REMARKS OF

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FEDERAL TRADE COMMISSION

Before the

ANNUAL NATIONAL CONVENTION
OF THE INSULATION DISTRIBUTOR-
CONTRACTORS NATIONAL ASSOCIATION, INC.

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REMARKS BY COMMISSIONER WILLIAM C. KERN
FOR PRESENTATION FEBRUARY 23, 1956
TO THE ANNUAL NATIONAL CONVENTION
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It was with a great deal of pleasure that I received and accepted the invitation of your Secretary, Mr. Kerns, to speak to the Annual Convention of the members of this trade association. I am especially glad to do so as I am told that your association is not an ancient one, but has been recently organized and therefore is in the full flower of its vigor and youth. Your membership represents an important and a growing segment of our dynamic building and construction industry. I am certain that with a constructive program your association can make important contributions to the healthy growth of not only your particular segment of our national economy, but also our entire free-enterprise system. That system depends for its survival upon fair, free and open methods of competition. The Federal Trade Commission was created to preserve and protect that system; so let me tell you in broad outline a few things about it.

It is my understanding that there are many here today who either have never heard of the Federal Trade Commission or, if they have, consider it to be just another one of those many bureaucratic agencies of the Government which painfully regulate at the taxpayer's expense. And so, before I turn to some of the more specific points where the Commission's jurisdiction may impinge upon the activities of trade associations like yours, let me tell you generally about the Commission and how it operates.

The Commission's work is determined by the statutes which it administers: the Federal Trade Commission Act, the Wheeler-Lea Act, the Clayton Act, the Robinson-Patman Act amending the Clayton Act, the Webb-Pomerene Export Trade Act, the Lanham Trade-Mark Act, the Oleomargarine Act, the Wool Products Labeling Act, the Fur Products Labeling Act, and the Flammable Fabrics Act. As we shall see, all these laws are designed in one way or another to protect the public from unwholesome conditions in trade and commerce; all are directed toward the elimination of unfair and unscrupulous business practices and toward the fostering of business conduct on a high ethical plane.

Quantitatively speaking, most of the Commission's work has been carried on under Section 5 of the Federal Trade Commission Act, the organic act which created the Commission in 1914 and empowered it in broad terms to prevent the use of "unfair methods of competition in commerce." The courts have interpreted this act in such a way as to give the Commission jurisdiction over false and misleading advertising and restraints of trade, including conspiracies and combinations tending to restrain trade. Although the ultimate determination of whether a particular practice is unfair in the light of the facts is for the courts, nevertheless there is a real necessity for continued study by trained experts so as to keep vitality in such broad terminology by constant redefinition to fit the needs of a rapidly changing economy. Here is a statute ideally fitted to the administrative process and, indeed, one which could not be effectively enforced or interpreted by any other means. This the courts have specifically recognized.1/

1/ FTC v. Raladam Co., 283 U.S. 649, 650-1 (1931); FTC v. R. F. Keppel & Bro., Inc., 291 U.S. 304, 314 (1934); Sears, Roebuck & Co. v. FTC, 258 Fed. 307, 312 (7th Cir. 1919).

This basic statute was amended in 1938 by the Wheeler-Lea Act, which added a series of new sections giving to the Commission greater powers and additional duties designed to afford maximum protection to consumers against the false advertising of foods, cosmetics and curative devices. Under the Wheeler-Lea amendments "unfair and deceptive acts and practices" were made unlawful in addition to the earlier "unfair methods of competition," so that now the Commission can proceed against an unfair practice solely upon the basis of protection to the public. These amendments amount to a direct mandate to protect the consumer as well as the business man.

The Commission likewise has jurisdiction to enforce certain sections of the Clayton Act which forbid specific types of practices which the Congress considers inimical to competition. This act prohibits under certain circumstances the use of full requirements or exclusive-dealing contracts or so-called tying contracts by which the buyer is required to purchase certain goods in connection with his purchase of other merchandise or in connection with the leasing of machines such as vending machines. It is under Section 7 of the Clayton Act that the Commission proceeds against unlawful corporate acquisitions or mergers where the effect may be substantially to lessen competition or tend to create a monopoly. This act also aims at the prevention of interlocking directorates of certain competing corporations and bars individuals from serving as directors of competing corporations where the capital stock is in excess of $1,000,000.

