For Release p.m.
Monday, May 20,1963

REMARKS BY
EVERETTE MacINTYRE
COMMISSIONER, FEDERAL TRADE COMMISSION
BEFORE A MEETING OF THE
SOCIETY OF BUSINESS ADVISORY PROFESSIONS, INC.
NEW YORK, N.Y.
MAY 20,1963
ON

RECENT FEDERAL TRADE COMMISSION DEVELOPMENTS

Introduction

I have been requested to discuss with you today recent developments at the Federal Trade Commission. Included are such matters as the adoption of procedures for industry-wide trade regulation rules and advisory opinions. Also, I have been asked to discuss proposals for voluntary compliance programs and other proposed changes in the Commission's rules. It is helpful to an understanding of a discussion of these matters to have some information responsive to the question, "What is the Federal Trade Commission?"

The Federal Trade Commission

Separate statements from different persons through the years have been made which could be regarded as answers to the question "What is the Federal Trade Commission?"

These answers vary widely. Of course all who have any information about the Federal Trade Commission could answer the question with the statement that the Federal Trade Commission is a Federal agency of five Commissioners appointed by the President of the United States, by and with the consent of the Senate. From there, even the views of those who have some information about the Federal Trade Commission vary widely about it and what it does. The expressions of these widely varying views confuse and then compound confusion. It is the responsibility and duty of the Federal Trade Commission to help protect business and the public from unfair acts and practices.

The Federal Trade Commission's principal authority to protect businessmen, consumers, and other members of the public from unfair acts and practices is derived from the Federal Trade Commission Act, as approved in 1914, and as amended in 1938.

The most important part of the Federal Trade Commission Act is set out in Section 5(a)(1) of said Act and contains only 19 words. Those words are: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."[1/]

1/ 38 Stat. 717 (1914), as amended, 52 Stat. 111 (1938), 15 U.S.C. §41 (1958).

The jurisdiction of the Commission originally was based upon injury to competition, actual or potential, and injury to or deception of the public was not of itself sufficient to constitute an offense under the statute. The defect became apparent in the 1930's when the courts set aside a Commission order against false advertising because there had been no showing of competitive injury. This imperfection was remedied by the 1938 amendment, which declared "unfair and deceptive acts and practices in commerce" to be in the same unlawful category as "unfair methods of competition." Since then the Commission has been able to proceed directly to protect consumers and other members of the public while at the same time eradicating competitive methods which unfairly divert trade from the honest to the unscrupulous members of the business community. We should therefore keep in mind, then, that the purpose of the Federal Trade Commission is to protect the public by protecting competition. Through its performance of that function the Federal Trade Commission serves as a guardian of our free and competitive enterprise system. We are all familiar with the fact that the concept underlying our public policy for a free and competitive enterprise system calls for free and fair competition.

Unless we accept that concept and acquire a reasonably

good understanding of what it means to us in our everyday affairs, we are not likely either to understand or to accept the Federal Trade Commission or what it is doing. Indeed, we will suffer confusion and become confounded as that confusion becomes compounded.

A story coming out of the happenings of World War II will serve to illustrate that point. The story is to the effect that a salesman of war bonds had covered the territory and prospects assigned to him except for a cabin and its occupants located upon a high hill at the edge of his territory. In an effort to cover that portion of his assignment, he found it necessary to park his auto at the foot of the hill and climb the footpath to the top. As he did this and reached the top, his eyes fell upon an unusual sight. There he saw the woman of the house hitching her husband to a plow. The husband, upon sighting the stranger, galloped off around the house, dragging the plow. The woman of the house approached the salesman to inquire about the purpose of his call. The ensuing conversation did not result in a sale of war bonds. As the salesman trudged his way down the hill to his auto, the husband returned from around the rear of the house, dragging the plow. He asked his wife "What did that fella want?" She replied, "I don't rightly know. It seems that some

fella by the name of Hitler went with some girl by the name of Pearl Harbor to some place called Churchill and got into a mess of trouble. This fella now wants us to go their bond."

