

THE FEDERAL TRADE COMMISSION

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Commissioner MacIntyre and Mr. Volhard have prepared an extensive article on the functions of the Federal Trade Commission, which traces the legislative history of the Commission, its relationship to the three branches of government, and the Commission's own rules of practice. The article explores the Commission's problems and successes in establishing and enforcing priorities, and in this fashion points out often overlooked considerations which dictate or influence the activities and policies of the Commission. While this comprehensive analysis discusses many of the activities of the Commission during the decade of the 1960s, the authors also have included a specific section which traces the most important antitrust cases during the decade, as well as the recent developments in the area of deceptive practices.

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I. HISTORY AND LEGISLATIVE BACKGROUND OF THE FEDERAL TRADE COMMISSION¹

A. *Creation of the Federal Trade Commission*

Subsequent to the Civil War and the consequent increasing commercial intercourse between the states came the realization that Congress, constitutionally charged with the regulation of commerce,² would be unable to concern itself with this matter on a day-to-day basis. As a result, a number of agencies were created to deal with the minutiae of regulating commerce. With the exception of the Federal Trade Commission, these agencies are entrusted with the regulation of specific industries; the Commission, on the other hand, is charged with regulating that vast array of American businesses not otherwise the subject of special federal regulation. Its primary task is to keep competition both free and fair.

The most immediate impetus for the Commission's creation was the Supreme Court's 1911 decisions in *Standard Oil Co. v. United States*³ and the *American Tobacco Co. v. United States*.⁴ In these two Sherman Act⁵ cases the Supreme Court enunciated the "rule of reason" and held that only conduct which unreasonably restrains trade is illegal. This standard, inasmuch as it left to the courts the power to decide what particular practices constitute illegal restraints of trade, was deemed too uncertain by Congress and the business community.⁶ In addition, the enforcement history of the Sherman Act up to 1911 had been criticized by some commentators,⁷ and the courts did not appear to view Sherman Act proceedings with particular

¹ For a comprehensive and detailed analysis of the political and legislative history of the Federal Trade Commission, see G. Henderson, *The Federal Trade Commission* 1-48 (3d ed. 1927).

² U.S. Const. art. I, § 8 empowers Congress "To regulate Commerce with foreign Nations, and among the several States . . ."

³ 221 U.S. 1 (1911).

⁴ 221 U.S. 106 (1911).

⁵ 15 U.S.C. § 1 (1964). The Sherman Act declares illegal "every" contract in restraint of trade and makes monopolization or attempts to monopolize a misdemeanor.

⁶ Votaw, *Antitrust in 1914: The Climate of Opinion*, 24 ABA Antitrust Section 14, 21 (1964).

⁷ *Id.* at 19.

favor.⁸ Thereafter, several years of legislative effort culminated in the enactment of the Federal Trade Commission Act⁹ and its companion bill, the Clayton Act.¹⁰ The former established the Federal Trade Commission and the latter was aimed at clarifying the "rule of reason" by attempting to define specific practices deemed anticompetitive. The new commission was given the task of defining "unfair methods of competition in commerce," and the authority to issue cease and desist orders prohibiting practices it found to be such "unfair methods of competition."

From the time the need for a trade commission was first perceived there existed a dichotomy of views as to its appropriate functions. One school of thought, to which President Wilson, one of the Commission's strongest supporters, belonged, envisioned the function of such a commission as providing advice for the business community, the Executive, and the Congress. On the basis of its fact-finding abilities, for which it should be given the broadest possible investigatory powers, the Commission was to make recommendations for legislation to the Congress and generally report on existing trade conditions. The grant of quasi-judicial authority was not contemplated by this school of thought.¹¹ In principle the new commission was to take over, in expanded form, the functions and existing programs of the Bureau of Corporations of the Department of Commerce and Labor.¹² One of the major advantages of the new commission was that it was an independent agency under the supervision of Congress rather than the executive department, as had been the Bureau of Corporations. The "regulatory" activities of the new commission were to be merely advisory. This school of thought also contended that publicity in and of itself would be a deterrent to anticompetitive behavior.

The second school of thought advocated a commission with regulatory as well as quasi-judicial authority.¹³ This view reflected not only dissatisfaction with judicial interpretations but also with the choice of cases brought by the Attorney General. It was argued that the regulation of commerce should reflect a continuous policy based on a body of precedents, and not subject to changing political fortunes cited by White House occupancy. This gave added impetus to the concept that such a commission should be independent from executive

⁸ See, e.g., *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895).

⁹ 15 U.S.C. § 45 et seq. (1964).

¹⁰ 15 U.S.C. § 12 et seq. (1964).

¹¹ According to President Wilson, the Commission was to substitute "counsel and accommodation for the harsher processes of legal restraint . . ." 16 *Bureau of Nat'l Literature, Messages and Papers of the Presidents* 8158 (Supp. 1917).

¹² The Bureau of Corporations was created in 1903 and those programs in existence in 1914 were continued by the Federal Trade Commission.

¹³ See G. Henderson, *supra* note 1, at 20-23.

control, and that this quasi-judicial power would remove some of the prior uncertainties inherent in judicial proceedings. The independent status of the agency was established at the time not solely for jurisprudential reasons, but also to provide for the regulation of trade on a continuous basis beyond direct executive control.¹⁴ Little thought was given to the fact that legislation enacting a commission exercising quasi-judicial functions on the basis of such a broad mandate as a part of the executive branch of the government would in all probability have been declared unconstitutional by the Supreme Court under the separation of powers doctrine.¹⁵

Inasmuch as support for the commission came from different quarters and for different reasons,¹⁶ expressions as to the functions of the new commission were equally divergent. It is difficult to determine a clear and specific description of its duties from the legislative history. It has been correctly observed that the "[c]hronicles of the 1914 legislative year in the Sixty-Third Congress are, perhaps understandably, confused, inconsistent and unusually uninformative."¹⁷ Too great a reliance on congressional and other pronouncements may therefore be misleading. Nevertheless, the underlying theme of the commission's creation was dissatisfaction with things as they were, and it was left to the Commission to develop the solutions.

B. *Legislative Grants of Authority*

1. The Federal Trade Commission Act

The Commission's grant of legislative authority is as diverse as it is broad. Section 5 of the Federal Trade Commission Act declares unlawful "unfair methods of competition in commerce" and directs the Commission to issue a complaint¹⁸ whenever it has reason to believe that an unfair method of competition is being used and a proceed-

¹⁴ This was expressed on the floor of the House of Representatives in the following manner:

And instead of giving additional power to the Attorney General we should . . . create a great, independent, non-partisan commission independent of the President, independent of Cabinet Officers, removed so far as possible from partisan politics, that would command the respect and confidence of all parties and of all the people of the Nation.

51 Cong. Rec. 8857 (1914) (remarks of Congressman Morgan).

¹⁵ See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

¹⁶ The business interests supported the Commission not only upon the expectation that such a commission would administer a policy more tolerant toward large aggregations of capital, but on the belief that it could give to a group of businessmen, in advance, authoritative advice as to the legality of a contemplated undertaking.

G. Henderson, *supra* note 1, at 21.

¹⁷ Votaw, *supra* note 6, at 25.

¹⁸ 15 U.S.C. § 45 et seq. (1964). As does the Sherman Act, 15 U.S.C. § 1 (1964), the Federal Trade Commission Act permits resale price maintenance. 15 U.S.C. § 45(a)(2).

ing would be in the public interest. A finding, subsequent to a hearing, that unfair methods of competition had in fact been used was to result in a cease and desist order prohibiting the future use of the practices. In 1938, section 5 was amended to include "unfair or deceptive acts and practices" within its proscription.¹⁹ The amendment was occasioned²⁰ by the Supreme Court's decision in *FTC v. Raladam Co.*,²¹ where the Court held that "[u]nfair trade methods are not per se unfair methods of competition,"²² thereby requiring a showing of competitive injury for a finding of violation. The case involved alleged misrepresentations of the efficacy of an obesity cure. As in many previous cases, the Commission's opinion recited, rather perfunctorily, that the practice under consideration is "to the prejudice of the public and respondent's competitors,"²³ even though no actual evidence of competitive injury had been introduced. With the Wheeler-Lea Amendment the necessity to make a finding of competitive injury was eliminated in those cases involving misrepresentations of a product or service.

The Amendment contained another important revision of the Federal Trade Commission Act. In its original form the act required the Commission to apply to a United States Court of Appeals for the enforcement of Commission cease and desist orders. Under the Amendment, however, the Commission's orders were made final and enforceable 60 days after their issuance unless appealed by the respondent to a United States Court of Appeals.²⁴ Finally the Amendment provided that violations of final orders were subject to civil penalties "of not more than \$5,000 for each violation" to "be recovered in a civil action by the United States."

To assist it in its tasks, the Commission was initially given broad investigatory powers, including the right of access to corporate records, issuance of subpoenas and the authority to require the completion of special reports.²⁵ In view of the different types of investigations authorized by the Act these powers continue to be considerable importance, and furthermore the Commission's investigatory authority is not limited to suspected violations of law but the Act

¹⁹ Wheeler-Lea Act, 15 U.S.C. § 45(a)(1) (1964), amending ch. 311, § 5, 38 Stat. 719 (1914).

²⁰ See 80 Cong. Rec. 6590 (1936) (remarks of Senator Wheeler).

²¹ 283 U.S. 643 (1931).

²² *Id.* at 649.

²³ *Raladam Co.*, 12 F.T.C. 363, 369 (1929).

²⁴ A similar amendment was passed in 1959 with respect to Clayton Act orders. 15 U.S.C. § 21(b) (1964), amending ch. 323, § 11, 38 Stat. 734 (1914).

²⁵ For a detailed discussion of this power, see Withrow, *Investigatory Powers of the Federal Trade Commission—Constitutional and Statutory Limitation*, 24 Fed. B.J. 456 (1964). See also Handler, *The Constitutionality of Investigations by the Federal Trade Commission*, 28 Colum. L. Rev. 708 (1928).

empowers the Commission to collect information under the threat of compulsory process for purely administrative purposes.²⁶

2. The Clayton Act

The Clayton Act attempts to provide the specificity deemed missing from the Sherman Act by outlawing particular practices. The Act's major prohibitions are aimed at injurious and unjustified price discriminations, tie-in sales, exclusive dealing, mergers and interlocking directorates. In addition, it permits private plaintiffs to recover treble damages for violations of the antitrust laws and provides for the government to seek criminal penalties. Jurisdiction to enforce the Act rests with both the Commission and the Department of Justice. The chief aim of the law is elimination of price discrimination, which is a potent weapon in the hands of the large firm and would-be monopolist. For example, in *Standard Oil Co. v. United States*,²⁷ the argument was advanced before the Supreme Court that the Standard Oil trust should not be broken up because it had acquired its position in large measure as a result of lawful means—the practice of price discrimination.²⁸

The effects of the new legislation, however, did not measure up to expectations. The price discrimination proscription, due to its provision permitting different prices for purchases of different quantities, and for other reasons,²⁹ proved less than satisfactory, and enforcement endeavors were disappointing.³⁰ As a result, in 1936 Congress amended Section 2 of the Clayton Act.³¹ The amendment considerably narrowed the defense provisos of section 2 and added new substantive prohibitions. Dummy brokerage fees were outlawed and advertising allowances and payments for other merchandising services could be paid only if made available on proportionally equal terms to competing purchasers. The knowing inducement or acceptance of a discrimination in price was also prohibited by the Act. The provisions dealing with advertising allowances and merchandising services were intended to close a serious loophole under the original

²⁶ *United States v. Morton Salt Co.*, 338 U.S. 632 (1950).

²⁷ 211 U.S. 1 (1911).

²⁸ *Id.* at 84.

²⁹ For example, payments or allowances for bogus advertising and promotional services apparently did not fall within the proscription of the law, see 80 Cong. Rec. 6282 (1936) (remarks of Senator Logan).

³⁰ All 3 price discrimination cases to reach the courts before 1936 were reversed. *Goodyear Tire & Rubber Co. v. FTC*, 101 F.2d 620 (6th Cir.), cert. denied, 308 U.S. 557 (1939); *National Biscuit Co. v. FTC*, 299 F. 733 (2d Cir.), cert. denied, 266 U.S. 613 (1924); *Mennen Co. v. FTC*, 288 F. 774 (2d Cir 1922), cert. denied, 266 U.S. 759 (1923).

³¹ *Robinson-Patman Act*, 15 U.S.C. § 13 (1964), amending ch. 323, § 2, 38 Stat. 730 (1914).

Section 2 of the Act.³² It was found that one of the favorite methods of evading the price discrimination proscription was through payments or allowances for advertising and other promotional services which were either not rendered at all or rendered in insufficient value.³³ To the extent that such payments were no more than disguised price discriminations, these provisions sought to bring them out into the open by making the prohibitions absolute. Thus, no showing of competitive injury is required for the establishment of a *prima facie* case under these provisions.³⁴ The law represents an effort by Congress to place competing purchasers as nearly as possible on an equal footing.³⁵

The next significant extension of the Commission's statutory authority came in the form of an amendment to Section 7 of the Clayton Act. The original section provided that

no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between [the two corporations], or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.³⁶

This prohibition, perhaps more than any other in the antitrust laws, directly represented congressional concern with increased economic concentration and was aimed at preventing the formation of monopolies.³⁷ However, since the law was limited to the acquisition of a

³² See 80 Cong. Rec. 6282 (1936) (remarks of Senator Logan).

³³ Senator Logan indicated that fraudulent advertising allowances had been indulged in to . . . an enormous extent. . . . Legitimate allowances for advertising . . . may be made, but allowances must not be made for the purpose of giving the purchaser an opportunity to buy goods at a lower price than others similarly situated buy them.

Id.

³⁴ *Simplicity Pattern Co. v. FTC*, 360 U.S. 55 (1959).

³⁵ For valuable discussions regarding various aspects of this law, including price discrimination, see W. Patman, *The Robinson-Patman Act* (1938); L. Austin, *Price Discrimination and Related Problems Under the Robinson-Patman Act* (1952); C. Edwards, *The Price Discrimination Law* (1959); F. Rowe, *Price Discrimination Under the Robinson-Patman Act* (1962).

³⁶ Clayton Act, ch. 25, § 7, 38 Stat. 631 (1914), as amended, 15 U.S.C. § 18 (1964).

³⁷ The Senate Judiciary Committee characterized the proposed Clayton Act as follows: Broadly stated, the bill, in its treatment of unlawful restraints and monopolies, seeks to prohibit and make unlawful certain trade practices which, as a rule, singly and in themselves, are not covered by the Act of July 2, 1890 [the Sherman Act] or other existing antitrust acts and thus, by making these practices illegal, to arrest the creation of trusts, conspiracies, and monopolies in their incipency. . . .

S. Rep. No. 695, 63d Cong., 2d Sess. 1 (1914).

corporation's stock, its intent was readily circumvented by the acquisition of a corporation's assets. In a 1926 decision, the Supreme Court held that not even the acquisition of assets based upon an illegal acquisition of stock came within the law's proscription.³⁸ The Supreme Court sounded the death knell in a 1934 opinion holding that if the assets of a corporation whose stock had been illegally acquired were absorbed between the time the complaint issued and a final order of divestiture, the law did not apply.³⁹ The only case successfully prosecuted under the original section 7 was a proceeding brought against the Aluminum Company of America after it had acquired its only competitor.⁴⁰ This statutory loophole and these adverse court decisions caused the Commission to abandon section 7 enforcement endeavors.⁴¹

This disastrous enforcement experience, and the Commission's report on merger activities,⁴² persuaded Congress to close the loophole in the 1950 amendment to Section 7 of the Clayton Act by making it applicable to the acquisition of assets as well as stock.⁴³

3. Consumer Statutes

Over the years Congress has passed other important legislation, mainly in the consumer field, the enforcement of which has been entrusted to the Commission. These acts include the Wool Products Labeling Act,⁴⁴ the Fur Products Labeling Act,⁴⁵ the Flammable

³⁸ In *FTC v. Western Meat Co.*, 272 U.S. 554, 561 (1926), the Court held that the Act has no application to ownership of a competitor's property and business obtained prior to any action by the Commission, even though this was brought about by stock unlawfully held.

³⁹ *Arrow-Hart & Hegeman Elec. Co. v. FTC*, 291 U.S. 587 (1934).

⁴⁰ *Aluminum Co. of America v. FTC*, 284 F. 401 (3d Cir. 1922), cert. denied, 261 U.S. 616 (1923).

⁴¹ See *FTC, Report on the Present Trend of Corporate Mergers and Acquisitions* 3 (1947):

The economic effect of the loophole in the statute was to create a striking anomaly. A premium was placed upon the attainment of monopolistic ends by the completely final method of consolidation [commingling of assets], as against the weaker more vulnerable method of cooperation among different firms [stock control and ownership].

⁴² *FTC, Report on the Merger Movement: A Summary Report* (1948).

⁴³ The Act now provides:

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share of capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

¹⁵ U.S.C. § 18 (1964), formerly ch. 25, § 7, 38 Stat. 631 (1914).

