such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries.

VIII.

It is further ordered, That within sixty (60) days from the date of service of this order, and on a periodic basis thereafter, the respondent shall submit, in writing, to the Federal Trade Commission a report setting forth in detail the manner and form in which respondent is meeting its compliance obligations.

IN THE MATTER OF

AMERICAN ALUMINUM CORPORATION, ET AL.

ORDER, OPINION, ETC. IN REGARD TO ALLEGED VIOLATIONS OF THE TRUTH IN LENDING AND FEDERAL TRADE COMMISSION ACTS

*Docket 8865. Complaint, Oct. 4, 1971—Order & Opinion, July 2, 1974**

Order requiring a Birmingham, Ala., seller and distributor of residential aluminum siding, storm windows, storm doors and various other home improvement products, among other things to cease using any sales plan employing false, misleading or deceptive statements or representations to obtain leads to potential customers; disparaging advertised products; misrepresenting the savings available to purchasers; misrepresenting the duration, nature or extent of any guarantee; misrepresenting the durability or efficacy of its products; failing to maintain adequate records to substantiate any advertising claims made; and violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *John H. Bedford*, and *W. Roland Campbell*.
For the respondents: *Joseph J. Lyman*, Wash., D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Truth in Lending Act and the regulations promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that American Aluminum Corporation, a corporation, and Norman J. Foucha and Bobby G. Smith,

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* On September 16, 1974, respondents filed a petition for review in the Court of Appeals for the Fifth Circuit.

6. Certain of respondents' home improvement products are unconditionally guaranteed or guaranteed for life.

7. Respondents' siding materials will never require painting.

PAR. 6. In truth and in fact:

1. Respondents' said advertised offers are not genuine or bona fide offers but are made for the purpose of obtaining leads as to persons interested in the purchase of respondents' products. After obtaining such leads, respondents' salesmen or representatives call upon such persons at their homes and, according to their established mode of operation, respondents' salesmen or representatives disparage the advertised product and otherwise discourage the purchase thereof and attempt to sell and frequently do sell a different and more expensive product instead of the advertised product for which the customer was originally solicited.

2. Respondents' products are not being offered for sale at special or reduced prices, and savings are not thereby afforded purchasers because of reductions from respondents' regular selling prices. In fact, respondents do not have regular selling prices but the prices at which respondents' products are sold vary from customer to customer depending on the resistance of the prospective purchaser.

3. Respondents' advertised offer is not made for a limited time only. Said merchandise is advertised regularly at the represented prices and on the terms and conditions therein stated.

4. Purchasers of respondents' products do not receive a free bonus or gift in the form of free storm windows.

5. After installation of respondents' aluminum siding is completed, homes of purchasers are not used for demonstration or advertising purposes; and purchasers, as a result of allowing their homes to be used as models, are not granted reduced prices, nor do they receive allowances, discounts or commissions.

6. Respondents' home improvement products are not unconditionally guaranteed or guaranteed for life. Such guarantee as may be provided is subject to numerous terms, conditions and limitations respecting the duration of the guarantee and the extent and manner of performance thereunder. Furthermore, in a substantial number of cases, respondents or their salesmen or representatives fail to furnish any written guarantee to the customer and fail to disclose the life during which said guarantee applies.

7. Respondents' siding materials will require painting.

Therefore, the statements and representations set forth in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PAR. 7. In a substantial number of instances and in the usual course of their business, respondents sell and transfer their customers' obligations, procured by the aforesaid unfair, false, misleading and deceptive means, to various financial institutions. In any subsequent legal action to collect on such obligations, these financial institutions or other third parties, as a general rule, have available and can interpose various defenses which may cut off certain valid claims customers may have against respondents for their failure to perform or for certain other unfair, false, misleading or deceptive acts and practices.

PAR. 8. In the conduct of their aforesaid business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of aluminum siding and other home improvement products of the same general kind and nature as those sold by respondents.

PAR. 9. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging violation of the Truth in Lending Act and the implementing regulation promulgated thereunder, and of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 11. In the ordinary course and conduct of their business, as aforesaid, respondents regularly extend, and for some time last past have regularly extended, consumer credit as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act duly promulgated by the board of governors of the Federal Reserve System.

PAR. 12. In the ordinary course of their business as aforesaid, respondents cause to be published advertisements of their goods and services,

as "advertisement" is defined in Regulation Z. These advertisements aid, promote, or assist directly or indirectly extensions of consumer credit in connection with the sale of these goods and services. By and through the use of the advertisements, respondents:

1. State that no downpayment is required in connection with a consumer credit transaction, without also stating all of the following items, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10 (d) (2) thereof:

(i) The cash price;

(ii) The number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;

(iii) The amount of the finance charge expressed as an annual percentage rate; and

(iv) The deferred payment price.

PAR. 13. By and through the use of respondents' contract to perform various home improvements, a security interest, as "security interest" is defined in Section 226.2 (z) of Regulation Z, is or will be retained or acquired in real property which is used or expected to be used as the principal residence of the respondents' customers. Respondents' retention or acquisition of such security interest in said real property thereby entitles their credit customers to be given the right to rescind that transaction until midnight of the third business day following the consummation of the transaction or the date of delivery of all the disclosures required by Regulation Z, whichever is later.

Respondents have caused the following additional information and clause to appear in its contract with credit customers:

The undersigned agree(s) that due to the custom nature of the work called for herein (he) (they) will pay as liquidated and agreed damages the sum of 25% of the agreed price upon (his) (their) cancellation of this agreement.

By and through the use of the above-quoted additional information and clause, respondents have and are representing to their customers that they are liable for damages in the event that these customers exercise their right to rescind, thereby violating Section 226.9 (d) of Regulation Z. And, said additional information is stated and utilized so as to mislead or confuse the customer and contradicts, obscures and detracts attention from the information required by Regulation Z to be disclosed, thereby violating Section 226.6 (c) of Regulation Z.

PAR. 14. Pursuant to Section 103 (q) of the Truth in Lending Act, respondents' aforesaid failure to comply with the provisions of Regulation Z constitute violations of that Act, and, pursuant to Section 108 thereof, respondents thereby violated the Federal Trade Commission Act.

INITIAL DECISION BY DAVID H. ALLARD, ADMINISTRATIVE LAW JUDGE

OCTOBER 9, 1973

PRELIMINARY STATEMENT

This proceeding was commenced with the issuance of a complaint on Oct 4, 1971,[1] charging the corporate respondent and Norman J. Foucha and Bobby G. Smith, individually and as officers of the corporate respondent, with violations of Section 5 of the Federal Trade Commission Act by committing unfair methods of competition and unfair and deceptive acts and practices in commerce and violating the Truth in Lending Act and the implementing regulations promulgated thereunder.

A pretrial conference was held on Dec. 21, 1971; a request for admissions was filed by complaint counsel on Jan. 18, 1972, to which respondents timely failed to answer. On Mar. 9, 1972, the matter was assigned to the undersigned. Hearings were held in Birmingham, Ala., on Apr. 4, 1972, in Chattanooga, Tenn., on Apr. 5, 6, and 7, 1972, and in Birmingham, Ala., on May 30, 1972. Thereafter, hearings were held in abeyance to allow complaint counsel to proceed with remedies, the net result of which was to enforce the subpoenas issued by the Commission against the named individual respondents as well as several other individuals. When this matter was resolved, the hearings were promptly set and concluded in Birmingham, Ala., on July 10 and 11, 1973. Briefs were filed on Sept. 10, 1973.

At those hearings, testimony and documents were incorporated in the record in support of the complaint as well as in opposition thereto. This proceeding, thus, is before the administrative law judge upon the complaint, answer, admissions, testimony and other evidence, proposed findings of fact and conclusions, and briefs filed in support thereof submitted by the parties have been carefully considered and those findings not adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matter.

Having heard and observed the witnesses and having carefully reviewed the entire record[2] in this proceeding, together with the proposed

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[1] On brief, complaint counsel erroneously maintain the date to be Apr. 3, 1971.

[2] References to the record are made in parentheses, and certain abbreviations are used as follows:
Comp.—Complaint
Ans.—Answer
Tr.—Transcript page
CX—Commission exhibit
RX—Respondents' exhibit

findings, conclusions, and briefs submitted by the parties as well as replies, the administrative law judge makes the following findings as to facts, conclusions, and order.

FINDINGS OF FACT

1. Respondent American Aluminum Corporation is a corporation organized in 1965, under the laws of the State of Alabama, with its principal office located at 1624 6th Avenue North, Birmingham, Ala.[3] (Comp., par. 1; Ans. par. 1).

