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INFORMATIVE AND NONDECEPTIVE ADVERTISING

Remarks of

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Government Regulation of Marketing Practices--the general title of your morning's conference session--is business shorthand. It describes our country's efforts through legislation to preserve the economic system of free enterprise that meshes so precisely and pleasantly with our free social and political institutions. It is an obvious but hard truth that if the freedom inherent in any one of them is destroyed, inevitably it will be lost for the others as well. Thus the antitrust laws testify to intuitive recognition and reasoned conviction that open and fair competition is the power plant that propels this capitalistic economy. Regulatory procedures are not ends in themselves but minimal measures designed to assure the integrity of the energy source.

High on the list of legislative targets beginning with the last decade of the Nineteenth Century were certain unfair practices recognized as detrimental to our national welfare which had developed early in the transition from agrarian economy to industrial power. When Congress, as one approach to the problems, created the Federal Trade Commission in 1914, it in effect directed the Commission to eliminate unfair and deceptive methods in commerce. Rather than punitive or advisory, the Commission's role was to be preventive. Sponsors of the legislation visualized the Commission as a powerful potential in helping scrupulous business to stay in the race and to retain its competitive integrity. They sought not only to promote keen competition but to create an atmosphere encouraging evolutionary improvement in business ethics, in relation not only to competitors but also to customers. For the long pull it was believed the interest of consumers and those of the great body of businessmen were closely parallel.

Committed also to the Commission's administration are the Clayton Act of 1914, as amended by the Robinson-Patman Act, of 1936, the Export Trade Act of 1918, and the Wool Products Labeling Act of 1939 which became effective in 1941 and which relates to the disclosure of substitutes and mixtures in wool products. Under the Trade-Mark Act of 1946, other duties regarding cancellation of marks devolve upon the Commission. The fundamental theme of all these Acts is protection of the public and business from unwholesome conditions in commerce. As our job has evolved over a 34-year period, the Commission's work has been directed to eliminating practices which are unfair because either monopolistic or unscrupulous. Such practices are unlawful, as one Supreme Court Justice put it, 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. The Supreme Court, too, in affirming another Commission order to cease and desist proclaimed that the careless and unscrupulous minority of vendors must rise to the standards of the scrupulous and the diligent.

Quantitatively speaking, the greater portion of the Commission's work has involved false and misleading advertising. Cases in this field have ranged from misrepresentation as to the power or capacity of large electric motors to claims made in connection with the sale of tooth picks. Even in this enlightened era, the Commission has found it necessary to disturb a thriving mail order business in crystal balls guaranteed to disclose mysteries of the future. Such matters may include misrepresentation of commodities respecting ingredients, quality, purity, origin, attributes or

properties, or nature of manufacture. Still others involve false and disparaging statements respecting competitor's products in business in some cases under the guise of ostensibly disinterested and specially informed sources or through purported scientific but in fact misleading demonstrations or tests; methods creating the impression that the customer is being offered an opportunity to make purchases under unusually favorable conditions when such is not the case; false representations as to reduction in price and misrepresenting the interest rate or carrying charge on deferred payment; false promises made in obtaining agents or representatives to distribute products respecting guarantees, exclusive territories or overstatements as to earnings or opportunities which the employment may offer.

At the intellectual level there is deep accord as to what constitutes good advertising. Certain principles inherent in good advertising are outside the legal realm. These pertain to avoidance of practices which are offensive or annoying and recognition of advertising's economic responsibility in helping to reduce distribution costs and its responsibility as a social institution in serving the public interest. Along this same line are those involving good taste in relation to inviolable concepts such as the sacredness of religious belief and the dignity of marital relations. Good advertising also aims to inform the consumer and to help him buy more intelligently. Moreover, good advertising not only tells the literal truth but also avoids possible deception through subtle implication or omission. Transgressions in either of these two categories may constitute a violation of law.

Congress refrained from attempting to catalog the practices it deemed unfair and deceptive, fearing that precise definition might result in evasion. Our accord at the intellectual level in condemnation of outright falsity, however, does not prevent differences of opinion arising at the level of application to troublesome borderline situations. Especially is this true where words and sentences literally true may be framed in a confusing setting designed to be misleading. Only two months ago the Supreme Court considered a post office fraud order case in which "paradoxically, the advertisements constituted at the same time models of clarity and of obscurity." It held that although many readers would be capable of piecing together by "intensive and concentrated reading" that the offer referred to an essay contest rather than enrollment in a puzzle project, the manifest attempt to confuse and divert attention would mislead. "People have a right to assume that fraudulent advertising traps will not be laid to ensnare them," the Court decided in upholding the Government's findings as to illegality and repeated its statement in an early Federal Trade Commission case that "laws are made to protect the trusting as well as the suspicious."

No magic formula is available to resolve the implications of loosely worded advertising copy. It is fortunate that the test of unfairness is an elastic one and the Commission's duty is to keep pace with new promotional inventions. It is in part because of these considerations that the Commission traditionally has declined to issue advance opinion or to evaluate or otherwise criticize proposed advertising copy. In part also it is because any other course would have an attendant risk of evolving into some species of censorship.

Here are some other observations respecting phases of our work of deep interest to me. Unanimously condemned in principle are advertisements which deceive by reason of nondisclosure. There is nothing novel in this conviction, and extending far back to the early days of this country was judicial recognition of the doctrine that under certain circumstances mere silence becomes unlawful concealment. The Commission in passing on matters in this field often has decided that previously used articles should be so described in commerce; especially when they have been made over to resemble new articles, such as hats for example; or have been retreaded as in the case of tires, or reconditioned as in the cases of spark plugs and fur garments. The same principle applies in the case of textiles that simulate other fabrics in appearance, such as rayon that cannot be distinguished from silk or wool.

