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ANTITRUST ENFORCEMENT BY THE
FEDERAL TRADE COMMISSION

Outline By

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OUTLINE OF
ANTITRUST ENFORCEMENT BY THE
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Commissioner Mary Gardiner Jones
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Harry A. Garfield II, Assistant
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The purpose of this outline is to provide a quick reference and introduction, primarily for the private practitioner not specializing in the field, to the authority, functions and procedures of the Federal Trade Commission in the antitrust area. The substantive aspects of the antitrust law are not intended to be covered in depth except as examples of recent or significant Commission actions dealt with primarily in the last section of the outline.

I. Statutory Enforcement Authority.

A. Section 5 of the FTC Act (15 U.S.C.A. §45).

1. The basic provision, enacted in 1914 declares that, "Unfair methods of competition in commerce are unlawful". The Wheeler-Lea Amendment in 1938 added a prohibition against "unfair or deceptive acts or practices".

2. Together, these provisions form the broadest criteria for measuring the anti-competitive effects of business practices found in the Federal antitrust and trade regulations laws. The scope of these prohibitions of trade restraints is not confined to the antitrust reach of the Sherman Act although all traditional antitrust violations are included.

FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922); FTC v. R. F. Keppel & Brother, Inc., 291 U.S. 304 (1934); FTC v. Cement Institute, 333 U.S. 683 (1948); FTC v. Motion Picture Advertising Co., 344 U.S. 392 (1953).

3. The "commerce" limitation - The Commission's authority extends to acts or practices in interstate commerce and does not presently cover acts or practices that merely "affect" interstate commerce.

FTC v. Bunte Bros., 312 U.S. 349 (1941);
but see proposed legislation to extend
jurisdiction to acts and practices
"affecting commerce"; (See e.g., S. 3201,
91st Congress, 1st Session).

4. The dual nature of the Commission's
responsibility. It is the only Federal
agency charged both with enforcing laws
against anticompetitive practices and
with protection of the consumer.

FTC v. Keppel & Brother, Inc., 291 U.S.
304 (1934) (exploitation of consumers
is an unfair method of competition);
FTC v. Royal Milling Co., 288 U.S. 212
(1933); FTC v. Colgate-Palmolive Co.,
380 U.S. 374 (1965) (the Wheeler-Lea
Amendment showed Congress' special
concern for the consumer).

B. Section 11 of the Clayton Act (15 U.S.C.A. §21).

1. The Commission has specific responsibility under that section to enforce Section 2 (as amended by the Robinson-Patman Act), and Sections 3 and 7 of the Clayton Act which prohibit, respectively, discriminatory pricing and related practices, exclusive dealing by sellers and corporate acquisitions, where the effect "may be to substantially lessen competition or tend to create a monopoly in any line of commerce".*/

C. Other statutes administered by the Commission.

With the exception of the Export Trade Act (The Webb-Pomerene Act) 15 U.S.C.A. §61-5, most of the remaining statutory responsibilities

*/ The Commission's jurisdiction also covers Section 8 relating to interlocking directorates.

of the Commission are directed primarily toward protection of the consumer. These acts also work, however, to promote fair and honest competition in the areas in which they operate. They are:

1. Wool Products Labeling Act, 15 U.S.C.A. §68.
2. Fur Products Labeling Act, 15 U.S.C.A. §69.
3. Flammable Fabrics Act, 15 U.S.C.A. §1191-1200.
4. Textile Fiber Products Identification Act, 15 U.S.C.A. §70.
5. Fair Packaging and Labeling Act, 15 U.S.C.A. §§1451-61 (except with respect to foods, drugs, devices and cosmetics).

6. Consumer Credit Protection Act
(the Truth-in-Lending Law) 15
U.S.C.A. §1601-77) (the Commission's
responsibility extends to retailers,
finance companies, non-federal
credit unions and other creditors
not specifically regulated by
another government agency).

1. Investigative Authority.

A. The Commission, in addition to authority to
conduct investigations in connection with
specific enforcement actions under Section 9
of the FTC Act (15 U.S.C.A. §49) has very broad
powers to conduct investigations of corporations
and corporate activities of every kind under
Section 6 of the FTC Act (15 U.S.C.A. §46) and
to require special or annual reports furnishing
"such information as [the Commission] may require."
Such investigations may be for the purpose of
developing information to further enforcement

activities, to develop industrywide rules or simply to expose to public view corporate phenomena lying within the general area of Commission activity.

FTC v. Waltham Watch, 169 F. Supp. 614 (SDNY 1959); Lehigh Portland Cement Co. v. FTC, (1968 Trade Cases ¶72,620 (ED Va.), aff'd. per curiam _____ F.2d _____ (4th Cir. October 27, 1969).

