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THE FEDERAL TRADE COMMISSION IN 1960--
APOLOGIA PRO VITA NOSTRA

Statement by Earl W. Kintner
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At the 1961 Annual Meeting of
The New York State Bar Association
Section of Antitrust Law
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I.

The antitrust bar has never exhibited any antipathy to untrammelled debate. Sharp, but friendly exchanges on the theory, application and enforcement of the antitrust and trade regulation laws have marked these meetings since their inception. But one basic premise of antitrust has never been a subject of dispute. Antitrust lawyers unite, as do all Americans, in the fundamental belief that our nation's economy is best regulated by the interplay of free market forces.

The rub comes in constructing a methodology that will effectively preserve and extend the benefits of the free market.

If the premise that the antitrust and trade regulation laws are the most effective instruments for preserving and extending the benefits of our free market economy be accepted,

there is still much room for dispute as to the fitting application and proper enforcement of those laws. Today I do not propose to launch an examination of the whole spectrum of viewpoints within the area of dispute. I do propose to relate one man's and one agency's views and to examine the implementation of those views during the past year.

II.

When President Eisenhower appointed me chairman of the Federal Trade Commission a year ago last June, my thinking about the goals which the Commission should pursue and the policies which should guide it was anchored on three concepts. My three basic enforcement concepts were and are: (1) the idea of meaningful compliance as an overriding goal, (2) the need for activism, and (3) a proper regard for due process.

I chose the term meaningful compliance to signify my principal enforcement goal for a number of reasons. First, this term focuses attention, quite properly I think, on industry conditions rather than enforcement techniques. Indeed, to achieve meaningful compliance an enforcement agency with limited resources necessarily must exercise flexibility in the choice of methods. If the desired end is to be achieved there must be a judicious adaptation of methods to circumstances as competitive situations change, and there must be a willingness to exploit multiple approaches

successively and simultaneously as the situation may require.

A second reason for choosing the term meaningful compliance to describe my enforcement goal is that this term is free of the semantic barnacles that encrust the historic terms used to describe enforcement philosophy. Two principal approaches to antitrust enforcement were evolved during the history of the Federal Trade Commission. The first of these was vigorous all-out enforcement through compulsory process. The second was an appeal to industry for self-regulation supported by a government educational program. In the course of time these two approaches acquired labels. The first approach came to be called "hard enforcement" and the second approach was termed "soft enforcement." These positions were thought to be antithetical. Each became encrusted with many confused positions and attitudes.

In the common understanding "hard enforcement" came to be equated with all-out prosecution engendered by suspicion, if not open hostility, toward business motives and practices. In the minds of some, the "hard enforcement" position required that any and every suspected violation must be met with a formal complaint without regard to the magnitude of the offense, the relative degree of public interest, the availability and proper allocation of limited funds and skilled manpower, the propriety of the employment of informal

techniques, or the problems of a given industry. Justly or unjustly, this position came to be equated with a concentration on successful prosecution rather than meaningful compliance. The important thing was to get an order-- an ever-increasing number of orders--without much consideration of the effect of the order. The emphasis on new prosecutions was to be maintained even at the expense of inadequate or non-existent policing of compliance with outstanding orders. This total emphasis on prosecution meant that no advance warnings were to be given to the business community either by way of general education or by way of careful statement of the rationale of positions in formal opinions, lest an advantage be surrendered to an implacable adversary.

The "soft enforcement" position in the course of time acquired equally unfortunate connotations. In the common understanding this position was equated with a benign willingness to allow business conduct to go unregulated. The emphasis on business education was not coupled with any overriding emphasis on thoroughgoing compliance when such compliance required resort to compulsory process.

It seemed to me that each of these historical positions was unsatisfactory. If our goal is to insure the operation of our nation's economy in conformity to the antitrust and trade regulation laws neither position alone is likely to

achieve it. But are the two positions mutually exclusive? I believe not. I am firmly convinced that vigorous enforcement and meaningful business education in the requirements of the laws followed by effective self-regulation are not antithetical. Rather, they are complementary tools for achieving the same goal. Vigorous enforcement alone cannot do the job. The time and resources of the enforcement agency are cruelly limited. A program of business education, without more, cannot do the job, for honest men are likely to succumb to temptation if dishonest men are not deterred.

