Remarks

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Before the

INSTITUTE ON THE FEDERAL ADMINISTRATIVE PROCEDURE ACT AND THE ADMINISTRATIVE AGENCIES

AN ANALYSIS OF FEDERAL TRADE COMMISSION PROCEDURES AS THEY RELATE TO THE ADMINISTRATIVE PROCEDURE ACT

New York University School of Law
New York, New York

February 6th, 1947

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It is indeed a challenging task to undertake to deal extensively with the impact of the Administrative Procedure Act upon the Federal Trade Commission so shortly after enactment of that Act. In the interest of orderly and intelligible presentation I first will sketch briefly the Commission's background and the job for which it was created.

The Federal Trade Commission Act was the product of many years' discussion in the Congress regarding effective means of controlling monopolies and preserving our traditional free enterprise system of trade and commerce. It represented many compromises between conflicting points of view and it is understandable that not many of its sponsors wished to predict with precision the Commission's problems of the 1940's when the Commission was created in 1914 with a mandate to "prevent persons, partnerships or corporations * * * from using unfair methods of competition in commerce."1/ It is clear that the Commission's primary duties were to be prophylactic in nature and that it was to be more than a quasi-court of industrial relations settling such disputes as might be brought to it by litigants.

As the U. S. Circuit Court of Appeals said in Pep Boys--Manny, Moe and Jack, Inc. v. Federal Trade Commission,2/

> "The procedure in the Federal Trade Commission Act is prescribed in the public interest as distinguished from provisions intended to afford remedies to private persons."

Congress made no further attempt in the Federal Trade Commission Act to prepare an index expurgatorius of practices over which the Commission was to have jurisdiction, and, as was stated by Mr. Justice Brandeis in his famous dissenting opinion in Federal Trade Commission v. Gratz,3/

> "Instead of undertaking to define what practices should be deemed unfair, as had been done in earlier legislation, the Act left the determination to the Commission. Experience with existing laws had taught that definition, being necessarily rigid, would prove embarrassing and, if rigorously applied, might involve great hardship. Methods of competition which would be unfair in one industry, under certain circumstances, might, when adopted in another industry, or even in the same industry under different circumstances, be entirely unobjectionable. Furthermore, an enumeration, however comprehensive, of existing methods of unfair competition must necessarily soon prove incomplete, as with new conditions constantly arising novel unfair methods would be devised and developed."

1/52 Stat. 111; 15 U.S.C.A. Sec. 45.
2/122 Fed. (2d) 158.
3/253 U. S. 421-436.

When the Commission has reason to believe that any person, partnership, or corporation has engaged in unfair acts, practices or methods of competition in commerce, it is empowered and, moreover, directed to issue and serve a formal complaint setting out wherein it believes the law to have been violated if a proceeding in respect thereto appears to the Commission to be in the interest of the public.4/ The Federal Trade Commission, exercising the broad jurisdiction granted by this enactment, has held numerous practices and methods to be unlawful, and the overwhelming majority of such of its orders as were appealed have been sustained by the courts.5/ Practices and methods, to name a few, which are now generally regarded to be within the prohibitions of section 5, are combination or conspiracy to fix or control prices or to hamper, boycott or obstruct business rivals; misrepresentation as to composition, origin, quality or source of commodity; false and misleading advertising; sale of products by means of lottery or chance devices; commercial bribery; and disparagement or misrepresentation concerning a competitor.

Section 11 of the Clayton Act vests authority in the Commission to enforce compliance with the proscriptive provisions of sections 2, 3, 7 and 8 of this legislation.6/ In language not dissimilar to that of section 5 of the Federal Trade Commission Act, the Commission is directed to issue and serve a complaint stating its charges whenever it shall have reason to believe that any person is violating or has violated such sections of the Act. Section 2 in substance makes it unlawful to discriminate in price in the course of interstate commerce when the effect is to suppress competition, create a monopoly or injure, prevent or destroy competition; to pay or receive anything of value as brokerage or in lieu of brokerage when the recipient is acting in behalf of, or under the control of, anyone other than the person by whom the brokerage or allowance is granted; to pay customers for services or facilities furnished by the customer unless such payments are available to all competing customers on proportionally equal terms, to furnish services or facilities to a purchaser which are not accorded to all other purchasers on proportionally equal terms; or knowingly to induce or receive a discrimination in price prohibited by the section.