One thing is clear. There was gross minunderstanding in that case. It is my hope that the few remarks I make here today will help you avoid such gross misunderstanding about the Federal Trade Commission and the recent developments there.

When the Sherman Antitrust Act was passed in 1890 it was thought that the language of its provisions was quite definite and sufficiently broad for appropriate regulation of interstate and foreign commerce. Particular basis for that thought is found in the words of the first section of that law to the following effect: "Every contract combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce . . . is hereby declared to be illegal", and the words of Section 2 to the effect that "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor,

and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

First, proposals were made that the Sherman Act be amended to provide for some exemptions from its application to certain conditions and practices. Those proposals were rejected. Then proposals were made to make the application of the Sherman Act more flexible by making it effective only where trade restraints and monopolistic conditions were found to be unreasonable.

At first the Supreme Court rejected proposals that it make the Sherman Antitrust Act indefinite by reading into it an interpretation which would make it applicable only to unreasonable restraint of trade.[2/]

Although these proposals were not acted on by the Congress, the law, through the process of judicial interpretation, was made almost as general and broad in its sweep as the common law of England and this country. A part of this development was the decision by the Court in the Standard Oil Case.[3/] In that case the "rule

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2/ U.S. v. Trans-Missouri Freight Association, 166 U.S. 290 (1897); U.S. v. Joint Traffic Association, 171 U.S. 505 (1898).

3/ 221 U.S. 1.

of reason" was read into the Sherman Act and that law was, thereby, made to apply only to unreasonable restraints of trade.

The uncertainties inherent in such a situation were aptly described in the opinion of Justice Harlan, a member of the Supreme Court, who participated in the decision in the Standard Oil Case.

Justice Harlan pointed out that now the Sherman Act, even though it is a criminal or penal statute, is indefinite and uncertain in its application. He observed that businessmen and others made subject to the Act are without guide lines regarding its application to particular situations.

The Federal Trade Commission Act is couched in terms almost as general as those of the Sherman Act and with greater breadth. The Supreme Court has ruled that the words "unfair methods of competition" are not defined by the statute and their exact meaning is in dispute. However, they have held them to be applicable to practices opposed

to good morals because characterized by deception, bad faith, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly.

It is clear that Woodrow Wilson in asking for legislation to create the Federal Trade Commission not only wanted an agency which would have broad power under such general provisions of law to halt unfair methods of competition, but also wished it to act to assist businessmen in better understanding their responsibilities under such law. He made that clear when he stated, in referring to the need for a Federal Trade Commission:

> "It is of capital importance that the business men of this country should be relieved of all uncertainties of law with regard to their enterprises and investments and a clear path indicated which they can travel without anxiety. It is as important that they should be relieved of embarrassment and set free to prosper as that private monopoly should be destroyed. The ways of action should be thrown wide open." 4/

On September 2, 1916, in his speech of acceptance on renomination to the presidency, Wilson restated his view of the function of the Commission in the following terms:

> " . . . a Trade Commission has been created with powers of guidance and accommodation which

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4/ Messages and Papers of the Presidents, Vol. XVI, Bureau of National Literature, Inc., pp. 7909-10.

have relieved businessmen of unfounded fears and set them upon the road of hopeful and confident enterprise." 5/

". . . .We have created, in the Federal Trade Commission, a means of inquiry and of accomodation in the field of commerce which ought both to co-ordinate the enterprises of our traders and manufacturers and to remove the barriers of misunderstanding and of a too technical interpretation of the law. . . . The Trade Commission substitutes counsel and accomodation for the harsher processes of legal restraint. . . ." 6/

From existing circumstances and our experience, it is clear that public policy will continue to dictate that our antimonopoly laws continue with their broad sweep covering a multitude of unspecified trade practices and conditions. It cannot be expected that the Congress will undertake to specify in new legislation each of the trade practices and conditions likely to fall within the broad sweep of the Sherman Act and the Federal Trade Commission Act. Therefore, businessmen and the public are unlikely to enjoy flexibility, breadth and certainty under our antimonopoly laws unless there is action from day to day by an administrative law agency such as the Federal Trade Commission, devoted to spelling out and specifying what trade restraints and conditions are unlawful, and aiding in the establishment of guide lines for avoidance of pitfalls

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5/ Ibid. p. 8151

6/ Ibid. p. 8158

leading to violations.