2. Respondent American Aluminum Corporation also does business under the trade name National Aluminum Corporation. (Ans. par. 1).

3. Respondents Norman J. Foucha and Bobby G. Smith served as the principal officers of the corporate respondent. However, respondent Foucha sold his interest in the corporation to Bobby G. Smith in Jan. 1971, and thereafter severed all relationships with the corporate respondent.[4] (Comp. par. 1; Ans. par. 1; Tr. 606, 607).

4. Respondent Bobby G. Smith now formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. (Comp. par. 1; Tr. 751-52, 754, 762, 608, 611-12, 621-22, 700).

5. Smith hires and fires salesmen (Tr. 699), furnishes leads to them (Tr. 706-07), approves and pays for the mailers and advertisements (Tr. 707-08), determines to whom mailers will be sent (Tr. 716), presides at sales meetings (Tr. 711-12); resolves disputes with customers (Tr. 705-06), assumes responsibility for installation (Tr. 699), and determines to which finance company to transfer the customers' retail installment contract (Tr. 704).

6. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, and distribution of residential aluminum siding, storm windows, storm doors and various other home improvement products to the public and in the installation thereof. (Comp. par. 2; Ans. par. 2).

COUNT I

Alleging violations of Section 5 of the Federal Trade Commission Act,

7. Respondents, in the course and conduct of their business, now

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[3] At some period of time, the principal office appears to have been moved to 228 First Avenue North, Birmingham, Ala. (Tr. 697-98).

[4] In their proposed findings, respondents admit that the corporate respondents' internal office affairs and fiscal policies were conducted primarily by respondent Foucha as a corporate officer until he sold his interest to Bobby G. Smith (Tr. 609, 690, 707). Respondents also admit that during that time frame, respondent Bobby G. Smith in his capacity as a corporate officer hired the salesmen and generally was in charge of selling the corporate respondents' products. (Tr. 619, 690-91, 699, 707, 714).

cause, and for some time last past have caused, their said products, advertising and promotional material, contracts, and other business papers and documents to be shipped and transmitted from and to their place of business, located as aforesaid in the State of Alabama and from the suppliers of said products, located in various States of the United States, to their prospective purchasers and purchasers thereof, located in various other States of the United States, other than the State of Alabama and the states in which said suppliers are located, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products, in commerce, as "commerce" is defined in the Federal Trade Commission Act. (Comp. par. 3; Admitted at prehearing conference, Tr. 5).[5]

8. Respondents' gross sales during 1968, were $1,477,977 and in 1969, $1,664,867 (CX 10b). Since Smith became president in Jan. 1971, sales have not diminished appreciably and during 1972, were about $1,000,000 (Tr. 712-13).

Respondents' Advertisements and Representations Therein

9. Respondents' principal method of advertising its products is through mailouts to people in selected areas where it plans to solicit business (Tr. 611, 616). Approximately 50,000 mailers were sent out each week (Tr. 714) to different states (Tr. 616). CX la-8b are typical mailouts. They represent formats of advertisements used by respondents during the period of 1961-1971 (Admission #2).

10. The mailouts most often sent out by American offered aluminum siding installed for $189.50, $199.50 or $219.50 with free storm windows (CX la-7b).

a. A salesman testified that leads given him were always from the mailers, with a price of $189.50, $199.50 or $219.50.

b. All of the 20 public witnesses whose testimony was adduced at the hearings had received mailers similar to CX la-7b. The mailers featured the cheaper grade siding at less than $219.50.

c. There was no evidence that the mailer featuring the more expensive siding (CX 8a-8b) had ever been used, except for the testimony of respondent Foucha, who claimed some had been sent out (Tr. 616).

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[5] In their proposed finding No. 8, respondents also admit that their business "was transacted under circumstances disclosing, they were engaged 'in commerce' as that term is defined in the Federal Trade Commission Act."

11. Typical and illustrative of the contents of respondents' mailouts, but not all-inclusive thereof, are the following:

ALL-ALUMINUM SIDING SALE
MANY MONTHS TO PAY-LOW MONTHLY PAYMENTS
PAY NOTHING FOR MONTHS AFTER INSTALLATION
$199.50
(CX la, CX 2a, CX 4a)

ENJOY EVERLASTING HOME BEAUTY FREE BONUS

Special Offer To You-If you act promptly we will include Storm Windows for every window in your home as a FREE Bonus with the purchase of our All Aluminum or Siding Special.

- 100% Guaranteed Genuine Aluminum Siding
- Completely installed by our our expert home finishers.
- Absolutely NO EXTRAS to pay.
- YOUR CHOICE of beautiful decorator colors.
- One lifetime installation protects forever!

(CX la, 2a, 3b, 4a, 5b, 6a, 33a, 35a).

THIS CARD IS WORTH $431.00 TO YOU AND YOU GET A BONUS GIFT FREE WITH PURCHASE

THIS IS A LIMITED OFFER!!

MAIL THIS CARD TODAY AND GET YOUR FREE GIFT

Mail this card within 7 days to become eligible for this savings, plus FREE Storm Windows for every window in your home with the purchase of this Aluminum Siding for your home.
(CX lb, 2b, 7b, 33a, 35a)

12. Each of the mailouts sent out included a business reply card and when prospective customers fill in the reply cards and return them to respondents, the cards then become leads and are turned over to salesmen (Tr. 400-01, 619, 707). Thereafter, the salesmen make appointments with the prospective customers and attempt to sell them aluminum siding installed on their homes (Tr. 619). The respondents generally have two grades of aluminum siding that they offer to sell. The first is what respondents call Imperial siding and the second is referred to as cheaper siding (Tr. 704). The cheaper siding was offered for sale in respondents' mailers at $199.50, $189.50, $219.50 and $199 completely installed (CX la-7b). The Imperial siding is advertised in a mailer at a price of $199.50 (CX 8a-8b).

13. Respondent American furnished salesmen with its contract forms, mortgage forms, and rescission notices, and other forms necessary to make sales of aluminum siding (Tr. 465, 468). The salesmen would then, upon making a sale, obtain the customer's signature on a

blank retail installment contract which was later completed by American (Tr. 474).

14. Respondent American furnished salesmen unpainted samples of the cheaper grade aluminum siding and storm windows (CX 59) to show to customers (Tr. 434). These samples were used by salesmen to show the siding advertised at less than $219.50, with a free storm window (Tr. 434).

15. Through oral statements of its salesmen who called on prospective customers in response to receiving a reply from the mailouts, respondents made the following representations with regard to the transactions:

a. The offer set forth in said advertisements is a bona fide offer to sell the advertised products at the prices and on the terms and conditions stated.

b. Respondents' products are being offered for sale at special or reduced prices, and that savings are thereby afforded to purchasers from respondents' regular selling price.

c. Respondents' advertised offer is made for a limited time only.

d. That purchasers of respondents' products would receive a Free Bonus or gift in the form of free storm windows.

e. After the installation of respondents' aluminum siding is completed, the homes of purchasers will be used for demonstration and advertising purposes by the respondents; and, as a result of allowing their homes to be used as models, purchasers will be granted reduced prices or will receive allowances, discounts or commissions.

f. Certain of respondents' home improvement products are unconditionally guaranteed for life.

g. Respondents' siding materials will never require painting.[6]

Bait and Switch Sales Tactics

16. Respondents' sales methods were described by one respondent as "step up selling" which means "When you go into a customer's house and sell a product and after you sell the product you show them something besides what you've advertised." (Foucha, Tr. 610-11). To accomplish this, the salesman sells the cheaper grade siding and obtains a signed contract for it. After obtaining the signed contract, the salesman persuades the customer to purchase the Imperial grade siding at a much higher price (Smith, Tr. 733-34). Salesmen were told by respondents to

[6] A, b, c and d above were admitted by respondents at the pretrial conference (Prehearing Tr. 21-22). The representations e, f and g, which were not admitted, will be discussed fully hereinafter under the headings "Representations Regarding Use of Home in Advertising," "Guarantee," and "Never Requires Painting."

sell the better grade material to earn a commission (Cameron, Tr. 410).

17. During the time period of Mar. 12, 1969 through Dec. 31, 1969, respondents neither sold nor installed any residential siding at the advertised prices of $189.50, $199, $199.50 or $219.50 (Admission #3). No documentary evidence was presented to show that American had ever sold residential siding at the above-mentioned prices.

