clerk. So, on the whole, we don't save these tags. Nor should we have to. If "easy care" means hard work, then it's not so easy.

Besides all this, some of the language on the tags turns out to be more promotional than instructive. Many a woman has discovered that the phrase "Never needs ironing" could use the parenthetical warning: "If you don't mind looking a little wrinkled." And many a harrier housewife has had cause to wonder whether "permanent press" applied to the pleats put in by the manufacturer or the wrinkles she herself acquired later.

I recently bought a floor mat that came with a paper label reading: "Cleans Easily." Okay, but I had to write to the manufacturer to find out how, and with what.

Women trying to keep their families washed and cleaned and pressed aren't the only ones wondering what temperature of water, which method of drying, and how hot an iron (if any) to use—or whether maybe dry cleaning was the answer in the first place. Professional laundries and, to a greater degree, dry cleaners need this information as much as we do.

The National Institute of Dry Cleaning, an association of 10,000 dry-cleaning firms, has a laboratory where it tests garments that have been ruined at the cleaner's. These are the items we've hollered about because they've lost their shape or body or color. If the cleaner has hollered back that he did everything right and it's not his fault, and he's a member of the NID, he can then send the botched-up garment to the lab for testing—to find out what went wrong.

In 1969, the NID lab tested 36,150 garments and found that 46 percent of the problems could be laid at the door of the manufacturer, either because he used incompatible items in a garment (such as two fabrics, bonded together, that weren't destined to stay bonded in any cleaning process) or because, though the fabric *appeared* to have been made or dyed or finished by a certain process, it was not. In other words, the garment should have had special handling; but in the absence of attached instructions, the cleaner had no way of knowing this.

The American Institute of Laundering has its testing laboratory, too, and its problems. Among its recent reports was one about a polka-dot dress it had examined. White dots on a black background. When the dress was machine washed at home, enough of the black dye faded and ran to muddy the white dots. Hand washing, which included some scrubbing, then worsened the effect. Dry-cleaning solvents tried as a last resort, caused the black background to fade and run even more. As the institute concluded its report: "This garment, then, might well have been labeled 'Hand wash only. Do not rub'—or might better never have been made."

What we all need—housewives and professionals alike—is permanent care labeling. That means a label attached to every garment we buy, designed to stay, forever and ever, till the garment, not the label, wears out—with simply worded care instructions, either stamped on the item itself or sewn in on a woven or printed label.

But this poses problems. Who is responsible for seeing that the right information gets on the right shirt? Like the animals in "The Little Red Hen," "Not I," says the fiber maker. He doesn't know how or with what other elements his fiber will be woven. "Not I," says the fabric maker. He doesn't know how it's going to be dyed or finished. "Who, me?" asks the clothing manufacturer. Yes, you. Because you know, or can find out, the properties you're dealing with; and besides, in many garments, it's your decision as to what gets combined with the basic fabric—lining, trim, buttons, and so on.

Sometimes these elements aren't compatible, and yet how is the housewife in Denver supposed to know that? By the manufacturer's telling her, that's how.

But why should the manufacturer take on this bother and responsibility? It's a simple matter to label an Orlon sweater, but it could be complicated in a dress combining several elements. Besides, it costs money—and there's the rub. In middle- or higher-priced items, the added cost of a label isn't going to affect the maker or the purchaser very much. But as the price goes down, the cost of the label represents a higher percentage of the total cost; and in low-priced items, where competition is rough, a difference of a couple of cents can mean a sale or no sale. And sale is the name of the game.

In 1966, when Esther Peterson was the official worrier for consumers in Washington, she established an Industry Advisory Committee, composed of people representing fiber, fabric, and apparel manufacturers, retailers, and dry cleaners and launderers. Their first mission was to develop a glossary of care terms that would fit on labels and be easily understood.

Two years later, they presented the glossary to me (when I was the official Washington worrier) and announced that they were going to make every effort to see that permanent care labels were used by industry, on a voluntary basis. Soon afterward, the American Apparel Manufacturers Association, representing 435 manufacturers, urged its members to adopt this plan.

But, though a trade association can urge, prod, and plead, it has no authority, no clout over its members. So what happens is that a few enlightened members decide permanent care labeling is a good idea, and they use it; but the few tend to be very few. And remember, it's only the organization's members who have been urged to take on this added trouble and expense. Even if they all complied, there would still be many manufacturers who weren't doing it, simply because they didn't have to.

There's also a hitch in the voluntary labeling plan itself. Permanent care labels are intended only for items that need special handling. If it's obvious how something should be cleaned—men's underwear, bath linens, wool suits, etc.—no label would be used. So, in the absence of a label, we might assume that what we're about to wash can be handled "normally." But there may be pertinent information that the maker simply hasn't given us. (It's still possible to buy a dress that seems to be cotton, wash it, then put a hot iron to it, and burn an iron-shape hole right through the fabric.)

Of course, fiber-content labeling should make such an accident avoidable, but fiber-content labeling isn't always done, law or no law. Even when it is, it doesn't always do the trick.

Recently I bought two blouses labeled "Dacron & Cotton." I thought I knew how to take care of them. But because the blouses were expensive (\$16 and \$20), I washed them by hand and put them on hangers to dry. Dried, both were full of tiny wrinkles. So I tried a touch-up with a cool and then a warm iron. Nothing. Both were unwearable.

I later had occasion to address some fiber manufacturers (an opportunity not given to every housewife with a ruined blouse), and in urging them to push for permanent care labeling, I showed them my blouses. It happened that the president of the store from which I'd bought the blouses was there. He took back one of them and sent me a replacement immediately, and the fiber people took the other, to see if they could get the wrinkles out. They did, and told me that if I had machine washed and tumble dried the blouse, and plucked it immediately from the dryer, the wrinkles wouldn't have developed. Or, with a steam iron, I could have got out the ones I had unwittingly put in.

Swell, fellows, but where was the label telling me that?

Incidentally, if the blouses had been so labeled, I might not have bought them. One good reason for buying the "miracle" fibers is that they're so convenient when you're traveling. But, overpack though I do, I don't take with me either the necessary steam iron or yet a tumble dryer.

It's interesting to note that the store president didn't really think permanent care labeling necessary. He felt that his Fifth Avenue customers cared more about fashion than such mundane things as cleaning or laundering. I'm likely to stay closer to another Fifth Avenue store, where I got a pair of slacks with a woven label, sewn in, that read: "This is a *washable* fabric. Dry clean, or launder as follows: Use lukewarm water, no chlorine bleach, drip dry, do not wring or spin dry. Press lightly."

That's my kind of label.

Along with you and me, the Federal Trade Commission recently decided that the textile-care problem was getting out of hand and proposed a Trade Regulation Rule making it mandatory that every textile product used by consumers carry a permanent care label.

There's nothing that grabs the attention of an industry like the threat of being "regulated." Hearings were held, and some interesting (and funny) points were brought out.

By and large, all industries involved—fiber makers, fabric makers, clothing manufacturers, even the laundry and cleaning industries—were opposed to labeling all textile items; instead, they favored "exception" labeling. The exceptions would be textiles that require other than obvious cleaning methods (back to cotton, linen, wool, and silk). I'm persuaded that this is probably a good idea. I agree that the appearance of wall-to-wall carpeting would not be enhanced by a care level in the corner. And I think the man from Spring Mills had a point when he said: "The fact that both sides of a handkerchief are used prohibits affixing a permanent label sufficient to carry the required instructions and certifications. In addition, the label could scratch the nose." I'm even persuaded that men's socks don't need a label if they can be safely washed and dried in a machine.

It may also be true, as industry argues, that if every item we owned had a permanent label, we might become so used to them that we would ignore them, whereas exception labeling would act as a red flag and get our attention every time.

But just when I think an industry is indeed being responsive to consumer needs, along comes a man representing a knitwear manufacturer who says, "A industry which is dominated by fashion and is highly seasonal is faced with the fact that they make many fabrics without being completely sure how they will actually be called upon to perform, *and they are pushed in this direction by the consumer*" (emphasis added). What consumer? Name one.

He goes on to say, "These innovated developments are the babies of the textile industry, and both the consuming public and the industry love them, though they must anticipate all the problems involved with these infants."

I submit, Mr. Knitwear, that there's a basic difference between a regular infant and a textile infant. We can recognize the one on sight and know what to expect of it. That is not true of the other.

Happily, there are segments of industry that do not share this cavalier attitude. Montgomery Ward is about to see to it that all its wearing apparel has permanent care labeling, which it has designed. There will be 28 combinations of instructions in simple terms.

I asked why they're doing this, since it's costly and they don't, as yet, have to. "Because it's a good idea," they answered, "and inevitable."

Sears Roebuck, too, is totally committed to permanent care labeling. It does point out that the labeling can be difficult and even objectionable in such items as sheer blouses and lingerie, and it warns that when it buys high-fashion items from the open market for fast delivery, they may not all carry the labeling. But it assures me that all items made to its own specifications will have labels.

Though Montgomery Ward is moving ahead with the labeling plan, the vice-president in charge of it isn't convinced that all of us want it, considering the attendant cost that will inevitably be passed on to us. He thinks the plan is a good idea, his wife thinks it's a good idea, and he knows I do, too, but he's not sure how much the whole problem has been bothering you.

The FTC has not come to a decision regarding its proposed rule. Why not let the commission know what you think? Should every textile item be labeled permanently? Or would you prefer exception labeling, to be used only when there could be confusion about proper care methods? And which cost would you prefer to pay—the cost of the label in a lot of items where it doesn't now exist, or the potential cost of ruined garments?

As a representative from Montgomery Ward pointed out at the FTC hearings, "In our cost-competitive economy, it seems unlikely that permanent care labeling shall ever become widespread unless required by the government."

The absence of government regulation can mean the absence of a lot of care labeling. The absence of a label can lull us into a sense of false security if we assume that no label means go ahead and wash it any old way.

