

ADJUSTMENTS AND OTHER SPECIAL PROBLEMS UNDER THE GENERAL CEILING PRICE REGULATION†

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I

INDIVIDUAL ADJUSTMENT PROBLEMS

The GCPR itself contained only one provision for the adjustment of ceiling prices under the freeze. This applied to processors and resellers of agricultural commodities selling below parity and was provided to conform to the provisions of the Defense Production Act relating to such commodities.¹ The GCPR contained no general adjustment provision. Within a few months of the freeze, however, the need for individual adjustments to meet a number of different problems became apparent, and regulations were issued to authorize such adjustments.

The first supplementary regulation to the GCPR provided for the relief of hardship where the GCPR ceiling price was impeding the supply of essential commodities or services under defense contracts or subcontracts. Several supplementary regulations to the GCPR were issued to remedy distortions in the price structure frozen by the GCPR. A number of regulations were issued to resolve conflicts between the GCPR and the provisions of state and federal laws.² Provisions for individual

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¹ Pursuant to Sec. 402(d)(3) of the Defense Production Act of 1951 (64 STAT. 803 (1950), 50 U. S. C. App. §2102(d)(3) (Supp. 1952)) agricultural commodities with prices below the legal minima established by that section were exempted from the GCPR. These commodities were listed in Section 11 of the GCPR (16 FED. REG. 808 (1951)) and under that section processors and distributors were permitted to increase their ceiling prices by the dollars-and-cents amount of any increase in the cost to them of a listed agricultural commodity or a product processed from such a commodity. Section 11 did not, however, require a decrease in ceiling price if a cost later decreased. Compare SR 63 to the GCPR which required such a decrease. 16 FED. REG. 9559 (1951), 17 *id.* 446 (1952). As to this and other aspects of Sec. 11, see Interpretations, OPS Loose Leaf Serv., 42 Reg 211.1 *et seq.*; 16 FED. REG. 4192 (1951), 17 *id.* 11442 (1952), 18 *id.* 625 (1953). A prohibition on "inventory windfalls" had been included in Sec. 11(b), applicable to processors, by Amendment 13 to the GCPR. This was deleted with respect to sales on commodity exchanges by Amendment 14 and completely eliminated by Amendment 17. 16 FED. REG. 5051, 5119, 6774 (1951). Amendment 1 to the GCPR had added a provision limiting adjustments by a reseller to cases in which the processor had increased his price under Sec. 11(b). This provision was deleted by Amendment 13 to permit resellers to pass through processors' increases under CPR 22. 16 FED. REG. 1503, 5051 (1951).

² *State fair trade acts:* GCPR, SR 19, 16 FED. REG. 3387, 3651 (1951). *State minimum price laws:* GCPR, SR 16, 16 FED. REG. 3011 (1951), revoked by GCPR, SR 63, 16 FED. REG. 9559 (1951), 17 *id.* 446, 893 (1952); GCPR, SR 23, 16 FED. REG. 3832 (1951); GCPR, SR 53, Rev. 1, 17 FED. REG. 4649, 4889, 5427 (1952); GOR 32, 17 FED. REG. 6583 (1952), pursuant to Sec. 402(l) of the Defense Production Act, added as part of the 1952 Amendments, and GOR 39, 17 FED. REG. 10405 (1952), pursuant to the amended Sec. 402(d)(3) of the Act. *Federal antitrust laws:* GCPR, SR 22, 16 FED. REG. 3831 (1951), superseded by GOR 18, Rev. 1, 17 FED. REG. 4236 (1952). *Robinson Patman Act;* GOR 18, 16 FED. REG. 8830, 8934 (1951), 17 *id.* 4236 (1952).

hardship adjustment and other types of individual adjustments were developed to deal with the problems of sellers who remained under the GCPR for more than an interim period, and individual adjustment provisions were included in many of the ceiling price regulations issued by OPS subsequent to the GCPR. The supplementary regulations to the GCPR issued to deal with the problem of essential supply and the correction of distortions under the freeze have been selected for discussion here since these are problems of a type which may arise immediately upon the issuance of a general freeze regulation.

A. Essential Supply—Defense Procurement

Supplementary Regulation 1 to the GCPR, issued six days after the GCPR itself, dealt with sales to defense agencies or to persons holding defense contracts.³ The regulation exempted an extensive list of commodities and services, in general of a purely military nature, when sold to defense agencies and their suppliers, and contained a general exemption of commodities and services sold under secret contracts and developmental defense contracts. Certain additional commodities were exempted on a temporary basis.⁴ In addition, the regulation contained several provisions designed to minimize any interference with defense production which might be caused by the general freeze. Special provisions were made for the purchase of strategic and critical materials and other emergency purchases, and a hardship adjustment was provided for individual firms selling essential commodities under a defense contract or subcontract.