18. According to respondent Foucha, American kept something like 100 squares of the cheaper grade siding on hand in its warehouse (Tr. 625). The installation manager testified that he had enough of the cheaper grade siding in stock to do only five or six jobs (Tr. 762). Even though it maintained this limited amount in stock, American purchased none of the residential siding advertised in the mailouts for cheaper grade siding (CX la-7b) during the years 1968 and 1969 (Admission #7). Although the records of sales for the nine-month period show no sales at $219.50 or less, there were sales at much higher prices where it appears that the cheaper grade siding was used (Tr. 643-46; CX 11Z228, 11Z268, 11Z269). In these instances, the price per square far exceeded the price per square advertised in CX la-7b, which would be $19.95 to $21.95.

19. American could not have operated profitably if it had sold its aluminum siding at prices of $199.50 with free storm windows.

a. According to respondent Foucha, the cost of the siding, exclusive of any accessories needed to install it, was $10-12 per square and the installer was paid $6 per square (Tr. 620). A square is 100 square feet. Overhead expenses, including advertising, were for the year 1969, 34.7 percent (CX 10b) and on a $199.50 sale would amount to $69.23. On a $199.50 job, the siding would cost a minimum of $100, the installation cost would be $60 and overhead expense would be $69.23. This would total $229.23.

b. This figure, however, does not take into consideration any commission to the salesman or the cost of storm windows which were supposed to be given free with the job. Thus American, taking into consideration all costs and expenses of doing business, would lose money on any job done at less than $219.50.

20. Respondents discouraged their salesmen from selling the siding advertised for $219.50 or less by paying salesmen a very small commission on it, and a much better commission on the Imperial grade siding.

a. The commission on the Imperial grade siding was 50 percent of all money charged over $65 per square and thus depended on the price charged the customer (Foucha, Tr. 621).

b. The commission on the siding advertised at less than $219.50 was a couple of dollars (Cameron, Tr. 412). This, according to a salesman of

American, being practically nothing, induced you to sell a better grade material (Tr. 412).

21. Respondents discouraged the purchase of aluminum siding advertised at a price of $219.50 or less by salesmen showing customers unpainted samples which were unattractive.

a. Fifteen public witnesses who had been switched to the Imperial grade siding were shown unpainted samples after they had first signed a contract for siding at $199.50 (Parkerson, Tr. 141; Ellis, Tr. 171; Smith, Tr. 247; Bryant Tr. 264, the testimony of 11 of these witnesses was stipulated as being the same as that of Woods Bryant, CX 60; hereinafter when reference is made to Bryant's testimony, it includes the 11 witnesses whose testimony was stipulated).

b. These witnesses described the sample as looking like tin (Tr. 141, 247, 264) or what you would put on a barn (Tr. 140). One witness was told he would have to paint it right after it was put on to keep it from tarnishing (Ellis, Tr. 172). After Bryant saw the unpainted sample, he told the salesman he wouldn't have it (Tr. 265).

22. Respondents, after binding the prospective customer to a contract for the siding of $219.50 or less, immediately proceeded to disparage it, claiming that it would require special maintenance and would not prove satisfactory.

a. Witnesses who had been switched were told that the $199.50 siding would require regular maintenance such as painting or treatment (Tr. 172, 247, 264).

b. Some were told it would rattle because of not being interlocked (Tr. 173, 174, 268) and that anything would dent it (Tr. 269).

c. Four witnesses who contracted for siding advertised in the CX la-7b mailers were told the siding which they purchased would require some maintenance. They were told such things as it would have to be treated twice a year (Creel Tr. 66), would have to be painted every 2 or 3 years (Winsett, Tr. 98), would have to be waxed each year (Hatcher, Tr. 274), would have to be painted (Whaley, Tr. 317). Two of these witnesses were told the siding would not interlock (Winsett, Tr. 97; Whaley, Tr. 317).

23. When a customer who had contracted for the siding offered at $219.50 or less would not be switched to the Imperial grade siding, respondents failed to perform under its contract to install the aluminum siding. Various reasons were given, such as the siding was not in stock.

a. Five witnesses, who contracted for cheaper grade siding between the years 1966-1971, were unable to get performance by American (Creel, Tr. 57-91; Winsett, Tr. 93-119; Cannon, Tr. 223-39; Hatcher, Tr. 82-93; Whaley, Tr. 24-37). Joseph W. Cannon spent $25 in telephone

charges calling American about installation of the cheaper siding job at $259, to no avail (Tr. 230-32). He made at least 15 calls to the company (Tr. 236) and was told such things as the siding was not in stock (Tr. 231). He paid $25 down on the contract (CX 228) by check to American (CX 50a and b). In spite of his many efforts in prodding American, he never received performance or his deposit back (Tr. 232). Even the Chattanooga Better Business Bureau and the Birmingham Better Business Bureau, whom he contacted, did not get him his money back (Tr. 231-32).

b. Martha Winsett, who had contracted with American for a siding job at $259 in Sept. of 1971 (Tr. 98), was promised installation within two weeks (Tr. 100). When no one came to install the siding, she wrote the company but received no answer (Tr. 100-02). Believing she was bound to the contract and wanting siding put on her house, she contacted the Birmingham Better Business Bureau and finally, through their efforts, received a letter from American canceling the contract (Tr. 102-03; CX 46).

c. Mattie Creel signed a contract for the cheaper grade siding at $297, paying $50 down (Tr. 65; CX 45). Installation, which had been promised in two weeks, was never done (Tr. 69-70). She called American several times and was given various excuses why the job had not been done, such as the company was out of siding (Tr. 69-70). She was finally told her money for downpayment was being mailed (Tr. 69-70). When it was not received, she called again and was told she could get "two lawyers" to collect her downpayment and it would not do any good (Tr. 70). Finally, after four months of trying to get the job done or her money back, she contacted the Better Business Bureau and finally received a refund (Tr. 71).

c. Ben Whaley contracted with American for the cheaper grade siding and paid $39.50 down in 1966 (Tr. 318). He was promised that the siding would be installed by Dec. 15, 1966. As a result of not hearing from them, he wrote letter but received no reply (Tr. 321). His down payment was not refunded until he went to the Better Business Bureau (Tr. 320-21).

d. James Hatcher, who contracted with American for the cheaper grade siding at $335 (CX 39c), also failed subsequently to hear from that company (Tr. 276). He had been promised installation within sixty days (Tr. 274). He called at least three times and on one occasion was told it was not in stock (Tr. 276). Subsequently, he answered a similar mailer and contracted with Southern Aluminum Enterprise for a similar job at $398 (Tr. 277, 279, CX 40). He never again heard from this company (Tr. 280), which actually is a trade name used by respondent American (Foucha, Tr. 612).

Price Savings Representation

24. The representation in respondents' mailers that a customer saves $431 on the advertised special (CX lb, 2b, 4b, 7b) clearly implies that the regular price would be $630.50. Also, the representation that $189.50 is a "50% discount special" represents a regular price of $379 for the cheaper grade siding. Respondents do not have a regular price of $630.50, $379 or any other regular price for the cheaper grade siding. Respondents admitted there is no regular price for its products and the prices at which they are sold vary from customer to customer, depending on the resistance of the prospective customer (Prehearing Conference, Tr. 27).

25. In its mailer for the Imperial grade siding (CX 8a-b), respondents claim "if you act now save 20% NOW ONLY $1999.00." This clearly infers a regular selling price for the Imperial grade siding of $2493.00 for ten squares, which would amount to $249.30 per square. The amount is much in excess of the usual and the highest price at which the Imperial grade siding is actually sold.

a. According to respondent Foucha, the maximum price which salesmen would be allowed to charge a customer for Imperial siding is $100 to $150 per square (Tr. 618).

b. According to respondent Smith, the average price of the Imperial siding is only $90 per square (Smith, Tr. 739).

c. Cameron, a salesman, testified the list price for Imperial siding installed with ten squares would be $1595 (Tr. 502). The normal price would be based on $100 per square or $1000 for the job advertised on the mailer CX 8a-b (Tr. 502, 503).

d. Thus, the highest price which a salesman would be authorized to charge for the Imperial grade siding on the mailer would be $1500 and the average price on a job as advertised would be $900-$1000.

e. The claimed regular price is more than two times this average price of a job and 60 percent in excess of the highest possible price charged customers.

Limited Time Offer

26. The offer made in the mailers for siding at $219.50 or less was not for a limited time only as represented. The mailers with the offer proclaiming "All American Siding Sale" were sent out to prospective customers each and every week (Smith, Tr. 707-08). In fact, about 50,000 mailers were sent each week (Smith, Tr. 714).

a. The so-called special offer was a continuing offer even though it had the appearance of bait designed to make sales at higher prices. The

only sense in which the offer was limited was that American might not send a salesman to the area for an isolated lead (Cameron, Tr. 530-31).

b. The mailer, however, clearly gives the impression that the sale advertised was a limited offer and not being continually made (CX la-7b).

c. The prospective customer considered the price at which the siding was advertised to be an exceptional bargain (Winsett, Tr. 94; Parkerson, Tr. 139; Ellis, Tr. 159; Bryant, Tr. 263).

d. Because it had the appearance of a bargain, the prospective customer mailed it back right away (Bryant, Tr. 263). Some customers sent the card back shortly after receiving the mailer to qualify for the free storm windows, which offer they assumed to be limited (Creel, Tr. 63; Parkerson, Tr. 137).