Section 3 of the Clayton Act refers to so-called "full line forcing" and "exclusive dealing" contracts, and makes it unlawful for a seller or a lessor to require that a purchaser or lessee shall not use or deal in the goods of a competitor of such seller or lessor where the effect of the arrangement may be substantially to lessen competition or tend to create a monopoly.

Section 7 deals with the acquisition of stock of one corporation engaged in interstate commerce, or of stock of two or more such corporations, by another so engaged, and makes such acquisition unlawful where its effect may be substantially to lessen competition between the acquiring and the acquired corporations, or between the two or more acquired corporations, or to restrain commerce in any section or community, or tend to create a monopoly in any line of commerce.

4/Sec. 5 (b).
5/See Annual Report, 1946 pp. 37-43 for statistics.
6/38 Stat. 734; 15 U.S.C.A. Sec. 21.

Under section 8 of the Clayton Act it is unlawful for a person at the same time to be a director in two or more corporations where either has capital, surplus and undivided profits aggregating more than $1,000,000 and is engaged in commerce, if such corporations are or shall have been theretofore competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of the antitrust laws.

Under the Wheeler-Lea Act of 1938, the Federal Trade Commission Act was amended to empower the Commission, among other things, to expand its jurisdiction over unfair and deceptive practices in the advertising of food, drugs, devices and cosmetics. These provisions empower the Commission to require positive disclosure of certain facts in advertising where their omission would be misleading, and permit the seeking of temporary injunctions and restraining orders in the District Courts of the United States pending proceedings under section 5.7/

Under the Wool Products Labeling Act of 1939, the introduction, or manufacture for introduction into commerce, or the sale, transportation or distribution in commerce of any wool product which is misbranded is declared to be unlawful, and an unfair method of competition and an unfair and deceptive act or practice.8/ Any person who shall manufacture, or deliver for shipment, or ship or sell or offer for sale in commerce any misbranded wool product is declared to be guilty of an unfair method of competition and an unfair and deceptive act or practice under the Federal Trade Commission Act. Misbranding is specifically defined therein and the Commission is authorized to cause tests, inspections, analyses and examinations to be made of any wool product subject to the Act. The Commission also is given the power to make rules and regulations and prescribe procedure thereunder, to which provision I shall refer later.

Most of you are familiar in a general way with the manner in which the Commission proceeds against a specific individual charged with a violation of the laws which it administers. The Administrative Procedure Act does not alter the Commission's procedures in this aspect of its work in any material respect, since the Commission had long prior to that enactment accomplished an administrative divorce of its investigative and prosecutive functions from those in which it acted as a tryer of facts. Orders of the Commission in these proceedings are reviewable directly in the U. S. Circuit Courts of Appeals, and the procedures adopted by the Commission have been subject constantly to judicial review over a period of more than thirty years with gratifying results attesting the Commission's fairness to respondents.

I would like to reiterate the thought that the Commission is not a body determining disputes between litigants but that its primary duty is to act affirmatively and effectively to prevent destruction of the free competitive system by predatory practices. Ancillary to this duty the Commission has certain other functions and powers which are difficult to classify within the

7/52 Stat. 115; 15 U.S.C.A. Sec. 52, 53.
8/54 Stat. 1129; 15 U.S.C.A. Sec. 68a.

