

## Title 16—COMMERCIAL PRACTICES

### Chapter I—Federal Trade Commission SUBCHAPTER D—TRADE REGULATION RULES PART 424—RETAIL FOOD STORE ADVERTISING AND MARKETING PRACTICES

The Federal Trade Commission, pursuant to the Federal Trade Commission Act, as amended, 15 U.S.C. 41, et seq., and the provisions of Subpart B, Part 1 of the Commission's Procedures and Rules of Practice, 16 CFR 1.11, et seq., has conducted a proceeding for the promulgation of a trade regulation rule regarding retail foodstore advertising and marketing practices. Notice of this proceeding, including a proposed rule, was published in the FEDERAL REGISTER on November 14, 1969 (34 F.R. 18252). Interested parties were thereafter afforded opportunity to participate in the proceeding through the submission of written data, views, and arguments and to appear and orally express their views as to the proposed rule and to suggest amendments, revisions and additions thereto.

The Commission has now considered all matters of fact, law, policy, and discretion, including the data, views and arguments presented on the record by interested parties in response to the notice, as prescribed by law, and has determined that the adoption of the trade regulation rule and statement of its Basis and Purpose set forth herein is in the public interest.

#### STATEMENT OF BASIS AND PURPOSE

##### I. HISTORY OF THE PROCEEDING

In October 1967 the Commission directed the staff to undertake an investigation of the pricing practices of food chain retailers. Among these were unavailability and overpricing of items featured in food chain advertisements, which subsequently became the subjects of this proceeding. In the course of this investigation which covered the period 1967-69, the staff conducted approximately 500 pricing surveys in stores operated by the leading food chains of Washington, D.C., San Francisco, and Baltimore. During these pricing checks the staff recorded price and availability information on approximately 45,000 individual grocery items. In addition to the pricing surveys, the staff held extensive nonpublic hearings to determine the official pricing policies of the food chains, and how those policies were implemented.

In May 1969 the findings of the 1967-68 staff investigations were made public in the form of the "Economic Report on Food Chain Selling Practices in the District of Columbia and San Francisco" (R 9).<sup>1</sup> The results of the 1969 investigations in the Washington, D.C. and Balti-

<sup>1</sup> References to written comments and materials appearing in the public record are cited as (R page number), and oral testimony delivered at the public hearing is cited as (Tr. page number).

more areas have also been made a part of the public record of this proceeding. (R 41-63).

The Commission then indicated its affirmative interest in an industrywide rulemaking proceeding by publishing in the FEDERAL REGISTER on November 14, 1969 a notice (34 F.R. 18252) which included a proposed rule, and scheduled a public hearing on January 20 and 21, 1970. Subsequently, petitions were received from the National Association of Food Chains (NAFC) and the National Association of Retail Grocers of the United States (NARGUS) for an extension of time for filing written comments and for an additional public hearing. The petitions were granted by the Commission, and an additional hearing was announced for March 24 and 25, (35 F.R. 326).

##### II. THE PROPOSED TRADE REGULATION RULE AND ITS EFFECTS

The proposed rule which has been the subject of this proceeding is as follows:

In connection with the sale or offering for sale by food retailers of food and grocery products or other merchandise, subject to the jurisdictional requirements of sections 5 and 12 of the Federal Trade Commission Act, it is an unfair method of competition and/or an unfair or deceptive act or practice to:

(1) Offer any such product for sale at a stated price, by means of any advertisement disseminated in an area served by any of its stores which do not have such products in stock, and readily available to customers in self-service areas of such stores. (If not readily available on a self-service basis, clear and adequate notice shall be provided at the point where customers would normally expect the products to be offered for sale, that the item or items are in stock and may be obtained upon request.)

*Provided, however,* That it shall constitute a defense to a charge under Part (1) of the Rule, supra, if the retailer maintains records to show that the advertised products were ordered and delivered to the stores in quantities sufficient to meet reasonably anticipated demands.

(2) Fail to make the advertised items conspicuously and readily available for sale at or below the advertised prices:

Unless, in each of the above cases, there is clear and conspicuous disclosure in all such advertisements as to all exceptions with respect to specific stores, products or prices otherwise included within the advertisement.

**NOTE: I. General disclaimers in advertising relating to product availability will not be considered to be in compliance with the disclosure provisions of the Rule. Examples of such general disclaimers would be:**

(a) "Not all items available at all stores."  
(b) A statement that a particular item or group of items is "Available at most stores".

(c) "Available at stores featuring delicatessen departments." In this case the specific stores where the advertised item is either available or unavailable shall be disclosed.