I concluded that the central concept of my program as chairman of the Federal Trade Commission would be the combination of a vigorous enforcement program with an intensive program of business education. I felt that the Commission should prosecute vigorously and quickly where prosecution was needed, but that it should also encourage self-regulation by honest businessmen at the same time.

The concept of meaningful compliance implies a degree of flexibility in the employment of available techniques and in the timing and emphasis of actions. Since time and resources are limited and since the relative degree of public interest shifts as circumstances change, there must be a careful pre-selection of the areas of greatest impact for any given action. There must be a careful adaptation of technique to situation in order to achieve a state of

compliance in the cheapest and quickest way possible. The minimum effort necessary to correct any given situation must be employed in order to cover the broadest area possible. If a situation will not yield to any of the Commission's traditional techniques, then new techniques must be evolved, and, most important, the focus must be firmly fixed on the goal of meaningful compliance with no method or technique exalted at the expense of that goal.

Passive enforcers can never produce meaningful compliance. Government regulation is a mockery unless the enforcement agency and its personnel actively pursue their statutory mandates. The proper role of government in the economy is that of a referee, not of a player; but this does not mean that the referee should remain supinely idle while one player gouges another and the contest turns into chaos. There must be a vigorous enforcement of the ground rules of competition. A government agency charged with the enforcement of the antitrust and trade regulation laws and the proscription of unfair trade practices must actively use every resource available to it to insure that competition is free and fair.

The third consideration which should guide enforcement activity is a regard for fairness. An administrative agency charged with the enforcement of the antitrust and trade regulation laws must show continuous careful regard for the

procedural requirements which insure fairness in adjudicative proceedings. The Federal Trade Commission's orders are not instruments of punishment. Rather, they are instruments designed to prevent future violations and insure meaningful compliance. No order issued without regard to procedural due process can create a climate of meaningful compliance. Shady conduct by the government breeds shady conduct by others. In a government of laws, fairness must be an end in itself.

Also, the Commission has too long lacked another important dimension in any concept of fairness. Under the current program we have taken some steps to prevent the unfairness that results when a single company is singled out for attention in a whole industry that is rife with violations. With the broad powers entrusted to us by the Congress there is no reason why we should not proceed simultaneously on an industry-wide front where necessary. In the last 18 months we have, in my opinion, made significant progress in avoiding this kind of unfairness, but much remains to be done, and must be done because administration of the antitrust and trade regulation laws can never be made truly effective if this kind of fairness is lacking.

These three basic concepts, then, shape the program for the Federal Trade Commission which I have attempted to follow and on which I have sought and, for the most part, received the agreement of my fellow commissioners.

III.

Careful measurement of available and prospective resources is a necessary predicate for the successful implementation of any program. The primary resource of any government agency is the skill of its personnel. When I assumed the chairmanship of the Commission, I knew that I could profitably devote a great deal of time to a careful inventory of the skills of our professional staff. My survey confirmed that, while our staff had many towers of strength, there were also significant areas of weakness. I realized that intensive effort was needed both to recruit better qualified personnel and to retain competent and capable staff members. No task had a higher priority. The Federal Government cannot now, if ever in the past it could, afford the luxury of mediocre personnel if our form of government is to survive. During my tenure as chairman of the Federal Trade Commission I have devoted much thought and effort to the problems of recruitment, retention, and advancement of qualified personnel. Since most of the professional staff of the Commission are lawyers, I necessarily concentrated on a search for legal talent.

I was determined that my search would not be impeded by the irrelevancies of race, religion, national origin or political affiliation. The things we needed were imagination, professional skill and motivation.

In recent years the Commission has received an average of 600 applications from attorneys annually. But the qualitative level of that great number of applications was far too low. Many of the applications received were from attorneys who were obviously looking upon government only as a safe haven from the vicissitudes of private practice. Every consideration dictated a concerted effort to attract outstanding recent law school graduates.