The individual hardship adjustment provision was contained in Sections 10-13 of SR 1. It permitted adjustment of the ceiling price for the sale under a defense contract or subcontract of any commodity or service essential to the defense program where the ceiling price impeded the production or distribution of the commodity or service. An applicant was required to state his ceiling price, the requested adjusted ceiling price, and the facts showing the nature and cause of the hardship. In addition, a certificate was required from the defense agency concerned, stating that the subject matter of the application was essential to the defense program and that the ceiling price would impede supply. Contracts at the requested ceiling price were permitted after an application had been filed; deliveries under such contracts could also be made, but payment at the higher price was not permitted unless and until an adjustment was granted. In emergency situations in which there was no time to submit an application, Section 9 provided an exemption from the GCPR where the defense agency found that immediate delivery was imperative and that it was impossible to secure immediate delivery at the ceiling price. In such cases, the defense agency was required promptly to file with OPS a statement of the facts of the case.

From the summary above, it will be seen that the individual hardship adjustment provision of SR 1 was vague both as to the standard to be applied in acting on appli-

³ GCPR, SR 1, 16 FED. REG. 1006 (1951).

⁴ See pp. 515-520, *supra*.

cations and as to the information to be supplied by the applicant. This can be seen most clearly by comparing its provisions with those of General Overriding Regulation 29, issued May 23, 1952,⁵ which embodied the developed thinking of the agency with respect to the standards for essential supply adjustments. However, with essential items of a purely military nature exempt under SR 1 and special provisions made in SR 1 for certain other items of defense procurement, only a relatively small number of applications was received under the individual adjustment provision, and the problems of its vagueness therefore did not become critical. Had they become so, it would have been necessary at an earlier date to develop the essential supply standards of GOR 29.

B. Correction of Distortions

A general freeze regulation such as the GCPR issued to check an inflationary movement of prices which has been under way for some time can be expected to halt many prices in positions out of line with their normal relationships to other prices and to costs. This out-of-lineness can be reduced to some extent by the terms of the freeze itself. The provisions of Section 3(a) and 3(b) of the GCPR⁶ were a significant step in this direction. Further to eliminate distortions under the freeze, several supplementary regulations to the GCPR were issued, SR 26 and SR 27,⁷ relating to special deals and introductory offers in effect during the base period, and SR 29 concerned with replacement squeezes on resellers.⁸

The GCPR did not itself contain any adjustment provision for the correction of distortions. The GCPR in this respect may be contrasted with the GMPR, the general freeze regulation issued by OPA.

Section 18(a) of the GMPR as issued in April 1942 permitted a retailer to apply for an adjustment if his maximum price was abnormally low, in relation to the maximum prices of other retailers, to such an extent as to constitute a hardship. In July 1942 a similar adjustment was permitted for sellers other than retailers where the adjustment would not increase retail prices. The processing of the large volume of applications filed under these provisions proved a heavy burden on the agency and, after these adjustment provisions had served their initial purpose, a deadline was set at November 30, 1942, after which no further applications for such abnormality adjustments were accepted.⁹

OPS, with only the beginnings of a staff in January 1951, was reluctant to

⁵ 17 FED. REG. 4762, 11229 (1952).

⁶ See pp. 522-531, *supra*.

⁷ GCPR, SR 26, 16 FED. REG. 4126 (1951); GCPR, SR 27, 16 FED. REG. 4617 (1951). The adjustments permitted by SR 26 were substantially the same as those provided for by OPA in Sec. 4(b) of the GMPR, added to that regulation by Amendment 14.

⁸ 16 FED. REG. 5011 (1951).

⁹ For an analysis of the problems encountered in processing these abnormality adjustments and an assessment of their value, see McMillan, *Adjustment of Abnormally Low Prices Under the General Maximum Price Regulation*, in PROBLEMS IN PRICE CONTROL: PRICING STANDARDS, GEN. PUB. NO. 7, OPA HISTORICAL REPORTS ON WAR ADMINISTRATION 421-444 (1947); and N. L. NATHANSON AND HAROLD LEVENTHAL, PROBLEMS IN PRICE CONTROL: LEGAL PHASES, GEN. PUB. NO. 11, OPA HISTORICAL REPORTS ON WAR ADMINISTRATION 105-106 (1947).

engage in a wide scale program of individual adjustments. The main emphasis was rather directed to the development of regulations to replace the freeze. In the field of manufacturing generally, CPR's 22¹⁰ and 30¹¹ and other regulations were developed to replace the price structure under the freeze with a completely new price structure related to prices in effect prior to June 24, 1950. Sellers of services were covered by a general regulation, CPR 34,¹² which contained its own individual hardship adjustment provisions. Large groups of resellers were covered by tailored regulations; CPR 7¹³ for department stores; CPR 11¹⁴ for restaurants; CPR's 13¹⁵ and 17¹⁶ for retailers and wholesalers of petroleum products; CPR's 14,¹⁷ 15,¹⁸ and 16¹⁹ for wholesalers and retailers of dry groceries and perishables; and CPR's 24,²⁰ 25,²¹ and 26²² for wholesalers and retailers of beef.