The Clayton Act was amended by the Robinson-Patman Act, which has been described as the equality-of-opportunity act striking at various discriminatory practices in the distribution of goods in interstate commerce. It not only prohibits price discrimination and related discriminatory methods but proscribes the payment of certain brokerages and commissions except for services rendered, and prevents the payment by manufacturers or sellers for, or the furnishing of services or facilities to, dealers unless such payments or services or facilities furnished be made available to all competing customers on proportionately equal terms. Likewise Section 2(f) of this act makes illegal the knowing inducement or receipt of any illegal price discrimination.

Time will permit only a brief discussion of the other acts administered by the Commission. The Webb-Pomerene Export Trade Act confers jurisdiction over associations engaged in foreign commerce and provides a limited exemption from the antitrust laws of corporations so engaged in export trade although such organizations are required to file with the Commission certain data and are subject to the Commission's supervision.

The Lanham Trade-Mark Act empowers the Commission to apply for cancellation of certain trade-marks improperly registered with the Patent Office when they are improperly used in competition.

The Oleomargarine Act broadens the scope of the basic Federal Trade Commission Act by making illegal the improper description of oleomargarine in terms normally applied to butter or other dairy products.

The Wool Products Labeling Act and the Fur Products Labeling Act empower the Commission to prevent unfair methods of competition and unfair or deceptive

acts in commerce in wool and fur products by requiring informative labeling to reveal their true composition. Failure to label such products properly or to make certain disclosures as required by rules promulgated by the Commission subjects violators to the legal processes of the Commission under the Federal Trade Commission Act.

The remaining act entrusted to the Commission's jurisdiction is the Flammable Fabrics Act, passed in 1953, for the protection of the public against the dangers of flammable fabrics and wearing apparel. Through it, the manufacture, transportation and sale of such fabrics are made violations of the Federal Trade Commission Act.

The unthinking may gather the impression that only insignificant monetary savings accrue to consumers from the Commission's policing of the channels of commerce through the enforcement of these various acts. Such an impression is quickly dispelled by examination of the thousands of Commission orders directed against misrepresentation, quackery and false advertising in all lines of trade and commerce. It has been conservatively estimated that millions of dollars annually have been saved to consumers by the outlawry of such injurious practices. Moreover, the Commission's activities in proceeding against trade restraints arising through unlawful price-fixing agreements constitute another important element of consumer protection for artificial enhancements of prices by price-fixing arrangements that nullify the effects of fair and free competitive influences in an open market put a heavy financial burden on the consuming public.

The review of the objectives of these major acts administered by the Commission and my knowledge of the results obtained in their enforcement prompts me to conclude that the public interest has been faithfully guarded by the Commission throughout the forty-two years of its existence. This protection of the public, far from being an idle phrase, has been a goal constantly sought and repeatedly realized in the many spheres of its influence.

To carry out its vital functions under the various acts which I have just described, may I point out that the Commission has only 607 employees and an annual appropriation approximating $4,300,000. Since conservative estimates count consumer savings as a result of the Commission's program at many times that amount, you can see that this is far from being a swollen bureaucratic enterprise.

While the Commission is authorized to issue formal complaints against law violators, and often does, it accomplishes its law-enforcement objectives in many cases, particularly those involving false and misleading advertising, without formal proceedings, but rather through the informal procedure of stipulation, whereby the vendor-advertiser voluntarily agrees in writing to cease and desist from questioned activities. Moreover, the Commission invites the voluntary cooperation of all industries in its law enforcement program and has established the Division of Trade Practice Conferences as a unit of its Bureau of Consultation. Since I believe that your association may have a very real interest in the work of this division I shall briefly describe its activities to you.

Trade practice conference proceedings for an industry are usually initiated by an application by a representative group in the industry or by the industry's trade association taking the initiative in arranging for such a conference. In the latter situation the association acts as a clearing house for bringing into open discussion industry practices inconsistent with law, and it frequently supplies the technical and statistical information required as a basis for any industry rules. These conferences look toward the drafting of sets of rules which interpret, as to particular industries, the various statutes enforced by the Commission and which establish industry standards of fairness.

When, upon application, the Commission determines that a trade practice conference would be in the public interest, it is usually scheduled in a city located centrally for the members of the industry, all of whom are invited to attend. An official of the Commission, usually one of the Commissioners, presides at the conference and the problems of the industry are thoroughly considered and a set of proposed rules is recommended to the Commission for its consideration and action. After study the Commission releases the proposed rules and invites discussion by all interested parties, consumers as well as members of the industry. After public hearing and after full discussion, the Commission finally approves and promulgates the rules, sending each member of the industry a copy for signature. If the industry member does not care to subscribe to the rules he is free to do so; however, to fail to sign in no wise excuses such industry member from full compliance with all applicable laws administered by the Commission.