For a substantial period of time the Commission has utilized a trade practice conference procedure for the purpose of informing itself about industry-wide practices alleged to be unfair. It has proceeded to utilize that information in formulating statements of what the Commission believed to be applicable as law to the trade practices in question. These statements were designated as Trade Practice Rules and were designed to afford guidance to industries and enable them to voluntarily operate in compliance with the interpretations of the law by the Commission and the courts. It was hoped that through such advisory rule-making procedures there would be voluntary compliance with the acts administered by the Commission.

The Commission's files are replete with information to the effect that in many instances the wide publicity given to the Commission's Trade Practice Rules and its statements of Guides, have had a wholesome effect in improving compliance with law. However, the sad fact about the matter is that in a number of very important areas, industry-wide practices adverse to the trade generally, and apparently inconsistent with the law,

have been continued despite publicity given to the Commission's Trade Practice Rules and Guides.

The Trade Regulation Rule Procedure

It is gratifying to report to you that on May 15, 1962 the Federal Trade Commission announced that it had approved and would put into effect on June 1, 1962 a new procedure providing for the establishment of Trade Regulation Rule proceedings.

Under this new procedure the Commission will promulgate rules expressing its experience and judgment, based upon facts of which it has knowledge derived from studies, reports, investigations, hearings, and other proceedings, or within official notice, concerning the substantive requirements of the statutes it administers. The rules thus developed and issued by the Commission may cover all applications of a particular statutory provision and may be nationwide in effect, or they may be limited to particular areas or industries or to particular products or geographical markets as may be appropriate. Following its promulgation and issuance, and where any such rule is relevant to any issue involved in an adjudicative proceeding thereafter instituted, the Commission may rely upon such rule, provided that the respondent shall have

been given a fair hearing on the legality and propriety of applying the rule to the issue in his particular case. That is to say that the effective rule would be to take it as the basis for the establishment of a prima facie case with opportunity for the respondent charged with the violation of the rule to defend on the contention and showing that the rule should not be regarded as legally binding and appropriately applicable to the practices which have been challenged as being in violation of the rule.

Of course before the Commission would promulgate and issue rules of this kind under its new rule making process, it would give proper notice and afford hearings to all interested parties on any proposed rule. The proceedings may be initiated by the Commission upon its own motion or pursuant to a petition filed by any interested party. Following notice and hearings, the Commission, after due consideration of all relevant matters of fact, law, policy and discretion, would proceed to promulgate and issue the rule with a brief general statement of its basis and purpose. It would not become effective until after it has been published in the Federal Register.

In this dynamic and space age it is anticipated that changing conditions are likely to bring about need for revision or repeal of rules. Therefore, the Commission's

policy and procedure will provide for amendment, suspension, and repeal of any such rule. In that way the administrative process will serve the needs of the public interest and businessmen from day to day. Rapidly changing conditions emphasize that those needs can be served in no other way.

Inquiry has been made as to the areas suitable for the application of trade regulation rules and whether they would be limited to situations where the courts have sustained the Commission in prior adjudicatory proceedings.

I can see no need for limiting rules to situations where they are supported by Commission orders to cease and desist. A trade regulation rule may be established under this rule making procedure by use of facts, knowledge, studies and expertise of the Commission so long as the rule is well founded. New and novel practices may well be the subject of trade regulation rules. These rules may cover all applications of a particular statutory provision and may be nationwide in effect, or they may be limited to particular areas or industries or to particular products or geographic markets, as may be appropriate.

