For Release Thurs. a.m.
November 21, 1963

# FTC PROMOTES FAIR COMPETITIVE ACTS AND PRACTICES

An Address by

EVERETTE MACINTYRE

Member of the Federal Trade Commission

Before

THE HARVARD BUSINESS SCHOOL CLUB OF PHILADELPHIA

FEDERAL TRADE COMMISSION
JAN 16 1964
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Philadelphia, Pa.

November 20, 1963

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## Introduction

Mr. Chairman, guests, officials and members of the Harvard Business School Club of Philadelphia:

It is a pleasure to talk with you here this evening. It is noted that in your earlier meetings this Fall you have heard discussions on some very interesting subjects and on some perhaps far more interesting than the one I am to discuss with you. However, I shall undertake to provide you with some information regarding the Federal Trade Commission, the subject which I have been requested to discuss.

It has been indicated to you and to me that I should be prepared to discuss with you actions which have been taken by the Federal Trade Commission to improve business-government cooperation in furtherance of our public policy for a free and fair competitive enterprise system.

## The Federal Trade Commission

Before engaging in a discussion of the things recently undertaken by the Federal Trade Commission in support of our

public policy for a free and competitive enterprise system, I believe it would be helpful to try to answer for some of you the question of "What is the Federal Trade Commission?"

The Federal Trade Commission is one of the so-called independent regulatory agencies of the Federal government. It was created through the provisions and for the enforcement of the provisions of the Federal Trade Commission Act which was approved September 26, 1914. The Federal Trade Commission is a body of five members, not more than three of whom may come from any one political party. Each member is appointed for a term of seven years. The terms are so arranged that the law provides for not more than one to expire in any one year. At the present time the Commission has among its membership three Democrats, one Republican and one Independent. Perhaps it would be more accurate to say that each of the five members of the Federal Trade Commission is an Independent. That is the purport of the decision by the Supreme Court of the United States in the case of Humphrey's Executor v. United States, 295 U.S. 602, 624 decided May 27, 1935, when the Court held:

> "The Commission is to be nonpartisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative."

## FTC Authority Regarding Unfair Acts and Practices

The Federal Trade Commission's 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 Act consists of 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."

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. The 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 of competition." Since then the Commission has been able to proceed directly to protect consumers and other members of the public while continuing to eradicate competitive methods which unfairly divert trade from the honest to the unscrupulous members of the business community. We should

keep in mind, then, that the purpose of the Federal Trade Commission is to protect the public and at the same time protect 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 free and competitive enterprise system calls for free and fair competition.

We share with you a common interest in fostering a high level of business ethics and preventing unfair practices. We believe, as I am sure you do, that ethical practice is good for business and for the community as a whole, not only from the standpoint of morality, but also from the standpoint of the businessman's return on investment.

The Federal Trade Commission Act has been interpreted as outlawing not only those practices which involve false, misleading and deceptive advertising, but also those which are against public policy because of their dangerous tendency unduly to hinder competition or create a monopoly (Federal Trade Commission v. Gratz, 353 U.S. 421, 427 and Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441, 453-454).

Of course, one of the principal means utilized by the Federal Trade Commission in furtherance of its work to

eradicate unfair acts and practices and unfair methods of competition has been quasi-judicial proceedings. Through such formal cases the Commission has proceeded by issuing complaints, holding hearings and, where warranted, the issuance of cease and desist orders to stop practices found unfair or injurious to competition and the public. Also, to assist businessmen in their understanding of the laws administered by the Commission and to assist the Commission in its work to eradicate unfair acts and practices, the Commission designed, formulated, and has utilized a Trade Practice Conference procedure. The Commission's work in this area dates back to 1918. In the intervening years, in excess of 250 United States industries have, at one time or another, operated under various forms of trade practice rules. Today rules are in effect for 168 industries.

Trade Practice Conferences have been initiated at all stages of unfair practices within an industry. They have run the gamut of fairly standard rules where the law has been well settled in case decisions. Also, the Rules are of value where express standards may be prepared for guidance of industries early in the history of the emerging industry and in the initial stages of unfair practices within the industry.