III. Limitation and Criteria of Commission Actions.

A. Manpower and budgetary limitations.

The Commission has a total staff of about 1270 employees, of which 250 are attorneys engaged in whole or in part in antitrust enforcement. The Commission's total budget is approximately \$20 million annually, of which approximately a third is directed to antitrust matters.

B. Statutory criteria.

Under section 5, the Commission acts when it deems such action to "be to the interest of the public."

C. Liaison with the Department of Justice.

In general there is some degree of overlap between the Commission's jurisdiction and that of the Antitrust Division of the Department of Justice. The Commission by custom has enforced the Robinson-Patman anti-discrimination law while the Department of Justice, with its sterner sanctions, has usually moved against hard-core antitrust violations. Both agencies enforce the Merger Act (Clayton Act §7). In order to avoid duplication of effort, there is a formal liaison between the Antitrust Division and the Commission through which matters are cleared to one agency or the other.

D. Program planning.

The Commission generates investigations of possible antitrust violations on the basis of its own action as well as of specific applications for complaint, either in the form of referrals from Congress or information received directly from the public in formal written applications for complaint. In the recently announced reorganization of the Commission, the Office of Policy Planning and Evaluation has been substantially enlarged and upgraded. The Commission, as well as the American Bar Association's Commission that recently examined the Commission, recognized the need for more effective use of the Commission's limited resources requiring a more affirmatively programmed approach to pinpoint emerging problem areas, such as reciprocal dealing among corporations or discriminatory promotional allowances in particular industries or to deal comprehensively with industrywide problems

involving several types of antitrust violation and other law violations, as, for example, in the area of the burgeoning franchise industry.

IV. Commission Antitrust Enforcement Procedures.

- A. The cease and desist order is the basic Commission sanction (15 U.S.C.A. §45(b)). It results either from a consent settlement prior to formal adjudication (see 16 C.F.R. §§2.14, 2.31-2.35*/) or from a final determination of a matter by the Commission after formal hearing (see 16 C.F.R. §§3.1 et seq.; 15 U.S.C.A. §5(b)-(k)).

The Commission has successfully sustained its right to seek a preliminary injunction in a merger case under the All Writs Statute (28 U.S.C.A. §1651). FTC v. Dean Foods Co., 348 U.S. 597 (1966). Legislation has also been proposed to give the Commission specific authority to seek injunctions in deceptive practice cases (see S. 3201, 91st Cong., 1st Sess.

*/ The Commission's Rules of Practice are also found at CCH Trade Reg. Rep. Vol. 3, ¶9,500.

B. Investigation (see Part 2A of the Commission's Rules of Practice, 16 C.F.R. §2.1-2.13).

Commission proceedings start with investigations conducted by Commission attorneys either from Washington or from one of the eleven field offices. (Note that under new Commission procedures, in many instances the field offices will be handling all phases of cases, including investigation, trial and enforcement without continual reference to Washington.)

1. Frequently, letter requests for information result in voluntary production of information but the Commission has full power to issue investigational subpoenas, to order investigational hearings and to conduct other discovery procedures. A resolution generally authorizing formal investigation through such measures is, in the first instance, issued by the Commission. Thereafter, the staff, through delegated discretion determines how the specific investigation is to proceed (16 C.F.R. §§2.7, 2.11 and 2.12).

C. Voluntary compliance by parties under investigation prior to formal issuance of a complaint.

1. Assurances of Voluntary Compliance (AVC's).

Under Rule 2.21, the Commission may afford the opportunity of disposing of a matter on an informal non-adjudicatory basis. In determining whether the public interest will be fully safeguarded by such disposition the Commission will consider: (1) whether the questioned act or practice has been discontinued; (2) the seriousness of the alleged violation; (3) the prior record and good faith of the parties involved; (4) the likelihood of recurrence of unlawful conduct; (5) the extent of cooperation by the parties; and (6) immediate cessation of challenged acts or practices.

In the antitrust area, an Assurance of Voluntary Compliance will generally not be considered appropriate where there has been a substantial restraint of trade.

(The Commission has also announced recently that as a general principle it will not accept an AVC in disposition of flammable fabrics matters.)

The Assurance is normally negotiated with the investigating attorney in the first instance and is usually in affidavit form. It should set out the facts of the matter and contain an unequivocal certification that the acts will not be engaged in. It should not contain any assertion that the challenged acts or practices were not committed, nor should it compromise the Commission's position in any way. It may, however, contain a simple statement that the Assurance of Voluntary Compliance does not constitute an admission that the acts complained of were a violation of the law.