usual categories of administrative law. For instance, under section 6, subsections (a) - (h), it has power to gather and compile information concerning the practices of any corporation engaged in commerce, except banks and common carriers; to require such corporations to file annual or special reports relating to their practices; to investigate, upon its own initiative, the manner in which a final decree in any suit brought by the United States under the antitrust acts has been or is being carried out; to make investigations, upon the direction of the President or of Congress, into alleged violations of the antitrust acts; upon application of the Attorney General, to investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust laws; to investigate trade conditions in and with foreign countries and to report to Congress with its recommendations regarding associations, combinations, or practices as they affect the foreign trade of the United States; and under section 7 to act as a Master in Chancery in any suit in equity brought by the Attorney General under the antitrust acts. Under section 2 of the Clayton Act, the Commission may, after investigation and hearing, fix and establish the limits of quantity discounts for the sale of goods in commerce where it is found that available purchasers in greater quantities are so few as to render quantity differentials unjustly discriminatory or promotive of monopoly in any line of commerce. It must make investigations of export trade associations and may make recommendations to such associations for readjustments in organization and management to conform with the provisions of the Webb-Pomerene Export Trade Act.9/

So much for the statutes administered by the Commission. I now turn to the Administrative Procedure Act itself.

PUBLIC INFORMATION, Section 3 -

The Commission has directed its efforts through the years toward the development of a procedure within the framework of the laws it administers which will guarantee to all parties full opportunity to be heard. While it has been criticized because of delays resulting therefrom, it has not deviated from its insistence upon a full and impartial hearing. Its General Policy and Rules of Practice have been developed in an effort to insure the fair and even administration of its laws. As a result of this policy the passing of the Administrative Procedure Act brought about no revolutionary change in the operation of the Federal Trade Commission. Such revisions as were necessary were made as rapidly as possible--some prior to the effective date of the Act and others as soon as legal authority was conferred under the Act. These changes provide in some instances for additional steps in the Commission's procedure, and insofar as they do, it must be recognized that there is inherent in them the possibility of further delays.

Amended Rules of Practice were adopted last June and published by the Commission on July 1, 1946.10/ Effort was made to give effect therein to both the letter and spirit of the Administrative Procedure Act. Changes

9/40 Stat. 517; 15 U.S.C.A. Sec. 65.
10/Rules, Policy and Acts July 1, 1946.

made consisted in large part of putting into writing practices and procedures which were in common use but which had not been actually committed to writing prior thereto. An example of this type of change appears in the rule governing hearings on formal proceedings. The following is quoted from that rule as published on July 1, 1946:11/

> "Every party respondent shall have the right of due notice, cross-examination, presentation of evidence, objection, exception, motion, argument, appeal and all other fundamental rights."

This section did not appear in the previously published rule governing hearings on complaints. Some of the rights outlined therein were provided for elsewhere in rules,12/ but those rights, whether or not previously set forth in any written rule, had been preserved to the respondents by the Commission in the course of its regular procedure. A similar situation will be found in comparing the rule on evidence published July 1, 1946, with that previously in effect.13/

In general it may be stated that insofar as the Federal Trade Commission is concerned, the effect of section 3 of the Administrative Procedure Act was to cause it to analyze more carefully its practice and procedure and to express more definitely and in greater detail the rules and policy governing its action. These, together with a description of its organization, the manner in which the public may make submittals or requests, its procedure and the channeling of its functions have all been fully set forth in the Federal Register.14/

Paragraphs (b) and (c) of section 3 have not had any appreciable effect upon Commission procedure. Final opinions or orders in the adjudication of cases have been published and been made available to public inspection. As a matter of fact, the Commission took the initiative in this matter when provision was first made for the publication of the Federal Register and has succeeded in having its orders published therein since 1938. These, of course, are served upon the parties involved, but the Commission felt the general publication would serve to put others on notice as to practices that were prohibited and would thereby accomplish results much broader than those flowing directly from specific Commission action.

The exceptions in paragraph (b), which provide for confidential treatment, have no application to the Commission's work since all of its orders are published and all formal documents including the complaint and findings of fact are available for public inspection.15/

All matters of official record of the nature described in paragraph (c) of section 3 are and always have been available to persons properly and directly concerned so that this section has no effect upon the Commission's practice.

