ADDRESS

on

THE FEDERAL TRADE COMMISSION
BUSINESS AND THE CONSUMER

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It is a real pleasure for me to attend and participate in this session of the Marketing Institute, particularly since it is made possible through cooperation between an important institution of higher learning and a number of public spirited organizations of men and women actually engaged in the marketing field.

My subject is "The Federal Trade Commission, Business and the Consumer." Perhaps I should take them up in order and first describe to you somewhat generally what the Commission is, how it came about, and what it does. The Federal Trade Commission Act was passed by Congress in 1914, and it is one of those statutes ordinarily grouped under the term "antitrust laws."

The Act embodies a number of different approaches to the problems of maintaining fair competition, and, as a consequence, the Commission exercises several different functions.

The Bureau of Corporations, the Commission's immediate predecessor, was created in 1903 for the purpose of inquiring into corporate relationships and practices and the making of public reports. It was felt that if questionable practices could only be aired, direct government intervention would in many cases be unnecessary, because public opinion would require the voluntary elimination of bad practices. The investigative and reporting functions of the Bureau of Corporations were incorporated in Section 6 of the Federal Trade Commission Act. Under this section the Commission is authorized to gather and compile information concerning corporations engaged in interstate commerce, excepting banks and common carriers, publish such of this information as it deems expedient in the public interest and to submit recommendations for additional legislation in annual and special reports to the Congress.

Enactment of both the Federal Trade Commission Act and the Clayton Act followed President Wilson's message to Congress urging strengthening of the antitrust laws, and an inquiry on the part of the Senate Committee on Interstate Commerce extending from 1911 to 1913 and in many respects similar to that now being conducted by the Temporary National Economic Committee. In a brief but masterly report submitted in 1913 the Committee recommended among other things that the Bureau of Corporations be converted into an independent commission with power to inquire into business practices and to participate in the unscrambling of combinations found to be unlawful under the Sherman Act.

As finally enacted in September, 1914, the Federal Trade Commission Act included in Sections 6 and 7 much of what had been recommended by the Committee, with the addition of a number of other important functions.

At that time, Congress considered carefully whether the law should list and specifically proscribe all the business practices then considered to embody a tendency toward the restraint upon competition

prohibited in the Sherman Act; or whether a quasi-judicial commission should be empowered to deal with business practices under a wide standard of legality.

The final outcome was a compromise between the two points of view - in the Clayton Act, so-called tying or exclusive dealing contracts were specifically prohibited, along with certain price discriminations, the acquisition of capital stock of competing corporations, and certain types of interlocking directorates.

The committees considering the bills were of the opinion, however, that it would be an impossible task to write into a statute prohibitions against all the trade practices which were then, or might in the future, be considered harmful to the public or to competitors. Hence, in Section 5 of the Federal Trade Commission Act, the Commission was empowered broadly to prevent the use of "unfair methods of competition in commerce."

In March, 1938, the President approved the first direct amendments to the Federal Trade Commission Act. This amendatory legislation, known as the Wheeler-Lea Act, among other things, adds to Section 5 by making "unfair or deceptive acts or practices" unlawful in addition to "unfair methods of competition." The principal effect of this amendment is to remove any doubt that may have existed theretofore regarding the Commission's right to proceed against an unfair practice solely on the basis of injury to the general public and without additional necessity of showing injury to competitors.

An administrative procedure is set up in the organic act to make it possible for a commission of experts, with a highly trained staff, to evaluate the facts pertaining to particular trade practices and to pass upon their unfairness under a broad standard of legality, subject to the review of the courts. The courts, of course, have always considered ultimate determination of whether a practice is unfair in the light of the facts to be a legal question and, therefore, peculiarly a function of the judiciary. Consequently, the process of working out the application of Section 5 of the Federal Trade Commission Act to particular practices has been aptly described as "the gradual process of judicial inclusion and exclusion."

Over the past twenty-five years, a host of business practices have been examined and considered by the Commission. Many of these have been held by it to be unfair methods of competition and in only a few cases have these decisions been reversed by the courts.