When an Assurance in satisfactory form has been negotiated by the staff, it is submitted to the Commission. Upon

acceptance, the nature of the AVC and the names of parties thereto is made public.

Violation of an Assurance carries no sanction but could be a factor in Commission determination to file a subsequent complaint. Also the Commission frequently conducts a spot-check to determine adherence after accepting an AVC.

2. Consent order procedure prior to issuance of complaint (Rules §2.14).

Even though the voluntary assurance resolution of the matter is not afforded, the Commission may consider a consent order voluntarily submitted by a prospective respondent accompanied by a proposed complaint submitted by the Commission staff.

D. Consent order procedure under Subpart 2C of the Rules (16 C.F.R. §§2.31-2.35).

1. Upon determining that a formal complaint is warranted, the Commission may afford the opportunity of negotiating a consent order prior to actual issuance of the complaint as an adjudicative matter. A copy of the proposed complaint and order is sent to the proposed respondent with a letter affording 10 days to give notice of the desire to take advantage of the consent settlement procedure. Thereafter the Rules provide for a 30 day negotiation period.

The initial 30 day period sometimes develops into lengthy negotiations of the terms of the consent order. These negotiations are conducted by the Commission's staff which then submits the negotiated agreement to the Commission for approval or rejection.

2. If the consent order is satisfactory to the Commission, it is provisionally accepted by the Commission and placed on the public record

for 30 days during which any interested member of the public may comment and after which the Commission makes a final determination as to whether the consent order should be finally accepted (§2.34(b)). If so accepted, the order is enforceable as any order to cease and desist entered after an adjudicative proceeding.

Swingline, Inc., FTC Docket No. 8759
(Final Order issued October 9, 1969)
(consent order offer after formal
issuance of complaint rejected); Beloit-
Culligan Soft Water Service v. Culligan,
Inc., 1959 Trade Cases ¶69,255 (ND. Ill.)
(effect of consent orders the same as
litigated orders).

See also Campbell Soup, (decision announced June 3, 1970) (challenge to Commission consent order procedure by persons claiming to represent consumer interests).

3. Consent orders must contain the following provisions:

(1) a waiver of the respondent's rights to obtain judicial review; (2) an admission of the jurisdictional facts alleged in the complaint, and that the Commission has personal jurisdiction over the respondent; (3) and a waiver of any further procedural steps which the Commission would otherwise be required to take.

See Cotherman v. FTC, 417 F.2d 587 (5th Cir. 1969). (Waiver of subject matter jurisdiction.)

4. Consent orders generally are not admissible in private treble damage actions and do not toll the statute of limitations for private actions.

(See Farmington Dowel Products Co., v. Forster Mfg. Co., 421 F.2d 61 (1st Cir. 1969) (Commission's adjudicated

orders are prima facie evidence in private actions); Minnesota Mining & Manufacturing v. New Jersey Wood Finishing Co., 381 U.S. 311 (1965) (commencement of adjudicative proceedings by the Commission tolls the statute of limitations on private actions)).

E. Adjudication (Rules Part 3).

1. Upon issuance of a formal complaint under Part 3 of the Commission's Rules, the matter proceeds much as a court case with formal pleadings, motions and pre-trial procedures, hearings, briefing and decisional processes (see 16 C .F.R. Part 3). Commission staff counsel acts as the prosecutor before a Federal Hearing Examiner who renders an initial decision based on proposed findings of fact and briefs submitted by both sides (16 C.R.R. §3.46).

2. Upon filing, the Hearing Examiner's initial decision becomes the decision of the Commission after 30 days unless either side appeals or the Commission itself docket the matter for review (§§3.52(a), 3.53).

To obtain review, a notice of intent in simple letter form must be filed within 10 days after service of the Hearing Examiner's decision with the Secretary of the Commission. The appeal must then be perfected by filing an appeal brief within 30 days after such service (unless time is extended (16 C.F.R. §3.52(b))).

3. When an appeal to the Commission has been perfected, the matter will be set down for oral argument before the full Commission unless otherwise ordered (§3.52(f)). Thereafter, the Commission renders its decision either sustaining or modifying the Hearing Examiner's initial decision and substituting its own findings.

4. In the event of a Commission decision adverse to the respondent, review may be obtained in any Circuit Court of Appeals where the unlawful conduct "was used", in which the respondent does business, or in which he resides (15 U.S.C.A. §45(c)).

Procedures on review of a Commission order are governed by 15 U.S.C.A. §45(c-e) as to finality of Commission orders, see 15 U.S.C.A. §45(g-k).

