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REMARKS OF

WILLIAM C. KERN, COMMISSIONER
FEDERAL TRADE COMMISSION

Before the

NATIONAL COMBINATION STORM
WINDOW & DOOR INSTITUTE, INC.

February 6, 1957

New York, New York



REMARKS OF COMMISSIONER WILLIAM C. KERN
BEFORE THE NATIONAL COMBINATION STORM
WINDOW & DOOR INSTITUTE, INC.,
FEBRUARY 6, 1957

It was with a great deal of pleasure that I received and accepted the invitation of your Executive Director, Mr. Winnick, and your Program Chairman, Mr. Lipman, to speak at this meeting of the members of The National Combination Storm Window & Door Institute, Inc. I am especially pleased to do so because yours is not an old association with deeply imbedded practices and points of view. You represent an important segment of the building industry. With a constructive program I am sure that your contributions will be impressive, not only to your own particular segment of our national economy, but to our entire free-enterprise system which depends for its survival upon fair, free and open methods of competition. The Federal Trade Commission was organized to protect and foster that system. Let me give you a brief resume of the Commission's history and tell you generally how it operates.

The Commission was created by an Act of Congress in 1914 during the administration of President Wilson. At that time the Sherman Antitrust Law had been in effect since 1890. Experience during that almost quarter of a century showed that there was needed additional legislation to stop combinations in restraint of trade at their inception and further, that there were many unfair methods of competition which did not constitute Sherman Act violations. The legislators also recognized that the judicial system was sorely in need of an adjunct to handle various trade abuses which were becoming prevalent in the economy of a nation enjoying a phenomenally rapid industrial growth. In the same year, 1914, the Congress passed the Clayton Act which proscribed the practice of lessening competition and restraining trade by discriminations in price and by the use of tying in contracts in the distribution of goods, wares or merchandise. Other practices having a monopolistic tendency such as the use of interlocking directorates between normally competing corporations were also forbidden.

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body specially competent to deal with /administrative functions committed to it/ by reason of information, experience and careful study of the business and economic conditions of the industry affected."

I shall not further delve into all the legislation which the Commission is directed to administer but will deal primarily with the Federal Trade Commission Act as amended in 1938 by the Wheeler-Lea Act. Section 5 thereof is very broad and general in its language. Among other things, it declares "unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." I am sure that the pioneers in the administration of such vague legislation must have asked themselves many times "what is unfair competition?" and "what are deceptive acts or practices." Fortunately, much light has been shed on these questions in intervening years. As a result of intervening legislation and subsequent decisions made by the Commission and the courts we now have a much clearer insight into what is meant by those phrases. However, as competitive conditions change and new business practices evolve, we find it necessary constantly to evaluate such practices and reach a determination as to whether they fall within the proscriptions of the FTC Act.

At this point I feel that a brief description of the procedures employed by the Commission in obtaining compliance with the laws it administers would be appropriate. Generally speaking, the procedures may follow one of three courses, litigation, stipulation and consultative.

The litigation method contemplates a complete investigation of alleged violations of law and where the circumstances warrant the issuance of a complaint, the making of findings of fact upon pleadings and evidence after full opportunity for the taking of testimony, the filing of briefs and oral arguments and ultimately the issuance of a cease and desist order, or in the alternate the dismissal of the matter. Cease and desist orders may be appealed to the United States Circuit Court of Appeals for review and eventually may be taken to the Supreme Court of the United States. For violation of a cease and desist order issued under Section 5 of the Federal Trade Commission Act the offender is subject to civil penalties of not more than \$5,000 for each violation or in the case of continuing violations, not more than \$5,000 for each day, collectible through the courts.

The second method of obtaining compliance with our laws is by the stipulation procedure. At the discretion of the Commission, in cases where all of the circumstances indicate that disposition of the matter by stipulation will fully protect and satisfy the public interest, an offender is offered the opportunity of agreeing voluntarily to discontinue the unfair or deceptive act or practice. It is the Commission's stated policy, however, not to afford such opportunity when the alleged violation of law involves false advertising of food, drugs, devices, or cosmetics which are inherently dangerous, the sale of fabrics and wearing apparel which are so highly flammable as to be dangerous, or the suppression or restraint of competition through conspiracy or discriminatory or monopolistic practices. Furthermore, the Commission reserves the right in all cases to withhold the privilege of disposition by voluntary agreement.

