BUSINESS -- LARGE AND SMALL -- MUST REMAIN FREE AND COMPETITIVE

Remarks

of

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Ladies and Gentlemen of the American Fair Trade Council:

I am delighted to accept this opportunity to speak to you at this, your Twelfth Annual Meeting. It is always a pleasure for me to speak to a group of businessmen and to discuss with them some of the rules and regulations that govern and guide our system of free competitive enterprise.

Your Council was established by, and is composed of, a group of manufacturers of trade-marked goods --- you represent many different industries --- many of you are leaders in your respective fields. As the name of your Council signifies, you are vitally interested in the support and promotion of Fair Trade laws. You are also vitally interested in basic rules and regulations by which business --- whether manufacturer or distributor --- can operate on a competitive basis and obtain its rewards in direct proportion to its industry and capacity.

You are interested in the protection of small business and you appreciate its important place in the economy and commerce of our country. We, at the Federal Trade Commission, charged with the responsibility of maintaining free enterprise, are particularly cognizant of the general concern for small business.

President Truman has said: "We must curb monopoly and provide aids to independent business so that it may have the credit and capital to compete in a system of free enterprise. . ."

Congress has recognized the importance of small business by declaring as a policy that small business has the right to equal representation, as an entity, with labor, agriculture, and other groups on various Government boards, committees, or other agencies in which the interest of the American economy may be affected.1/

Congress has further declared its policy that a fair proportion of the total purchases and contracts for supplies and services for the Government shall be placed with small business concerns.2/

In addition to enunciated policies --- Congressional committees are holding hearings for the purpose of investigation and study of the extent and effect of monopoly power; --- to determine and identify factors and influences which militate against small business; --- and to find ways and means to encourage, stimulate, maintain and preserve independent enterprises of every character.

All business --- large and small --- under our system of free competitive enterprise --- must be allowed the unrestrained opportunity to enter the competitive struggle; --- to bring ideas and energies to bear in that struggle through the free independent conduct of its own affairs.

1/Senate Concurrent Resolution 14 - 1948.

2/The Armed Services Procurement Act of 1947 and the Federal Property and Administrative Services Act.

Businessmen must have the freedom to buy where they please; to sell where they please; and to seek the patronage of whom they please.

The purpose of all antitrust legislation, including the laws administered by the Federal Trade Commission, is the regulation of business to the end that bad business practices and unfair tactics are eliminated from the competitive struggle.

In this struggle of business competition, there are certain rules and regulations which are your guarantee against unfair competition. All players must have knowledge of the rules of the game.

With your kind indulgence, I am going to take this opportunity to briefly review with you some of these fundamental rules and regulations.

The basic principles have been the same since 1890 when the Sherman Act became law. However, Congress has, from time to time, added new rules and refinements of rules. The purpose of all these rules and regulations is to secure to each segment of industry its right, and place and opportunity to capitalize on its capabilities and ingenuities.

Antitrust rules and regulations were never intended to guarantee to any business the assurance of profits, or indeed, even of existence. In any competitive struggle, whether it be baseball or football or business, it must be remembered that there are necessarily losers as well as winners; that the only proper and continuing guarantee is that the competition be fair or as the Federal Trade Commission says, "not unfair."

The Federal Trade Commission operates under several Federal statutes. The primary responsibility of the Commission, under all these statutes, is one of the important guarantees of freedom, that is, the maintenance of competition in business; the preservation of free enterprise. First, and foremost of these statutes, is the organic act by which the Federal Trade Commission was created just thirty-seven years ago. It was enacted by Congress in exercise of the authority contained in the commerce clause of the Constitution. By that legislation, there was, in 1914 for the first time, introduced into the laws of our country that short and far reaching clause which reads "Unfair methods of competition in commerce are hereby declared unlawful." This provision against unfair methods of competition was, and still is, the cornerstone of the regulation of competitive practices in interstate commerce. The Commission was set up under this Act as the administrative and enforcing agency of the Government with powers to carry out its provisions; with authority, in the interest of the public, to issue cease and desist orders against persons, partnerships, or corporations found using such unfair methods of competition in interstate commerce. Experience in the application of this law, since it was signed by President Woodrow Wilson in 1914, has brought to the Commission many cases of administrative and judicial determination. These reveal that the phrase "unfair methods of competition" is not only of

comprehensive character, but also is a living organism capable of being applied to new, or as yet unknown practices, which may arise from time to time in the conduct of business and which prove to be unfair.

In the same year 1914, the Clayton Act was passed, by which Congress legislated, among other things, against the practices of lessening competition and restraining trade by certain specific trade practices; such as (1) discrimination in price; (2) the use of tying contracts in the distribution of goods, wares, or merchandise; (3) the practice of one competitor gaining control of another through stock acquisitions or mergers, and (4) the use of interlocking directorates between normally competing corporations. Primary authority to enforce the provisions of the Clayton Act proscribing these several inhibited trade practices was vested in the Commission, with certain concurrent authority conferred upon the Department of Justice.

In 1936, Congress added to the unfair trade practices with which the Commission may deal, by enacting the Robinson-Patman Anti-Discrimination Act. This statute amends section 2 of the Clayton Act of 1914 and prohibits the practice of selling in commerce at discriminatory prices where the effect may be substantially to lessen competition; tend to create a monopoly; or to injure, destroy, or prevent competition. It also catalogues as unfair and illegal trade practices, the granting of certain types of brokerage commissions, advertising, or promotional allowances, and discriminatory services, or facilities.

