

FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

ENCYCLOPAEDIA BRITANNICA, INC., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8908. Final Order, March 9, 1976—Modifying Order, July 5, 1988

This order reopens the proceeding and modifies the Preambles to Paragraphs I through IV, Paragraph II.C (Telephone Talk), and Paragraph II.L (No-Contact Period) of the Commission's final order issued on March 9, 1976 [87 FTC 421]. The Commission concludes that the modifying order is in the public interest. The modification of the Preambles clarifies that the Commission's final order applies only to subsidiaries and employees of Encyclopaedia Britannica, Inc. engaged in selling or being recruited to sell via in-home, over-the-counter, direct mail, or telephone solicitations. The modification of Paragraph II.C requires respondents to disclose the sales purpose of a call or an appointment within 30 seconds of beginning a sales call or a call to make a sales appointment. The modification of Paragraph II.L allows respondents to contact purchasers to correct inadvertent errors on sales forms, or to obtain necessary information that respondent inadvertently failed to obtain during a sales presentation.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

On September 22, 1987, Encyclopaedia Britannica, Inc. ("EB") filed with the Commission a request that the above-referenced proceeding be reopened and that the order issued therein on March 9, 1976, either

- (1) be set aside in its entirety; or
- (2) be modified by setting a date certain when the order would expire and in the interim modifying specific provisions; or
- (3) be modified by altering specific order provisions. The specific modifications requested were alterations to Parts I.B., II.C, II.H., IV., and the Preambles I- IV, and deletion of Parts I.D., I.E., II.L., and V. [2]

This petition replaced an earlier petition filed on April 2, 1987, that was subsequently withdrawn.

The petition contends that changed conditions of fact and law and the public interest require that the proceeding be reopened and the order be set aside or modified as respondent requests. One comment was received from placement of the petition on the public record.

On December 11, 1987, EB asserted that its petition had requested sunseting of the order in its entirety, or, in the alternative, sunseting of all the affirmative fencing-in provisions of the order. We disagree with EB. The petition sets forth the relief requested in its first page, and does not request sunseting all of the affirmative fencing-in provisions. If EB had wished to request such action, it could have clearly done so in its subsequent refiling of January 22, 1988 so that the request would have clearly been presented to the public for comment. EB failed to do so. Even if the petition did request such relief, we would deny it for the reasons we here deny a sunseting of the entire order.

On December 29, 1987, EB submitted alternative language for the requested specific modifications and stated that it would accept whatever modifications the Commission would agree to.

On January 19, 1988, another comment regarding EB was received.

On January 22, 1988, EB withdrew its petition, and simultaneously refiled its petition with the addition of two [3] affidavits, one from the president and one from the general counsel of EB. These affidavits provided clarification and additional evidence of some of the assertions EB made in its petition.

HISTORY OF THE ORDER AGAINST EB

The complaint against EB and Britannica Home Library Services, Inc., ("BHLS") was issued by the Commission on December 11, 1972. It alleged that EB and BHLS had made certain false and misleading representations to induce consumers to purchase encyclopedias and accessories, to induce job recruits to accept sales positions, and to collect debts.

After several years of litigation, the Commission issued an order on March 9, 1976, which became effective on March 17, 1980, after the company exhausted its appeals. Since its effective date, the order has twice been modified at EB's request, first on October 28, 1980, and again on October 5, 1982.

DESCRIPTION OF EB

EB publishes encyclopedias and continuity book plans. and markets

them through in-home sales talks, telephone solicitations, and over-the-counter sales. EB publishes and markets both the Encyclopaedia Britannica and the Compton's Encyclopedia brands of encyclopedias. BHLS publishes and markets the annual supplements to encyclopedias published by EB. [4]

DESCRIPTION OF THE ORDER

The order comprises nine parts. Part I prohibits certain misrepresentations during employee recruitment and requires that certain information be supplied to prospective recruits. Part II prohibits certain misrepresentations during marketing of merchandise or services and requires that certain information be supplied to prospective buyers. Part III prohibits creation of any training devices or sales aids which are inconsistent with Parts I or II of the order. Part IV prohibits certain misrepresentations in the marketing of continuity book programs and requires that certain information be supplied to prospective buyers. Part V prohibits certain misrepresentations during attempts to collect debts. Part VI requires measures to ensure compliance to the order by all respondents and their agents. Parts VII through IX are standard provisions requiring distribution of the order, notification to the Commission of any change in the corporate respondents, and filing of a compliance report with the Commission.