In more recent years, the trade practice rules have been more often utilized to afford detailed and specific

guidance to industry on specific problems of compliance which were peculiar to the industries affected and in the early stages of the use of unfair methods.

The purpose and significance of the Commission's Trade Practrice Rules is the interpretation of the law. In that respect they are advisory. Since it is the purpose of these Trade Practice Conference Rules to help businessmen understand the provisions of the law applicable to certain trade practices, this work of the Commission has really performed an advisory service to businessmen and their industries.

The legislative history of the Federal Trade Commission Act clearly indicates that this function was intended to promote voluntary compliance with the law. As this activity of the Commission has progressed, it has become a program designed to obtain and maintain, to the greatest extent possible, observance of requirements of law administered by the Commission on an industry-wide and voluntary basis.

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 the advice set forth in Trade Practice Conference Rules and Guides.

It was suggested that the deficiencies be remedied through the establishment of new and supplementary procedures which would involve substantive rule making. Through the suggested supplementary proceedings certain industry-wide unfair trade practices could be halted simultaneously. The small percentage in the industry seeking to take advantage of competitors would not be left entirely free of sanctions as in the past under Trade Practice Conference procedures. Thus, it was suggested that the new supplementary procedure would provide more equitable treatment for all competitors. It would avoid the singling out of a firm from among many in an industry engaged in the use of an unfair act or practice. As you know, when a firm is put under the sanctions of a cease and desist order and his competitors left free for prolonged periods to use similar practices, the disadvantages to the firm under the cease and desist order become obvious. Likewise, the suggested supplementary rule-making procedure was designed to avoid the weaknesses of the Trade Practice Conference procedures.

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.

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 and fifty 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.

These recent developments at the Federal Trade Commission reflect trends in the enforcement of Federal antimonopoly legislation.

## Antitrust Trends

There has been a long and continuing trend away from litigation toward consent settlement of antimonopoly cases. This development has produced controversy. The consent decree procedure in the antitrust field has been derided on the one hand as "gentlemanly treaty making" 1/ and extolled on the other as presenting an opportunity "to a group of men sitting around a table to reach a settlement grounded in industrial reality and the demands of public policy"2/ without the distractions of ordinary court room procedure.

The Federal Trade Commission, which devotes about 60% of its total effort to curbing acts and practices tending to

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1/ William D. Rogers, Is It Trust Busting or Window Dressing? The Reporter, November 1, 1956, pp. 21, 23.

2/ Hamilton and Till, Antitrust in Action, pp. 88, 89 TNEC Monograph No. 16 (1940).

hinder competition or create monopoly, i.e., antitrust violations, within the last decade or so has increasingly inclined toward the second view. As I have noted, it has progressively streamlined its policies and rules to facilitate the work of the Commission without formal case proceedings. Moreover, the Commission has progressively tailored its procedural rules applicable to formal cases to provide for and to encourage disposition of such cases by consent negotiations.

The Commission took its first tentative steps toward a consent settlement procedure of its adjudicative cases in 1927 with the promulgation of a rule providing that a respondent desiring to waive hearings on the charges against him could file an answer admitting the allegations of the complaint. Respondents could also make the requisite admission by stipulating the facts on which the charges were based. The Commission's insistence in the ensuing twenty-four year period that no proceeding could be settled by way of consent agreement without admissions of this nature was severely criticized. The Attorney General's Report on Administrative Procedure in Government Agencies (1941) stated the requirement in many instances hindered settlement where respondents were willing to consent to an order to cease

and desist from specific practices but were unwilling to admit the charges in the complaint because of the fear of treble damage litigation. The Report concluded that from the point of view of both the public and private interest it seemed desirable to permit entry of an enforcement order without requiring admissions of this nature.

