Address of

HONORABLE GARLAND S. FERGUSON, CHAIRMAN

of the

FEDERAL TRADE COMMISSION

SMALL BUSINESS ADVISORY COMMITTEE
MEETING

October 13, 1947

DEPARTMENT OF COMMERCE
Washington, D. C.

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It is a difficult task for anyone in a short time to discuss the policies and activities of the Federal Trade Commission relating to small business. Here time permits the presentation of only an outline.

The Commission operates under several Federal statutes. First and foremost of these is the Federal Trade Commission Act. It is the organic act by which the Federal Trade Commission was created just 33 years ago this last month. It was enacted by the Congress in exercise of the authority contained in the commerce clause of the Constitution of the United States. By this 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, and 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 prove to be unfair.

In the same year 1914, the Clayton Act was passed, by which the Congress legislated, among other things, against the practice of lessening competition and restraining trade by certain specific trade practices; namely, (1) discriminations in price as was then covered by section 2 of the Act; (2) the use of tying contracts in the distribution of goods, wares or merchandise as covered by section 3; (3) the practice of one competitor gaining control of another through stock acquisitions or mergers covered by section 7 of the Act, 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 took another step, to add to the category of 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 catalogs, 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 for the Wheeler-Lea enactment was to facilitate remedial processes for dealing with unfair trade practices and to make substantive provisions of law of more direct service in protecting the public interest. 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 or deceptive acts or practices in commerce."

The Wheeler-Lea Act specifically lists false or misleading advertising of food, drugs, curative devices, and cosmetics, as being a type of trade practice falling within the inhibited class. It also adds special civil and criminal remedies in the case of misrepresentation of these products. The Wool Products Labeling Act of 1939 was designed to protect industry, trade and the consumer against the evils resulting from the unrevealed presence of substitutes and mixtures in wool products.

The statutes which I have cited constitute the source of the Commission's authority and the chart of 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 and 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.

As the official body set up to deal with these matters, the Commission was created in 1914 as a nonpartisan independent agency of the Government and a quasi-judicial tribunal, having not only powers and facilities for administration and investigation, but also the determination of issues by judicial processes.

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 compulsory method, the consent method, and the cooperative method. All three are designed to do just what our Act says; that is, prevent unfair competition, and unfair and deceptive acts and practices in interstate commerce.

Where compulsory action against an offender is required to bring about correction and the protection of the public interest, the Commission, as I have already indicated, is authorized, upon due process, to issue cease and desist orders against the offender. In such cases, findings of fact are made upon pleadings and evidence and, of course, after full opportunity is afforded the respondent for the taking of testimony, the filing of briefs and the submission of oral argument. Such cease and desist orders may be appealed to the United States Circuit Courts of Appeal for review, and may eventually be taken to the Supreme Court of the United States upon certiorari. If no appeal is taken, the order becomes final at the end of sixty days. For violation of a final order, the offender may be subjected to civil penalties of not more than $5,000 for each violation, collectible through the courts.

One charged only with a violation of our organic act, however, need not in all cases have compulsory action in the nature of formal trial taken against him, unless he chooses to persist in the alleged unfair practices and refuses to avail himself of the means of voluntarily consenting to refrain from them in a manner which will satisfy the public interest and avoid the necessity for litigation; or unless he desires to contest the issues and have them determined by the judicial processes I have referred to. If 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 stipulation procedure is what I have referred to as the consent 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.

A third procedure available for the elimination of unfair trade practices and the consequent promotion of fair standards of business ethics is provided by the Commission in the trade practice conference plan. This is what I have referred to as the cooperative method. Such trade practice conference procedure has for its purpose the wholesale elimination of unfair trade practices by industry-wide cooperation with the Commission and collaboration of all groups in interest in the formulation, establishment and observance of fair trade practice rules governing the conduct of the industry and trade in question. Under the plan, joint action among competitors with the supervision and aid of the Commission is possible, and experience has proved the efficacy of this method in more than 100 industries as an adjunct to the compulsory procedure which I have outlined. The Commission is now, with the sanction of the Congress, enlarging this method of procedure.

