Approved February 25, 1987
Date

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY.

The meeting was called to order by Senator Robert Frey at
Chairperson

10:00 a.m./p.m. on February 24, 1987 in room 514-S of the Capitol.

All members were present except: Senators Frey, Hoferer, Burke, Feleciano, Langworthy, Parrish, Steineger, Talkington and Winter.

Committee staff present:

Mike Heim, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Gordon Self, Office of Revisor of Statutes

Conferees appearing before the committee:

Senator Jim Allen
Steve Queen, Ottawa, Sales Representative
Jim Allen, Chanute, Manufacturer Wholesaler
Roy Moore, Shawnee, Sales Representative
Paul Cloughley, Overland Park, Sales Representative
Sherwyn E. Syna, Executive Director, The Bureau of Wholesale Sales Representatives
Karen McClain, Kansas Association of Realtors
Rob Hodges, Kansas Chamber of Commerce
Robert Cloughley, Kansas City Apparel Mart

Senate Bill 180 - Prompt payment of commissions to commission salespersons when contractual relationship terminates.

Senator Jim Allen, sponsor of the bill, stated this is a problem throughout the state with commissions not being paid on time or properly.

Steve Queen, sales representative, appeared in support of the bill. He testified the bill is a protection for us as independent sales representatives. The manufacturer can decide they don't need a salesman anymore; they can take key accounts from us. He said most of the salesmen work without contracts because the manufacturer won't give them contracts. Many salesmen have earned commissions and they don't get them. They try to sue the manufacturer for their money and the manufacturer won't come to the state. They have to go to the state in which the manufacturer resides for litigation. Then when they are ready to go to court, the manufacturer suggests settling out of court. Mr. Queen proposed the bill provide for treble damages to stimulate manufacturer paying them in a reasonable amount of time.

Jim Allen, Chanute manufacturer wholesaler, appeared in support of the bill. He stated a salesman needs this protection bill. As a former salesman, I know what has happened to the salesmen.

Roy Moore, sales representative, appeared in support of the bill. He testified he worked for a company for six years under contract to guarantee 7% commission on 85% of orders thathe wrote, but this was shortened to 75%. They owed him $14,000. Each year they promised this would be settled. He finally turned this over to the bureau of salesmen to see if they could collect the money for him. The bureau tried for a year and after a great deal of correspondence, the decision was made they could go no further. His own attorney

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

Senate Bill 180 continued

finally settled out of court for $5,000. His attorney received one-third of that. It took 16 months from time contacted bureau to collect this money until he finally received the $5,000.

Paul Cloughley, sales representative, testified in support of the bill. He testified he has been a wholesale sales representative for 18 years, and as a result of the experience he strongly urged the passage of this bill. He worked for a company in Cleveland, Ohio, for 14 years and was terminated in February, 1983. When he was terminated, they owed him commissions totaling $2,500. A copy of his testimony is attached (See Attachment I). He said this occurence is not unusual, Sales reps often find it difficult, if not impossible, to collect the commissions which they have earned.

Sherwin E. Syna, The Bureau of Wholesale Sales Representatives, testified in support of the bill. At the most basic level, our courts have not devised a consistent scheme to classify traveling, wholesale sales representatives. Depending on the particular facts and court, a sales representative might be labeled a sales agent, a jobber, a merchandiser, a distributor, or an employee. A particular label will carry with it particular rights and duties. Several inequities and uncertainties have resulted from this inconsistency. He said this bill will not address all the abuse prior conferees have mentioned. This problem is addressed in 10 other states. The bill is an immensely useful tool for collecting commissions. A copy of his handout is attached (See Attachment II).

Committee discussion was held concerning a contractural agreement between sales representative and the company. Mr. Syna stated in many instances the agreements are oral agreements. Mr. Queen added many of our manufacturers do not give us contracts. They would rather not do business in Kansas than give us a contract. Further committee discussion was held concerning imposition on free enterprise system and settling disputes with an oral contract.

Karen McClain, Kansas Association of Realtors, testified in opposition to the bill, in respect to the way it applies to the real estate industry. She stated the association feels the bill has serious ramifications on the sale of real estate which have not been taken into consideration. She proposed amending the definition of "commission salesperson" in Section 1 (a), on line 25 by adding the phrase, "but shall not include persons licensed under the Kansas Real Estate Brokers' and Salespersons' License Act, K.S.A. 58-3034, et seq." A copy of her testimony is attached (See Attachment III).

Rob Hodges, Kansas Chamber of Commerce, stated he had a 12 page testimony from the Federation of Apparel Manufacturers in opposition to the bill. He would have copies made for the committee members and bring them in later.

Robert Cloughley, Kansas City Apparel Mart, testified in support of the bill. He said every week the phone rings, a salesman says I have lost my line or I have been fired. He stated he would like the back of the order become the contract. If that order is accepted within 30 days, that is a bona fide order. Once the order is accepted, the commission is owed. The chairman inquired if that law was in existence

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON JUDICIARY,

room 514-S, Statehouse, at 10:00 a.m./p.m. on February 24, 1987.

Senate Bill 180 continued

in any other state. Mr. Cloughley replied, not to my knowledge.

The meeting adjourned.

A copy of the guest list is attached (See Attachment IV).

The handout from the Federation of Apparel Manufacturers is attached (See Attachment V).