So now is your chance to get in on the decision-making process. If you're tired of running a test lab in your own home, tell the FTC; or tell me, and I'll tell them.

Or if you think the subject doesn't warrant the fuss and feathers and cost—tell them that.

Either way, if you don't tell them, who's going to?

AMERICAN RETAIL FEDERATION,
Washington, D.C., May 14, 1971.

HON. JOHN MOSS,
Chairman, Subcommittee on Commerce and Finance,
House Committee on Interstate and Foreign Commerce,
House Office Building,
Washington, D.C.

DEAR MR. MOSS: On May 10, the House Subcommittee on Commerce and Finance of the Interstate and Foreign Commerce Committee held hearings on H.R. 6143, a bill requiring that certain textile products bear a label containing cleaning instructions. The bill would make it an unfair method of competition and an unfair or deceptive act or practice to sell or import any textile product which does not have a permanent tag or label which discloses laundering cleaning instructions for such product which, if not followed, may result in the impairment of its utility or appearance. The Federal Trade Commission would have the power to enforce the provisions of the act.

The American Retail Federation is a national organization which, through its 50 state and 28 national retail trade association affiliates, represents more than one million retail establishments of all types across the country. We respectfully request that action on this bill be postponed until the FTC publishes final regulations on their care labeling proposals. The issue has been before the Commission for some time and we believe it would be more appropriate for the subcommittee to await their action on this complex issue.

If the subcommittee feels that this legislation should be acted upon, it is our hope that more hearings will be scheduled in order for industry experts to present their knowledge and expertise on this subject.

We would appreciate the inclusion of this letter in the hearing record.

Cordially,

EUGENE A. KEENEY,
President.

AMERICAN APPAREL MANUFACTURERS ASSOCIATION,
Washington, D.C., May 10, 1971.

COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE,
U.S. House of Representatives,
Washington, D.C.

GENTLEMEN: On behalf of the membership of this Association, I hereby submit a statement of our industry's position as it relates to your bill requiring the permanent care labeling of all textile products. We would appreciate it if this statement could be made a part of your hearing record.

This statement was prepared and filed in response to a proposal of the Federal Trade Commission, March 17, 1970, which also proposed to require the permanent care labeling of all textile products. This industry document represents our industry response to the care labeling requirements proposed in H.R. 6143.

Our Association urges careful consideration of this complex proposal and the effects it will have on the apparel/textile/fiber complex of this Country.

Respectfully submitted,

ELLIS E. MEREDITH,
Executive Vice President.

STATEMENT BY ELLIS E. MEREDITH, EXECUTIVE VICE PRESIDENT, ON BEHALF OF THE AMERICAN APPAREL MANUFACTURERS ASSOCIATION, PRESENTED AT THE FEDERAL TRADE COMMISSION PROCEEDING FOR THE PROMULGATION OF TRADE REGULATION RULES RELATING TO CARE LABELING OF TEXTILE PRODUCTS, MARCH 17, 1970

Mr. Chairman and Gentlemen, my name is Ellis Meredith, and I am Executive Vice President of the American Apparel Manufacturers Association located in Washington, D.C. Our Association has a membership of 435 apparel manufacturers with production in 43 states, doing an estimated annual volume of \$9.5 billion in sales, at manufacturers' prices. We very much appreciate the opportunity to discuss with you today an area in which we have been actively involved since its inception: namely, permanent care labeling of apparel products.

My comments will be brief. They are directed solely to outlining, in summary form, a history of our concern for, and involvement in, the entire question of permanent care labeling for the apparel and textile industries. Our next witness will present for your consideration the specific recommendations we wish to make with respect to the proposed Trade Regulation Rules. His recommendations represent the best judgment of our membership generally and our Consumer Affairs Committee in particular.

The American Apparel Manufacturers Association is clearly committed to concern for the best interests and welfare of its members' consumers. As a prime mover in the area of voluntary establishment of permanent care labeling by the apparel manufacturing community, we ask that a long, hard look be taken at the record—the record of achievement in this field by both AAMA and its member firms. Action—positive, affirmative action—backed by three solid years of effort in this vital area should not, we believe, be overlooked or down-graded by this body.

No one is or has been more aware of, or more concerned with, proper care labeling of apparel products than AAMA and the membership we represent. The Association's record on permanent care labeling is, we think, a good one, an enlightened one, one that supports our total commitment that what's good for our consumers is good for us and what's bad for our consumers will either immediately or ultimately be bad for us.

As early as 1966, AAMA was a moving force in the industry-government discussions which culminated in formation of the Industry Advisory Committee on Textile Information—a special industry-wide committee which worked with the President's then-Advisor for Consumer Affairs, Mrs. Esther Peterson, in developing a guide for sound care labeling practices for the apparel and textile industries.

In fact, it was at my personal initiative that a representative inter-industry delegation called on Mrs. Esther Peterson to discuss a possible voluntary approach to the care labeling problem. That approach was made in a sincere spirit of cooperation and not under any duress or compulsion of any kind.

Through extensive and exhaustive liaison with the IACTI, AAMA assisted in formulating the initial *Industry Guide for the Voluntary Improvement of Permanent Care Labeling of Consumer Textile Products*.

This initial guide, accepted by Miss Betty Furness, Mrs. Peterson's successor and then-Special Assistant to the President for Consumer Affairs, was incorporated into a comprehensive care labeling packet, published by the Association and numerous manufacturing firms, which received industry-wide distribution and attention. This intensive effort, praised by Government and industry alike as a landmark of voluntary inter-industry cooperation to help meet a clear-cut consumer need, has resulted in an ever-increasing practice of permanent care labeling, conciseness and uniformity of terminology and clearly demonstrated our industry's continuing concern for consumer satisfaction.

As you know, the IACTI has been re-named the Textile Advisory Committee on Consumer Interest. By continuing the work of this Committee as an independent group concerned with meeting consumer needs, we believe our industry, and its sister industries, can continue demonstrating their interest in meeting consumer responsibilities without abrogating his responsibility to Government.

Equipped through its work with IACTI, with full cognizance of the need for consumer-oriented industry guidance in this area, AAMA pioneered in 1967 with the establishment of the Association's Consumer Affairs Committee—a

Committee guided by some of our industry's outstanding executives; a Committee specifically created, and I quote from the Committee's formal statement of function, "to cooperate with industry, consumer and governmental representatives in the development and implementation of programs designed to meet demonstrated consumer needs involving the apparel industry."

And cooperate we did, gentlemen! But our efforts in this area have not been confined to one front: work within the industry. Noting the need to obtain and evaluate consumer attitude feed-back, the Association established liaison with Mrs. Margaret Dana, who is probably one of the best known and most widely-read journalists in the United States working in the consumer field. Samplings of letters and postcards received by Mrs. Dana from readers all over the Country have been made known to our manufacturing member firms for their evaluation and action, thus establishing a dialog between our manufacturers and their customers which had not existed previously. The Association looks forward to a continuing liaison with Mrs. Dana, confident that she does, in fact, have her fingers on the consumers' pulse.

Further evidence of consumer-aimed Association action is a new Consumer Care Guide for Apparel which has been developed after thorough study and research by the Association's Consumer Affairs Committee. Non-technical in nature, the Guide has been designed to help consumers better understand how to get maximum useful life from articles of wearing apparel through optimum care practices. Widespread dissemination of this new care guide to consumers is anticipated through the auspices of manufacturer and retailer sources.

Another illustration of the Association's commitment to quality is the live demonstration of a minimum quality testing program for apparel manufacturers which will be on stage continuously when the Association presents its Annual Trade Exposition for Apparel Manufacturers May 13-16 in Atlantic City, New Jersey. You may recall Mrs. Virginia Knauer's reference to this program when she testified before you earlier this year. This laboratory will feature and be under the direction of Miss Josephine Blandford, Textile Technologist for the National Bureau of Standards and the Apparel Research Foundation.

Miss Blandford will personally demonstrate the equipment necessary to implement a minimum apparel testing program and perform many of the actual tests possible, including: appearance of creases, durable press fabrics and seams after laundering; color-fastness to laundering, crocking and perspiration; shrinkage of stretch in laundering; soil release; fabric weight; shade matching; water repellency and thread count.

The Apparel Research Foundation itself, although now independent, was founded by the American Apparel Manufacturers Association—the Association having provided it with leadership, legal advice and funding from among its membership.

Finally, the Association's most recent consumer-oriented effort is an offer, made to the President's Committee on Consumer Interests, to act as a referral office for consumer complaints they may receive involving products manufactured by companies in the domestic apparel industry. The Association's proposal was made to Mrs. Virginia Knauer in her capacity as Special Assistant to the President for Consumer Affairs. In volunteering to assist the President's Committee in this way, AAMA is continuing its well-established policy of responding to demonstrated consumer problems involving apparel products, as well as once again pioneering a new approach to the voluntary solution of such problems.

In summary, our organization has devoted a substantial share of its time and resources to consumer-oriented activities. We will do more. We believe, however, that our record to date is a good one and that it justifies your confidence in the recommendations with respect to this problem which will now be made on behalf of our Association by our Associate General Counsel, Mr. John Henry Brebbia.

I hope that as you listen to his statement, and consider mine, you will give some credit to our industry and its trade organizations. We are the third-largest consumer industry in this Country. We are manufacturing the most fashionable and easy-to-care-for apparel for the smallest proportion of consumer income of any developed country in the world.

Hundreds of millions of our products move into consumer hands annually, with consumer satisfaction much more the rule than the exception. In view of this record, we urge again that the greatest care be exercised before decisions affecting this vast, complex, highly competitive industry are made by Government. Above all, we urge that the position of industry itself be given your fullest consideration before you act.

If you have any questions with respect to my statement, I will be happy to try to answer them. Thank you for this opportunity to appear before you today.

