ADDRESS

of

HON. ROBERT E. FREER, VICE CHAIRMAN OF
THE FEDERAL TRADE COMMISSION

on

WHEELER-LEA AMENDMENTS TO THE FEDERAL TRADE
COMMISSION ACT

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It gives me real pleasure to participate in this series of broadcasts dedicated to a clearer understanding on the part of the general public of Federal statutes and the work of Federal agencies which vitally affect consumers and those engaged in business. I have always felt that the success or failure of any law is dependent for the most part upon its administration, and that one way to insure good administration is to cultivate an intelligent understanding of, and an active interest in, the functions and problems of the administrative agencies on the part of the public.

Two weeks ago, in this same series, Mr. Irving Fox of the National Retail Dry Goods Association spoke generally on the work of the Federal Trade Commission. Those of you who listened to that address will already be somewhat familiar with the subject of my talk - which is the Wheeler-Lea Amendment to the Federal Trade Commission Act.

Under the Federal Trade Commission Act, enacted in 1914, the Commission was directed by Congress to prevent unfair methods of competition in interstate commerce. This was a term new to the law, and it was the hope of Congress that its interpretation would not be restricted by the limitations which the Courts had placed upon common law actions for damages brought against those engaged in unfair or monopolistic practices by their injured competitors.

In the twenty-four years of its existence, the Commission has examined hundreds of different types of business practices, many of which it found to be unfair methods of competition. For example, concerns have been ordered to cease and desist from making or carrying out agreements to fix prices or to control channels of trade to the exclusion of competitors. Others have been required to stop making false statements about their competitors or competing products. Numerically, by far the largest number of the Commission's orders have been directed against misrepresentation by manufacturers or distributors of the prices, quality, origin, or characteristics of their merchandise.

In connection with the latter type of case, in 1930 the Commission asked the courts to enforce an order which required a concern, marketing a reducing compound which was dangerous to health, to cease and desist from representing it to be safe and harmless. Both the United States Circuit Court of Appeals and the Supreme Court rejected the Commission's plea for enforcement of its order against this concern. In an opinion which was focused upon the competitors rather than the customers of the seller, the Supreme Court declared:

> "It is impossible to say whether, as a result of respondent's advertisements, any business was diverted, or was likely to be diverted, from others engaged in like trade, or whether competitors, identified or unidentified, were injured in their business, or were likely to be injured, or, indeed, whether any other anti-obesity remedies were sold or offered for sale in competition, or were of such a character as naturally to come into any real competition, with respondent's preparation in the interstate market . . . Something more substantial than that is required as a basis for the exercise of the authority of the Commission."

This decision was an obstacle to the Commission's effort to protect the consumer in those cases where it was difficult to prove that a practice, clearly harmful to the public, injured any legitimate competitor, or where all members of an industry might be engaged in the same type of unfair practice. Indeed, the Court raised, without deciding, a question as to whether Congress intended to protect one knave against the competition of another.

The attention of Congress was called to this situation, and bills were introduced as early as 1935, having for their purpose the broadening of the Federal Trade Commission Act to allow the Commission to protect the public against unfair practices, irrespective of their effect upon competitors. In the last Congress, there was enacted what is known as the Wheeler-Lea Act, amending the Federal Trade Commission Act so as to empower and direct the Commission to prevent not only unfair methods of competition, but also unfair or deceptive acts or practices in commerce. Now the Commission may proceed against acts or practices which are inherently unfair or deceptive without spending time and money in emphasizing their effect upon competitors. Now the consumer can be protected in his own right and not merely as an incident to the protection of the honest businessman.

The question of administration of the Commission's Act having been raised, Congress included in the Wheeler-Lea Act a number of other amendments designed to make the Commission's procedure more effective and expeditious.

The Commission had long proceeded against the false advertisement of food, drugs, curative devices and cosmetics where it could be shown that such advertising amounted to an unfair method of competition. As amended, however, the law expressly forbids such false advertising, and defines a false advertisement of such products specifically to include misrepresentation or deception, not only directly or by implication, but also through failure to reveal material facts. It also empowers the Commission when it

has reason to believe that anyone is engaged in, or is about to engage in, the dissemination of false advertisements relating to such products, to apply to any Federal District or Territorial Court for a temporary injunction to prevent any further advertising of the product until the Commission has had an opportunity, through its regular formal procedure, which includes a fair hearing to all interested parties, to determine whether or not there has been a violation of the law.

Within the last few weeks, the Commission applied for and obtained such an injunction in the Federal District Court at Chicago against an advertiser of a reducing compound which it believed to be dangerous to the health of many users. Although a formal complaint has been served upon this advertiser, several weeks at least must intervene before answer is filed, hearings completed, oral argument held, and a final decision reached by the Commission. But in the interim, the public will have been protected against the possibility of injury from the use of this product which the Commission has reason to believe is dangerous.

Another amendment which likewise applies specifically to food, drugs, curative devices, and cosmetics, makes any false advertisement of these products a misdemeanor, if such advertisement is with intent to defraud or mislead, or if the product may be dangerous to health. The Commission is directed to certify the facts regarding any such violation of the law to the Attorney General for a criminal prosecution, in which imprisonment up to six months and fines up to $5,000 may be imposed by the Court, with second offenders subject to double such penalties.

These amendments make it possible for the Commission to act with speed and severity where a falsely advertised food, drug, curative device, or cosmetic may have serious consequences to health, or where the falsity is intentional.

Another of the important Wheeler-Lea amendments makes all cease and desist orders of the Commission final if not appealed to the United States Circuit Court of Appeals within sixty days. Prior to this amendment, there was no time limit upon appeals, and no Commission order could be regarded as truly final until it had been reviewed and affirmed. In the past, also, no penalty attached to the violation of a Commission order as such, although if the affirming Court had directed the respondent to comply, subsequent violation constituted contempt of court; for which offense penalties might be and were exacted by the courts. Now, however, violation of a Commission order which has become final, either through affirmance by the court or by failure to appeal within 60 days, subjects a respondent to a civil penalty of $5,000 for each offense, recoverable in a suit brought by the Attorney General.

I hope you will not get the impression from this talk that I believe that the Commission, in administering the amended act, will find it necessary to spend most of its time in seeking either criminal prosecutions for intentional frauds or the imposition of civil penalties upon those who violate its orders. Not only have most business men shown a disposition to comply with the Commission's orders, but the Commission will continue to perform under its act and other federal statutes, other duties and functions, too numerous to mention in the time allotted to me tonight.

I want to make it clear, also, in closing, that the Commission is not a regulatory body, except in the very broad sense that its activities are directed toward enforcing laws designed to protect the public by keeping competition clean and free of unlawful restraint, and that I believe the great majority of businessmen applaud these activities from which ethical business derives benefit equally with the public. The Federal Trade Commission Act is one of the anti-trust Acts, and the general policy of those acts is not to manage business, but, in the public interest, to keep the channels of trade clear of monopolistic practices, and to stop in their incipiency all unfair or "below the belt" tactics by which the unethical in business seek unjust enrichment either at the expense of the public or through injury to or ruin of their scrupulous competitors.

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