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REPORT ON PROGRESS OF SUPPLEMENTAL FEDERAL ANTITRUST ACTS

Address by

JAMES M. MEAD, CHAIRMAN

FEDERAL TRADE COMMISSION

At the Fourth Annual Meeting of the

Section on Antitrust Law

of the

NEW YORK STATE BAR ASSOCIATION

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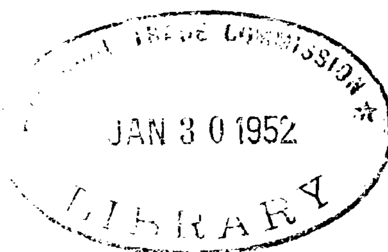
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Your Chairman has asked me to discuss several aspects of the work of the Federal Trade Commission. Preliminarily, however, I wish to recall to you the fact that within the relatively recent past--a little more than two years--this Commission has had major changes in membership, staff organization, internal functioning, and many of its regulatory procedures. Three of the Commission's five members have taken office since September 1949. Early in May 1950, the Commission announced a major staff reorganization intended to facilitate and expedite internal operations by aligning the staff organization and work along strictly functional lines. Also in May 1950 "Reorganization Plan No. 8" became law. Under its provisions the Commission itself retained the authority and responsibility for the substantive work and policies of the agency, but the handling of executive and administrative details was made the sole responsibility of a Chairman designated by the President. The changes in regulatory procedures since June 1950 include a change from recommended to initial decisions by hearing examiners, disposition of cases by default orders, and provision for the settlement of formal cases by consent. These and other procedural changes I shall discuss later in more detail.

In your professional capacity as lawyers, you are perhaps more familiar with the regulatory case work of the Commission than with some other phases of its activities. One such phase is the economic reporting function. We are faced with an indefinite period of defense mobilization in which defense needs result in changes in and restrictions upon our normal economic rights and procedures. Basic factual information is especially important to assist in avoiding permanent injury to our concept of free competition. Section 6 of the Commission's organic act provides a basic for this reporting function and the tools for its performance. The Commission is attempting, with very limited resources, to provide facts to Congress which will assist in its consideration of legislative needs and to provide Government, business, and the public with information on current trends not otherwise available.

One aspect of the Commission's current economic reporting program is to ascertain and disclose the extent of business concentration. As a preliminary step, it became necessary to develop a list of large manufacturing companies, with their subsidiaries and affiliates, including the extent of the stock interest held in subordinate concerns. This list, which is for the year 1948, was recently published as a result of requests from other Government departments, especially defense agencies, which needed a similar list for their own statistical studies. The Commission has also published annually for the last few years comparative figures as to the profits of 520 identical companies in 1940 and in the post-war period. The purpose of this publication is to provide, through the use of comparable figures, reliable data upon the level of post-war profits.

In studying industrial concentration, the Commission recently asked about a thousand of the largest manufacturing companies to supply information as to the value of their shipments of each important type of commodity which they produced in 1950. This is a spot inquiry and is not intended to be the beginning of an annual collection of similar figures. Doubtless a good many of you are attorneys for corporations which have received and complied with this request. In view of inquiries that have come to us about this matter, it may be worthwhile to explain what we propose to do with the facts obtained. The reports submitted by individual companies will be treated as confidential documents not available to the public. The first use made of the figures will be in checking the importance of

industrial mergers in order to decide whether they should be investigated as possible violations of Section 7 of the Clayton Act. If the figures appear to indicate the existence of a public problem to which the attention of the Congress should be directed, we may also use them in preparing a report upon economic concentration. Because of this possibility, it was indicated when the information was requested that the Commission reserved the right to make it public. This reservation was not intended to affect the statutory duty imposed by Section 6 of the Federal Trade Commission Act to refrain from making public trade secrets and the names of customers. It was merely intended to make clear to the reporting companies that these reports have a different status from other reports which some of the same companies furnish for use in our financial reporting program, as to which we have agreed that no identified figures will be published. However, if such use is made of these new figures, the Commission does not contemplate publication which contains identifying details about particular companies other than such details as may be incidentally required in giving the picture of concentration. Moreover, the task of coding, classifying, and tabulating the figures is so large that it is clear they cannot be used in a public report earlier than 1953, by which time they will be more than two years old.

Two other reports were substantially completed but not published in the same fiscal year. One is a study of the character and extent of joint action of seven international oil companies through marketing agreements; through the development of common ownership of reserves and production in the Middle East, Venezuela, and other producing areas; and through the major patterns of contracts for the purchase and sale of oil. The other report is an examination of the competitive effects of the shift in the steel industry from almost complete reliance on domestic high-grade ore supplies to substantial reliance on foreign sources and low-grade domestic sources.

In addition, the Commission regularly publishes in cooperation with the Securities and Exchange Commission quarterly industrial financial reports the purpose of which is to provide an indication of the current financial condition of all manufacturing corporations. They supply quarterly estimates of income, expense, assets, liabilities, and net worth of all United States manufacturing corporations for different sizes of corporations and for major industries, and, show trends in these items also by corporate size group and by major industry group, with compaisons between corporate size and industry groups.