SUMMARY OF EB'S ARGUMENTS FOR REOPENING AND VACATING OR SUNSETTING THE ORDER

In a request to reopen based on changed conditions or on public interest considerations, the burden is on the respondent to make the requisite satisfactory showing. Both the language of Section 5(b) and its legislative history make it clear that the petitioner has the burden of showing, other than by conclusory [5] statements, why an order should be modified. The Commission may properly decline to reopen an order if a request is "merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979). The Commission is not required to reopen the order if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. In the present case, the petitioner has not met its burden to show that the order should be vacated or set to expire, and the Commission now declines to reopen the order to consider granting such relief.

Respondent alleges that three changed conditions of fact require the reopening and setting aside or modification: (1) the ownership and control of EB had been transferred to a private, noncommercial foundation, with profits from its operation going to the University of Chicago; (2) EB has instituted policies and procedures rendering the order unnecessary; and (3) EB has ceased the practices which caused the Commission to issue the complaint.

None of these allegations set forth changed conditions of fact that support reopening this matter. The Commission has previously considered and rejected in the context of EB's 1982 petition the argument that its transfer of ownership to the University of Chicago constitutes a change in fact. The implementation of internal policies to ensure adherence to an [6] order, and the alleged cessation of the practices giving rise to an order, are not the type of conduct to be rewarded by termination of an order, but are the minimum we require of a respondent for it to avoid civil penalties for violating the order.

Respondent further alleges that two changed conditions of law require the reopening and setting aside or modification: (1) consumer protection statutes and regulations now render the order unnecessary; and (2) EB's situation is similar to that of various respondents whose orders (in decisions cited) were sunsetted or modified.

EB misconstrues the requirements for reopening an order based upon changed conditions of law. The Commission has consistently declined to reopen proceedings based upon changed conditions of law absent a specific showing that the order prohibits activity that subsequently has been found or made lawful. The petition makes no such showing, and therefore fails to state sufficient cause on this ground.

EB has cited several cases as precedent for reopening and sunseting or vacating orders on public interest grounds. These cases establish that the petitioner must demonstrate either that an order places it at a competitive disadvantage in the marketplace or that an order is no longer necessary because of changes in the marketplace. EB has shown neither.

EB has similarly not made a sufficient showing to support [7] reopening the order to sunset the affirmative disclosure requirements on public interest grounds.

EB'S REQUESTS FOR MODIFICATIONS TO SPECIFIC PROVISIONS

Respondent's petition alternatively alleges that several specific

modifications to the order should be made. On December 29, 1987, EB stated that it would accept certain alternative modifications to those proposed in the petition. On January 22, 1988, EB provided additional evidence and clarification of its arguments for specific modifications. On June 9, 1988, EB stated that it would accept a proviso limiting Para. II.L. of the order in lieu of the deletion of that paragraph as EB had originally requested.

The Commission concludes that it is in the public interest to reopen the order and grant some of the modifications sought by the petitioners, but to deny other modifications requested.

Para. II.C.—Telephone Talks

Para. II.C. requires EB to disclose the sales purpose of a telephone call before beginning any "sales presentation." The respondent complains that it has expended considerable legal resources in defining what constitutes a "sales presentation." As respondent devises new telephone talks in the future, it is likely that this issue will continue to arise.

To prevent this, EB proposed in its petition that Para. II.C. be modified to require that in any telephone sales call, EB [8] disclose the sales purpose within thirty seconds of the beginning of the call, and that in any call to set a sales appointment, EB disclose the sales purpose of the appointment before setting the date and time of the appointment. However, EB fails to show that it is in the public interest to reopen the order and grant a proposed modification that would, in effect, lessen consumer protection.

In its letter of December 29, 1987, EB indicated that it would accept a more limited modification of Para. II.C., which would require that EB disclose the sales purpose of a call or an appointment within thirty seconds of beginning a sales call or a call to make a sales appointment. This modification would not lessen consumer protection, and would effectively eliminate any conceivable ambiguity by establishing a bright line standard to measure future compliance.