GUEST LIST

COMMITTEE: SENATE JUDICIARY COMMITTEE DATE: 2-24-87

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Sherwyn E. Seyna	1718 Peachtree St, NW, Atl, GA. 30304	Bureau of Wholesale Sales Representatives
Sen Jim Allen		
Steve Queen	327 S. Willow Ottawa, Ks	Sales Rep.
Phil Anderson	Topeka	Budget Div.
Jim Allen	1202 W. 2nd Chanute KS	
Roy Moore	6609 Garnett Dr Shawnee KS	
Paul Cloughley	9707 Woodson Overland Pk, KS	Sales Rep.
Patrick J. Allen	301 So Ever Chanute, KS	Sales Rep
Don Lawson	7008 Carrie LA Merriam KS 66203	" "
Cora "Frankie" Little	11214 W. 71 Shawnee, Ks	[illegible]
Robert E Thompson	1444 Maple Ottawa	Le Tigre
Wm Daniels	Lawrence	Legislative Intern Sen. Parrish
Jim Sullivan	Topeka	Ks. Motor Car Dealers Assn
[illegible]	"	KMHI
Jerry Powell	"	DHR
William E. Buchanan	Emporia	
Pat Barnes	Topeka	Ks Motor Car Dealers Assn.
Jim Crouch	O.P. + Topeka	W. Koury / Adventure Great Outfitters
Jim Schultz	Olathe, Ks.	HAMAC officer Sansabelt Rep.
Robert Cloughley	Leawood Ks.	Kansas City Apparel Mart
Rob Hodges	Topeka	KCCI
Bud Grant	"	"
Karen McClain	Ks. Assn Realtors Topeka	

Attach. IV
Sen. Judiciary
2-24-87

2-24-87

February 14, 1987

Mr. Chairman, Members of the Committee, my name is Paul Cloughley I reside in Overland Park, Kansas. I have been a wholesale sales representative for eighteen years. As a result of my experience I strongly urge the passage of this bill. I worked for Shaker Sport (Stanley M. Feil) in Cleveland, Ohio for fourteen years and was terminated in February, of 1983. When they terminated me they owed me commissions totalling $ 2,500.00.

I spent my time and money generating business for Shaker Sport and was not paid any commission. They also took commissions from me on major accounts (i.e. Jones Store in Kansas City). My contract stated that I was to receive full commissions on any orders written in my territory or in New York. They changed the contract without my consent. At first they said I would receive only half commission and the New York representative would receive the other half. Then they cut the commission to one percent without my consent again and finally to <u>no commission</u> at all. I spent my time and money selling the account and keeping merchandise coming into the store and received <u>no commissions</u> for my efforts. For this reason, I feel this bill is needed to protect commissioned salesmen.

This occurence is not unusual. Sales reps often find it difficult, if not impossible, to collect the commissions which they have earned. Again, for this reason, I feel commissioned salesmen need to be heard and I appreciate you listening.

Attach. I.
Senate Judiciary
2-24-87

Mr. Chairman and members of the Committee on Labor, Industry & Small Business:

My name is Sherwyn E. Syna. I am a practicing attorney as well as Executive Director of the Bureau of Wholesale Sales Representatives. I am also authorized to speak on behalf of the Bureau of Salesmen's National Association, an umbrella organization which consists of the Bureau of Wholesale Sales Representatives, the National Shoe Travelers Association and the Southeastern Toy Travelers Association.

These organizations support S.B. 180.

Prior to being elected to my current position, I served for more than 20 years as legal counsel to various national and local sales representatives' organizations. I am intimately familiar with many of the legal problems encountered by sales representatives. In introduction, allow me to present background information to show why S.B. 180 is needed.

A wholesale Sales Representative is a person engaged in a small business who represents one or more Principals. Generally a Sales Representative services the retail or industrial trade in a specified geographic territory which may be limited to part of a state or which may include several states.

Sales Representatives are usually distinguished by the following characteristics:

(1) They are compensated in whole or in part by commission;

(2) They pay their own business, travel, entertainment and other related expenses;

(3) They are assigned a certain geographical territory or specific accounts;

Attach. II
Senate Judiciary
2-24-87

(4) They obtain orders which are subject to the acceptance of their employer or Principal. (Technically, order taking is not a sale, but a process known as "inviting acceptance." The "sale" does not take place until or after the Principal accepts the order.) 1

UNCERTAIN STATE OF COMMON LAW

At the most basic level, our courts have not devised a consistent scheme to classify traveling, wholesale Sales Representatives. Depending on the particular facts and court, a Sales Representative might be labeled a "sales agent," a "jobber," a "merchandiser," a "distributor," or an "employee." A particular label will carry with it particular rights and duties. Several inequities and uncertainties have resulted from this inconsistency.

For example, a Principal may be able to take advantage of these ambiguities by classifying his Sales Representatives as "independent contractors," in order to avoid statutorily mandated "employer" obligations. The Principal may, and usually does, however, exercise virtually complete control over Sales Representatives' activities regarding the extension of credit, shipping, samples, seasons, designs and advertising. This has resulted in situations where Sales Representatives will be treated as "independent contractors" for social security, unemployment compensation, workers' compensation and collective bargaining purposes. By the common law "control test" the same Sales Representatives may be deemed "servants" for matters of management, performance and termination.

"WOOD'S RULE"

Under the terminable-at-will presumption in England, at common law, employment contracts were presumed to last for one year unless the agreement specifically provided otherwise. 2 In America in the 19th century, however, in the absence of particular terms regarding duration, courts generally dissolved disputes by looking to the intent of the parties, as indicated by a contract's language and by the surrounding circumstances. 3

In 1877, the American law of contracts was drastically altered by the publication of H.G. Wood's treatise on master-servant relationships. 4 Wood maintained that existing case law provided that when employment contracts failed to specify duration, a contract "at will" - one terminable by either party, at any time, for any reason - would be presumed:

> With us the rule is inflexible that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof. A hiring at so much a day, week, month, or year, no time being specified, is an indefinite hiring and no presumption attaches that it was for a day even but only at the rate fixed for whatever time the party may serve. 5

Wood offered no analysis to justify the assertion of this rule or his rejection of the English tradition. He cited only four American cases as authority for his approach to general hirings, none of which supported him. 6 Despite this lack of support, courts quickly embraced Wood's Rule and elevated it to the status of a legal maxim in contract law. 7

THE IMPACT OF WOOD'S RULE

Verbal and indefinite hirings of Sales Representatives are commonplace and result in frequent abuses. Firings may be for good cause or simply to place a new son-in-law in a territory that was developed through the time, effort, talents and investment of the terminated Sales Representative.