⁴⁴ 15 U.S.C. § 68 (1964).

⁴⁵ 15 U.S.C. § 69 (1964).

Fabrics Act,⁴⁶ the Textile Fiber Products Identification Act,⁴⁷ the Fair Packaging and Labeling Act⁴⁸ and the Consumer Credit Protection Act (Truth-in-Lending).⁴⁹ The reference to these laws as "consumer statutes" does not and should not mean that the antitrust statutes are excluded from that description. Some legislation is clearly of more immediate impact on the consumer in a relatively narrow framework. However, the Sherman Act of 1890 was the first consumer statute of an extremely broad nature, for the Act is designed at least implicitly to protect the consumer against his greatest threat—monopoly. Under monopolistic conditions there would be little need for the present type of consumer protection, which, in part, is occasioned by the fact that some degree of competition, in whatever form, does exist. Ultimately, all else being equal, the best protection the consumer can receive, irrespective of political considerations concerning economic concentration and basic elements of fairness, is protection from exorbitant prices. This is best demonstrated by a recent case involving a price-fixing conspiracy between the Seattle, Washington bread bakeries. There it was found that due to the price-fixing conspiracy the consumer paid 19 percent in excess of the national average for his bread. Subsequent to Commission intervention,⁵⁰ the conspiracy collapsed and prices eventually settled at slightly below the national average.⁵¹ Although in other instances Commission intervention appears to result in higher consumer prices, these would at best be temporary and in the long run are outweighed by the public interest in the preservation of a healthy competitive climate. An example of such a situation is gasoline price wars, which, if allowed to persist, ultimately result in the elimination of the independent petro-

⁴⁶ 15 U.S.C. § 1191 et seq. (1964).

⁴⁷ 15 U.S.C. § 70 et seq. (1964).

⁴⁸ 15 U.S.C. § 1451 et seq. (Supp. IV, 1969).

⁴⁹ 15 U.S.C.A. §§ 1601-13, 1631-41, 1671-77 (Supp. 1969). In addition, the Commission must take into account, and exercise varying degrees of responsibility under, a host of other statutes. These include the Administrative Procedure Act of 1946, 5 U.S.C. § 1001 et seq. (1964); the Automobile Information Disclosure Act of 1958, 15 U.S.C. § 1231 et seq. (1964); the Federal Cigarette Labeling and Advertising Act of 1965, 15 U.S.C. § 1331 et seq. (Supp. IV, 1969); the Federal Food, Drug and Cosmetics Act of 1938, 21 U.S.C. § 301 et seq. (1964); the Fisheries Cooperative Marketing Act of 1934, 15 U.S.C. § 521 et seq. (1964); the Freedom of Information Act of 1966, 5 U.S.C. § 1002 (Supp. IV, 1969); the Lanham Trade-Mark Act of 1946, 15 U.S.C. § 1051 et seq. (1964); the McCarran-Ferguson Insurance Act of 1945, 15 U.S.C. § 1011 et seq. (1964); the McGuire Resale Price Maintenance Act of 1952, 15 U.S.C. § 45(a)(2) (1964); the Miller-Tydings Resale Price Maintenance Act of 1937, 15 U.S.C. § 1 (1964); and the Webb-Pomerene Export Trade Act of 1918, 15 U.S.C. § 61 et seq. (1964).

⁵⁰ See *Safeway Stores, Inc. v. FTC*, 366 F.2d 795 (9th Cir. 1966).

⁵¹ FTC, Economic Report on the Baking Industry (1968) (summarized in 3 Trade Reg. Rep. ¶ 10,370).

leum refineries, which at present account for much, if not all, of the price competition in that industry.⁵²

II. PROBLEMS OF ESTABLISHING ENFORCEMENT PRIORITIES: CONSCIOUS CHOICE AND PURSUIT OF PUBLIC POLICY

When the Commission began operations in 1915, it was unsure of the specifics of its mission. The organic act as finally passed differed considerably in a number of respects from what had been indicated by previous expressions as to its expected content. The most notable addition was the grant of quasi-judicial authority. If a uniform purpose can be extracted from the legislative history, it is that of flexibility in enforcement, unhampered by historical impediments.

As one of its first activities, the Commission held conferences and solicited views as to where it should concentrate its attention.⁵³ The advice received was diverse; however, two dominant viewpoints did emerge. The first urged the Commission to make itself available to the individual businessman for the purpose of advising him as to the legality of a particular course of action.⁵⁴ Although it was recognized that the Act did not provide for such personalized service, the legislative history and other pronouncements leading to the creation of the Commission were thought to justify the suggestion.⁵⁵ Others, notably Louis Brandeis, who was a long-time advocate of the establishment of a trade commission, strongly opposed such a procedure. He pointed out that such advice in all likelihood would be based on insufficient facts and hence maximize the possibility of a mistake. Brandeis also believed that the Commission would be "hoodwinked" by businessmen, many of whom would merely want to know how close they could come to violating the law without being prosecuted.⁵⁶ The principal function of the Commission, as Brandeis saw it, was fact-finding and the definition, by the process of judicial exclusion and inclusion, of those trade practices which constitute unfair methods of competition.

These conferences did not help the Commission in the establishment of meaningful enforcement priorities or in pinpointing

⁵² FTC, Report on Anticompetitive Practices in the Marketing of Gasoline (1967) (summarized in 3 Trade Reg. Rep. ¶ 10,373).

⁵³ "To get its bearings, the new Commission held numerous informal conferences with various business groups." Dixon, *The Federal Trade Commission: The First Fifty Years*, 24 ABA Antitrust Section 29, 33 (1964).

⁵⁴ See letter from Gilbert H. Montague to the Federal Trade Commission, June 25, 1915, on file in the National Archives.

⁵⁵ See Bureau of Nat'l Literature, *supra* note 11, at 8158.

⁵⁶ Address by Louis D. Brandeis, Federal Trade Commission Hearings, April 30, 1915, on file in the National Archives. The Commission first began rendering formal advisory opinions in 1962.

specific areas for Commission action, although they did serve to crystallize some procedural aspects. Over the years the question of priorities has been the single most troublesome issue facing the Commission. Every major study conducted about the Commission, to varying degrees, is critical of the Commission's choice of priorities and its procedures. Typically, the charge is made that too much of the Commission's time and money is spent on "trivia." As early as 1924, and only nine years after the Commission began to operate, it was observed that

[t]he Commission is handling too many cases, and that it should exercise a greater discretion in selecting those cases which involve questions of public importance. It does not seem necessary that public funds should be employed to prosecute cases . . . involving trivial or merely technical offenses, in which the public interest is not always easy to discern.⁵⁷

Over the years this criticism was echoed by others, including the Hoover Commission,⁵⁸ the Landis Report,⁵⁹ and most recently the 1969 report prepared for the American Bar Association.⁶⁰ The last-mentioned study states that

[m]any of the present problems of the FTC—including allocation of resources, commitment of time and effort to relatively trivial matters, and extensive delay in the investigational stage of agency action—are traceable to a considerable extent to the fundamental failure to establish goals and priorities and to implement effective planning controls consistent with these goals and priorities.⁶¹

Much of this type of criticism continues and, though at times overstated, needs to be considered. Over the years the establishment of meaningful priorities and enforcement goals has often proven to be an elusive objective. Being governed by a consortium of five, the

⁵⁷ G. Henderson, *The Federal Trade Commission* 337 (3d ed. 1927).

⁵⁸ The Hoover Commission Report stated that

[i]n the selection of cases for its formal dockets, the Commission has long been guilty of prosecuting trivial and technical offenses and of failing to confine these dockets to cases of public importance.

Commission on the Organization of the Executive Branch of the Government, 81st Cong., 2d Sess., Task Force Report on Regulatory Commissions, app. N, 128 (Comm. Print 1949) [hereinafter cited as Hoover Commission Report].

⁵⁹ J. Landis, Report on Regulatory Agencies to the President-Elect, Senate Comm. on the Judiciary, 86th Cong., 2d Sess. (Comm. Print 1960).

⁶⁰ ABA, Report of the ABA Commission to Study the Federal Trade Commission (1969) [hereinafter cited as ABA Report].

⁶¹ ABA Report 77.

decision-making process is, of necessity, often a matter of compromise. While this may not always be apparent, it is particularly relevant when the Commission is composed of personalities, each of whom feels strongly about the direction of the Commission's enforcement activities. Ironically, the stronger and more dedicated the views, the more difficult it may become to reach agreement on enforcement priorities.

A brief outline of the manner in which the Commission is moved to action may be helpful in illustrating the process of establishing enforcement priorities. Action by the Commission is initiated basically in three ways: by application for complaint by the general public or a governmental agency; on its own motion; or upon the direction of the President or Congress.⁶² The last method is almost never used; the last time an investigation was directed by Congress was in 1938.⁶³ The last President to direct the Commission to undertake an investigation was President Truman who in 1952 directed the Commission to launch a special investigation "to give us a breakdown of the consumer's dollar."⁶⁴ As a practical matter, this leaves the Commission to act on its own accord or pursuant to applications for complaint by the general public—the so-called "mail bag" approach. No adequate and conclusive breakdown as to the Commission's actions in response to either of the two methods has been made. Based on the authors' knowledge, however, the mail bag approach probably accounts for far less than 50 percent of the Commission's activities, and has found its principal application in the deceptive practices area.⁶⁵ The method's importance, and its shortcomings as well, have been greatly exaggerated. The mail bag is a fairly accurate barometer of those practices which are considered by businessmen, the consumer and other governmental agencies as being violative of one of the Commission-administered laws. While the Commission should not, and cannot act on each application for complaint it receives, it

⁶² Section 6 of the Federal Trade Commission Act authorizes the President or either House of Congress to direct the initiation of an investigation. 15 U.S.C. § 46(d) (1964). A rider to the 1934 appropriations bill amended this section to require a concurrent resolution of Congress. 15 U.S.C. § 46a (1964).

⁶³ H.R. Doc. No. 468, 76th Cong., 2d Sess. (1939). See also 1968 FTC Ann. Rep. 89. The Commission may, of course, initiate an investigation pursuant to a congressional request but it is not required to do so.

⁶⁴ See Boyle, *Economic Reports and the Federal Trade Commission: 50 Years Experience*, 24 Fed. B.J. 489, 501 (1960). See also 1968 FTC Ann. Rep. 80.

⁶⁵ For example, in fiscal 1969, in the deceptive practices area a total of 192 investigations were initiated. Of these, 74 were originated by the Commission; the rest originated by applications for complaint, broken down as follows: Consumers—84, Congress—19, Federal Government—6, Better Business Bureaus and Chambers of Commerce—6, State or Local Governments—3.

has the duty to consider such communications when it establishes priorities and enforcement goals.

In allocating its enforcement resources, the Commission also must be mindful of the immediate impact of a particular practice. In the deceptive practices area it may have a choice between prohibiting a deception affecting millions of people in a minor way and a scheme robbing relatively few of their life savings. For example the Commission must determine whether to give priority to a television commercial seen by 30 million people of a product which perhaps does not quite perform as advertised or to the home improvement fraud making paupers out of a few hundred. A decision to proceed, based purely on the amount of dollars and cents and impact upon the general public as a whole, in such a situation would be totally inadequate.

One particular example illustrates some aspects of the priority problem. The enormous growth in the use of credit spawned the formation of companies engaged in the collection of debts and related activities. It is estimated that today there are over 2,000 companies engaged in debt collection activities. Being a young industry, it is characterized by easy entry and it consists of many small businesses. The industry came to the Commission's attention because many of its members were engaged in deceptive practices in their efforts to collect debts or in selling information to aid others in collecting debts. For example, the most widespread and objectionable practice (as well as the most effective from the collection agencies' point of view) is the threat of legal action against a debtor when no such action is contemplated.⁶⁶ Although in a majority of instances the practices of any one industry member might be of negligible impact and might not satisfy the public interest prerequisite to Commission action, collectively the impact is considerable and the public interest very decidedly warrants action. This is especially true since the industry is growing and beginning to experience consolidation, resulting in larger businesses.

In view of the large variety of deceptive debt collection practices and the number of industry members involved, the Commission decided to issue guides covering the conduct of collection agencies, both in relation to debtors and creditors, rather than proceed against indi-

⁶⁶ Other misrepresentations in the debt collection area include representations that the information on the debtor is sought for a survey, that the information is sought for cast selection for a motion picture, that a sum of money or prize will be sent if the requested information is furnished, and that the documents are legal process forms when they are not. Debt collection agencies have also represented themselves to be credit bureaus. The reason for these practices is to disguise the nature of the communication and to mislead the recipient as to its purpose. See FTC, Guides Against Debt Collection Deception, 16 C.F.R. § 237 (1967).

vidual firms on a case-by-case basis.⁶⁷ Subsequent to the promulgation and effective date of the guides,⁶⁸ extensive efforts were made to place a copy of them in the hands of every industry member. After allowing a reasonable period of time for industry members to bring their practices into conformity with the guides, a survey was undertaken to determine the degree of compliance.

It is at this point that the enforcement scheme is put to its greatest test. Generally, those companies which have failed to bring their practices into conformity with the guides are permitted to file an assurance of voluntary compliance wherein discontinuance of the challenged practices is promised. In the case of extremely flagrant violations, formal enforcement procedures resulting in an order to cease and desist will be initiated.⁶⁹ A number of relatively small and local companies, however, with minimal interstate commerce, have refused to comply with the guides; in these cases under ordinary circumstances the public interest would not warrant pursuit of the matter. Yet, the existence of the guides and their effective and equitable enforcement require a far greater extent of compliance than when no guides have been issued. While such a program unquestionably leads to temporary surges in enforcement activities which would probably be unjustified on a more permanent basis, it is precisely for this reason that initial efforts must be aimed at total compliance to prevent either a collapse of the program or additional commitment of enforcement resources in the future.

In discussing some of the more practical aspects of the establishment of meaningful priorities and enforcement goals, it should be noted that Congress has passed a number of technical statutes, notably the various labeling acts, the enforcement of which has been entrusted to the Commission. The "Nader" Study of the Commission's enforcement priorities for example, leveled criticism at the Commission's alleged over-concern with the Fur, Textile, Wool and Flammable Fab-

⁶⁷ Industry guides are promulgated by the Commission on its own initiative or pursuant to petition . . . when it appears to the Commission that guidance as to the legal requirements applicable to particular practices would be beneficial in the public interest and would serve to bring about more widespread and equitable observance of the laws administered by the Commission.

FTC, Rules of Practice, 16 C.F.R. § 1.6 (1969). In addition, the guides provide the basis for voluntary and simultaneous abandonment of unlawful practices by members of industry. Failure to comply with the guides may result in corrective action by the Commission under applicable statutory provisions.

FTC, Rules of Practice, 16 C.F.R. § 1.5 (1969).

⁶⁸ FTC, Guides Against Debt Collection Deception, 16 C.F.R. § 237 (1969).

⁶⁹ For present purposes, the chief difference between the two is that a violation of a cease and desist order may subject the company to a civil penalty proceeding whereas no such sanction accompanies an assurance of voluntary compliance. See 15 U.S.C. § 45(I) (1964).

ric Labeling Acts.⁷⁰ In an overall sense, it is not the Commission's function to substitute its own judgment for that of Congress' as to those laws deemed worthy of enforcement. Nor is congressional expression of concern over truthful labeling of products or services devoid of recent examples.⁷¹ Congressional rationale for this concern undoubtedly rests on the belief that a healthy competitive market economy depends upon consumers being able to make informed and rational choices between competing products and services free of fraud and deception. The ultimate purpose of these labeling laws is to inform consumers and enable them to make a rational choice based upon accurate information. By the same token, every time the consumer avoids a purchasing mistake his expenses are correspondingly reduced. Naturally, in its efforts to secure compliance with these labeling laws the Commission is often required to process relatively minor violations. This is inevitable, although in some instances it may bear directly on the enforcement credibility of the Commission. It does not alter, however, the need for meaningful enforcement of these laws and the fact that Congress annually appropriates funds earmarked for specific areas of enforcement.

It is not suggested that more rational planning and establishing of enforcement goals and priorities could not be realized by the Commission. To fulfill its function adequately, the Commission must become more responsive more quickly to the troublespots in the economy. A partial blueprint for greater Commission effectiveness was recently presented by the Commission of the American Bar Association to Study the Federal Trade Commission. That Commission's report proposed

[t]he immediate expansion and reinvigoration of the Office of Program Review to take principal responsibility for reporting to the Commission on ways and means of coordinating future agency operations.⁷²

To the extent that this proposal envisages review, along with recommendations on every proposal involving commitment of Commission resources, it would appear to be highly desirable. The report, however, further recommends that Bureau Directors, Assistant Directors, "personnel even further down the line,"⁷³ and the field offices⁷⁴ be

⁷⁰ See 115 Cong. Rec. E 373-74 (daily ed. Jan. 22, 1969) (remarks of Senator Nelson).

