"LET'S STOP KICKING THE ANTI-TRUST LAWS AROUND"

Remarks of

ROBERT ELLIOTT FREER, CHAIRMAN

FEDERAL TRADE COMMISSION

Prepared for Delivery Before

THE SALES EXECUTIVES CLUB OF NEW YORK

Roosevelt Hotel, New York City

Tuesday, December 7, 1948

For Release in AFTERNOON NEWSPAPERS of Tuesday, December 7, 1948.

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It is a real pleasure to attend this session of the Sales Executives Club of New York, but I have some hesitation in addressing you nevertheless. Events of the past six months have convinced me that the Federal Trade Commission's most urgent need right now is for some lessons in practical salesmanship. I think we have the finest product in the government today but that our distribution and sales promotion activities have been sadly neglected. As soon as we have finished this lunch I am going to find out whether the Commission can either take out a special membership in your organization, or, at the very least, have you return the favor and address us on the subject of how to sell the idea that real enforcement of the anti-trust laws is essential to preserving our American way of life.

I say that the Commission needs some basic courses in practical salesmanship since it is obvious that hardly anyone realizes what the Commission is supposed to do, let alone the basic philosophy of the laws it administers. I am not even going to assume that you are entirely familiar with the scope of its functions, and will begin by describing them to you.

Six weeks ago, after more than thirteen years service I announced my intention to resign from the Federal Trade Commission, effective at the end of this month. I have enjoyed every minute of this time, particularly serving with my fellow Commissioners and the members of the Commission's staff. Almost without exception, my fellow laborers in the Commission vineyard have been high-minded, able men struggling against almost insuperable problems. I feel a real sense of loss in severing my official relations with them. This decision to resign is based solely upon the fact that I can no longer continue to serve on the Commission at a salary which may have been adequate in 1914 when it was first fixed by law but which certainly is a pittance by today's standards, especially when the responsibilities of the position are taken into account.

Having announced my resignation, I feel free of that fear of speaking too plainly which haunts most government officials, who know from experience that whatever they say on any controversial subject will be thrown back at them, often out of context, before a Congressional committee or in the brief or oral argument of some party to a controversy. Hence, I would like to speak to you as 1949's private citizen lawyer interested in the problem of preserving our competitive system rather than as 1948's Chairman of the Federal Trade Commission.

As you may have observed, interest in the anti-trust problem ebbs and flows in a very sharp but irregular manner. The first great ground-swell culminated in the Sherman law in 1890. After the first wave of cases under this law, the tide ebbed for a while and there came a great plea on the part of the business community to amend the Sherman Act and to make it certain just what a business man could or could not do. Out of this ground-swell came a real inquiry into the steps necessary to preserve our competitive system. The Bureau of Corporations, established in 1902 for the purpose of investigation and report on competitive conditions, conducted exhaustive inquiries, as did a number of Congressional committees. The Federal Trade Commission was the product of Congress' determination in 1914 that something

more than sanctions against accomplished monopoly was required. The practical difficulties of trying to make eggs out of omelets required that means be found to keep the eggs from being broken in the first place. Much debate occurred as to the best approach to the problem, and the end result was a compromise between the view, on the one hand, that Congress should attempt a codification of all those practices known to tend toward monopoly, and the view, on the other, that an independent administrative agency should be created with the widest quasi-judicial discretion to eliminate unspecified practices falling within broad legislative standards. In the Clayton Act, Congress sought to specify objectionable practices, such as price discrimination, restrictive leases and contracts, corporate acquisitions of competitors and interlocking corporate directorships. In the Federal Trade Commission Act, there was created an agency which was given even broader powers of investigation and report than the old Bureau of Corporations and directed to "prevent unfair methods of competition in commerce," subject to review by the United States Courts of Appeals. This term "unfair methods of competition" was new to the law, and the Congress intended that the Commission should be a body of real experts in the field of business relationships, not only to prevent those specific practices enumerated in the Clayton Act, but to prevent any other practices in commerce which might be characterized by bad faith, oppression, fraud or a tendency to create monopoly or suppress competition.

Over a long period of years the Commission in its cases, and the Courts in the process of reviewing these Commission cases, have spelled out the illegality of a great many practices which today universally are recognized to be unfair methods of competition or unfair and deceptive practices. These include false advertising, deception of customers, monopolistic practices, lottery merchandising schemes, price-fixing, boycotts, commercial bribery, disparagement of competitors, and a host of different variations of all of them.

