ADDRESS OF

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FEDERAL TRADE COMMISSION

BEFORE NATIONAL FUNERAL DIRECTORS ASSOCIATION
HOTEL ROOSEVELT, NEW YORK, N. Y.

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The Federal Trade Commission and Fair Competition

I appreciate this opportunity to meet with you today. It was, however, after long hesitation, and largely because of your counsel and my good friend James R. Clark that it was found possible for me to accept the invitation to address your Association. My hesitation was due first to pressure of other duties, and second, to a feeling that your field is not so much a business as a profession, and that as the activities of the Federal Trade Commission relate only to commerce, a talk on the work of the Commission would neither be of interest to you, nor particularly helpful in pointing the way to greater cooperation in the joint enterprise of the Commission and business in elevating the plane of commercial ethics.

However, the Commission has had considerable experience with parties engaged in supplying you with articles of commerce necessary to the service you render the public. I should like, therefore, to briefly outline to you, as a matter of information, the way the Commission operates, and then to tell you something of our experience with these industries.

The Federal Trade Commission administers a number of different statutes and it has investigated and considered at one time or another just about every line of interstate business activity in the country. The Commission is an independent and bi-partisan agency, created in 1914 under the Federal Trade Commission Act, which declared "unfair methods of competition in commerce" to be unlawful, and directed the Commission to prevent them in the public interest.

Over the past twenty-four years the Commission has determined scores of business practices to be unfair methods of competition and many of these decisions have been reviewed and affirmed by the courts.

A case may originate before the Commission in one of several ways. The most common origin is through an application for complaint made by a competitor or a consumer. No formality is required, and either a personal call at one of the Commission's offices or a letter setting forth the facts concerning a matter within its jurisdiction is sufficient to set in operation the Commission's machinery. The identify of a complainant is not revealed by the Commission, which acts entirely in the public interest rather than in the private interest of the complainant.

The Commission makes its own investigations of the facts involved in such applications for complaint. If the facts indicate a violation of law, the case may be handled in one of two ways. If the violation does not

involve monopolistic or fraudulent practices and the respondent is reputable and responsible, he may be afforded the privilege of avoiding formal complaint by signing a stipulation in which he agrees to forthwith cease and desist from such violations. Where the facts indicate a more serious offense, or that the offender has a record of previous violations of the Act, and hence, that the privilege of stipulation is not appropriate, or in the event the respondent does not desire to avail himself of the opportunity of agreeing to cease voluntarily, a formal complaint charging violation of the law is issued. The complaint is served upon the respondent who is permitted a reasonable time in which to answer, after which public hearings are held, evidence is taken, briefs are filed, and the case is argued much as in ordinary court procedure. If the Commission finds that the evidence taken at the hearings bears out the charges, it issues an order requiring the respondent to cease and desist from the unlawful practices charged in the formal complaint. Thereafter, the United States Circuit Courts of Appeal are open to the respondent for review of the Commission's order.

This, briefly, is an outline of the Commission's formal procedure developed under the Federal Trade Commission Act, as originally enacted. In March of this year the Congress passed and the President approved the Wheeler-Lea Act, which constituted the first direct amendment to the Federal Trade Commission Act in twenty-four years, although the general subject of amending the law had been before Congress in the form of Commission recommendations for a number of years and although bills to that end had been introduced as early as 1935.

The new amendments greatly strengthen the Commission's general power to adequately protect the public, and contains completely new provisions relating specifically to the advertising of food, drugs, curative devices, and cosmetics.

One of the contributing factors to the recommendations of the Commission to Congress for amending the Act was a case involving a patent medicine advertised widely as a safe and harmless method of reducing weight. The Commission found on investigation that the product contained a dangerous drug which might result in serious impairment of the health of a user. The Commission issued its formal complaint, hearings were held, and the seller of the preparation was ordered to cease and desist from representing it to be safe and harmless. Upon appeal the United States Circuit Court of Appeals set aside the Commission's order, and certiorari was granted to the Supreme Court of the United States. The Supreme Court agreed with the Commission's conclusions that the preparation was potentially dangerous to health but held that the Commission was without power to proceed unless it could be shown that some actual or potential competitor of the advertiser was injured, irrespective of the harmful effect of the false advertisement on the buying public.