⁷¹ In 1967, Congress passed the Fair Packaging and Labeling Act, 15 U.S.C. § 1451 et seq. (Supp. IV, 1969) and in 1969, the Consumer Credit Protection Act (Truth-in-Lending), 15 U.S.C.A. §§ 1601-13, 1631-41, 1671-77 (Supp. 1969).

⁷² ABA Report 78.

⁷³ Id. at 83.

⁷⁴ Id. at 84.

delegated the authority to issue complaints. Assuming that the statutory authority for such a delegation exists,⁷⁵ and that the power to issue complaints should be exercised by someone other than, or in addition to, the Commission, it would seem that the proposed diffusion of power would greatly weaken any attempts to establish priorities and enforcement goals. In the event it were deemed advisable to expand the power to issue complaints, it would be preferable to delegate it to a particular official, such as the General Counsel, rather than scatter it throughout the Commission. That way at least the commitment of resources could be coordinated between the Program Review Officer and the General Counsel along established lines of priorities. In the final analysis, however, the responsibility for action, as well as for inaction, must and should rest with the Commission. The diffusion of responsibility would not only hinder the establishment of priorities but also unnecessarily undermine the effectiveness of the Commission.

One method of establishing priorities which has not been sufficiently explored by the Commission is the cost-benefit analysis along economic lines. While it is no panacea relative to priority problems this procedure would focus on those areas in which the enforcement dollar could achieve the greatest benefit for the public. The application of this technique would be particularly beneficial in the restraint of trade area, and is also capable of successful application in the deceptive practices area. Certainly such an approach could be used to minimize the tendency to deal with violations on an ad hoc basis rather than in the context of the overall market structure.

Whatever approach is used, it is clear that the Commission must take a more active part in the shaping of a competitive economy. All too often the Commission merely reacts to problems once they occur, which may have the effect of committing enforcement resources to areas where none would be required if a more foresighted and imaginative policy had been pursued. Prevention of the breakdown of the competitive process, as distinguished from attempts to cure a break-

⁷⁵ Section 5(b) of the Federal Trade Commission Act provides in part:

Whenever *the Commission* shall have reason to believe that any such person . . . has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to *the Commission* that a proceeding by it would be in the interest of the public, *it* shall issue . . . a complaint [Emphasis added.]

But see Reorganization Plan No. 4 of 1961 which provides for the delegation of the Commission's functions within its discretion.

In addition to its existing authority, the . . . Commission . . . shall have the authority to delegate, by published order or rule, any of its functions to a division of the Commission, an individual Commissioner, a hearing examiner, an employee or employee board

5 U.S.C. § 133z-15 (1964).

down once it has occurred, would dramatically increase the Commission's effectiveness.

III. THE COMMISSION'S RELATIONSHIP TO THE OTHER BRANCHES OF GOVERNMENT

A. *The Executive Branch*

1. The President

As conceived, the Commission was to be as free as possible from the influence and control of the President. Initially, there were only two ways in which the President had any direct influence over the Commission. The first was the President's power to appoint Commissioners with the advice and consent of the Senate. To reduce the impact of this influence the terms of Commissioners were staggered and extended for a period of seven years.

In 1933 the question arose whether the President could also remove a commissioner. President F. D. Roosevelt removed Commissioner Humphrey because the latter was openly opposed to the President's economic policies, which he wanted to pursue, at least in part, through the Commission. The dispute reached the Supreme Court on the issue whether the President could remove a commissioner of an independent agency solely because of differing points of view. In a landmark decision the Supreme Court held that he could not.⁷⁶ In reaching its decision, the Court emphasized the quasi-judicial nature of the Commission, which under the constitutional separation of functions doctrine requires freedom from the control or the influence of the President.

We think it plain under the Constitution that illimitable power of removal is not possessed by the President The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that the authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will.⁷⁷

Thus, the Court specifically recognized the need for independence

⁷⁶ *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935).

⁷⁷ *Id.* at 629.

from executive control of agencies exercising quasi-judicial functions.⁷⁸

The second source of presidential influence is the President's authority to direct the Commission to initiate investigations and report to him.⁷⁹ Although this authority contains the potential for considerable presidential control and influence over the Commission, it has been used sparingly. The most popular subject of such investigations was prices, in particular food prices, during the World Wars. For example, President Wilson, as a wartime emergency measure, directed the Commission "to investigate and report the facts relating to the production, ownership, manufacture, storage and distribution of food-stuffs" and "to ascertain the facts bearing on alleged violations of the antitrust acts."⁸⁰ Many of the reports submitted pursuant to presidential directives had great influence in the formulation and passage of important legislation.⁸¹ However, there has not been a presidentially directed investigation since 1952. In that year President Truman directed the Commission "to launch a special investigation to give us a breakdown of the consumer's dollar."⁸² Congressional action, however, in the form of a rider to the 1953 appropriations bill, blocked the investigation.⁸³

Since passage of the Federal Trade Commission Act a number of events have significantly broadened the relationship of the President to the Commission. In 1921 the Budget and Accounting Act⁸⁴ created the Bureau of the Budget, and required that requests for appropriations of all governmental agencies with the exception of the legislative and judicial branches must be channeled through, and reviewed by, the Bureau of the Budget. This was deemed "necessary to wipe out duplications in the Government service, to eliminate inefficiency, and

⁷⁸ The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in contemplation of the statute, must be free from executive control.

Id. at 628.

⁷⁹ Section 6(d) of the Federal Trade Commission Act, 15 U.S.C. § 46(d) (1964), provides that the Commission shall have the power "[u]pon the direction of the President . . . to investigate and report the facts relating to any alleged violations of the antitrust Acts"

⁸⁰ See 1968 FTC Ann. Rep. 85.

⁸¹ See, e.g., the Packers and Stockyards Act of 1921, 7 U.S.C. § 7 et seq. (1964). Commission influence in this legislation was attributable to the FTC's, Food Investigation—Report on the Meat Packing Industry (1918-19). See 1968 FTC Ann. Rep. 84.

⁸² Boyle, *supra* note 64, at 501.

⁸³ Act of July 31, 1953, ch. 302, § 1, 67 Stat. 301, provided in part "[t]hat no part of the foregoing shall be available for a statistical analysis of the consumer's dollar."

⁸⁴ 31 U.S.C. § 1 et seq. (1964).

to stop unnecessary work."⁸⁵ The question of the resulting presidential control or influence over independent agencies was not raised at the time the Act was passed, perhaps because the Bureau of the Budget was originally a part of the Treasury Department and therefore was somewhat further removed from the President than it is today. It was not until 1939 that the Bureau was placed directly under the President.⁸⁶ The progressive expansion of the President's power over the preparation of the national budget has increased his influence over the operation of all the independent agencies. This influence does not terminate when the budget becomes law since the Bureau must authorize expenditures at quarterly intervals and determine by direct investigation or Accounting Office inspection whether the agencies are spending the funds for the purpose for which they were authorized.

Other important supervisory functions are exercised by the Bureau of the Budget. The staggering growth of the government in the three decades between 1912 and 1942 and its insatiable appetite for information culminated in enactment of the Federal Reports Act of 1942.⁸⁷ The Act provides that with minor exceptions all governmental agencies must channel their requests for information through the Bureau of the Budget.⁸⁸ It was hoped that in this fashion unnecessary and duplicative questionnaires and data collection activities could be avoided. The Bureau's review of data collection activities is not only aimed at the substance of the data, but also at the problem of improving the technical aspects of data gathering.⁸⁹ Such review permits extensive control over the investigative functions of the Commission in that the Bureau is empowered to limit the collection of the information sought.

In submitting questionnaires and other requests for information to the Bureau for approval, the Commission distinguishes between information sought for general statistical purposes and that sought for law enforcement purposes. With respect to the latter category the Commission takes the position that Bureau approval is not contemplated by the Act. A reading of the Act and its legislative history seems to support this position, although the question is far from settled. A case challenging the Commission's position arose in connection with an industry-wide investigation to uncover possible Clayton Act violations in the apparel industry, in which the Commission had issued numerous section 6(b) questionnaires.⁹⁰ The section 6(b)

⁸⁵ 61 Cong. Rec. 980 (1921) (remarks of Congressman Good).

⁸⁶ Exec. Order No. 8248, 3 C.F.R. § 576 (1939).

⁸⁷ 5 U.S.C. § 139 (1964).

⁸⁸ The Act only applies to requests for information directed to more than 9 respondents. 5 U.S.C. § 139e(c) (1964).

⁸⁹ See 5 U.S.C. §§ 139a(a)-(b) (1964).

⁹⁰ Such questionnaires are issued pursuant to § 6(b) of the Federal Trade Commis-

orders had not been submitted to the Bureau for approval, and two companies maintained that the failure to obtain prior approval rendered the orders unenforceable. Accordingly, in January, 1964, they brought suit, seeking a declaratory judgment and injunctive relief.⁹¹ In October, 1964, the Department of Justice, on behalf of the Commission, filed motions for summary judgment and to dismiss the complaint. The case has been pending since that time due to

the efforts of the Department of Justice to resolve the conflicting views of the Bureau of the Budget and other government agencies regarding the scope of the Federal Reports Act and the exemptions from the Bureau's "clearance" procedures under the Act when agency investigations concern law enforcement matters.⁹²

The relationship between the Commission and the Bureau is also affected by the practice under which recommendations for and reports on proposed legislation are cleared through the Bureau prior to submission to Congress. This practice originated during the 1930s, apparently without the benefit of statutory authority. Such recommendations and reports are reviewed in the light of policy objectives which may or may not coincide with those of the Commission. Control or influence over the Commission by the Bureau results where revisions of such recommendations or reports are effected at the Bureau's behest—a not infrequent occurrence.

The President's own influence over the Commission was expanded in 1950. Up until that time the custom had prevailed that the Commissioners selected from among themselves a chairman on an annual basis to serve as *primus inter pares*. The Hoover Commission, organized in 1947 to study efficiency in the operation of government, recommended that the President be given the authority to appoint the chairman. The purpose was to "enable the President to obtain a sympathetic hearing for broader considerations of national policy which he feels the commission should take into account."⁹³ The recommendation was embodied in the Reorganization Plan No. 8 which became law in 1950.⁹⁴ The plan also provided that the chairman should have the authority (1) to appoint and supervise personnel,⁹⁵ (2) to distribute the work load among such personnel, and (3) to de-

sion Act, 15 U.S.C. § 46(b) (1964). Failure to reply may result in a statutory fine of \$100 for each day of noncompliance, 15 U.S.C. § 50 (1964).

⁹¹ *Puritan Fashions Corp. v. FTC*, Civil No. 70-64 (D.D.C., filed Jan. 10, 1964).

⁹² 1968 FTC Ann. Rep. 69-70.

⁹³ Hoover Commission Report 32.

⁹⁴ 5 U.S.C. § 133z-15 (1964).

⁹⁵ Appointments to the major administrative units within the Commission, however, require approval by a majority of the Commissioners.

termine the use and expenditure of funds. Inasmuch as the chairman now holds his position at the pleasure of the President, it is unlikely that he will pursue policies contrary to those of the Chief Executive. The power to appoint the chairman, together with the latter's administrative control, which was expanded in 1961,⁹⁶ provides the potential for significant presidential influence over the agency.

2. The Department of Justice

One of the factors governing the Commission's relationship with the Department of Justice is their concurrent jurisdiction with respect to a number of statutory provisions. Extensive liaison activities and a working agreement ensure that both do not cover the same territory. This is especially important where there is a choice of proceeding either under the criminal or the civil provisions of the antitrust laws. Since the Commission is only empowered to proceed under the civil provision, cases with criminal implications are routinely referred to the Department. Although concurrent jurisdiction exists, rarely does a conflict develop. In some areas such as the Robinson-Patman Act, the Department has left enforcement exclusively to the Commission. Conversely, the so-called "hard core" cases which could give rise to a criminal proceeding, such as price-fixing, are traditionally handled by the Department. These and other matters in which concurrent jurisdiction exists are the subject of liaison communications. Pursuant to an agreement formalized in 1948, each agency notifies the other by an exchange of cards of an intention to initiate action in areas of concurrent jurisdiction.⁹⁷ Should a conflict develop, it is settled by means of a joint conference.⁹⁸

⁹⁶ Reorganization Plan No. 4 of 1961, 5 U.S.C. § 1332-15 (1964).

⁹⁷ Report of the Attorney General's National Committee to Study the Antitrust Laws 376 n.53 (1965) [hereinafter cited as Att'y Gen. Rep.] describes the agreement as a "systematic mutual exchange of information regarding pending anti-monopoly investigations and of each new investigation at the time it is directed." It provided for creation of a "card system." These "cards are to be made in duplicate, exchanged between the two offices and a file of such exchange cards retained in each office" The agreement continues that "upon receipt of a card disclosing *** a new investigation has been directed, information to be conveyed back as to whether or not any matter is pending in *** [the other] agency concerning the specific party or parties, commodity and charges. Should there be no matter pending *** the submitting agency can proceed without liaison. If . . . a matter is pending, further liaison is to be effected However, nothing herein contained shall in any way limit either agency in making an independent decision as to what investigation it will undertake."

⁹⁸ Beyond this formal agreement, an enforcement pattern has emerged from case by case action. Thus apart from cases where Clayton Section 3 forms part of a larger Sherman Act charge, the Department has brought only one case solely under Section 3 of the Clayton Act. Similarly, unless a Clayton Act Section 2 offense comprises an element of Sherman Act violation, the Division appar-

Liaison activities, although sufficient under the agreement, have been expanded over the years by an extension of the card exchange system, the making available of investigative files, consultation between the agencies' economists, and periodic meetings between the agencies' heads for the purposes of determining jurisdiction on the basis of past experience, manpower and funds available, and the remedies available to the agencies.⁹⁹ Similar observations are contained in the recent ABA report, as well as the suggestion that

where issues of anticompetitive effects turn essentially on complicated economic analysis, and where decided cases have not yet succeeded in fashioning a clear line marking the boundary between legal and illegal conduct, such matters should generally be assigned to the FTC.¹⁰⁰

It appears that the grant of concurrent jurisdiction was more accidental than a conscious design to have two governmental agencies deal with similar problems. It is questionable whether this overlap was intended by Congress when it established the Commission, as there is nothing in the legislative history to so indicate. In fact, one of the reasons for the enactment of the Federal Trade Commission Act was to provide for the expeditious treatment of incipient trade restraints. In theory, at least, there was no need for the extent of jurisdictional overlap that exists today, for the Commission was to move against trade restraints in their early stages. The Department on the other hand was to concern itself with the mature monopoly. The Commission's jurisdiction was intended to be of a more definitional and experimental nature, that is, it was to determine or define those practices which are inimical to fair competition. As stated by Judge Learned Hand, one of the Commission's duties is "to discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop."¹⁰¹ The Commission's expertise and fact-finding authority were expected to make it particularly suitable for this task, quite apart from its intended independence from executive control.

Very early in the Commission's history two specific factors impeded the original scheme and moved the Commission's activities into the "concurrent jurisdiction" area. The first factor was the early

ently recognizes Commission procedures are better suited to primary enforcement of price discrimination bans.

Id. at 376.

⁹⁹ Expansion of liaison activities was the result of specific suggestions to that effect contained in the Att'y Gen. Rep. 376-77.

¹⁰⁰ ABA Report 66.

¹⁰¹ *FTC v. Standard Educ. Soc'y*, 86 F.2d 692, 696 (2d Cir. 1936), rev'd on other grounds, 302 U.S. 112 (1937).

Commission's own uncertainty as to its mission. The second, and more important factor, was the early court decisions severely limiting the Commission's anticipated jurisdiction. For example, the first Commission case to reach the Supreme Court, *FTC v. Gratz*,¹⁰² held that the words "unfair methods of competition"

are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly.¹⁰³

The decision completely ignored the reason and congressional intent underlying the Commission's creation—to prevent trade restraints in their incipency. This was pointed out by Justice Brandeis in his dissenting opinion in *Gratz*:

If [the Commission] discovered that any business concern had used any practice which would be likely to result in public injury—because in its nature it would tend to aid or develop into a restraint of trade—the Commission was directed to intervene, before anything should be done or condition arise violative of the Anti-Trust Act.¹⁰⁴

By limiting the Commission's jurisdiction to practices previously considered actionable, the Court probably caused the Commission to move into the more clear-cut antitrust areas in which the Department had jurisdiction. Hence the areas of their concurrent jurisdiction were expanded.

a. Petitions for Certiorari and Subpoena Enforcement. The Commission channels its requests for petitions for certiorari through the Solicitor General of the Department of Justice, who is authorized by statute to "conduct and argue suits and appeals in the Supreme Court . . . in which the United States is interested."¹⁰⁵ The Commission's success during the past eight years in obtaining petitions has been mediocre, for only slightly more than one half of its requests for petitions for certiorari, 19 out of 34, were actually filed.¹⁰⁶ Of the 14 petitions that were granted by the Court, all were ultimately decided in favor of the Commission.

To the extent that the Solicitor General bases his decision whether or not to file a petition for certiorari upon policy and enforcement

¹⁰² 253 U.S. 421 (1920).

