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**A REPORT OF PROGRESS**

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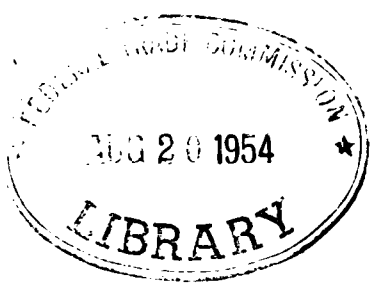
**Hon. Edward F. Howrey, Chairman  
Federal Trade Commission**

**Prepared for Delivery  
Before**

**THE SECTION OF ANTITRUST LAW  
OF THE AMERICAN BAR ASSOCIATION**

**Chicago, Illinois**

**August 19, 1954**



## A REPORT OF PROGRESS

During the twelve months since the last Association meeting in Boston, I have completed my first year as Chairman of the Federal Trade Commission. I feel that the year has been one of progress. We have not accomplished all of our objectives, but we have taken measurable strides in what I consider to be the right direction.

Shortly after taking office I suggested a revaluation or reassessment of the Commission's responsibilities. Among other things I proposed a return to first principles, a program for increased compliance and enforcement, a full-fledged attack on "delay" - probably the worst enemy of administrative law, and a study of agency overlap and duplication of activity.

Let us review a few of the developments that have taken place with reference to these problems:

### Return to First Principles

In creating the Federal Trade Commission, the Congress had two principal ideas in mind: first, to create a body of experts competent to deal with complex competitive practices "by reason of information, experience and careful study of business and economic conditions"; and, second, to authorize this body of experts to deal with unfair competitive methods in their incipient stages. The action was to be prophylactic; the purpose was prevention of diseased business conditions.

While the Sherman Act of 1890 constituted a substantial first step toward the alleviation of the deficiencies of private remedies in the antitrust field, there remained a general climate of doubt, particularly in Congress, that the Sherman Act and the judicial process provided the complete solution in an America emerging from an agricultural economy. It was believed that the administrative process -- in the form of a trade commission -- would be well suited to deal with the difficult problems of industries and markets, problems which Congress was unable to solve and which it considered too burdensome for the courts to solve without assistance.

In my first public statement as Chairman, made at Ann Arbor in June, 1953, I called attention to the fact that critics of the Commission had maintained that it was not the body of experts Congress intended; that it had become instead a prosecuting agency employing laborious procedures and rigid interpretations without regard to the relationship of law, business economics and public policy. I said that if this were true, that if an administrative tribunal of experts does nothing but promulgate *per se* doctrines, the rationale for its creation disappears. I urged that the Commission gear itself to the responsibilities originally contemplated by Congress.

Assuming that some of the criticism was justified, what have we done about it at the Commission?

1. First and foremost, the decisional work of the Commission is ample evidence, I believe, of a return to first principles. The Maico, Pillsbury and Harley-Davidson decisions make clear that the Commission will examine relevant industry and market facts; that henceforth it will attempt to perform its intended function as a body of experts. The General Foods decision demonstrates that conclusive presumptions of injury do not constitute acceptable substitutes for fair evidentiary standards. The Lever Brothers decision provides reassurance that the Commission is looking to the impact and practical consequences of its enforcement measures. The Wildroot decision indicates that good faith consultation and cooperation can, in some cases at least, take the place of compulsory procedures. And the Doubleday and Eastman decisions show, I believe, that the Commission will take a good hard look at so-called peripheral "test" cases.

The Commission has, at the same time, been hard-hitting and effective where the circumstances required it, particularly the "hard-core" type of case. Since I have been Chairman, the Commission has issued 129 cease and desist orders, -- 29 in the anti-monopoly field and 100 in the deceptive practice field.

The magnitude of some of these orders is indicated by one cease and desist order that terminated a restraint of trade combination among 350 distributors of electronic equipment. Another involved the entire salmon industry of Alaska and brought to an end a long standing price-fixing combination among canners and fisherman unions. A number of orders to cease and desist were issued under section 3 of the Clayton Act; these required the discontinuation of exclusive dealing arrangements in the hearing aid, hog serum and motorcycle industries. Numerous other orders prohibited false labeling of wool and fur products, false and misleading advertising of "food plans," and misrepresentations with reference to sewing machines and other consumer appliances.

During the same period of time the Commission issued 141 complaints, 34 in antimonopoly cases and 107 in deceptive practice cases.

Illustrative of the antimonopoly complaints were those against members of the iron and steel scrap industry alleging restraint of trade in both domestic and foreign commerce; against price fixing agreements among building material manufacturers and among paint and wallpaper dealers; and against unlawful price discrimination in the sale of petroleum gas used by farmers and rural residents for cooking and heating.