**NOTE: II. Some food retailers have utilized a "raincheck" policy whereby customers may subsequently purchase at the advertised prices items which were unavailable during the effective period of the advertisement. Such a system will not be considered as compliance with Part (1) of the Rule.**

Part (1) of the proposed rule would require that merchandise advertised at a stated price be in stock in all of the ad-

vertiser's stores in the area wherein the advertisement was disseminated and readily available to customers in self-service areas of such stores. Part (1) also requires that if not readily available, notice shall be provided at the point where customers would normally expect the products to be offered for sale that the item or items are in stock and may be obtained upon request. This latter provision was designed to cover such situations as temporarily unstocked shelves with the products themselves in the stock room, or meat which is not displayed because it is hanging in the refrigerator awaiting cutting, etc.

The rule also contains a built-in defense to Part (1) merchandise availability requirements, provided the food retailer maintains records to show that the advertised products were ordered and delivered to the stores in quantities sufficient to meet reasonably anticipated demands.

Part (2) of the proposed rule would require the advertised items to be conspicuously and readily available at or below the advertised prices.

The proposed rule does contain a proviso that exceptions to the requirements of Parts (1) and (2) will be permitted if there is disclosure in the advertisement as to all exceptions with respect to specific stores, products, or prices otherwise included within the advertisement.

The proposed rule is also accompanied by two notes, the first of which deals with general disclaimers as to product availability, and declares that such disclaimers will not be considered to be in compliance with the disclosure provisions of the rule. Three specific examples of disclaimers are dealt with in the note.

The second note describes the "raincheck" policy which some food marketers currently employ, and advises that this system will not be considered as compliance with availability provisions of Part (1) of the rule.

##### III. THE NEED FOR A RULE TO REMEDY UNAVAILABILITY AND MISPRICING OF ADVERTISED ITEMS

This proceeding was initiated principally on the basis of the results of Bureau of Economics' staff investigations conducted in San Francisco and Washington, D.C. in 1967-68, and in Baltimore and Washington, D.C. in 1969.

The 1967-68 investigations are described in detail in the Bureau of Economics' staff report to the Commission titled "Economic Report on Food Chain Selling Practices in the District of Columbia and San Francisco" (R 9), which was published in July 1969. The investigation covered by this report included surveys of a total of 137 stores operated by 10 leading food chains.

The report disclosed that a total of 11 percent of the advertised items in the two cities were found to be unavailable, and only eight of the 137 stores checked had every advertised item available for the consumer. In each of the two cities considerably more items were unavailable in low-income area stores as compared to higher income area stores.

Also described in the report is the extent to which deviations existed between the prices items were advertised at and the prices appearing on the items in 99 stores. The results indicated deviations of 9 percent in Washington and 8.8 percent in San Francisco. Several chains had 10 percent or more items mispriced. In a very substantial majority of the instances of deviations, the prices marked on the items were higher than the advertised prices.

A summarization of the findings of these investigations was provided by Dr. Russell C. Parker of the Commission's Bureau of Economics, in his testimony at the public hearing. Some excerpts from that testimony are set forth as follows:

In the course of the Commission's investigation the staff conducted approximately 500 pricing surveys in the food stores operated by the leading food chains of Washington, D.C., San Francisco, and Baltimore. During these pricing checks the staff recorded price and availability information on approximately 45,000 individual grocery items. Tr. 42

The Federal Trade Commission surveys focusing on pricing and availability patterns of advertised items show that a substantial share of those items are either not available or, if available, are overpriced. In the Washington area, the surveys conducted through June 1969, show that most of the largest chains had average unavailability plus overpricing rates ranging between 21 percent and 26 percent. In the surveys conducted in August the averages were lower. Tr. 45

Before discussing the change in pattern that occurred over the summer of 1969, I would like to direct attention to the wide variability found between stores of the same chain. The overall chain averages obscure this important variability. Generally, each chain had some good performing stores whose low unavailability and overpricing rates were offset by stores that had very high unavailability and overpricing rates. Roughly, a third of the stores of leading chains included in the surveys conducted prior to August 1969 had low rates (zero to 10 percent unavailable or overpriced). In contrast, the worst third of the stores had more than 30 percent of the advertised items either unavailable or overpriced. Between 5 and 10 percent of the stores had fewer than half of the items featured in advertisements available at (or below) the prices shown in the advertisements. On the other hand, some of the best performing stores in terms of having all or nearly all of the specials available, were also consistently found to be selling a substantial share of items at prices below those appearing in advertisements. Tr. 45, 46

