A SUMMARY OF THE STATEMENT OF R. E. FREER, CHAIRMAN OF THE FEDERAL TRADE COMMISSION, BEFORE THE HOUSE COMMITTEE ON INTERSTATE AND FOREIGN COMMERCE IN OPPOSITION TO H.R. 3871, THE O'HARA BILL

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The Federal Trade Commission, a bi-partisan independent, administrative agency, composed of five Commissioners and approximately six hundred lawyers, economists, statisticians, accountants, scientists and clerks, was organized March 15, 1915, under the Federal Trade Commission Act, approved September 26, 1914, and amended by the Wheeler-Lea Act, approved March 21, 1938.

This Act, as amended, makes unlawful and empowers the Commission to prevent by cease and desist order the use of unfair methods of competition and unfair or deceptive acts or practices in commerce. Upon this Act, the Commission has built a formal adversary procedure resembling closely the conventional legal procedure of the Courts. The Commission's actions are solely for the protection of the public interest.

After issuance of a formal complaint, issues are joined and a Trial Examiner, assigned for that purpose, hears the evidence in such parts of the country as may be necessary with due regard for the convenience of the parties and witnesses. All proper parties may be represented by counsel and all fundamental rights such as cross-examination of witnesses, adduction of evidence, objections, exceptions, motions, appeals, and the submission of briefs and oral argument are preserved to the respondents.

The Trial Examiner's recommended decision and the decision of the Commission are required by the Commission's Rules of Practice to be based upon the greater weight of evidence and, if the Commission is of the opinion that the method of competition or the act or practice in question violates the Act, the Commission is required to state its findings as to the facts and to issue an order to cease and desist. The rules of evidence and procedure followed by the Trial Examiners and the Commission are in exact accord with the Administrative Procedure Act. In certain cases, the Federal Trade Commission Act provides for injunctive proceedings by the Commission and for criminal prosecutions and civil penalty suits by the Attorney General in the United States District Courts.

Judicial review of the Commission's findings and orders is provided for in Section 5 (c) of the Federal Trade Commission Act and Section 10 of the Administrative Procedure Act, and may be obtained in the Circuit Court of Appeals within any circuit where the method of competition or the act or practice in question was used or where such respondent resides or carries on business. Such judicial review is based upon the substantial evidence rule which, for all practical purposes, is the same as that developed and followed by Appellate Courts in judicial review of jury verdicts.

In 1925, the Commission inaugurated the Stipulation Procedure for informal settlement of certain of its applications for complaint, which utilizes written agreements to cease and desist the unfair or misleading practices.

In 1926, the Commission established its Trade Practice Conference Procedure which enlists the cooperation of members of an entire industry to bring about voluntary and simultaneous discontinuance of unfair or misleading acts and practices, through establishment of trade practice rules, cataloging and concretely defining the acts or practices which may be harmful to the industry or to the consumer. Proceedings for the establishment of rules may be instituted upon application from members of an industry or upon the Commission's own motion. Rules have been promulgated for over 150 industries and Congress has increased the Commission's appropriations for this purpose. These procedures are not used in certain cases.

The prohibitions of the Act have been held by the Commission and the Courts to include the following practices: (1) combination or conspiracy to fix or control prices; (2) combination or conspiracy between competitors to hamper or obstruct the business of rivals; (3) misbranding, mislabeling, or misrepresenting products as to composition, origin, quality, or source; (4) false and misleading advertising; (5) passing off one's goods as those of another; (6) sale of products by means of lottery or chance devices; (7) concerted refusal to buy where the effect is to suppress competition; (8) monopolization of trade channels; (9) combination and conspiracy to obstruct a competitor's source of supply; (10) white-listing, black-listing, or other forms of concerted boycotting; (11) commercial bribery; (12) threats of litigation not in good faith; (13) false disparagement or misrepresentation concerning a competitor; (14) causing breach of contract between competitor and customers; (15) secret control of a supposed competitor; (16) unfair use of patent rights; and (17) full line forcing.

The O'Hara Bill proposes to deprive the Commission of the power to make findings as to the facts, to decide whether its Act has been violated and to issue orders to cease and desist. The Bill would transfer such power to the United States District Courts, leaving to the Commission only the function of initiating and prosecuting its proceedings in the District Court for the District in which the respondent resides or maintains his or its principal place of business. One District Court Judge would be substituted for the five Commissioners. Civil penalties would be abolished and contempt proceedings in the Courts would be the only remedy.

The O'Hara Bill would emasculate and destroy the effectiveness of the Commission in its stipulation and Trade Practice Conference Procedures. The Commission would be prevented from taking uniform corrective action on an industry-wide basis and would substitute therefor an individual complaint procedure in the Courts. This Bill would put an end to the quasi-judicial powers and functions which the Commission has exercised for over thirty years and under which a large body of administrative law has been established for the guidance of business under the safeguards of judicial review. The whole philosophy of dealing with the increasing complexities of modern Commerce through an agency directly responsible to the legislature and which acts as an agent of the Congress in its constitutional function of regulating commerce among the States would be abandoned.