A proceeding may involve economic or other studies of industry problems in depth. It might apply to a trade area or areas or relate to one facet of the economy on a

national basis. Industry members have indicated that the most appropriate and effective application appeared to be where unfair practices are limited to one or at least a narrow range of unlawful practices and the practices are of concern to the entire industry. The rule would be directed against practices rather than named persons or firms and would be appropriate where many, possibly a hundred or more, concerns would be subject to the rule. This would be especially true where the rule would eliminate the possibility of a multitude of formal proceedings. In no event would the substance of a rule attempt to reach beyond the scope of the applicable statute. The rule may have application to specified unfair methods of competition by designated classes of companies in a designated industry or a specified market. The rules would constitute a more compelling force for law observance. Businessmen would know that a violation would be an invitation to litigation with the Commission.

Under the new supplementary rule making procedure, applications have been received from representatives of firms in a number of industries. Our Trade Regulation Rule Division in the Federal Trade Commission's Bureau of Industry Guidance, has under study and consideration proposals for trade regulation proceedings affecting more

than a dozen industries. At this time I am able to report to you that the Commission has announced two hearings on the first proposed rules under this new Trade Regulation Rule Procedure which became effective in June 1962.

These two proceedings involve the sewing machine manufacturing industry and the industry engaged in the production of sleeping bags. The objective of these initial undertakings is to formulate proper rules regarding industrywide use of the word "automatic" for describing sewing machines and the use of certain size dimensions for sleeping bags.

These proceedings are designed to inform all concerned of their obligations under the law and assure equitable treatment in obtaining compliance with the law. Any trade regulation rule eventually adopted will be binding upon the entire industry.

Advisory Opinion Procedure

Another major innovation has been the Commission's decision to issue advisory opinions. This is a very recent development, and many of you may not be aware of it. The decision was long overdue, for if the Commission is to fulfill its purpose of providing guidance to businessmen, what better time is there to provide the

guidance than before the law is violated? Previously, advice in the form of opinions was offered only by the Commission's staff and such advice was not binding on the Commission. This made the advice of such limited value to businessmen that few bothered to ask for it. Under our new system, advisory opinions do bind the Commission. And, in the unlikely event that such opinions would have to be changed, sufficient notice would be given before any adversary action would be taken.

Perhaps it is of interest to you to know that more than one hundred requests have been made to the Commission for advisory opinions as provided for under this new procedure. These requests have involved proposed courses of action presenting many questions about the application of laws entrusted to the Commission. In each instance where the Commission found it practicable to do so, it rendered an advisory opinion, binding on the Commission, regarding the legality of the proposed course of action under the laws administered by the Commission.

Proposals for Voluntary Compliance Programs

One proposal that leading representatives of manufacturing firms has advanced is for a change in the procedure and practice at the Federal Trade Commission to

provide greater opportunity for firms whose practices are questioned to act promptly and voluntarily in bringing themselves into compliance with the law without being made the subject of investigation and litigation. Proposals along this line have been made from time to time over the years. Many of the proposals as made in the past were severely criticized in Congress and elsewhere because they smacked of suggestions that cases which had been developed against law violators be dropped on the promise that the violators would "go and sin no more." Some of the more recent proposals advanced by representatives of leading manufacturing firms have avoided much of the basis for this criticism. Therefore, they were given careful consideration by a number of us at the Federal Trade Commission.

It has been argued that many of the inequities arising from following the case-by-case method of enforcing our Federal Trade Regulation Laws can be avoided and in many instances would be avoided, if the businessmen accused were afforded the opportunity to voluntarily comply with the law before investigation and litigation ensues. It is further argued that a voluntary compliance procedure may substantially reduce the load upon the Commission's staff and in turn enable it to expeditiously dispose of

in a proper manner the cases which must be undertaken in the prosecution of formal proceedings.

In view of these circumstances it is believed that we should act to improve our procedures to assist us more effectively in our efforts to persuade businessmen into voluntary compliance with the law. In making this suggestion I am not proposing that we consider changing our policy or procedures to provide for the dropping of antimonopoly cases once they are taken up and have reached the stage where the Commission has undertaken litigation or otherwise has been led to believe that injury in violation of our antimonopoly laws is actually occurring. However, I do believe that there is room for us to move forward and make considerable progress in our effort to persuade businessmen into voluntary compliance with the law without doing violence to policies the Commission has adhered to heretofore. I say that because it is my firm belief that we can make changes in our policy and procedures which will provide a greater opportunity for us to persuade businessmen into voluntary compliance with the law before we are compelled to investigate and litigate cases against them.