When unavailability rates were tabulated according to the level of income served by the stores, it was found that stores located in low-income areas had unavailability-overpricing rates averaging twice as high as stores located in higher income areas. The difference was not attributed to policies designed to discriminate against poor people, however, but rather to differences in competition and size of store. The primary factor was the lack of supermarkets in the inner city low-income areas. When a supermarket faces substantial competition from supermarkets of other chains, advertised specials are usually available. Competitive stores also serve customers better in other respects. Tr. 46

The pattern of unavailability-overpricing rates of Washington area chains changed significantly over the summer of 1969. Surveys made in August showed declines in the unavailability-overpricing rates of all the Wash-

ington area chains. The improvement of Safeway was especially noteworthy. Its unavailability and overpricing rate on advertised items dropped to between a fourth and a fifth of the level found in previous Washington area surveys. In the two surveys conducted, in the winter of 1967-68 and in June 1969, in which the staff believes that most Safeway supermarkets (as well as the stores of other chains surveyed) were caught by surprise, Safeway averaged combined out-of-stock and overpricing rates on advertised items of 21 percent and 26 percent, respectively. Its average in the August 1969 survey dropped to only 5 percent. Tr. 47

In the staff's view this reduction in percent of advertised items found either not in stock or overpriced was due to Safeway's efforts in the interim to change its procedures in an effort to solve the problem. Tr. 47

It is my belief that the results of the August 1969 surveys present persuasive evidence that unavailability and overpricing of advertised items can be avoided if the food chains are interested in taking the necessary action to solve the problem. The purpose of the rule proposed before this hearing is to encourage such action. Tr. 50

Safeway Stores, Inc. submitted a statement (R 976-1020) relative to the Commission staff surveys conducted in November 1967, June and August 1969. It is Safeway's principal contention that the results of the November 1967 and June 1969 surveys substantially overstate the incidence of unavailability and mispricing conditions in Safeway stores, chiefly because of a failure to include in the tally count a substantial number of advertised items. Safeway is not so critical concerning the results of the August 1969 survey which demonstrated a great improvement in Safeway stores in the matters of unavailability and mispricing (R 985). For other industry criticism of the survey results, see (R 574-575) and (R 586-589).

In his evaluation of the Safeway contentions (R 1023-1030), Dr. Parker takes the position that the survey results do not substantially overstate the incidence of unavailability and mispricing in Safeway stores. Dr. Parker stated, in part, that:

Rather than involve the Commission in an item-by-item rebuttal of each of Safeway's allegations, it seems much more to the point to show that even when every challenged item is retabulated in the way Safeway claims it should be, the total change in the results is insignificant. The weight of the evidence remains, namely, that a significant number of Safeway stores still show up with 20, 30, and even 40 percent of advertised items either unavailable or overpriced. (R 1023-1024)

The results of the retabulation in accord with Safeway's contentions are shown on the record at (R 1025-1027).

In his statement, Dr. Parker has concluded that with respect to the Safeway allegations:

The weight of the evidence of the staff surveys, which supports the need for the trade regulation rule presently being considered by the Commission, has not been reduced. (R 1030)

*Consumer testimony.* During the course of the public hearing 18 consumer witnesses, 13 of them representing consumer organizations, testified as to the widespread nature of unavailability and

mispricing of advertised items.<sup>2</sup> Three of the organizations represented conducted surveys the results of which are consistent with the results of the Commission's investigation.<sup>3</sup> We have also received several hundred consumer complaints regarding unavailability and/or mispricing.

In addition, we have received written comments from the following local governmental agencies supportive of regulation in this area and some advising of the many complaints they receive in this area:

Hawaii Consumer Protection Office, R 24-25.  
Connecticut Department of Consumer Protection, R 39-40.  
North Carolina Consumer Protection Division, R 70-80.  
Vermont Consumer Protection Bureau, R 90-91.  
New York City Department of Consumer Affairs, R 140-141.  
Pennsylvania Bureau of Consumer Protection, R 160.  
Attorney General, New York State, R 212-213.  
Nassau County, New York Office of Consumer Affairs, R 852.

Support for regulation was forthcoming from groups within the following universities:

University of Vermont, R 70. o  
Furdue, R 92.  
New York State University, R 95.  
Penn. State, R 100.  
Cornell, R 119.  
George Washington Law School (nonpublic record).