Further, being too successful is riddled with problems for the Sales Representative. It is often an invitation for cutting or reducing the Sales Representative's territory or having customers taken over by management as "house accounts." In these instances, the Sales Representative can ill afford to give up the remaining territory and producing accounts which he has developed. Unlike insurance salespeople, the wholesale Sales Representative has no residual benefit or vested commissions in an account which the Sales Representative obtained for the Principal. This is true even where the Sales Representative is terminated and the Principal continues to do business with the account secured by the Sales Representative. Additionally, the very nature of the undertaking excludes the building of an equity interest in the business developed by a Sales Representative.

Nevertheless, in good times or bad these are self-starting individuals who keep the wheels of our economy turning and the shelves of our retailers stocked. Their contribution to our local and national economic well-being has never been recognized or appreciated. They produce 5% of the Gross National Product for non-durable goods.

S.B. 180 does not address all the vices which may be attendant to the Principal-Sales Representative relationship. It does encourage a written agreement and prompt payment of commissions due the Sales Representative.

In the present system, the Principal traditionally enjoys a superior economic position which is greatly amplified by the Principal's control of the relationship's purse strings. In the absence of a written contract, this disparity is further compounded by the right to a summary termination.

The Sales Representative expends time and money up front to secure orders which may or may not be accepted by the Principal. Commissions are often not paid until goods are shipped by the Principal; in other instances, commissions are paid only after the goods have been accepted and paid for by the customer. The time elapsing between obtaining an order and payment of commission is usually substantial. When there is an intervening termination, the drawn-out commission payment process is almost always further delayed.

THE PRACTICAL ISSUE

Sales Representatives are motivated by risks and rewards. They undertake the risk of developing and working a territory at considerable expense. Work done this season or this year may not bring an order until next season or next year. The commissions or reward for their efforts may take even longer.

While the Sales Representative is engaged in this effort, it is in the Principal's best interest to pay commissions promptly. Payment motivates the Sales Representative.

After termination, the Principal's interest in the Sales Representative is far different. The need to provide the Sales Representative with an incentive no longer exists. To the contrary, there is a benefit to the Principal - the cost of money - in delaying or withholding payment. Further, summarily terminating the Sales Representative often amounts to pulling the economic rug from under him and creates a very real financial bind.

A Principal may induce a Sales Representative to settle or compromise a claim by delaying or withholding payment of earned commissions. Consequently, many post-termination claims for earned commissions are either settled for far less than due or go unprosecuted. Therefore termination may result in an economic advantage to manufacturers.

S.B. 180 merely provides that a sales representative be paid commissions earned within 30 or possibly 40 days of the termination. Or suffer the possibility of paying up to 8 percent damages in accordance with the provisions of K.S.A. 44-315 and the amendments thereto, plus reasonable attorney fees.

Please note that S.B. 180 will require no addition to the bureaucracy, funding or involvement of any state agency or personnel. Additionally, there is an interest to the State that

its citizens be properly remunerated by corporations who benefit from the time, effort and money expended by Pennsylvanians. The state may also have an interest in the tax revenues that will be generated by its citizens being paid their due.

I thank the Committee on Business and Commerce for the opportunity to submit this statement in support of S.B. 180.

Respectfully submitted,

BUREAU OF WHOLESALE SALES
REPRESENTATIVES

By:____________________
Sherwyn E. Syna
Executive Director

Bureau of Wholesale Sales Representatives
Suite 600, 1718 Peachtree Street, N.W.
Atlanta, GA 30309
(404) 881-0933

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2-24-86

KANSAS ASSOCIATION OF REALTORS

Executive Offices:
3644 S. W. Burlingame Road
Topeka, Kansas 66611
Telephone 913/267-3610

TO: SENATE JUDICIARY COMMITTEE

FROM: KAREN MCCLAIN, DIRECTOR, GOVERNMENTAL AFFAIRS

DATE: FEBRUARY 24, 1987

SUBJECT: SB 180

On behalf of the Kansas Association of REALTORS®, I am here to speak in opposition to SB 586, in respect to the way it applies to the real estate industry.

The Kansas Association of REALTORS® feels the bill has serious ramifications on the sale of real estate which have not been taken into consideration.

SB 586 would require payment of earned commissions within thirty days of the date of the termination of a contractual relationship between two parties to solicit and make sales.

The bill does not define the term "earned". Under rules of statutory construction, language which is not specifically defined by law are to be given their ordinary meaning in usage. Webster's New collegiate Dictionary defines the word "earn" as "1. to receive as return for work done or services rendered, 2. to come to be duly worthy of or entitled or suited to."

In a real estate sales transaction, a sales commission is "earned" when the agent produces a "willing and able buyer." The time for determining whether a "willing and able buyer" has been produced is the time of the real estate closing, when the buyer actually produces the purchase price of the property. The timing for closings can be as long as 90 days to a year after the purchase contract has been signed. This may be months after the contractual relationship for a salesperson has terminated. Yet, under this broadly worded sta-

Attach. III
Senate Judiciary
2-24-87

REALTOR® — is a registered mark which identifies a professional in real estate who subscribes to a strict Code of Ethics as a member of the NATIONAL ASSOCIATION OF REALTORS.

tute, a salesperson could force a broker to pay out the commission within thirty days after his or her termination, if the salesperson claimed that the commission had been "earned", under the definition given above, and by totally ignoring the provisions of a contract, which the salesperson signs.

Another problem arises for members of our association, because by being a member of the Kansas Association of REALTORS®, a salesperson agrees to arbitrate any disputes over, among other things, whether an agent is entitled to a commission. This arbitration would come into play where there was a dispute within a firm over which agent was the "procuring cause" of the sale, or it can arise where there is a dispute between agents in different firms over who was the "procuring cause".

The arbitration procedure can take as long as 130 days to be completed. There is also a right of a district court appeal if the claimant or respondent does not agree with the decision of the arbitration panel. Yet, due to this broadly worded statute, an agent could demand the commission within 30 days of the termination of the contractual relationship.

What this law would then, in effect do is to statutorily override and interfere with any contract which real estate salespersons agree to. The Kansas Association of REALTORS® feels very strongly that interference by the state with contractual agreements, is a very dangerous business for the state to be in.

We request that this committee closely examine the impact of a law such as this on <u>all</u> commission salesperson relationships in this state before they begin passing such legislation, which may have been intended to protect a few commission salespersons.