These thoughts prompt me to say that I shall urge the Commission to adopt a procedure along these lines designed to promote more effectively voluntary compliance

with the law. For the purpose of identification at this time I would describe this suggested procedure as a "Pre-Investigation Conference."

It is believed that if the Federal Trade Commission should approve and put into effect a procedure such as I suggest, business and the public will benefit. It could mark the real beginning of an effective partnership of government and business in developing a program for voluntary compliance with the law. The end point result would be a greater degree of fairness and far more effectiveness flowing from the application of our Federal Trade Regulatory Laws.

Proposals for Delegation of Responsibility

A number of proposals have been made that the Federal Trade Commission consider delegating to either one of its members or to members of its staff some of the responsibility Congress entrusted to the Commission under the law.

One of the greatest responsibilities entrusted to the Commission is the issuance of Complaints and Orders to Cease and Desist.

The law provides for the Commission to issue a complaint only when it has reason to believe that provisions of the law entrusted to the Commission are being violated.

Recently proposals were advanced that the Commission delegate to the heads of its enforcement Bureaus the authority to determine "whether there is reason to believe that a violation has been committed" and to issue Complaints subject only to review by the Commission.7/ Such proposal, it is suggested, could be effected pursuant to the provisions of Reorganization Plan No. 4 of 1961. In that connection it must be remembered that Chairman Dixon of the Commission, in testifying before a Senate Committee in support of Reorganization Plan No. 4, commented upon the thought that under it the Commission could delegate the authority to issue Complaints. He stated:

> "I don't think a majority of the Commission would ever delegate the right to anyone to issue a complaint and I would oppose it myself."

I do not believe that any businessman should be made the subject of charges in a Complaint unless it has been fully considered and the Commission itself has been led to believe that a violation of law has been or is being committed. However, strange things do happen. A present member of the Federal Trade Commission has been advocating that the Commission delegate to its staff the authority and power to issue Complaints.

7/ According to items appearing in the press, this proposal was set forth in a "Report on the Internal Organization and Procedure of the Federal Trade Commission" by Carl Auerbach, Staff Director of the Committee on Internal Organization and Procedure of the Federal Trade Commission

These proposals that the Commission delegate the authority and responsibility Congress entrusted to the Commission to issue Complaints and Orders to Cease and Desist, in my opinion are not proper. The members of the Federal Trade Commission are appointed by the President, with the consent and advice of the Senate. Presumably, they are responsible for their actions. They are in such position that they must answer for the propriety or impropriety of any action they take as members of the Commission. When the Commission makes an error through the action of its members, businessmen are able to point to the members of the Commission as the ones responsible for the error. That is as it should be. Let no member of the Federal Trade Commission be provided with an opportunity to escape criticism for error committed at the Commission by pointing to unspecified members of the Commission's staff and saying, "There is where the error was made."

Conclusion

The new policies which have been adopted by the Federal Trade Commission provide businessmen with opportunities never before available. Now, you and other representatives of businessmen are enabled to get together with representatives of your Government for the purpose of exchanging views

and eliminating troublesome problems. If businessmen cooperate willingly in such undertakings, the opportunities are for you to become partners, rather than antagonists, in the development of fundamental policies and relationships between Government and business. In this way you are provided a voice in the development of sound trade regulation policies. If businessmen and their representatives evidence statesmanship in taking advantage of these opportunities, pitfalls may be avoided and you may escape the interminable legal processes inherent in the case-by-case approach of adversary litigation in the resolution of trade regulation problems.

I deeply appreciate the opportunity you have provided for me to visit and discuss these problems with you today. I say that because I sincerely believe that the better we understand each other, the better we can work together for the good of business and the public.