Complaints in the deceptive practice field ran the entire gamut of consumer goods, from food and drugs to clothing and home appliances.

Based on a comparison of fiscal years, I am told that the record of complaints issued during the past fiscal year has not been surpassed -- at least in recent years. While I have no intention of running a statistical race against earlier commissions, and did not intend to compile this record until asked to do so a few weeks ago in order to prepare a statement for the House Small Business Committee, I cite it here to show that an administrative tribunal can have a sensible trade regulation program and still remain a strong law enforcement agency.

2. The economic and marketing work of the Commission is of primary concern if the administrative process is to furnish the broad factual base in the complex field of antitrust law that Congress originally intended. Almost every antitrust case presents economic and marketing problems. Legal procedures are employed, it is true, but primarily for the purpose of resolving relevant economic questions. For this reason, the Commission's Bureau of Economics has been and is being revitalized. Our economists are working closely with our investigators and trial lawyers. Primary emphasis is being placed upon those practices that have significance in the market place; that have or are likely to have some economic consequence.

Recently the Commission issued two economic reports, one on Changes in Concentration in Manufacturing, and the other on Coffee Prices. Both are fair, honest and objective studies. The coffee report is in my judgment one of the best economic studies ever published by a governmental agency.

3. On several occasions, I have taken the position that the Commission should not further extend the *per se* doctrine; that, except where the courts and Congress have directed otherwise, the Commission should determine competitive effects by examination, analysis and evaluation of relevant market facts.

If this view is to prevail, satisfactory answers to three very practical questions must be found:

- a. What are the relevant economic and marketing factors in the particular case?
- b. How can they be developed?
- c. How can they be presented in evidence without unduly burdening the record?

If a rule of reason approach is ever to receive general application, solutions to these questions must be forthcoming. In a recent talk before the American Marketing Association I attempted to furnish partial answers. My main purpose, however, was to stimulate the thinking of antitrust scholars and perhaps thereby stimulate legal and economic research on the overall problem.

4. Another key in our effort to effectuate a return to first principles lies in the improvements that have taken place in the fact-finding and decisional work of the Commission and its hearing examiners.

On May 11, the Commission adopted the following program:

a. The hearing examiner should issue findings and conclusions and his reasons therefor in every case, whether they be favorable or adverse to the allegations of the complaint. He should abandon formal and legalistic "findings" and adopt instead narrative and descriptive reports.

b. The form and content of the order to cease and desist, which is part of the initial decision, should be improved.

The prohibitions of the order should deal with the specific issues and should be so clear that respondents will have no doubt as to what is expected of them. The exact practice found to be illegal should be expressly prohibited, as well as such other practices as may be necessary to assure adequate relief.

c. Except in rare cases, the Commission, on review or appeal, should not issue new or separate findings.

Where the Commission disagrees with some of the findings in the initial decision, it is the purpose of an opinion to point that out, to explain why the Commission differs, and to order the findings modified accordingly. Since the Commission, under the statute, has the ultimate fact finding responsibility, the opinion should, of course, expressly adopt the findings and conclusions of the hearing examiner as modified.

d. The Commission should write an opinion in every case.

It is my hope that as a result of this action future published decisions will not only constitute the authentic public record of what was done in a particular case but will also afford a collection of precedents by which its handling of future cases can be forecast. All of us know that fact-finding is the heart of the Commission's work. Narrative and descriptive reports will provide a long-needed degree of certainty in this complex field of the law.

5. The Commission has, I think, adopted the view that it should proceed against "hard-core," predatory violations of the antitrust laws and should forego cases of doubtful validity and questionable economic consequence. We feel we should not deplete our limited resources on fringe issues having no practical benefit. In this connection, we feel that the Sherman Act, the Federal Trade Commission Act and the Clayton Act, with its Robinson-Patman amendment, can be successfully administered as interrelated expressions of national antitrust policy -- not as separate and conflicting statutes.

6. To assure a proper functioning of the Commission as a quasi-judicial agency, a number of steps have been taken to increase the authority of the hearing examiners who, as the triers of fact, are of key importance in the administrative process. In the Eastman Kodak case, for instance, the Commission ruled that examiners were qualified to entertain a preliminary motion to dismiss on the ground that the complaint failed to state a cause of action.

Presently the Commission is engaged in a comprehensive study of its rules of practice. On the basis of this study, it is fair to expect that the Commission will be able to revise its rules and thus to improve its administrative procedures. Such revisions will, I hope, include recommendations of the President's Conference on Administrative Procedure to increase the authority of hearing examiners. This will lend greater substance to the spirit and purpose of the Administrative Procedure Act.