The Act as amended makes unlawful not only unfair methods of competition but also unfair or deceptive acts or practices in interstate commerce. Thus it will be no longer necessary to supply protection to the consumer solely as an incident to the protection of an adversely affected competitor.

The amendments also strengthen the Commission's procedure by providing that cease and desist orders become final if no appeal is filed within sixty days. Previously an order of the Commission could be enforced only by the United States Circuit Courts of Appeals, violation of whose decrees commanding respondents to obey orders of the Commission constituted contempt of court. Under the Act as amended an additional method of enforcement is provided, and now the violation of an order of the Commission which has become final, either through failure to appeal within sixty days or by affirmance of the court upon appeal, subjects a respondent to risk of a civil penalty of $5,000 for each offense.

The new sections relating to food, drugs, curative devices, and cosmetics provide special procedures for dealing with false advertising of those products, including a provision permitting the Commission to secure a temporary injunction in certain federal courts pending outcome of a formal proceeding before the Commission. In this connection, the United States District Court in Chicago granted such an injunction late in September which will protect the public by preventing advertisement of another reducing compound pending the Commission's formal proceedings.

The new amendments also provide criminal penalties calling for imprisonment up to six months and fines up to $5,000 for false advertising of food, drugs, curative devices, and cosmetics, if the falsity is with intent to defraud or mislead, or if use of the product as advertised may prove dangerous to health. Second offenders may be subjected to double these penalties.

These are the "teeth" of the Commission's procedure. We have found, however, that a great deal of good can be accomplished through more informal proceedings wherein the members of an industry can come to the Commission and obtain trade practice rules for their particular industry. The Commission has a division devoted exclusively to securing and supervising industry conferences looking toward approval of Trade Practice Rules. This procedure has proved most effective and economical, and the Commission found around 200 important industries only too glad to voluntarily avail themselves of such an opportunity for a thorough scrutiny of their practices and, where necessary, a general housecleaning.

No penalty attaches to a violation of trade practice rules as such. However, the rules are of two classes. Group I rules prohibit practices previously determined by the Commission to be unfair and violative of the law, hence when a violation of such a rule is called to the Commission's attention, there is presented a situation which calls for the taking of regular formal corrective action under the statute. Group II rules, on the other hand, constitute expressions of the industry policy as to the adoption of ethical practices, generally regarded as desirable and to be encouraged by the Commission on a wholly voluntary basis. Usually violation of a Group II rule, therefore, does not call for formal corrective action.

Another and important phase of the Commission's work lies in the field of general economic investigations. At the direction of Congress or the President we have made a number of searching investigations into electric and gas utilities, chain stores, agricultural income, farm machinery, steel, cement, tobacco, grain trade, meat-packing, and dozens of other industries and phases of industrial life. These general investigations have placed the spotlight of publicity on many questionable activities and have assisted the Congress and state legislatures in framing important legislation which affects the whole public.

Our largest job in this regard was the investigation of electric and gas utilities. The direct result of that investigation, which revealed fully the practices of public utility holding companies and their control of operating subsidiaries, was enactment of the Public Utility Holding Company Act of 1935. In addition, the investigation was of real assistance to most of the state public utility commissions in effectively extending their regulations over electric and gas utilities and in causing substantial reduction of many of their rates.

In addition, the Commission has duties under the Clayton Act and the Webb-Pomerene Export Trade Act. The so-called Robinson-Patman Act, which amends Section 2 of the Clayton Act, vests the Commission with a number of important duties and powers relating to price discrimination. Section 7 of the Clayton Act empowers the Commission to proceed against the acquisition of capital stock of competing corporations where the effect is to suppress competition.

It will be noted from this explanation that the Commission's functions are basically concerned with competition. They are directed to the preservation and fostering of fair competition, under a general policy of the law based on maintaining the competitive system.