- F. Compliance with Commission orders to cease and desist (Rules Part 3G).

Final Commission orders (both consent and adjudicative) must contain a provision requiring the filing of a report showing compliance within 60 days following the effective date of the order. In the event of orders requiring divestiture of acquired property or other ongoing commitments, subsequent compliance reports may be required. All

such reports are ultimately passed on by the Commission. Respondents subject to compliance requirements may request advice of the Commission as to whether proposed courses of action will constitute compliance and the Commission will render advisory opinions on such subjects (16 C.F.R. §3.61(c & d)).

Reports and applications relating to proposed divestitures or acquisitions under Commission orders are placed on the public record for a period of 30 days for public comment prior to Commission consideration (16 C.F.R. §3.61(e)).

G. Enforcement of Orders to cease and desist.

1. Commission orders are enforced through the Attorney General (15 U.S.C.A. §46) by civil penalty actions in the name of the United States. Each violation carries a maximum penalty of \$5,000, and in the case of a continuing violation or failure to obey an order, each day constitutes a separate violation (15 U.S.C.A. §45(e)).

2. Commission has requested new legislation to enable it to bring its own actions and assess damages for violations. It has also requested legislative authority to enable it to bring actions on behalf of consumers. (See S. 3201, 91st Cong., 1st Sess.)

V. Other types of Commission Antitrust Activities.

In addition to enforcement relating to issuance of cease and desist orders, the Commission may exercise its antitrust responsibility through (1) Advisory Opinions given upon request to individual businessmen and (2) rulemaking covering industrywide practices through issuance of Trade Regulation Rules, Industry Guides and various types of policy statements.

A. Advisory Opinions (16 C.F.R. §§1.1-1.4).

1. The Commission will issue binding advice to individual businessmen or trade groups as to the legality of proposed activities.

The program is designed to encourage voluntary compliance with the law and to reduce risk of violation on the part of the businessman.

2. Procedure - Requests for advisory opinions are initiated by letter to the Secretary of the Commission setting forth a full disclosure of all relevant facts and specifying the advice requested.

3. Criteria - The request will ordinarily be considered inappropriate for an opinion if:

(a) the course of action to which it relates is already being engaged in;

(b) the course of action is the same or substantially the same practice which is the subject of a pending

Commission proceeding or the subject of a decree or order from another governmental agency;

(c) the opinion could not be rendered without the necessity of extensive investigations, clinical study, testing, or collateral inquiry.

4. Binding effect - Advisory Opinions, while in effect, constitute a statement by the Commission that the proposed activity will not be regarded as a violation of Commission statutes. They are not binding on the Justice Department and may be rescinded or modified by the Commission where required in the public interest upon written notification to the recipient. One reason for withdrawal of an advisory opinion is that subsequent to its issuance significant factual changes occur which raise possible violations. The Commission will not proceed against a party who relied upon an advisory opinion

in good faith if all relevant facts were originally disclosed and the practice promptly discontinued upon notification of withdrawal of Commission approval.

5. Except in instances in which the applicant initially seeks and is granted confidentiality, advisory opinions are now published by the Commission in full text including the names of the parties seeking the advice in question. Advisory opinions covering premerger clearance are placed on the public record for comment for a period of 30 days prior to final approval.

B. Trade Regulation Rules (Rules §1.12).

1. The Trade Regulation Rule, which usually covers a specific industry practice, is designed to express the Commission's experience and judgment as to the legality of particular practice. It is issued as the result of formal rulemaking procedures under Section 4

4. Requiring care labeling of textile products (proposed) (2 CCH Trade Reg. Rep. ¶7,979).

5. Regulating retail food store advertising and marketing practices (2 CCH Trade Reg. Rep. ¶7,982).

C. Other Regulations issued pursuant to specific statutory obligation to implement various laws.

1. Each of the Fur, Textile and Flammable Fabrics Acts provides for specific implementing regulations to be promulgated by the Commission and detailed regulations have been issued.

2. The Fair Packaging and Labeling Act also requires that the Commission provide by regulation for labeling requirements for products under its jurisdiction and provides for discretionary regulations with respect to package size labeling, indicating special pricing and non-functional slack filling.

Under this authority, the Commission has recently promulgated a proposed regulation concerning the use of "cents-off" labeling (2 CCH Trade Reg. Rep. ¶7,440).

D. Industry Guides (formerly also Trade Practice Rules)
(Rules §§1.5-1.6).

1. Content - Industry Guides are administrative interpretations of the law by the Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. They may relate to a particular practice common to many industries or to several practices of a particular industry.

2. Guides may be promulgated by the Commission on its own initiative or pursuant to an application by an interested party or group.