27. Respondents' salesmen tell customers the reduced price on the Imperial grade siding is a limited offer (American, Tr. 458). As an example, one customer was told the offer of Imperial siding at $995 was limited (Smith, Tr. 251). The Imperial siding is offered continuously at similar prices (See Finding 25).

Free Gift Representation

28. The mailers state "mail this card today and get your free gift" (CX la-7b). Prospective customers do not receive any gift for sending the mailer. In fact, customers do not receive the free gift of storm windows mentioned in its mailers for making a purchase.

a. None of the 20 customer witnesses received any free gift or storm windows.

b. Mrs. Parkerson, who was promised storm windows and doors by the salesman, did not receive them (Tr. 141). The salesman entered "no plastic windows" on her contract (CX 57) to make her believe she would receive aluminum storm windows.

c. The free storm windows are not given to customers who purchase the Imperial grade siding and they are only free with the cheaper material (Campbell, Tr. 767).

d. Salesmen were told to tell customers "that they're plastic, and cost about a dollar each to manufacture" (Cameron, Tr. 433).

e. Mrs. Creel sent the reply card back in immediately in order to receive the free storm windows offered (Tr. 63). She contracted to purchase the advertised special in the mailer and did not receive either it or the storm windows (Tr. 68-69).

Representations Regarding Use of Home in Advertising

29. Respondents, through their salesmen, offer customers a so-called reduced price if they will allow their homes to be used for advertising and demonstration purposes.

a. All of the customers who purchased the Imperial grade siding were told that they were receiving a price reduction for allowing their homes to be used for advertising purposes (Ellis, Tr. 175; Smith, Tr. 253; Parkerson, Tr. 143; Bryant Tr. 266).

b. In addition to this, James W. Smith was offered $50 for every other job sold as the result of the company using pictures taken of his home (Tr. 253).

30. Respondents, after installation of siding on the homes of purchasers, do not use the homes for demonstration or advertising purposes (Admitted at Prehearing Conference, Tr. 30).

Guarantee

31. Respondents, through their salesmen, represent that their Imperial grade siding is guaranteed for life and that customers will receive a written guarantee to this effect.

a. Cameron, a salesman, testified that each and every customer is told he will receive a lifetime guarantee on the Imperial siding (Tr. 450, 456).

b. Customers were told that the expensive siding was guaranteed "just as long as it was on the house" (Bryant, Tr. 267). James W. Smith, who was told it was guaranteed a lifetime (Tr. 251), was also told "we'll guarantee it not to blow off" (Tr. 250).

32. Respondents' written guarantee on the Imperial grade siding is as follows:

> Vendor guarantees this aluminum siding applied on your home to be free from defects of workmanship and material, and shall replace any defective part free of charge for the lifetime of your structure; however, the seller will not be responsible for defects or damages arising through negligence of purchaser or acts of anyone else. (CX 9; Foucha, Tr. 626-27).

33. Respondents do not furnish each customer the written guarantee on the Imperial grade siding (Smith, Tr. 251-52; Bryant, Tr. 268).

34. Respondents' home improvement products are not unconditionally guaranteed. Such guarantee as may be provided is subject to numerous terms, conditions and limitations respecting the duration of the guarantee and the extent and manner of performance thereunder (Admitted, Prehearing Conference, Tr. 31).

35. Respondents do not fully honor the guarantee on the Imperial grade siding.

Illustrative is the fact that the Imperial grade siding which was installed by respondents on James W. Smith's home blew off and respondents refused to fix it, claiming this was not covered by the guarantee (Tr. 250, 252).

36. Respondents' representations on its mailers for cheaper grade siding "100% Guaranteed Genuine Aluminum Siding," "One lifetime installation protects forever" and "Enjoy Everlasting Home Beauty" infer that it is guaranteed to last and protect one's home indefinitely. One witness expressed it this way, "I just took it from the card that it was good aluminum and it was—I kind of took it as a lifetime guarantee" (Ellis, Tr. 171).

37. There was no guarantee on the cheaper grade siding other than that it was 100 percent aluminum siding (Foucha, Tr. 627). Salesmen told prospective customers that the only guarantee on the cheaper grade siding was that it would be installed properly (Cameron, Tr. 447).

Never Requires Painting

38. Respondents, by the statements in their mailers (CX la-7b), "Stop Unnecessary Home Problems" and "Enjoy Everlasting Home Beauty," imply that the siding advertised will not require painting or other maintenance.

39. The cheaper grade siding advertised requires maintenance including painting at regular intervals according to what respondents' salesmen tell prospective customers (See Finding 22).

COUNT II

Alleging violations of the Truth in Lending Act and the implementing regulation promulgated thereunder and of the Federal Trade Commission Act,

40. Respondents regularly extend, and for some time last past have regularly extended, consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act duly promulgated by the Board of Governors of the Federal Reserve System (Comp. par. 11; Ans. par. 11; Admitted, Prehearing Conference, Tr. 39).

41. Respondents, in their mailers advertising aluminum siding, state that it can be purchased with "no down payment" without disclosing the other terms of sales, such as:

a. The cash price;

b. The number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;

c. The amount of the finance charge expressed as an annual percentage rate; and

d. The deferred payment price.

(Admitted, Prehearing Conference, Tr. 41).

42. Since the Truth in Lending Act went into effect on July 1, 1969, respondents have caused the following additional information and clause to appear in their contracts with credit customers:

The undersigned agree(s) that due to the custom nature of the work called for herein (he) (they) will pay as liquidated and agreed damages the sum of 25% of the agreed price upon (his) (their) cancellation of this agreement. (CX 24c, 25c, 37, 42, 57)

43. By and through the use of the above-quoted additional information and clause, respondents have and are representing to their customers that they are liable for damages in the event that these customers exercise their right to rescind, and said additional information misleads and confuses the customer and contradicts, obscures and detracts attention from the information required by Regulation Z to be disclosed.

a. The experience of Billy Ellis, who testifed at the hearings, illustrates how a prospective customer can be confused about his right to rescind the contract under the Truth in Lending Act.

b. Ellis contracted for the Imperial grade siding on Oct. 9, 1969 (CX 32; Tr. 182). He was given a group of papers in an envelope, which he was told by the salesman to keep and not do anything with them until hearing from the company (Tr. 183). The next day after signing the contract, Ellis decided he had made a bad deal and would like to back out (Tr. 183). He did not do anything about backing out of the contract because the contract had the appearance of being legally binding (Tr. 183-84).

Holder in Due Course

44. In a substantial number of instances and in the usual course of their business, respondents sell and transfer their customers' obligations to various financial institutions. In any subsequent legal action to collect on such obligations, these financial institutions or other third parties, as a general rule, have available and can interpose various defenses which may cut off certain valid claims customers may have against respondents for their failure to perform or for certain unfair, false, misleading or deceptive acts and practices.

a. This was admitted by respondents at a prehearing conference, Tr. 37-38.

b. The experience of James W. Smith illustrates how a customer has no recourse against the lending institution purchasing his contract with respondents. Smith claimed that respondents failed to honor their guarantee on the Imperial grade siding installed on his home (Tr. 250, 252). Consequently, Smith complained to the finance company to whom he was making payments, Avco, that American had not completed service on his house (Tr. 255). Smith testified regarding Avco's reply as follows: "They said there wasn't nothing they could do about it. It was between me and the company, American Aluminum Corporation." (Tr. 255).