STATEMENT BY JOHN HENRY BREBBIA AND GEORGE D. WEBSTER, ON BEHALF OF THE AMERICAN APPAREL MANUFACTURERS ASSOCIATION, AT THE FEDERAL TRADE COMMISSION PROCEEDING FOR THE PROMULGATION OF TRADE REGULATION RULES RELATING TO CARE LABELING OF TEXTILE PRODUCTS, MARCH 17, 1970

I am appearing today on behalf of the American Apparel Manufacturers Association (AAMA), whose members are responsible for the manufacture at wholesale prices of more than \$9½ billion of apparel products for men, women and children annually. AAMA would like to emphasize that its members are vitally interested in the Commission's efforts with regard to the care labeling of textile products and appreciate the opportunity to participate in this hearing. Mr. Ellis E. Meredith, the Executive Vice President of the Association, has already detailed for the record the work of AAMA on behalf of its members to promote care labeling within the apparel industry. I will not reiterate what has already been said by Mr. Meredith. However, at the outset I do wish to reaffirm the fact that our membership wholeheartedly endorses the concept of permanent care labeling. The purpose of this statement is to elaborate on the Association's position with regard to the proposed rules.

The notice of this rule-making proceeding was issued on November 4, 1969. It contained three proposed trade regulation rules:

Proposed rule 1 makes it an unfair method of competition and an unfair or deceptive act or practice to sell "any textile product" which does not have a label or tag "permanently affixed or attached thereto which accurately and clearly discloses proper instructions for the laundering and cleaning of such product, as well as any other instructions material to the proper care and normal use of such product, which if not followed, may result in the impairment of its utility or appearance."

We take exception to the overall ambiguity of several terms contained in Proposed Rule 1. The term "textile product" is so broad as to include a wide range of products which it appears obvious were not intended to be labeled, such as women's and men's hats, paint brushes, cloth shoes, shoelaces and luggage. We would also be interested in being advised as to the definition of the terms "accurately and clearly" and "proper instructions." The inclusion of the term "as well as any other instructions material to the proper care and normal use of such product" would appear to require finely detailed instructions. We find this interesting in view of the praise which has been given to the English and European systems by consumer groups, which systems employ abbreviated instructions. Finally, the term "impairment of its utility or appearance" causes us great concern, because if narrowly construed, it could conceivably require garment performance standards which would be impossible for most manufacturers to meet, as well as lifetime guarantees which the Commission does not have the authority to require.

Proposed rule 2 requires a certification from the manufacturer on the label, wherein the care instructions are disclosed or on a separate label or tag, to the effect that the instructions disclosed "are valid and proper, and will not impair the product's utility or appearance."

Proposed Rule 2 repeats the term "proper" and the phrase "not impair the product's utility or appearance." These present the same difficulties as has been noted above in connection with Proposed Rule 1. In addition, we do not feel that the Commission has the power to require express guarantees of manufacturers.

Proposed rule 3 exonerates persons from violations of the rule in situations where the manufacturer provides its customers with a guarantee that the product involved "is not mislabeled under the provisions of the rules." Any such guarantee must be signed by and contain "the name and address of the person

residing in the United States by whom the textile product guaranteed was manufactured or for whom it was received that said product was not mislabeled under the provisions of the rules."

As will be explained later in this Statement, our members do not feel their fabric suppliers will be in a position to furnish them meaningful guarantees, and therefore to all intents and purposes, this proposed rule is of no value to the manufacturer.

AAMA feels that the long-run solution to the problem of care labeling lies neither with the substance of the Commission's proposals nor with their compulsory nature. We feel that the proper way to proceed in this matter is for the Commission to promulgate an Industry Guide using as a basis the "Guide for the Voluntary Improvement of Permanent Care Labeling," (Exhibit A), which was mentioned earlier in Mr. Meredith's testimony as having been developed by the Industry Advisory Committee on Textile Information (hereinafter referred to as IACTI) in which AAMA and other major industry groups were participants.

Generally, the IACTI Guide recommends care instructions on an exception basis, preferably of a permanent type which continue to appear on the product during its normal period of usefulness, when any of the following purposes or conditions are to be served:

1. "When a care practice normal for a general type of textile product might result in harm to a particular product," such as deep colored pajamas which will run if machine washed and therefore must be washed separately.

2. "When a particular care practice is essential to the best overall performance of the product, though not potentially harmful," such as a permanently pressed garment which should be removed from a tumble drier immediately at the end of the drying cycle to prevent wrinkling.

3. "When a consumer might be in doubt that a product can be laundered, when in fact, laundering is possible or dry cleaned when dry cleaning is possible," such as wash and wear dress suits.

4. "When a textile product is so basically new that a consumer would have no traditional knowledge of its proper care."

The Guide also contains a glossary of terms and definitions grouped according to the primary method of care involved. Information is also provided therein with regard to the availability and use of woven and printed labels.¹

The Guide has already been adopted by the AAMA membership which represents approximately 45.5 percent of the apparel industry volume and also has been endorsed by the following additional associations:

- American National Standards Institute
- American Retail Federation
- American Textile Manufacturers Institute
- Apparel Industries Inter-Association Committee
- Association of Home Appliance Manufacturers
- Clothing Manufacturers Association of the USA
- Man-Made Fibers Association
- National Association of Wool Manufacturers
- National Cotton Counsel of America
- National Institute of Dry Cleaning
- National Knitted Outerwear Association
- National Outerwear and Sportswear Association
- National Retail Merchants Association
- Northern Textile Association
- Soap and Detergent Association
- Textile Distributors Association

In order to insure the widest possible distribution, the contents of the Guide's glossary of terms have been reduced to a one-page consumer care guide for apparel, by AAMA (Exhibit B).

AAMA recommends that the Guide be adopted immediately by the Commission and that it become effective 24 months from the date of issuance in order to permit the industry sufficient time to work off its present inventory of goods, consume the present inventory of labels and tags, develop testing programs,

¹ In proposing the IACTI Guides, we should point out that they provide for disclosure of more information than the Commission would be authorized to encourage on a compulsory basis to cure deceptive or unfair practices.

and assemble the equipment and label inventory necessary for proper compliance.

AAMA, as has previously been stated, has supported the concept of permanent care labeling for a considerable period of time. However, it feels that the Trade Regulation Rules which are set forth in the Commission's notice are not the solution to the problem. Additionally, AAMA feels that the sweeping nature of the proposed rules indicates that the Commission has not taken into consideration the problems confronting the apparel industry with regard to care labeling. Aside from the fact that we feel the Commission lacks the power to make permanent care labeling mandatory, our objections to the proposed regulations fall into three major categories:

1. They provide for no exceptions and outlaw the use of non-permanent care labels in situations wherein such method may be preferable.
2. They seek to establish mandatory guarantees on the part of the manufacturers and in conjunction therewith, require manufacturer identification.
3. There is presently a total absence of performance standards within the industry.

A. EXCEPTION LABELING

The percentage of permanent care labeling done by the members runs anywhere from 0 to 100 percent. Generally, those who do no labeling manufacture items of apparel that fall into categories wherein the consumer is familiar with the product. Most of the members who do not use permanent labels, but whose products require special care, place the special care instructions on hang tags or wrappers for reasons of cost, space availability and esthetic considerations.

The majority of the consumer representatives who appeared at the hearings previously held on the subject of care labeling on January 13 and 14, 1970, agreed that there were some textile products which should be exempted from coverage under the proposed rules. This view was shared by Mrs. Virginia Knauer, the Special Assistant to the President for Consumer Affairs. In her statement, Mrs. Knauer indicated that she did not quarrel "with the argument that permanent care labeling is not needed for textile products for which cleaning procedures are already known by consumers" (Knauer Statement, p. 2). She stated further, "that many textile products are not usually refurbished by consumers and as such should be eligible for exemption from the labeling rules" (Knauer Statement, p. 6). The disagreement appears to center around the extent to which exception labeling should be permitted under the proposed rules.

In our opinion, the Commission has misconstrued the concept of "exception labeling," by which we mean identification of situations where labeling is appropriate, i.e., where "exceptional" care is needed—not where labeling is inappropriate. By focusing its attention on the latter rather than the former, the Commission will cover many items needlessly. Some examples follow, and they indicate that it is virtually impossible to draw up a definitive list:

1. *Athletic uniforms.*—They are usually distributed to schools and colleges as well as professional teams and generally not washed or cleaned by the user but by experienced launderers.

2. *Jeans and all work clothes.*—Ordinarily such items do not need labeling because they can be cared for by any type of refurbishing.

3. *Sweatshirts and sweatpants.*—For the same reason stated in item 2 above.

4. *Men's hosiery.*—Practically all men's hose is machine washable and dryable. Presently no hosiery manufacturer sews a label in socks. However, most of them contain a sole transfer that is heat imprinted on the foot, which gives laundry instructions. After repeated launderings, the sole transfer is generally washed off. By this time, the laundry instructions disappear. Due to the machine washable aspects of most men's hose, the instructions are not needed in the first place, but certainly, no more than a heat imprint should be required. By the time the sole transfer is ordinarily washed off, the owner is completely familiar with the instructions.

Due to the nature of men's hose it would be difficult, if not impossible, to make them a salable item if a permanent label were required to be sewn into the item. If this requirement were put into effect, then the label would be on the outside and unsightly or on the inside and an irritant to the skin. In either case, it is our opinion that it would be removed prior to wearing.

5. *Men's and boys' winter suits, sportswear and slacks.*—Men's winter suits should not be labeled unless they should not be refurbished by dry cleaning.

6. *Men's and boys' underwear.*—Machine washability and dryability are a must for all such underwear styles and ironing is not a problem or a factor. All innovated developments that have produced new fibers, fabrics and finishes for underwear in the past few years have been designed primarily to produce certain fabric blends and a completely machine washable and dryable garment. From an underwear standpoint, the proposed rules are designed to correct a problem that does not exist.

7. *Neckties, scarves, handkerchiefs, and sashes.*

8. *Reversible garments.*—A special problem because they are worn inside out and care labels are unseemly. Hang tags are the solution.