The criteria used by the Commission in determining whether to issue guides are whether they will be "beneficial in the public interest" and "serve to bring about more widespread and equitable observance of laws" than alternative courses of action.

Guides may be issued by the Commission without any prior notification to the public. It may make its own investigation of the area to be covered by the Guides or it may hold public hearings prior to their issuance.

* Under prior Commission procedures, applications by interested parties were treated as applications for Trade Practice Conference Rules and were designated as such. To the extent that they are outstanding, they have the same significance as guides under present Commission procedures.

The Commission may also publish proposed guides for comments prior to issuing them in final form and after consideration of the comments, may hold public hearings at which affected parties will be given opportunity to be heard orally.

3. Industry Guides do not have force of law and violations of guides are not treated as violations of the laws administered by the Commission. However, engaging in practices covered in a manner contrary to the provisions of the guides will usually be regarded by the Commission as constituting a law violation and can be expected to result in a complaint. Surveys are made of the industries involved to determine the degree of compliance and the Commission's staff, at least in the period immediately following issuance of the guides, will seek to use all voluntary means at its disposal to bring

existing industry conduct into conformity with the guides. Instances of non-adherence after this initial period will usually be referred to the operating Bureaus for possible handling as individual violations of law.

The Courts have sustained the Commission's use of its guides as a means of interpreting cease and desist orders.

Clinton Watch Co. v. FTC, 57 FTC 222 (1960), 291 F.2d 838 (7th Cir. 1961); cert. denied, 386 U.S. 952 (1961).

E. Policy Statements.

The Commission from time to time has issued statements indicating in detail, criteria that the Commission may be expected to apply in administering particularly difficult or uncertain areas of the law. In the antitrust field,

these enforcement policy statements have covered merger problems in the following industries (see 1 CCH Trade Reg. Rep. ¶4,510).

1. Cement industry - vertical mergers.
2. Food distribution industry.
3. Grocery product manufacturing - product extension mergers.
4. Textile mill products industry.

VI. Recent Commission Activity in Antitrust Enforcement^{*/}

A. General Trade Restraints.

1. Franchising - The growth of franchising as a form of doing business has raised

^{*/} The material here is organized according to the now existing Divisions of the Commission's Bureau of Restraint of Trade. As of July 1, 1970, these Divisions will be reorganized. However, their substantive functions can be expected to continue.

a myriad of problems both at the franchisor and franchisee level.

The problem areas cut across traditional distinctions between antitrust and deceptive practices. Some of the problem areas are:

- (a) price, territorial or other customer restrictions placed by the franchisor on the franchisee.
- (b) requiring franchisees to purchase supplies and equipment from the franchisor.

See Carvel Corp., FTC Docket 8574 (July 19, 1965, dismissing complaint, CCH Trade Reg. Rep. Transfer Binder ¶17,298).

- (c) deceptions by the franchisor to attract prospective franchisees.

(d) oppressive termination provisions
and other coercion of franchisees.

(e) responsibility of franchisor for
the practices of the franchisee.
This raises problems as to what can
be required of the franchisor with-
out giving him too much control.

See Riccar America Co. (consent
order, 3 CCH Trade Reg. Rep.
¶18,581). This is not a
franchise matter but the consent
order contains a provision
requiring the seller of branded
merchandise, selling through
retailers who use the seller's
name, to refuse to deal with
any person who violates the
prohibitions of the order.
The Commission is likely to

insist on similar provisions
in other appropriate cases
including franchising matters.

The Commission recently announced
a full investigation into the problem
of franchising.

Press release, May 7, 1970.

2. Reciprocal buying and selling by corporations.

The Commission has obtained Assurances
of Voluntary Compliance dis-establishing
corporate trade relations departments
and reducing opportunities for reciprocity.

See, e.g., 3 CCH Trade Reg. Rep.

¶¶18,167, 18,669, 18,694 and 18,758.

3. Commission staff is investigating the breakfast
cereal industry to determine the legal implications
of the oligopolistic structure of that industry.

and particularly the influence of advertising expenditures on structure and performance in a concentrated industry.

4. Recent Cases.

- a. Koppers Company, FTC Docket No. 8755
(Hearing Examiner's initial decision dismissing the case May 13, 1970)
monopolization of resorcinol.

- b. Lenox, Inc., FTC Docket No. 8718
(2nd Circuit decision modifying Commission's decision 417 F.2d 126)
resale price maintenance and customer restraints in sale and distribution of china dinnerware.

- c. Great Lakes Carbon Corp., FTC Docket 8805
(complaint issued November 26, 1969,
3 CCH Trade Reg. Rep. ¶19,023) alleged unreasonably long-term exclusive dealing contracts in the purchase and sale of petroleum coke.