To meet the needs of the defense agencies, this program has been extended to cover corporations engaged in wholesaling and retailing as well as manufacturing. It is also expected that the manufacturing report will be made in greater detail as to industry groups covered. About 10,000 business enterprises have asked to receive our manufacturing reports regularly, and there is a waiting list of about 5,000 more for the first issue of our report for wholesale and retail trade. As more detail is supplied, the reports should be even more valuable to business than they now are.

The Commission is called upon for and furnishes many reports to committees of Congress concerning proposed legislation. During the 1951 fiscal year, 60 such reports were made by the Commission. In addition to these reports, the Commission has made two specific legislative recommendations to Congress for amendments to the Clayton Act. One of these is for an amendment to Section 11 of that Act which would provide finality for cease and desist orders issued by the

Commission under the Clayton Act similar to that now provided for orders issued under the Federal Trade Commission Act, with similar means of enforcement. As you know, under the present form of Section 11, enforcement procedures are relatively ineffectual, time-consuming, and expensive. Unless the party against whom an order is issued seeks court review of the order, three separate and consecutive violations of law must be proved before any penalty results: violation must be proved before the Commission's order to cease and desist may be issued; violation subsequent to the order must be proved in order to obtain a court decree of enforcement; and a third violation subsequent to the decree of enforcement must be proved as a basis for contempt proceedings for violation of the order as enforced by court decree.

The second recommendation made is for an amendment of Section 8 of the Clayton Act relating to interlocking directorates. In its present form this section may be readily evaded, and it does not cover certain types of interlocking relationships which impair competition. Taking the instance of two corporations where under present law the same individual may not lawfully serve as a director of both, an individual who is an officer but not a director of one of these corporations may serve as a director of the other. There are various other types of interlocking relationships which may impair competition and which are not covered by the present law, including interlocks between corporations one of which supplies goods or services to or purchases them from the other.

Turning now to the regulatory activities of the Commission, probably most if not all of you know that the Commission recently promulgated the first rule issued under the quantity-limit proviso of Section 2(a) of the Clayton Act. It applies to replacement tires and tubes of natural or synthetic rubber, and has an effective date of April 7, 1952. The specific terms of this rule are:

> The quantity limit as to replacement tires and tubes made of natural or synthetic rubber for use on motor vehicles as a class of commodity is 20,000 pounds ordered at one time for delivery at one time.

The term "replacement tires and tubes" excludes from the rule tires and tubes used by the manufacturer of a motor vehicle to equip it and which are components or accessories of the vehicle when it is first sold. The quantity of 20,000 pounds approximates a carload quantity as generally recognized in the rubber industry. The purpose of the rule is to limit the cost defense based upon quantity provided in Section 2(a) to such savings as may be made on quantities up to but not exceeding 20,000 pounds sold at one time for delivery at one time. This being the first action taken under the quantity-limit proviso, no one can predict with any certainty the outcome with respect to the rule or the results which may be accomplished by it. There is no doubt that in the replacement tire field extreme price differences exist between competing purchasers. In some instances buyers receive prices which enable them to resell profitably at less than other resellers must pay for like tires. With respect to the rule, the Commission stated in part:

> Unless the Clayton Act as amended by the Robinson-Patman Act is implemented by this quantity-limit rule, it is relatively certain that the conditions with respect to price discrimination which now prevail and which began to develop as early as 1926 in the replacement tire industry will continue and worsen. With the rule in effect, such may not be the

case and the contrary may happen. In any event, the capacity of the Act should be exhausted in an attempt to remedy the evil. This will be accomplished by the promulgation of the rule, and, if necessary, the institution of proceedings to enforce it under complaints against sellers, purchasers, or both, charging violation of Section 2 as implemented by it.

During the 1951 fiscal year the Commission received from outside sources slightly more than 3200 complaints of alleged law violations. Such complaints came from competitors or customers of the concern against which the complaint was made, from consumers, and from Federal, State, and municipal agencies. During the same period of time the Commission completed almost 1200 investigations of alleged violations. There are two general methods by which the Commission disposes of matters involving law violations. One is by informal action, and the other by proceedings pursuant to formal complaint. The informal disposition is available except in restraint-of-trade matters and certain other types of cases involving deliberate intent to deceive or defraud, or where a substantial threat to public health is involved. In any instance, of course, where the circumstances are such that the Commission is not satisfied that the voluntary discontinuance of an unlawful practice will be permanent, it does not make informal disposition of the matter. The number of matters involving law violations which are disposed of by voluntary discontinuance, with appropriate assurance that there will be no resumption, is far greater than the number of matters in which formal complaints are issued. This, of course, is one of the things which contribute greatly to the value and importance of the administrative process. In the last fiscal year, 427 matters involving law violations were concluded by discontinuance of the practices and appropriate assurances that the practices would not be resumed. This figure compares with 121 orders to cease and desist and 32 orders of dismissal, or a total of 153 proceedings pursuant to complaint disposed of by the entry of final order.