For resellers remaining under the GCPR, SR 29 to the GCPR afforded somewhat more liberal treatment than was available under OPA's abnormality adjustments. As explained below, SR 29 in effect permitted the reseller to realize his "normal" margin on each of his products. No showing of an abnormally low ceiling or of hardship was required. SR 29 did not require the filing of any applications or reports; thus the workload occasioned by OPA's abnormality adjustments was avoided.

As indicated above, SR 29 dealt with the problem of the "replacement squeeze" which arises when, after a period of rising prices, a regulation is issued freezing the prices of manufacturers, wholesalers, and retailers in effect during the same base period. Thus, for example, a reseller who did not purchase from a particular supplier during the latter part of the base period may find that the supplier put a price increase into effect during that time and therefore has a ceiling price higher than the price at which the reseller last purchased from him. Or a reseller may have received notice of an increase in the supplier's price during the base period but may have postponed raising his own price until his inventory, purchased at a lower price, was exhausted. In such cases, when his inventory is exhausted, the reseller may find himself in a "replacement squeeze" in which his frozen price does not yield an appropriate margin over his new cost.

A margin type of price control for resellers, of course, avoids this problem, and regulations of this type were issued shortly after the GCPR covering resellers in several important areas. SR 29 was issued as an interim regulation to solve the replacement squeeze problem for resellers remaining under the GCPR, pending the development of tailored regulations. While such regulations were later issued for resellers in many areas, some resellers remained permanently under the GCPR.

The provisions of SR 29 relating to replacement squeezes under the GCPR were contained in Section 3 of the regulation. This section permitted an adjustment where the reseller's suppliers had been frozen by the GCPR at a price which was higher than the reseller's "base period cost" of the commodity concerned, and where, as a

¹⁰ 16 FED. REG. 3562 (1951).

¹³ *Id.* at 1872 (1951).

¹⁶ *Id.* at 3033 (1951).

¹⁹ *Id.* at 2750 (1951).

²² *Id.* at 3704 (1951).

¹¹ *Id.* at 4108 (1951).

¹⁴ *Id.* at 2391 (1951).

¹⁷ *Id.* at 2725 (1951).

²⁰ *Id.* at 3721 (1951).

¹² *Id.* at 4446 (1951).

¹⁵ *Id.* at 2628 (1951).

¹⁸ *Id.* at 2735 (1951).

²¹ *Id.* at 3739 (1951).

result, the supplier's new price to the reseller was higher than the reseller's base period cost. "Base period cost" was defined as the net invoice cost shown on the last invoice which the reseller received from any of his suppliers of the commodity prior to the time when the reseller first put into effect the selling price at which he himself was frozen by the GCPR. The reseller then determined the percentage markup which his frozen price yielded over his base period cost and determined a recalculated ceiling price by applying this markup to the last invoice for the commodity which he received prior to May 28, 1951, the date on which SR 29 was issued. If at that time he was purchasing the same commodity from more than one supplier, a separate recalculation was made on the basis of the last invoice received prior to May 28, 1951, from each supplier. If none had been received from a particular supplier prior to May 28, 1951, then the first invoice received after that date was used. Provisos were included that the invoices used in these recalculations must represent purchases which were typical with respect to terms and quantity and that a markup determined with respect to a supplier of one class could not be applied to the invoice cost of a purchase from a supplier of a different class.

Where a wholesaler recalculated an adjusted ceiling price under SR 29 to relieve himself of a replacement squeeze, this in turn sometimes created a replacement squeeze on retailers purchasing from him, and Section 5 of SR 29 permitted a reseller in such a case to recalculate his ceiling price by applying to his new net invoice cost the percentage markup he had been receiving on the commodity prior to the increase in his cost.

SR 29 would have been more satisfactory if it had been practicable to specify that the seller's normal pre-Korean markup be used in making the calculations. However, it was believed that many resellers would not have adequate records going back that far. Consequently, an attempt was made to define a markup in terms of base period experience. The technique used in Section 3 probably was the best that could be devised under the circumstances, but obviously yielded an abnormally high markup where the reseller had raised his prices before receiving an invoice reflecting an increase in his own cost. Thus, a reseller might have raised his prices in anticipation of a price increase by his suppliers, or upon receiving notification of an increase by his suppliers but before making a purchase at the increased price, or simply to charge what the traffic would bear in the inflationary market existing during the last six months of 1950.

II

TRANSPORTATION TERMS OF SALE

During the GCPR base period, different sellers had in effect different methods of handling transportation charges. When the GCPR froze the price charged during the base period, it became necessary to determine the effect of the freeze upon these varying practices. The interpretation adopted by OPS,²³ which followed the interpretation adopted by OPA,²⁴ was that the seller's base period method of treating

²³ Interpretation 1 to GCPR, 16 FED. REG. 3113 (1951).