- d. SCM Corp., (Consent Agreement April 7, 1970, 3 CCH Trade Reg. Rep. ¶18, 191) territorial restrictions on distributors and tie-in requirements of copying equipment with supplies.

B. Mergers.

1. Premerger notification - In May 1969, the Commission instituted a program requiring that the Commission receive notice of mergers involving large companies (combined assets of \$250 million) and that in certain cases special reports (as authorized by FTC Act §6(b)) be furnished to the Commission 60 days prior to consummation of the merger. (See 1 CCH Trade Reg. Rep. ¶4,455.)

Merger Notification Program of the
Federal Trade Commission, 38 Antitrust
Law Journal 679 (1970).

2. The Commission is engaged in an economic study of the conglomerate merger movement. Phase I of this work was issued as a

Commission staff report in November 1969
(Economic Report on Corporate Mergers).

Phase II, which will analyze performance data with respect to a specific group of companies is underway.

3. Policy statements on various types of mergers.

(See section V.E. above.)

See also, Federal Trade Commission Merger Guidelines: Stemming the Tide, 5 Columbia Journal of Law & Social Problems 137 (1969); and Toward A Consumer's Antitrust Law: The Federal Trade Commission and Vertical Mergers in the Cement Industry, 15 UCLA L. Rev. 1153 (1968).

4. Recent merger cases*/ - While activity in initiating cases in certain of its traditional areas, such as the dairy, textile and department

*/ A listing of the major merger case activity of the Commission is attached hereto as Appendix A. Case citations appear therein.

store industries has died down, the Commission continues an active surveillance program in these industries (the Commission is also reviewing developments in the dairy and department store industries with a view to determining its future policy as its prior orders expire). The Commission has continued its enforcement efforts in initiating cases involving horizontal and vertical mergers in areas as to which it possesses particular expertise, such as the cement (Marquette, Missouri Portland, OKC), auto parts (Maremont) and grocery product (General Foods) industries. In addition the Commission has brought cases involving product extension issues (AMK) and potential competition issues (Kennecott, Bendix, Litton & Sterling). In particular, the Commission has been exploring the anticompetitive effects of aggregate concentration and potential competition as criteria in merger matters (Bendix, Sterling). Finally, the Commission's decision in U.S. Steel represents an important development in holding that the failing firm doctrine is not an absolute defense, but requires a balancing of anticompetitive effects together with potential injury resulting from the failure.

C. Discriminatory Practices.

1. The Commission has recently undertaken a comprehensive study of its past Robinson-Patman Act orders to determine what effects they may have had upon the companies and industries involved.
2. One of the most significant Guides (see section V. D. above) that the Commission has issued in recent years relates to Advertising Allowances and Other Merchandising Payments and Services (issued May 29, 1969, see 1 CCH Trade Reg. Rep. ¶4,003 (16 C.F.R. Part 240)). These guides constitute a comprehensive statement of the obligation of buyers and sellers in this area incorporating the teaching of FTC v. Fred Meyer, Inc., 390 U.S. 341 (1968) holding that equality of treatment in providing promotional allowances and services must be afforded by a seller to retailers and others who buy through intermediaries as well as those who compete with them and buy directly from the seller.

3. Tripartite promotional plans - The Commission has been considering the Robinson-Patman consequences of the developing use of tripartite promotional plans whereby a third party provides advertising material of various kinds to retailers (primarily grocery or drug stores) and is compensated by the suppliers of the advertised products. To date, Commission activity has resulted in the issuance of a number of advisory opinions.

See e.g., 3 CCH Trade Reg. Rep. ¶¶18,024, 18,755, 18,834, 18,841, 18,891, 18,956, 18,961, 18,970, 19,188.

4. Recent discriminatory practice cases^{*/} - In addition to continuing Robinson-Patman enforcement in such traditional areas as the dairy and other food industries, and the apparel and

^{*/} See attached Appendix B for list of recent cases. Statutory references here are to Section 2 of the Clayton Act as amended by the Robinson-Patman Act. case citations are incorporated into the Appendix.

automobile aftermarket industries, the following matters are of note.

(a) Court decision have upheld the Commission position in a number of cases:

- Fred Meyer - scope of Section 2(d) re promotional services.
- Standard Oil - fourth line injury.
- National Dairy (Docket 8548) - primary line injury.
- National Dairy (Docket 7018) - Section 2(a) milk case and cost justification.
- Viviano Macaroni - good faith meeting competition.
- Clairol - beauty salons are resellers.
- Surprise Brassiere - meeting competition.