CONCLUSIONS

45. Respondents consistently employ "bait and switch" tactics in selling their aluminum siding, which inherently is a deceptive practice.

a. The offer in its mailers to sell aluminum siding fully installed with free storm windows for a price of $219.50 or less is not a *bona fide* offer but rather one used as bait to obtain leads of prospective customers who can then be sold the more expensive aluminum siding on which respondents realize a more substantial profit (Findings 15-19). The fact that this siding is not generally sold is enough to draw an inference of a switch.

b. To accomplish the switch, respondents disparage the aluminum siding which it extensively advertises, by use of unpainted samples and running it down (Findings 20, 21). This method of selling, as employed by respondents, presents a bait and switch scheme including most all of the elements of that practice and clearly fits the definition of this unfair practice set forth in the Commission's Guides Against Bait Advertising. (CCH Trade Reg. Rep. ¶39,011 Nov. 24, 1959):

> Bait advertising is an alluring but insincere offer to sell a product or service which the advertiser in truth does not intend or want to sell. Its purpose is to switch consumers from buying the advertised merchandise, in order to sell something else, usually at a higher price or on a basis more advantageous to the advertiser. The primary aim of a bait advertisement is to obtain leads as to persons interested in buying merchandise of the type so advertised.

c. The bait and switch nature of respondents' operation is evidence by practices condemned by the guides:

1. Respondents' offer to sell advertised produce in advertisements is not a bona bona fide effort to sell it (Guide 1).

2. The first contact or interview with the customer is secured by deception in that the offer in respondents' advertisements does not truthfully represent the product and nature of the offer (Guide 2).

3. Respondents refuse to sell the product offered in accordance with the terms of the offer (Guide 3 (a)).

4. Respondents and their representatives disparage the advertised product (Guide 3 (b)).

5. Respondents do not have a sufficient quantity of the advertised product to meet reasonably anticipated demands (Guide 3 (c)).

6. Respondents show or demonstrate a product that is defective, unusable, or impractical for the purpose represented in the advertisement (Guide 3 (e)).

7. Respondents use a sales plan or a method of compensation for salesmen designed to prevent or to discourage them from selling the advertised product (Guide 3 (f)).

8. Respondents fail to deliver the advertised product and make refunds (Guide 4 (b)).

d. The facts here are also almost identical to the factual situation presented in *All-State Industries of N. C., Inc.* v. *FTC*, 465, 423 F.2d 423 (4th Cir. 1970), *cert. denied*, 400 U.S. 828 (1970). There, the Court of Appeals affirmed a decision of the Federal Trade Commission holding bait and switch practices to be a deceptive practice.[7]

e. The only difference here and *All-State*, *supra*, is that respondents herein do not install the cheaper grade siding which they advertise (see Finding 17), making this even a more obvious example of bait and switch. See *Royal Construction Company*, 71 F.T.C. 762 (1967), where similar sales methods were found to be bait and switch practices.

46. Respondents have engaged in deceptive advertising by claiming that their products are being offered at special or reduced prices and for a limited time only.

a. Respondents misrepresent the savings to a prospective customer on their siding advertised at $219.50 or less and on their Imperial grade siding (Findings 24 and 25) and that the offers on both grades siding are limited (Findings 26-27).

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[7] The Commission described the practices in its *All-State* decision, 75 F.T.C. 465, 485, as follows:

"Respondents' principal method of advertising is through mail-outs which include return mail cards. These mail-out advertisements promote an inexpensive product within respondents' product line which they refer to as an "ADV" product. The ADV product is ostensibly offered at a substantial reduction from a fictitious "regular" price for a fictitious "limited" time. Respondents also sell a more expensive line of similar products which they term "PRO" products. When prospective customers return the mail cards to respondents, the cards are turned over to salesmen who make appointments with the prospective customers. Respondents' sales approach is to attempt to obtain a signed contract for sale of the ADV product along with a signed note for the price of the product and a deed in blank. After obtaining the signed contract, the salesman proceeds to disparage the ADV product by pointing out a multitude of deficiencies in the product. The salesman then produces a sample of the PRO product, embarks upon a lengthly discussion of its virtues in contrast with the deficiencies of the ADV and concludes, whenever possible, by selling the PRO product to the customer in place of the ADV product. Respondents do, however, install the ADV product if a customer insists or demands its installation in accordance with the ADV contract."

b. In *All-State Industries, supra*, the respondents therein also represented in their mailouts that their prices were specials and reduced for a limited time only. It was held therein that the representations of price savings and that the offer was limited were deceptive because "with minor changes from time to time, respondents' prices for their ADV products have always remained substantially the same and do not represent any reduction from previously established prices." (75 F.T.C. at p. 477).

c. In *Royal Construction Company, supra* at 781, the representation "limited time" in connection with their special offer of aluminum siding was held to be a deceptive practice because "respondents regularly advertised the so-called aluminum siding over a period of two years."

47. Respondents have engaged in deceptive advertising by misrepresenting that customers will receive a free gift by sending in the mailout business reply card or making a purchase. See Finding 28 and *Royal Construction Company, supra* at 782-85, where the same practice was held to be deceptive.

48. Respondents have engaged in deceptive advertising and selling practices by advising prospective customers that their homes may be used for advertising purposes and thereby granting a reduction from prices originally quoted. See Findings 29-30 and *All-State Industries*, 75 F.T.C. 477, 478, wherein the same representation was held to be a deceptive practice.

49. Respondents have engaged in a deceptive practice by misrepresenting the guarantee on the products they sell. See Findings 31-37 and *All-State Industries*, 75 F.T.C. 478, wherein it was held that the representation "100% Guaranteed Genuine Aluminum Siding" in mailouts was deceptive where the "Actual guarantee, when presented to a customer, is not an unconditional 100% guarantee." Here, the siding advertised at $219.50, less, was not guaranteed at all, although it was represented to be "100% Guaranteed Genuine Aluminum Siding" in the mailouts. See Guide I of the FTC Guide Against Deceptive Advertising of Guarantees, CCH Trade Reg. Rep. ¶39,014, Apr. 26, 1960, which requires full disclosure of all facts whenever a guarantee is advertised.

50. Respondents have engaged in a deceptive practice by misrepresenting that its aluminum siding never requires repainting (see Findings 38-39).

51. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial

quantities of respondents' products by reason of said erroneous and mistaken belief.

a. It long has been established that the Commission may utilize its accumulated expertise to determine what direct and implied representations are contained in such advertising. *Pfizer, Inc.*, F.T.C. Docket No. 8819 (1972); *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965), and its expertise may be similarly applied to determine what facts are material to consumers and whether such information has been withheld. (*Pfizer, supra*). Moreover, in making such determinations, the Commission may draw its own inferences from the advertisements and need not depend on testimony or exhibits, aside from the advertisements themselves, introduced into the record. *Carter Products, Inc.* v. *FTC*, 323 F.2d 523 (5th Cir. 1963).

b. A finding of actual deception is not prerequisite to proof of a violation of the Federal Trade Commission Act, and representations merely having the capacity to deceive are unlawful. *Charles of the Ritz Dist. Corp.* v. *FTC*, 143 F.2d 676, 680 (2nd Cir. 1944).

c. "The important criterion in determining the meaning of an advertisement is the net impression that it is likely to make on the general populace." *National Bakers Services, Inc.* v. *FTC*, 329 F.2d 365, 367 (7th Cir. 1964). In determining the impression created by an advertisement, the Commission need not look to the technical interpretation of each phrase but must look to the overall impression likely to be made on the buying public. *Murray Space Shoe Corporation* v. *FTC*, 304 F.2d 270, 272 (2nd Cir. 1962).

d. Although a statement "may be obviously false to those who are trained and experienced [this] does not change its character, nor take away its power to deceive others less experienced." *FTC* v. *Standard Education Society, et al*, 302 U.S. 112, 116 (1937). The fact that the representation may be obviously false to the more sophisticated is immaterial.

52. The aforesaid acts and practices of respondents, as herein found, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted and now constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.[8] This deception of purchasers constitutes unfair competition. *FTC* v. *Winsted Hosiery Co.*, 258 U.S. 483 (1922). In reaching

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[8] Respondents admit that they have been in substantial competion in commerce, with corporations, firms and individuals in the sale of aluminum siding and other aluminum home improvement products of the same kind. (Comp. par. 8; Ans. par. 8).

this conclusion, the administrative law judge has evaluated respondents' practices in light of the capacity of the advertisements to deceive, and the inherent unfairness of the advertisements and the practices, and not on the basis of a demonstrated injury to purchasers. *Montgomery Ward & Co.* v. *FTC*, 379 F.2d 666 (7th Cir. 1967); *Charles of the Ritz*, *supra*.

53. Moreover, by the acts described above, respondents have failed to comply with the provisions of Regulation Z, the implementing regulation of the Truth in Lending Act duly promulgated by the Board of Governors of the Federal Reserve System, which failure constitutes a violation of the Federal Trade Commission Act pursuant to Section 103 (q) of the Truth in Lending Act.