¹⁰³ *Id.* at 427.

¹⁰⁴ *Id.* at 435.

¹⁰⁵ 28 U.S.C.A. § 518 (1964).

¹⁰⁶ This covers the period from July 1, 1961, through March 1, 1969.

priorities established by the Department, the advantages supposedly accruing from the Commission's expertise become largely submerged since differences of opinion are resolved in favor of the Solicitor General. In evaluating the Commission's requests the Solicitor General must of necessity rely upon the Department's various operational divisions. When such a division—as, for example, the Antitrust Division—substitutes its judgment for that of the Commission, it alters the Commission's enforcement scheme, frustrating, in some instances, congressional intent. Under some circumstances this may amount to de facto repeal of congressional action. The Commission's experience in specific areas serves to demonstrate this point. While the Solicitor General filed certiorari petitions in slightly more than one half of the cases in which he was requested to do so during the last eight years, he did so in only one third of the Commission's Robinson-Patman cases. During the same time span, the Solicitor refused to file petitions in the only two cases involving the Wool Products Labeling Act. On the other hand, the Commission's three merger cases during this period were all filed and successfully appealed.¹⁰⁷ Thus it had been pointed out that

[t]he Solicitor General's power to deny authorization to petition for certiorari raises fundamental questions concerning his relationship to the regulatory agencies. His power over the agencies' litigation substitutes executive for judicial review, while his power to deny certiorari entails foreclosure of the Court's own examination.¹⁰⁸

It is frequently pointed out that the need for agency independence must be balanced against the danger of overloading the Court's docket and the presentation of inconsistent positions. This argument is not entirely valid, however, since the Court seems to manage without a corollary position when dealing with nongovernmental appeals. Nor is it necessarily the function of the Solicitor General to attempt reconciliation of conflicting positions when regulatory agencies are involved. If any balance is to be achieved, the underlying purposes of creating independent agencies suggests that it be in favor of independence as against priorities imposed by the Solicitor General.

In this context, a relatively recent development concerning subpoena enforcement should be mentioned. Pursuant to Section 9 of the Federal Trade Commission Act,¹⁰⁹ enforcement of subpoenas before

¹⁰⁷ For a more detailed discussion of these and related matters, see MacIntyre, *The Status of Regulatory Independence*, 29 Fed. B.J. 1 (1969).

¹⁰⁸ Note, *Government Litigation in the Supreme Court: The Roles of the Solicitor General*, 78 Yale L.J. 1442, 1457 (1969).

¹⁰⁹ Section 9 states that

in case of disobedience to a subpoena the *Commission* may invoke the aid of any

the courts was traditionally handled by the Commission, and its authority to do so had not been questioned.¹¹⁰ In *FTC v. Guignon*,¹¹¹ however, the argument was advanced, and supported by an amicus curiae brief of the Department of Justice, that the Commission did not have the authority to seek enforcement of its own subpoenas except with the aid and consent of the Attorney General. In upholding this position the court relied upon the statutory language of Title 28, Sections 516 and 518 of the United States Code, which in substance provide that except "as otherwise authorized by law" litigation in which the United States or an agency is a party or interested shall be conducted by the Department of Justice. The phrase "as otherwise authorized by law" was inserted during the codification of sections 516 and 518 and any intent to change pre-existing law was specifically disavowed by Congress.¹¹² The Court, however, apparently failed to take this into account in reaching its decision.¹¹³ It is too early for an assessment of the decision's practical impact, but the potential for significant influence and control over the Commission's investigative endeavors clearly exists.

b. Civil Penalty Proceedings. Section 16 of the Federal Trade Commission Act provides that

[w]henever the Federal Trade Commission has reason to believe that any person, partnership, or corporation is liable to a penalty under section 54 of this title or under subsection (1) of section 45 of this title, it shall certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought for the enforcement of the provisions of such section or subsection.¹¹⁴

Thus, in enforcing one of its cease and desist orders the Commission is required to certify the pertinent facts to the Attorney General for an enforcement proceeding. Although the statutory language is mandatory, that is, once the facts have been certified, it is the duty of the Attorney General "to cause appropriate proceedings to be brought,"

court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence. [Emphasis added.]

15 U.S.C. § 49 (1964).

¹¹⁰ See Withrow, *Investigatory Power of the Federal Trade Commission—Constitutional and Statutory Limitations*, 24 Fed. B.J. 456 (1964).

¹¹¹ 390 F.2d 323 (8th Cir. 1968).

¹¹² H. Rep. No. 901, 89th Cong., 1st Sess. 3 (1965), stated that "[i]n codification . . . the statute is intended to remain substantively unchanged."

¹¹³ In addition, the court failed to consider the significant difference between mandamus proceedings and subpoena enforcement and failed to consider the legislative history of § 9, 15 U.S.C. § 49 (1964). The issues are considered extensively in Judge Heaney's dissenting opinion, 390 F.2d at 330-38. See also MacIntyre, *supra* note 107.

¹¹⁴ 15 U.S.C. § 46 (1964).

such cases must fit into the Department's own scheme of priorities. Manpower and fund limitations almost dictate independent review of the merits of the particular case by the Department. This not only can but does effect the Commission's enforcement activities.

Commission certifications of civil penalty proceedings are ultimately assigned to the local United States Attorneys. Such cases are usually given relatively low priority and often encounter considerable delays. Since the fact, and hence the date, of certification is not a matter of public record, a detailed analysis of the delay problem cannot be made. However, the effects of delay can be very serious. In some instances the evidence of violation has become so stale that in order to keep the case alive it must be reinvestigated, and even this may not save the case since witnesses forget or disappear altogether. A number of cases must therefore be dropped purely for failure of expeditious prosecution. Moreover, by assigning these cases to United States Attorneys, the expertise in antitrust and trade regulation law possessed by Commission attorneys is not put to its fullest use. Thus, the statutory scheme for civil penalty proceedings represents perhaps the weakest link in the Commission's enforcement chain. Unquestionably, it would be preferable to have this function exercised by the Commission.

B. *The Courts*

1. Section 5 and Judicial Review

Section 5 of the Federal Trade Commission Act provides that whenever the Commission has reason to believe that one of the laws it administers has been violated and a proceeding would be in the public interest, it shall issue a complaint, whereupon the respondent shall have a right to appear and show cause why a cease and desist order should not be entered.¹¹⁵ The same section provides for judicial review of cease and desist orders issued by the Commission.¹¹⁶ It is noteworthy that the Commission has not utilized the show cause route in the substantive way in which it apparently was intended, presumably because the Act also requires the Commission to make findings of fact. Perhaps it was felt that this requirement necessitated the building of a record by the Commission rather than placing the burden on the respondent to show why an order should not be issued. It is also not clear whether the show cause route would be received favorably by the courts.¹¹⁷

¹¹⁵ 15 U.S.C. § 45(b) (1964).

¹¹⁶ 15 U.S.C. § 45(c) et seq. (1964).

¹¹⁷ The Federal Trade Commission Act indicates that the respondent has the right to "show cause why an order should not be entered by the Commission requiring such person . . . to cease and desist . . ." The Administrative Procedure Act, 5 U.S.C. § 1001

Over the years the criteria for judicial review have become fairly crystallized. As the Commission built up a body of precedents and the courts began to recognize its expertise, they have become more inclined to defer to its judgment. Initially, however, early court decisions frequently misconstrued the Commission's purpose. In the *FTC v. Gratz*¹¹⁸ decision, the Supreme Court stated that conduct "never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly"¹¹⁹ was not an unfair method of competition. The Commission's decision was actually overturned, however, because the Court found the complaint defective in not alleging competitive injury. The Court also took the position that the decision as to what constitutes a violation of the law must ultimately be made by the courts, thereby in large part ignoring the reasons for the Commission's creation. Furthermore, as Justice Brandeis pointed out in his dissent, section 5 was to apply before a monopoly had been acquired, and not after, as implied by the majority.¹²⁰

In the following decade the Commission, with some exceptions, did not fare well in the courts. The first meaningful breakthrough came in 1934, in *FTC v. R. F. Keppel & Bros.*¹²¹ where the Court stated:

[W]e cannot say that the Commission's jurisdiction extends only to those types of practices which happen to have been litigated before this Court.

Neither the language nor the history of the Act suggests that Congress intended to confine the forbidden methods to fixed and unyielding categories. . . . It would not have been a difficult feat of draftsmanship to have restricted the op-

et seq. (1964), states that "[e]xcept as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof." 5 U.S.C. § 1006(c) (1964). The "show cause" provision of the Federal Trade Commission Act might come within the exception of the Administrative Procedure Act. However, the Federal Trade Commission Act requires the Commission to "state its findings as to the facts." 15 U.S.C. § 45(b) (1964). The Act also provides that the "findings of the Commission as to facts, if supported by the evidence, shall be conclusive." 15 U.S.C. § 45(c) (1964). This clearly puts the burden on the Commission to substantiate the findings of fact and consequently the burden of proof as to the cease and desist order based on these findings of fact.

¹¹⁸ 253 U.S. 421 (1920).

¹¹⁹ *Id.* at 427.

¹²⁰ The majority stated:

The Complaint contains no intimation that Warren, Jones & Gratz did not properly obtain their ties and bagging as merchants usually do . . . nor is it alleged that they held a monopoly of either ties or bagging or had the ability, purpose or intent to acquire one.

Id. at 428.

¹²¹ 291 U.S. 304 (1934).

eration of the Federal Trade Commission Act to those methods of competition in interstate commerce which are forbidden at common law or which are likely to grow into violations of the Sherman Act, if that had been the purpose of the legislation.¹²²

The Court recognized the intent of section 5 and its definitional nature by extensive references to the legislative history and to *FTC v. Raladam Co.*¹²³ The Court reasoned that Congress advisedly adopted a phrase not "of precise definition but the meaning and application of which must be arrived at by what this Court elsewhere has called 'the gradual process of judicial inclusion and exclusion.'"¹²⁴ The Court thus concluded that

[i]t is unnecessary to attempt a comprehensive definition of the unfair methods which are banned, even if it were possible to do so. We do not intimate either that the statute does not authorize the prohibition of other and hitherto unknown methods of competition or, on the other hand, that the Commission may prohibit every unethical competitive practice regardless of its particular character or consequences. New or different practices must be considered as they arise in the light of the circumstance in which they are employed.¹²⁵

Once having determined that section 5 is to be interpreted broadly, the next question is the extent of judicial review of Commission opinions. In a 1927 decision,¹²⁶ the Supreme Court stated that the "weight to be given to the facts and circumstances admitted, as well as the inferences reasonably to be drawn from them is for the commission."¹²⁷ Today, *Universal Camera Corp. v. NLRB*¹²⁸ is generally cited for the proposition that the findings of the Commission, if supported by substantial evidence on the record, are conclusive. While this is the accepted rule, many courts will do little more than pay lip service to it and will not hesitate to review the record, not for the purpose of determining the existence of substantial evidence, but in order to draw their own conclusions. Similarly, the holding that "Courts will

¹²² *Id.* at 309-10.

¹²³ 283 U.S. 643 (1931).

¹²⁴ 291 U.S. at 312 [citations omitted].

¹²⁵ *Id.* at 314.

¹²⁶ *FTC v. Pacific States Paper Trade Ass'n*, 273 U.S. 52 (1927).

¹²⁷ *Id.* at 63.

¹²⁸ 340 U.S. 474, 493-95 (1951).

not substitute their judgment for that of the Commission"¹²⁹ is frequently not observed.

2. Limitations on Remedial Power

Particularly with respect to the question of remedy and the scope of the Commission's orders, the courts are inclined to exercise their own judgment and be influenced by their own sense of equity. The exception occurs in the instance of orders to cease and desist entered by consent of the parties. In one civil penalty proceeding based upon an alleged violation of a consent order, the defendant argued that the proceeding was inappropriate because a consent order is not a final order within the meaning of the Act. The Court disposed of this argument with the following language:

[T]he claim that the order is not a final order for enforcement purposes is without merit. Defendant agreed that "the order shall have the same force and effect as if entered after a full hearing." Moreover, enforcement procedure would be frustrated if the Commission were powerless to enforce its order by monetary penalties merely because its order was on consent.¹³⁰

On the whole, the Commission's record in the courts in recent years has been quite good, particularly in the Supreme Court. There is one area, however, in which it has always encountered considerable resistance—civil penalty proceedings, which are brought in United States District Courts. In civil penalty proceedings, the courts have shown an extraordinary reluctance to assess significant penalties.¹³¹ Naturally, the courts should and usually do consider the financial ability of the defendant to pay the penalty, especially when such resources are limited.¹³² On the other hand, penalties are commonly so small so as to be meaningless. In one unusual recent case, *In re*

¹²⁹ *DeGorter v. FTC*, 244 F.2d 270, 273 (9th Cir. 1957). See also *Standard Distribs., Inc. v. FTC*, 211 F.2d 7, 12 (2d Cir. 1954), where the court held:

It was for it, not for us, to pass upon the credibility of the witnesses and the weight to be given their testimony in light of it all, conflicting or otherwise. Having done so, the findings of the Commission, when, as here the record as a whole gives them substantial support, are final even though the evidence is so conflicting that it might have supported the contrary had such finding been made. [Citations omitted.]

¹³⁰ *United States v. Vitasafe Corp.*, 212 F. Supp. 397, 398-99 (S.D.N.Y. 1962).

¹³¹ The Act provides for the assessment of civil penalties as high as \$5,000 for violation of a cease and desist order. In cases of continuing failure to obey an order, each day is deemed a separate offense. 15 U.S.C. § 50 (1964).

¹³² *United States v. Universal Wool Batting Corp.*, 1961 Trade Cas. ¶ 70,168, at 78,681 (S.D.N.Y. Nov. 30, 1961).

Holland Furnace Co.,¹³³ a criminal contempt proceeding was initiated by the Commission for "knowingly, willfully and intentionally" violating a 1959 cease and desist order.¹³⁴ In upholding the allegation of violation, the court sentenced the president of the company to 6 months imprisonment, fined the company \$100,000 and two other company officers \$500 each.¹³⁵ Even though this is a noteworthy case, the fine is not particularly large compared to the company's sales of \$30,000,000 in 1961.¹³⁶ In the unusual penalty case, fines range from \$1,000 to \$10,000, hardly adequate in most cases to constitute a deterrent for future violations.

One further problem of enforcement should be briefly mentioned—injunctions. Pursuant to Section 13 of the Act,¹³⁷ the Commission is authorized to initiate a proceeding in a district court of the United States, seeking to enjoin the dissemination of allegedly false advertising of food, drugs, medical devices or cosmetics pending the issuance of a complaint.¹³⁸ This authority has been frequently and successfully used by the Commission, particularly with respect to claims questioning the efficacy of drugs. But in 1963 the Commission brought a proceeding against Sterling Drug, seeking to enjoin further dissemination of allegedly false and misleading advertising of Bayer aspirin. In denying the relief sought, the court stated that it could "not grant a preliminary injunction unless it can find that the defendants have, in fact, used a false advertisement."¹³⁹ Until that time the test for granting such a preliminary injunction had been whether there was a reasonable cause to believe that the alleged violation had occurred, and not whether in fact the law had been violated. Thus, in *FTC v. Rhodes Pharmacal Co.*,¹⁴⁰ the court held:

We think, however, that it is fair to say that all the Commission had to show was a justifiable basis for believing, derived from reasonable inquiry or other credible information, that such a state of facts probably existed as reasonably would lead the Commission to believe that the defendants were engaged in the dissemination of false ad-

¹³³ 341 F.2d 548 (7th Cir.), cert. denied, 381 U.S. 924 (1965).

¹³⁴ *Holland Furnace Co.*, 55 F.T.C. 55 (1959), aff'd, 295 F.2d 302 (7th Cir. 1961).

¹³⁵ 341 F.2d at 555.

¹³⁶ See 295 F.2d at 302.

¹³⁷ 15 U.S.C. § 53 (1964).

¹³⁸ Similar injunction power is conferred on the Commission by § 7 of the Wool Products Labeling Act, 15 U.S.C. § 68e (1964); § 6 of the Flammable Fabrics Act, 15 U.S.C. § 1195(a) (1964); and § 8 of the Textile Fiber Products Identification Act, 15 U.S.C. § 70f (1964).

¹³⁹ *FTC v. Sterling Drug, Inc.*, 215 F. Supp. 327, 332 (S.D.N.Y. 1963).

¹⁴⁰ 191 F.2d 744 (7th Cir. 1951). See also *FTC v. Thomsen-King & Co.*, 109 F.2d 516, 519 (7th Cir. 1940).

vertisements of a drug in violation of the act. . . . The District Court was not required to find the charges made to be true, but to find reasonable cause to believe them to be true.¹⁴¹

The distinction between whether an advertisement is in fact false or whether there is reason to believe that it may be false is quite important. In the *Sterling Drug* case, the court, by ruling that the advertising in fact was not false, decided a Commission proceeding before it was ever tried.¹⁴² In effect, the court decided the merits of the proceeding and foreclosed the Commission from taking any further action without adducing additional evidence.