Practices which have been held to violate Section 5 include, in addition to those which were known to Congress at the time of passage of the act, a number of schemes which were not and could not have been foreseen, as well as some modern refinements of the old ones. In importance the practices range from those involving dream books for guiding lottery players to price-fixing devices employed by entire industries which affect the whole country. In ingenuity they range from barefaced frauds to such novel devices as one worked out by merchants in a small town to minimize mail order competition by having the local movie theatre admit children upon presentation of a mail order catalogue,

with the effect of depleting the supply of catalogues in the hands of prospective customers.

While it is rather difficult to fit into pigeon holes all the practices which have been held to violate Section 5 of the Federal Trade Commission Act and to catalogue them on a sound basis of distinction, I will attempt to list briefly some of the categories. They are:

1. False and misleading advertising or misbranding of products as to composition, quality, purity, origin, source, properties or nature of manufacture.

2. Sale of rebuilt, second-hand, renovated or old products, or finished articles made from used materials, as and for new.

3. Use of containers or packages customarily associated in the minds of purchasers with standard weights or quantities when such weights or quantities are not therein contained.

4. Various schemes to create the impression in the mind of a customer that the terms of an offer of sale are unusually advantageous when such is not the fact. This classification includes misrepresentation of the regular price, or use of trade names or advertisements misrepresenting the business status of the seller.

5. Passing off articles as those of a competitor through appropriation or simulation of trade names, labels, dress of goods, etc.

6. Disparagement of the goods, services, financial condition or reputation of competitors, sometimes accomplished under the guise of tests or reports of supposedly disinterested agencies.

7. Threats of patent infringement suits or other court actions not made in good faith.

8. Use of concealed subsidiaries, ostensibly independent, to obtain competitive business otherwise unavailable.

9. Bribery of buyers or other employees of customers without the customers' knowledge or consent.

10. Procuring the trade secrets of competitors or inducing employees of competitors to violate employment contracts.

11. Use of schemes involving chance or lottery distribution of goods.

12. Boycotts or combinations of traders to prevent competitors from procuring goods on the same terms accorded them, or for the purpose of coercing competitors or manufacturers from whom they buy into adopting a policy considered desirable.

13. Cooperative schemes and practices for compelling wholesalers or retailers to maintain resale prices.

14. Combinations or agreements of competitors to enhance prices, maintain prices, bring about substantial uniformity in prices or to divide sales territories or cut off competitors' sources of supply.

15. Contracts or agreements among competitors to restrict exports or imports.

16. Payment of excessive prices for raw materials for the purpose and with the effect of eliminating weaker competitors dependent upon the same sources of supply.

There are three principal methods employed by the Commission in fulfilling its duty to prevent unfair business practices. One is by what is called stipulation procedure. When a practice is not tinged with fraud or monopolistic effect, and does not involve the dissemination of advertising of dangerous drug products, the Commission will usually offer a respondent the privilege of executing a formal agreement setting out the facts and undertaking to refrain from the questioned practices in the future. This procedure is employed, of course, only where there is no dispute as to the facts or the law and where the respondent is entirely willing to abandon the practice voluntarily. By far the largest number of violations are disposed of by means of such stipulations, since it is the Commission's experience that most business men are anxious to conform their practices to the highest standards.

In the event the Commission considers that a stipulation would not adequately protect the public interest or if there is any dispute or reservation on the part of the respondent, a formal complaint setting out the facts ascertained by the Commission in preliminary investigations and stating wherein the Commission believes the law to have been violated is issued and served upon the respondent. The procedure following complaint is very similar to that in the courts. The respondents are given every opportunity to answer the charges, and testimony and evidence may be presented at hearings before a trial examiner of the Commission. A report must be filed by the trial examiner on the evidence taken at the hearing before him, to which exceptions may be taken by the respondent or by the Commission's trial attorney, briefs are submitted and opportunity is given for oral argument of the issues before the entire Commission.