Additional support for regulation is found in the following comments:

Senator Philip A. Hart of Michigan, R 74.  
Senator Edward M. Kennedy, R 73.  
Congressman Benjamin Rosenthal who conducted Congressional hearings on unavailability and mispricing in 1967, Tr. 10-26.  
Margaret Lana—a nationally syndicated consumer columnist who reports many complaints, R 84.  
Oregon Consumer League, R 144.  
Columbia-Missouri Committee on Consumer Rights, R 152.  
Missouri Association of Consumers, R 170.  
Detroit Consumer Research Advisory Council, R 184.  
Association of California Consumers, R 351.  
Chief, Assistance Standards Branch, U.S. Department of Health, Education, and Welfare, R 75.

Mrs. Virginia Knauer, Special Assistant to the President for Consumer Affairs testified as to the need for regulation. Tr. 93-104. However, although in agreement with the spirit of the proposed rule, she suggested issuing complaints against offending parties.

The U.S. Department of Commerce, in a submission received after the public record had closed, while agreeing that regulation may be necessary, nonetheless felt that the proposed rule imposed undue burdens upon retailers. Their principal recommendations are:

<sup>2</sup> Tr. 28-30, 59-60, 66, 74, 76-78, 109, 120, 143-146, 148, 151, 155, 158-159, 217, 232-233, 235, 261, 333, 344.

<sup>3</sup> Tr. 143-146, Tr. 148, Tr. 217-224. However, we are unaware of the quality of the survey techniques, methodology and implementation with respect to these surveys.

1. Revise the defense to Part (1) to require only a showing that adequate products were ordered in sufficient quantities in adequate time for delivery, rather than "ordered and delivered."

2. Revise Part (2) to require proper pricing "with reasonable degree of accuracy," thus eliminating the per se requirement of the proposed rule.

*Other reports and studies.* Included in the public record are the results of four other studies relating to unavailability and mispricing of advertised grocery items.

A 1968 study conducted by the U.S. Department of Agriculture titled "Comparison of Prices Paid for Selected Foods in Chain Stores in High and Low Income Areas of Six Cities" (R11) contains a very brief reference on page 3, "Availability and Prices of Advertised Items." There it is stated, "In only six instances, out of 382 purchases of advertised items that could have been made in stores of these eight chains, were any of these items out of stock. These were equally divided among low- and high-income stores \* \* \*. Advertised prices were paid for nine out of 10 purchases of such items."

A survey conducted in Manhattan, Kans. by the Department of Family Economics of Kansas State University in the Fall of 1969 (R 191-193) found that " \* \* \* 86 percent to 100 percent of items were available in the eight stores of Manhattan. The average was 96 percent \* \* \* 24 percent to 100 percent of items were price marked; the average was 70 percent \* \* \* most stores were in the 70-80 percent range."

A "Study of Retail Food Store Advertising and Marketing Practices in the St. Louis Area" was conducted in 1969 by a consumer group, Housewives Elect Lower Prices (R 233-242). The report concluded that " \* \* \* 11 to 16.6 percent of the items which were advertised were not available at the time of the surveys. In addition, an 8 to 9 percent price deviation occurred between the advertised price and the marked price, and 7 to 8 percent of the items advertised were not marked."

A 1970 study (R 853-881) was conducted in Nassau County, N.Y. at the direction of County Executive Eugene H. Nickerson. The following are excerpts from the published results (R 882-886):

Of 42 supermarkets inspected on a typical Monday (February 2), only eight had all their leading "specials" visually available for sale—and only one of the stores had all its leading specials marked with the advertised sale price, according to the Nickerson report.

Inspectors from the County's Office of Consumer Affairs checked from 40 to 50 supermarkets on 4 different days of the week in response to complaints from the public concerning unavailability and incorrect pricing of items featured in heavy newspaper advertising.

On a typical Friday (January 16), only 28 of 52 stores inspected had all their leading specials visually available for sale, and only 20 had all leading specials marked with the advertised sale price.

"The findings show genuine cause for consumer dissatisfaction." Nickerson stated, " \* \* \* and I am directing the Office of

Consumer Affairs to provide a report to the Federal Trade Commission, to call meetings with supermarket officials, and to obtain immediate action by supermarkets to live up to their advertising".

A special survey of 11 supermarkets serving low-income areas showed conditions generally consistent with conditions found throughout the county. On Monday and Tuesday, February 2 and 3, not a single store checked in a low-income area had all its leading specials visually available and properly marked.

Nickerson noted that as compared to a similar survey conducted last year by the Federal Trade Commission in the Washington area, the situation in Nassau County is better with respect to availability but much worse with respect to overpricing.