We now come to the third procedure of obtaining compliance with the laws we administer, the trade practice conference method. This method we call the consultative method or the cooperative method. It has for its purpose the wholesale abandonment and elimination of unfair trade practices by industry members through education and cooperation. Normally, an industry group, quite often a trade association, if faced with the ravages of unlawful practices will apply to the Commission for the holding of a trade practice conference which normally will result in the promulgation of trade practice rules. Such proceedings are conducted on a basis of voluntary participation. The industry is regarded not as an accused, but as a "friend of the court." You who are members of the Combination Storm Window and Door Industry have just experienced the various steps which are taken leading to final trade practice rules. Usually the genesis of a trade practice proceeding is in the form of informal meetings between industry representatives and members of our staff. At these meetings business representatives outline the various unlawful practices in their industry. The staff gives the entire matter careful consideration and makes its recommendations to the Commission as to whether a trade practice conference should or should not be authorized. The Commission will authorize a conference if it appears that such a proceeding has possibilities of constructively advancing the best interests of the industry, or further competitive principles in consonance with public policy, or of bringing about more adequate observance of the laws it administers or otherwise protecting the public interest. A set of industry suggested

trade practice rules is placed before the conferees at a trade practice conference to which all known industry members are invited to attend. Opportunity is there afforded to businessmen to make any suggestions or recommendations with respect to the suggested rules. After the conference our staff gives careful and deliberate thought to all of the suggestions or recommendations received so far and prepares a set of proposed trade practice rules which is submitted to the Commission for approval. The next step is the holding of a public hearing on the proposed rules. Not only the industry but all other interested or affected parties, including consumers, are invited to attend and to express their views. Following the hearing the entire matter is again given careful consideration and all suggestions or criticism received at the hearing or by correspondence, or by informal discussion is reviewed following which the staff makes its recommendation to the Commission as to the form in which final trade practice rules should be approved for promulgation.

At this time I am happy to announce that similar trade practice rules for the Combination Storm Window and Door Industry were approved by the Commission at a meeting held on January 31st. They are being printed and mailed to all industry members and interested or affected parties whose names are of record so that you should receive copies of these rules in the very near future.

Naturally, businessmen ask "what benefit can we hope to derive from the promulgation of trade practice rules." Our experience has shown that the benefits of such rules accrue not only to an industry but also to the consuming public and to the Government.

One of the great appellate judges, Learned Hand, has said "The Commission's powers * * * are more than procedural; its duty in part at any rate is to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop." Accordingly, in answer to the businessmen's quest for certainty, the rules are designed to be informative in that they pinpoint certain acts or practices which are considered to be unlawful and they specifically spell out the practices which should be avoided. In this respect the rules are prophylactic and in many instances prevent the spread of disease.

Another advantage derived from the rules is that upon promulgation of such rules an entire industry is afforded the opportunity of simultaneously abandoning unlawful practices which may have become prevalent and which unquestionably many industry members have been forced to adopt in order not to be placed at competitive disadvantage. Then too, many businessmen unknowingly violate the rules we administer and if his industry is operating under trade practice rules he may be afforded an opportunity to voluntarily abandon the challenged practice. It follows, of course, that this is done on an informal basis and the businessman is spared the expense of employing counsel and of other costs which result from litigation. Not only does he save money but he saves his time which in these busy days is an important factor. One of the greatest benefits resulting from trade practice rules, in my opinion, is that when an industry member observes the requirements of such rules he builds up the good will of his customers. Honest advertising and fair play soon gain the confidence of the purchasing public.

Another beneficiary of the trade practice conference procedure is the Government. When certain types of alleged violations are called to our attention we find that many of them may be disposed of through consultation with the offender on a voluntary basis within a relatively short time and at a minimum of cost.

In addition to the specific benefits which I have just described, we know that trade practice rules in general have a very salutary effect. As you no doubt know, the jurisdiction of the Commission is limited by statute to, generally speaking, transactions in interstate commerce. However, the benefits following from trade practice rules very frequently extend to businessmen not subject to the Commission's jurisdiction. Better Business Bureaus, for example, through their "Guide For Retail Advertising And Selling" apply many of the principles set forth in the rules as standards of ethical business conduct. We believe that most businessmen, being sincerely desirous of operating on a high moral plane, are happy to have such standards to guide them.