We ask that, <u>if</u> you choose to pass this legislation, you amend the definition of "commission salesperson" in Section 1 (a), on line 25 by adding the phrase, "but shall not include persons licensed under the Kansas Real Estate Brokers' and Salespersons' License Act, K.S.A. 58-3034, et seq."

We feel this language will avoid causing problems in the real estate industry, by enacting this legislation. Thank you.

FEDERATION OF APPAREL MANUFACTURERS

STATEMENT IN OPPOSITION

TO

KANSAS SENATE BILL NO. 180

February 24, 1987

Attach. V
Senate Judiciary
2-24-87

This is a statement of the Federation of Apparel Manufacturers (FAM) in opposition of Senate Bill No. 180, which would award damages to independent commissioned sales representatives against principals if the latter fail to pay "earned commissions" within 30 days after the conclusion of a business relationship. FAM is a trade association based in New York which speaks for the interests of approximately 4,200 unionized manufacturers of women's and children's fashion outerwear.

The apparel industry, contrary to what some of you may have heard, is almost entirely comprised of businesses employing an average of 25 people, small businesses doing less than $5 million per year in sales, earning, when they are lucky and have caught the crest of a fashion wave, $50,000 to $100,000 on their annual sales -- perhaps the lowest profit margin of all major American industries. Many of sales rep firms, which carry the lines of several manufacturers, earn more in a year then they do.

Almost all of the manufacturers FAM speaks for are dead meat without good, effective, independent sales representatives. Without good representation, their lines fail: they have no business. On the other hand, with good representation by competent sales reps who enjoy a top reputation in the field, and whose competence is acknowledged by the retailers to whom they sell, manufacturers are powerfully competitive in the demanding consumer goods marketplace, and they are able to generate a strong bottom line. These manufacturers have no incentive to deal with such performers in bad faith.

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Nevertheless, FAM must oppose Senate Bill No. 180 for the following reasons:

1. Imports have our industry by the throat. In order to survive against slave-wage apparel exporting nations, domestic manufacturers must have maximum marketing flexibility. Senate Bill No. 180 undermines the flexibility we require by imposing provisions that bear no relation to market realities. The FTC, under Democratic and Republican chairmen, plainly called related legislation at the federal level anti-competitive and costly to consumers.

2. There is insufficient documentation to show a need for Senate Bill no. 180. Supporters of the bill have not produced economic research or statistical evidence to show that a pattern of abuse exists that requires legislative intervention; they can only point to isolated instances of alleged "abuses" that may be nothing more than honest business disputes. Indeed, how could the bill's supporters credibly continue to act as agents for New York apparel manufacturers, who collectively ship approximately $17 billion in wholesale apparel each year?

3. While Senate Bill No. 180 penalizes the manufacturer for good faith disputes over amounts owed the rep, it

offers to the manufacturer no countervailing protection against frivolous lawsuits by a sales representative. Further, it must be left to the courts to decide the meaning of such vague terms as "commissions earned" when, in fact, the shifting realities of retail marketing frequently govern the payment pattern of principals to their sales repsentatives.

4. The provisions in Sections 1(a) and 2(b) of the bill, requiring that commissions earned through the last day of the relationship be paid within a specified time upon termination will almost certainly encourage disputes and litigation. Who can define when commissions are earned? Are they earned when the goods are ordered? Shipped? When the retailer has made the first in a series of payments? When the retailer has paid in full? Or, perhaps, the December following payment, when some retailers request manufacturers to voluntarily accept a percentage advertising allowance on all transactions, and which the manufacturer has little choice but to accept? What commissions are earned depends entirely on what has been paid for, and retail accounts take much, much longer than 30 days to settle.

5. Because Senate Bill No. 180 may, to observers outside

the apparel industry, appear reasonable, it may be useful to describe briefly how work flows through production, from the design and planning stage to receipt of final payment by the retailer. The following example uses coats manufactured for delivery to the retailer for the Fall selling season.

Initially, a coat manufacturer will have its designers produce as many as one thousand designs for as many styles. Of these, the manufacturer may produce samples for all of its sales reps across the country for as many as 250 styles -- an overall investment that can amount to as much as $250,000, and rarely falls below $100,000 -- in time for the first fall market week, which occurs in March. Please note that the investment in samples is made before a single order has been written. Most importantly, since there are three selling seasons for coats each year, this investment occurs at least three times each year.

The manufacturer then ships the samples to the independent commissioned sales reps, who show the styles to retail store buyers responsible for selecting the store's Fall line. Once the orders have been written, specifying a date of delivery (for Fall, the delivery date falls some time in July or August) price, and terms of payment, the manu-

facturer prepares to go into production. To produce the goods, the manufacturer usually goes into debt to buy the piece goods, trim and other components needed to make the coats. Ordinarily, the debt is incurred through factors, financiers to the industry who frequently, because of the high risk involved, charge as much as 5 points over the prime rate for the money lend. The manufacturer, upon delivery of components, goes into production and is responsible for delivering the finished garments to the retailer's freight forwarder by a specified shipping date.

Then the manufacturer awaits the result -- acceptance by the retailer and actual sales in the stores. If its styles sell, the manufacturer may, as late as November, begin receiving payment from the retailer, even though the order terms allow the retailer to take an 8% deduction from the total amount owing if payment is made by the 10th day of the month following delivery to the freight forwarder. The retailer, having possession of the goods, in reality often hedges on it payments. It may take chargebacks for specific reasons, or it may take arbitrary deductions for no valid reason whatever -- unfortunately, this happens with alarming regularity. Even worse, a retailer may cancel a part or all of its order during any point in the production process prior to delivery.

Alternatively, the retailer may, without justification, claim that the coats were accepted on a consignment basis, and pay for only those goods which actually were sold, leaving the manufacturer with a heavy inventory of out-of-fashion coats and equally heavy debts. In extreme instances, the retailer may simply refuse to accept the goods. Two years ago, when The Limited, Inc. acquired Lerner Shops of America, it immediately notified Lerner's suppliers that it would not accept the goods Lerner's ordered and the manufacturers accepted in good faith. And there is the increasing problem of stores stretching out the payment time, by as much as 90 days or more.