- Dean Milk - Section 2(a) milk case.
- Tri-Valley Growers - order broadened to include customers not purchasing directly.

(b) Industrywide approaches:

- Consent orders concerning office furniture manufacturers under Section 2(a) - Art Metal-Knoll, Directional Contract, Herman Miller, Jens Risom, Stow & Davis.
- Complaints against food brokerage under Section 2(c) - Jewel, Borman, First National, Bohack, Food Fair, Scott Finks.
- Consent orders concerning secret rebates under Section 2(c) by suppliers of railroad parts and

specialty products - Amsted,
Crucible Steel, William S. Hanson,
Morton Mfg.

(c) Good faith meeting competition - Beatrice
Foods.

(d) Inducing discrimination (Section 2(f)):

- Buyer associations - Associated Pest
Control, Ark-La-Tex Warehouse

- Other - Beatrice Foods

APPENDIX A

Recent Merger Matters

I. Horizontal Cases

A. Litigated

1. American Brake Shoe Co., Trade Reg. Rep. ¶18,339 (FTC Dkt. 8622, 1968); Abex Corporation v. Federal Trade Commission, _____ F.2d _____ (6th Cir. 1970) (Decided January 8, 1970)
2. Seeburg Corp., Trade Reg. Rep. ¶18,464 and ¶18,748 (FTC Dkt. 8682, 1968); The Seeburg Corporation v. Federal Trade Commission, F.2d _____ (6th Cir. 1970) (Decided April 29, 1970).
3. Papercraft Corp., Trade Reg. Rep. ¶18,735 (FTC Dkt. 8779, 1969).

B. Consent Settlements

1. Occidental Petroleum Corp., Trade Reg. Rep. ¶18,527 and ¶18,599 (FTC Dkt. C-1450, 1968).
2. Swingline, Inc., Trade Reg. Rep. ¶17,305 (FTC Dkt. 8759, 1968). Parties agreed to stipulated findings of fact and consent order while case was in adjudicative stage. The agreement became the Hearing Examiner's initial decision and the Commission adopted this decision on October 9, 1969.

C. Complaints Issued

1. Maremont Corp., Trade Reg. Rep. ¶18,431 (FTC Dkt. 8763, 1969).
2. Litton Industries, Inc., Trade Reg. Rep. ¶18,729 (FTC Dkt. 8778, 1969).

II. Vertical Cases

A. Litigated

1. Marquette Cement Mfg. Co., Trade Reg. Rep.
¶18,247 and ¶18,657 (FTC Dkt. 8685, 1968 and 1969).
2. Mississippi River Fuel Corp., Trade Reg. Rep.
¶18,801 (FTC Dkt. 8657, 1968 and 1969).
3. United States Steel Corp., Trade Reg. Rep.
¶18,626 (FTC Dkt. 8655, 1968).
4. Allied Chemical Corp., Trade Reg. Rep. ¶18,49
(FTC Dkt. 8767, 1968).

B. Complaints Issued

1. Missouri Portland Cement Co., Trade Reg. Rep.
¶18,805 (FTC Dkt. 8783, 1969).
2. OKC Corp., Trade Reg. Rep. ¶18,809 (FTC Dkt.
8802, 1969).
3. Maremont Corp., Trade Reg. Rep. ¶18,431 (FTC
Dkt. 8763, 1969).

III. Product Extension Cases

A. Litigated

1. General Foods Corp. v. Federal Trade Commission
386 F.2d 94 (3rd Cir. 1967) cert. denied, 391
U.S. 919 (1968).

B. Proposed Complaints Issued

1. AMK Corp., et al., FTC File No. 701 0605,
(issued May 6, 1970).

IV. Market Extension Cases

A. Consent Settlement - Order Modified

1. Broadway-Hale Stores, Inc., Trade Reg. Rep.
¶18,692 (FTC Dkt. C-1057, 1969). Approval
granted to acquisition of Neiman-Marcus Co.
but ban on department store acquisitions in
Order extended for 3 years - from 1971 to
1974.

V. Conglomerate Cases

A. Litigated

1. Kennecott Copper Corp., Trade Reg. Rep.
¶18,466 (FTC Dkt. 8765, 1968).
2. Bendix Corp., Trade Reg. Rep. ¶17,997
(FTC Dkt. 8739, 1967).

B. Complaints Issued

1. Litton Industries, Inc., Trade Reg. Rep.
¶18,729 (FTD Dkt. 8778, 1969).
2. Sterling Drug Inc., issued August 7, 1969
(FTC Dkt. 8797, 1969).