Deprived of its power to decide cases, the relation between the Commission and its attorneys would be much like that existing between a United

States District Attorney and his assistants. The question would then arise as to why there need be any Commission at all, and why, if it be desirable to put the decision in the hands of a single Judge without specialized experience, it would not be equally desirable to require that all investigation and prosecution be handled only by District Attorneys without specialized experience.

The present Federal Trade Commission Act provides a more complete trial of the facts than the Courts appear able to supply and affords all of the legal protection which the O'Hara Bill offers. This would be true even if crowded court dockets would permit expeditious trials. The increasing quantity of litigation in the United States District Court for the Southern District of New York indicates that, if Commission proceedings are instituted in that Court, there would be a delay of approximately five years before the trials of such proceedings could even begin.

The Commissioners, because of their appointment for limited terms, are presumably more responsive to the will of Congress than Federal Judges who have a constitutional life tenure. The idea that the Commission acts as prosecutor, judge and jury involves the idea that the President may appoint and the Senate may confirm men who mal-administer their trust. There is no reason to believe that the President and the Senate would be more fortunate in their selection of Judges.

In creating the Federal Trade Commission as a single centralized agency, Congress recognized the desirability and necessity for uniformity in the application of the law. If the O'Hara plan is adopted, uniformity would be impaired. The ninety-four separate District and Territorial Courts may render as many differing opinions as there are courts. This Bill could produce the worst possible situation in business relations, if one or more individual companies are deprived of their right to use a certain method of competition, while fifty additional companies of the same industry are permitted, through neglect, delay, or conflicting determinations of the Courts, to continue to use the same competitive method. A business man may find that he is entitled to use one method of competition in one area of the United States, while he is prevented from using the same method in another area. Delay and conflicting decisions of separate Courts could readily result in the ruin of one competitor and the financial gain of another. Consequently, until the Supreme Court has spoken, there would be a state of confusion and uncertainty in the law that would be intolerable and prejudicial to business interests.

The O'Hara Bill, unlike the present Federal Trade Commission Act, contains no provision for quickly and immediately altering, modifying or setting aside orders when required by the public interest or changed conditions of fact or of law. Newly discovered science or improved business techniques may disclose that a prohibited method, act or practice which previously violated the Act is now in accord therewith. In such cases, the Commission can quickly and immediately change its orders to cease and desist, whereas considerable delay would necessarily ensue in similar proceedings in the various separate Courts. Such delays would be prejudicial and harmful to business rivals and would result in unfair competitive advantages and disadvantages.

The Supreme Court has held that the commingling in one agency of quasi-legislative, quasi-judicial and quasi-executive functions is not unconstitutional, that the Federal Trade Commission was created by Congress to carry into effect legislative policies embodied in the statutes in accordance with the legislative standard thereby prescribed and to perform other specified duties as a legislative or as a judicial aid, that it was created with the avowed purpose of lodging the administrative functions committed to it in a body specially competent to deal with them by reason of information, experience and careful study of the business and economic conditions of the industry affected. The commingling of functions in the Commission was considered necessary by the Congress in order to allow the Commission to reach effectively the objective of the basic legislation and the problems toward the solution of which the anti-trust laws are directed.

In the public interest the Commission has exercised jurisdiction over many methods and practices which would not be reached at common law. For instance, in an action of fraud and deceit, reliance on the false representation and injury flowing from such reliance must be shown at common law while the Commission may proceed against the use of false advertising without proving actual deception of any customer, providing the advertisement has an inherent capacity and tendency to deceive.

The argument that the issuance of a complaint by the Commission is a pre-judgment of the case is without merit. The issuance of a complaint indicates only that the Commission has determined that the allegations, if proved, are sufficient as a matter of law. This closely resembles the Judge's task of deciding on demurrer and is analogous to the granting of a temporary restraining order by a Judge who then proceeds to hear the evidence on the question of temporary or permanent injunction. The power of the Commission conferred by Congress to initiate proceedings on its own motion is important to the objectives of the Act. This power represents one of the principal departures from the common law method of dealing with situations which are within the Commission's jurisdiction. This was recognized by the Congress as one of the impelling reasons for the legislation.

A complete answer to the criticisms of the Commission made by the proponents of the O'Hara Bill is implicit in the Administrative Procedure Act, approved June 11, 1946, and its legislative history. This Act dealt comprehensively with the subjects of procedure, the rules of evidence, the separation of prosecuting and deciding functions, and judicial review in proceedings before administrative agencies, including the Federal Trade Commission, on which Congress had in numerous instances conferred remedial powers and commingled functions. The purpose of this Act was to improve the administration of justice by prescribing fair administrative procedure in such agencies. The fact that Congress contented itself in this Act with safeguarding against possible abuses by provisions dealing with these subjects, is itself an approval of the administrative process and an answer to the argument and criticisms made by the proponents of the O'Hara Bill. The procedure, rules of evidence and separation of prosecuting and deciding functions of the Federal Trade Commission, as well as judicial review of its decisions, are in exact accord with the requirements of the Administrative Procedure Act.

There is no irreconcilable conflict between the administrative process and the judicial process. The legislation proposed by the O'Hara Bill is neither necessary nor desirable and the approach of the Administrative Procedure Act is the proper one for those who are not satisfied with the functioning of administrative agencies.