54. In their proposed findings and conclusions of law, respondents urge the administrative law judge to conclude that there "is no evidence to support the allegations of the complaint that respondents Norman J. Foucha and Bobby G. Smith, in their *individual capacities*, violated the provisions of the Federal Trade Commission, or the Truth-in-Lending Act." However, the named individual respondents admittedly were the persons responsible for the management, direction and control of the corporate respondent. Effective administration of the Federal Trade Commission Act and the Truth in Lending Act dictate that an outstanding order be directed against the responsible individuals and not merely against a lifeless corporate entity. For respondents Norman J. Foucha and Bobby G. Smith were, and Bobby G. Smith now is, in fact, the alter ego of American Aluminum Corporation. *Cf. Fred Meyer, Inc.*, 63 F.T.C. 1; *Pati-Port, Inc.* v. *Federal Trade Commission*, 313 F.2d 103, 105 (4th Cir. 1963).

55. Since one of the essential purposes of both the Federal Trade Commission Act and the Truth in Lending Act is the protection of the public, the Commission necessarily must "be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity." *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952). The remedy in the accompanying order has a reasonable relationship to the unlawful practice here found to exist. It is the only action which reasonably could be calculated to preclude a revival of the illegal practices.

56. The Federal Trade Commission has jurisdiction of and over respondents and the subject matter of this proceeding.

57. The complaint herein states a cause of action and this proceeding is in the public interest.

58. This decision is not a major Federal action significantly affecting

the quality of the human environment within the meaning of the National Environment Policy Act of 1969.[9]

ORDER

It is ordered, That respondents American Aluminum Corporation, a corporation, and its officers, and Norman J. Foucha and Bobby G. Smith, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale, distribution or installation of aluminum siding, storm windows, storm doors or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, in any manner, any advertising, sales plan, scheme or device wherein false, misleading or deceptive statements or representations are made in order to obtain leads or prospects for the sale of other merchandise or services.

2. Making representations purporting to offer merchandise for sale when the purpose of the representation is not to sell the offered merchandise but to obtain leads or prospects for the sale of other merchandise at higher prices.

3. Discouraging the purchase of or disparaging any merchandise or services which are advertised or offered for sale.

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[9] Section 102 of the National Environmental Policy Act of 1969 (Public Law 91-190), specifically requires that all agencies of the Federal Government shall, to the fullest extent possible,

"(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly effecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."

But see *Harlem Valley Transportation Association* v. *George M. Stafford*, Civil No. 73-Civ. 1330, S.D.N.Y., June 21, 1973, where the Court emphasized that the agency "should determine at the outset of * * * proceedings whether 'major Federal actions significantly affecting the quality of the human environment' are involved within the meaning of 42 U.S.C. §4332(2)(C), and, if so, (2) to require staff preparation of a draft impact statement for circulation to the parties * * *;" and *Hanly* v. *Kleindienst*, 471 F.2d 823 (2nd Cir. 1972) where the Second Circuit Court of Appeals held at p. 836 that:

"Notwithstanding the absence of statutory or administrative provisions on (threshold determinations), this Court has already held in *Hanly I* * * * that federal agencies must 'affirmatively develop a reviewable environmental record * * * even for purposes of a threshold (NEPA) determination.' We now go further and hold that before a preliminary or threshold determination of significance is made the responsible agency must give notice to the public of the proposed major federal action and an opportunity to submit relevant facts which might bear upon the agency's threshold decision. * * * The precise procedural steps to be adopted are better left to the agency, which should be in a better position to determine whether solution of the problems with respect to a specific major federal action can better be achieved through a hearing or by informal acceptance of relevant data."

4. Representing, directly or by implication, that any merchandise or services are offered for sale when such offer is not a bona fide offer to sell such merchandise or services.

5. Representing, directly or by implication, that any price for respondents' products and/or services is a special or reduced price, unless such price constitutes a significant reduction from an established selling price at which such products and/or services have been sold in substantial quantities by respondents in the recent regular course of their business; or misrepresenting, in any manner, the savings available to purchasers.

6. Representing, directly or by implication, that any offer to sell products is limited as to time or is limited in any other manner.

7. Representing, directly or by implication, that persons will receive a gift of a specified article of merchandise, or anything of value.

8. Representing, directly or by implication, that the home of any of respondents' customers or prospective customers will be used as a model home, or otherwise, for advertising, demonstration or sales purposes.

9. Representing, directly or by implication, that any allowance, discount or commission is granted by respondents to purchasers in return for permitting or agreeing to allow the premises on which respondents' products are installed to be used for model homes or demonstration purposes.

10. Representing, directly or by implication, that any of respondents' products are guaranteed, unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed; or making any direct or implied representation that any of respondents' products are guaranteed unless in each instance a written guarantee is given to the purchaser containing provisions fully equivalent to those contained in such representations.

11. Representing, directly or by implication, that any product is guaranteed for life without clearly and conspicuously disclosing the life to which such reference is made; or misrepresenting, in any manner, the duration, nature or extent of any guarantee.

12. Representing, directly or by implication, that respondents' products will never require repainting; or misrepresenting, in any manner, the durability or efficacy of respondents' products.

13. Failing to deliver a copy of this order to all present and future salesmen or other persons engaged in the sale of respon-

dents' products and to secure from each salesman or person a signed statement acknowledging receipt of said order.

14. Assigning, selling or otherwise transferring respondents' notes, contracts or other documents evidencing a purchaser's indebtedness, unless any rights or defenses which the purchaser has and may assert against respondent are preserved and may be asserted against any assignee or subsequent holder of such note, contract or other documents evidencing the indebtedness.

15. Failing to include the following statement clearly and conspicuously on the face of any note, contract or other instrument of indebtedness executed by or on behalf of respondents' customers:

NOTICE

Any holder takes this instrument subject to the terms and conditions of the contract which gave rise to the debt evidenced hereby, any contractural provision or other agreement to the contrary notwithstanding.

16. Failing to maintain adequate records:

(a) For a period of five (5) years which disclose the factual basis for any representations or statements as to special or reduced prices, as to usual and customary retail prices, as to savings afforded to purchasers, and as to similar representations of the type described in paragraph 5 of this order.

(b) For a period of five (5) years, with regard to each and every contract hereafter entered into between respondents and their customers, which disclose, in itemized form, what each customer was charged, exclusive of interest or finance charges, for materials and for labor, and for those contracts involving siding, or the installation of siding, or both, additional information as to the total amount of siding materials and other materials installed or delivered to the customer, the type and grade of said siding and other materials, a description of the installation performed, the total amount of money paid to salesmen, agents or representatives for the solicitation of the said contracts, and what each customer was charged exclusive of interest or finance charges per square foot for the performance of the said contract.

(c) For a period of five (5) years invoices, notices for payment and all similar documents which respondents receive in the conduct of their business from suppliers, subcontractors and other persons, and for a period of five (5) years copies of all contracts entered into between respondents and their customers.

II

It is further ordered, That respondents American Aluminum Corporation, a corporation, and its officers, and Norman J. Foucha and Bobby G. Smith, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device in connection with any advertisement or consumer credit sale of home improvement products or services, or any other products or services, as "advertisement" and "credit sale" are defined in Regulation Z (12 C.E.R. 226) of the Truth in Lending Act (Pub.L. 90-321, 15 U.S.C. 1601, *et seq.*), forthwith cease and desist from:

1. Representing, directly or by implication, in any advertisement as "advertisement" is defined in Regulation Z, the amount of the downpayment required or that no downpayment is required, the amount of any installment payment, the dollar amount of any finance charge, the number of installments or the period of repayment, or that there is no charge for credit, unless all of the following items are stated in terminology prescribed under Section 226.8 of Regulation Z:

(i) the cash price;

(ii) the amount of the downpayment required or that no downpayment is required, as applicable;

(iii) the number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;

(iv) the amount of the finance charge expressed as an annual percentage rate; and

(v) the deferred payment price.

2. Representing, directly or by implication, on retail installment contracts, promissory notes, or on any written document or orally, that customers will or may be liable for damages, penalties or any other charges for exercising their right to rescind that is provided by Section 226.9 of Regulation Z.

3. Supplying any additional information, contract clause or other statement about the customer's liability or obligations in the event that the customer exercises his right to rescind except that information furnished in accordance with Section 226.9 of Regulation Z.

4. Supplying any additional information, in writing or orally, that is stated, utilized or placed so as to mislead or confuse the customer or that contradicts, obscures or detracts attention from the information that is required to be disclosed by Regulation Z, as prohibited by Section 226.6 (c) of Regulation Z.

5. Failing, in any consumer credit transaction or advertisement,

to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.8, 226.9 and 226.10 of Regulation Z.

III

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondents shall forthwith deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of respondents' products or services, and shall secure from each such salesman or other person a signed statement acknowledging receipt of said order.