Now I would like to point out some of the advantages which members of the Combination Storm Window and Door Industry may hope to derive from the rules for their industry. Of course, you do not have the rules before you at this time but I can tell you that the final rules will be substantially in the same form as the proposed rules which were discussed at the public hearing on November 2.

There are twenty-two rules which embrace many various types of unfair or deceptive practices and unfair methods of competition known to the law. I have been told that in all probability the rules which will be of greatest assistance to your industry are entitled "Deception (General)," "Bait Advertising" and "Deceptive Pricing." However, I strongly recommend that you read all twenty-two rules when you receive your copies.

A review of the records of the Commission shows that most of the violations of law which have occurred in the industry fall into one or more of the three subjects dealt with in the three named rules. Rule 1, Deception (General) in general language proscribes false or misleading advertising of industry products. The second part of the rule spells out specific unlawful practices which are deemed to be deceptive and which you should avoid in the sale of your products. Misrepresentation as to the composition of your products, misleading claims relating to savings in fuel, or with respect to such products affording positive protection against prowlers are specifically pinpointed. These practices are known to have been prevalent and we believe some of them still exist. According to the record of this trade practice conference proceeding it is clear as emphasized by members of the industry, representatives of Better Business Bureaus and by examination of formal cases, that one of the most devastating practices in the industry is bait advertising. Rule 2 declares that it is an unfair trade practice for an industry member to offer for sale any industry product when the offer is not a bona fide effort to sell the product so offered. The rule then spells out in detail specific acts or practices which may be considered in determining whether the offer to sell is bona fide. These acts or practices have not been dreamed up by our Trade Practice Conference Division. They include disparagement of the product offered, the refusal to show, demonstrate or sell the product offered and the failure to have available a quantity of the advertised product sufficient to meet reasonably anticipated demands. These factors and others which are set forth in the rule have actually been present in adjudicated cases and have been considered as evidence tending to show that an offer to sell was not bona fide. To the best of my knowledge the rule on bait advertising is the first rule on that subject in which the Commission has with such high degree of specificity spelled out the various elements of bait. Such a rule cannot help but be of great informational value to industry.

Rule 3 relating to deceptive pricing in general terms proscribes pricing practices which are false or misleading or which have a tendency to deceive prospective purchasers of your products with respect to the price of such products. Like the bait rule, it contains an enumeration of practices which are frequently present in cases involving deceptive pricing. For example, it is considered deceptive and thus unlawful to represent or imply that the advertised price of a combination storm window or door includes installation or weatherstripping, or parts or accessories when such is not the fact. The rule also states that it is an unfair trade practice to publish any false or misleading representations concerning installment sales contracts or the terms or conditions of such contracts. Deceptive use of such words as "reduced" or "special" or "factory to you" is also dealt with. The use of "loss leaders" under certain circumstances which are set forth in the rule, is also declared to be an unfair trade practice. The other rules spell out other unlawful acts or practices which are considered to be unlawful but I will not deal with these at this time. I would like to make it plain, however, that these trade practice rules merely interpret and clarify the laws which are already on the books. They do not impose any additional burden whatsoever on business.

There will no doubt be many members of the industry and perhaps other interested parties who after reading the rules may still have a question as to what they may or may not do within the framework of the law. This illustrates another advantage of working under the rules in that the facilities of the Trade Practice Conference Division are available to you. You may discuss pertinent matters with our staff or you may direct correspondence to them stating the problem confronting you. You can rest assured that a carefully considered reply will be forthcoming within a reasonable time. Our purpose in promulgating trade practice rules is to obtain voluntary cessation of unlawful practices and even better to prevent such practices in their incipiency.

But in the last analysis the efficacy of any set of rules depends upon the conscientiousness with which they are observed and followed. If your industry exercises self discipline and faithfully follows the guideposts set out in these rules, you will avoid major conflict with the Federal Trade Commission. To accomplish this you should police your own industry and report to us promptly any infractions. I

assure you that our action will be most vigorous and prompt. To avoid such action your membership must exercise both self discipline and self restraint.

I close with a quotation from an address recently delivered by our very able Chairman John W. Gwynne to the New York State Bar Association:

"The times call for moderation; the times call for self restraint. The thought I have in mind was well expressed by President Eisenhower in his State of the Union Message in the following language:

"The national interest must take precedence over the temporary advantages which may be secured by particular groups at the expense of all the people."