In 1938 came the Wheeler-Lea Act by which Congress further expanded the Federal Trade Commission's authority to deal with unfair trade practices. A primary purpose of the Wheeler-Lea Amendment was to afford consumers the same protection against unfair and deceptive acts and practices that competitors had theretofore been given against unfair methods of competition. The Act amends and strengthens the original Federal Trade Commission Act of 1914. By it, the words "unfair or deceptive acts or practices in commerce," were added to the phrase "unfair methods of competition in commerce" as it stood in the original Act. Thus, as this basic statute now stands, the Commission is authorized to act in prevention of all those business practices which the law classifies as "unfair methods of competition in commerce" or "unfair acts or deceptive acts or practices in commerce."

In December 1950, Congress passed an amendment to section 7 of the Clayton Act which will have the effect of remedying a grave defect in the antitrust laws. This defect has been annually, for many years, called to the attention of Congress by the Federal Trade Commission. Under the Clayton Act, it is illegal for a firm to buy stock in a rival concern where the effect is to "substantially lessen competition." But the same end might be, indeed has been, achieved by the completely legal act of buying the physical assets of a rival. The new legislation plugs this gap by forbidding a firm to purchase the assets of business rivals if the effect may be to substantially lessen competition or tend to create a monopoly "in any line of commerce in any section of the country."

The statutes -- the rules and regulations -- which I have cited constitute the source of the Commission's authority. They chart its duties with respect to the regulation of business practices in interstate commerce. They are all directed toward the maintenance of free and fair competition; to the control of methods which, in the eyes of the law, are harmful to industry, trade, and the public; which obstruct or interfere with the free flow of merchandise in the channels of distribution under sound and equitable conditions.

In the work of the Commission directed toward preventing the use of unfair trade practices in industry and trade, three well defined courses of procedure are followed. One might somewhat descriptively refer to them as the litigation method, the stipulation method, and the trade practice method. All three are designed to do just what our Act says; to prevent unfair competition and unfair and deceptive acts and practices in interstate commerce.

The litigation method is when the Commission, in order to obtain correction and protect the public interest, is required, upon due process, to issue cease and desist orders against the offender. In such cases after a formal complaint is issued, a full opportunity is afforded the respondent for the taking of testimony; thereafter, an initial decision upon the pleadings and evidence is filed by a trial examiner; appeals may be taken therefrom, briefs filed, and oral arguments held. Such cease and desist orders may be appealed to the United States Courts of Appeal for review; they may be eventually taken to the Supreme Court upon certiorari. For violation of a final order the offender may be subjected to civil penalties.

The stipulation method occurs, when an offender desires to agree voluntarily to discontinue the unfair practice which is complained of, the Commission in its discretion, and subject to certain limitations, may afford him the opportunity to enter into an agreement, called a stipulation, to cease and desist. It is the policy of the Commission to extend the privilege of such informal stipulation only in cases where it is of the opinion, under all the circumstances, that disposition of the case by this method will effect prompt correction and will fully protect and satisfy the public interest. Such procedure is what I referred to as the stipulation method of settling cases without the necessity of instituting formal litigation. It does not extend to cases of deliberate fraud or concerted action in restraint of trade.

The trade practice method provided by the Commission is the trade practice conference plan which is available for the elimination of unfair trade practices and the consequent promotion of fair standards of business ethics. Such trade practice conference procedure has for its purpose the wholesale elimination of unfair trade practices by industry-wide cooperation with the Commission, and the collaboration of all groups and interest in the formulation, establishment, and observance of fair trade practice rules governing the conduct of the industry and trade in question.

I mentioned at the beginning of these remarks your great interest in Fair Trade laws. I suppose --- a few months ago --- you never heard of the name "Schwegmann." That name "Schwegmann" is today perhaps as

familiar to each one of you as your own trade-marks. For me to restate the facts of that case would be comparable to my relating an intimate fact from your personal lives.

Serious though the effect of this decision may be on each of you and your Council, it is paradoxical to consider the effect which an apparently insignificant object may have on an intricate and far reaching structure. The N.R.A. stumbled and collapsed on Mr. Schechter's chickens and now Schwegmann's bottle of Calvert has stunned the Fair Trade laws almost into insensibility.

The Supreme Court, as you know, decided last May that the non-signer provision --- perhaps the keystone of Fair Trade laws --- to be outside the protection of the Miller-Tydings Act and that attempts to impose such restrictions on non-signers in the sale of products touching interstate commerce remain a violation of the Sherman Act. This decision was a serious blow to the sponsors of Fair Trade laws. It appears that for all practical purposes the Schwegmann decision has seriously impaired minimum resale price maintenance of nationally known trade-marked products.

The remedy, if such be advisable, must come from Congress. It is interesting to note that shortly before the adjournment of the last session of Congress, there was introduced into the House and referred to the Committee on Interstate Commerce, a bill that would validate the non-signer clause of State Fair Trade laws through an amendment -- not to the Miller-Tydings Act -- but to the Federal Trade Commission Act. This bill proposes to amend Section 5 (a) of the Federal Trade Commission Act, which I have mentioned above and, in effect, would except the non-signer provision of the State Fair Trade laws from attack as "unfair" or "unlawful" under Federal antitrust law.

I am told that this bill is expected to be considered by the House Committee early in the next session of the 82nd Congress. In due course, it is expected the bill will be referred to the Federal Trade Commission for our study and comment. It is, of course, inadvisable to comment at this time on any aspects of the bill until the Committee has officially referred it to the Commission and our report has been delivered to Congress. I can assure you, however, that it will be given detailed consideration by the Commission.

The people of this country, for the most part, agree that they want free enterprise, full employment and equal economic opportunity. As we believe in economic freedom, we must do what is absolutely necessary to make it possible -- that is restore, preserve and continually create competition. The history of this country is great because its people have made it so. They have supplied the energy and the leadership. In this democratic system, we develop leaders only because we are a strong nation and a free people. The American system of free enterprise has been the backbone of our strength and our freedom. We must remain that way.