Trade practice rules fall into two categories: Group I rules condemn, as unfair and unlawful, practices deemed to be in violation of laws administered by the Commission as such laws have been interpreted by the courts. (In effect, Group I rules codify and clarify for the industry the existing law applicable to it.) Group II rules in general do not in and of themselves refer to violations of the law but are expressions of the industry's representatives on the desirability or undesirability of practices which they condemn as harmful or as unethical. This second group of rules are regarded as voluntary rules, as distinguished from Group I rules which are mandatory, and the compliance of members rests solely on their willingness to abide by them.

The trade practice conference procedure is based upon the principle that the Commission seeks compliance, not punishment. Representatives of business should approach the problem in the same spirit; they should wish to live within both the letter and spirit of the law; they should -- and I believe it is in their real self-interest to do so -- place public interest ahead of private advantage. In the long run it is better, where possible, to obtain compliance with the law through such informal procedures as consultation. In either case, whether compliance be involuntary by formal order or voluntary through such devices as consultation and voluntary adherence by industry representatives to trade practice conference rules, the goal is the same: the perpetuation of our free enterprise system through effective enforcement of the law.

In the brief time remaining, let us turn to some of the more obvious pitfalls and dangers a trade association may be confronted with in activities inconsistent with public antitrust policy as laid down by the Congress and

as interpreted by the courts. An awareness of some of the antitrust danger zones may result in saving you some day the required costly defense of government prosecution or the severe penalty of a treble damage suit. An ounce of prevention in this field, as in others, may be worth a pound of cure.

The Federal Trade Commission made clear its basic position with respect to the legality of trade associations in its report on "Open-Price Trade Associations" to the U. S. Senate on February 11, 1929 (Sen. Doc. No. 226, 70th Cong., 2d Sess.), responsive to Senate Resolution No. 28, 69th Cong., Special Session. In its letter of transmittal the Commission noted that it had studied in a broad way the activities of about ninety open-price trade associations or groups. The Commission's position, as evidenced by that report and by its decisions in formal cases, is that only those trade association activities which are susceptible to abuses with trade-restraining effect are beyond the pale. In taking that position the Commission has not blazed a new trail, but has followed one clearly marked by the decisions of the United States Supreme Court.2/

A trade association being, as it is, a group of individuals, who are competitors working in a common cause, it follows that such an association is a combination. Its common cause or its fundamental purposes must not be in restraint of trade, but must be legal. The pursuance of illegal objectives will inevitably run afoul of the law. Thus the court in the old Sugar Institute case 3/ said:

> "I find that defendants' dominant purposes in organizing the Institute were: to create and maintain a uniform price structure, thereby eliminating and suppressing price competition among themselves and other competitors; to maintain relatively high prices for refined, as compared with contemporary prices of raw sugar; to improve their own financial position by limiting and suppressing numerous contract terms and conditions; and to make as certain as possible that no secret concessions should be granted. In their efforts to accomplish these purposes, defendants have ignored the interests of distributors and consumers of sugar."

It is in the field of attempted price-fixing and control of production that a trade association almost inevitably finds itself on illegal ground. It cannot be too strongly emphasized that price-fixing is illegal per se. As the court, speaking through Judge Learned Hand, said in United States v. Aluminum Company of America, 148 F.2d 416, 427 (2d Cir. 1945):

> "It is settled, at least as to #1, that there are some contracts restricting competition which are unlawful, no matter how beneficient they may be; no industrial exigency will justify them; they are absolutely forbidden. ... The Supreme Court unconditionally condemned all contracts fixing prices in United States v. Trenton Potteries Co., 273 U. S. 392, 397, 398, * * * and whatever doubts may have arisen as to that decision from Appalachian Coals Inc. v. United States, 288 U. S. 344, * * * they were laid by United States v. Socony-Vacuum Co., 318 U. S. 150, 220-224, * * *." [Emphasis supplied.]

2/ Maple Flooring Manufacturers' Assn. v. United States, 268 U.S. 563 (1925); Cement Manufacturers' Protective Assn. v. United States (1926).

3/ Sugar Institute v. United States, 297 U.S. 553, 577 (1936).

Yet, as well settled as the law is, the Commission since 1953 has had to proceed by formal proceedings against eleven trade associations, all but one of which involved variations on the single theme of price-fixing, in which the association coordinated the price restrictive policies agreed upon at association meetings. Four of these proceedings also involved charges of boycott and coercion of dealers or suppliers. This seemingly compelling urge illegally to tamper with price structures was ommented upon many years ago by Adam Smith in his "Wealth of Nations":

> "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."

To yield to such an urge is to invite dire antitrust consequences and inevitable prosecution.