²⁴ 2 OPA SERVICE 11:979, par. 11-14.

outbound transportation costs was a term or condition of sale which was included in his ceiling price. Thus a seller who during the base period sold on an f.o.b. price basis had a ceiling price at the f.o.b. point, and the purchaser was considered to have purchased the commodity at that point. Where a seller sold on a delivered price basis, the seller's ceiling price applied to the delivery point and was the total amount that could be charged for the commodity delivered to that point. In this situation, outbound transportation costs were treated as one of the costs incurred by the seller in selling his commodity, and were handled in the same manner as any other cost element which he had to recover within his ceiling price. This meant that increases in transportation costs had to be absorbed by the seller whose ceiling price was on a delivered basis.

If a seller listed his price on an invoice to his customer as a "delivered price," under Interpretation 1 such sales could nevertheless be considered to be f.o.b. sales, and the seller could pass on increases in outbound transportation costs, where such prices actually were computed upon the basis of an f.o.b. price, adjusted for the actual cost of making delivery to each purchaser. The result in such cases was the same as in cases where the seller invoiced on an f.o.b. basis and, acting as the buyer's agent, billed the latter in addition for the cost of shipping the goods to their destination on the buyer's behalf.

On the other hand, even though the seller quoted an f.o.b. price plus transportation charges, under Section 2(c) of Interpretation 1 such a sale would not be considered as an f.o.b. sale where the transportation charge did not represent the actual transportation cost incurred by the seller for sales to that particular purchaser. Such a sale would be held to be on a delivered price basis.

For example, a manufacturer of linseed meal had billed his customers at an f.o.b. plant price plus the "lowest applicable carload rail freight rate from the plant to the point of delivery to the customer." However, the actual transportation cost incurred by the manufacturer on each shipment was lower than the rate which he charged the buyer because of the use of "transit balances." The manufacturer was able to ship the linseed meal to his customers at a rate computed by subtracting the inbound freight cost paid on flaxseed from the through rate from point of origin of the flaxseed to the point of destination of the linseed meal. Since the freight rate which the seller charged the buyer did not represent the actual cost of making delivery to each purchaser, the seller was not permitted to pass on any freight rate increase to the buyer.²⁵

In view of the basic concept of the GCPR that a seller could not charge more than he did in the base period, sellers were not permitted to change the terms and conditions applicable to their ceiling prices in any manner which resulted in buyers being required to pay higher prices. This rule applied to transportation terms and conditions of sale as well as others.

Two situations, for example, were presented in this respect. In one, a seller, who

²⁵ Interpretations, OPS Loose Leaf Service, 42 Reg 11:200.2a.

during the base period sold on an f.o.b. basis, later wished to calculate an average freight allowance, add this to his f.o.b. price, and arrive at a uniform delivered price to all purchasers. This would have meant that nearby buyers for whom freight costs were less than the average, would have been required to pay more than they did during the base period. In the second situation, a seller, who had sold at a delivered price during the base period, subsequently wished to subtract his average freight cost from his base period delivered price and arrive at a uniform f.o.b. shipping point price. This would have meant that more distant buyers, for whom freight costs were more than the average, would have been required to pay more than they did during the base period. Neither of these changes was permitted under the original terms of the GCPR.

The freezing of transportation terms and conditions of sale, as well as other terms and conditions, is of particular importance in the initial period of a general freeze. This approach was felt necessary both by OPS and by OPA. As time went on, however, many problems connected with transportation costs and terms received special treatment in tailored regulations or supplementary regulations dealing with particular industries or groups of sellers.

Thus, in some later regulations increases in transportation costs, particularly inbound transportation costs, as well as increases in other costs, were reflected in increases in ceiling prices where it was found that price increases were necessary to maintain ceiling prices that were generally fair and equitable. Especially was this true in cases involving relatively heavy commodities where transportation costs represented a high proportion of all costs and margins were too narrow to permit absorption of substantial increases in transportation costs.²⁶ And in September 1952 price increases for retailers and wholesalers under the GCPR were authorized to reflect increases in inbound transportation costs since the base period, because of the belief that the increases which had occurred could not be generally absorbed.²⁷

The difference in treatment of those sellers who were frozen to base period f.o.b. prices and so were able to pass on to buyers all subsequent increases in outbound transportation costs, as against those sellers who were frozen to base period delivered prices and who were therefore required themselves to absorb subsequent increases in outbound transportation costs, was eliminated in some industries by the issuance of tailored regulations which put all sellers of the same commodities on the same ceiling price basis. Many sellers continued subject to the GCPR, however, and for these sellers there was an unevenness of treatment that seemed less equitable the further the base period receded into the past and the more transportation rates were permitted to increase by action of the Interstate Commerce Commission and otherwise. Accordingly, in October 1952, manufacturers frozen on a delivered price basis were put on an equal footing with f.o.b. sellers in so far as

²⁶ For example, mixed fertilizers, SR 114 to GCPR, 17 FED. REG. 7393 (1952); and certain building materials, SR 106 to GCPR, 17 FED. REG. 5612 (1952).