Conference proceedings are conducted on a basis of voluntary participation; though the Commission may initiate the conference, it cannot compel attendance or participation. Parties in interest are at all times free to advise and consult with the Commission's representatives in the matter. Where necessary or desirable, informal meetings or preliminary discussion may be arranged to formulate tentative drafts of rules or to develop, through an exchange of ideas, a clearer understanding of the problems involved and the assistance which can be rendered by the Commission in their solution. The conference considers and proposes rules for submission to the Commission for its approval. Before rules are finally approved or promulgated by the Commission, they are subjected to public hearings at which all interested or affected parties are afforded opportunity to present their views. They may submit such in writing or be heard orally as desired. Through such conferences and hearings, all groups in interest have the opportunity to be heard and to consult with us in the matter, even though they may not happen to be classed as members of the particular industry or trade involved.

In passing upon the rules proposed for approval, the Commission applies the test of law. In other words, the rules must not sanction practices which are contrary to law or which, when put into effect, may bring about a result which is illegal or opposed to the public interest. The purpose of this is, of course, obvious. It is not within our province to sanction violations of the law, but on the contrary we are directed to promote law observance, to the end that honest business may be liberated from the waste and fetters of unfair practices, and the rights of the public may be protected.

In addition to the activities of the Commission in enforcing the laws committed to it, it has the function which may be described as advisory or consultative in character, as provided for under section 6 of the Federal Trade Commission Act. In carrying out that function, the Commission places at the service of Congress, the President, the courts and the general public the expert knowledge and skill acquired by the Commission and its staff in ascertaining and analyzing the facts regarding various industries and recommending remedies for evils disclosed, including recommendations for legislation. This class of activities includes matters of broad public policy that are of special interest, not only to the statesman and lawmaker, but also to the economist, the small business man, and all others who are concerned with economic and social trends with their long-range results.

While the subject matter of these reports varies considerably, most of them deal with the general subject of competition and monopoly. With the level of economic concentration reaching all-time heights, the need for such special reports will undoubtedly increase, and it is hoped that they will be continued and expanded.

The relevancy of these reports to the problem of small business is obvious. They describe the general trend of economic concentration, the means by which large corporations may have achieved the ascendancy of power, the mergers and acquisitions which may have taken place, and the monopolistic practices which may have existed. Frequently these reports have an immediate impact on legislation; for example, the Commission's report in 1919 which resulted in the Packers and Stockyards Act; the report of the

Commission on public utilities which resulted in the Securities and Exchange Act and the Public Utility Holding Company Act; and recently its report on the copper industry that had its effect on tariff legislation.

In passing section 6 of the Federal Trade Commission Act, Congress intended that the Commission should make full use of the "spotlight of publicity" as a means of ameliorating the uneconomic and harmful practices of monopolies which could not be adequately dealt with through the antitrust laws. It is the purpose of the Commission to effectively utilize this power in order to protect small business and the competitive system. Recently the Commission gathered factual information and reported it to Congress showing that in the dynamic development of industry, based on modern technology, the facts of concentration in big business and the swallowing up of small business constantly tend to outrun the law. In laying these facts before Congress, the Commission pointed up today's choice as being one between legislative action recommended by the Commission to plug loopholes in the present laws against further concentration of economic power in big business, the disappearance of small business, and continued frustration of our declared public policy for free and competitive enterprise.

Simply stated, the Commission's proposal is that the Clayton Act be so amended that acquisition by a corporation engaged in interstate commerce of the assets of a competing corporation also engaged in interstate commerce be made unlawful where the result tends to monopoly. As the law now is, only stock (not asset) acquisitions so tending are unlawful under that Act.

Under the present law, the Commission cannot halt this concentration of economic power when accomplished through acquisition of assets as distinguished from acquisition of stocks. It is in that respect that the Commission has recommended each year since 1927 that Congress amend and strengthen the law, so as to make the acquisition of assets unlawful.

The war contributed powerfully to the trend of concentration. Government purchases and Government financing of productive facilities were necessarily, in order to win the war, channeled predominantly into the hands of corporations which already occupied positions of dominance. Surplus profits created by such channeling have contributed powerfully to the trend by providing funds for additional wartime and postwar expansion through acquisition of former competitors.