11/Rule XV (a).
12/Rules X, XII, XIV, XXI and XXIV July 1, 1945.
13/Cf. Rules, Policy and Acts Rule XVII July 1, 1945 with Rule XVIII July 1, 1946.
14/177A - 571 to 574 Sept. 11, 1946, pp. 14-233 - 40 Dec. 11, 1946.
15/Rule XXIX (e) (g) (i).

RULE MAKING, Section 4 -

Functions of the Commission which might be considered in any discussion of rule making are (1) the publication of Rules of Practice governing procedure in Commission proceedings, (2) the promulgation of trade practice conference rules, and (3) publication of any amendments to rules and regulations previously issued under the Wool Products Labeling Act of 1939.

Rules of Practice - In carrying out its statutory functions the Commission publishes from time to time Rules of Practice setting forth the procedure to be followed in formal and informal Commission proceedings. Such Rules of Practice and any amendments thereto are published in the Federal Register and are made available to interested parties in pamphlet form.16/ Section 4 (a) of the Administrative Procedure Act specifically excepts this type of rule from the requirements of such section, and sections 7, 8 and 11 of the Act are likewise inapplicable.

Trade Practice Conference Rules - Under the Commission's trade practice conference procedure the Commission, acting in the public interest, invites all members of an industry to attend an industry conference to consider practices in that industry and to adopt rules covering unfair practices therein. After further hearing of interested parties, rules are promulgated for the industry and the members afforded opportunity to indicate their willingness to observe such rules in the conduct of their business.17/ By agreeing to abide by the rules for their industry they, in effect, agree to abandon or refrain from using the stated unfair practices.

Trade practice rules, as promulgated by the Commission, are divided into Group I and Group II rules. Group II rules have no status other than as expressions of what is considered desirable in the interest of promoting fair competitive conditions. Group I rules define industry practices which are deemed to be unfair methods of competition, unfair or deceptive acts or practices, or other illegal practices, under laws administered by the Commission, as construed by the Commission and the courts. They do not purport to make unlawful any practice which is not illegal under existing statutes. They merely catalogue such illegal practices for the information and guidance of industry members. As interpretations of existing decision law as applied to practices in a particular industry, such trade practice rules are considered to come within the specific exceptions set forth in section 4 (a) of the Administrative Procedure Act.

The public procedures followed in trade practice conference proceedings respecting publication of notice and opportunity afforded interested parties for participation, although not considered to be subject to the requirements of section 4, are such as to comply fully with its provisions. In fact, in providing for oral hearing, the trade practice conference procedure goes beyond the requirements of such section. Since there is no statutory requirement of hearing in such proceedings, this procedure is not considered subject to the requirements of sections 7, 8 and 11 of the Act.

16/Rules, Policies & Acts Dec. 11, 1946.
17/Rule XXVIII Dec. 11, 1946.

Rules and Regulations Under the Wool Products Labeling Act - Section 6 (a) of the Wool Products Labeling Act of 1939 authorizes and directs the Commission to make rules and regulations for the manner and form of disclosing certain required information and for segregation of such information for different portions of a wool product as may be necessary to avoid deception and confusion, and to make such further rules and regulations under and in pursuance of the terms of such Act as may be necessary and proper for administration and enforcement.18/ Pursuant to such authority, the Commission promulgated rules and regulations effective July 15, 1941, after hearing held pursuant to notice published in the Federal Register and full opportunity for participation by interested parties.19/

Amendments to the rules and regulations issued under the Wool Products Labeling Act are not included in the specifically excepted categories set forth in section 4 (a). Since the Wool Act does not require that any amendments to such rules and regulations be made on the record after opportunity for hearing, the requirements of sections 7, 8 and 11 of the Administrative Procedure Act are not considered applicable.