²⁷ SR 120 to GCPR, 17 FED. REG. 8618 (1952). Similar relief was granted retailers under CPR 7 by SR 5 to CPR 7. 17 FED. REG. 5420 (1952).

outbound transportation costs were concerned, by a supplementary regulation which allowed delivered price manufacturers to adjust their delivered ceiling prices to reflect increases in outbound transportation costs.²⁸

In July, 1952, manufacturers of a limited number of consumer items were given a method whereby they could translate their f.o.b. ceiling prices into delivered ceiling prices by calculating an average outbound freight charge which they could add to the f.o.b. ceiling prices. However, in making such a charge, these manufacturers were limited to freight rates in effect on March 15, 1951.

III

TREATMENT OF TAXES

The original tax provision of the GCPR, Section 20, provided:

In addition to your ceiling price, you may collect the amount of any excise, sales or similar taxes paid by you as such only if, during the base period, you stated and collected such taxes separately from your selling price. . . .

The result of this provision was that a seller who in the base period had not stated and collected his taxes separately from his selling price could not pass on to his customers any subsequent increase in such taxes, but was required to absorb the increase. This was consistent with the general principle followed in the GCPR that a seller could not increase his ceiling price on any commodity to compensate for increases in any of his costs which had been included in the determination of his ceiling price.

If, however, the seller in the base period had separately stated and collected the taxes, he could subsequently collect, in addition to his ceiling price, the actual amount of those taxes paid as such by him at any given time. As a result, if the base period tax was subsequently increased, such a seller could pass on the increase to his customers, and in the event of a tax decrease only the decreased tax could be passed on.

In the case of excise, sales or similar taxes, imposed for the first time after the GCPR base period, Section 20 provided that the seller was permitted to collect the amount of a new tax imposed for the first time after January 26, 1951, in addition to his ceiling price, if not prohibited by the tax law, provided that he separately stated the amount of such tax.

A number of interpretative problems arose under Section 20 as originally drafted. Some cases presented the question whether a particular tax constituted an "excise, sales or similar tax," within the meaning of Section 20. The term excise, sales or similar taxes was interpreted as applying to a tax which was incidental to the sale or delivery of a commodity, and which was levied on quantity, value or price. It also covered taxes imposed for the privilege of engaging in a business or occupation, and measured by gross receipts or gross income. However, the term was not

²⁸ SR 122 to GCPR, 17 FED. REG. 8845 (1952). Similar relief was granted manufacturers under CPR 22 and CPR 30, as well as several other regulations utilizing base period freeze techniques.

applicable to a lump sum license tax amounting to a stated sum per year, or to income or related taxes which were based upon the seller's profits.

Section 20 in its original form provided relief only to those sellers who paid the tax as such. It did not permit a reseller to add to his ceiling price a tax imposed upon his supplier and passed on by the latter.

In the Revenue Act of 1951, Congress made several changes in excise taxes, including increases and decreases in existing taxes, as well as the imposition of new taxes and the elimination of previous taxes. These substantial changes in the tax structure impelled a general revision of Section 20, with two types of changes receiving the greatest emphasis. It was felt that it was unfair to limit relief in the case of tax increases to those sellers who happened to have separately stated and collected such taxes in the base period. In addition, it was felt that wholesalers and retailers were entitled to relief where the newly increased manufacturers' excise taxes were passed to them by their suppliers.

Accordingly, Amendment 23 to the GCPR was issued on November 1, 1951, amending Section 20 in certain major respects.²⁹ Under the amended Section 20, excise, sales or similar taxes were handled as follows:

(1) In the case of a tax paid as such by a seller who in the base period separately stated and collected the tax, such a seller could continue to collect the amount of the tax in addition to his ceiling price. If such tax were increased, or if a new tax became effective, after January 26, 1951, the amount of such increased or new tax could be collected in addition to the ceiling price. Although not expressly stated, it followed that where such a tax was decreased, such a seller could collect only the decreased amount, in addition to his ceiling price (Section 20(a)).

(2) In the case of a wholesaler or retailer who had not separately stated and collected the tax in the base period, if the amount of a tax paid as such by him and included in the ceiling price was increased after January 26, 1951, or if a new tax was thereafter imposed, he could increase his ceiling price to reflect the appropriate amount of such increased or new tax. If such a tax was reduced or eliminated after January 26, 1951, he was required to reduce his ceiling price to reflect the appropriate amount of such reduction or elimination (Section 20(b)).

(3) Section 20(c) made a similar provision for manufacturers who had not separately stated and collected the tax during the base period.

(4) Section 20(d) provided that where the net invoice cost of a commodity purchased by a wholesaler or retailer for resale was changed by reason of the imposition or elimination of or increase or decrease in a manufacturers' excise tax, the reseller must recalculate his ceiling price under Supplementary Regulation 29,³⁰ which called for the application of markup to his total cost, including the excise tax. This provision was equally applicable where the reseller's supplier separately stated the tax.³¹

²⁹ 16 FED. REG. 11178 (1951).

³⁰ *Id.* at 5011 (1951).