Based upon the public record thus accumulated, the Commission makes its decision, either dismissing the complaint or requiring the respondent to cease and desist from the practices found to be unlawful. Such orders must be accompanied by written findings of fact based upon the evidence at the hearings and the pleadings, and the respondent may appeal to the United States Circuit Court of Appeals for a review of the Commission's order. These courts have the power to affirm, modify or set aside the Commission's orders, and, of course, the proceedings in the circuit courts reviewing Commission orders may, and are, sometimes taken to the Supreme Court of the United States upon certiorari.

A third method of preventing unfair business practices is by means of the trade practice conference. This is a cooperative and voluntary

method of improving competition by working out with business trade practice rules designed to eliminate trade abuses.

When the majority of an industry desires to cooperate for this purpose, a conference may be held with members of the Commission's staff at which the problems of the industry are thoroughly discussed. These conferences are open and everyone interested is invited to attend. Following the conference a draft of proposed rules is published by the Commission and widely distributed. After a sufficient length of time to afford thorough consideration by everyone interested, public hearings are held at which suggestions and objections are heard. After this hearing, final rules are promulgated by the Commission and the industry is requested to cooperate in their observation.

The trade practice conference method provides for a pleasant, intelligent and inexpensive means of enforcing the law since it is cooperative and voluntary. Furthermore, the Commission, when proceeding under Section 5 against a single concern in an industry for use of an unfair business practice, has often met with the plea that competitors are likewise engaged and that an order to cease and desist against only one concern would place it at a competitive disadvantage. The trade practice conference permits all those engaged in an unfair practice to abandon it simultaneously.

Perhaps I can give you a clearer idea of the nature of the Commission and the work it does by describing its activities during August of 1940, the most recent month for which material has been compiled and published. This was not exactly a typical month, occuring in the Commission's "slack" season, but it will serve for illustrative purposes. Orders were served upon a group of producers of hardwood charcoal requiring them to cease and desist from restraining competition and fixing prices in the sale of charcoal; an order served upon a cosmetic manufacturer prevents discrimination among his customers by selling to some of them 10¢ sizes of cosmetics and refusing to sell such sizes to other customers; a well known distributor of antiseptics was ordered to cease granting discriminatory rebates to some of its customers; a concern distributing earthenware and china was required to cease describing its customary prices as "clearance sale" prices; and a distributor of used and reconditioned spark plugs was ordered to cease their sale in commerce unless they were clearly marked as used or second-hand; a distributor of paint was ordered to cease representing his products as fresh new stock when in fact they had been reclaimed from paint lost in spray gun painting operations; a distributor of leather products made from split leather was ordered to cease describing them as "top grain" leather; and a distributor of so-called air conditioning cosmetics was required to cease representing that its soap would air condition the human body.

The cases described above are those in which, after a formal complaint and the taking of testimony and argument for the Commission, an order is issued. As I mentioned before, most of the cases of unfair business practices are disposed of by the Commission by means of its stipulation procedure in which the proposed respondent executed a formal agreement with the Commission, setting out the facts as disclosed in the preliminary investigation and agreed in the future to cease and desist from the objectionable practices. Forty-two such stipulations

were made public during the month, and covered such varied products as paints, varnishes and lacquers, barber and beauty preparations, dog shampoos, carbonated beverages, animal serums, arch supporters, correspondence courses in public speaking and airplane mechanics, life preservers, wheat and rye flours, pipes, mothproofing liquids, rock wool insulation, potted bulbs, honey, reducing preparations, upholstery nails, milk, shoes, water softeners, raw furs, flavoring extracts and spices, musical instruments, rice, bunion reducers, rat poison, gasoline stoves, baby chicks, hair restorers, a variety of dog products, and a device advertised as capable of locating gold and buried treasure.

During that same month, the Economic Division of the Commission was engaged in the preparation of a report on the practice of resale price maintenance following an investigation, was engaged in an investigation generally into distribution costs and in procuring and preparing reports of certain general statistics from corporations.

Pursuant to the provisions of the Export Trade Act which is administered by the Commission, papers were filed by an association organized for the purpose of exporting flints and spark metal.