During my tenure as chairman I have taken direct steps to channel a flow of ever-more qualified applicants for employment to the Commission. Through the development of an Honors Program which permits the offering of a higher salary to outstanding graduates more nearly competitive with their opportunities elsewhere, through correspondence with deans of law schools and professors of administrative and antitrust law, through the development of a selective Summer Intern Program with resultant contacts on the student level at law schools throughout the nation, and through bolstering public awareness of the Commission and its mission at every opportunity, I have endeavored to establish an atmosphere in which outstanding graduates of the nation's law schools will seek

with pride a position on our staff. This effort has already borne fruit. The Commission secured a promising group of 1960 honor graduates last June, and we enjoyed the services of ten outstanding second year law students during the past summer. In the current academic year this effort has resulted in the receipt of more than 100 applications from third year law students in the upper quarter of their classes. Realizing that in order to compete for these men and women of superior training and demonstrated intellectual ability we must offer them firm pledges of employment while they are still in school, we have been making definite employment commitments since before Christmas to candidates which we feel that the Trade Commission cannot afford to lose. We have made about 30 firm offers and are making more every day as interviews and evaluation of written recommendations for applicants are completed. At the Federal Trade Commission in the past year a foundation has been laid for vastly more effective staff improvement in the years to come. I believe that if the administrative agencies generally are to be improved, recruitment programs of the same general nature must be undertaken by each of them.

The regeneration of agency personnel policy must not be limited to the recruitment of new personnel. The enthusiasm and imagination of veteran staff members, often dormant or repressed, must be kindled. Advancement for the meritorious

must be sure and swift, and quiet harbors must be found for those who are exhausted or incompetent.

The administrative agencies must make an unremitting re-assessment of roles and functions if delay and inefficiency is to be avoided. In this connection the Federal Trade Commission is now conducting a promising experiment. For some time we have been troubled by the vast amount of work that the hearing examiners must perform with little or no assistance. Any meaningful assistance which could be given to the examiners would obviously make a large contribution toward the reduction of delay. Therefore, we recently hired two law clerks for hearing examiners on a temporary basis. One is a business specialist who is a member of the bar; the other is a second year law student. These young men perform the traditional law clerk duties of indexing and cataloguing exhibits and testimony, the preparation of tabulations, the checking of citations and record references, and the preparation of memoranda of law. The employment of these clerks closely parallels the duties of law clerks to judges sitting in courts of first instance. The Division of Hearing Examiners exercises sole authority over these clerks and therefore no possibility of conflicting functions and loyalties can arise. Nor can there be any valid claim that these clerks might usurp the function of decision. This nation has had long experience with law clerks for judges and a valid claim

of usurpation has yet to be demonstrated. We can be sure that a hearing examiner endowed with integrity would no more surrender his functions than would a judge. Parenthetically, I was told recently of a speech by an eminent practitioner charging that judges in a certain state allowed their clerks to prepare their decisions. The charge lost some of its impact when it was found that the practitioner's speech had been prepared by his junior.

The Federal Trade Commission hearing examiners have been enthusiastic about the experiment. In my judgment, clerks for hearing examiners should be established on a continuing basis. I enthusiastically recommend this system to the other administrative agencies. At the Federal Trade Commission I think that further improvements can be made in the clerkship system by both hearing examiners and the Commission. You will remember Judge Wyzanski's imaginative use of an economist as a "law clerk" in the United Shoe Machinery case. Recently I have had occasion to use this technique myself by utilizing the services of a lawyer-economist in analysis of a complicated case record. I am convinced that there is a real need for the employment of economists, statisticians and accountants in this manner in complex antimonopoly cases.

In the final analysis a government of laws is not an effective government unless its laws are administered by effective men. Recently Dean James Landis has had occasion to comment at length on the crying need of the administrative

agencies for effective personnel. I support Mr. Landis' views on this subject completely, and I earnestly hope that the new Administration will implement them without favor or reservation.