He said that the FTC is considering the promulgation of a Trade Regulation Rule covering foodstore advertising and marketing practices and that he would urge such a rule be issued.

#### IV. THE POSITION OF THE INDUSTRY

The public record contains presentations submitted by five trade associations and seven food chains, as follows:

National Association of Retail Grocers of the United States (represents approximately 40,000 local retailers ranging from small outlets to supermarkets).

National Association of Food Chains (represents 220 retailers operating from 2 to 4,000 stores, including virtually all the large chain operations).

Grocery Manufacturers' of America.

National American Wholesale Grocers' Association.

National Retail Merchants Association.

Safeway Stores, Inc.

Atlantic & Pacific Tea Co. (A&P).

Grand Union Co.

Harvest Markets, Inc.

Co-Op.

Ralphs Grocery Co.

Packmart Supermarkets.

The chain retailers, for the most part, permitted two trade associations, National Association of Retail Grocers of the United States (NARGUS) and the National Association of Food Chains (NAFC), to represent their interests in this proceeding.

The principal arguments which have been advanced against the proposed rule are as follows:

1. (a) Part (1) of the proposed rule is impossible to comply with since it represents an absolute requirement that every advertised item be in every case available in each of the approximately 150,000 foodstores which would be affected by the rule. Tr. 173, 270-273, 282, 296; R 573, 579, 956-57.

(b) The defense provided in Part (1) of the proposed rule which would hold retailers blameless provided they maintained records to show that advertised items were "ordered and delivered", is in fact no defense at all since there are so many factors beyond the retailers' control which could result in nondelivery. Tr. 183-189; R 28-30.

Industry members have pointed out that Part (1) of the proposed rule sets an inflexible standard requiring 100 percent availability of advertised items in 100 percent of the advertiser's stores. The failure of one store, for whatever reason to have a single advertised item available could expose the retailer to a

technical charge of having violated the rule.

In citing the many factors beyond the retailers' control which may result in nondelivery and consequent unavailability of ordered products, industry members pointed to:

Acts of God, such as severe storms or fire, which destroy shipments en route or cause transportation tie-ups and delays.

Severe climatic changes which damage or destroy crops. Mechanical failures causing delayed truck or railroad deliveries.

Government regulations may contribute to delay of product arrival or reduction of the quantity ordered. For example, merchandise is condemned by the U.S. Department of Agriculture at shipment point; or a product is rejected at the warehouse because it does not pass State or Federal inspection; or carriers' trucks are sometimes in violation of State and ICC regulations.

2. The same argument of impossibility of performance has been made with respect to Part (2) of the proposed rule. Again, it is argued that even isolated inadvertent instances of mis-marked prices on products, through employee error would leave the stores open to charges of thousands of violations. Tr. 189-192, Tr. 287-288, Tr. 274; R 573, R 595, R 581, R 957.

There is an irreducible amount of human error that makes pricing perfection unattainable. There are the simple mistakes by the clerk marking the price on an item, mistakes by the advertising department in writing the price to be put in the advertisement, or confusion resulting from the fact that the clerks have neglected to remove all of the regular stock marked at the regular price. R 573.

The Commission and the public are entitled to no less than the best efforts of every food chain to reduce the number of mistakes to the very minimum, but the Government cannot legislate errorless performance merely by adopting a rule. R 573.

We do not condone mistakes, but it would be unrealistic to pretend that they can be wholly eliminated. R 570.

The record also includes the comment that:

At any one time, Safeway has on display more than 200 million packages that have been individually price marked. A 1 percent pricing error rate would mean 1 million "high-side" pricing errors. If all "high-side" pricing errors are prohibited (the proposed rule would absolutely prohibit all such errors on advertised prices), they could be penalized at the rate of \$5,000 per error per day, or \$5 billion for each day of "violation". R 570

3. Part (1) of the proposed rule also contains a parenthetic requirement that "(If not readily available on a self-service basis, clear and adequate notice shall be provided at the point where customers would normally expect the products to be offered for sale, that the item or items are in stock and may be obtained upon request.)"

The industry has argued that this provision seems to assume that all grocery products are sold, or should be sold, on a self-service basis but that this is a completely erroneous impression. They

then point out that many products may be and are sold either self-service or upon customer request, and that many other products are sold almost exclusively upon customer request, i.e., fish, meat, and delicatessen departments. R 655-656

4. Note I(c) of the proposed rule reads as follows:

NOTE: I. General disclaimers in advertising relating to product availability will not be considered to be in compliance with the disclosure provisions of the rule. Examples of such general disclaimers would be:

\* \* \* \* \*

(c) "Available at stores featuring delicatessen departments." In this case the specific stores where the advertised item is either available or unavailable shall be disclosed.