In its enforcement of laws committed to it by Congress, the Commission has proceeded for the protection and preservation of small business enterprises against blacklisting and boycotting with all thay they entail concerning cutting off supplies and outlets, use of tying and exclusive dealing arrangements, and unlawful acquisition of stock of competitors. Examples of the Commission's actions in those respects are briefly stated as follows:

In an industry consisting of approximately 100 wholesalers, the Commission found that they, through a trade association, combined and agreed not to buy from manufacturers dealing with small retailers on terms and conditions not approved by the wholesalers. It was clear that the purpose

of the scheme of the wholesalers was to prevent manufacturers from dealing directly with small merchants who were selling at retail. The small merchants thus not approved were included in "white lists" prepared and distributed to manufacturers by the wholesalers. Those small business men were thereby blacklisted. Manufacturers who sold them were then boycotted by the organized wholesalers. The Commission ordered that this practice be stopped. Its order was appealed to the United States Circuit Court of Appeals, where it was affirmed.

A similar case which did not reach the courts was one in which an organization of large building material dealers established rules and definitions, which, in effect, decreed that a manufacturer of building materials should not sell to the small retail distributors unless such retailers had been approved by the director of the organization. Such approvals were evidenced by certificates issued by the director. The retailer not holding such certificate was not considered to have shown any economic necessity for his operation as a building supply dealer. The operations of many small business men were thus interfered with and some were put out of business. The Commission's order in the case directed that such practices of that organization cease. There was no appeal to the courts.

During 1945, the Supreme Court of the United States unanimously upheld orders previously entered by the Commission against two large and prominent producers of glucose, one with a plant at Decatur, Illinois, and the other with plants at Kansas City, Missouri, and Chicago, Illinois. Those two companies had engaged in price discriminations through the use of a basing-point system. Under the operations of that system, small business men engaged in the manufacture and sale of candy in Southwestern United States, including Kansas City, as well as those located in the neighborhood of Decatur, Illinois, were being discriminated against in favor of the large candy manufacturing concerns located in Chicago. The discriminations involved in some instances exceeded the margin of profit usually realizable on some of the more popular brands of candy bars.

In other cases the Commission has proceeded against the practice of two large optical goods manufacturers because of their practice of granting preferential treatment to large buyers. For example, those companies granted quantity discounts in terms of what they designated "big dealer" and "little dealer" discounts. They gave the big dealers who were able to purchase optical goods in the amount of $1500 per month a discount of 25 percent from the prices that they compelled the small dealers to pay. The Commission's orders entered in the cases directed that such practice be discontinued.

In a case against a large salt manufacturer the Commission charged, and found that it was selling table salt to small buyers at prices considerably above those it was charging large buyers. The Commission found that the discriminations thus practiced operated to the detriment of the small business men and directed that the discriminations be discontinued. Many more examples could be cited.

For a number of years officials of associations representing more than 25,000 independent tire dealers, located throughout the United States, have

been filing with the Commission and with members of the House of Representatives and the Senate complaints that preferential treatment in the form of quantity discounts and other discriminatory favors were accorded to mass distributors of rubber tires by the manufacturers are creating monopolistic conditions in that industry. They have complained that mass distributors are gradually driving the independent tire dealers out of business. The Commission has had inadequate funds with which to undertake investigations for the purpose of ascertaining all of the facts with respect to the distribution and pricing policies of more than 40 manufacturers of tires and the effects of such policies on the independent tire dealers. However, following meetings of members of the Commission's staff with representatives of a Subcommittee of the House Select Committee on Small Business during June 1947, the Commission on July 7 adopted a resolution pursuant to the terms of which it has moved to investigate the pricing and distribution policies of more than 40 manufacturers of automobile tires. This action has been taken for the purpose of determining whether conditions in the industry warrant the Commission taking action as is provided for in section 2 of the Clayton Act, as amended, to fix and establish quantity limits with respect to the sale of automobile tires in commerce.

CONCLUSIONS

From what I have stated, it is, I trust, clear that the Commission is empowered to and is acting on a wide front in dealing with competitive practices which are truly unfair. In so doing, it is actively engaged in the work of keeping the channels of commerce free from unfair business practices and I can assure you that the Commission is willing and anxious to aid not only small business but all businessmen in every way possible to achieve and maintain these objectives in the public interest.

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