VI. Failing Company Defense

United States Steel Corporation, Trade Reg. Rep.
¶18,626 (FTC Dkt. 8655, 1968).

APPENDIX B
RECENT DISCRIMINATORY PRACTICES MATTERS

Court Cases:

Clairol, Inc. v. F.T.C., 410 F.2d 647
(9th Cir. 1969) Dkt. No. 8647

Dean Milk Co. v. F.T.C., 395 F.2d 696
(7th Cir. 1968) No. 8032

F.T.C. v. Fred Meyer, Inc., et al.,
390 U.S. 341 (1968) Dkt. No. 7492

National Dairy Products Corp., v. F.T.C.,
395 F.2d 517 (7th Cir. 1968)
Dkt. No. 7018

National Dairy Products Corp. v. F.T.C.,
412 F.2d 605 (7th Cir. 1969) Cert. denied,
393 U.S. 977 (1969) Dkt. No. 8548

Standard Oil Co. of California v. Perkins,
395 U.S. 642 (1968)

Surprise Brassiere Co., Inc. v. F.T.C.
406 F.2d 711 (5th Cir. 1969)
Dkt. No. 8584

Tri-Valley Growers v. F.T.C., 411 F.2d 985
(9th Cir. 1969) Dkt. No. 7225 & 7496

Viviano Macaroni Co. v. F.T.C., 411 F.2d 255
(3rd Cir. 1969) Dkt. No. 8666

Commission Cases (consent orders and opinions)

Amsted Industries, Inc.,
Dkt. No. C-1382 (1968) 3 CCH Trade Reg Rep par. 18,388

Ark-La-Tex Warehouse Distributors Inc.,
et al., Dkt. No. 7592 (1968)
3 CCH Trade Reg Rep par. 18,347

Commission Cases (cont):

Art Metal-Knoll Corp.,

Dkt. No. C-1643 (1969)

3 CCH Trade Reg Rep par. 18,977

Associated Pest Control Services, Inc.,

et al., Dkt. No. C-1638 (1969)

3 CCH Trade Reg Rep par. 18,955

Beatrice Foods Co., et al.,

Dkt. No. 8663 (1969) 3 CCH Trade

Reg Rep par. 19,045

Connell Rice & Sugar Co., Inc., & Foremost-

McKesson, Inc., Dkt. No. 8736 (1969)

3 CCH Trade Reg Rep par. 18,319

Crucible Steel Co. of America,

Dkt. No. C-1385 3 CCH Trade Reg Rep par. 18,391

Directional Contract Furniture Corp.,

Dkt. No. 8741 (1968) 3CCH Trade Reg Rep par. 18,977

William S. Hanson, et al., d/b/a Stucki Co.,

Dkt. No. C-1384 (1968) 3 CCH Trade Reg Rep par. 18,390

Herman Miller Inc.,

Dkt. No. C-1248 (1968)

3 CCH Trade Reg Rep par. 18,012

Morton Mfg. Co.,

Dkt. No. C-1381 (1968)

3 CCH Trade Reg Rep par. 18,387

Jens Risom Design Inc., et al.,

Dkt. No. 8740 (1968)

3 CCH Trade Reg Rep par. 18,977

Joseph E. Schlitz Co.,

Dkt. No. C-1665 (1970)

3 CCH Trade Reg Rep par. 18,887 & 19,065

Commission Cases (cont):

Scott-Finks Co., Inc., et al.,
Dkt. No. C-1545 (1969)
3 CCH Trade Reg Rep par. 18,759

Stow & Davis Furniture Co.,
Dkt. No. C-1410
3 CCH Trade Reg Rep par. 18,441

Weatherhead Company
Dkt. No. C-1492 (1969)
3 CCH Trade Reg Rep par. 18,632

Commission Complaints Issued:

H.C. Bohack Co.,
Dkt. No. 8787 (1969)
3 CCH Trade Reg Rep par. 18,850

Borman Food Stores Inc.,
Dkt. No. 8789 (1969) 3 CCH Trade Reg Rep par. 18,850

First National Stores, Inc.,
Dkt. No. 8790 (1969)
3 CCH Trade Reg Rep par. 18,850

Food Fair Stores, Inc.,
Dkt. No. 8786 (1969)
3 CCH Trade Reg Rep par. 18,850

Jewel Companies Inc.,
Dkt. No. 8788 (1969)
3 CCH Trade Reg Rep par. 18,850

Borden Inc.,
Dkt. No. 8809 (1969)
3 CCH Trade Reg Rep par. 19,156

United Fruit Co., et al.,
Dkt. No. 8795 (1969)
3 CCH Trade Reg Rep par. 18,860