Supplementing its investigational and case work, conferences for the purpose of working out proposed trade practice rules were authorized for the sun glass industry and the beauty and barber equipment and supply industry. Hearings with the industry were held during August on the proposed trade rules for the subscription and mail order book publishing industry. Final trade practice rules for the resistance welder manufacturing industry and for the tuna industry were promulgated during the month.

What I have been describing you are the regular and normal functions of the Federal Trade Commission. As a matter of fact, the Commission had only been organized a very short time when this country was involved in the last World War and it was called upon to perform a number of extraordinary duties which it might be interesting, in these troubled times, to recall.

Two months before our entry into the war, President Wilson wrote the Commission regarding the necessity of maintaining adequate supplies of foodstuffs and related commodities and directed it to investigate storage and distribution of these products. This the Commission did, submitting numerous reports on the grain trade, the meat packing industry, canned foods, flour and other products concerned largely with the immediate objective of protecting the Nation's food supplies during the emergency. These studies had a lasting utility, moreover, as they provided the groundwork for later Federal legislation such as the Grain Futures and Packers and Stockyards Acts.

Shortly after our entry into the war, the President directed the Commission to ascertain costs of production of a number of raw materials and manufactured products which were of primary necessity, specifically petroleum, coal, coke, iron ore, pig iron and iron products, steel and steel products, copper, zinc, lead, aluminum, cement and lumber.

The Commission acted as the principal agency for ascertaining costs of products and the volume of its cost investigations was enormous.

The Army and the Navy purchased large quantities of supplies on a cost-plus-profit basis and the Commission was called upon to make cost determination for such contracts. A Price Fixing Committee was formed in the War Industries Board for controlling runaway prices. The then chairman of the Commission was designated by the President as a member of this Committee and the basis of control of prices was, of course, cost of production, which the Commission was called upon to determine. Similar work was performed for the Fuel Administration, the Food Administrator and other governmental agencies. It has been calculated that during the war the Commission furnished cost sheets on the volume of business aggregating more than $30,000,000,000.

In the course of its cost finding work, the Commission discovered many instances of profiteering and maintained a constant vigilance for such activities, particularly in the line of food and other essentials. Proceedings were initiated against all parties engaging in any unfair methods of competition which tended to increase prices.

Considerable work was also done by the Commission during the World War to uncover what would now be known as "Fifth Column Activities" and particularly enemy ownership or control of supposedly domestic corporations.

Inquiry by the Commission into the affairs of a number of corporations lead to the discovery that more than 100 of them, some of primary importance, were either enemy owned or controlled. This information was, of course, transmitted to the Alien Property Custodian while the facts regarding individuals connected with enemy-controlled enterprises were turned over to the intelligence units of military organizations.

In addition, the Commission was called upon to administer certain portions of the Trading with the Enemy Act, to license domestic corporations to manufacture articles which were subject to enemy patents. This country found itself in a rather peculiar position at the outbreak of the last war since a number of essential drug products, nearly all coal tar dyes and many other articles had been supplied by German companies or by companies operating under German patents. Much of our present day self sufficiency and remarkable production of dyestuffs is due to the experience gained by domestic producers under foreign patents licensed by the Commission at that time. Supplies of such drugs as salvarsan, novocaine and veronal became almost exhausted during the first World War and prices sky-rocketed to such an extent as to render use of them prohibitive. Licenses were granted to a number of domestic concerns for their manufacture.

What I have been describing to you at considerable length are the mechanics and the machinery of the Federal Trade Commission, although the description has by no means covered the ground completely.

The fundamental philosophy of the Federal Trade Commission Act is not that of regimentation of industry; on the contrary, it is that of aiding in the maintenance of the competitive system. All the varied powers bestowed upon the Commission and its energies are directed to this objective of keeping competition free and fair. By clearing restraints and obstructions from the channels of trade the Commission does assist the public to enjoy the benefits of competition and by

preventing the unscrupupous and dishonest trader from taking unfair competitive advantage, it does assist the best elements of business to prosper according to their merit and to reap a reward for their regard of ethical standards.