Parenthetically, I must note my respectful disagreement with Mr. Landis on certain other of his recommendations. On any transfer of antitrust functions from the Commission to the Department of Justice my views are well known and later may be expressed in detail before Committees of the Congress if my comments are invited. I support wholeheartedly the position taken on this question by the Attorney General's National Committee to Study the Antitrust Laws, of which our section Chairman, Breck McAllister, was a distinguished member. The Conference Subcommittee on Concurrent Jurisdiction headed by Curtis Williams and Jerrold Van Cise made an admirably thorough study of the work of the enforcement agencies. Nothing has occurred in the time since that Conference's Final Report was adopted that leads me to question the soundness of the Conference's position. I believe that the same considerations that suggest a positive value in some areas of concurrent responsibility between the Federal Trade Commission and the Food and Drug Administration^{1/} apply with equal force to the maintenance

1/ See Kintner, Federal Trade Commission Regulation of Food, Drug and Cosmetic Advertising, 16 Bus. Law. 81 (1960).

of an area of concurrent responsibility between the Federal Trade Commission and the Antitrust Division of the Department of Justice.

On the other hand, Mr. Landis' views on the selection of agency members and his brief for the centralization of executive and administrative responsibility in the agency chairman strike most responsive chords with me. I am firmly convinced that the transfer in 1950 of central administrative and executive responsibility from the Federal Trade Commission to its chairman has made possible to a substantial degree the improvements in efficiency and effectiveness demonstrated during recent years at this Commission.

IV.

Statistics can be inaccurate measurements of an agency's effectiveness, but, if checked against other measurements, they can vividly and truthfully portray marked trends. The statistics of Federal Trade Commission performance in calendar 1960 do just this. The totals of 560 complaints and 410 orders issued exceed those of all other years in the Commission's 46-year history. The previous record year of 1959 was exceeded by 52 per cent in complaints issued and by 36 per cent in orders. Most significant is the fact that the largest percentage gain was in actions to halt antitrust violations. In this area the 202 formal complaints issued

more than doubled the previous record number of 99 in 1959 and more than tripled the 56 complaints issued in 1958. These increases were achieved with a staff only 8-1/2 per cent larger than in 1959. Thirteen new complaints charging violations of Section 7 of the Clayton Act were issued in 1960 compared to 3 in 1959, and the Commission issued orders of divestiture to 6 corporations compared to 1 the year before.

The Robinson-Patman Act has been belabored before this group by speakers too numerous to count. The controversy surrounding that Act does not appear to diminish with time. However, as I sought to develop my enforcement program I was struck by one startling fact: despite a wealth of comment and numerous glosses upon the Act, it had never had a real test of effectiveness! I had taken an oath to enforce that Act and I was determined that it would have its test. To this end, with the concurrence of the Commission, I appointed a Robinson-Patman Task Force to seek ways in which to bolster our enforcement effort. Its recommendation for the employment of the Section 6(b) special report power in legal investigations prior to complaint presaged the employment in this area of an effective enforcement tool long allowed to rust. Its recommendation for the issuance of guides for compliance with Sections 2(d) and 2(e) of the Act added a completely new dimension to our total effort.

The subsequent issuance of those guides and their reception demonstrated that we could secure meaningful compliance in a selected antitrust area rife with violations by combining vigorous enforcement with effective business education. This we have done. One hundred and seventy Robinson-Patman complaints were issued in 1960 compared to a total of 80 in 1959 and 54 in 1958. The number of 1960 orders was 58 compared to 45 in 1959. The investigation of the Florida Fresh Fruit Industry employing the Section 6(b) special report power produced startling results. Within 6 months after the reports were received, 47 complaints were directed against shippers of fruit and 21 against buyers. The range and speed of this investigation amply demonstrates the effectiveness of legal investigation by special report and amply justifies its continued and expanded use. The citrus industry investigation also demonstrated that the Section 6(b) power can make an important contribution to due process in the larger sense. A quick and thorough industry-wide investigation can not only halt illegal practices quickly on a broad scale, but can also avoid the unfairness that results from singling out a few to make immediate payment for the sins of many.