Congress addressed itself to the problem of nondisclosure in connection with the advertising of food, drugs, cosmetics and therapeutic devices when it enacted the Wheeler-Lea Act in 1938. This amendment to the Federal Trade Commission Act affords advertisers in these fields concrete guiding principles. Under its provisions an advertisement is not only false if untruthful and misleading, the Commission is further directed to take into account in determining its truth or falsity, the extent to which the advertising fails to reveal material facts in the light of the representations made or with respect to consequences which may ensue from use of the commodity under usual or customary conditions.

Authoritative guides as to what practices warrant cessation as unfair or deceptive and are made unlawful by the broad and flexible language of the Act to which I have previously referred, are found in the decisions of the Commission and of courts reviewing its orders to cease and desist. Preferences are expressed from time to time for even more certainty of standards and some central or ready reference point. Responsive in great measure to this preference is the trade practice conference procedure established in 1926 to which the Commission in recent years has been giving the great emphasis it deserves. Conferences usually originate upon application of an interested industry segment or group. The prime consideration in determining whether an application will be granted is the possibility for real good in advancing the best interests of the industry and the public. On the other hand, sometimes during the course of investigation of an individual concern on a charge of law violation, the information secured points to the conclusion that similar practices are being followed by competitors of the party originally complained against. In such cases the inquiry may be expanded to industry-wide proportions. Corrective action through formal proceedings in such instances might necessitate a multiplicity of time-consuming separate proceedings. In lieu of this, if such cooperative means appears appropriate in the accomplishment of mass correction and practicable of execution, the trade practice conference procedure generally will be employed.

The conference procedure constitutes machinery within Government under which Government and businessmen can cooperatively evaluate and discuss commercial practices within an industry. The procedure invites industrial statesmanship and affords a forum to those working in the enlightened self-interest of the industry. Because it looks to simultaneous elimination of unfair practices by voluntary and cooperative means rather than by invoking

the mandatory processes of the statutes, this part of our work is of deep interest to me and to my colleagues in the Commission.

When a conference is called by the Commission, all known members of the industry are invited to participate by taking part in the discussions with representatives of the Commission or by submitting proposed rules. There are expressions as to troublesome practices which may prevail in any of the industry's segments. These may bear on consumer or trade differences as to the understanding of trade terms. The application and interpretation of any orders to cease and desist which may have been issued by the Commission against industry members is explored. It can readily be seen that one or more of the subjects may be highly controversial. Occasionally there may come about periods when all is not sweetness and light. Nevertheless, these practices can be intelligently weighed and appraised by reasonable men in frank and open discussion.

The rules as usually promulgated after a conference are divided into two groups. One interprets the meaning of the law applicable to conditions in a particular industry specifying expressly as unfair those practices believed to fall within the statutory proscriptions. The other group expresses further standards of business conduct which are proposed by the industry and accepted by the Commission as desirable. Usually the effectiveness of the rules in the second category depends upon voluntary compliance.

Concerns engaging in practices characterized as unfair in the first group are subject to formal proceedings by the Commission. However, in such case the Commission does not proceed on the basis of violation of the rules, but because the law itself upon which the rules are based has been violated.

One example of trade practice rules designed to aid the consumer is illustrated by those promulgated February 26, 1948, for the Office Machine Marketing Industry, defining such terms as "demonstrator," "factory rebuilt," "rebuilt" and "reconditioned" as applied to typewriters. In this category too are those issued January 26, 1948, for the Watch Case Industry prescribing a certain minimum fineness of alloy or a minimum thickness of rolled plate or electroplate as a condition for nondeceptive use of the word gold. Those for the Household Fabric Dye Industry promulgated May 29, 1947, define such expressions as "all fabric," "all purpose," "fade-proof" and "sun fast" among others. Another example of trade practice conference rules designed to aid the consumer and scrupulous business is illustrated by those promulgated for and accepted by many members of the fur industry. These rules require that the seller disclose the true name of the furs which have been dyed to resemble other fur peltries, together with information as to whether the furs have been tipped or blended if such be the case. They also require disclosure of the facts if the garment is made of pieces, tails, paws, or scraps rather than of full skins. By the development of such rules the honest merchant and the consumer are informed as to the meaning of terms which they use in their dealings with each other. The concern which would seek to benefit from consumer ignorance is put on warning as to what it should not do.

Rules may include expressions respecting practices violative of the Clayton Act as amended which relates, among other things, to price

discriminations and other discriminations, tie-in sales and exclusive dealing contracts. Included too, may be provisions condemning conspiracies and agreements in restraint of trade. Necessarily these are general in treatment and coverage. Insofar as the rules and the conference discussions with staff members may be informative to industry members in interpreting the spirit and basic philosophy of the antimonopoly laws, it is felt they have substantial value. Because, for the most part, conspiracies and monopolistic practices are adopted with the objective of restraining competition, and intricate questions must be resolved in deciding whether the acts have had the adverse effects proscribed in the statutes, these matters peculiarly necessitate determination upon the basis of full trial of the issues and the greater weight of the evidence adduced as to the nature, purpose and effects of the practices. Cessation of such practices and protection for the public against resumption are best assured by the statutory remedies.