While the law demands that competition be preserved free of artificial restraint, it also outlaws all unfair methods of competition. Fair competition is truly the life of trade, and the way of business freedom; unfair competition, on the other hand, tends to restrict and destroy the development and prosperity of industrial and commercial activity. The prevention of unfair competition is thus essential to the broader objective of preserving the freedom of opportunity for business under the competitive system to achieve such measure of success as is merited by its public service.

Competitive conduct therefore requires those engaged therein to be active in drawing the line between fair competitive activity and that which is unfair within the meaning of the law; in other words, business men are constantly confronted with the necessity of so shaping their activities as to be numbered among the sheep rather than the goats. In this choice, a guide as to what is fair or unfair may be found in the numerous decisions of the Commission and of the courts.

In the earliest Commission case to reach the Supreme Court, that Court indicated the elements of unfair competition by pointing out that the business

practices to be avoided as unlawful are those opposed to good morals, because characterized by deception, bad faith, fraud or oppression, and those against public policy, because of their dangerous tendency unduly to hinder competition or create monopoly. /F.T.C. v. Gratz, 253 U. S. 421 (1920)./

In the first court case decided under the original Trade Commission Act, the United States Circuit Court of Appeals for the Second Circuit said:

> "The Commissioners, * * * are to exercise their common sense * * * and stop all those trade practices that have a capacity or a tendency to injure competitors directly or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common law cases." /Sears Roebuck & Co. v. Federal Trade Commission, 258 Fed. 307 (1919)./

The court thus put its finger on a large class of practices which in law are to be considered unfair competitive conduct, namely, trade practices which have a capacity or a tendency to injure competitors, through deception of purchasers.

In a more recent case the Supreme Court of the United States used language which should aid a business man to keep his legal obligation to preserve competition and at the same time to avoid unfair methods of competition. The court said:

> "A method of competition which casts upon one's competitors the burden of the loss of business unless they will descend to a practice which they are under a powerful moral compulsion not to adopt, even though it is not criminal, was thought to involve the kind of unfairness at which the statute was aimed." /Federal Trade Commission v. Keppel & Bro., 291 U. S. 304 (1934)./

As I suggested to you before, the procedures of the Commission perhaps directly affect the members of your Association only as purchasers or consumers. You are dealing with the public in an unusual and peculiar relationship. You are not merely selling goods; you are rendering a service which is both necessary and delicate. In my recollection the Commission has proceeded only once against a member of your profession and I doubt that the advertising practices involved in that case are countenanced by any of your reputable members.

The Commission has found, however, dozens of instances of false advertising of the products which reach the public only through your members. In one of the Commission's earliest stipulations, a partnership engaged in making tombstones agreed with the Commission to cease from further representing that the monument makers in the State of Oklahoma were adhering to a price-fixing plan, when such was not the fact. Another stipulation bound a respondent to cease offering a reward for the disinterment for comparative purposes of competitors' burial vaults. About a score of formal complaints have been issued against manufacturers and distributors of metal grave vaults for misrepresenting the water-proofness and the corrosion resistance of such vaults, and with unfairly and falsely disparaging the durability and serviceability of the grave vaults manufactured of concrete and stone. Likewise, many complaints and stipulations have been drawn to remedy the practice of

the concrete and stone burial vault manufacturers of misrepresenting the durability and water-proof character of their products.

In 1932, a set of trade practice rules was drafted by the Commission in cooperation with the members of the metal burial vault industry and finally approved. At the time there were pending formal charges against a number of metal vault manufacturers, and when these members agreed to abide by the trade practice rules the Commission was able to dismiss its formal proceedings against them.

Likewise, trade practice rules have been drawn and approved for the concrete burial vault industry.

The Commission has also had experience with misrepresentation of burial garments sold as "all wool".

I do not know to what extent the representations of manufacturers of equipment thus misrepresented have been passed on through any of you to the general public. If any has, perhaps it is because you have relied without investigation upon the representations made to you by the manufacturer. I hope so, because the public expects you to be highly scrupulous in discharge of the trust which it necessarily reposes in you. The public expects of you much greater frankness than the law requires of ordinary commercial sellers. They expect you to tell not only "the whole truth and nothing but the truth", but to see that your statements of the truth are so clear as to leave no room for misconception.

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