I attempted to deal with some of these important considerations in my dissenting opinion in the Florida Citrus case. There the Commission held that the hearing examiner did not have the authority to entertain a motion to dismiss predicated on the contention that, inasmuch as the practices had been abandoned, there was no further public interest in the proceeding. My dissent stated that the jurisdictional issue of public interest should not be removed from the adjudicatory processes of the Commission and made a matter of administrative discretion. If the basic statutory issue of public interest can be removed from the hearing table and determined by the Commissioners, as plaintiffs instead of judges, upon the basis of information contained in secret files, so can any other issue.

As Chairman, I have attempted in every possible way to strengthen administrative law and procedure.

#### Increased Compliance and Enforcement

Several steps have been taken to accelerate and make more effective the Commission's compliance and enforcement work. These include:

7. In November of 1953, we announced the appointment of members of the Commission's Advisory Committee on Cost Justification. The purpose of this committee, which consists of outstanding specialists in the field of distribution cost accounting, is to ascertain the feasibility of developing standards of proof and procedures for costing for adoption by the Commission as guides to businessmen desiring to comply with the Robinson-Patman Act. The work of this committee should result in a strengthening of the administration of the Act and result in wider compliance with its provisions.

8. The investigative work of the Commission has been improved and expanded. All of the Commission's work, its successes and failures, depends primarily upon the facts which are developed by investigators in the field. The attorneys engaged in this work had received neither the recognition nor the support necessary for effective results. A number of steps have been taken to assure improvement, including the establishment of a separate Bureau of Investigation.

In addition to its usual case work, this bureau will, on occasion, make industry-wide investigations. Typical of these is the present nation-wide investigation of the advertising claims of concerns selling health, accident and hospitalization insurance. This is the first investigation of its kind that has ever been conducted by a law enforcement agency. The public interest in this project, like the coffee study, is almost staggering.

9. In September of last year, a special staff committee was appointed to study the agency's procedures for obtaining compliance. On the basis of this committee's work, the Commission adopted in June a broad-scale compliance program. This will include, as a first step, a systematic and selective review of over 4,000 cease and desist orders, 8,000 stipulations and 2,000 trade practice rules. Other steps include:

a. Closer co-ordination between the general investigative staff and the staffs primarily responsible for compliance with orders, stipulations and trade practice rules.

b. More frequent use of procedures for requiring the filing of special follow-up reports "showing the manner and form of compliance with cease and desist orders."

c. Use of a more informative letter of notification to respondents under orders and parties to stipulations concerning the action taken in receiving and filing their reports of compliance.

d. A more effective program for enlisting the cooperation of industry members to effect industry-wide observance of trade practice rules.

On August 3, we appointed a task force to screen current national and regional advertising so as to determine whether advertisers are in compliance with outstanding orders, stipulations and trade practice rules. The task force is comprised of personnel with legal training. Previous advertising surveys were conducted by non-legal personnel.

These measures will serve to stimulate compliance with existing orders. It is useless, it seems to me, for the Commission to enter orders unless it sees to it that they are obeyed either voluntarily or through appropriate enforcement proceedings against those who deliberately or wilfully ignore them.

Failure to obtain compliance constitutes a waste of public money, has a demoralizing effect on competitors and members of the public who have been injured and tends to encourage a disregard of anti-trust and trade regulation laws, oftentimes to the direct detriment of small businessmen trying to enter or remain in a highly competitive market.

10. On May 12 of this year, I indicated in a public statement that the Commission's trade practice conference rules would, in appropriate instances, be backed up by investigations and formal action. On that date I announced the Commission's plan to effectuate a cooperative program designed to bring about prompt compliance with the rules in the Cosmetics Industry. In the future, one of the purposes of the trade practice rules will be to ferret out and pinpoint the wilful violator.

11. To expedite compliance in formal cases, the Commission adopted in May a new rule of practice permitting a more extensive use of consent orders. This new rule was recommended for the primary purpose of reducing expense and delay. The new rule --

- a. Eliminates the previous requirement that consent settlements contain findings of fact.
- b. Permits disposition of a case by consent at any stage of the proceeding.
- c. Allows settlement of a case as to some or all of the issues or as to some or all of the respondents.
- d. Authorizes hearing examiners to accept or reject stipulations containing proposed consent orders, with acceptance subject to Commission review and with rejection subject to appeal to the Commission.

Under the new rule, the only admission required of respondents is that of jurisdiction. Respondents must agree, however, that the



complaint may be used in construing the terms of the order; that the order shall have the same force and effect as if entered after a full hearing; and that the order may be modified or set aside in the same manner as other orders. The rule further provides for the respondents to waive the entry of findings of fact and conclusions of law, as well as further procedural steps before the hearing examiner or the Commission, and also their right to contest in the courts the validity of the order.