The intent of Note I(c) was to require advertising to disclose precisely by address or otherwise by location the identity of the specific stores where advertised items were either available or unavailable. Industry members have pointed out that this provision would require some chains in metropolitan areas to list the addresses of half their stores, which would mean a list of 100 to 125 store locations in a single ad. Tr. 277. It is argued by industry members that such a requirement would force the stores to enlarge the ads at a high cost, or to reduce the number of items (delicatessen, fish, pastry, etc.) advertised. It would also eliminate much of the current radio and television advertising. Tr. 192, 193, 278.

5. The National Retail Merchants Association (NRMA) in their statement (R 969-975) has pointed out that the proposed rule was clearly directed at food chains based upon the staff investigations of 10 leading food chains in Washington, San Francisco, and Baltimore. Yet, NRMA argues the proposed rule could be interpreted to cover the advertising of all products by all retailers selling food products in any quantity.

6. Complementing the foregoing industry arguments, NARGUS and NAFC have recommended that the Commission adopt the following revised rule: R 667-668, 828-829.

In connection with the sale or offering for sale by retailers of food and grocery products, subject to the jurisdictional requirements of sections 5 and 12 of the Federal Trade Commission Act, it is an unfair method of competition and/or an unfair or deceptive act or practice to:

(1) Offer any such products for sale at a stated price, by means of any advertisement disseminated in any area served by any of its stores which are covered by the advertisement and do not have such products in stock and readily available to customers during the effective period of the advertisement. (If not readily available, clear and adequate notice shall be provided that the items are in stock and may be obtained upon request.):

Provided, however, That it shall constitute a defense to a charge under Part (1) of the rule supra, if the retailer shows that he has taken reasonable good faith actions to have the advertised products readily available in the stores covered by the advertisement in quantities sufficient to meet reasonably anticipated demand during the effective period of the advertisement.

NOTE: In determining whether reasonable good faith efforts have been exercised by the retailer, the Commission will consider, in addition to other appropriate factors, such circumstances as orders of sufficient quantities to meet reasonably anticipated demand, failure of expected delivery, unexpectedly high demand depleting store inventory, media errors, failure of suppliers to fill orders, and use of rain checks. While no record-keeping requirement is imposed under this rule, retailers would be in a better position to establish their reasonable good faith effort by maintaining appropriate records;

(2) Fail to take reasonable action in good faith to make advertised food and grocery products conspicuously and readily available at or below the advertised price. When a deficiency or error appears, the retailer shall promptly initiate procedures for the purpose of preventing its repetition or continuation.

Unless, in each of the above cases, there is clear and conspicuous disclosure in all such advertisements as to all exceptions with respect to stores, products or prices otherwise included within the advertisement.

NOTE: I. General disclaimers in advertising relating to product availability will not be considered to be in compliance with the disclosure provisions of the rule. Examples of such disclaimers would be:

(a) "Not all items available at all stores".

(b) A statement that a particular item or group of items is "available at most stores".

NOTE: II. Some food retailers have utilized a "raincheck" policy whereby customers may subsequently purchase at the advertised prices items which were unavailable during the effective period of the advertisement. The use of rain checks is relevant to determining a retailer's good faith reasonable action under Part (1), however, such a system will not be considered as complete compliance therewith if it appears that it is used as a substitute for such reasonable good faith action.

#### V. SUMMARY AND CONCLUSIONS

Food is one of the Nation's largest industries. Food consumed in 1968 had an estimated retail value of \$76.05 billion. There are approximately 282,300 retail foodstores in the United States of which 46,000 are chain stores operated by 4,241 chain foodstore companies.<sup>4</sup> The estimated chain sales in 1968 amounted to \$51.6 billion which is 67 percent of the total food sales.<sup>5</sup>

Food also is a necessity of life and represents a major outlay in the budgets of all consumers. For the Nation as a whole it represents 17 percent of the average consumer budget; and for families with disposable incomes of \$3,000 or less per year, it represents over 40 percent.<sup>6</sup> Obviously, then, there exists a broad public interest in the advertising and marketing practices of the retail

<sup>4</sup> A chain is considered to be a company operating two or more stores under common ownership.

<sup>5</sup> The data set forth is contained in the 1970 Directory of Food Chains published by Business Guides, Inc.