9. *Sleeping bag liners.*

10. *Institutional garments.*

11. *Waterproof, protective industrial clothing.*

12. *Women's hose and panty hose.*

13. *Women's lingerie.*

14. *Baby's diapers.*

The above list could never be made definitive. For this and other reasons which will be outlined more fully below, the Commission would be on much sounder ground if it agreed to utilize the criteria developed by IACTI and determine on an individual basis which products or categories of products should carry labels thereunder. The Association is prepared to cooperate with the Commission staff in collecting data as to which such products should be included under the coverage of the Guide.

When it comes to machine washable items, in common and widespread use, there is no need to have permanent care labeling. Perhaps tags or packaging identifying the item as machine washable would suffice, for once the item is machine washed the first time, the consumer would not need to be reminded of its machine washable qualities at any future time.

When it comes to women's dresses, and increasingly, men's clothing, the customer is frequently buying fashion as opposed to utility. In such cases, it seems obvious that the consumer would prefer fewer and smaller labels. For this reason, hang tags may be a better solution than permanent labels.

We suggest that hang tags are preferable to permanent labels when: (a) very detailed instructions are required which take up more room than is advisable on a cloth label; (b) in instances where the merchandise by its nature does not lend itself to the necessary additional cloth labels, such as see-through garments.

It is important to note that a tag is immediately visible to the consumer before purchase whereas it would be impossible for this to be the case with a great many apparel items which would contain permanent care labels.

While we are in favor of the principle of permanent care labeling on an exception basis, we seriously question whether the Commission has the power to require permanent care labels. The requirement appears to be based on a finding which is contained in paragraph 7 of the Notice of Rule-Making Proceeding which states that care instructions are normally supplied in the form of "detachable labels or tags which may be easily lost or destroyed by the ultimate consumer shortly after purchase." Paragraph 8 postulates that as a result, consumers are thereby "misled or deceived with respect to the care procedures necessary to achieve unimpaired utility and appearance," and that they are "deprived of the opportunity to make a rational and informed choice among competing textile products." These two assumptions led to a finding that apparel manufacturers who do not provide permanent care labels on their products are guilty of an unfair method of competition or unfair or deceptive act or practice.

Section 1.12 of the Commission's Rules of Practice states that trade regulations rules are to be "based on facts of which it has knowledge derived from studies, reports, investigations, hearings, and other proceedings, or within official notice, concerning the substantive requirements of the statutes which it administers." Therefore, in our opinion, in the event the Commission did have the power to require permanent care labels, it would be required to judge each separate item of apparel on its merits. We feel that it would be required to make specific findings as to each item of fabric regulated rather than doing so on a wholesale basis as it has herein. However, we fail to see

how the Commission can successfully maintain that an unfair trade practice exists even though the consumer is supplied with proper care instructions, although not of the permanent type. Obviously, consumers are not deprived of the opportunity to choose among competing textile products in the event that products requiring instructions supply them on hang tags or wrappers rather than on permanent labels.

The courts long ago recognized the fact that the Commission's power with regard to the policing of unfair or deceptive acts or practices is not unlimited. In *Alberty et al v. Federal Trade Commission*, (C.A.D.C., 1950), 182 Fed 2d 36, the Commission in its order attempted to force an advertiser to tell the negative aspects of his product as well as the positive aspects. Therein the court stated that:

"Even if we give effect to the broadest possible concept of the power conferred by the Congress upon the Commission, we do not think that the Commission has the power here claimed. There is a limit to the Commission's power. It is not given a general charter to police the expenditure of the public's money or generally to do whatever is considered by it to be good and beneficial. The task assigned to it by Congress is specific and it has no other authority in respect to this subject," *Id.* at 39.

The court went on to express its concern with the scope of the power sought by the Commission saying that "such power seems to us to be no less than the power to control the marketing of all such products. . . ." We find it difficult to understand how the Commission can maintain the position that it is an unfair or deceptive practice not to supply *permanent* labels for garments and therefore, that it can force our members to so label. However, as we have continuously stated, the Association is in favor of the principle of permanent care labeling. We are merely suggesting that there are instances where it might be advisable to use hang tags or other forms of instructions which are not permanently attached to the garment.

B. THE REQUIREMENT FOR MANDATORY GUARANTEES OF PROPER CARE INSTRUCTIONS WHICH WILL PREVENT IMPAIRMENT OF A PRODUCT'S "UTILITY OR APPEARANCE"

It should be noted at the outset that it has never been held to be an unfair method of competition or unfair trade practice to fail to guarantee a product, nor has the Commission so stated in the preliminary findings accompanying its jurisdiction as it has not the authority to legislate. Several bills concerning guarantees have been introduced in the past in Congress and in the present session. Some are disclosure bills, others would require specified minimum guarantees. None has passed either the House or Senate and no hearings have been held thereon.

Proposed rule 2 is nothing more than a requirement that each manufacturer of apparel be compelled to give guarantees to its customers and ultimately to the consumer. The rule also requires that the manufacturer disclose its identity on the label. Additionally, proposed rule 3 would apparently exempt manufacturers from liability in instances where improper care instructions are included in the label in the event the manufacturer is able to secure a guarantee from his fabric supplier that the instructions supplied by the fabric supplier and passed along to the manufacturer's customers are accurate. As will be shown later, such an approach is impractical and of no help to the apparel manufacturer because unlike other FTC situations after which it is patterned, such as the rules and regulations under the Flammable Fabrics Act, the manufacturer does add various materials to most apparel items during the manufacturing process which in many cases alter the washability or care characteristics of the garment when taken as a whole.

It is the opinion of the AAMA membership that in some instances it would be possible to obtain guarantees of the type described in proposed rule 3 and in many other instances it would be impossible to obtain such guarantees. On the whole, it would appear that meaningful guarantees would not generally be available to apparel manufacturers from their fabric suppliers. Proposed the Textile Fibers Identification Act. Both of those acts carry criminal penalties for the violation thereof, and the purpose of the establishment of rule 3 seems to be an extension of rule 2 in that it appears to authorize a system of guarantees such as is found under the Flammable Fabrics Act and the guarantee was to relieve the manufacturer and/or the fabric supplier from

the burden of criminal penalties under the Act. In those instances, the guarantee provisions are contained in the legislation under which the Commission's rules were written. There is no legislation requiring guarantees in the case of care labeling and no criminal penalties can attach from the failure to properly care label. As has already been stated, this proposed rule is meaningless to the manufacturers insofar as they will be unable to get *meaningful* guarantees from their fabric suppliers.

The problems concerned with guarantees are many. Cotton yarns, for instance, will vary from season to season depending on rainfall, and cotton fiber will also vary depending upon the area of the country in which it was grown. It is doubtful that spinners of cotton would give guarantees. The same is true of synthetic yarns which even though made from a very precise formula, can vary from production lot to production lot.

Some fabric sources do supply hang tags with laundering and cleaning instructions which pertain only to the fabric and not to the final garment. Many fabrics are of a knit type and rolls of fabric react differently to washing or ironing depending on the specific knitting machines on which they are produced. The manufacturing process often requires a "marriage" of two or more different fabrics which could change the reaction to laundering and dry cleaning.

The fabric makers should be able to provide the manufacturers with recommendations as to care requirements of their products. However, the manufacturing process adds such components as sewing thread, tension, trim, interlinings, linings or other components of the finished garment, which are usually obtained from several suppliers. Each supplier can only give a guarantee that he believes is meaningful at the time the component leaves his place of business.

In the case of quilted products, fabric manufacturer guarantees would appear to be impossible. Therein the manufacturer combines face fabric of one fiber from one supplier with backing fabric from another supplier of another fiber with a filling supplied by the quilter from still another fiber. It would be impractical for manufacturers to attempt to supply their fabric makers with a detailed intended use of the fabrics. Therefore, it would be extremely difficult for the fabric maker in many instances to provide care instructions to the manufacturer which would be accurate and therefore, to guarantee such instructions.

Trimming and garment construction could void fabric maker guarantees. In addition, the other composition of fabrics, additives for bonding and other new processes make it impossible for the component manufacturer to know the proper care instructions. It is possible that adding decorative lace or high fashion pleating, for instance, would also change the nature of the garment and affect its performance as far as care instructions are concerned.

It is doubtful in any situation where piece goods are post cured by the manufacturer that the fabric mills will accept the responsibility for their care instructions.

There is a danger that under any established system of compulsory guarantees by the fabric makers that they might resort to the use of "dry clean only" in most fabrics, as such would be the safest way of assuring performance during the refurbishing process.

Unfortunately, it is possible that the standard answer from fabric suppliers when complaints are received as to the condition of garments as a result of the refurbishing process will be that their instructions have not been followed and it would be very difficult for the apparel manufacturer to prove otherwise. Another painful issue is the question of how long piece goods in garments are supposed to last under the care instructions provided by the fabric makers assuming they were to provide them, and therefore, what would be the duration of the guarantee. Certainly, the fabric makers could not be expected to guarantee fabrics forever. In addition, what do manufacturers do about consumers who insist that a given garment was refurbished according to the care instructions when in fact it was not? There already exists a certain amount of difficulty in apparel manufacturers obtaining guarantees under the Flammable Fabrics Act and Textile Fiber Identification Act. This being the case, it seems certain that it would be many times more difficult to obtain meaningful guarantees with regard to care instructions, for such instructions apply much more to the manufacturing process than do flammability standards or textile fibers identification.

Needless to say, when discussing guarantees, one cannot avoid the subject of standards. Apparel manufacturers would have to allow suppliers tolerances in the quality of their products or service, which affect the performance of the product. The matter of tolerances would be a proper topic of discussion under the subject heading of Standards, but adds another uncertain element when dealing with the subject matter of guarantees.