In 1965 the Commission brought an injunctive proceeding to bar consummation of the proposed acquisition of Bowman Dairy by Dean Foods on the grounds that the merger would probably violate the antitrust laws, and, if consummated, the Commission's ability to enter an effective order would be seriously impaired due to the anticipated commingling of assets. The proceeding was brought in the Court of Appeals for the Seventh Circuit under the All Writs Act.¹⁴³ The court dissolved a previously granted temporary restraining order, stating that the Commission did not have the authority to institute such a proceeding.¹⁴⁴ It seems that this result was reached because at various times the Commission had unsuccessfully recommended that Congress enact legislation specifically authorizing the Commission to seek preliminary injunctions to bar proposed mergers.

The Supreme Court granted certiorari¹⁴⁵ and, in reversing the lower court, stated:

It is therefore clear that the "proceedings" in the Congress with reference to the authority of the Commission itself to issue or apply to the district courts for the issuance of preliminary injunctions in merger cases have no relevance whatever to the question before us. In short, Congress gave no attention to the exercise of judicial power by the courts of appeals under the All Writs Act, leaving that power intact and the standing of the Commission to invoke it undiminished. We thus hold that the Commission has standing to

¹⁴¹ 191 F.2d at 747-48.

¹⁴² Although the Commission's complaint had issued, hearings had not begun at the time the petition for an injunction was filed. 215 F. Supp. at 329.

¹⁴³ 28 U.S.C. § 1651 (1964).

¹⁴⁴ *FTC v. Dean Foods Co.*, 356 F.2d 481, 482 (7th Cir. 1966).

¹⁴⁵ *FTC v. Dean Foods Co.*, 383 U.S. 901 (1966).

seek preliminary relief from the Court of Appeals under the circumstances alleged.¹⁴⁶

In a previous instance where the Commission had sought a preliminary injunction in a merger case under the All Writs Act, the *International Paper Co.* case,¹⁴⁷ the application was denied. The extent to which the Commission will make use of this authority under the All Writs Act to seek preliminary injunctions, not only in merger cases but other cases as well, cannot be predicted. Clearly, such authority must be used sparingly. Notwithstanding the *Dean Foods* decision, it probably would be preferable for Congress to specifically confer preliminary injunction power upon the Commission with respect to all of its enforcement endeavors.

C. The Congress

As are all of the independent regulatory agencies, the Commission is an "arm of Congress" and directly responsible to it. The degree of congressional supervision has varied over the years, ranging from very little to the establishment of specific supervisory committees, which among other things have sought to determine the impact of regulatory activities on specific segments of the economy.¹⁴⁸ The most immediate and recurrent control exercised by Congress results from approval of the Commission's annual budget. During the course of the appropriations hearings, the agency's past performance is reviewed and requests for additional funds are weighed.

1. Investigations

The "arm of Congress" label is more than justified in the instance of the Federal Trade Commission. Under the original Section 6(d) of the Act,¹⁴⁹ the Commission conducted numerous investigations pursuant to congressional direction, particularly during the first 20 years of its existence. The reports submitted pursuant to some of these directives resulted in the subsequent passage of important legislation.¹⁵⁰ The Commission's investigation of the radio industry prompted passage of the Radio Act of 1927¹⁵¹ and, ultimately, the Federal Communications Act of 1934.¹⁵² An investigation of electric and gas utility

¹⁴⁶ *FTC v. Dean Foods Co.*, 384 U.S. 597, 611-12 (1966).

¹⁴⁷ *FTC v. International Paper Co.*, 241 F.2d 372, 373-74 (2d Cir. 1956).

¹⁴⁸ See H.R. Rep. No. 2967, 84th Cong., 2d Sess. (1956).

¹⁴⁹ Section 6(d), 15 U.S.C. § 46(d) (1964), as originally drafted, gave the Commission power upon "the direction of . . . either House of Congress to investigate and report the facts relating to any alleged violations of the antitrust Acts by any corporation."

¹⁵⁰ See generally 1968 FTC Ann. Rep. 75-101.

¹⁵¹ Ch. 169, §§ 1-41, 44 Stat. 1162 (1927).

¹⁵² 47 U.S.C. § 151 et seq. (1964); see 1968 FTC Ann. Rep. 92-93.

corporations sparked enactment of the Securities Act of 1934,¹⁵³ the Public Utility Holding Company Act of 1935,¹⁵⁴ the Federal Power Act of 1935¹⁵⁵ and the Natural Gas Act of 1938.¹⁵⁶ And the Commission's chain store investigation prompted enactment of the Robinson-Patman Act of 1936.¹⁵⁷

During its early history, a not inconsequential amount of the Commission's funds and energies were devoted to such investigations. As early as the 1920s, however, businesses being investigated and economy-minded congressmen sought to curtail some of these investigative activities. In 1933 a rider to the fiscal 1934 appropriations bill provided that "no new investigation shall be initiated by the Commission as a result of a legislative resolution, except if the same be a concurrent resolution of the two Houses of Congress."¹⁵⁸ The new law virtually eliminated investigations at the behest of Congress, and since that time there have been only three, and none since 1938.¹⁵⁹ This compares to 48 investigations initiated pursuant to a resolution by either branch of Congress—43 by Senate Resolution and 5 by House Resolution—before enactment of the rider.

There can be little doubt that this rider had a profound effect on the Commission's mission as originally conceived, particularly with respect to the "arm of Congress" concept. While there is scant evidence that the rider adversely affected the Commission's influence on proposed legislation, although it became perhaps somewhat less direct, it nevertheless hindered congressional utilization of the more immediate and direct fact-finding activities of the Commission.¹⁶⁰ The Commission's broad investigatory power and fact-finding abilities are, of course, especially useful for such endeavors.

A related situation arose in 1963 as a result of the Commission's decision in the previous year to initiate a comprehensive investigation of the 1,000 largest manufacturing corporations. Immediately a controversy developed and strong opposition arose from business interests—especially the United States Chamber of Commerce and the

¹⁵³ 15 U.S.C. § 78a et seq. (1964).

¹⁵⁴ 15 U.S.C. § 79 et seq. (1964).

¹⁵⁵ 16 U.S.C. § 791 et seq. (1964).

¹⁵⁶ 17 U.S.C. § 717 et seq. (1964); see 1968 FTC Ann. Rep. 91.

¹⁵⁷ 15 U.S.C. § 13c et seq. (1964); see 1968 FTC Ann. Rep. 77.

¹⁵⁸ 15 U.S.C. § 46a et seq. (1964).

¹⁵⁹ See 1968 FTC Ann. Rep. 75-76, 89.

¹⁶⁰ Members of Congress can still, of course, request the initiation of investigations. The Senate Select Committee on Small Business, for example, requested a study on the effect of monopolistic practices on small business. See 1968 FTC Ann. Rep. 89. This does not have the same impact, however, as an investigation directed by either House of Congress.

National Association of Manufacturers. The end result was a rider to the 1964 appropriations bill prohibiting the investigation.¹⁶¹

2. Legislation

The most significant aspect of the Commission's relationship to Congress is the Commission's impact on proposed legislation or in originating legislation. This has been an extremely productive area for the Commission and one of enduring value. Some of the more recent laws profoundly influenced by, or the direct result of, Commission activities or recommendations include the 1950 amendment to Section 7 of the Clayton Act,¹⁶² the "Finality" amendment to Section 11 of the Clayton Act,¹⁶³ the Fur Products Labeling Act,¹⁶⁴ the Flammable Fabrics Act,¹⁶⁵ the Textile Fiber Products Identification Act,¹⁶⁶ the Fair Packaging and Labeling Act,¹⁶⁷ and the Consumer Credit Protection Act (Truth-in-Lending).¹⁶⁸

The Commission's influence upon the enactment of these laws or their contents arises from different sources. The most direct form of influence is a recommendation for legislation based upon the result of an extensive investigation. More indirect forms consist of the trend of Commission cases and other activities, such as rule-making and special reports.

3. Congressional Action and Quasi-Judicial Responsibility

The Commission's relationship to Congress recently came under judicial scrutiny. The first Commission proceeding brought under the amended Section 7 of the Clayton Act was against the Pillsbury Company challenging its acquisition of two smaller regional competitors.¹⁶⁹ The case came before the Commission upon the hearing examiner's dismissal of the complaint, and one of the issues involved the sufficiency of evidence in a section 7 proceeding. The precise issue was whether a substantial market foreclosure amounts to a per se violation of section 7,¹⁷⁰ or whether additional evidence is needed showing that "the effect of such acquisition may be substantially to

¹⁶¹ The Independent Offices Appropriation Act of 1964, Pub. L. No. 88-215, § 1, 77 Stat. 431, provides in part "[t]hat no part of the foregoing appropriation shall be used for an economic questionnaire or financial study of intercorporate relations."

¹⁶² 15 U.S.C. § 18 et seq. (1964).

¹⁶³ 15 U.S.C. § 21(b) et seq. (1964).

¹⁶⁴ 15 U.S.C. § 69 et seq. (1964).

¹⁶⁵ 15 U.S.C. § 1191 et seq. (1964).

¹⁶⁶ 15 U.S.C. § 70 et seq. (1964).

¹⁶⁷ 15 U.S.C. § 1451 et seq. (Supp. IV, 1969).

¹⁶⁸ 15 U.S.C.A. §§ 1601-13, 1631-41, 1671-77 (Supp. 1969).

¹⁶⁹ Pillsbury Co. v. FTC, 354 F.2d 952 (5th Cir. 1966).

¹⁷⁰ The so-called "substantiality" test was applied by the Supreme Court in *International Salt Co. v. United States*, 332 U.S. 392 (1947).

lessen competition or tend to create a monopoly."¹⁷¹ The Commission rejected the per se approach and held that "it would not be sufficient to show that an acquiring and an acquired company together control a substantial amount of sales, or that a substantial portion of commerce is affected."¹⁷² Aside from this particular issue, which was not at the core of the examiner's ruling, the Commission disagreed with the dismissal of the complaint and remanded the case to the examiner.

While the matter was pending with the examiner, hearings were being conducted by the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary and the Subcommittee on Antitrust of the House Judiciary Committee.¹⁷³ During the course of these hearings, members of Congress made repeated references to the then pending *Pillsbury* case, which were critical of the Commission's handling of the case. Particular criticism was levied against the Commission's evidentiary ruling as to the manner in which a prima facie section 7 case was to be established.

When the case was finally concluded by a divestiture order of the Commission¹⁷⁴ and appealed to the court, one of the issues raised on appeal was whether there had been improper congressional intervention in the Commission's decision-making process. By the time the Commission's final decision was made in 1960, only one of the four Commissioners deciding the case, Commissioner Secrest, had also been a Commissioner at the time of the congressional hearings in 1955. The court noted, however, that Chairman Kintner was the Commission's General Counsel in 1955 and thus also was "substantially exposed to whatever 'interference' was embodied in the hearings [before Congress]."¹⁷⁵ In vacating the Commission's order and remanding the case, the court stated:

To subject an administrator to a searching examination as to how and why he reached his decision in a case still pending before him, and to criticize him for reaching the "wrong" decision as the Senate subcommittee did in this

¹⁷¹ 15 U.S.C. § 18 (1964).

¹⁷² *Pillsbury Mills, Inc.*, 50 F.T.C. 555, 564 (1953). Complaint counsel had suggested the following test for § 7 cases:

Where a leading factor in the relevant market having a substantial share of the market, acquires another factor in that market also having a substantial share of that market, the inference arises that competition may be substantially lessened in the lines of commerce involved.

Id. at 564 n. 29.

¹⁷³ See generally Hearings on the Antitrust Laws Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 84th Cong., 1st Sess., pts. 1-3 (1955); Hearings on Current Antitrust Problems Before the Antitrust Subcomm. of the House Comm. on the Judiciary, 84th Cong., 1st Sess., pts. 1-6 (1955).

¹⁷⁴ *Pillsbury Mills, Inc.*, 57 F.T.C. 1274 (1960).

¹⁷⁵ 354 F.2d at 956.

case, sacrifices the appearance of impartiality—the *sine qua non* of American *judicial* justice—in favor of some short-run notions regarding the Congressional intent It may be argued that such officials as members of the Federal Trade Commission are sufficiently aware of the realities of governmental, not to say “political,” life as to be able to withstand such questioning as we have outlined here. However, this court is not so “sophisticated” that it can shrug off such a procedural due process claim merely because the officials involved should be able to discount what is said and to disregard the force of the intrusion into the adjudicatory process.¹⁷⁶

The court did not find any actual impropriety, and its main concern was the maintenance of the *appearance* of quasi-judicial integrity and impartiality. Because 12 years had passed since the consummation of the questioned acquisitions, the Commission decided to dismiss the complaint.¹⁷⁷

IV. THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE

A. *Formal and Informal Adjudications*

The Commission's Rules of Practice and Procedure provide for two types of proceedings—formal and informal. A formal proceeding entails the issuance of a complaint by the Commission charging that it has reason to believe that certain acts and practices engaged in by respondent are violative of one of the laws it administers. Then follow hearings before a hearing examiner, upon the conclusion of which he issues an initial decision. The case can then be placed on the Commission's docket, either on its own motion or upon appeal by either party. The proceeding before the Commission is in the nature of an appeal but the Commission, pursuant to the FTC Act, may decide issues of fact in the same way as would a court of original jurisdiction, or it can rely on the initial decision of the examiner. The concept of the hearing examiner developed in order to expedite the proceeding, and to relieve the Commission of the time-consuming aspects connected with any trial. Even before the advent of the Administrative Procedure Act of 1946 the Commission's trial procedures had become “judicialized” and it adhered to the various standards of due process.

Informal proceedings involve consent orders to cease and desist, assurances of voluntary compliance, and general rule-making. In the case of consent orders, the respondent agrees to the entry of an order

¹⁷⁶ *Id.* at 964.

¹⁷⁷ *Pillsbury Mills, Inc.*, No. 6000 (F.T.C., Mar. 28, 1966).

to cease and desist without admitting that a law has been violated and without the necessity of findings of fact by the Commission. At one time there was considerable controversy whether the Commission could enter orders without findings of fact which are specifically required by the Act.¹⁷⁸ Court challenges to the effectiveness of such orders for failure to make findings of fact, however, have been unsuccessful.¹⁷⁹ Today such orders are considered to have the same force and effect as those based upon a fully adjudicated proceeding. Once a formal complaint has issued, the consent order procedure is no longer available to the respondent except under unusual circumstances and for good cause shown; a settlement after the issuance of a formal complaint can only be effected through the adjudicatory process by the filing of an admission answer or upon a stipulation of facts.¹⁸⁰ In practice the Commission has frequently made the procedure available to a respondent at any time prior to a final order, provided agreement on the order can be reached.

At present, the consent order procedure is made available to every proposed respondent regardless of the gravity of the alleged violation. It is designed to facilitate the administrative process and provide a speedy disposition of a proposed proceeding. The wisdom of making the procedure available to every proposed respondent, and particularly after complaint has formally issued, is questionable. It would appear that since the fact-finding machinery of the Commission is circumvented, the procedure should be used with some degree of selectivity. Its use does not, for example, appear justified in hard-core antitrust cases in which the building of a public record may subsequently aid a third party, private or governmental, in the preparation of a treble-damage action. Fact-finding is among the Commission's most important functions and should not be unnecessarily curtailed. In some instances the Commission should not settle for anything less than a fully developed record upon which an informed judgment can be made. Unless and until cease and desist orders based upon an adjudicatory proceeding can be used by treble-damage claimants for the purpose of establishing a *prima facie* case,¹⁸¹ the issue will probably remain dormant.

¹⁷⁸ Section 5(b) provides in part that the Commission shall make a report in writing in which *it shall state its findings as to the facts* and shall issue and cause to be served on such person . . . an order requiring such person . . . to cease and desist [Emphasis added.]

¹⁷⁹ 15 U.S.C. § 45(b) (1964).

¹⁷⁹ *United States v. Vitasafe Corp.*, 212 F. Supp. 397 (S.D.N.Y. 1962); *FTC v. Jantzen, Inc.*, 383 F.2d 981 (9th Cir. 1967).

¹⁸⁰ FTC, Rules of Practice, 16 C.F.R. § 2.34(d) (1969).

¹⁸¹ See *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958), where the Supreme Court held that the treble damage and injunctive provisions of Clayton §§ 24 & 16, 15

An assurance of voluntary compliance is no more than a promise that the questioned practice has been discontinued and will not be resumed. It carries no sanctions and cannot be enforced. The criteria for the use of this procedure include weighing the gravity of the alleged violation and the prior record of the party involved.¹⁸² It has proven a useful procedure, especially in the deceptive practices area in which often the practice involved would not merit the expenditure of a full-fledged field investigation. Although the Commission has routinely accepted such assurances after a case has been fully investigated, the procedure should in most cases, only be used before an investigation has been made since consent orders may be better suited for post-investigation action. Similarly, in a number of instances the Commission has accepted repeated assurances from the same party, involving different products or practices—a questionable procedure.