³¹ See Sec. 22 definition of "net invoice costs," as amended by Amendment 23, to include separately stated manufacturers' excise taxes, except in the case of special commodities listed in Sec. 20(e).

The markup technique was not, however, permitted in the case of certain listed commodities where it was known that manufacturers' excise taxes were generally reflected in wholesale and retail prices only in the exact amount of the tax, and where accordingly the Herlong Amendment, Section 402(k), Defense Production Act of 1950,³² as amended, did not require the allowance of markup on excise tax increases. In the case of these specified commodities (*i.e.*, photographic apparatus, film, and equipment), Section 20(e) provided that wholesalers and retailers might increase their ceiling price by the exact amount of any increase in or new manufacturers' excise tax reflected on the invoice to them. It also required them to decrease their ceiling price by the exact amount of the decrease in or elimination of any such tax reflected on such invoice.

IV

EVASION

Section 18 of the GCPR contained the following prohibition against evasion:

Any practice which results in obtaining indirectly a higher price than is permitted by this regulation is a violation of this regulation. Such practices include, but are not limited to, devices making use of commissions, services, cross sales, transportation arrangements, premiums, discounts, special privileges, tie in agreements and trade understandings.

The question arose in preparing the evasion section as to whether a general prohibition would suffice, or whether a number of specific evasion practices should be listed. There was a danger that if OPS failed to prohibit specifically any evasive practice, the courts might hold that such a practice was not a violation of the GCPR. This uncertainty resulted from the decision of the United States Supreme Court in the case of *M. Kraus & Bros. Inc., v. United States* (327 U. S. 614 (1946)), in which the Court held that a tie-in sale of chickens and chicken parts (feet and skin) was not a violation of Revised MPR 269, issued by OPA, where the chicken parts had some value and where the regulation did not expressly prohibit tie-in sales. The line of cases following the *Kraus* case made it clear that it was not sufficient merely to state a general prohibition against evasive practices. Rather it was necessary to specify at least the broad areas of evasive practices which were to be prohibited. Since Section 18, although phrased in broad, general terms, did set forth the various types of evasive practices which were proscribed, it appeared to meet the standards set forth by the courts.³³

On the other hand, there was a danger that if OPS became too specific, and attempted to list all the known evasive practices, the courts might hold that the list was all inclusive, and that any practices not specifically listed were not violations of the regulation. Consequently, OPS would be forced constantly to amend the evasion section to prohibit new evasive practices as they were discovered.

Another danger in specific listing of evasive practices was that either through

³² 65 STAT. 134 (1951), 50 U. S. C. App. §2102(k) (Supp. 1952).

³³ OPS MANUAL Pt. 5, c. 3, §2.27, *Evasion Provisions in OPS Regulations*, April 11, 1951.

inadvertence, or because of differences in industry practices, certain practices might be included in the evasion section of one regulation and omitted from another. During OPA days, where a specific evasive practice was listed in one regulation and omitted from another, the courts sometimes regarded the omission as an indication of intent by OPA.

A form section on evasions suggested for use in subsequent regulations sought to avoid these dangers.³⁴ This section was very similar to Section 18 in that it included a general prohibition paragraph listing the various types of evasive practices which were proscribed. In addition, there was a second paragraph, in which specific evasive practices could be listed, with, however, a precautionary statement that they were only some of the prohibited practices and that they were listed only to lessen the frequency of interpretative inquiries which experience indicated were likely to be made in a particular industry under the evasion provision.

Tie-in sales were frequently used as an indirect attempt to evade ceiling price restrictions. A tie-in sale was a sale in which the seller required the buyer to purchase another commodity or service in order to obtain the commodity the latter desired. Even though the seller sold both commodities or services at or below the ceiling price for each, the result was that the buyer was forced to buy something which he did not desire, and this was held to be prohibited under the evasion section where such a requirement was not in effect during the base period.

The following is an example of a tie-in sale. During the base period, a manufacturer had sold baling machines and safety devices separately. Subsequently, the manufacturer decided to sell the machine and safety device only as a unit and at a price which equaled the total amount previously charged for each item separately. Unless the purchaser had the option of purchasing the baling machine and safety device separately at no more than the ceiling price for each, such a proposal constituted a tie-in sale, in violation of Section 18.³⁵

On the other hand, where a seller during the base period had sold a brush and comb only as a combination set, it would not be a prohibited tie-in sale to continue to offer only the combination under the GCPR.

Many sellers had adopted various promotional schemes to encourage the sale of a commodity. Some of these plans bordered closely upon a tie-in sale. For example, a seller of washing machines charged a price for a washing machine which was within his ceiling price for that item, and in addition as a sales inducement he offered another commodity, such as soap flakes, at a bargain price which was lower than the prevailing price charged for soap flakes. The seller would not, however, sell soap flakes to a customer who did not purchase a washing machine.