We have already stated that we feel the Commission lacks the power to impose a system of compulsory guarantees upon the apparel industry or any other industry for that matter. However, in view of the opinions expressed by the Commission's staff in its recent "Report on Automobile Warranties," we find it difficult to understand what the Commission feels it is gaining for the consumer by the imposition of compulsory guarantees. That study takes the position that implied warranties are preferable to express warranties, in that they are broader in scope. Inasmuch as care instructions appear to assume the status of express warranties, one would think that the Commission might be opposed to care instructions. However, once the instructions are provided, they become a warranty in our opinion, and it is difficult to imagine what a statement guaranteeing their accuracy adds to a consumer's rights.

While the Report took the position that "the time has come for warranty and quality control standards in this industry to be established by the public, through governmental action, rather than by the automobile manufacturers," it went on to state that:

"The Commission believes that many of the practices of the industry in the automobile warranty area constitute unfair trade practices subject to formal Commission action under Section 5 of the Federal Trade Commission Act. The Commission's procedures, facilities, and resources, however, are clearly inadequate to carry out a program under which the manufacturers and dealers would be held to appropriate standards. Complaints issued by the Commission in this connection would apply only to past actions by industry members and would become effectively and enforceable only after extensive litigation. More over, the Commission possesses neither the physical facilities nor the technical expertise required to conduct an effective program of prescribing and enforcing quality control and performance standards, a necessary part of any government action in this field.

"What the public interest requires from the federal government is enactment by Congress of a new and comprehensive Automobile Quality Control Act, which would give statutory recognition to the public utility obligations of automobile manufacturers and provide for minimum standards of quality, durability, and performance for new automobiles and all parts thereof, and which would place a statutory obligation on manufacturers to provide consumers with defect-free automobiles in compliance with such standards and to repair defective automobiles and automobile parts which do not conform to such standards. In sum, such an Act would create a meaningful mandatory, statutory warranty instead of the meaningless voluntary, unilateral warranty now issued by the manufacturer, if an automobile or any of its parts failed to function properly within the prescribed periods of time under the statutory warranty, to stand behind his product and replace or repair it without charge." *FTC Report on Automobile Warranties*, Pgs. 124-126.

We submit that in the case of apparel care labeling, the Commission is dealing with an industry with equally as many, or more, component combinations and products and a larger number of manufacturers. Yet, rather than calling for legislation, it has, for reasons which we do not understand, decided to attempt to impose guarantees and to plunge into the area of performance standards, though it appears to lack the necessary expertise and manpower to successfully do so in the apparel industry, as well.

C. MANUFACTURER IDENTIFICATION

Proposed rule 2 requires the identification of the apparel manufacturer on the required certification. It appears that the certification is meant to reach from the manufacturer to the ultimate consumer. A previous witness, representing one of the consumer groups, stated that the purpose of such a certification is to permit the consumer to deal directly with the manufacturer in any instance where he is dissatisfied with the results of refurbishing any item of apparel either according to the care instructions or to the lack of care

instructions. While the identification of the manufacturer does not appear to be a problem with regard to brand name merchandise wherein as a rule the manufacturer is known, it does create a tremendous problem with regard to private label merchandise.

One of the problems with branded merchandise which needs to be discussed is that often a manufacturer sells under the same brand name merchandise made for it by subcontractors as well as by the brand name manufacturer itself. In each such instance, the brand manufacturer considers itself the guarantor of the product and regards itself as bearing the responsibility for any liability on its part for impairment or destruction of the garment in circumstances wherein the garment has undergone proper refurbishing. In such instances, the identification of the subcontractor as the manufacturer could destroy the brand image and would serve no useful purpose to the consumer.

There is the additional problem of brand name manufacturers selling off their goods as unbranded irregulars. In the event their names had to appear on such items, they could suffer a double loss. The first by selling at reduced prices as irregulars, and the second, in the event consumers were able to return the merchandise to the manufacturer while being fully aware that it was sold as an irregular. With the requirement of permanent care instructions, it would necessitate the manufacturer's name being on a label separate from the care instructions in order to permit them to sell merchandise as seconds or as close-outs because they would then be in a position to remove the brand label. This would assume that it will be permissible to remove manufacturer's identification during close-outs or the sale of seconds. However, it would also assume that such items would require care instructions.

Some manufacturers distribute most, if not all, of their goods, under a private label or labels. Many of them sell on an exclusive basis to retail outlets which maintain their own labels. Obviously, the identification of the manufacturer under these circumstances would cause a loss of the exclusivity feature. In addition, the use of the manufacturer's name on private labeled goods would undermine competing distributors who are pushing their own labels or the labels of their own customers for the same goods. The disclosure, under such circumstances, of the manufacturer's name would only succeed in reducing or eliminating brand competition. For those retailers who are trying to develop their own brands, manufacturer identification would make it difficult if not impossible for them to do so, particularly where competitors of theirs were selling the same manufacturer's line.

In the case of manufacturers who make both branded and unbranded merchandise, it will in fact cause the cancellation of purchases by their private label customers who would not wish to compete with the manufacturer who already has a well founded image due to his identification with his branded product. Conversely, retailers which pride themselves on their fashion leadership and carry a brand name because it reflects that image, would be unwilling to purchase that brand if it is also available through and identified with mass-distribution outlets.

When it comes to sales to chain stores in the unbranded goods area, most of them have developed their own labels for various lines of merchandise, and have no desire to have the manufacturer identified, therefore damaging their own brand image. Many of them set fabric weight, color fastness and other specifications for their manufacturers. In addition, some chain stores buy the same items, such as shirts, made to the same specifications, from a number of manufacturers and sell them under their own brand names. The disclosure to the customer of a number of manufacturers for the same branded item would cause further difficulty in developing retailer owned brands as well as confusion among customers. Some customers buy a shirt with the store's label because they believe in the store's product integrity and would be upset to learn that a number of manufacturers were involved and could never be made to believe that the same quality existed in the products of all the manufacturers. The store warrants the garment and knows who manufactured the garment should it require replacement. In such instances, the chains expect that any recourse with regard to damage during refurbishing due to the inadequacy of care instructions would be to the retailer rather than to the manufacturer.

There is rarely a time when a manufacturer cannot be found in this country who is ready and willing to produce the wanted articles under the

retailer's brand. In such instances, there would be no occasion where the buyer would wish to have the name of the producer affixed to the article rather than its own. The buyer has inspectors to check the articles at various stages of production and on receipt in its warehouse and wishes to adopt the article of apparel as its own and to accept the responsibility for the quality of the article as its own without giving credit to the producer who may be marketing its own similar but less expensive article under its own private brand. If the producer's name was required, then the buyer would obviously slacken its sales efforts to its customers until it could build its own productive capacity or just omit that particular article entirely. This would result in deserving and needy people losing employment and should the producer be dependent upon such business, there is a possibility of it being forced to cease operation with a resulting certainty of increased prices. Finally, the trend of large retailers to acquire manufacturing facilities would most certainly accelerate should they be required to show the manufacturer's name, with the inevitable accompanying reduction in the number of manufacturers, with a loss of jobs and lessening of competition again resulting in increased prices to the consumer.

Some manufacturers offer like articles of different quality at different prices under different brands. Completely separate sales organizations market the articles of apparel to different grades of retailers. One brand, a product of high style and quality, may be offered in a store catering to the affluent at a higher price while another brand of less quality and/or style may be offered in a discount type store at a lower price. Were this manufacturer required to disclose its name it would soon have to make an election as to which quality product it wished to continue to market for it could not successfully market both in the same area.

Other manufacturers market the same quality and the same price article of apparel under different brands and through separate sales organizations. Each such organization competes with the others for the retailer's business and each distributes apparel manufactured by contractors of the parent and utilizes all of its facilities such as shipping, credit, traffic and accounting. It would be seriously detrimental to such companies if they were required to show the parent company label on every article of apparel of each branch. It would virtually eliminate the possibility of selling to more than one account in a small market area. To deprive such manufacturers of this sales tool would reduce their sales volume, bring about a reduction in jobs and reduce the opportunity of the small merchant to buy at a fair and competitive price since they could only sell one merchant in any given area.

An additional problem with identifying the manufacturer is that of the manufacturer whose corporate name is used for advertising in one line of merchandise such as work clothes wherein its image is very strong, which makes additional lines of clothing such as fashion wear with an altogether different image under a separate brand name without identifying the manufacturer. Under these circumstances it is felt that the manufacturer's image is so identified with one line of clothing that it would inhibit the ability to market a different line of clothing under the same name.

It does not appear to us that it would serve any useful purpose by the advent of these proposed regulations to eliminate the existing dual distribution system in the apparel field. Such action, as has been repeatedly illustrated, would only result in a lessening of competition and a loss of customers to manufacturers engaged in dual distribution, which in the end, will only mean higher prices to the consumer. If the Commission were to attempt to do so, in our opinion, it would be illegal and beyond its powers.

If manufacturer identification is forced upon the industry, the problem might be substantially eased for the majority of our members if they are permitted to be identified by a system of multiple manufacturer identification numbers.

It must be added that the requirement of an additional certification over and above care instructions seems unnecessary. In addition, it will further increase the size of the label or cause an additional label to be added. Not only will such a requirement result in an increase in cost, but it could also cause high fashion items to appear unsightly.

D. STANDARDS

Probably the most troublesome aspect of the entire proposal is the question of garment performance standards and what the FTC proposes to do about the problem. Presently there are no standards in existence for judging the results of the refurbishing of apparel items. While the IATCI has developed a Guide, and included therein a glossary of terms and definitions to assist consumers with the interpretation of care instructions provided by manufacturers, the Guide can be of no assistance in judging whether the use of such instructions actually results in an "impairment" of the "utility or appearance" of any given item of apparel. No items are meant to last forever and the passage of time and continued washing and/or dry cleaning is bound to cause some impairment of the utility or appearance of any garment. Yet the Commission proposes to promulgate a rule which requires manufacturers to guarantee that no "impairment" will take place without any further guidelines. Nor is the Commission, any other agency of Government, or industry presently equipped to do the type of testing that would be required on a continuing basis in order to establish a workable set of standards. Any such undertaking would be bound to result in an enormous amount of red tape including a mountain of paper work which would sorely tax the resources of the Commission or any other government agency to which such a task is assigned. It would appear to be better for all concerned to leave the question of performance standards to the market place and the courts, which can best judge the type or degree of impairment which would result in a set of care instructions being determined to be insufficient, and/or misleading.