We all recognize that when litigation is necessary it should not be unduly protracted, and unreasonable delays between the commencement and the completion of litigation are harmful both to the public interest and to the interest of the parties concerned. This Commission has been confronted with a backlog of formal cases which built up over a period of years for various reasons. It is earnestly striving to dispose of this backlog of old cases and to bring all of its litigated matters to a current basis. To aid in accomplishing this result, many procedural changes of substance and importance have been made in the last year and a half, and these, of course, have been reflected in the Commission's rules of practice.

One such change, though seemingly unimportant, has contributed much to expedite the handling of litigation. It is the naming of the hearing examiner in the complaint. The previous practice had been to designate a hearing examiner only when the case was actually ready to go to hearing, with the result that all preliminary motions, requests, and other papers filed prior to the commencement of hearings had to be passed upon by the Commission. By designating the hearing examiner at the time complaint is issued, he becomes available for the handling of all such preliminary matters. The hearing examiners have been able to dispose of such matters much more promptly than when it was necessary for the Commission to pass upon them, and a substantial saving in time has resulted.

Another important step in expediting litigation has been the change from the making of recommended decisions by hearing examiners to their making of initial decisions. This change applied to all cases except those in which the taking of testimony had been completed, and under it the initial decision of the hearing examiner automatically becomes the decision of the Commission unless an appeal is taken to the Commission, or the Commission either issues a stay order or upon its own motion places the initial decision on its docket for review. In a substantial number of cases this eliminates the time formerly consumed by briefing and orally arguing the recommended decision before the Commission, as well as the time required thereafter for decision. Since this change in the rules became effective, 106 initial decisions have become final decisions. The average time between the commencement of these proceedings through the issuance of complaint and final disposition of the case has been 16.2 months. It is interesting to observe that out of this total of 106 initial decisions which have become final, approximately half were pursuant to complaints issued after the change by which hearing examiners were named in the complaint. The average time between complaint and final disposition of the cases in this group was 6.6 months.

By amendments to its rules of practice made during the first half of 1951, the Commission provided for default orders. Under this procedure, there is normally placed in the "notice" portion of complaints a draft of an order to cease and desist believed to be appropriate if the facts should be found to be as alleged in the complaint. A failure to answer the complaint is deemed to authorize the Commission to find the facts to be as alleged therein, and if, after failure to answer, the party charged does not appear to show cause why the draft of order appearing in the "notice" portion of the complaint should not issue, such order will issue. Thus, a party charged has before him a statement of the exact nature of the relief the Commission seeks, and if he chooses to default by failure to answer or contest in any way, the order which will be issued is that which appeared in the "notice" portion of the complaint. On the other hand, the party charged may, by failure to answer, admit the facts alleged, but if he desires may still contest the form of order, or whether any order is warranted under the admitted facts.

Perhaps the most important procedural change made by the Commission in its effort to expedite the disposition of formal proceedings is the consent-settlement rule promulgated in July 1951. It has been said many times that a substantial number of those who are charged with law violations, and especially those involving restraint of trade, would be willing to agree to the entry of an order to cease and desist without any trial of the case if it were not necessary to admit the specific acts or practices alleged in the complaint. Under the new consent-settlement procedure, the only admission that a party charged with law violation needs to make is an admission of jurisdictional facts. Every consent settlement must contain, in addition to the admission of the jurisdictional facts, a statement of the acts and practices which the Commission had reason to believe were unlawful. The person charged need not admit any of the matters contained in such statement, but merely consents to its entry and also consents to the entry of the agreed order to cease and desist. For obvious reasons, the rule provides that any consent settlement must dispose of all the issues as to all the parties. In order to invoke this procedure, it is necessary for the parties charged to move the hearing examiner for a suspension of proceedings to afford opportunity to negotiate for a consent settlement. Such suspension, and the time thereof, are matters within the hearing examiner's discretion. In the event a satisfactory consent settlement is agreed upon, it will be entered in disposition of the

proceeding. In the event the negotiations do not result in an agreement, or if an agreed settlement recommended to the Commission is rejected by it, the case will proceed to trial. Any motion for suspension for the purpose of negotiating for a consent settlement must be made, however, before the commencement of the taking of evidence.

We are indebted to individual practitioners and to several bar association committees for various suggestions relating to the Commission's procedures and rules of practice. A committee of the Antitrust Section of the New York State Bar Association has been particularly helpful. This committee has met with one of our staff committees several times over the past three years, and these meetings, because of the manner in which your committee has functioned, have encouraged full and free discussion of the many suggestions presented. It is important that the Commission's procedures and rules of practice conduce to the effective and expeditious handling of regulatory actions in a fair and equitable manner. To this end I invite suggestions and cooperation from those who engage in practice before the Commission.