The Act sets up a procedure by which the Commission is to carry out this basic duty of preventing unfair methods of competition. It contemplates, first of all, a very extensive power of investigation and of making public the facts regarding trade practices. This power was an enlargement of similar duties in the old Bureau of Corporations which was merged into the Federal Trade Commission when the latter was created. Secondly, the Act directs the Commission to issue a formal complaint when it has reason to believe that any person has engaged in an unfair method of competition and that such action would be in the public interest. The complaint is served on the parties involved, who then have an opportunity of answering the allegations contained in it. If the complaint and answers create issues of fact or law, full hearings are conducted before a Trial Examiner, and the attorneys trying the case and the respondents have a full opportunity of being heard both before the Trial Examiner and the Commission upon the basis of a public record. At the conclusion of this proceeding the Commission enters an order either requiring the respondent to cease from the practices found to be unfair or dismissing the complaint. In no case is this procedure punitive, and the most that the Commission may do is point the finger of admonishment and require that the illegal practices be terminated. The immediate right of appeal is given to the United States Courts of Appeal, which have the power to modify, affirm, enforce or vacate the orders of the Commission.

A similar procedure is specified in the Clayton Act as to those sections which the Federal Trade Commission is directed to enforce, relating to price discrimination, exclusive-dealing contracts, corporate acquisitions of competitors, and interlocking directorates.

In addition, the Commission has worked out two methods of handling questions of violation of law where the formal procedure of complaint, hearing and order seem inappropriate. One is by obtaining an agreement from the party involved to discontinue the practice in question; the other is by the trade practice conference method, where an entire industry may sit down with the Commission's staff and work out on a cooperative basis trade practice rules covering many industry problems. Both of these latter procedures are effective only to the extent that questions of law involved are clear-cut and there is a genuine desire on the part of industry to comply with the most ethical standards. Neither of them can be employed effectively in border-line situations, or where there is any substantial factual dispute. Numerically, a great majority of Commission cases are settled either by stipulation or by trade practice conference procedure. In contrast with cases which are fully litigated before the Commission and in the courts such cooperative settlements receive little public notice. This may be one reason why the Commission may bear the reputation in some quarters of a crusading agency.

The Commission has found the stipulation procedure to be an excellent method of disposing of the largest proportion of cases involving false advertising and similar deceptive practices, particularly where there has been no real intention to defraud or deceive. The trade practice conference procedure also has proved effective in a number of fields where it has been possible with industry cooperation to draw standards of ethical conduct much higher than could be practically enforced by a series of individual complaints and orders. This conference procedure, however, is regarded by the Commission, and quite properly so I think, as being inappropriate for use in matters involving cooperative restraints of trade or violations of the Clayton Act. By this I mean that the Commission has felt that there was a proper field for industry agreement, principally in the matter of eliminating deceptive practices, but that it would be highly improper to change this procedure into one producing rules even faintly resembling the old N. R. A. Codes of Fair Competition, which were in large part devoted to softening the effects of competition rather than to promoting competition itself.

In 1918, Congress enacted the Webb-Pomerene Export Trade Act which set up a procedure for organization of associations to engage in export trade and created certain exemptions from the anti-trust laws for such associations, subject to their filing their articles of association with the Commission and to their submission thereafter to supervision of their activities by the Commission.

In 1936, the Robinson-Patman Act constituted a major revision of Section 2 of the Clayton Act, materially expanding the Commission's duties in the field of discrimination.

In 1938, Congress significantly amended the Federal Trade Commission Act and broadened the Commission's basic jurisdiction to prevent unfair methods of competition by adding to them unfair or deceptive acts and

practices and by extending considerably the Commission's jurisdiction over the advertising of food, drugs, devices and cosmetics.

In 1939, Congress passed the Wool Products Labeling Act which requires considerable supervision by the Commission over the labeling of wool products, from yarn to the finished suit on the retail rack.

In 1946, Congress passed the Lanham Trade-Mark Act which, among other things, provided that the Federal Trade Commission might apply for cancellation of trade-marks under certain conditions.

As you can see, the Commission was established as a watch dog in the anti-trust field and given the formidable task of preventing every person engaged in commerce except banks, meat packers and carriers subject to the various Acts to regulate commerce, from engaging in unfair methods of competition or unfair and deceptive acts and practices.

Now I would like to translate these duties into the details of the Commission's work load. During the present fiscal year the Commission will do the following things, among others:

1. Answer about twenty thousand letters of inquiry or complaint regarding individual business practices;

2. Check several million pages of advertising copy and radio continuities for grosser forms of false advertising or violations of previous orders;

3. Conduct about 1,000 field investigations into alleged violations of law;

4. Collect, compile and publish quarterly financial statistics for more than 5,000 manufacturing corporations as a basis for preparing statistical estimates for all manufacturing corporations;

5. Conduct hearings and draft trade practice rules applicable to a dozen different industries;

6. Negotiate the settlement of 200 or more cases of law violation by stipulation;

7. Conduct a dozen economic investigations and prepare reports thereon for the President or the Congress reporting our findings and recommendations;