It was necessary to examine the facts of each specific case of this kind to determine whether it constituted a violation of Section 18. If the seller was in the business of selling washing machines only, and if his purpose was not to sell soap flakes generally, but merely to employ the latter as a promotional device to encourage the

³⁴ OPS MANUAL Pt. 5, c. 7.

³⁵ Interpretations, OPS Loose Leaf Service, 42 Reg 11:218.5.

purchase of washing machines, such a plan was not considered a tie-in sale in violation of Section 18, provided that the sum collected for each item did not exceed the seller's appropriate ceiling price for such item. On the other hand, if it appeared that soap flakes were in short supply, and the sale of soap flakes at the price requested became the primary consideration of the seller, it would then be a violation for the seller to condition the delivery of soap flakes upon the purchase of a washing machine.

Another common evasive practice was the cross sale. A cross sale was one in which a seller agreed to sell one commodity at the ceiling price only on condition that the buyer sell back to him another commodity at a price below ceiling. This in effect constituted an over-ceiling charge for the first commodity. However, even where the buyer sold back the other commodity at its ceiling price, the transaction constituted a prohibited cross sale if the buyer was required to sell his commodity as a condition to purchasing the commodity he desired.

Section 19 of the GCPR, commonly referred to as the transfer of business section, provided:

Transfers of business or stock in trade. If the business, assets or stock in trade of any business are sold or otherwise transferred after January 26, 1951, and the transferee carries on the business, or continues to deal in the same type of commodities or services, in an establishment separate from any other establishment previously owned or operated by him, the maximum prices of the transferee shall be the same as those to which his transferor would have been subject if no such transfer had taken place, and his obligation to keep records sufficient to verify such prices shall be the same. The transferor shall either preserve and make available, or turn over, to the transferee all records of transactions prior to the transfer which are necessary to enable the transferee to comply with the record provisions of this regulation.

This section was believed necessary to prevent evasion of ceiling prices by changes in the legal entity operating a business. Obviously, the freezing of a seller's base period prices would have been rendered ineffective if that seller could ostensibly discontinue business but in reality reappear as a "new" seller seeking to establish ceilings under Section 6 or 7 of the regulation. The effectiveness of a freeze of base period prices would also have been seriously impaired if a base period seller had been allowed to shop around and buy up the business of another seller who had established relatively high base period prices, and then apply those higher prices to his own business. Section 19 was modeled on the transfer sections used by OPA.³⁰ Practically all of the regulations issued by OPS included transfer sections similar to Section 19.

A somewhat similar problem was presented in the case of coin vending machines. Under the usual contract arrangement, where the vending machine operator owned and replaced the commodity, and controlled and serviced the machine, he was regarded as the seller of the commodity, rather than the proprietor of the establishment where the machine was located, and his ceiling price for any given vending

³⁰ See NATHANSON AND LEVENTHAL, PROBLEMS IN PRICE CONTROL: LEGAL PHASES, GEN. PUB. NO. 11, OPA HISTORICAL REPORTS ON WAR ADMINISTRATION 71 (1947).

machine was the highest price at which he had operated a similar machine in the same establishment during the base period.³⁷ If the machine operator's ceiling price in a particular establishment was relatively low, there was a temptation on the part of the establishment-owner to terminate his relationship with that particular operator and to make a deal with a different machine operator who had no base period history in that particular establishment. The new machine operator would then be able to price under Section 6, under which he might conceivably obtain a higher ceiling price for the machine to be installed in such establishment, if the prevailing rates were higher for similar machines in similar establishments in that trading area.³⁸

In an effort to discourage such practices, which were characterized by the industry as "pirating," serious consideration was given by OPS at one time to the issuance of a special regulation governing sales from coin vending machines. The proposed regulation would have provided that no vending machine operated in a given establishment could charge more than the highest price which had been charged by any similar machine operated in the same establishment during the base period, regardless of ownership. For various reasons, the proposed regulation was never issued.

An effort was made to reach the same result by interpretation in the case of service vending machines, such as juke boxes, which were governed by CPR 34. In seeking to establish that the proprietor of the establishment was the seller of the service in such cases, it was argued that although the machine operator controlled the machine, replaced the records, and collected the machine "take," the establishment-owner in fact held himself out to his patrons as providing the service to them and therefore should be regarded as the seller of such service. This view was never adopted by the Chief Counsel.

Certain situations arose in which the question presented was whether OPS should prohibit a change in the seller's base period pricing practices, even though such a change did not actually result in consumers paying a higher price than in the base period. An illustrative case was that of a manufacturer of television sets who in the base period included a warranty on a mandatory basis. Although neither the set nor the warranty was separately available to the purchaser, the base period invoice showed a separately stated charge for the warranty. Subsequent to the GCPR, the manufacturer sold the identical set with the same mandatory warranty, under the same general terms. However, the invoice showed a higher separately stated charge for the mandatory warranty, with a lower separately stated charge for the television set itself. OPS ruled that the higher charge listed for the same warranty would constitute a violation only if the total amount charged for the set plus the warranty exceeded the total amount charged for the same set plus the

³⁷ The definition of "seller" in Sec. 22 of the GCPR stated that where a seller made sales or supplied services through more than one selling unit, each such separate place of business should be deemed to be a separate seller.