Finally, there is the matter of retroactive deductions. As noted earlier, a retailer may request a manufacturer to voluntarily accept advertising allowances, or, as one retailer recently did, to immediately acced to a voluntary 5 per cent deduction and a 60-day postponement on all accounts receivable to help finance the chains expansion.

In all of these instances, the manufacturer is left holding the bag, and , more important, the manufacturer simply does not realize payment in full for the value of the written order. In an ongoing relationship with a sales rep, the manufacturer may make adjustments readily accepted by the

reps both of monies the manufacturer has advanced to the rep and also monies that the rep's retail accounts have failed to pay to the manufacturers. But, under Senate Bill No. 180, the manufacturer does not have a realistic opportunity to pay to the terminated rep an amount that reflects the actual commissions earned, simply because the real amount the manufacturer realizes on a transaction may not be known within 30 days of termination.

6. Senate Bill No. 180 makes reference to the "contractual relationship" between sales rep companies and manufacturers, as if such a relationship were actually the standard or only relationship between the parties. This is not the case, and often cannot be the case.

Frequently, the relationship between a sales agency or firm and a manufacturer is nothing more than a handshake agreement, possibly confirmed by letter. Such an arrangement works to the benefit of both parties. For the sales rep, this arrangement allows the firm to carry other lines and products and to accept more successful accounts without restrictive contractual obligations.

For the manufacturer, such an arrangement is often necessary to his or her survival. In order to have the

maximum flexibility to compete against imports and to respond to what are often overnight changes in the retail environment, many manufacturers simply cannot enter into formal contracts that may have the effect of rigidly locking them into marketing strategies that limit their ability to reach the consumer.

Besides, the "contractual relationship" referred to in the bill is one which is often controlled by the realities of retailing. These realities are:

a. When retailers enter a new market, they go in with their own established procedures, and , frequently, with an inclination to rely on reps known to them. The retailer may insist on designating the rep it wants a manufacturer to use, or conversely, it may not want to do business with the rep the manufacturer uses. The manufacturer, if it want to sell to the retailer, has no choice but to take the retailer's preferences into account.

b. The most precious asset of a sales rep or agency is its good contacts among retail store buyers. These buyers frequently move from one company to another, but, no matter who their employer is, they will

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continue to deal with the reps they know. Therefore, when a buyer moves to a new company, the rep may be able to obtain for the manufacturer access to a new account. But, even more important, the manufacturer may find that its rep is suddenly unable to sell to its established account.

c. The competitive nature of the fashion-sensitive apparel industry requires the manufacturer to exercise full flexibility in responding to rapidly changing market conditions. In the past, a manufacturer could rely on a few department stores to survive. Now, discounters, specialty shops, off-pricers, and even the hyper-market stores -- such as stores which sell apparel along with food and other products -- are all players in an ever competitive arena. All of these retailers have different requirements, and different ways of buying goods from U.S. or overseas manufacturers, or from the importers who buy from foreign countries.

d. In the retail industry, there is current wave of consolidation. Overnight, three separate, independent retail operations -- one in Massachusetts, one in Montana, and one in Kansas -- may become part of a

consolidated chain that does all of its buying and distribution from a central facility in a fourth state. The manufacturer has no choice but to sell to the central facility, and through no action of its own, it is forced to terminate the good services of the reps in the states mentioned. More to the point, the recent acquisition of Macy's Mid-West by Dillard's has resulted in a complete change in the buying and distribution practices of the former Macy's stores. While this is normal in the economy we live in, Senate Bill No. 180 does not take such considerations into account.

For all these reasons, the retail marketplace decides when a manufacturer must engage or terminate a sales rep firm and , as mentioned previously, a manufacturer's survival depends on its ability to respond flexibly to market changes. Such flexibility is often not possible in a "contractual relationship," which is by no means a standard industry practice.

7. This legislation, on its surface, appears to address a current, local problem concerning prompt payment of commissions. However, it is in reality part of an old, old story. The sales reps who support this bill, and they seem

to be only from apparel agencies, have not and are not able to draw a connection between the payment problems they allege and the fact that their solution establishes in Kansas a contractual relationship between the parties -- a mandatory relationship that doesn't exist now.

For decades, these reps, particularly those associated with the Bureau of Wholesale Sales Representatives and its predecessor organization, the National Association of Women's and Children's Apparel Salesmen, have been intent on imposing standardized written contracts on the apparel industry, either through legislation or collective bargaining. They unsuccessfully tried that latter approach in the early 70's, but both the NLRB and the Federal Trade Commission rejected their claim to be treated as a bona fide labor organization. In fact, the FTC found that the sales rep groups had violated the antitrust laws by attempting, through collective bargaining and boycotts, to force industry acceptance of standardized written contracts. The FTC order was upheld by a Federal court of appeals in Atlanta [National Ass'n of Women's and Children's Apparel Salesmen, Inc. v. FTC, 479 G 2d 139 (5th Cir. 1973)]. And just last year, the FTC again rejected an effort by these groups to seek an antitrust exemption for their joint bargaining activities. Attached, for the record of this hearing, is FAM's petition to the FTC in

this matter.

Having failed by administrative means and the judicial process, these groups spent ten years seeking Congressional legislation in pursuit of the same ends, but no Congressional committee ever voted one of these proposals favorably because they were unable to find a compelling need for the protections the sales reps sought. Currently, having exhausted all these avenues, the same groups have sought the same kinds of protection -- including so called "prompt payment" laws that also establish special contract provisions -- in the states of Washington, Ohio, Arizona, Pennsylvania, New York and, last year Kansas, all without success.

All of these reasons lead us to conclude that Senate Bill No. 180 is unnecessary and unwarranted, and can only lead to the further undermining of American industry trying to compete in Kansas.