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

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

Opinion of the Commission

By Thompson, *Commissioner:*

This matter is before the Commission on appeal from an initial decision of an administrative law judge finding that American Aluminum and two of its officers have failed to make certain credit disclosures required by the Truth in Lending Act, 15 U.S.C. §§ 1601, *et seq.*, and have engaged in certain deceptive acts and practices in the advertising and sale of various home-improvement products, particularly aluminum siding, all in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45(a). The order issued by the law judge would require respondents to make the credit disclosures required by the former statute in their future contracts and advertising and to cease and desist from the other deceptive acts and practices in their future business dealings.

The law judge found, and respondents do not deny: (1) That respondent American Aluminum advertises its aluminum-siding business by

sending out "mailers" to local homeowners offering to install such aluminum siding for $189.50 to $219.50 ("low priced siding"), a price that is described as a "saving" of $431; (2) that these promotional mailers also promise that, if the attached response card is returned within seven days, a set of storm windows will be thrown in as a "free gift" or bonus; (3) that these mailers also imply that the aluminum siding in question will last indefinitely; (4) that homeowners who return these mailers are visited by salesmen who, after execution of the contract for the purchase of the advertised low-priced siding, make every effort to "switch" the purchaser to a higher-priced product (respondents' "Imperial" aluminum siding); (5) that this "switching" of the customer to the higher-priced product is accomplished by showing him an unpainted and unattractive sample of the advertised low-priced siding, disparaging its durability, and explaining that it would require periodic painting and other costly maintenance; (6) that respondents' salesmen also offer substantial reductions from a purported "regular" price of the higher-priced "Imperial" siding if the customer will permit the use of his home for advertising purposes and promise a written guarantee that the siding will last indefinitely; (7) that in fact all of these representations are false, *i.e.*, no such guarantees are provided, the product does not last indefinitely, customers' homes are never used for advertising or demonstration purposes, and there are no "regular" prices from which a discount *could* be given (the salesmen charge whatever the individual customers will pay, up to certain maxima that are well below the purported "regular" price); (8) that respondents have rarely, if ever, actually installed the advertised low-priced siding, even when it has been demanded by particular customers; and (9) that American Aluminum has failed to make a number of credit disclosures required by the Truth in Lending Act and has used contracts that tend to mislead the customer as to his right to rescind under that statute.

Respondents contend on appeal, however: (a) That the record does not support the law judge's finding that the two *individual* respondents, Smith and Foucha, are legally responsible for the bait-and-switch practices of the firm's salesmen; (b) that their competitors are engaged in similar practices and hence that the law judge and the Commission committed prejudicial error in denying respondents' pretrial motion for the issuance of subpoenas *duces tecum* directed to a number of such competing organizations; (c) that the record does not support the law judge's finding of injury to the public; and (d) that the order issued by the law judge is overly broad insofar as it (i) directs its prohibitions to "all" products respondents might sell in the future rather than to those involved in its past deceptions, (ii) prohibits certain representations

without regard to whether they might in fact be true, and (iii) abrogates the "holder-in-due-course" doctrine on respondents' future credit sales. We agree that the order goes too far in the last two particulars but otherwise affirm and adopt the law judge's decision.

It is a well-settled principle of law that the Federal Trade Commission is not precluded from stopping the law violations of a particular firm merely because some other firms might be engaged in similar practices. *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411 (1958); *United Biscuit Co.* v. *Federal Trade Commission*, 350 F. 2d 615, 624 (7th Cir. 1965), *cert. denied*, 383 U.S. 926 (1966). And since injury to competitors is not a necessary element of a case charging deception of the public, *Federal Trade Commission* v. *Algoma Lumber*, 291 U.S. 67, 81 (1934), the data respondents sought to gather by the requested subpoenas *duces tecum* would have been irrelevant to this proceeding. Nor is it a defense in such a case to show that the public has not in fact been injured[1] by the challenged deception. Section 5(b) of the Federal Trade Commission Act requires that, as a condition to filing a complaint, (1) the Commission must have "reason to believe" an unfair or deceptive act or practice has occurred and (2) it must "appear" to the Commission that a proceeding to stop that violation "would be to the interest of the public * * *" 15 U.S.C. 45(b). Once such a complaint has been issued, however, the courts will not review the mental processes of the Commission in arriving at that decision not permit the charged party to litigate the adequacy of the data on which the Commission acted.[2] The issue to be litigated, rather, is "whether the alleged violation has in fact occurred." *Exxon Corporation*, Docket 8934 (Order of the Commission, June 4, 1974) [83 F.T.C. 1759].

The two corporate officers, Smith and Foucha, concede their responsibility for the firm's violations of the Truth in Lending Act and the deceptive claims in their printed advertisements, their denials of liability being limited to the "bait-and-switch" practices of their salesmen. The record is clear, however, that they knew about and were involved in those practices. First, they admit their responsibility for sending out the "bait," the mailers purporting to offer the product at a price ($189.50 to $219.50, for an alleged "saving" of $431) they will not in fact accept. In

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[1] American Aluminum's officials testified that its prices were 30 percent to 50 percent lower than those of a particular competitor. Tr. 516-522, 661-664, 725-727. Since complaint counsel had no legal obligation to attempt a rebuttal of this irrelevant testimony, it naturally stands "uncontroverted" in the record.

[2] This is not to imply, of course, that the Commission *itself* does not have at least a duty to consider, in deciding whether a particular proceeding is likely to be "to the interest of the public," the issue of consumer injury. Sensible resource allocation requires that, other things being equal, the Commission focus its limited resources on those matters in which the probable economic benefits to the consuming public are likely to be the largest. These are internal policy questions, however, not issues on which a law violator himself is entitled to be heard.

other words, the "offers" these two men sent out to the local homeowners in such large quantities[3] were not, as the law judge correctly found, *bona fide* offers.

Secondly, both of these men were clearly aware of the "switching" operations practiced by their salesmen. Foucha, president and sole stockholder of the firm until Jan. 1971, described the company's sales plan as "step-up selling," *i.e.*, persuading the customer to shift to a higher-priced product after he has already been sold a lower-priced one.[4] Smith, the man who supervised the firm's salesmen prior to his purchase of the company from Foucha in 1971 and its president and sole stockholder since that time, devised the salesman-compensation plan used to encourage customer "switching." (The salesman gets "a couple of dollars" if he sells the low-priced siding, versus as much as $150 if he sells the higher-priced product.[5]) Third, both of these men knew that the firm could not have been operated profitably if the product had actually been sold at the advertised low prices.[6] Fourth, a former salesman testified without contradiction that both men had told him he had to sell the higher-priced product in order to get a commission.[7] Fifth, the number of protests lodged with the company by customers demanding performance at the advertised low price or their money back is simply inconsistent with any possibility that these men could have been unaware of what was going on.[8]

These same considerations persuade us that any order issued here, if it is to be effective, must extend to "all" products these respondents might sell in the future. This is not a case in which a relatively remote corporate official is being charged with constructive responsibility for an unlawful act committed by a couple of salesmen in violation of an established and enforced company policy. These men *were* the corporation—its "alter ego"—and their acts *were* its policies. Deception is a way of life with these respondents, a major part of their stock-in-trade.

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[3] Approximately 50,000 of these mailers were sent out each *week*. Tr. 714.

[4] Tr. 610-611.

[5] The salesman receives a commission of 50 percent on that part of the sales price that *exceeds* $65 per "square" (a surface measuring 10 feet by 10 feet or a total of 100 square feet). Since the firm's average sales price is approximately $90 per square, the average sales commission is some $12.50 per square or roughly $125 on a somewhat below average 10-square (1,000 square feet) installation or job. See tr. 412, 621, 678, 739.

[6] Initial decision, pp. 8-9. "On a $199.50 job, the siding would cost [respondents] a minimum of $100, the installation cost would be $60.00 and overhead expense would be $69.23. This would total $229.23." Id., p. 9. Respondents would thus lose some $30 on each installation at the advertised $199.50 price, even if they (a) paid *no* commission to their salesmen and (b) omitted (as they did anyway) the promised free storm windows. Id. (The prices quoted are for a quantity sufficient to cover 10 squares, *i.e.*, 1,000 square feet. Id., p. 8; tr. 620.) In fact, respondents charge an average price of $900 for a job of this size. See note 5, *supra*.

[7] Tr. 410.

[8] Initial decision, pp. 10-12. One such customer testified, for example, to having made at least 15 telephone calls to the company in an effort to get the lower-priced product installed or his money back. Tr. 230-236. Despite his own and the efforts of the Chattanooga and Birmingham Better Business Bureaus on his behalf, he got neither. Id.