<sup>6</sup> "Marketing and Transportation Situation", August 1968, Economic Research Service, U.S. Department of Agriculture, and "Food Consumption of Households in the United States", Consumer and Food Economic Research Division, Agricultural Research Service, U.S. Department of Agriculture, Spring 1965.

food industry, particularly when that industry has been the subject of numerous allegations of unfair and anticompetitive practices. It was against that background that this rulemaking proceeding was initiated.

Now, on the basis of the entire public record which has been developed in the course of the proceeding, the Commission has concluded that the issuance of a trade regulation rule with respect to the unavailability and mispricing of advertised food and grocery products is required by that record, and is in the public interest. However, the arguments set forth by the industry in opposition to certain portions of the proposed rule were found by the Commission to be persuasive and, appropriate revisions have been made in the final rule.

For example, the contentions made by industry members with respect to Parts (1) and (2) of the proposed rule can hardly be ignored. Those parts of the proposed rule would inevitably result in many technical per se violations despite any honest best efforts of industry members to insure the availability and proper pricing of advertised items.

Consequently, the final rule has been revised to include the following language:

NOTE: I. In determining whether the rule will be applied the Commission will consider (a) all circumstances surrounding non-delivery of advertised products which were actually ordered in quantities sufficient to meet reasonably anticipated demands but were not delivered due to circumstances beyond the advertiser's control, and (b) all circumstances surrounding failure to make advertised items conspicuously and readily available for sale at or below the advertised prices, but were not made available at those prices due to circumstances beyond the advertiser's control. In such cases, the availability of "rainchecks" will also be considered by the Commission as relevant. However, the existence of a "raincheck" policy, in and of itself, will not be considered as compliance with the rule.

In addition, the Commission has revised the parenthetical requirement of Part (1) of the proposed rule which stated "(If not readily available on a self-service basis, clear and adequate notice shall be provided at the point where customers would normally expect the products to be offered for sale, that the item or items are in stock and may be obtained upon request)". The Commission has concluded that this provision was based upon the faulty assumption that all grocery products are sold on a self-service basis. Such, of course, is not the case. Therefore, the requirement has been revised to read "(If not readily available, clear, and adequate notice shall be provided that the items are in stock and may be obtained upon request.)"

Note I(c) of the proposed rule read as follows:

NOTE: I. General disclaimers in advertising relating to product availability will not be considered to be in compliance with the disclosure provisions of the rule. Examples of such general disclaimers would be:

(c) "Available at stores featuring delicatessen department." In this case the specific stores where the advertised item is either available or unavailable shall be disclosed.

The Commission has excised this provision as impractical, unnecessary, and unduly burdensome to advertisers who may have a large number of stores in the area covered by an advertisement, and where a substantial percentage of such stores either do or do not carry the advertised item. The Commission has concluded that the current practice of specifying in ads that an item is available only at those stores having a particular specialty department (delicatessen, fish, pastry) is not misleading or deceptive within the purview of section 5 of the Federal Trade Commission Act. NOTE III of the final rule explicitly permits such disclosures.

The language of the proposed rule directed itself to "food retailers". The final rule directs itself to "retail food stores".

The originally proposed rule would have included a substantial number of retail establishments which offer food and grocery items among the many products they offer for sale. However, the food and grocery products represent only a minimal segment of such stores' total sales volume. Examples of such retailers would include gasoline stations and drugstores where milk and bread are sold, and large department stores having gourmet food departments. Such stores do not generally advertise the "weekly food specials" which are the principal subject of this proceeding.

It is the opinion of the Commission that explicitly restricting the application of the rule to "retail food stores" is consistent with the public record which has been developed. Any attempt to broaden the rule's application to other types of retailers who incidentally and minimally sell food and grocery products would not be supported by that record.

The question of failure to disclose quantity limitations in retail foodstore advertising has been the subject of a number of consumer complaints. The Commission has determined that such failure is clearly a false and misleading practice within the purview of section 5 of the Federal Trade Commission Act. An affirmative obligation to make such a disclosure is contained in that language of the final rule which reads as follows:

Unless in each of the above cases, there is clear and conspicuous disclosure in all such advertisements as to all exceptions and/or limitation or restrictions with respect to stores, products or prices otherwise included within the advertisements.

Finally, with respect to the rule proposed by two industry trade associations (NAFC and NARGUS), which has been set forth previously herein, the Commission has concluded that it would not effectively cope with the factual situation which has been developed. The language of that proposal contains built-in defenses as to unavailability and mispricing of advertised products, upon a showing of "reasonable good faith efforts" by the affected parties.