We strongly urge that you reject it.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the matter of:	)	
	)	
NATIONAL ASSOCIATION OF WOMEN'S AND CHILDREN'S APPAREL SALESMEN, INC.	)	Docket No. 8691

FEDERATION OF APPAREL MANUFACTURERS, INC. COMMENTS REGARDING REQUEST TO REOPEN PROCEEDINGS AND MODIFY OR SET ASIDE ORDER

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Attach. V
Senate Judiciary
2-24-87

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the matter of: NATIONAL ASSOCIATION OF WOMEN'S AND CHILDREN'S APPAREL SALESMEN, INC.	)	Docket No. 8691

FEDERATION OF APPAREL MANUFACTURERS, INC. COMMENTS REGARDING REQUEST TO REOPEN PROCEEDINGS AND MODIFY OR SET ASIDE ORDER

I. INTRODUCTION

The Federation of Apparel Manufacturers, Inc. ("FAM"), hereby responds to the request by the Federal Trade Commission ("Commission") for comments on the petition filed by the Bureau of Wholesale Sales Representatives ("Petitioner"), successor to the National Association of Women's and Children's Apparel Salesmen, Inc. ("NAWCAS"), to reopen proceedings and modify or set aside an order of the Commission in the above captioned case issued February 24, 1971. For reasons that will be explained fully below, FAM strongly opposes modification of the Commission's 1971 order. Petitioner has completely failed to produce any evidence of sufficient changes in law or fact to warrant reopening this proceeding or modification of the order under either Section 5(b) of the Federal Trade Commission Act ("FTC Act") or Section 2.51 of the Commission's rules.

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Following almost five years of careful deliberations, t Commission handed down its order in this proceeding, proscribing activities of the Petitioner that clearly violate long-established antitrust prohibitions against group boycotts, market division, and price fixing. Specifically, the order prohibited petitioner from restricting access to trade shows to certain manufacturers, attaching specific unreasonable conditions to participation in trade shows, publishing an "uncooperative" manufacturers list, restricting representation of certain manufacturers' lines, allocating representation of certain lines, dictating certain contract terms between manufacturers and their salespeople, dictating the times and places of trade shows throughout the country, and other anticompetitive conduct.

Now, almost fourteen years later, Petitioner asks the Commission to sanction those identical activities, citing ostensibly changed circumstances in the apparel industry as the sole justification for conduct that Petitioner itself acknowledged in the earlier proceeding to be a clear violation of the antitrust laws, absent a finding that petitioner was a bona fide labor union. Commission Order Adopting Findings and Conclusions Deferring Entry of Final Order, Docket No. 8691 ("Commission order"), at 2. Petitioner's contention that it is a labor organization was rejected by the National Labor Relations Board (Bambury Fashions, Inc., 179 NLRB No. 75 (1969)), the Commission (Commission order, at 11) and the U.S. Court of Appeals for the Fifth Circuit (National Association of Women's and Children's Apparel Salesmen, Inc. v. Federal Trade Commission, 479 F.2d 139 (5th Cir.1973),

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cert. denied 414 U.S. 1004 (1973)). Petitioner does not attempt to resurrect the argument here that its activities fall within labor's antitrust exemption.

Rather, Petitioner bases its entire case on irrelevant assertions that somehow changed marketing conditions in segments of the apparel industry merit reopening the record herein. Notably, Petitioner does not cite one single case to support its novel interpretation of the antitrust laws, nor could it, since the law remains unambiguous that what petitioner seeks to do is plainly illegal.

Equally important, Petitioner asserts that its petition is intended to support and aid the small manufacturer, whose existence, Petitioner acknowledges, is already threatened. NAMCAS petition, at 45. FAM represents and speaks for these small manufacturers to which NAMCAS refers. And, as will be demonstrated below, it is precisely these small manufacturers that will be seriously harmed -- and even permanently injured -- by the modifications of the Commission order sought by Petitioner.

II. INTEREST OF FAM

A. FAM Represents 5,500 Primarily Small Manufacturers of Women's and Children's Apparel

FAM represents the women's and children's apparel manufacturing industry in its relations with all levels of government and the retailing and textile industries. Affiliated with FAM are the eight major apparel trade associations: Apparel Manufac-

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turers Association, Inc.; Affiliated Dress Manufacturers, ; New York Coat and Suit Association, Inc.; National Association of Blouse Manufacturers, Inc.; New York Skirt and Sportswear Association, Inc.; Infants' and Children's Coat Association, Inc.; United Infants' and Children's Wear Association, Inc.; and New York Raincoat Manufacturers, Inc. Through FAM, these member associations collectively speak for their members, some 5,500 women's and children's apparel manufacturers ("affiliated manufacturers" or "affiliated firms") operating in the United States.

An extremely large percent of FAM's affiliated manufacturers are considered, by industry and government standards, small. U.S. Department of Commerce, Bureau of the Census, County Business Patterns (New York) (1982). (Petitioner itself acknowledges that "small manufacturers comprise nearly 90 or more percent of the firms in the industry". MANCAS petition, at 37.) And, FAM's affiliated firms are the very same small manufacturers Petitioner's past anticompetitive acts were designed to control and harm and whom the Commission's 1971 order protected.

B. FAM's Affiliated Firms Are The Small Manufacturers Whom Petitioner's Members Service and Who Would Be Seriously Harmed By Any Modification of the Commission's 1971 Order

Prior to 1971, Petitioner controlled the small manufacturers' access to apparel trade shows, which was — and remains — the single most important marketing tool of the small manufacturer. Petitioner operated the trade shows and restricted manu-

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facturers' access to them by, inter alia, requiring FAM's affi-liated firms to sign standard NAWCAS contracts in order to gain entry to these trade shows and by restricting participation in these trade shows to NAWCAS members only. The Commission's 1971 order, among other things, found Petitioner's practices with respect to small manufacturers' access to trade shows violative of Section 5 of the FTC Act. Commission order, at 4-5.

Petitioner acknowledges that it is still the small manufacturers -- FAM's affiliated firms -- "which rely most heavily upon the use of [Petitioner's members]". NAWCAS petition, at 37-38. Petitioner further acknowledges that "[t]oday the apparel trade shows sponsored by [Petitioner's members] are even more important to small retailers and their customers, as well as to small manufacturers and their traveling salesmen" than they were 13 years ago when the Commission issued its protective order (emphasis added). NAWCAS petition, at 43. In short, small manufacturers are more dependent today on trade shows, as the principal means for the distribution of their products, than they were in 1971 when the Commission found that NAWCAS had engaged in unlawful practices.