Having sympathetically misrepresented their products and their terms of trade for so many years (the firm was organized in 1965), it would be unrealistic, we think, to expect them to voluntarily adopt a program of honest business dealing when and if they find it in their interest to begin selling some new line of products. As modified by us, the law judge's proposed order will bar no legitimate business activity. It will serve, rather, to reinforce those honest impulses that are said to survive to at least some degree in the human breast after even the most prolonged association with a fast branding iron. These are precisely the kinds of respondents the courts had in mind when they affirmed the principle that those caught violating the law must expect some "fencing in." *Federal Trade Commission* v. *National Lead Company*, 352 U.S. 419, 431 (1957).

The record is insufficient, however, to support the provision in the law judge's order that would bar respondents from future recourse to the holder-in-due-course doctrine. This is an appropriate remedy where there is "some evidence of actual or imminent injury from the operation of the doctrine." *Southern States Distributing Company*, Docket 8882 (Dec. 26, 1973), at 13 [83 F.T.C. 1126]. The respondents in the case before us do negotiate their customer contracts but only one witness testified (and not too clearly) that such negotiation had been used as a bar to his claim against respondents.[9] The Commission will require a more definite showing than this before denying any individual respondent, on a case by case basis, the right to negotiate his commercial paper.

We also agree that even these respondents should not be prohibited from making a claim they can prove is true. Again such a remedy is appropriate in the situation where the nature of the product dictates that a certain representation, if made, will necessarily be a false one. *Lane* v. *Federal Trade Commission*, 130 F. 2d 48 (9th Cir. 1942). Such is not the case here. If respondents should actually adopt the policy of giving away additional "bonus" items, for example, to people who buy their aluminum siding, we see nothing inherently unfair or deceptive about their saying so in their advertisements.

The decision and order of the administrative law judge will be modified in accordance with this opinion and, as so modified, adopted as the decision and order of the Commission.

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[9] Tr. 255.

FINAL ORDER

This matter having been considered on respondents' appeal from an initial decision of the administrative law judge of Oct. 9, 1973, and the Commission having determined that said appeal should be granted in part and denied in part in accordance with the accompanying opinion of the Commission:

It is ordered, That respondents American Aluminum Corporation, a corporation, and its officers, and Norman J. Foucha and Bobby G. Smith, individually and as officers of said corporation, and respondents' agents representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale, distribution or installation of aluminum siding, storm windows, storm doors or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, in any manner, any advertising, sales plan, scheme or device wherein false, misleading or deceptive statements or representations are made in order to obtain leads or prospects for the sale of other merchandise or services.

2. Making representations purporting to offer merchandise for sale when the purpose of the representation is not to sell the offered merchandise but to obtain leads or prospects for the sale of other merchandise at higher prices.

3. Discouraging the purchase of or disparaging any merchandise or services which are advertised or offered for sale.

4. Representing, directly or by implication, that any merchandise or services are offered for sale when such offer is not a bona fide offer to sell such merchandise or services.

5. Representing, directly or by implication, that any price for respondents' products and/or services is a special or reduced price, unless such price constitutes a significant reduction from an established selling price at which such products and/or services have been sold in substantial quantities by respondents in the recent regular course of their business; or misrepresenting, in any manner, the savings available to purchasers.

6. Representing, directly or by implication, that any offer to sell products is limited as to time or is limited in any other manner, unless such represented limitations are actually in force and are in good faith adhered to.

7. Falsely representing, directly or by implication, that persons will receive a gift of a specified article of merchandise, or anything of value.

8. Falsely representing, directly or by implication, that the home of any of respondents' customers or prospective customers will be used as a model home, or otherwise, for advertising, demonstration or sales purposes.

9. Falsely representing, directly or by implication, that any allowance, discount or commission is granted by respondents to purchasers in return for permitting or agreeing to allow the premises on which respondents' products are installed to be used for model homes or demonstration purposes.

10. Representing, directly or by implication, that any of respondents' products are guaranteed, unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed; or making any direct or implied representation that any of respondents' products are guaranteed unless in each instance a written guarantee is given to the purchaser containing provisions fully equivalent to those contained in such representations.

11. Representing, directly or by implication, that any product is guaranteed for life without clearly and conspicuously disclosing the life to which such reference is made; or misrepresenting, in any manner, the duration, nature or extent of any guarantee.

12. Representing, directly or by implication, that respondents' products will never require repainting; or misrepresenting, in any manner, the durability or efficacy of respondents' products.

13. Failing to deliver a copy of this order to all present and future salesmen or other persons engaged in the sale of respondents' products and to secure from each salesman or person a signed statement acknowledging receipt of said order.

14. Failing to maintain adequate records:

(a) For a period of five (5) years which disclose the factual basis for any representations or statements as to special or reduced prices, as to usual and customary retail prices, as to savings afforded to purchasers, and as to similar representations of the type described in Paragraph 5 of this order.

(b) For a period of five (5) years, with regard to each and every contract hereafter entered into between respondents and their customers, which disclose, in itemized form, what each customer was charged, exclusive of interest or finance charges, for materials and for labor, and for those contracts involving siding, or the installation of siding, or both, additional information as to the total amount of siding materials and

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other materials installed or delivered to the customer, the type and grade of said siding and other materials, a description of the installation performed, the total amount of money paid to salesmen, agents or representatives for the solicitation of the said contracts, and what each customer was charged exclusive of interest or finance charges per square foot for the performance of the said contract.

(c) For a period of five (5) years invoices, notices for payment and all similar documents which respondents receive in the conduct of their business from suppliers, subcontractors and other persons, and for a period of five (5) years copies of all contracts entered into between respondents and their customers.

II

It is further ordered, That respondents American Aluminum Corporation, a corporation, and its officers, and Norman J. Foucha and Bobby G. Smith, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device in connection with any advertisement or consumer credit sale of home improvement products or services, or any other products or services, as "advertisement" and "credit sale" are defined in Regulation Z (12 C.F.R. §226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. 1601, *et seq.*), forthwith cease and desist from:

1. Representing, directly or by implication, in any advertisement as "advertisement" is defined in Regulation Z, the amount of the downpayment required or that no downpayment is required, the amount of any installment payment, the dollar amount of any finance charge, the number of installments or the period of repayment, or that there is no charge for credit, unless all of the following items are stated in terminology prescribed under Section 226.8 of Regulation Z:

(i) the cash price;

(ii) the amount of the downpayment required or that no downpayment is required, as applicable;

(iii) the number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;

(iv) the amount of the finance charge expressed as an annual percentage rate; and

(v) the deferred payment price.

2. Representing directly or by implication, on retail installment contracts, promissory notes, or on any written document or orally, that customers will or may be liable for damages, penalties or any other charges for exercising their right to rescind that is provided by Section 226.9 of Regulation Z.

3. Supplying any additional information, contract clause or other statement about the customer's liability or obligations in the event that the customer exercises his right to rescind except that information furnished in accordance with Section 226.9 of Regulation Z.

4. Supplying any additional information, in writing or orally, that is stated, utilized or placed so as to mislead or confuse the customer or that contradicts, obscures or detracts attention from the information that is required to be disclosed by Regulation Z, as prohibited by Section 226.6(c) of Regulation Z.

5. Failing, in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.8, 226.9 and 226.10 of Regulation Z.

III

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

It is further ordered, That respondents shall forthwith deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of respondents' products or services, and shall secure from each such salesman or other person a signed statement acknowledging receipt of said order.

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

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

It is further ordered, That respondents, American Aluminum Corporation, Norman J. Foucha and Bobby G. Smith shall, within sixty (60)

days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

Commissioner Nye not participating.

IN THE MATTER OF

COLT INDUSTRIES OPERATING CORP.

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

Docket C-2520. Complaint, July 12, 1974—Decision, July 12, 1974

Consent order requiring a Hartford, Conn., manufacturer, seller and distributor of sporting firearms and firearm accessories, among other things to cease fixing its dealers' retail prices of firearm products; requiring dealers, through any means, to agree to resell at specified retail prices; using cancellation threats to induce dealers to observe its retail prices; and requesting dealers or salesmen to report persons who do not adhere to its suggested retail prices.

Appearances

For the Commission: *James D. Tangiers.*

For the respondent: *John Linsenmeyer, Cravath, Swaine & Moore,* New York, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Colt Industries Operating Corp., a corporation, and more particularly described and referred to hereinafter as respondent, has violated and is now violating the provisions of Section 5 of said Act (15 U.S.C. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in respect thereto as follows:

PARAGRAPH 1. Respondent Colt Industries Operating Corp., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware. Its Firearms Division is a successor in interest to Colt's Inc., an Arizona corporation, with its office and principal place of business located at 150 Huyshope Ave., in Hartford, Conn.