The public response to the issuance of the guides on 2(d) and 2(e) was equally gratifying to one who believes in the flexible exploitation of every resource available to the Commission. During calendar 1960 requests for over 40,000 copies of these guides were received, and the demand has yet

to slacken. Many trade publications reproduced them. The unprecedented use of guides for compliance with one of the antitrust laws signifies that there is a wide demand for business education in this area. I believe that the Commission should increase its educational contribution in this area. Toward the end of the year I devised and issued informal guides for compliance with Section 2(c) in my personal capacity. These guides had not been considered by the Commission, but I felt the need for further experimentation in this area and wished to provide a stimulus for public study and comment. Parenthetically, I also believe that the bar can make a significant contribution toward compliance with the antitrust laws through business education. I hope that all of you will consider the possibility of a personal contribution in this area.

The record volume of complaints and orders issued by the Commission in 1960 was undergirded by significant increases in the work of the Commission's compliance staff. A record number of 18 civil penalty suits were filed against alleged violators of outstanding orders during the year.

During the calendar year the Compliance Division undertook two full-scale field investigations of industry-wide price fixing. In one of these investigations the Compliance Division surveyed the pricing practices of more than 70 manufacturers

of steel who were subject to the Commission's cease and desist order issued in 1951 in the case of American Iron and Steel Institute.^{2/} Compliance attorneys conducted field investigations in several states and documentary evidence was obtained from dealers, government purchasing agents and other purchasers. During the calendar year the staff also surveyed compliance with the Commission's order in the Cement Institute case.^{3/} In both of these industry-wide cases all information which has been obtained during the past year is now being analyzed to determine whether violations of these orders have occurred.

In the enforcement of Clayton Act orders, a criminal contempt fine of \$2,000 was imposed upon Whitney & Company for violation of a decree commanding obedience to a Commission order to cease and desist from violating Section 2(c).^{4/}

The signal achievements on all fronts made during the past year do not represent the maximum range of Commission effort. The Commission is not yet moving at flank speed. However, the momentum achieved during the past year can carry the Commission to new heights of effectiveness if the current momentum is not allowed to dissipate. Enlightened, imaginative and energetic leadership will be necessary to prevent dissipation.

^{2/} 48 F.T.C. 123 (1951).

^{3/} 37 F.T.C. 87 (1943), aff'd, 333 U.S. 683 (1948).

^{4/} In Re Whitney & Co., 273 F.2d 211 (9th Cir. 1960).

V.

Flexibility and inventiveness marked the implementation of the Commission's program in 1960. A number of significant court decisions, Commission opinions and complaints brought new light, or the promise of it, in some shadowy areas of the law. These cases deserve examination.

Before an examination is launched however, it is proper to note the continuation of the Appellate Division's marked success in defending the Commission's orders from attack in the courts. The skill and determination of this small staff of lawyers deserves hearty commendation.

Developments in Robinson-Patman Act Enforcement

By far the most significant development in the enforcement of Section 2(a) was the decision of the Supreme Court in the Anheuser-Busch case.^{5/} The Court unanimously ruled that the terms "price differences" and "price discriminations" are synonymous. Chief Justice Warren, speaking for the Court, held that price differences are unlawful price discriminations where injurious to competition, notwithstanding that the customers paying the different prices are not in competition with each other. The Court summarily refused to sustain the decision of the 7th Circuit which would have limited the application of Section 2(a) to cases where competitive injury to competing buyers was demonstrated. The case was remanded

^{5/} Federal Trade Commission v. Anheuser-Busch, Inc., 363 U.S. 536 (1960).

to the 7th Circuit for resolution of the issues not passed upon by the High Court.

One of the most interesting 2(a) cases considered by the Commission was a consent settlement. In General National Gas Co. (D. 7782, June 30, 1960) the settlement agreement did not contain the customary provision to the effect that the agreement does not constitute an admission of violation of law. Because of the apparent character of the violations in question and because the evidence of violations appeared so overwhelming, it was deemed inappropriate to permit respondents to have the benefit of language which left some doubt, at least, that they in fact had engaged in illegal conduct. Orders were issued in several other interesting and important 2(a) cases, including Cutter Laboratories (D. 7840, October 7, 1960) and Albert Ehlers, Inc. (D. 7663, April 27, 1960).