In reaching its 1971 order, the Commission noted then-existing competitive pressures on the small manufacturer. The trend toward concentration into conglomerates in the industry and the growth of merchandise marts were cited particularly. Commission order, at 2 and 5. As petitioner admits, today small manufacturers are even more at the mercy of large diversified conglomerates and are faced with increased competition generated from the

growth of the large merchandise marts, catalogue and mail or houses, and private label merchandising. NAWCAS petition, at 15-24. Petitioner does not even address the principal competitive threat to FAM's small affiliated manufacturers -- imports.*

The economic outlook for the small manufacturer is indeed bleak. But, notwithstanding the lawful competitive pressures discussed above, what enables small manufacturers to survive is their ability to market their products free from unlawful anti-competitive pressures. It is precisely these unlawful anticompetitive pressures which Petitioner seeks to resurrect.

III. PETITIONERS HAVE CLEARLY FAILED TO MAKE A SUFFICIENT SHOWING TO JUSTIFY REOPENING PROCEEDING

This case should not be difficult for the Commission to decide, because it involves no intricate sifting of complex facts and law to reach a reasoned decision. Instead, the Commission has decades of sound precedent holding squarely that the conduct prohibited by the order is a violation of the antitrust laws, including Section 5 of the FTC Act. In addition, the Commission developed a massive record upon which it based its order, which was upheld by the Court of Appeals for the Fifth Circuit (National Association of Women's and Children's Apparel Salesman, Inc.,

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* By 1980, the apparel industry in New York City had lost approximately a quarter of a million workers. This loss has been attributed, by the New York State Department of Labor, to the disastrous effect of imports on the industry. New York State Department of Labor, Division of Research and Statistics, Employment Review, vol. 34, no. 1 (January, 1981).

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v. Federal Trade Commission, 479 F.2d 139 (5th Cir. 1973)) review of which was denied by the United States Supreme Court (National Association of Women's and Children's Apparel Salesmen, Inc. v. Federal Trade Commission, 414 U.S. 1004 (1973)).

A. Petitioners Have Not Met Commission Standards For Reopening Proceeding and Order Modification

Section 2.51 of the Commission's Rules (16 C.F.R. §2.51) permits any person, partnership or corporation subject to a Commission rule or order to petition to reopen the proceeding and modify the rule or order, due to changed conditions of law or fact, or reopening or modification would be in the public interest. While Petitioner indeed is subject to a Commission order, it falls far short of meeting the burden set by federal agencies, in general, and the Commission, in specific, to reopen a proceeding and modify a Commission order.

Agencies generally are somewhat reluctant to reopen proceedings after an order has been entered, particularly when the order is based upon a solid record, as is the case with the subject order. The Supreme Court of the United States has explained the rationale for this reluctance as follows:

> If upon the coming down of the order litigants might demand rehearings as a matter of law becuase some new circumstance has arisen, some new trend has been observed, or some new fact discovered, there would be little hope that the administrative process could ever be consummated in an order that would not be subject to reopening.

Interstate Commerce Commission v. Jersey City, 322 U.S. 503, 514 (1944).

However, recently, the Commission has shown somewhat g[illegible]ter willingness to reopen a proceeding for the purpose of modifying an order. For example, in Damon Corp., CCH Trade Reg. Rep. ¶22,007 (March 29, 1983), the Commission reopened a proceeding and modified an order requiring preacquisition clearance on the basis of a "public interest" standard, "[balancing] the reasons for modifying an order against the reasons for its retention." And, in E. & J. Gallo Winery, Docket No. C-2836, 3 CCH Trade Reg. Rep. ¶22,024 (May 19, 1983), the Commission modified an order that had prohibited a variety of non-price vertical restraints, based upon intervening Commission decisions, the competitive state of the market, and practices engaged in by competitors not under order. See also Brown Shoe Co., Inc., Docket No. 7606, 3 CCH Trade Reg. Rep. ¶22,174 (July 16, 1984).

However, it is one thing for the Commission to open up a proceeding and modify an order in areas where the law has changed and the changes are justified as being pro-competitive. The cases discussed above were just such orders, concerning, inter alia, vertical restraints on trade where both the law and facts had changed appreciably since the issuance of the order. It is an entirely different matter to reopen a proceeding and modify an order prohibiting classic, per se horizontal restraints on trade, such as the conduct prohibited by the subject order.

For example, in Armstrong Cork Co., Docket No. C-1010, 3 CCH Trade Reg. Rep. ¶22,195 (September 17, 1984), the Commission refused to modify an earlier order prohibiting per se resale price maintenance, even though the modification was sought only

for exported items. Even with respect to issues like resale price maintenance, where different policy views have been expressed, the Commission has not loosened its standards.

In the instant case, the prohibited conduct in question remains as unlawful today as it was when the order was issued. While certain factors in the apparel industry may have changed to some degree, the order remains a valid preventative to classic anticompetitive, horizontal agreements among members of a particular industry. To reopen a proceeding on such weak grounds would be completely unjustified on either a factual or legal basis.

B. Commission Precedent Strongly Supports Validity of Order

More than four decades ago, the Supreme Court of the United States upheld a Commission order that has become one of the hallmarks of basic antitrust law. The case, Fashion Originators' Guild v. Federal Trade Commission, 312 U.S. 457 (1941), concerned an association of manufacturers of women's garments that boycotted and refused to sell to retailers who dealt in "pirated" fashion designs. In addition, the association compiled lists of "non-cooperative retailers," to whom no sales could be made and regulated terms of sale, days upon which special sales could be held, and other anticompetitive acts.

The Supreme Court held that the conduct of the Guild constituted a horizontal restraint of trade in violation of the Clayton and Sherman Acts. As the Court noted, the Guild's conduct --

> narrows the outlets to which garment and textile manufacturers can sell and the sources from which retailers can buy; subjects all retailers and manufacturers who decline to comply with the Guild's program to an organized boycott; takes away the freedom of action of members by requiring each to reveal to the guild the intimate details of their individual affairs; and has both as its necessary tendency and as its purpose and effect the direct suppression of competition from the sale of unregistered textiles and copied designs.