Because of these advantages, we conclude that it is in the public interest to modify Para. II.C. of the order in accordance with the proposal in the letter of December 29, 1987.

Para. II.L. No-Contact Period

Para. II.L. forbids EB from contacting purchasers during the "cooling off" period when purchasers may cancel their contracts. One

effect of this paragraph is to prevent EB from correcting certain inadvertent errors during this period.

In its petition, EB alleges that Para. II.L. should be deleted in the public interest to allow EB to contact consumers [9] before the cooling-off period has expired so that EB may expedite corrections in the interests of consumers. EB has stated that this paragraph sometimes prevents it from contacting consumers to correct errors, such as when salespersons calculate incorrectly the date until which a consumer may cancel his or her order under the Commission's *Trade Regulation Rule, Cooling-Off Period for Door-to-Door Sales* (16 CFR 429.1). Such a calculation, if uncorrected, could mistakenly deprive a consumer of his or her rights. Therefore, there would be some benefit to the public if EB were allowed to contact persons to correct inadvertent mistakes or oversights. However, EB has not shown that it would be in the public interest to delete Para. II.L. and allow EB to have unrestricted access to contact purchasers. EB has not shown that allowing such unrestricted access would benefit the public, or that allowing such access would relieve a burden from EB without potentially harming consumers' interests. On the other hand, we find that it would be in the public interest to modify the order to include the proviso to Para. II.L. agreed to by EB in its June 9, 1988 letter. That proviso allows EB to contact purchasers to correct inadvertent errors on sales forms, or to obtain necessary information that EB inadvertently failed to obtain during a sales presentation. [10]

Preambles

The Preambles to paragraphs I through IV define the scope of coverage of the order. In its petition, EB alleges that changes in fact require that the Preambles to paragraphs I through IV be modified so that the order covers EB subsidiaries only when they are engaged in certain selling practices and only when they are marketing merchandise or services related to encyclopedias, textbooks, reference materials, or educational materials. EB alleges that, because it has diversified its business, this modification is necessary to prevent the order from requiring EB to demand "false statements" from employees, *i.e.*, statements from employees that they will comply with the order when in fact the order does not apply to them. However, the present order merely requires an agreement that the employee will comply with the order, and assumes that they are engaged in practices covered by the order. Obviously if the employee is not engaged in

practices covered by the order, no obligation arises. EB has not made a showing sufficient to reopen the order for this proposed modification, because no requirement exists that employees file "false statements."

In its letter of December 29, 1987, EB indicated that it would accept a more limited modification of the Preambles. This modification would clarify that the order applies only to subsidiaries and employees of EB engaged in selling or being recruited to sell via in-home, over-the-counter, direct mail, or telephone solicitations. Such has been the interpretation FTC [11] staff has worked under, and the more limited modification is therefore a clarification of the coverage of this order.

This proposed modification, which merely states the Commission's interpretation of the order more clearly than does the present language, should be made for purposes of clarification, and we so modify the order. Consistent with this modification and with our interpretation of the scope of the order, we interpret the phrase "successors and assigns, officers, agents, representatives and employees" in the preambles to Paras. I.-IV. as "excluding independent retailers who derive the majority of their income from products or services not covered by the order, and who sell in-store." We also interpret the phrase "any of the publications, merchandise or services included in this order" in Para. VI.A. of the order as referring only to "any textbook, encyclopedia, reference or educational product or any publication, merchandise or service related thereto." And finally, we interpret the phrase "any person" in Para. VI.A. to exclude independent retailers who derive the majority of their income from products or services not covered by the order, and who sell in-store. We note that the exclusion of retailers is meant only to allow bona fide independent retailers to sell publications or merchandise covered by the order without being required to have their employees or assigns agree to the terms of the order, and without risking liability for infractions of the order. We note, however, that EB and BHLS are still liable under this order for violations of the order incurred "through any [12] . . . device," including those incurred by independent retailers and their successors and assigns, officers, agents, representatives and employees, directly and indirectly.

Paras. I.B., I.D., I.E.

Para. I.B. prohibits EB from making misrepresentations regarding certain factors that would affect a recruit's income. Paras. I.D. and