ADJUDICATION, Section 5 -

The Federal Trade Commission is concerned with the exceptions contained in the first paragraph of section 5 only insofar as they may relate to cases in which it is acting as an agent for the court. This will include matters referred to it as a master by the court as has been done, for example, in cases where the Commission sought enforcement of orders issued under the Clayton Act.20/ It may also be appointed a master under section 7 of the Federal Trade Commission Act to ascertain and report an appropriate form of decree in any equity suit brought by the Attorney General as provided in the Anti-Trust Acts. Even this exception is not considered important since the requirements of section 5 of the Administrative Procedure Act are no more stringent than those the Commission has imposed upon its agents, employees and itself in carrying out the direction of the court when it has been appointed as a master.

With regard to all cases of adjudication required by statute to be determined upon the record, the provisions concerning notice and procedure are being and have been followed. Rules of practice in effect prior to the adoption of the Administrative Procedure Act did not contain specific provision for the submission of offers of settlement or adjustment, but the parties were always at liberty to submit these for consideration, and, in a substantial number of cases, availed themselves of this procedure, as is evidenced by numerous matters wherein stipulations as to the facts have been received by the Commission and have formed the basis for the findings and orders subsequently issued.21/ In order that there may be no question as to the availability of this method of settlement, the Commission has added the following paragraph to its Rule of Practice governing complaints:22/

18/Sec. 6 (a).
19/16 Code Federal Regulations Sec. 300.1 et seq.
20/D. 1574, D. 4240 and D. 4247.
21/D. 4563, D. 5013 and D. 4865.
22/Rule V Dec. 11, 1946.

"Upon request made within fifteen (15) days after service of the complaint, any party shall be afforded opportunity for the submission of facts, arguments, offers of settlement or proposals of adjustment where time, the nature of the proceeding and the public interest permit, and due consideration shall be given to same. Such submission shall be in writing. The filing of such request shall not operate to delay the filing of the answer."

The adjudication functions of the Commission are those exercised in carrying out statutory requirements with regard to complaints, findings of fact and orders. These functions are subject to sections 5, 7 and 8 of the Administrative Procedure Act insofar as those sections are applicable to our work, and it is believed that quotations from some of our amended Rules of Practice will show both the manner in which those sections have affected the Commission's procedure as well as the action taken to insure conformity with the statute. The following excerpts from Rules 14 and 22 23/ were adopted to secure compliance with subsection (c) of section 5:

"Except where he shall have become unavailable to the Commission, the said recommended decision shall be made by the trial examiner who presided at the hearing."

"Trial examiners shall perform no duties inconsistent with their duties and responsibilities as such. Save to the extent required for the disposition of ex parte matters as authorized by law, no trial examiner shall consult any person or party as to any fact in issue unless upon notice and opportunity for all parties to participate."

"Trial examiners shall not be responsible to, or subject to the supervision or direction of, any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for the Commission."

"No officer, employee or agent, engaged in the performance of investigative or prosecuting functions for the Commission in any case shall, in that or a factually related case, participate or advise in the recommended decision of the trial examiner, except as a witness or as counsel in public proceedings."

The Federal Trade Commission has not availed itself of the authorization in section 5 (d) to issue declaratory orders, to terminate controversies or to remove uncertainties.

HEARINGS, Section 7 -

The provision with regard to presiding officers contained in section 7 (a) has caused no material change in procedure of the Commission. Subsection (b), however, has conferred additional powers and duties upon hearing officers, and appropriate changes have been made in the Rules of Practice to

23/Rules, Policies & Acts, Dec. 11, 1946.

provide therefor. The principal changes in this regard relate to the issuing of subpoenas, taking of depositions and submission of recommended decisions.