1. Collateral Suits

During recent years the Commission has placed increasing emphasis and reliance upon enforcement by its informal procedures. In 1963 the Commission issued a total of 431 formal complaints, of which 66 were contested and 365 settled by consent. By comparison, in 1969, 220 complaints were issued, of which 22 were contested and 198 settled by consent.¹⁸³ The decline of the Commission's formal case load has been accompanied by an increase in the number of collateral suits against the Commission in the district courts. The lowest number of formal complaints on the Commission's docket was reached in 1968, when 123 were issued, 23 of which were contested and 100 settled. That same year witnessed a 75 percent increase over the previous year in collateral suits against the Commission.¹⁸⁴ In relation to the Commission's average annual docket of 255 during the period of 1961-1969, such suits have more than tripled.

The subject matter of collateral suits has varied widely, and, although technically concerned with procedural and related matters, many have had a profound effect on the subsequent outcome of the Commission's proceeding. Others have resulted in great delay. In *Frito-Lay, Inc. v. FTC*,¹⁸⁵ the company filed a motion in the Eastern District of Texas for a preliminary injunction and summary judgment to dismiss a Commission complaint. The action was filed on December 1,

U.S.C. §§ 15, 26 (1964), apply to only those acts specified in § 1 of the Clayton Act, 15 U.S.C. § 12 (1964). The Federal Trade Commission Act, because it is not listed in § 1 of the Clayton Act, would presumably not provide the basis for a treble damage or injunctive claim under the Clayton Act.

¹⁸² FTC, Rules of Practice, 16 C.F.R. § 2.21(b) (1969).

¹⁸³ ABA Report, *supra* note 60, at 20.

¹⁸⁴ 1968 FTC Ann. Rep. 25-27.

¹⁸⁵ Civil No. 4941 (E.D. Tex., April 17, 1966).

1964. Hearings were held in May, 1965 and the district court handed down its decision in April, 1966, denying the relief sought on the grounds that petitioner had an adequate remedy at law, would not suffer any irreparable injury, and that there was no genuine issue of material fact. The ruling was appealed and in upholding the lower court's decision the court stated:

Where Congress has provided an adequate procedure for judicial review of administrative actions, that procedure must be followed. Only in extraordinary cases will parties be allowed to deviate from this statutory course and seek injunctive relief from the district court, short circuiting the administrative procedures.¹⁸⁶

That decision was handed down on June 21, 1967, or more than three and one-half years after the Commission had issued its complaint.¹⁸⁷ While this case is perhaps a more unusual example of the delays caused by collateral suits, it is typical of the problems such cases present.

In other cases, respondents in Commission proceedings have challenged the Commission's long-standing practice of issuing factual press releases of complaints it has issued.¹⁸⁸ In reversing a lower court's decision and upholding the Commission's right to issue such press releases, the Court of Appeals for the District of Columbia stated:

If the unsophisticated consumer is to be protected in any measure from deceptive or unfair practices, it is essential that he be informed in some manner as to the identity of those most likely to prey upon him utilizing such prohibited conduct. Certainly advice through news media as to the actions being taken by a government agency in his behalf constitutes a prophylactic step addressed ultimately to the elimination of the conduct prohibited by the statute.¹⁸⁹

Most collateral suits (1) involve a ruling by the Commission during the course of an adjudicatory proceeding adverse to respondent from which redress is sought in the courts, or (2) allege bias and prejudgment on the part of the Commission. In those instances in which injunctive relief is denied, the courts most commonly find failure to exhaust the administrative process and absence of irreparable injury. One court has stated:

¹⁸⁶ *Frito-Lay, Inc. v. FTC*, 380 F.2d 8, 10 (5th Cir. 1967).

¹⁸⁷ *Frito-Lay, Inc.*, No. 8606 (F.T.C., Nov. 13, 1963).

¹⁸⁸ *Cinderella Career & Finishing School, Inc. v. FTC*, 1967 Trade Cas. ¶ 72,072 (D.D.C., April 13, 1967).

¹⁸⁹ *FTC v. Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308, 1314 (D.C. Cir. 1968).

Interference with the conduct of proceedings before an administrative agency, through the equity powers of the court, as distinguished from supervision and control by direct review, has long been the exception rather than the rule. . . . Accordingly, as a prerequisite to judicial intervention—at least where preliminary matters are involved—the cases have consistently required a showing of a patent violation of constitutional or statutory authority by the agency, as well as an absence of an alternative avenue of relief to the injured party.¹⁹⁰

Notwithstanding expressions of judicial restraint concerning interference in an administrative proceeding, the courts have shown an increased willingness to entertain such suits as indicated by their increased frequency.

2. Interlocutory Appeals

In a corollary development, the number of requests for interlocutory appeals to obtain Commission review of an order by a hearing examiner have followed a pattern similar to that of collateral suits. In ruling on such requests the Commission must be careful to avoid the temptation to second-guess the examiner, who is charged with the primary responsibility of conducting the trial. The general rule is that only such requests showing that an examiner's ruling involves substantial rights which will materially affect the final decision or involves a clear abuse of discretion by the examiner will be granted by the Commission. The soundness of this rule is clear—the Commission cannot conduct the trial by remote control. Experience has shown that the greater the Commission's willingness to interfere in proceedings before an examiner the greater the likelihood that the case will encounter procedural difficulties and delays. Only infrequently can Commission intervention aid in the orderly and expeditious conduct of the trial. More often than not, however, one successful appeal to the Commission invites another, and before long the case is firmly embedded in a morass of procedural matters. These procedural delays are detrimental to the Commission's effort to provide expeditious relief for consumers. Such delays are a sound reason for favorable consideration of current legislative proposals which would authorize the Commission to seek injunctions *pendente lite* of suspected violations of Section 5 of the Federal Trade Commission Act.¹⁹¹ This authority

¹⁹⁰ *Sperry & Hutchinson Co. v. FTC*, 256 F. Supp. 136, 140 (S.D.N.Y. 1966).

¹⁹¹ See Introduction of S. 2246—Deceptive Sales Act, 115 Cong. Rec. 5579 (daily ed. May 26, 1969) (text of S. 2246). Section 2 of the proposed bill would give the Commission temporary injunction power. The same power would be conferred by a bill

would greatly expedite Commission proceedings and consequently would be in the interests of not only the Commission but respondents as well.

B. Guidance Procedures

Since 1962 the Commission has utilized two additional procedures—trade regulation rules and advisory opinions—in its enforcement scheme. The trade regulation rule procedure is designed to deal with a specific problem facing an industry. The procedure provides for a public hearing and submission of comments by interested parties and the promulgation of a rule based upon the public record so developed. These rules are more than advisory, and a showing of nonconformity with a rule can be used to establish a *prima facie* case under section 5. Thus, the Rules of Practice provide that

[w]here a trade regulation rule is relevant to any issue involved in an adjudicative proceeding thereafter instituted, the Commission may rely upon the rule to resolve such issue, provided that the respondent shall have been given a fair hearing on the applicability of the rule to the particular case.¹⁹²

The purpose of the procedure is to dispose of an issue of fact or law on the basis of an extensively developed record, and thereby preclude the necessity of repetitious findings in subsequent proceedings. For example, the rule-making proceeding involving batteries determined that the present state of the art has not produced a leakproof flashlight or similar battery. Based on this finding, the Commission held that it would be an unfair practice to label or guarantee such batteries as "leakproof."¹⁹³ In the event a leakproof battery is developed in the future, the rule will be modified or amended. Ideally, a trade regulation rule avoids the necessity of proceedings against a widespread unfair or deceptive trade practice on a case-by-case basis since it is binding on all members of the industry.

The advisory opinion procedure was instituted to permit a businessman to seek Commission guidance concerning the legality of a proposed course of action. The Commission will not render this advice, however, if an investigation or corollary inquiry is required to render an informed judgment. Businessmen have made extensive use of the procedure and elicited the Commission's opinion on a wide

introduced by Senator Magnuson. See Introduction of S. 3201—Consumer Protection Act of 1969, 115 Cong. Rec. 15445 (daily ed. Dec. 3, 1969) (text of S. 3201).

¹⁹² 16 C.F.R. § 1.12 (1969).

¹⁹³ 16 C.F.R. § 403 (1969). The Commission's concern with battery leakage resulted from numerous complaints that a battery leak had destroyed radios or toys, although the battery was labeled leakproof.

variety of subjects. The procedure does, however, raise a number of questions, notably, whether it is justified to commit scarce resources to the analysis of a proposed trade practice, which, even if considered deceptive, the Commission would not challenge in an enforcement proceeding. Similarly, there appears little merit in the practice of having the Commission assume the function of legal counsel for businessmen on an individual basis. It would seem therefore, that the Commission's available resources could be utilized more effectively. Moreover, it is not at all certain that, even conceding a modicum of benefit flowing from the procedure, it is of such value to the businessman as to warrant its expense. For example, a total of 33 advisory opinions involving tripartite promotional assistance programs have been issued. The opinions have been mixed—some approving, some qualifying and some disapproving the proposed plan. The Commission has learned, however, that only one of these plans has actually been put into effect, justifying the conclusion that the procedure is of limited usefulness. It has also become apparent that with very few exceptions the proposed course of action, which is the subject of the advisory opinion, is of marginal public interest. A re-evaluation of the continued necessity of the procedure is clearly in order.

V. RECENT DEVELOPMENTS

The period since 1961 has witnessed some important developments in trade regulation law, both in terms of court decisions and Commission activities. These developments may be discussed under two areas—antitrust and deceptive practices.

A. *Antitrust Activity*

1. Mergers under Section 7 of the Clayton Act

In 1957 the Commission issued a complaint against Procter & Gamble, alleging that its acquisition of Clorox constituted a violation of Section 7 of the amended Clayton Act in that the acquisition might tend to substantially lessen competition in the household liquid bleach industry. At the time of the acquisition in 1957, Procter & Gamble was the leading detergent and soap manufacturer, accounting for 54.4 percent of the packaged detergent market in a heavily concentrated industry where the top three firms account for 80 percent of the market. In addition Procter & Gamble was the nation's largest advertiser, with a sales promotion budget of \$127,000,000. The acquired company, Clorox, was the largest manufacturer of household liquid bleach, with a market share of 48.8 percent. Its nearest competitor, Purex, accounted for 15.7 percent of the market.

In challenging this acquisition the Commission was not only con-

cerned with its impact on existing competition but potential competition as well. The proceeding marked the first time that a conglomerate merger, one involving companies in unrelated areas, as distinguished from a merger between supplier and customer (vertical) or between competitors (horizontal) had been adjudicated in a formal proceeding. The Commission upheld the hearing examiner's finding of violation and ordered divestiture.¹⁹⁴ The case ultimately reached the Supreme Court, which sustained the Commission's decision.¹⁹⁵ Perhaps the most important factor underlying the Court's decision was the extensive use of advertising by the respondents. Both companies sell low-priced, high-turnover consumer items, which to a large extent are presold by heavy advertising outlays. Their products are sold through similar distribution systems and reach the consumer by way of the grocery shelf. With respect to Clorox, the Court noted the Commission's finding that liquid household bleaches are chemically identical and the success Clorox achieved in differentiating its product from those of its competitors was directly attributable to its extensive sales promotion. As to the impact of the acquisition the Court stated:

The anticompetitive effects with which this product-extension merger is fraught can easily be seen: (1) the substitution of the powerful acquiring firm for the smaller, but already dominant, firm may substantially reduce the competitive structure of the industry by raising entry barriers and by dissuading the smaller firms from aggressively competing; (2) the acquisition eliminates the potential competition of the acquiring firm.¹⁹⁶

The key element of the decision was the advertising capability of Procter & Gamble, which, in fact, would permit it to out-advertise any competitor in the liquid bleach industry. Mere existence of this capability moved the Court to observe that "[t]here is every reason to assume that the smaller firms would become more cautious in competing due to their fear of retaliation by Procter."¹⁹⁷

One of the shortcomings of the decision was its failure to establish a clear-cut rule of law other than the applicability of section 7 to conglomerate mergers. Its utility as a viable precedent has not yet been determined and its precise limits not defined. It is nevertheless a significant breakthrough in section 7 enforcement, especially in view of the Court's willingness to adjudicate this case within the economic framework in which it was presented. Such "economic adjudication" is

¹⁹⁴ *Procter & Gamble Co.*, 63 F.T.C. 1465 (1963).

¹⁹⁵ *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967).

¹⁹⁶ *Id.* at 578.

¹⁹⁷ *Id.*

becoming increasingly important with the ever-mounting complexity of antitrust issues, which are no longer confined to traditional single industry lines.

A similar situation presented itself with the 1957 acquisition of SOS, a steel wool soap pad manufacturer, by General Foods, the nation's third largest advertiser. The steel wool soap pad industry, at the time of the acquisition in 1957, was an almost perfect duopoly, with SOS accounting for 51 percent of sales and its nearest competitor, Brillo, for 47.6 percent. Again, sales promotion and the ability to distinguish an otherwise indistinguishable product were of utmost importance. The Commission issued a divestiture order which was affirmed by the Third Circuit.¹⁹⁸

Although the two cases are quite similar, certain differences do exist, especially in the manner in which they were decided. Aside from the fact that the court of appeals relied heavily upon the then recent *Procter & Gamble* decision as authority for upholding the divestiture order, it gave considerable weight to post-acquisition developments. Thus, the court seemed to have little difficulty in ruling for the Commission when it considered that after the acquisition an extensive rejuvenation of SOS's advertising approach, almost totally by television, was initiated by General Foods, as a result of which "Brillo's position deteriorated rapidly."¹⁹⁹ In addition, the court did not feel that a finding of violation would necessarily have to be predicated upon a showing that the acquiring firm had been eliminated as a potential entrant and competitor:

[General Foods] has also argued that one of the central aspects of the *Clorox* case, the elimination of the acquiring firm as a potential competitor, is entirely missing in this case, and that the record does not support the finding that the market structure of the steel wool soap pad industry was drastically altered through any loss of potential competition. It is true that G.F. was not a potential competitor lurking on the fringe of the soap pad market and exerting an effect on the actions of the actual competitors. However, we do not read *Clorox* as holding that "product extension" mergers must involve the elimination of this type of potential competition to run afoul of the Clayton Act.²⁰⁰

The court found that the threat to potential competition need only be indirect, such as the substitution of a large and powerful firm which

¹⁹⁸ *General Foods Corp. v. FTC*, 386 F.2d 936 (3d Cir. 1967), cert. denied, 391 U.S. 919 (1968).

¹⁹⁹ *Id.* at 939.

²⁰⁰ *Id.* at 946.

prior to an acquisition had no entry plans. The court considered the substitution itself to have a depressing impact upon the quality of competition.

In both of these cases the requisite possible adverse competitive effect was readily apparent. Both involved an acquisition by the dominant factor in one or more industries of the dominant factor in another industry. It cannot be expected, however, that the holdings will greatly solve the possible anticompetitive effects which undoubtedly attend the present conglomerate merger frenzy.

2. Statements of Merger Enforcement Policy

In addition to other dispositions of a variety of merger matters, the Commission has issued a number of important reports dealing with merger activities. These reports analyze the economic impact of merger activity in a particular industry. In those instances in which remedial action was indicated, the Commission attempted to use the industry-wide approach in preference to case-by-case adjudication. Attempts at industry-wide enforcement thus far have been limited to horizontal or vertical merger activities, an area in which rules of law have become more crystallized as distinct from conglomerate mergers, for which legal precedents are still very much in the formative stage.

The first such attempt dealt with vertical integration in the cement industry. During the early 1960s the cement industry experienced a rash of acquisitions by cement manufacturers of their customers—ready-mixed concrete companies. Once such a trend develops, it frequently has a snowballing effect since manufacturers feel compelled to join the movement to protect their markets. In a comprehensive economic report,²⁰¹ it was found that three-fifths of the cement production is consumed by ready-mixed cement companies, which constitute the largest single market for cement producers. A period of excess capacity and declining profits in the 1950s sparked the search for guaranteed outlets in the form of captive customers through vertical integration. The consequences of the trend have been described as follows:

Vertical forward acquisitions of large readymixed manufacturers do more than merely temporarily disrupt access to cement markets by unintegrated suppliers. Such mergers tend to deprive other suppliers of economical access to the affected markets. A frequent response to disadvantaged firms is to engage in defensive mergers of their own, thereby triggering

²⁰¹ FTC, Economic Report on Mergers and Vertical Integration in the Cement Industry (1966).

other mergers. In this context unrestrained merger activity may freeze some suppliers out of a major segment of the market. The net effect is to shrink the size of the open market for cement. Several adverse competitive effects may flow from this. The number of effective competitors seeking to supply particular markets may be diminished, thereby reducing the intensity of competition. Moreover, the remaining smaller, unintegrated cement consumers may find suppliers less willing to engage in aggressive rivalry in serving their needs.²⁰²

The report concluded that any merger between a large factor in a local concrete market with a substantial supplier would have adverse competitive effects.