The Commission staff members, as well as most other consumers, should be aware of the vast array and infinite variety of apparel items which could be covered under the definition of the term "textile products." For example, there are presently twelve production textile fibers (generic) made either synthetically or regenerated from natural material and three high use natural fibers.

Of the synthetics there are many manufacturers and each manufacturer has several variations of the same fiber which have specific performance characteristics. In the natural fibers performance characteristics depend upon the type of material grown. For cotton, the difference between long staple Pima or Sea Island as compared to short staple western Texas Uplands; in wool, the coarse grades of New Mexico's Navajo to the finest grade, Australian Merino.

If we were to take the largest single use combination such as 65% polyester 35% cotton and eliminate the variations of manufacturer or type within manufacturer, we then arrive at variations of different yarn counts all the way from coarse (6's) in the knitting industry to fine (80's) in the woven goods industry. These can be further varied as to twist multiplier or number of turns per inch in order to obtain specific yarn hardness or performance characteristics.

These variations can then be further permuted on looms or knitting machines from simple plain weaves and stockinette stitches to fancy dobbies and jacquards. It is further complicated by the dyeing and finishing operation which could involve myriad colors and/or print patterns to variations in hand and/or surface and performance characteristics.

If we then take this same simple two-fiber combination, multiply it by a variation of only 10 yarn combinations, which is an extremely small number, furthered by perhaps 10 more variations within each yarn size for the twist multiplier and multiplied by a minimum of 25 weaving combinations complicated still further by an extremely low estimate of 100 dyeing, printing and/or finishing combinations, we can easily see that this one simple fiber combination has a quarter of a million permutations. When we add to this the other fiber blends which are available on the market the resultants as can be seen are astronomical and have quite frankly never been calculated. It would appear that there are 10 million or more different kinds of fabrics available on the market at any given instant and daily certain fabrics are being withdrawn and others being added to the list in order to supply industry's need to satisfy consumer demands in both the area of high performance and style.

It then becomes obvious that these millions of fabrics go through a further permutation when they are shipped to the individual apparel manufacturers to be put into garments since each manufacturer is obviously slightly different

in his technique than any other manufacturer. And so the permutations that exist simply on American-made fabrics are almost infinite.

Enclosed herewith as Exhibits C² and D³ are two charts which illustrate the variety of generic fibers available in the market today.

Instructions, in order to be valid, would have to include the type of laundering equipment, water temperature, length of cycle, detergent, drying equipment, and a variety of other factors. This would be particularly true of apparel items such as cashmere sweaters and very fine woollens which require sophisticated knowledge in cleaning and it is unlikely that any reasonably sized label could adequately describe the procedures required. Such a label would be unwieldy. Further, the seller would have no control over care procedures actually used. In short, it is a relatively simple matter to arrive at a test procedure and method of evaluating results in a laboratory. However, the results achieved in a laboratory cannot be assured in the case of an individual consumer because of the unlimited variations in the conditions under which given items of apparel are refurbished. Experience has proved that even when detailed instructions are given to a group of laboratories in interlaboratory tests, it has been found that there can be considerable ranges of variations among the results obtained.

Unfortunately, even assuming the establishment of standards, it will be difficult, if not impossible, for the manufacturer to determine whether the garment was refurbished according to the instructions. Furthermore, in the event there are any attempts to detail a standard such as a certain amount of fading or shrinking over a certain period of years, it would be impossible for the manufacturer to tell whether the garment as refurbished met an established standard, as he would not know the number of refurbishings which have actually taken place. For instance, there are many details that can serve as an excuse for finding fault with work garments. Work garments necessarily are washed in hot water with strong soaps or detergents very frequently. Seams will pucker, colors will fade, edges of seams will "whiten." These are the natural results of wear and washing. Any care instructions which imply perfect performance could be a cause for a customer to claim a refund. There is the further problem that for items such as blue jeans you may find that younger persons will find them undesirable if they do not begin to show signs of wear after relatively few wearings.

Trimmings, elastic, sewing threads and even other fabrics may have a very serious influence on how well the total product will withstand either washing or dry cleaning, or types of washing of different severity. Assuming the eventual development of a set of standards, every apparel manufacturer would have to test every garment which differed materially from those on which he had previously been putting labels. While in men's suits, in most instances, there will be no trouble adhering to a standard of "dryclean only," in women's wear, the problem would become much more complex. This is especially true since there are many pieces of women's outerwear which may be washable, and in this category, cover a gamut of different levels of severity, or may be only dry cleanable. Additionally, in women's wear, where very light and very dark colors may actually be sewn together, a garment which otherwise would have been washable may now become subject to color transference, depending on the degree of temperature at which it is washed, and the amount and nature of detergent used. Unless there were rather sophisticated checks made, one could not be certain of performance.

It should be noted that the best way to care for any given item of apparel may still result in some impairment of its "utility or appearance." For instance, washing and drying may be the best way to care for a product but it may also result in a certain degree of shrinkage and fading. The same is true of permanent press products. Washing without ironing may result in some degree of puckering. The question really is whether an item of apparel will be unduly impaired in its utility or appearance, or destroyed, rather than whether it will be impaired at all. We have already stated that we feel the test of unduly impaired should be left to the market place rather than to creating a new government bureaucracy to establish detailed standards for the entire textile industry. Assuming that such detailed standards for each product could be

² "C"—Properties of Man-Made Fibers, Textile Industry Magazine, August 1969.

³ "D"—Textile World 1968 Man-Made Fiber Chart.

established with the ever changing variety of apparel items appearing in the market place, the industry could become so bogged down with red tape as to eventually eliminate the entrance of new fashions or fabrics.

While the Commission appears willing to contend with the type of problems which would be involved in the development of standards for an industry as varied as the one in question, it did not express a willingness to do so when it came to the automobile industry as has previously been discussed. Therein, it acknowledged that it did not possess the necessary facilities to conduct such a program when it concluded that:

"An Automobile Quality Control Act would set up the governmental machinery necessary to assure both quality control and minimum performance standards. Quality control would assure that defect-free automobiles would be coming off the manufacturers' assembly line; minimum performance standards, which would also be established by the government agency designated by the Act, would assure satisfactory performance and durability for automobiles and for all the essential parts thereof—including the so-called accessories such as tires and batteries.

"The implementation of performance standards clearly should be assigned to a government agency which will possess the testing facilities, the technical expertise, the trained personnel, and adequate funding to set, evaluate, and upgrade such standards, and to test, on a continuing basis, the conformance of new automobiles to such standards. The Automobile Quality Control Act should provide not only for such testing but should also provide strong and effective penalties and sanctions, both public and private, under which the government and the individual consumer may obtain prompt redress from the manufacturers for any failure to abide by the statutory standards." FTC Report on Automobile Warranties, Pgs. 126-127.

We do not understand why the Commission feels that the situation would be any different when dealing with the Textile Industry. We also feel that the Commission tacitly admitted its lack of authority to legislate standards in the latter Report and that rather than moving into an unchartered area it adopt our recommendations as to the best method of dealing with the problem.

While it would be possible to establish uniform care information by the Commission's adoption of the IACTI Voluntary Guide, this could not produce uniform results after refurbishing without the establishment of standards such as the amount of shrinkage of color fading that would be permissible under the definition of impairment or the number of washings or length of time a garment could be in existence after which the care instructions would no longer apply. Any attempt by the Federal Trade Commission or any other government body to establish detailed standards of impairment for every single item of apparel would result in inevitable chaos in the Industry. Needless to say, under the latter set of circumstances, a manufacturer would be unable to safely market any item of apparel without first securing government approval. When dealing with hundreds of thousands of different items of apparel and new ones coming on the market every day, such a situation could bring the Industry to a standstill, and discourage manufacturers from the type of innovation which consumers desire. It must be kept in mind that within each item category, performance standards change with price level and the passage of time.

It has previously been suggested in these hearings that the present L-22 standard would be suitable for measuring the performance of apparel items after refurbishing. We believe that L-22 provides a good broad base for developing garment performance standards, but as presently formulated it only discusses fabric performance.

As one example of the lack of present utility of L-22 for garments, we cite the following:

Using L-22 as a standard and discussing only the performance characteristic of shrinkage: a manufacturer of women's dress fabrics purchasing under L-22 10.3—1968 may buy fabrics whose maximum dimensional change is $2\frac{1}{2}\%$ in either direction. It is assumed that he would also purchase trim items which would fall into this category.

Consider the fact that $2\frac{1}{2}\%$ is the maximum dimensional change in each direction; however, it is quite possible that one direction could be 0% and the other direction $2\frac{1}{2}\%$ and still fall in under this specification. Assuming that he will buy the trim under the same specifications, it is quite possible

and very likely that linings may fall at under $\frac{1}{2}\%$ and trims such as piping or binding, anywhere from 0 to $2\frac{1}{2}\%$. Additionally, we must note that the maximum dimensional change does not only cover shrinkage but may also cover stretch which does on occasion occur with certain fabrics called "overfed," "compact," etc. This now gives a variation possibility of 5%, all meeting an L-22 standard.

This now means that any one of these fabrics meeting a standard for its class of garment when sewn together can cause the most serious pucker problem that the consumer will find extremely difficult to remove, if in fact she can.

More important, we have now built into this the allowance of a 5% shrinkage in size when patterning characteristics permit a $2\frac{1}{2}\%$ stretch in one direction and $2\frac{1}{2}\%$ shrinkage in the other at a point of juncture. This would actually bring a size 12 dress down to approximately size 8.