It is the opinion of the Commission that "reasonable good faith efforts" is a

very relative, subjective and nonspecific concept not readily adaptable to rule-making.

VI. THE EFFECTIVE DATE OF THE RULE

The effective date of the rule will be sixty (60) days after the date of promulgation.

THE RULE AND ITS APPLICATION

Sec.

424.1 The Rule.

424.2 The application of § 424.1.

AUTHORITY: The provisions of this Part 424 issued under 38 Stat. 717, as amended; 15 U.S.C. 41-58.

§ 424.1 The Rule.

(a) The Commission, on the basis of the findings made by it in this proceeding, as set forth in the accompanying Statement of Basis and Purpose, hereby promulgates as a trade regulation rule its determination that:

(b) In connection with the sale or offering for sale by retail foodstores of food and grocery products or other merchandise, subject to the jurisdictional requirements of sections 5 and 12 of the Federal Trade Commission Act, it is an unfair method of competition and an unfair or deceptive act or practice to:

(1) (i) Offer any such products for sale at a stated price, by means of any advertisement disseminated in an area served by any of its stores which are covered by the advertisement which do not have such products in stock, and readily available to customers during the effective period of the advertisement. (If not readily available, clear and adequate notice shall be provided that the items are in stock and may be obtained upon request.)

(ii) Provided, however, That it shall constitute a defense to a charge under subdivision (i) of this subparagraph if the retailer maintains records sufficient to show that the advertised products were ordered in adequate time for delivery and delivered to the stores in quantities sufficient to meet reasonably anticipated demands.

(2) Fail to make the advertised items conspicuously and readily available for sale at or below the advertised prices.

Unless, in each of the above cases, there is clear and conspicuous disclosure in all such advertisements as to all exceptions and/or limitations or restrictions with respect to stores, products or prices otherwise included within the advertisements.

NOTE I: In determining whether this section will be applied the Commission will consider (a) all circumstances surrounding non-delivery of advertised products which were actually ordered in quantities sufficient to meet reasonably anticipated demands but were not delivered due to circumstances beyond the advertiser's control, and (b) all circumstances surrounding failure to make advertised items conspicuously and readily available for sale at or below the advertised prices, but were not made available at those prices due to circumstances beyond the advertiser's control. In such cases, the availability of "rainchecks" will also be considered by the Commission as relevant. However, the existence of a "raincheck" policy, in and of it-

self, will not be considered as compliance with this section.

NOTE II: General disclaimers in advertising relating to product availability will not be considered to be in compliance with the disclosure provisions of this section. Examples of such general disclaimers would be:

- (a) "Not all items available at all stores."
- (b) A statement that a particular item or group of items is "Available at most stores".

NOTE III: Specific clear and conspicuous disclaimers in advertising relating to product availability only in those stores possessing particular facilities will be considered to be in compliance with the disclosure provisions of paragraph (b) (1) (i) of this section. An example of such a disclaimer would be:

"Available only at stores featuring delicatessen departments."

§ 424.2 The application of § 424.1.

(a) The Commission has noted that the public record contains a number of suggestions that the application of a rule of this nature should be extended so as to cover all retail establishments, or to specific types of retailers such as drugstores, furniture stores, clothing stores, appliance stores. The latter suggestions were apparently generated by unhappy consumer experiences. The Commission has concluded that the public record of this proceeding would not support an extension of the applicability of § 424.1 beyond retail foodstores.

(b) However, while the applicability of § 424.1 itself is restricted to retail foodstores, the Commission wishes to take this opportunity to announce that the legal principles inherent in § 424.1 are in general applicable to the advertising of other commodities. Consequently, in the future the Commission will consider matters involving unavailability and mispricing of other advertised commodities in that spirit.

Promulgated: May 13, 1971.

Effective: July 12, 1971.

By the Commission.

[SEAL] CHARLES A. TOBIN,  
Secretary.

[FR Doc.71-6560 Filed 5-12-71;8:45 am]

Title 21—FOOD AND DRUGS

Chapter I—Food and Drug Administration, Department of Health, Education, and Welfare

SUBCHAPTER C—DRUGS

PART 135e—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

PART 135g—TOLERANCES FOR RESIDUES OF NEW ANIMAL DRUGS IN FOOD

Ipronidazole

The Commissioner of Food and Drugs has evaluated a new animal drug application (43-477V) filed by Hoffman-La Roche Inc., proposing the safe and effective use of ipronidazole in the feed of growing turkeys as an aid in the prevention of blackhead (histomoniasis). The application is approved.