To deal with this problem the Commission issued a statement of enforcement policy with respect to vertical mergers in the cement industry, outlining the circumstances under which an acquisition would likely be challenged.²⁰³ Specifically, the Commission announced its intention to issue a complaint in every case involving a merger between a cement producer and a substantial ready-mixed concrete firm in a market in which the acquiring firm was an actual or potential supplier. Moreover, unless unusual circumstances indicated the contrary, the acquisition of any ready-mixed concrete company ranking among the leading four non-integrated ready-mix producers in any market, or the acquisition of any ready-mixed company regularly purchasing 50,000 barrels of cement or more on an annual basis would be viewed as a substantial acquisition. The statement also cautioned that acquisitions on a smaller scale would not necessarily go unchallenged, particularly where successive smaller acquisitions could equal the substance of one large acquisition. This enforcement policy statement and the section 7 complaints issued prior thereto²⁰⁴ are credited with halting the merger movement in that industry.²⁰⁵

The Commission approached the merger threat in the food retailing industry in a similar manner; it issued five complaints which

²⁰² *Id.* at 14-15.

²⁰³ FTC, Commission Enforcement Policy with Respect to Vertical Mergers in the Cement Industry, (1967) (Trade Reg. Rep. ¶ 4510).

²⁰⁴ The Commission issued eleven § 7 complaints challenging vertical mergers prior to the enforcement statement: Permanente Cement Co., No. 7939 (F.T.C., June 14, 1962); Martin-Marietta Co., No. 8280 (F.T.C., Jan. 27, 1961); Lone Star Cement Corp., No. 8585 (F.T.C., July 15, 1963); American Cement Corp. No. C-681 (F.T.C., Jan. 20, 1964); National Portland Cement Co., No. 8654 (F.T.C., Jan. 22, 1965); United States Steel Corp., No. 8655 (F.T.C., Jan. 22, 1963); Texas Indus., Inc., No. 8656 (F.T.C., May 18, 1965); Mississippi River Fuel Corp., No. 8657 (F.T.C., Jan. 22, 1965); Ideal Cement Co., No. 8678 (F.T.C., Jan. 26, 1966); Lehigh Portland Cement Co., No. 8680 (F.T.C., April 1, 1966); and Lone Star Cement Corp., No. C-1159 (F.T.C., Jan. 16, 1967).

²⁰⁵ Staff of Antitrust Subcomm. of House Comm. on the Judiciary, 89th Cong., 1st Sess., *The Celler-Kefauver Act: Sixteen Years of Enforcement* 23 (Comm. Print 1967).

challenged not only horizontal mergers but also so-called "market extension" mergers,²⁰⁶ and it issued a statement of enforcement policy with respect to mergers in the food distribution industries.²⁰⁷ The thrust of the statement by the Commission indicated that it would scrutinize any merger which would result in combined annual food store sales of more than \$500 million. This figure takes cognizance of economies of scale and at which level they can be attained.

It therefore appears that whereas mergers by retail firms with annual sales in excess of \$500 million may contribute to further concentration of buying power, in addition to any adverse effect that they may have at the retail selling level, it is unlikely that the prohibition of mergers by such companies would have an adverse effect on efficiency. Moreover, insofar as economies of scale require fairly large-scale operations, the goal of promoting economic efficiency might be better achieved by channelling mergers away from the largest firms to those whose efficiency would be enhanced by further growth.²⁰⁸

The statement is noteworthy in two respects. It attempts to channel merger activity into a specific direction and it seeks to quantify, for enforcement purposes, the economies of scale concept. In addition, it introduces greater certainty and predictability into merger enforcement in this industry.

Since then the Commission has issued two enforcement policy statements—one dealing with mergers in the grocery products manufacturing industry,²⁰⁹ and one dealing with mergers in the textile mill products industry.²¹⁰ Finally, the Commission published an extensive staff report on corporate mergers.²¹¹ This report and the statements of merger policy have been especially valuable since the merger area has been fraught with uncertainty. The expressions of enforcement policy by the Commission not only fulfill one of the vital functions

²⁰⁶ National Tea Co., No. 7453 (F.T.C., March 26, 1959); Kroger Co., No. 7464 (F.T.C., April 1, 1959); Grand Union Co., No. 8458 (F.T.C., Jan. 12, 1962); Consolidated Foods Corp., No. C-1024 (F.T.C., Dec. 21, 1965); Winn-Dixie Stores, Inc., No. C-1110 (F.T.C., Sept. 14, 1966).

²⁰⁷ FTC, Commission Enforcement Policy with Respect to Mergers in the Food Distribution Industries (1967) (1 Trade Reg. Rep. ¶ 4520).

²⁰⁸ *Id.* at 14-15.

²⁰⁹ FTC, Commission Enforcement Policy with Respect to Product Extension Mergers in Grocery Products Manufacturing (1968) (1 Trade Reg. Rep. ¶ 4530).

²¹⁰ FTC, Enforcement Policy with Respect to Mergers in the Textile Mill Products Industry, 33 Fed. Reg. 17708 (1968).

²¹¹ FTC, Economic Report on Corporate Mergers (1969), appearing in Hearings on the Antitrust Laws Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess., pt. 8a (1969).

for which it was created—to substitute “counsel and accommodation for the harsher processes of legal restraint,”²¹² but also significantly aid in the maintenance of an adequate level of competition in important sectors of the economy.

3. Price Discrimination under the Robinson-Patman Act

The most significant development in this area is the scarcity of proceedings over the past ten years. Probably the most important reason for this is the divergence of views as to the proper enforcement of the Act which, as the record over the past years demonstrates, has resulted in little or no enforcement at all. There are, however, two significant recent cases. In the Seventh Circuit's decision in *Lloyd Fry Roofing Co. v. FTC*,²¹³ the Commission charged Fry, the nation's largest producer of asphalt roofing products, with violations of Section 2(a) of the amended Clayton Act²¹⁴ due to its pricing practices in the Knoxville, Tennessee area. Section 2(a), subject to certain defenses, prohibits a seller from charging discriminatory prices to different purchasers “where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce”²¹⁵

The asphalt roofing products industry consists of about 10 major producers, of which Fry is the largest, and a large number of local and regional independents selling at prices below those of the major producers. The instant proceeding arose because Fry was selling at lower prices in the Knoxville area than in other areas of the country “with the purpose of disciplining small independent concerns selling below the prices established by Fry and followed by other majors.”²¹⁶ With respect to the statutory requisites of competitive injury, the court stated:

An intent to harm competitors distinguishes anticompetitive price cutting from competitive activity not meant to be prohibited *per se* by the Robinson-Patman Act. An illicit intent serves to show the substantiality and probability of the competitive effects that may result from price reductions. If, as here, the price reductions are substantial and prolonged, it is proper to invoke the statute to curb the discriminatory pricing.²¹⁷

²¹² 16 Bureau of Nat'l Literature, Messages and Papers of the Presidents 8158 (Supp. 1917).

²¹³ 371 F.2d 277 (7th Cir. 1966).

²¹⁴ 15 U.S.C. § 13(a) (1964).

²¹⁵ *Id.*

²¹⁶ 371 F.2d at 281.

²¹⁷ *Id.* at 281-82.

The decision crystallizes previously traditional views that two distinct standards of illegality should be applied in price discrimination cases, depending upon the existence of predatory intent. The absence of predatory intent would require a fairly comprehensive analysis to determine whether the discrimination may substantially lessen competition. The standard of competitive injury is not one of injury to a competitor but to competition as a whole. The Attorney General's Committee to Study the Antitrust Laws explained the standard as follows:

[It] is not "injury" to *competitors* but adverse effects on "competition *with*" parties privy to discriminations that the statute expressly forbids . . . [C]riteria of competitive effect which focus exclusively on individual competitor's sales or profits rather than the health of the competitive process literally go beyond the terms of the law.

In some circumstances . . . injury to even a single competitor should bring the Act into play. Predatory price cutting designed to eliminate a smaller rival, for example, is a practice which inevitably frustrates competition by excluding competitors from the market or deliberately impairing their competitive strength.²¹⁸

The *Fry* case is noteworthy because the court went a step beyond this theory and suggested that predatory intent in and of itself may be relied upon for a showing of adverse effects without an actual showing of competitive injury even to one competitor.

A cautionary note, however, is in order. The establishment of an enforcement blueprint appears relatively easy, but efforts to distinguish injury to competition from injury to competitors tend to become somewhat esoteric. In actual practice it frequently is far more difficult to make such a distinction, for it is competitors who, in the final analysis, make up competition. In some instances the mere threat of a price discrimination is sufficient to cause a weakening of the competitive process, which would indicate that an across-the-board application of the competitor-competition distinction may not be particularly meaningful.

In *National Dairy Products Corp. v. FTC*²¹⁹ the court upheld the Commission's finding of illegal territorial price discrimination arising out of respondent's 2-for-1 promotion in the Washington, D.C.-Baltimore-Norfolk-Richmond area. Respondent, in order to increase its market share in these areas, offered retailers two cases of fruit

²¹⁸ Att'y Gen. Rep. 165.

²¹⁹ 412 F.2d 605 (7th Cir. 1969).

spread (jam and jelly) for the price of one, which amounted to a sale below cost. It also brought respondent's price below that of its regional competitors. There were no quantity limits imposed by the offer, and the response was enormous. The court sustained the Commission's conclusion of injury to competition, which was based upon a market analysis of respondent's leading regional competitors. Three of these competitors had lost an average of 30 percent of sales as a result of the offer. Although it did not consider predatory intent a necessary element for a finding of violation, the court upheld the Commission's finding of predatory intent, on the grounds that the competitive impact of the offer was reasonably foreseeable in light of the surrounding circumstances.²²⁰ While this case represents an example of a more flagrant violation of section 2(a) than is ordinarily found, it also demonstrates the need for a continuous enforcement program, rather than for revision or repeal of the price discrimination prohibition as has been suggested by some.²²¹ One aspect of the criticism of the Act which deserves mention is that often such proposals are devoid of supportive empirical data. Until an exhaustive review of the law has been made it would appear that recommendations for change are premature.

An important development relating to Sections 2(d) and 2(e) of the Robinson-Patman Act is the Supreme Court's 1968 decision in *FTC v. Fred Meyer, Inc.*²²² These sections are aimed at advertising allowances or promotional services which are not made available to competing purchasers on proportionally equal terms. They are principally intended to expose covert price discrimination. Hence, they are absolute and do not depend upon a showing of competitive injury for the establishment of a prima facie case of violation.²²³

The *Fred Meyer* decision deals with one of the more difficult aspects of the statute—the issue of who is a “competing customer.” In that case, Fred Meyer operated a chain of supermarkets and many of its purchases were made directly from a supplier (manufacturer) as distinguished from a wholesaler. From some of these suppliers Fred Meyer received promotional allowances which were not available to supermarkets competing with those operated by Fred Meyer because they purchased from wholesalers. The Commission challenged this arrangement and found that Fred Meyer had unlawfully induced

²²⁰ The court noted that “the Commission was warranted in finding the petitioner undertook an all out program, not caring what the effect would be on local competition and, in fact, fully intended to damage its competition.” *Id.* at 619.

²²¹ See Presidential Task Force, (Stigler Report) Report on Productivity and Competition (1969) (BNA Antitrust & Trade Reg. Rep. No. 413, at X-1, X-8 (June 10, 1969)).

²²² 390 U.S. 341 (1968).

²²³ *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 65 (1959).

some of its suppliers to engage in discriminatory sales promotion activities in violation of section 2(f). Fred Meyer advanced the argument that its suppliers could not have violated the "proportionally equal" requirement of the statute because the customers—the wholesalers and Meyer, a retailer—were not in competition with each other. The Commission, in similar situations, had previously sought to establish some nexus, however slight, between those retailers purchasing through a wholesaler and the manufacturer, upon which to predicate a finding of violation.²²⁴

The Supreme Court, in rejecting Fred Meyer's position, stated:

we cannot accept . . . this argument, for it rests on the narrow definition of "customer" which becomes wholly untenable when viewed in light of the central purpose of section 2(d) and the economic realities with which its framers were concerned.²²⁵

Thus, in preference to a technical and restrictive definition of "competing customer," the Court based its holding upon the end result of the practice involved and whether the Act was intended to encompass that result. It was clear that those retailers competing with Fred Meyer and to whom these promotional allowances were not made available were at a decided disadvantage. It is equally clear that the fact that some retailers purchase directly from a manufacturer and others purchase through a wholesaler has no bearing on the issue whether they are in competition with each other since any other interpretation would "frustrate the purpose of section 2(d)."²²⁶

Due to the intricacies of the two sections, the Commission had issued guides for advertising allowances and other merchandising services in 1967.²²⁷ These were revised subsequent to the *Fred Meyer* decision. The guides are intended as a general and practical manual for the businessman in order to assist him in complying with the two sections. In one instance the Commission has also issued a trade regulation rule dealing with promotional allowances in a particular industry in an effort to spell out the law's requirements.²²⁸ The rule marked the first time that the Commission attempted to deal with an antitrust problem by way of a trade regulation rule proceeding.

²²⁴ Cf. *Tri-Valley Packing Ass'n v. FTC*, 329 F.2d 694 (9th Cir. 1964).

²²⁵ 390 U.S. at 349.

²²⁶ *Id.* at 352.

²²⁷ FTC, *Guides for Advertising Allowances and other Merchandising Payments and Services*, 16 C.F.R. § 240 (1969).

²²⁸ FTC, *Discriminatory Practices in the Men's and Boys' Tailored Clothing Industry*, 16 C.F.R. § 412 (1969).

4. Section 5 of the Federal Trade Commission Act

The most significant recent development under Section 5 of the Federal Trade Commission Act is the Supreme Court's decision in *FTC v. Brown Shoe Co.*²²⁹ The proceeding before the Commission charged that Brown Shoe's "Franchise Stores' Program" constituted an unfair method of competition prohibited by section 5. The program involved an agreement between Brown Shoe and its retailers whereby, in return for a variety of valuable services such as architectural plans, merchandising records and other business aids, the retailer would concentrate on selling Brown shoes and not stock competing lines. Brown is the largest shoe manufacturer in the world, and some 650 retailers participated to varying degrees in the program. The Commission found that those retailers participating in the program purchased about 75 percent of their requirements from Brown Shoe, the remaining 25 percent consisting of noncompeting lines. The effect of the program was to foreclose a substantial share of the retailer dealers' market to Brown's competitors, especially the smaller manufacturers.²³⁰

In finding a violation the Commission held that "Brown's operation of the franchise plan constitutes an unfair trade practice violative of Section 5 of the Federal Trade Commission Act."²³¹ The significance of the holding is that it was not accompanied by a finding as to the program's probable effects upon competition, although it did include the fact that the Commission believed that the program's prospective competitive impact had met the standard of illegality under Section 3 of the Clayton Act,²³² the prohibition against exclusive dealing. In upholding the Commission, the Supreme Court stated:

We reject the argument that proof of this section 3 element must be made for . . . our cases hold that the Commission has power under section 5 to arrest trade restraints in their incipency without proof that they amount to an outright violation of section 3 of the Clayton Act or other provisions of the antitrust laws.²³³

This decision is a significant expansion of section 5, because it firmly established the Commission's broad authority to arrest trade restraints in their incipency before they become serious violations of other provisions of the antitrust laws.

²²⁹ *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966).

²³⁰ See *Brown Shoe Co.*, 62 F.T.C. 679 (1963).

²³¹ *Id.* at 717.

²³² 15 U.S.C. § 14 (1964). The Commission also indicated that the practice violated § 7 of the Clayton Act, 15 U.S.C. § 18 (1964). 62 F.T.C. at 717.

²³³ 384 U.S. at 322.

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Another important section 5 case is the Commission's proceeding against a number of antibiotic drug manufacturers for conspiring to secure a patent or unfairly withholding important information from the Patent Office. The first time the proceeding reached the courts, although vacating and remanding the Commission's order, the court ruled on the important procedural issue whether the Commission has jurisdiction over acts and practices arising out of a patent obtained by misrepresentation. In ruling in favor of the Commission, the court stated:

In the present case the Commission has not undertaken to pass upon the validity of the patents in question nor has it held the patents to be invalid. The order recognizes the validity of the . . . patents but compels licensing on what the Commission found to be a reasonable royalty basis. The Commission has not ruled that the act of obtaining the . . . patent by misrepresentation as such constituted a violation of Section 5, but rather that the subsequent use, for purposes of excluding competition, of a patent so obtained, constituted such a violation.²³⁴

After a *de novo* proceeding, the Commission again ordered the respondents to make their antibiotic patents available to other companies on a royalty basis. The order was based on the Commission's conclusion that respondent Pfizer "failed to abide by the standards of candor and good faith in procuring its patent, and that this conduct together with the subsequent exploitation of the . . . patent constituted a violation of Section 5 of the Federal Trade Commission Act."²³⁵ Upon court review the Commission's order was upheld.²³⁶

One further aspect of the case merits comment. Subsequent to the Commission's original 1963 order, although it was vacated and remanded, the prices of the patented goods dropped by almost two-thirds; the Commission's licensing order should stimulate more competition and further price declines.²³⁷

²³⁴ *American Cyanamid Co. v. FTC*, 363 F.2d 757, 769 (6th Cir. 1966).