Furthermore members of trade associations and those who manage their affairs should be ever mindful that a charge of an unlawful price-fixing agreement can be sustained without proof of any such agreement in writing signed by the parties. The Supreme Court of the United States in deciding a case brought by the Department of Justice under the Sherman Antitrust Act stated 4/:

> "It is elementary, however, that conspiracies are seldom capable of proof by direct testimony and may be inferred from the thing actually done and when in this case by concerted action the names of wholesalers who were reported as having made sales to consumers were periodically reported to the other members of the association, the conspiracy to accomplish that which was the natural consequence of such action may be readily inferred."

All relevant facts concerning the activities of a trade association or its members will be considered and from all of these facts an illegal price-fixing scheme may be inferred. Among the activities of trade associations which are suspect, or at least are frequently evaluated in connection with a determination of illegality of trade association activities, are (1) a program of standardization of products, and (2) price gathering and reporting activities. Both of these activities constitute perhaps the major danger zones involving possible antitrust repercussions and therefore deserve careful consideration.

I notice that one of the stated objectives of your association is the standardization of specifications - to the end that basic insulation materials will become increasingly standardized, thereby simplifying ordering, stocking, and application. An analysis of the leading court cases involving standardization programs leads to the conclusion that certainly standardization of products

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4/ Eastern States Lumber Assn. v. United States, 234 U. S. 600, 612 (1914). It is not even necessary that there be evidence of a meeting of the parties to a conspiracy to restrain trade. "The picture of conspiracy as a meeting by twilight of a trio of sinister persons with pointed hats close together belongs to a darker age." William Goldman Theatres v. Loew's, Inc., 150 F.2d 738, 743 (3rd Cir. 1945).

is not illegal per se and does not become tinged with illegality unless it operates along with other factors illegally to restrain trade.

The chief danger of standardization programs is that courts frequently look upon standardization as an important element of proof pointing towards illegality. In short, it is frequently considered as one of the facts from which an overall illegal price-fixing scheme may be inferred.5/ It is apparent that the uniformity that results from standardization makes it easier to accomplish price uniformity. For this reason it is wise, where standardization is present, to avoid additional practices which might be construed to be restrictive. As the court stated in the Maltsters case:

> "* * * The fact that malt is a standardized product * * * with a tendency toward uniformity of price, makes it all the more important that such product be permitted to enter the channels of commerce unfettered by any restrictions which might impair such competition as otherwise exists."

The only certain conclusion that can be drawn from a study of the case law on this subject is that standardization is not necessarily illegal and only becomes so when it becomes a part of an unlawful conspiracy to fix prices or to restrain trade. In order to avoid the conclusion of illegality, an expert on this subject in the Department of Justice has suggested that, in connection with any standardization program, an association observe the following caveat 6/:

> "1. Do not standardize on a product that involves use of a patent or technical information not available on equal terms to everyone in the industry.
>
> "2. Do not standardize on a raw material that is of limited availability to producers who are not members of your association.
>
> "3. Do not adopt standards that will require small, perhaps marginal, producers to engage in extensive retooling or other alterations they cannot afford.
>
> "4. Do not standardize, or simplify, on an uneconomic product, size or grade. Resultant price increases may be misconstrued.
>
> "5. Do not assume that standardization and simplification programs effectuated through the procedures of the Department of Commerce have antitrust immunity. The use of these procedures does not relieve an association or its members from responsibilities under the antitrust laws. There is no legal provisión for obtaining antitrust immunity through these procedures.

5/Ft. Howard Paper Co. v. FTC, 156 F.2d 899 (7th Cir. 1946); United States Maltsters Assn. v. FTC, 152 F.2d 161 (7th Cir. 1945); Bond Crown & Cork Co. v. FTC, 176 F.2d 974 (4th Cir. 1949).

6/Ephraim Jacobs, Statistical, Standardization and Research Activities, Address before Spring Meeting of Section of Antitrust Law, American Bar Assn., April 1, 1955.

"6. Do not enter into an agreement to adhere to standards. Each participant should retain his freedom to conform or not, as he individually desires. An agreement to adhere, in my opinion, would not always be illegal. It would depend upon the character of the standardization. An agreement on a standard for size 15 is obviously different than an agreement on the number of paper towels in a roll.

"7. Finally, do not threaten or exert compulsion to enforce adherence to a standard."