A Commission hearing examiner grappled with an interesting commerce question in National Dairy Products Corp. (D. 7018, January 18, 1960). In this complaint it was alleged that sales at differing prices made to competing customers within the same state violated Section 2(a). The complaint also contained a similar 2(d) charge. In ruling upon a motion to dismiss at the close of the Commission's case, the examiner held that Counsel Supporting the Complaint had satisfied the statutory interstate commerce requirements, first on a flow of commerce theory and second, because respondent's overall

business was carried on in such a manner as to include many instances of shipping products across state lines. The examiner refused to take a fragmentary view of respondent's business, holding that its operations should be considered as one integrated operation, interstate in character.

Two Section 2(a) complaints issued during 1960 are also interesting because of their commerce features. In Southern Bakeries Co. (D. 7881) and American Bakeries Co. (D. 8120) the respondents are large interstate bakers of bread with customers in several states. Since bread is perishable and bulky it cannot be feasibly transported long distances. For this reason much of the bread consumed in this nation never crosses state lines. The theory of these complaints is that by reason of a web of factors, including interstate customer contacts (negotiations, settling of accounts, etc.) plus interstate intramural contacts (for instance, control by central offices over bakery operations, prescription of prices, establishment of production standards, the performance of centralized purchasing and hiring of more important personnel, and the collection and disbursement of funds taken in by the bakeries) practically every sale of bread becomes a sale in commerce, even though there is no interstate movement of the product. These cases are also significant because injury to users of the product (restaurants) as well as injury to re-sellers (grocery stores) is alleged. Of course, the facts remain to be determined by final decision of the Commission.

A number of other significant 2(a) complaints were issued in calendar 1960. Among these were Purolator Products, Inc. (D. 7850). This case may produce significant future refinements of the law dealing with the right of a respondent to base a defense of a 2(a) charge on evidence of its buyer's costs. Although prior cases have made it reasonably clear that the buyer's costs cannot be used to form a cost justification defense, this case poses the question whether the buyer's costs can be used to show a lack of competitive injury.

The complaints in Logan-Long Co. (D. 7906), Celotex Corp. (D. 7907) and Lloyd A. Fry Roofing Co. (D. 7908) combine charges of territorial price discrimination against the nation's largest asphalt roofing manufacturer and two other large companies in the industry with charges of selling below cost or at unreasonably low prices with the actual or potential effect of unlawfully suppressing competition in violation of Section 5 of the Federal Trade Commission Act.

Chemway Corp. (D. 7815) furnishes an example of the speed that the Commission staff can attain under expediting procedures. In this matter the complaint was prepared in the Chicago Field Office by a Bureau of Litigation attorney with the cooperation of the attorney-examiner assigned to the investigation. As a result, the normal attorney-examiner's final report, branch chief's review and project attorney's review were obviated. This procedure saved an estimated

6 months in the preparation of the case and, equally as important, enabled Counsel Supporting the Complaint to discuss the details with the investigator while the facts were still fresh in the investigator's memory, thus eliminating the need for prolonged correspondence or re-investigation to determine precise details essential to the formal proceeding. Both sides concluded the presentation of their evidence within 7 months of the issuance of the complaint.

Section 2(c)

The Supreme Court decision in the Broch^{6/} case was the most significant addition to the law of Section 2(c) in 1960. The Court held that it was illegal for a representative of a seller to agree to a reduction in his percentage commission payments for the purpose of enabling a seller to make a sale to a customer at a lower price.

Perhaps the most significant 2(c) case decided by the Commission during 1960 was Venus Foods (D. 7212, October 28, 1960). In this case the Commission passed for the first time upon the defense that the discount allowed by the seller to the buyer on the buyer's purchases was a functional discount for warehousing, handling and freight-out^{7/} and not a discount in lieu of brokerage. The hearing examiner rejected this defense. The Commission, in affirming the decision of the

6/ Federal Trade Commission v. Henry Broch & Co., 363 U.S. 166 (1960).