Prior to the passage of the Administrative Procedure Act, subpoenas ad testificandum were issued by a Commissioner and application therefor could be made to the Secretary or to the presiding trial examiner. Applications for subpoenas duces tecum were submitted to the Commission and passed upon by it.24/ The Commission also determined when evidence might be taken by deposition.25/ These functions are now exercised by the officer presiding at the hearing, and provision is made in the Rules of Practice for appeal to the Commission from the presiding trial examiner's denial of a motion to quash or refusal to issue a subpoena for the production of documentary evidence.26/ The presiding trial officer also has the duty of filing with the Commission a recommended decision.27/

Rule XX of the Commission's Rules of Practice calls for the filing of motions before the trial examiner at the termination of the reception of evidence and for appeal to the Commission from any adverse rulings thereon. The purpose of this rule was to clear up the record before the trial examiner's recommended decision was prepared so as to insure that it be based upon the record in its final form and that the identical record would be before both the trial examiner and the Commission when decision is made. There is no provision in the Administrative Procedure Act requiring such a rule, but the Commission is of the opinion that it definitely furthered the intent and purposes of the Act.

Subsections (c) and (d) of section 7, relating to Evidence and to the Record, required no change in the Commission's procedure. The trial examiners had passed upon the admissibility of the evidence admitting that which was relevant, material and competent and excluding the irrelevant, immaterial and unduly repetitious. All findings, conclusions and recommendations of the trial examiner are based upon the greater weight of the evidence, as are the decisions of the Commission. This is true under the present procedure. It was true prior to the passage of the Act. The record for decision consists of the transcript of testimony and exhibits, together with all papers and requests filed in the proceeding.

DECISIONS, Section 8 -

Section 8 of the Act has effected a substantial change in the Commission's procedure. Under subsection (a) of this section, the Commission has reserved to itself as heretofore the function of making the initial decision.28/ This section places upon the trial examiner the new duty of presenting a recommended decision.29/ The exceptions as to rule making and initial licenses do not apply to the work of the Federal Trade Commission.

24/Rule XV July 1, 1945.
25/Rule XVIII July 1, 1945.
26/Rule XVI (g) Dec. 11, 1946.
27/Rule XXII Dec. 11, 1946.
28/Rule XXV Dec. 11, 1946.
29/Rule XXII Dec. 11, 1946.

Under subsection (b) of section 8, it is provided that prior to each recommended or initial decision the parties shall be afforded reasonable opportunity to submit for the consideration of those participating in the decision proposed findings and conclusions or exceptions to the decisions, or recommended decisions and reasons in support thereof. The statute makes the submission of this material a matter of right. Prior to its enactment, it was optional with the presiding trial examiner as to whether or not he would avail himself of the provisions of the Rule of Practice relative to receiving statements from attorneys for the Commission or for the respondent setting forth their contentions as to the facts proved in the proceeding.30/ It was also optional with the trial examiner as to whether or not he should receive material submitted in addition to that which he may have requested, but I know of no instance where a trial examiner or the Commission refused to receive material of this nature and to give appropriate attention to the matters thus submitted. This procedure is made obligatory under the new Act, and in addition the record must show the ruling upon each finding, conclusion or exception presented.31/ With regard to its decisions, the Commission, either in its findings or in separate opinions, seeks to make apparent the processes by which its conclusions are reached.

All decisions, whether recommended or initial, become a part of the record and include a statement of findings and conclusions with reasons therefor upon all material issues of fact, law or discretion presented in the record and the appropriate rule, sanction, relief or denial thereof. Insofar as the Federal Trade Commission is concerned, this procedure is new. Formerly the report of the trial examiner was served upon the Commission's attorney, the attorney for the respondents and upon respondents not represented by counsel. Such former report was not, however, a part of the record,32/ although, on review of the case, the trial examiner's report therein often was certified to the Circuit Court of Appeals with the record.

JUDICIAL REVIEW, Section 10 -

Section 10 (c) of the Administrative Procedure Act provides that every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review, and that any preliminary, procedural or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action.