I conclude with a brief discussion of that other somewhat hazardous pursuit that trade associations frequently engage in, namely, price gathering and reporting -- hazardous because pricing is one of the most important manifestations of competitive activity. Hence, it is easy to see why price gathering and reporting by a trade association, which by definition is a combination, has often been held, when used for improper ends, to constitute unlawful restraint of trade. The broad category of statistics, within which price reporting falls, includes information concerning prices, discounts, terms and conditions of sale, production, number of sales, inventories, shipments, costs and freight rates. The collection and dissemination of such information, in connection with product standardization and uniformity of prices has often spilled out a price-fixing conspiracy in the minds of commissioners and judges.7/

An analysis of the case law with respect to price gathering and reporting activities justifies the conclusion that this is a situation analogous to standardization of products in that price reporting activities are illegal if they are a part of a combination to suppress competition which actually results in or has a necessary tendency to restrain trade. There is no simple rule-of-thumb for judging the legality of trade association price-reporting activities. This can only be done by examining the features of the plan itself and the setting in which it is employed. The illegality of any trade association price reporting system hinges upon the finding of an agreement to fix prices. Where there was no proof of such an agreement to fix prices or proof of concert of action to lessen production or raise prices, price-reporting systems have received judicial sanction. Thus such a trade association activity received the approbation of the Supreme Court in 1925 by the following language:

"It is the consensus of opinion of economists and of many of the most important agencies of Government that the public interest is served by the gathering and dissemination, in the widest possible manner, of information with respect to production and distribution, cost and prices in actual sales, of market commodities, because the making available of such information tends to stabilize trade and industry, to produce fairer price levels and to avoid the waste which inevitably attends the unintelligent conduct of economic enterprise. Free competition means a free and open market among both buyers and sellers for the sale and distribution of commodities. Competition does not become less

7/American Column and Lumber Co. v. United States, 257 U. S. 377 (1921); United States v. American Linseed Oil Co., 262 U. S. 371 (1923); United States Maltsters Assn. v. FTC, 152 F.2d 161 (7th Cir. 1945); Ft. Howard Paper Co. v. FTC, 156 F.2d 899 (7th Cir. 1946).

free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction."8/

Time precludes a more extended discussion of this price-reporting problem. I was privileged to be called upon to address the Antitrust Section of the American Bar Association on this matter before their Spring Meeting in April, 1955, and I am taking the liberty of making available to you copies of my paper delivered at that time. I believe the subject is important enough for you and your officers to give this matter considerable study before embarking upon any price-gathering and price-reporting program. I pointed out in that paper, and I summarize it here, that trade association price-reporting activity conducted along the following lines will have the likeliest chance of avoiding entanglement with the antitrust laws:

1. The pricing information to be collected, compiled, and disseminated should not be in too great detail.

2. The prices should relate to past and closed transactions.

3. If the plan calls for the filing of bids on construction work, the bids must not be reported to the bid repository prior to their submission to the awarding authority.

4. If individual sales are reported, the names of the sellers and buyers involved in the transactions should not be revealed.

5. There must be no agreement on the part of association members to adhere to the prices, terms, and conditions of sale filed with the association.

6. No information should be disseminated identifying individual sellers or buyers who are deviating from announced prices, terms, or conditions of sale.

7. There must be no functional classification of buyers for discount purposes.

8. Cost data, even in the form of averages, should be avoided.

9. If members' books and records are to be audited, this can be done only for the purpose of determining whether the information supplied is accurate and not for the purpose of discovering unreported price cutting.

10. The price reporting system should not provide for penalties to be imposed against anyone failing to comply with the terms of the agreement.

11. The information collected and disseminated must be accurate and not intended to conceal actual market conditions.

8/ Maple Flooring Mfrs. Assn. v. United States, 268 U. S. 563, 582-583 (1925).

12. It must be made available to all members of the industry, both sellers and buyers and non-association members, as well as to the public generally.

13. It goes without saying that industry members should, under no circumstances, discuss pricing information at association meetings.

14. The trade association official administering the price reporting system should avoid interpreting the data collected and disseminated in such a way as to suggest future conduct on the part of association members.

Conclusion

In the final analysis the legality of any trade association activity will largely depend upon the fundamental attitude of trade association executives and members. If the present day trade association foregoes the role of a price-fixing intermediary and foregoes any efforts to implement an understanding among industry members to stabilize prices and otherwise suppress competition, there need be little fear of antitrust consequences. It is my earnest hope that the dangers I have discussed of embarking upon any such role will dissuade this association from embarking upon any dubious activities of that character. I am sure that you will instead confine your efforts to perpetuating the traditional American system of free, competitive and dynamic enterprise. In doing so, believe me, you will become a real and constructive force in working out the problems of your industry within the permissable orbit of existing law.