³⁸ Interpretations, OPS Loose Leaf Service, 42 Reg 11:203.9.

same warranty during the base period.³⁹ It was recognized that the latter situation might conceivably be regarded as involving an undesirable business practice, in that the customer might thereby obtain the impression that he was receiving a reduced price on the television set. However, since the practice was not regarded as one involving price stabilization principles, OPS did not assume jurisdiction.

V

SPECIAL TYPES OF AGREEMENTS—ADJUSTABLE PRICING

The prohibitions sections of the GCPR, Section 2(c), provided "you shall not sell . . . at a price exceeding the ceiling price established by this regulation." The definition of "sell" in Section 22 included "contracts and offers" to sell. The resultant limitation of contracts and offers to the ceiling prices *established by the GCPR* created a problem for a seller who found himself "squeezed" under the GCPR and wished to contract to sell at the ceiling price in effect at the time of delivery, in the hope that meanwhile a tailored regulation would be issued which would alleviate his situation. OPS ruled that such a contract clause was permissible⁴⁰ and, to make this quite clear, the definition of "sell" in Section 22 was amended to include the following provision:⁴¹

Nothing in this regulation shall be construed to prohibit the making of a contract or offer to sell a commodity or service at (a) the ceiling price in effect at the time of delivery or (b) the lower of a fixed price or the ceiling price in effect at the time of delivery.

Under clause (a) of the above amendment, it was held that a contract for future delivery was valid where it stated a fixed price no higher than the seller's existing ceiling, with a provision that "the seller reserves the right to increase the price stated herein to the ceiling price in effect at the time of delivery."⁴²

Although contracts to sell at a price within the seller's ceiling price *at the time of delivery* were thus approved, OPS rulings made it clear that a seller could not lawfully enter into a contract which provided for an upward adjustment in selling price *after delivery*, to reflect an increase in ceiling price after delivery, in the absence of authorization by OPS either in the form of an express provision in the regulation or a specific authorization issued to the seller by the Director or his delegatee.⁴³

A special type of contract which came to the attention of OPS represented an

³⁹ Interpretations, OPS Loose Leaf Service, 42 Reg 11:218.1.

⁴⁰ GCPR Interpretation 49, 17 FED. REG. 1521 (1952).

⁴¹ Amendment 6 to GCPR, 16 FED. REG. 2546 (1951).

⁴² GCPR Interpretation 50, 17 FED. REG. 2361 (1952).

⁴³ Some regulations specifically stated, in the "Adjustable Pricing" section, that such authorization might be given where a request for a change in the applicable ceiling price was pending, provided that certain stated criteria were met. However, specific approval by the Director or his delegatee was required in each case. On the other hand, the essential supply regulation, GOR 29, 17 FED. REG. 4762 (1952), expressly authorized sellers who were applying for an adjustment under that regulation to enter into such contracts after the application was filed, with the further provision that the price received for deliveries made subsequent to such application could not in any event exceed the ceiling price ultimately established by OPS. A similar provision was contained in SR 1 to the GCPR, discussed above.

effort on the part of the seller to avoid the effect of price controls upon a long-term contract for continuing future deliveries. The proposed contract fixed rates under a special formula, with a provision that if the seller's ceiling price at any time was lower than the rate called for in the contract, the buyer would pay only up to ceiling price at the time of delivery. However, it was also agreed that any difference between such payments at ceiling price and the total amounts called for in the contract would be handed over by the buyer in installments after price control terminated.

OPS ruled that such an agreement was invalid, since it called for deliveries to be made at an agreed price which was in excess of the seller's ceiling price. It was held that the fact that actual payment of that part of the agreed price which was in excess of ceiling was to be deferred until after termination of price controls, did not make the agreement any the less invalid.⁴⁴ If sellers had been permitted to exact agreements of this character from their buyers during the inflationary period, controls would have been rendered meaningless.

In the latter stages of OPS, after certain commodities had been exempted or suspended from control, the question was raised whether it would be illegal under OPS regulations for a buyer to make an additional payment to his supplier on account of a commodity which had been delivered to him prior to the exemption or suspension, where the total of the amounts previously paid for such commodity plus the additional new payment would exceed the seller's ceiling price as of the time the commodity was delivered. OPS took the position that if such an additional payment was made by the customer on a purely *voluntary* basis after controls had been terminated, and not pursuant to any agreement, understanding or arrangement entered into while controls were in effect, there would be no violation. This situation was distinguished from the one outlined in the immediately preceding paragraph, in that the subsequent additional payments were the result of a dealing at arm's length between the parties after controls were terminated, rather than under an agreement to which the buyer bound himself during controls, at a time when the buyer presumably did not have equal bargaining power.

⁴⁴ Interpretations, OPS Loose Leaf Service, 81 Trans 34:215.1.