The respondent against whom a cease and desist order is issued under the Federal Trade Commission Act may obtain a review by filing in the appropriate Circuit Court of Appeals of the United States within sixty days from the date of service of such order a written petition praying that it be set aside.33/ When a copy of such petition is served upon the Commission, it certifies to the Court a transcript of the entire record in the proceeding. The Court has power to enter a decree based upon this record affirming,

30/Rule XXII July 1, 1945.
31/Rule XXI Dec. 11, 1946.
32/Rule XX July 1, 1945.
33/Sec. 5 (c).

modifying or setting aside the order of the Commission and enforcing the same by issuance of its own order commanding obedience to the Commission's order to the extent that it has been affirmed. The judgment and decree of the Circuit Court are final except as they may be subject to review by the Supreme Court upon certiorari.34/

Such orders of the Commission to cease and desist become final if, upon expiration of the time allowed for filing a petition for review, no petition has been filed; or upon expiration of the time allowed for filing a petition for certiorari, if the Commission's order has been affirmed, or the petition for review dismissed and no petition for certiorari has been filed; or upon denial of the petition for certiorari, if the Commission's order has been affirmed or the petition for review dismissed; or upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if the Court directs that the Commission's order be affirmed or the petition for review dismissed.35/

If the Supreme Court directs that such order of the Commission be modified or set aside, the Commission's order issued in response thereto becomes final upon the expiration of thirty days from the time it is rendered unless within that time either party has instituted proceedings to have the order corrected to accord with the mandate, in which event the order becomes final when so corrected.36/

If such order of the Commission is modified or set aside by the Circuit Court of Appeals, and if the time allowed for filing a petition for certiorari has expired without such petition being filed, or if the petition has been denied or the decision of the Circuit Court has been affirmed by the Supreme Court, the order of the Commission rendered in accordance with the command of the Circuit Court of Appeals becomes final upon the expiration of thirty days from the time the order was rendered unless either party has instituted proceedings to have the order corrected to accord with the mandate, in which event it becomes final when so corrected.37/

If the Supreme Court orders a rehearing, or if the case is remanded by the Circuit Court of Appeals to the Commission for a rehearing, and if the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or if the petition has been denied, or if the decision of the Court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing becomes final in the same manner as though no prior order of the Commission had been rendered.38/

Any respondent who violates an order to cease and desist issued under the Federal Trade Commission Act after it becomes final and while it is in effect, becomes liable for the payment of a civil penalty of not more than $5,000 for each violation, which sum may be recovered in a civil action brought by the United States.39/

34/Sec. 5 (g).
35/Sec. 5 (g).
36/Sec. 5 (h).
37/Sec. 5 (l).
38/Sec. 5 (j).
39/Sec. 5 (l).

The procedure with respect to the enforcement of orders to cease and desist issued in accordance with the provisions of the Clayton Act are outlined in section 11 thereof.40/ When an order issued under the Clayton Act is not obeyed, the Commission may apply to the appropriate Circuit Court of Appeals for its enforcement. A complete transcript of the record, including the report or findings and the order, is filed with the Court, which is empowered to make a decree affirming, modifying or setting aside the order. The findings of the Commission as to the facts, if supported by testimony, are conclusive. Similar provision (sec. 5) in cases under the Federal Trade Commission Act reads "if supported by evidence."41/ The decision of the Circuit Court is final except as it may be subject to review by the Supreme Court upon certiorari.

The party against whom an order to cease and desist has been issued under the Clayton Act may obtain a court review by filing a petition praying that the order of the Commission be set aside. Certification of the record and other procedural steps are the same as when application for enforcement is filed by the Commission.

This brief outline of provisions made in the Federal Trade Commission Act and the Clayton Act for judicial review of its orders to cease and desist shows the safeguards that have been placed about the Commission's procedure in connection with its formal cases. It would be idle to speculate at this time as to other possible forms of final agency action which might conceivably be subject to judicial review. The steps in this field must be taken, when necessary, in connection with individual cases and with the guidance and assistance of the courts. In this regard, as is the case with all other sections of the Act, the Commission will bend its efforts toward carrying out the intent and purposes of the Congress as therein expressed.

40/38 Stat. 734; 15 U.S.C.A. Sec. 21.
41/15 U.S.C.A. Sec. 45c.