²³⁵ *American Cyanamid Co.*, 3 Trade Reg. Rep. ¶ 18,077, at 20,519 (FTC 1967).

²³⁶ *Pfizer v. FTC*, 410 F.2d 574 (6th Cir. 1968), cert. denied, 394 U.S. 920 (1969).

²³⁷ The price decline is reported in the Commission's opinion:

Pfizer represents in its brief that bid prices to hospitals have moved downward to levels of less than one-fourth of the 1958 bid prices and the list prices in the prescription market have also fallen. According to this respondent, the price to the retailer of one bottle of 100 capsules (250 mg.), which the record shows was \$30.60 in 1958, is now listed by Cyanamid at \$11.22, and other competitors of Pfizer sell at even lower "effective" prices.

3 Trade Reg. Rep. ¶ 18,077, at 20,521.

B. *Deceptive Practices*

Action against deceptive practices has constituted an important part of the Commission's enforcement efforts. Since 1961 the Commission has manifested increased willingness to reevaluate old principles and try novel approaches to current deceptive practice problems. As shifts in emphasis of public policy have occurred, the Commission has tried to adapt to the changes. The Commission has broadened its enforcement to include areas hitherto thought to be more appropriately the subject of congressional action or action by federal, state or local governmental agencies. The trend has been to analyze specific areas by considering sociological as well as legal factors. The Commission's concern with marketing practices affecting low-income consumers, for example, is a recognition that the problems of low-income consumers may be different from those of more affluent consumers.

The Commission also evidenced a greater willingness to abandon the more traditional case-by-case approach in favor of an industry-wide or specific-problem approach whenever feasible. In fact, merely providing a forum for presentation and clarification of issues without the achievement of any immediate solution has served a useful purpose. Such a forum was provided by the Commission's consumer protection hearings of 1969, focusing on specific problems of low-income consumers.

One of the most persistent deceptive practices relates to the advertising of prices, and it arises in a variety of forms such as fictitious pricing, preticketing, bait-and-switch, and the unavailability of advertised specials. The Commission has attempted to deal with most of these pricing practices by way of guides or a similar enforcement approach. The fictitious pricing problem was reconsidered in the Commission's guides against deceptive pricing issued in 1964.²³⁸ The guides are concerned with former price comparisons, retail prices and comparable value comparison, list prices and other "bargain" advertising. The central issue in such situations revolves around the advertiser's use of two prices—a new and lower sale price compared to a former and high price. Unless the merchandise has previously been sold at the former price, the new or alleged sale price is fictitious and constitutes a deception. Similarly, the use of a manufacturer's list price in such advertisements would constitute a deception if the product is not customarily sold at the price in the trade area involved. Such practices create the appearance of a bargain where none exists. The consumer is materially misled and, in view of the importance of price advertising, competitors may and usually do lose trade.

²³⁸ FTC, Guides Against Deceptive Pricing, 16 C.F.R. § 233 (1969).

The guides provide advice to the businessman as to the circumstances under which this type of advertising would be considered deceptive. They also treat the analogous practice of preticketing a product at an artificially high price to permit the retailer to create the impression of a substantial markdown. The guides, however, are lacking in specificity. For example, in order to establish a bona fide former price for purposes of future price comparisons, the guides merely provide that the product must have been "*offered* to the public on a regular basis for a reasonably substantial period of times . . ."²³⁹ [Emphasis added.] A more realistic test would substitute "*sold*" for "*offered*" as the determining factor for establishing a former price.

Bait-and-switch tactics also became the subject of a guide in 1967.²⁴⁰ The practice is defined by the guide as follows:

Bait advertising is an alluring but insincere offer to sell a product or service which the advertiser in truth does not intend or want to sell. Its purpose is to switch consumers from buying the advertised merchandise, in order to sell something else, usually at a higher price or on a basis more advantageous to the advertiser. The primary aim of bait advertisement is to obtain leads as to persons interested in buying merchandise of the type so advertised.²⁴¹

The unsuspecting consumer frequently does not realize he has been the victim of the practice. Thus, for example, when a customer responds to an advertisement and is shown a product of shoddy quality or poor condition, he often "switches" to a higher priced product without realizing he has been duped. Inasmuch as the Commission has previously relied upon a substantive test to establish a prima facie case by consumer testimony, detection and subsequent proof were difficult. In a recent case, however, the Commission applied an objective test to make out a prima facie case: if a product is advertised on a regular basis and no sales are consummated at the advertised price, but at the same time sales are consummated at higher prices, a strong inference arises that the retailer is engaged in bait-and-switch tactics.²⁴² This test, if upheld, should facilitate Commission proceedings against bait-and-switch tactics considerably. Rather than having to rely on testimony, the Commission need only compare a retailer's advertisement of a product with the corresponding sales record to determine whether the advertisements constitute a bona fide offer to sell the product involved.

²³⁹ Id. § 233.1.

²⁴⁰ FTC, Guides Against Bait Advertising, 16 C.F.R. § 238 (1969).

²⁴¹ Id.

²⁴² New York Jewelers, Inc., No. 8714 (F.T.C., Sept. 29, 1966).

A related problem arose in connection with the Commission's investigation of food retailers. Traditionally, food retailers rely heavily on advertising to attract shoppers and especially on the use of "specials" in such advertisements. The investigation determined that there is a considerable difference as to the availability of advertised specials in stores serving low-income areas and those stores serving high-income areas. In the Washington, D.C. metropolitan area, for example, it was "found that 23 percent of advertised special items were not available in low-income area stores as compared to only 11 percent not available in higher income area stores."²⁴³ In view of the importance of price advertising by food chains, inadequate stock of advertised specials to meet a reasonably calculated demand tends to be misleading. In addition, the consumer who responds to the advertisement only to find the "specials" unavailable is either inconvenienced or must pay higher prices. In order to deal with this problem, which particularly affects low-income consumers, the Commission has initiated a trade regulation rule proceeding.²⁴⁴

If price advertising ranks among the most potent of promotional weapons and it is therefore of utmost importance that it be free from deception, certainly a close second is the use of guarantees in the advertising and promotion of products. Many such guarantees turn out to be meaningless or, at best, severely limited by the fine print. A guarantee is a two-pronged claim in that it not only promises some degree of adjustment if the product fails prematurely, but it also constitutes an implied representation that the product will perform as promised. Thus in addition to assuring performance by the seller for failure of the product, the guarantee serves as an added inducement to buy by insuring product performance.

The many abuses occasioned by guarantee advertising prompted the Commission to issue guides against deceptive advertising of guarantees, which require that whenever a guarantee is used in the promotion of a product or service its terms and conditions and the manner of performance thereunder be clearly spelled out.²⁴⁵ For example, if a purchaser, in order to make a claim under the guarantee, is required to ship the product back to the manufacturer at his own expense, this fact must be clearly disclosed. Similarly, if the guarantee prorates the product's usefulness over a period of time, this fact must be disclosed, as well as any service and handling charges which may be imposed. The guides also recognize the fact that a guarantee may be

²⁴³ FTC, Economic Report on Food Chain Selling Practices in the District of Columbia and San Francisco 5 (1969) (summarized in 3 Trade Reg. Rep. ¶ 10,374).

²⁴⁴ 34 Fed. Reg. 18252 (1969).

²⁴⁵ See 16 C.F.R. § 239 (1969).

a misrepresentation, in which case the guarantor is considered to assume the responsibility for the truth of the representation. An example is the representation "guaranteed to grow hair or money back." Completely aside from the money-back representation, even if true, the guarantee representation cannot be made if the product will not in fact grow hair.²⁴⁶

The fantastic growth and competitive impact of games of chance employed by food and gasoline retailers during the past decade, and numerous consumer complaints concerning their use prompted a Commission investigation of that industry. The results of this investigation are contained in an economic report on the use of games of chance in food and gasoline retailing.²⁴⁷ With respect to the possible deceptive advertising of games, the report states:

Seldom disclosed is the actual number of prizes to be distributed in a specified area over a definite period of time. Nor do such advertisements spell out the breakdown of the number of prizes by various size categories. Our investigation has revealed several instances of apparent deceptive assertions including:

- (1) the advertised number of prizes to be awarded was not in conformity with the number actually programmed;
- (2) the advertised odds of winning were not in conformity with the actual odds; and
- (3) the games user (that is, the grocery chain) continued to advertise that customers could win big prizes although winning slips were no longer available.²⁴⁸

On the average, the programmed cash prize per store visit was calculated to 1.1 cents and the programmed chances of winning any cash prize was 3.4 to 1000 per store visit.

The Commission subsequently attempted to regulate the use of promotional games by promulgating a trade regulation rule.²⁴⁹ It is questionable, however, whether such games can be adequately regulated, and it would probably have been preferable to prohibit the use of games of chance and similar promotional devices outright as an unfair method of competition and deceptive practice. Pursuant to the doctrine laid down in *Keppel*,²⁵⁰ the Commission would have been well

²⁴⁶ 16 C.F.R. § 239.7 (1969). In a related development, the problems created by automobile warranties were examined. FTC, Report on Automobile Warranties (1968) (summarized in 3 Trade Reg. Rep. ¶ 10,377).

²⁴⁷ FTC, Economic Report on the Use of Games of Chance in Food and Gasoline Retailing (1968).

²⁴⁸ *Id.* at 5.

²⁴⁹ 16 C.F.R. § 419 (1969).

²⁵⁰ *FTC v. R.F. Keppel & Bros.*, 291 U.S. 304 (1934). See pp. 749-50 *supra*.

within its authority to do so. As it stands, games of chance will probably be superseded by other hitherto unregulated similar promotional activities. The cost of these promotions, unless absorbed by the user (an unlikely prospect) will ultimately be passed on to the consumer in the form of higher prices.

Two trends in Commission activity regarding deceptive practices have developed. First, the Commission has placed greater emphasis and reliance upon industry-wide enforcement and general fact-finding. In a number of instances, hearings, such as the consumer protection hearings, were held dealing with a wide range of topics. Although such hearings may not necessarily have culminated in definite enforcement action, the approach serves to provide a valuable forum for the presentation of issues and may provide the direction for further inquiry, including enforcement proceedings. An effective industry-wide approach can achieve far more equitable enforcement, at substantial cost savings, than ad hoc adjudication. Moreover, such hearings, when coupled with general fact-finding activities, provide a solid basis for legislative recommendations or trade regulation rules.

The second trend has been an extension of the concept of affirmative disclosure in labeling and advertising. The increased complexity and variety of products in the marketplace require greater knowledge on the part of the consumer. It is no longer enough merely to prohibit false or misleading advertising; what is needed is more informative advertising. Congressional awareness of this fact is evidenced by the passage of the various labeling acts, and the Commission is steadily moving in the same direction by way of requiring affirmative disclosure of material facts.²⁵¹ A fact bearing on the decision to buy or not to buy is material and, hence, even in the absence of outright deception, it may become the subject of an affirmative disclosure requirement.

VI. PROSPECTIVE ISSUES OF THE 1970s

Never in the history of the Commission has it faced a future of so much uncertainty in a number of respects, both as to its mission and as an institution, as it does now. The Commission has been scrutinized, analyzed and criticized. This examination has not been limited to the legal profession but has been joined by economists,²⁵² journal-

²⁵¹ See, e.g., Trade Regulation Rule Proceeding Relating to Case Labeling of Textile Products, 34 Fed. Reg. 17776 (1969).

²⁵² Presidential Task Force, Report on Productivity and Competition (Stigler Report) (1969) (BNA Antitrust & Trade Reg. Rep. No. 413, at X-1, X-3 (June 10, 1969)).

ists,²⁵³ students,²⁵⁴ and by members of the Commission itself.²⁵⁵ Fundamental to these endeavors is the desire to improve the Commission. However, differing degrees of analytical depth have been brought to bear on the problem, and there has been no agreement on why and how such improvement should be accomplished. Some significant issues have been omitted entirely. The diversity of views is, perhaps, the most puzzling part of the recent proposals for improving the Commission.

The current criticism does, however, suggest a number of important issues likely to attract further attention. The first and most important issue is whether the Commission, as an institution, has outlived its usefulness. The issue has been raised by suggestions to abolish not only the Commission²⁵⁶ but all regulatory agencies. To a great extent that suggestion fails to take into account the principal reason for the establishment of the regulatory agencies—regulation. Abolishment proponents often appear to aim at regulation itself rather than the regulatory institution at which they purport to aim. Since it can safely be assumed that the need for regulation will continue, the question then becomes: Who should regulate and how? With respect to the Commission, it could be argued that its law enforcement functions should be transferred to the executive branch of the government, its legislative functions reclaimed by Congress, and that a trade court be established to handle its judicial functions. There is no reason to suspect that the regulation of trade could not be accomplished in that fashion. On the other hand, there is no reason to suspect that it would be an improvement over available methods presently being used. It is a curious phenomenon in the antitrust and trade regulation field that recommendations for limiting, cutting back or abolishing specific legislation or institutions are almost totally devoid of empirical data to support such propositions. The following statement, made 15 years ago, would seem to apply also to present efforts to restructure the enforcement scheme.

The amazing thing about the vociferous new criticism of the antitrust laws is the paucity of evidence it has offered to show that antitrust decisions have actually had or even threatened

²⁵³ L. Kohlmeier, *The Regulators* (1969). See O'Reilly, Book Review, p. 863 *infra*.

²⁵⁴ E. Cox, R. Fellmeth & J. Schulz, *The Consumer and the Federal Trade Commission—A Critique of the Consumer Protection Record of the FTC*, 115 Cong. Rec. E 370 (daily ed. Jan. 22, 1969) (reprinted in the Record at the request of Senator Nelson).

²⁵⁵ Responses to Questionnaires on Citizen Involvement and Responsive Agency Decision Making, Subcomm. on Administrative Practice and Procedure of Sen. Comm. on Judiciary, 91st Cong., 1st Sess. 124 (1969).

²⁵⁶ Cf. ABA Report 118-19 (statement of Richard A. Posner).

to have the awful economic consequences that they predict so freely.²⁵⁷

There is a "paucity of evidence" supporting present proposals challenging the continued usefulness of the regulatory structure. Even aside from the fact that a change will not guarantee improved performance, there is considerable doubt whether the Commission's entire enforcement program is transferable to other governmental units. The enforcement mandate of section 5, declaring unlawful unfair methods of competition is extremely broad in character, and lacks definitional specificity. Enforcement actions under this provision by the executive branch of the government would almost certainly invoke a court challenge for vagueness, which in all likelihood, under present legal principles, would be upheld.²⁵⁸

The remedy for improved regulatory performance does not lie in the abolishment of the regulatory agency as an institution. The reasons for its continued existence are as valid today as they were at the time of their creation. Efforts to obtain greater efficiency of operation and more effective enforcement should be channelled into more detailed analysis of how improvement can be obtained within the present framework.

Another important issue involves the balance between "consumerism" and antitrust enforcement. Efforts by various groups to protect consumers have included proposals that the Commission become more active in this area. The Commission itself has ventured into some previously unexplored areas as evidenced by the housing complaints²⁵⁹ and orders seeking to limit application of the holder in due course doctrine in certain instances.²⁶⁰ It has been recognized that not all consumers have the same problems,²⁶¹ and that the traditional goals of preventing deceptive advertising and labeling practices may not adequately protect some consumers. To others, not even affirmative disclosures and informational labeling affords the desired degree of protection. A more immediate concern, however, is that too great a reliance on direct consumer protection may result in the neglect of antitrust enforcement, by design or accident. The balance between

²⁵⁷ J. Dirlam & A. Kahn, *Fair Competition and the Antitrust Laws* 769 (1954). See also E. Mason, *Economic Concentration and the Monopoly Problem* 389 (1957).

²⁵⁸ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

²⁵⁹ *First Buckingham Community, Inc.*, 3 Trade Reg. Rep. ¶ 18,357 (FTC May 20, 1968).

²⁶⁰ *All-State Indus., Inc.*, 3 Trade Reg. Rep. ¶ 18,740 (FTC April 1, 1969). See also *Household Sewing Mach. Co.*, 3 Trade Reg. Rep. ¶ 18,882 (FTC Aug. 6, 1969).

²⁶¹ See, e.g., FTC, *Economic Report on Installment Credit and Retail Sales Practices of District of Columbia Retailers* (1968). The report examines the difficulties encountered by low-income consumers in the purchase of merchandise.

deceptive practices and restraints of trade which presently exists should not be permitted to be tipped in favor of deceptive practices. If anything, a greater amount of the available enforcement funds should go to antitrust enforcement than is presently the case since that is at the core of "consumerism." The enthusiasm for consumer protection on the labeling and advertising front should not disguise the need for, and importance of, a continuous and vigorous antitrust program. It would be a distinct disservice to the public interest to overemphasize some "consumerism" activities at the expense of antitrust enforcement, since antitrust violations generally result in trade practices, particularly regarding pricing, which force *all* consumers to pay excessive prices for goods and services.