312 U.S. at 465.

Not only did the Court find that the Guild had violated the antitrust laws, it found that the violations were so basic as to constitute _per se_ violations, making their justifications irrelevant. 312 U.S. at 468.

The instant case falls directly in line with _Fashion Originators'_. Here, the subject order prohibits exactly the same type of horizontal agreements that would have the effect of shutting out uncooperative competitors from participation in traveling exhibits, compiling an "uncooperative" manufacturers list, restricting the number of shows, dictating contract terms between salespeople and manufacturers and other arrangements whose intent and effect would be to lessen competition. And, unlike the conduct that gave rise to the _Fashion Originators'_ decision, which was intended to prevent unfair pirating of apparel and textile designs, the conduct prohibited by the subject order has as its only purpose the exclusion of competitors.

The fact that the restraints might not today be as effective at totally restricting retailer access to apparel sources as they were twenty years ago does not make them less a violation of the antitrust laws. Further, the fact that the market may have

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changed to some extent in the apparel industry is equally i   e-
vant to Petitioner's case, because the conduct prohibited by the order would, for the most part, constitute per se antitrust violations, obviating the need to consider the reasonableness of the conduct. In any event, the justifications are without merit. They are not designed to make the market more efficient but, rather, to directly suppress competitors and stifle competition and further undercut the small manufacturer.

Much more recently, the Court of Appeals for the Fifth Circuit upheld a Commission order which held that a group of franchised stores had boycotted suppliers who refused to meet price terms demanded for participation in a trade show. Gibson v. Federal Trade Commission, 682 F.2d 554 (5th Cir.1982). Again, the similarities between that case and the instant case are clear. And, like the instant case, despite the fact that the stores involved in the boycott made up a relatively small percentage of the market for the victimized suppliers, the per se nature of the organized boycott made such a consideration irrelevant.

In the face of the strong case precedent that supports the continuing validity of the Commission order, Petitioner has failed to cite a single case to justify its position that the prohibited conduct no longer would violate the antitrust laws. It must be stressed that Petitioner acknowledged the anticompetitive nature of its actions when the case was first heard by the Commission but justified them by claiming to be a labor organization exempted from the antitrust laws — a claim soundly rejected by the Commission and by the U.S. Court of Appeals for the Fifth Circuit. 479 F.2d 139 (1973), cert. denied, 414 U.S. 1004 (1973).

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The only justification raised by Petitioner supporting modification of the order is the increased competition in metho of distribution within the apparel industry. In fact, according to Petitioner, because of these market changes, those whom Petitioner services -- the small manufacturers -- are themselves the victims of the anticompetitive acts of others in the industry. If this could be documented -- and it has not been -- then the remedy should be against those who are acting in an anticompetitive fashion rather than the Commission's sanctioning of boldly anticompetitive acts in retaliation. As the Supreme Court stated, in discussing the issue of wrongful style pirating in the *Fashion Originators'* case,

> Even if copying were an acknowleged tort under the law of every state, that situation would not justify Petitioners in combining together to regulate and restrain interstate commerce in violation of Federal law.

312 U.S. at 468.

C. Commission Must Not Reverse Its Legislative Position Regarding Sales Representatives' Contract Rights

In seeking Commission approval of standardized written contracts between sales representatives and manufacturers, Petitioner is trying to accomplish administratively what it has failed to accomplish legislatively. As candidly admitted by Petitioner in its recent petition --

> NAWCAS and its successor, the Bureau of Wholesale Sales Representatives, working within the constraints of the order have sought both federal and state legislation to remedy the problem. As a result, a few states have enacted legislation seeking to protect the

sidering such legislation. These statutes are not unlike various state laws protecting franchisees and/or distributors, or for that matter, petroleum dealers. But the net result is far from satisfactory and the protection afforded is literally spotty.

NAWCAS Petition, at 39. Petitioner does not mention the fact that the restrictions with regard to written contracts, for example, benefit only those imposing the restrictions -- not the manufacturers, which Petitioner purports to be representing.

In fact, legislation supported by Petitioner, entitled the "Sales Representatives Contractual Relations Act," was considered in both the House of Representatives and Senate during the 97th and 98th Congresses (H.R. 3591 (98th Congress); S. 1399 (97th Congress)). Despite hearings and repeated efforts by its supporters, Congress has repeatedly refused to enact such legislation. In fact, no bill has ever been reported by any subcommittee during the legislation's ten-year odyssey in Congress, and sponsorship declined by nearly two-thirds in the last Congress. Now, Petitioner is seeking Commission authorization for a private regulatory scheme that Congress would not, by government edict, enact.

The Commission is firmly on record in opposition to the proposed legislation because of its anticompetitive and anticonsumer effects. On August 1, 1983, Chairman Miller wrote to the House Committee on Energy and Commerce, noting the Commission's strong opposition to the legislation:

> . . . [O]n balance, and despite the possible benefits of required disclosure, the Commission believes that the enactment of H.R. 3591 would have serious anticompetitive effects producing marketing inefficiencies that would be costly to consumers. For this reason, the

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> Commission urges that the proposed legislation be examined with particular care given that the social costs inherent in restricting normal contracting processes and the inefficiencies and higher prices likely to result from the enactment of the bill do not appear to be offset by any expected benefits.

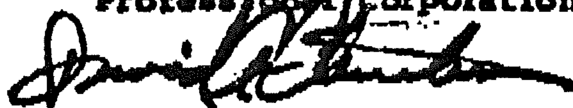
Petitioner has failed to marshall any evidence or legal arguments to justify a Commission reversal, either of its long-held legislative position on this issue or its earlier administrative order.

CONCLUSION

For the reasons discussed, FAM believes that the subject order remains as valid today as it was when it was issued in 1971. Because Petitioner has produced no evidence of changed facts or law that would warrant reopening the proceeding and modifying the order, we respectfully urge that the request be denied.

Respectfully submitted,

BUCHANAN INGERSOLL
Professional Corporation



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