It becomes painfully obvious that these standards are unsatisfactory for garments, without additional sophisticated interpretive capabilities.

We believe that garment standards could be developed by utilizing the people who sat on the L-22 Committee. We would like to bring to your attention that the National Bureau of Standards, the Federal Trade Commission and Government Services Administration were on the Committee as liaison members when the L-22 standards were revised in 1968 and should consider sitting on a new committee.

E. COSTS

The members have submitted various estimates of the increased costs which will result from the promulgation of the proposed rules. We estimate garments will increase in price to reflect the additional costs imposed upon the manufacturer by the labeling process. A 50¢ item can increase by 10% at the consumer level, while the increase on a \$100 item will be considerably lower. Therefore, although the cost will undoubtedly vary, the cost of labeling an inexpensive product will represent a greater percentage of the final cost of the product than the cost of labeling an expensive product. This will mean that as is so often the case, those who can least afford it will be required to pay the biggest increase.

These costs reflect only the labeling expense. Additional costs will be created by other efforts and expenses necessary to comply with the care labeling ruling. The additional cost burden, no matter how small, being placed on the textile industry at this time when it is presently being squeezed by increased imports and extremely high domestic costs will require the manufacturer to pass them along to the consumer.

Further, without uniformity of care information there will be an additional increase in the cost of doing business. Ultimately, this will result in a substantial increase in the cost to the consumer of those items of apparel affected by the proposed rules, as permanent care labels will be much more expensive than the tags which are presently generally in use. The major items of additional expense will be the cost of acquiring the labels, sewing them into the garments and establishing recordkeeping and inventory controls. If two labels are required rather than one, the rate will obviously be higher. Also, the program will require constant control and inspection to insure the proper label in each garment.

The inclusion of any amount of additional information on product care, such as proposed rule 1 seems to require, would necessitate either much larger labels or secondary labels, both of which are quite costly from a material and labor standpoint. In addition, it would obsolete existing labeling equipment where a great deal of money has been spent in the past on automation in order to hold costs down. New equipment would have to be acquired and manufacturers would have to bear the cost of amortization. It appears that promulgation of the rule would require a much large label printer than is presently in use with many of the manufacturers.

As changes occur, label stocks will become obsolete, thereby increasing the cost on a recurring basis. In addition, manufacturers will have to institute control procedures in cases where companies have a very wide range of fabric types in their operation. A tremendously increased supply of labels containing the permanent care instructions would have to be inventoried at all times. In

addition, for changing fashions, it would be necessary to purchase labels in "small quantities" which would be costly.

Further, some companies' styles are costed and adopted many months ahead of their actual sales. Many present styles will still be in the company's line one year from the date of promulgation. These will have to be recosted reflecting the impact of the change of procedures.

Some companies ship a variety of items such as skirts, pants, knit tops, shirts and shorts in an array of fabrics and colors. Most items would require different size, type and different information on the labels. Inventory would be a problem for each season and would complicate the ability to deal with high fashion garments if there is a problem in securing fast delivery of the proper labels. At the present time, some companies use specific dimension labels which are attached by automatic machine. In order to put care information on the labels, the label dimensions would change, necessitating elimination of present automatic equipment. This would also require an increase in cost and thus it represents an obviously inflationary move. Finally, we may be faced with retailers becoming afraid of unlabeled inventory, which they may consider to be old, thereby forcing markdowns of such inventory.

F. AMOUNT OF TIME REQUIRED FOR IMPLEMENTATION OF GUIDE

The implementation time required by our manufacturer members will run anywhere from 90 days to two to three years, depending on the type of item involved. However, it appears that if the Commission were to put into effect a requirement that the items of apparel affected would be those entering production more than 24 months after the date the Guide is promulgated, this would cover the bulk of the membership.

Among the considerations involved in estimating the amount of time needed for conversion are the following:

1. For most companies a complete reevaluation of their labeling programs would be necessary. In addition, they would have to establish an entire new set of labeling handling procedures and additional controls.
2. For many manufacturers, it would take approximately 18 to 24 months months to completely rotate their stock without suffering a serious burden both from the standpoint of sheer manpower and from the funds needed to buy new packaging, labels and other material needed for implementation of the program. If given a 24 months grace period, member companies will be able to rotate their stocks in an orderly manner.
3. Time must be given in which to obtain labels and the equipment for attaching same and to engineer sewing units for those who will be doing their own labeling. Further, it will take time to train operators in the manufacturing plants to install the labels.
4. Time must be given to rotate the bulk of finished stock out of warehouses. It is impossible to determine when the retailers in turn would have this merchandise completely sold.
5. Adding care labels to current stock would be a very burdensome expense. The unboxing and reboxing of goods in inventory in the event manufacturers were not able to work off their inventory in advance of implementation would be an expensive additional cost.
6. Some companies resell from inventory with only two seasons per year and the cost of rehandling finished stock would be prohibitive.
7. Requiring retail stores to return present inventory in stock for re-labeling would be a tremendous expense.
8. An earlier date would mean a loss of inventory of labels, string tags, tickets and other tags which are presently in use, thereby adding to the manufacturer's cost. Some manufacturers estimate that it would take two to three years to use up their inventories.
9. Manufacturers may be faced with retailers becoming afraid of unlabeled inventory which they may consider to be old, thereby forcing markdowns of such inventory. Provisions must be made for eventual resale of such returns. Initially they will be unlabeled and probably be resold for obsolete merchandise. If companies are required to insert labels before reselling the goods, it will further increase the loss they suffer on such distress merchandise.
10. Some companies manufacture for two seasons ahead, and then it is an additional season beyond that when the goods are still in stock.

11. The institution of such a Guide prior to permitting companies to run out their production inventory would require them to shut down for some time in order to gear up for the labeling process on goods already in the manufacturing process or about to be processed.

12. Some mail order houses obtain stock six months to a year or more in advance of actual need of finished goods. Some products have been in their product lines for many years. They do not have a style situation with these products. Consequently, particular sizes and colors may date back a year or two in production period. This would require either two to three years for implementation or a loss on all such items.

G. MISCELLANEOUS

(a) Status of labeling in Europe

Much mention has been made as to the care labeling systems presently being employed in Europe. As far as the status of care labeling in Europe, we think it is important to mention that it is slightly confused. The English system and the Continental systems are not consistent one with the other. All of the European systems are presently voluntary and as far as we know, no date has been set for making them mandatory. As a matter of fact, the English refused to implement a recommendation that they convert to a compulsory care labeling system. The East German system requires that permanent labels perform only for five refurbishings which certainly would be unsatisfactory in the United States. It is possible that the English system could be modified and be satisfactory here in the U.S.

The British Standards Institution has published a Standard BS 2747, entitled "Textile Care Labeling Code," which is similar to the IACTI Voluntary Code. It also contains a description of the Home Laundering Consultive Counsel (HLCC) scheme for the simplification of domestic washing instructions. The Code is *purely voluntary* and much more extensive than the HLCC scheme which contains eight labels numbered one through eight, containing code words for machine and hand washing instructions. The position of the HLCC with regard to compulsory care labeling was stated in a letter from Mr. C. Bellingham-Smith to the Commission's Division of Trade Regulation Rules, dated December 23, 1969, as follows:

"The HLCC has throughout favored the voluntary approach to care labelling as compulsory care labelling, however attractive it may seem on the surface, presents certain well-nigh insuperable difficulties. For example who is to decide what is the optimum cleansing treatment for a particular garment or article. The absence of an agreed framework of tests, and more important of universally acceptable compliance levels within those tests would in fact be an open invitation to manufacturers to play safe and label 'low' i.e. prescribe a milder treatment than the garment needs and thus revert to the 'Wash by hand in luke warm suds' sort of label. Universally acceptable compliance levels are by their very nature not possible to attain bearing in mind the fact that in for example colour fastness what is acceptable to manufacturer A may not for reasons of selling price be so for manufacturer B. In the second place the question of the adequate policing of compulsory care labelling arrangements would inevitably cause considerable difficulties bearing in mind the highly fragmented nature of the making-up industry."

It is our understanding that the British Board of Trade recently refused to accept a government recommendation that their program be made compulsory, and that there is no indication that it will be in the near future. We feel that the adoption of the IACTI Voluntary Guide is a better solution to the problem of permanent care labeling than is the HLCC program of eight numbered labels, because we feel that HLCC labels are unduly restrictive and that our Guide offers a much more flexible approach to the problem, and therefore, better and more detailed information to the consumer. As far as the system in Europe is concerned, it is our understanding that in 1960, the Symposium International D'Etiquetage d'entretien Des Textiles was formed, with headquarters in Paris. This body is the formal owner of a copyrighted system which was developed in the Netherlands in 1958 and which employs symbols for care labelings. This system differs from the British system, and it is our further understanding that the Symposium has made it available on a licensing basis to all companies desiring to use it. Almost all West

European countries, with the exception of Britain, now use the symbols on a voluntary basis. It was adopted by the East Germans earlier this year.

In an article on the European system, which appeared in the *Daily News Record*, dated February 25, 1970, Mr. Erwin Baier, an economist who heads the West German Working Committee for Textile Labeling, was quoted as explaining the reasons why he felt that a *voluntary* operation was the only one possible with regard to care labeling:

"We discussed mandatory regulations at length a long time ago, but the difficulties involved are too great. Today there are far too many instances of mixed materials being used in apparel, particularly outerwear. Mandatory regulations couldn't possibly cover all the possible combinations that might crop up. The only way would be for inspectors or panels to arbitrate on each item, which would be costly and cumbersome."

It is to be remembered that while Europeans seem to prefer a system of symbols, this is not necessarily the best method to be employed in the United States.