7/ "Freight-out" refers to the buyer's cost of delivering goods from its warehouse to the distributor.

examiner, did not rule out bona fide functional discounts based on services rendered at the different levels of distribution. It held, in effect, that the facts in each case must determine whether the discount was a bona fide functional discount or was a discount in lieu of brokerage.

The single most significant new enforcement action in the 2(c) area in the past year was the 48 complaints issued against sellers of fresh citrus fruit. These complaints were premised upon the Section 6 investigation in that area. If this industry-wide approach should prove successful, and there is every indication that it will, then the Robinson-Patman Act will receive the thoroughgoing test of its effectiveness that has long been lacking.

Sections 2(d) and 2(e)

By any measure, the most important development in the 2(d) and 2(e) area has been the coordinated industry-wide attack upon the knowing inducement of discriminatory promotional allowances or services as violations of Section 5 of the Federal Trade Commission Act coupled with the traditional attack upon the tender of discriminatory allowances or services under Sections 2(d) and 2(e).

In Grand Union Co. (D. 6973, August 12, 1960) the Commission for the first time held that a buyer's knowing inducement of discriminatory advertising allowances prohibited by Section 2(d) constitutes an unfair trade practice proscribed by Section 5 of the Federal Trade Commission Act. The obverse

of Grand Union is illustrated by Swanee Paper Corp. (D. 6972, March 22, 1960). This 2(d) case is important for another reason as well. The Commission's opinion establishes that, when a seller grants discriminatory benefits, the intervention of a third party intermediary between the seller and the favored buyer does not defeat the application of the statute. The principle of Grand Union was applied in American News Co. (D. 7396, January 10, 1961). American and its wholly owned subsidiary, the Union News Company, were ordered to cease and desist from knowingly inducing illegal allowances from publishers and distributors of magazines, comics and paperback books. The Commission had previously accepted consent agreements with 28 publishers and distributors^{8/} who had been charged with violating Section 2(d) in making

8/ D. 7384--Select Magazines, Inc. and the following publisher-owners: McCall Corp.; The Popular Science Publishing Co., Inc.; The Reader's Digest Assn., Inc.; Meredith Publishing Co.; Street & Smith Publications, Inc.; and Time, Inc.; D. 7385--The Curtis Publishing Co. and two wholly-owned subsidiaries: Curtis Circulation Co., and The American Home Magazine Corp.; D. 7386--Cowles Magazines, Inc.; D. 7387--Esquire, Inc.; D. 7388--New Yorker Magazine, Inc.; D. 7389--Newsweek, Inc.; D. 7390--United States News Publishing Corp.; D. 7391--The Hearst Corp.; D. 7392--MacFadden Publications, Inc.; D. 7393--Fawcett Publications, Inc.; D. 7394--Triangle Publications, Inc.; D. 7611--The New American Library of World Literature, Inc. and its national distributor, Independent News Co.; D. 7612--Dell Publishing Co., Inc.; D. 7613--Bantam Books, Inc.; D. 7614--National Comics Publications, Inc. and a subsidiary, Independent News Co.; D. 7615--Pocket Books, Inc., and a subsidiary, Affiliated Publishers, Inc.

payment to American and Union. The books and periodicals published or distributed by these respondents include virtually every nationally distributed popular magazine. These orders became effective at the same time as the American News Co. order. By this combined approach the Commission has quickly and effectively moved against an illegal practice that was industry-wide. During the past year the Commission has used this technique of proceeding simultaneously against both the donor and the recipient of illegal merchandising allowances or services in a number of industries, including groceries,^{9/} pipe and plumbing fixtures^{10/} and toys.^{11/}

9/ In a complaint issued April 19, 1960, Benner Tea Company was charged with inducing Section 2(d) violations (D. 7866). The following suppliers of Benner Tea were charged with violation of Section 2(d): Penick & Ford, Ltd., Inc. (D. 8118); Midwest Biscuit Co. (D. 7868); Kerr Glass Manufacturing Corp. (D. 8096); The Herst-Allen Co. (D. 7867); Dennis Chicken Products Co., Inc. (D. 8091); Chun King Sales, Inc. (D. 8093); Ball Brothers Co., Inc. (D. 8092); J. A. Folger & Co. (D. 8094); S. C. Johnson & Son., Inc. (D. 8177); Michigan Fruit Cannery, Inc. (D. 8095); Paxton and Gallagher Co. (D. 8176); The Quaker Oats Co. (D. 8119) and the Aluminum Company of America (D. 8175).