8. Investigate and conduct hearings on 200 or more formal cases of law violation, ranging from false advertising to price-fixing in the entire iron and steel industry;

9. Check the practices of 20,000 concerns handling wool products, from yarn to finished suits on the retail racks;

10. Prosecute or defend 20 or more cases in the Federal courts in which the Commission is a party;

11. Handle a variety of problems relating to 50 export trade associations;

12. Check some 25,000 trade-marks under the newly created jurisdiction of the Lanham Trade-Mark Act; and

13. Check compliance or lack of it with several hundred previous orders to cease and desist.

All of these things must be done with a total staff or 647 people, including messengers, clerks and "housekeeping" personnel. There are 340 members of the staff who are attorneys, accountants, economists or investigators, and it is these employees who must carry the whole burden of the Commission on an annual appropriation of about three and one-half million dollars.

I have always felt that the Commission's staff was pitifully inadequate to deal with its problems and that the appropriations of the Commission have been held down to a point where it can do no more than discharge a small portion of its full responsibility to the public.

I feel very strongly that this problem of preserving our competitive system is the foremost domestic problem today and that the public must soon decide whether we honestly intend to try to obey the rules of the economic road we so far have travelled or whether we are willing to recognize that the alternative route is one of all-out government regulation. Unfortunately, there seems to be no middle road in this situation. If we continue to give lip service to the competitive system and provide only token enforcement agencies under the anti-trust laws; if we continue to cry against monopolies and at the same time refuse to provide the means of curbing them, we will continue to coast down hill without conscious resolution into a valley from which we must be towed because the spark of competition neither exists nor can be restored to its proper function in our economic motive power. When that point is reached we will have no choice but to acquiesce in a system of permanent peacetime government controls which will shift the responsibility of management to the government.

I am not concerned at all about the possibility of any such system of government control resulting if it were left as a matter of free choice to the American public today. My concern is that if there continues much longer the present trend of concentration of power in fewer and fewer hands and the present trend of sniping at the anti-trust laws and seeking by every means to avoid competition, the power of choice between all-out government regulation and a free competitive system will have been removed. Thus, we will have actually made a choice of all-out government control of business through our very lack of appreciation of the problem and our consequent failure to do anything about it.

Preservation of the competitive system is the basic philosophy which has moved the Federal Trade Commission. The Commission is not an agency which is seeking power or control over industrial decision and discretion. It has been motivated by the principle that the coming of the day of government regulation can be postponed or forestalled by prevention of those practices which operate to destroy the competitive system by depriving the individual business man of his freedom.

Recently the Brookings Institution issued a report comparing the various economic systems throughout the world, and made this statement:

> "If the function of government is confined to the elimination of monopoly and the punishment of collusive efforts designed to restrict or destroy competition, the creative power of private enterprise which has been responsible for the extraordinary industrial achievements of modern times can be preserved. Such a method of regulation, in contrast to communism, socialism and hybrid systems of control, would insure the preservation of individual liberties."

I agree entirely with Dr. Moulton in his conclusion that the elimination of monopoly and the punishment of collusive efforts to destroy competition will both stimulate the creative power of private enterprise and preserve individual liberties. In fact, I doubt whether there is anyone who would disagree with this statement. The practical difficulty is that individual business men and groups of business men lose sight of this distinction when they are subjected to competitive stresses and often seek to relieve the stress either by private agreement or by special legislation exempting them from the anti-trust laws. Thus, we have seen in recent years repeated efforts by various groups to nibble at the edges of the anti-trust laws and to create exemptions from them. I would like to deal at some length with one of these recent efforts in concluding my remarks.

One of the greatest achievements of the Federal Trade Commission was its proceeding against the Cement Institute and more than 70 producers of cement on a charge of price-fixing and combination to suppress competition. The complaint in this case was issued about two years after I came to the Federal Trade Commission, and it has been a controversy for more than ten years. The most exhaustive case-investigation in the Commission's history was undertaken in this proceeding, and the transcript of testimony in the public hearings in this case consisted of more than 50,000 pages. The Commission made findings of fact reciting in detail the evidence leading it to the inescapable conclusion that the respondents had engaged in a combination and a conspiracy and upon the basis of these findings it entered an order requiring them to cease and desist from certain of their collusive pricing practices. The case was appealed and finally reached the Supreme Court of the United States, where in the Spring of this year the Commission's order was affirmed in every particular, the Court complimenting the Commission on fulfilling the original Congressional intention of giving truly expert consideration to the problems involved. I suspected when the Commission entered its order in the Cement case that if it were finally upheld in the courts an all-out effort would be made by many segments of the business world to modify the law to legalize the continuation of the so-called basing point system of fixing uniform delivered prices. Following the Supreme Court's decision some sellers of cement, steel and other heavy goods almost immediately advised their customers that the effect of the decision was that the buyer was now required to pay the freight, and that certain local shortages and certain increases in price in many different commodities were directly due to this decision of the Commission and the Supreme Court. Some business interests urged customers, stockholders and others to write to Congress urging the amendment of the law so as to permit the continued use of the basing point system. Many small business men have been misled into the belief that it is now illegal for any seller to pay