The Commission, however, proved reluctant to make the suggested change because of its belief that the law required that its orders be supported by findings of fact that the acts complained of had actually taken place. It was not until 1951 that the Commission's consent order procedure took on the flexible form which it now possesses. In that year the Commission changed its rules to provide that a respondent was only required to admit the jurisdictional facts; he was not required to admit, although he could not deny, the matters set forth in a statement of acts and practices the Commission had reason to believe were unlawful. In 1954 the consent settlement procedure was further liberalized by the adoption of a rule dispensing with the requirement that consent settlements contain findings of fact. Under the new procedure the terms of the consent order were to be construed by the allegations of the complaint. The Commission's change of heart on this score was summed up

in the statement of Chairman Howrey that "findings of fact are not only unnecessary (in consent settlements) but act as a deterrent to the accomplishment of compliance by voluntary means." 3/ Personally, I disagreed with the view that findings of fact were unnecessary. However, I supported then and I am continuing my support of appropriate measures for enforcement of our public policies to the greatest extent possible without resort to litigation.

The procedural changes of 1951 and 1954 were also noteworthy since they specifically gave the respondent an opportunity to present his views on the proper scope of the order in the course of negotiations. The previous admission answer procedure, on the other hand, had not provided to any extent for respondent's participation by way of conferences in the framing of the remedy to be imposed.

The 1954 rule was further liberalized by permitting settlement at any stage of the proceeding, but this feature was deleted in the new consent settlement procedures adopted in 1961 because the interruption of trial for consent negotiations had proved to be a source of delay.

The rules of practice adopted in 1961 initiated some very significant changes in the consent order procedure.

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3/ Howrey, Federal Trade Commission Decisions, ABA Section of Antitrust Law, 133, 141 (1954).

For the first time parties were offered the opportunity to enter consent negotiations in the investigational stage of the proceeding. The procedure is of advantage to respondents, since it may eliminate at least some of the unfavorable publicity inherent in many investigations when a party's suppliers, customers or competitors must be interviewed in order to secure the information necessary to determine whether a complaint should issue.

Prior to 1952 only approximately 10 per cent of Federal Trade Commission formal cases were settled under the admission of facts procedure. By 1960 this had jumped to approximately 80 per cent. At the present time, 80 per cent of all Federal Trade Commission formal cases are settled by consent.[4/] While these figures cover all types of the Commission's formal cases, including those involving false and misleading advertising, it has been determined from the Commission's records that at the present time over 80 per cent of all of the Commission's formal antimonopoly cases are settled by consent.

This trend toward an ever-increasing percentage in the number of all antimonopoly cases settled by consent at

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4/ Peter Woll, Administrative Law (1963), pp. 120, 121.

the Federal Trade Commission follows an earlier trend established by the Antitrust Division of the United States Department of Justice. There the trend toward consent settlement of antitrust cases has been more marked and over a longer period of time than has been the trend at the Federal Trade Commission. The first consent decree in a Sherman Act case was entered in 1906. In 1914, with the enactment of the Clayton Act, Congress provided private parties with the opportunity to recover treble damages for injuries arising from antitrust violations and further provided in Section 5 of that law that judgments in cases brought by the government would be available as prima facie evidence to assist the private parties in their treble damage cases; provided, however, that such judgments would not be available as prima facie evidence if entered before testimony should be taken. This stimulated the frequency of consent decrees in actions brought by the Antitrust Division under the Sherman Act. In 1940 the Temporary National Economic Committee reported that more than half of the antitrust equity actions instituted by the government were resulting in negotiated settlements.[5/] In 1955 the Attorney General's

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5/ Hamilton and Till, TNEC Monograph No. 16, p. 88 (1940).

Committee was able to report ". . . . . from 1935 to date, 72 per cent of the civil actions brought were terminated by consent decrees." 6/ Subsequently, Assistant Attorney General Hansen testified that "for fiscal years 1947 through 1957, 72 per cent of all civil-case terminations were by means of consent decrees." 7/ In the period since that date, the records of the Antitrust Division show that approximately 81 per cent of all antitrust civil cases have been settled by consent.

Recent developments at both the Federal Trade Commission and at the Antitrust Division of the United States Department of Justice indicate that businessmen may expect those agencies to devote progressively more effort to informal handling of complaints alleging violations of law. If these indications are meaningful, then the trend we have discussed undoubtedly will be continued in the future.

Augmenting the consent settlement procedures, the Commission in the rules effective August 1, 1963 inaugurated a voluntary compliance procedure for disposition of cases on an informal basis. This procedure contemplates that in

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6/ Report of the Attorney General's National Committee to Study the Antitrust Laws, p. 360.