(b) Imprinted instructions

We are assuming that the Commission's definition of "a label or tag permanently affixed or attached thereto" includes the right to imprint care instructions or to use heat bonded labels whenever the manufacturer so desires. The former method is currently being used by many shirt manufacturers and they consider it to be the most suitable technique on colors and fabric finishes on which it can be used. They prefer to imprint whenever practical. If because of color of finish, this is impractical, they resort to a sewn or heat bonded application.

(c) Attitude of consumer groups

Some of the consumer groups which have previously testified at these hearings appear to feel that many manufacturers or perhaps all manufacturers are desirous of deliberately deceiving customers whenever possible. The truth of the matter is that manufacturers cannot long stay in business by selling shoddy merchandise. With the advent of guides or regulations, industry hopes that some protection will also be afforded the manufacturer as well as the consumer. Many people in the industry feel that the Commission has been unable to properly police the Textile Fibers Identification Act and they wonder how well the Commission will do with any new regulations on the subject of care handling. They are particularly disturbed at the Commission's possible inability to enforce guides or regulations against imports.

(d) Enforcement

The Commission presently has in effect approximately 28 Guides and a larger number of Trade Practice Rules. In addition, it has approximately 22 Trade Regulation Rules, either proposed or in effect. Yet, the staff, charged with the responsibility for policing the rules and guides, is composed of but 29 persons. In addition, it appears that the Bureau of Textiles and Furs already has enough work to do to keep its present staff busy full time. Under these circumstances, and with the Commission's staff continuing to conduct Trade Practice Conferences and to issue new guides and rules, it appears doubtful that the Commission possesses either the manpower or the funds to properly police an imposed system of compulsory care labeling. As a matter of fact, one of the consumer witnesses who previously appeared at these hearings complained about a dress which contained no labels, despite the existence of congressionally sanctioned rules governing the product which the Commission is presently charged with enforcing. Finally, the American market is presently becoming saturated with imported apparel items.

AAMA is concerned that its members would bear the brunt of any enforcement activity while mislabeled or unlabeled imported goods would continue to be sold in great numbers although violating the proposed regulations. Under the circumstances, we would prefer to see the Commission accept our suggestion as to the voluntary approach in order that the Commission might be able to evaluate the enormous task ahead of it even after our members, who are responsible for such a large percentage of the volume in the industry have endorsed and implemented the program.

H. RULE-MAKING POWER OF THE COMMISSION

AAMA does not propose to present its definitive views on the Commission's rule-making power at this time. It merely offers some general observations on the subject matter to the effect that the proposed rules exceed the Commission's present powers and if promulgated could result in expensive and protracted litigation.

This rule-making proceeding has been initiated under the provisions of Part 1, subpart B of the Commission's Procedures and Rules of Practice, 16 CFR 1.11, *et seq.*, and under the provisions of the Federal Trade Commission Act. The Commission's rules of practice are administrative in nature and nobody quarrels with the right of the Commission to promulgate them subject, of course, to the provisions of the Administrative Procedure Act. On the other hand, the Commission must rely for its substantive rule-making power, on section 6(g) of the Federal Trade Commission Act (38 Stat. 721; 15 USC 46), which reads as follows:

"SEC. 6. That the Commission shall also have power—(g) From time to time to classify corporations and to make rules and regulations for the purpose of carrying out the provisions of this Act."

Whether or not the Commission has the right to promulgate substantive as opposed to procedural rules thereby engaging in the legislative process, has been the subject of intense controversy for a number of years. The Commission has recognized the existence of such a controversy in Subpart B of its Rules of Practice for Adjudicative Proceedings, i.e., that subpart which it depends upon as authority for convening this proceeding, for in section 1.14 therein, it cites its authority to promulgate rules "having the force and effect of law" under Section 6 of the Wool Products Labeling Act of 1939, Section 8 of the Fur Products Labeling Act, Section 5 of the Flammable Fabrics Act, Section 7 of the Textile Fiber Products Identification Act, and Sections 4, 5 and 6 of the Fair Packaging and Labeling Act.

Of course, the aforementioned Sections cited by the Commission contain specific authority to promulgate substantive rules, that authority having been granted by the Congress with the passage of the legislation. It is interesting to note that in none of the Acts was there any grant of authority on the part of the Commission to promulgate rules regarding the care labeling of apparel items. In this regard, it is interesting to note that during the debates on the Textile Fiber Products Identification Bill several comments were made as to the desirability of requiring care labeling in order to protect the consumer. See the remarks of Congressman Frank E. Smith, August 14, 1957, 103 Congressional Record 14752 (1957) and Senator John Pastore, August 18, 1958, 104 Congressional Record 18186 (1958); 104 Congressional Record 18177 (1958). However, the Act, as passed, contained no provisions with regard to care labeling. Additionally, the Committee Report of the Senate Interstate and Foreign Commerce Committee noted the argument with regard to performance standards and rejected it, S. Rep. No. 1658, 85th Cong., 2d Sess. 3 (1958).

The question has often been asked that if the Commission did in fact have the power to make substantive rules concerning any or all of the Acts which it administers, then why did Congress feel it necessary to grant specific substantive rule-making powers to the Commission in the aforementioned Acts? As care labeling is not covered under any of the other statutes involving textiles or apparel which are administered by the Commission, the Commission must rely for its power on section 5(a)(1) of the Federal Trade Commission Act (15 USC 45) which outlaws "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce." Section 5(b) of the Act, in turn, permits the Commission to issue complaints when it has reason to believe that a violation of the Act has occurred and upon proper hearing and if due cause is found to issue, cease and desist orders in connection with such violations. The Commission has in the past denied that in substantive matters it is confined to the cease and desist order adjudicative procedure provided in Section 5(b) of the Act, claiming that Section 6(g) of the Act permits the promulgation of Trade Regulation Rules, "Trade Regulation Rule for the Prevention of Unfair or Deceptive Advertising and the Labeling of Cigarettes in Relation to the Health Hazards of Smoking," Pgs. 139-142 (issued: June 22, 1964).

The Commission's position with regard to the use of trade regulation rules in an adjudicative proceeding is as follows, "Where a Trade Regulation Rule is relevant to any issue involved in an adjudicative proceeding thereafter instituted, the Commission may rely upon the rule to resolve such issue, provided that the respondent shall have been given a fair hearing on the applicability of the rule to the particular case," "FTC Rules of Practice," Section 1.12(c). In the Commission's view, any adjudicative proceeding initiated to enforce the rule would be greatly simplified, since the only factual issue to be adjudicated would be whether the rule had been violated. The rule would be conclusive so far as the issue of lawfulness was concerned. Under this view, when a company was cited for a violation of the rule, it would be prohibited from attacking the validity of the rule but would only be permitted to defend on the grounds that either the act or practice in question did not fall within the rule or that the company had not engaged in the act or practice as alleged by the Commission.⁴ The latter process is a far cry from the procedures and safeguards guaranteed to any respondent when served by a Commission complaint under the Administrative Procedures Act.

Considering some of the statements of the present and former Chairmen on the subject of the Commission's 6(g) powers, it is surprising that the Commission would attempt to promulgate rules in an area as controversial as the one at bar.

In past congressional testimony, former Chairman Paul Rand Dixon has specifically denied that the Commission has the power to take the action suggested herein:

"Now, in our broad, generic statute under Section 6(g). Congress said we could make our own rules and regulations. Well, no one has ever been foolish enough at the Commission yet to try to write law under that kind of a statute, under that broad thing. We have only adopted rules of practice which I have talked about."⁵

Chairman Caspar Weinberger echoed the same doubts in recent testimony before the Senate Commerce and Finance Subcommittee when testifying on the Consumer Protection Act of 1969 (H.R. 14931) wherein he stated that, "Although not covered by the provisions of H.R. 14931, the Commission believes that its power to issue substantive rules should be made more explicit. Any doubts about its rule-making authority should be clarified and removed. Any possible ambiguity in its present rule-making authority between its Labeling Acts and the Federal Trade Commission Act should be eliminated."

As has been repeatedly stated, AAMA feels that the care labeling problem should be handled in a voluntary manner. If the Commission agrees to adopt the voluntary approach, it will be able to make an immediate start toward its goal in cooperation with industry rather than risk protracted disagreement and the inevitable disruption of its program which would follow.

I. SUMMARY

In summation, the main points of the AAMA position on care labeling are as follows:

1. AAMA supports the principle of permanent care labeling on an exception basis.

2. The Commission should agree to the voluntary approach and adopt in principle the IACTI Guide which has already been endorsed by a large segment of the Industry. It should be noted that European authorities have rejected the compulsory approach.

3. The requirement of stated guarantees for care instructions must be eliminated because they add nothing to the consumer's present remedies at law and lie beyond the scope of the Commission's powers.

4. In most instances fabric makers will not be able to provide manufacturers with meaningful guarantees due to the changes in care requirements which are brought about in the manufacturing process, and therefore, the proposed system of continuing guarantees is useless.

⁴ Address by Commissioner Everette McIntyre, Winter Conference of the American Marketing Association, December 27, 1961.

⁵ Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 88th Cong., 1st Sess. 169-70 (October 31, 1963).

5. The requirement that manufacturers identify themselves on labels must be eliminated because such a requirement, besides being beyond the Commission's powers, will result in a reduction in competition, an increase in price and a decrease in customer selection.

6. There are no performance standards available with which to judge whether there has been undue impairment in an apparel item's "utility or appearance" after refurbishing and therefore that judgment should be left to the market place and the courts.

7. There are instances where hang tags and other types of non-permanent labels are preferable to permanent labels.

8. L-22 is a useful guide for fabric components but is not applicable to apparel items.

9. Any permanent care labeling program will result in increased costs which will be passed along to the consumer, but, on an exception basis, the consumer will receive a benefit in excess of the increased cost.

10. Industry should be given 24 months to convert to our proposed system after which all apparel items entering the manufacturing process should be governed by the terms of the Guide.

11. The Commission lacks the power to promulgate substantive rules in the Textile Industry.

(Thereupon, at 11:05 a.m., the hearing was adjourned.)