freight and that no seller can seek customers in any area except those in which his f.o.b. price plus freight is lower than his competitor's. Questionnaires have been sent out by business organizations asking such questions as "Do you believe that discontinuance of freight absorption would force companies in your industry to change the location of their plants"? and "Do you think mandatory uniform plant prices would increase or decrease competition"? I think that such questionnaires, which are based upon a misunderstanding of the law and of the Commission's recent proceedings, might well have included such other questions as whether the recipients favored drinking by minors or courses on the art of profanity in the primary schools.

Hearings have been held before a sub-committee of the Senate Committee on Interstate and Foreign Commerce at which many witnesses have expressed the alarm created as a result of these interpretations of the law. I observed no later than Sunday, November 28, an Associated Press dispatch in the "Washington Star" which concluded with the following amazing statement:

> "To date, the witnesses all have favored a legalized pricing system which would permit paying freight costs. The only opposition has come from the FTC."

In my opinion a great many morally and intellectually honest American business men have been misinformed as to the effect of the Commission's decision in the Cement case and other similar proceedings by the Commission, and have been misled into the alarming feeling that the Federal Trade Commission has so interpreted the law that now everyone must invariably add actual freight costs on every shipment and must never meet a lower price of a competitor.

And I want to say that if any such interpretation can reasonably be given to the law as it now stands then my reaction is that of Mr. Bumble in "Oliver Twist," "If the law supposes that, the law is a ass, a idiot."

Recently the Commission adopted a statement of policy regarding ographic pricing for the guidance of its staff. This statement of policy was designed for the guidance of expert attorneys and economists as a standard to be used in their consideration of these problems in Commission cases. It is a rather complex and difficult document for the average business man to understand. Hence, I would like to say in short-syllable words that the Commission has stated officially that freight absorption is not "out the window" and that the Commission has not deprived any business man of the honestly and independently exercised right to meet competition. I will further state, as strongly as I know how, that no business man acting in a genuinely competitive way need fear that the decisions in either the Cement or Rigid Steel Conduit cases will be used as precedents for declaring his competitive conduct unlawful. Both of these cases were recognized by the reviewing courts to be efforts of the Commission to break up highly integrated and organized conspiracies to prevent any competition in price. The reviewing courts likewise agreed with the Commission that the basing point practices employed in these industries were the central mechanism of price-fixing combinations formulated, maintained and preserved by collusion.

Of course, the nub of this controversy appears to me to be an effort in certain business circles to write an amendment into the law to the effect that the mere fact that everyone in an industry is employing a basing point or other organized system of selling at identical prices shall not be considered as evidence of agreement in an anti-trust proceeding. I am convinced that the success of this effort not only would set the anti-trust laws back more than fifty years but also accelerate a trend toward governmental regulation, It is a well-recognized fact that most price-fixing in this enlightened age is not accomplished by means of formal contract, signed and sealed in the blood of the brothers. Many of you know from first-hand experience that a rather forceful discussion, in the course of a sales managers' meeting, of the predatory practices of an errant member is often quite adequate to bring him into line without need of exacting any formal penitential agreement from him. The courts and the Commission should continue to have the right to make proper and reasonable inferences from all the facts and circumstances, if the anti-trust laws are to be effective at all. I know of no instance in which the Commission has proceeded against any industry solely on the basis of identical prices. I know of no contemplated proceeding involving this issue. I do not believe that there is any member of the Federal Trade Commission who would argue that this should be the law. But the Commission and the courts should continue to be free to examine all of the circumstances of industry action, including the fact, as in the Cement case and as in the Rigid Steel Conduit case, that prices remained identical and relatively inflexible over long periods of time -- periods of surplus as well as periods of scarcity -- and that buyers could almost never find any advantage, even in periods of surplus, in dealing with one seller over another.

In conclusion, let me urge you to lend your personal individual sales technique to selling the anti-trust laws and their essentiality to the competitive theory of regulation by the natural forces of a free market. Without substantial support from top flight sales executives of the business community, neither the Federal Trade Commission nor the Department of Justice can today "sell" the enduring qualities of competition as the foundation stone of the American economic system of free enterprise. Let me urge you further to help these agencies to sell all proper strengthening of these laws and their enforcement on a scale commensurate with the importance of the problem.

And now if I may have that application blank, I shall enroll the Commission as a special member of your great organization.