7/ Hearings, p. 10. Consent Decrees Program of the Department of Justice, Antitrust Subcommittee, Committee on the Judiciary, House of Representatives, 85th Cong., Serial No. 9. The hearings are contained in 5 volumes in 2 parts.

a proper case, depending upon the nature and gravity of the alleged violation, the prior record of the parties, and other factors, the Commission may accept adequate assurance that the practice has been discontinued and will not be resumed. The rule in some respects is analogous to the stipulation procedure discontinued in 1961 whereunder the Commission accepted stipulations from respondents that they would discontinue certain practices, as well as the provision for "informal administrative treatment" supplanting the provision for the stipulations in the same year. The new voluntary compliance procedure, however, goes much further in providing for the settlement of cases on an informal basis. In a sharp break with precedent, the voluntary compliance procedure on its face extends to violations in the restraint of trade or antitrust field. Previously, it had been the Commission's announced policy with respect to stipulations or the informal administrative treatment provision, that informal settlement, not terminating in an enforceable cease and desist order was not to be utilized in those cases involving activities having the tendency to suppress or restrain competition through conspiracy, discriminatory or monopolistic practices.

The Commission will have to be vigilant lest the provision for voluntary compliance become an escape hatch

for serious antitrust violators who would be subject to no more than a slap on the wrist and an unenforceable admonition not to sin further. Obviously, care must be exercised to limit the voluntary compliance procedure to those parties violating the law unintentionally or through misunderstanding. Voluntary compliance of the nature spelled out in the new rules is not suitable for the flagrant or deliberate transgressor. In my view, if the party charged has led in illegal discriminatory pricing, in damaging predatory practices, or taken part in a conspiracy to fix prices or allocate markets, the voluntary compliance procedure should not, as a general rule, be made available.

It is my belief that a program providing for voluntary compliance by businessmen prior to investigation and litigation of cases by the Commission would avoid some of the pitfalls presented by the new voluntary compliance procedure. A pre-investigation procedure providing for conferences with businessmen when the Commission has information indicating that possible violations of law have been committed by various firms in a given industry would provide for settlement of appropriate cases prior to the time the Commission has expended its limited funds and manpower in investigation. This would enable the Commission in all likelihood to dispose of numerous cases before investigation on the basis of the

pre-investigation conference without further action. At least this should be the effect in all of those cases where it is clear that the businessmen involved have engaged in the practices without knowledge that their activities would be questioned as illegal. In my view, discontinuance of the challenged practices as a result of such conferences before investigation commences would in many instances justify closing many such matters.

In formulating the present voluntary compliance procedure the Commission, contrary to its past practices, has apparently committed itself to exercising its discretion on a case to case basis in the antitrust area in deciding whether or not to bring formal proceedings or to accept assurances of voluntary discontinuances of the questioned practices which are not enforceable. In the interest of speed, economy and more equitable enforcement of the law, the procedure has much to recommend it; the Commission, however, within the foreseeable future in my opinion will have to issue some clear guide lines as to the types of cases in which this procedure will be available to the business community, or it may well be subject to a welter of charges that it has abused its discretion in determining which cases should be brought under the formal adjudicatory

procedures to protect the public interest. While procedural informality may be of considerable value in eliminating the problem of regulatory lag, increasing care must be exercised that with our newly attained flexibility the economic objectives of Commission proceedings are not compromised for the sake of expedience. Every negotiated settlement is not necessarily a case won. [8/]

## Conclusion

Antitrust trends for consent orders and consent decrees have been accelerated at the Federal Trade Commission, particularly by the policy and procedural changes initiated in 1961 and 1963. The Commission, in seeking to encourage disposition of the cases before it by way of consent negotiations and other related informal procedures in appropriate cases is, of course, influenced by the fact that its mission is not punitive but rather to guide and instruct businessmen so as to faciliate their compliance with the law.

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8/ Cf. Antitrust Subcommittee of the Committee on the Judiciary, Report on Consent Decree Program of The Department of Justice, 86th Cong. 1st Sess. (1959), p. 22.