12. On December 11, 1953, the Commission adopted a policy to provide fuller protection of the public against unfair and deceptive practices through increased cooperation with officials of State governments. Under this policy, the Commission will regularly refer to State authorities matters it closes for lack of the jurisdictional prerequisite of interstate commerce.

13. The consultative function of the Commission has not in recent years received sufficient emphasis. Before the enactment of the Federal Trade Commission Act, both political parties, the Congress and the President, envisaged a trade commission which would, as part of the administrative process, provide solutions to many complex competitive problems through consultation. It is my hope that the new Bureau of Consultation, which was established on July 1, will revitalize this intended program. The new bureau includes, in addition to the Divisions of Trade Practice Conferences and Stipulations, a Division of Small Business. The establishment of the latter division was considered important in order to make the facilities of the Commission readily accessible to small business concerns. Among other things, the division will advise small businessmen with respect to laws administered by the Commission, explain to them the method by which complaints are initiated, inform them of the status of investigations in which they are interested, and otherwise expedite small business matters through the Commission.

#### Delay

14. One of the most significant events during my term as Chairman was the recent reorganization of the Commission. Its significance depends in no small measure upon the frequent criticism, valid in my view, that the Commission's operations and procedures over the years have been marked by endless delays.

Shortly after I took office, I stated that every effort would be made to eliminate such delays. The reorganization, based as it is upon an objective survey by an outside firm of management consultants, is designed to achieve this end. Measures have now been placed in effect to eliminate more than 50 percent of the procedural steps formerly taken within the Commission in the internal processing of its work.

The new organization of the Commission represents a major change in both concept and structure. By contrast, it is much simpler than the old organization and should promote more economical use of manpower. With well selected personnel in key positions, the organization should develop a high level of administrative efficiency, enabling the Commission to fulfill its responsibilities with greater dispatch and less cost.

All investigative activities will be centered in a newly formed Bureau of Investigation, all trial work in a new Bureau of Litigation, and voluntary compliance procedures in a Bureau of Consultation. Thus the Commission will no longer enjoy the luxury of two separate trial and investigative staffs. The integrated staffs should prove more economical and, I am confident, will provide the basis for a more effective administration of our antimonopoly and trade regulation statutes.

Probably one of the greatest causes of delay in the past was the fact that responsibility for a case was not centered in any particular individual. Responsibility was reassigned to conform to various stages of the development of a case, with no one attorney remaining continuously responsible. To correct this shortcoming, and also to furnish a smooth coordination of trial and investigative activities in keeping with the principles outlined by the first Hoover Commission, provision has been made for the appointment of project attorneys in the Bureau of Investigation. These attorneys will supervise a case through its entire course and will be responsible for any unnecessary delay.

We envisage the project attorney as being analogous to the solicitor in the British practice. The solicitor is responsible to his client through all phases of a case, although he may, from time to time, bring into the case additional assistance in the form of economists, accountants, barristers and the like. Like the solicitor, the work of the project attorney will not cease with the conclusion of the investigation; he will accompany the case into the litigation stage and assist the trial attorney with respect to the facts. It is my feeling that, if delay is to be eliminated, this feature of the reorganization will be more helpful than any other.

15. One of the most important accomplishments in our effort to eliminate delay has been the reduction in the backlog of cases pending before the Commission for decision. It has been the custom, at the first of each month, for the Secretary to report at the conference table the cases which have rested on individual Commissioners' desks for 30 days or more.

In the period since early 1953, with Commissioner Mead acting as whip and with the cooperation of all the Commissioners, we have

reduced by almost five times the number of cases pending more than 30 days. I am especially proud of this fact.

The Commission has also become more expeditious in disposing of informal matters brought before it by the staff. The backlog of recommendations for complaints, for example, has been reduced by more than 10 times -- until at the present time this work is virtually current.

### Overlapping Activities

16. Some mention should be made of the steps taken to improve the relationships existing between the Commission and other agencies of the Government. I have long deplored instances of overlapping and conflicting activities. It is inconceivable to me that there is justification for non-cumulative remedies being sought by more than one agency against the same person, at the same time, for the same thing.

I am especially grateful for the fine arrangement that we have with Stanley N. Barnes of the Department of Justice. We discuss matters of mutual concern at frequent intervals, and I am strongly convinced that the great volume of our work is in no way inconsistent.

In the field of food, drug and cosmetics, we have been able to work with Secretary Hobby a very promising inter-agency agreement designed to correlate the work of the Commission and the Food and Drug Administration in such a way as to eliminate overlapping activities and duplication of effort. This agreement has been in effect since July 1.

Similar liaison arrangements, although less formal, have been made with other agencies, including the Bureau of Standards, the Post Office Department and the Patent Office.

These are some of the events that have taken place in recent months at the Commission. I hope you will agree that they have been constructive and in the public interest.