A similar pattern was displayed in a Section 5 charge against J. Weingarten, Inc., a southwestern food chain and eight of its suppliers. These suppliers included Ipswich Hosiery Co., Nestle Lemur Co., Lanolin Plus, Max Factor, Inc., Shulton, Inc., Shreveport Macaroni Co. and Yakima Fruit & Cold Storage Co. (Dockets 7715-7722).

10/ American Radiator and Standard Sanitary Corp. was charged with violating Section 5 by inducing illegal allowances (D. 7835). Grantors of allowances were charged with violating Section 2(d): Anniston Foundry Co. (D. 8031); Nibco, Inc. (D. 8074); Tyler Pipe & Foundry Co. (D. 8123); Grabler Manufacturing Co., Inc. (D. 7838) and Bridgeport Brass Co., Inc. (D. 7842).

11/ Six toy wholesaler buying groups and their wholesaler members were charged with violation of Section 5: Santa's

In Exquisite Form Brassiere, Inc. (D. 6966), a case involving alleged violation of both 2(d) and 2(e), the Commission reaffirmed its holding that the 2(b) defense is available under 2(e) but not under 2(d). This is the first case involving violations of both sections in which the availability of the 2(b) defense was raised. The respondent has filed a petition for review of the Commission's decision.

In a series of cases charging violations of Section 2(d) by suppliers of printing and photo-mechanical equipment the Commission for the first time issued orders premised upon the

11/ (Cont'd from p. 26)

Official Toy Preview, Inc. (D. 8231); Santa's Playthings, Inc. (D. 8259); Billy & Ruth Promotion, Inc. (D. 8240); United Variety Wholesalers (D. 8255); Individual Catalogues, Inc. (D. 7971) and ATD Catalogs, Inc. (D. 8100).

Twenty-seven toy manufacturers were charged with participation in one or more of those programs: Ideal Toy Corp. (D. 7979); Emenee Industries, Inc. (D. 7974); Transogram Co., Inc. (D. 7978); Parker Brothers, Inc. (D. 7976); Bilnor Corp. (D. 7975); American Machine & Foundry Co. (D. 7977); Wolverine Supply and Manufacturing Co. (D. 7972); Knickerbocker Toy Co., Inc. (D. 8101); Alexander Miner Sales Corp. (D. 8102); Remco Industries, Inc. (D. 8103); A. C. Gilbert Co. (D. 8104); Revell, Inc. (D. 8224); Aurora Plastics Corp. (D. 8225); Kohner Bros., Inc. (D. 8226); Mattel, Inc. (D. 8227); The Porter Chemical Co. (D. 8228); Multiple Products Co. (D. 8229); Kalsam Products Co. (D. 8230); Horsman Dolls, Inc. (D. 8241); Tonka Toys, Inc. (D. 8242); Fisher-Price Toys, Inc. (D. 8243); Radio Steel & Mfg. Co. (D. 8244); Wen-Mac Corp. (D. 8245); The Hubley Manufacturing Co. (D. 8254); Milton Bradley Co. (D. 8256); Hamilton Steel Products, Inc. (D. 8257) and Hassenfeld Bros., Inc. (D. 8258).

doctrine of State Wholesale Grocers v. Great A. & P. Tea Co., 258 F.2d 831 (7th Cir. 1958). These suppliers had purchased advertising for their products in a publication controlled by a favored customer and thus had violated Section 2(d). Anchor Chemical Co. (D. 7701, April 28, 1960); Wetter Numbering Machine Co. (D. 7700, May 10, 1960); Lanstor Industries, Inc. (D. 7699, June 1, 1960); Craftsman Line-Up Table Co. (D. 7847, September 7, 1960). A similar complaint against Nu Arc Co., Inc. (D. 7848) is now being heard.

Section 2(f)

In 1960 the United States Court of Appeals for the Second Circuit granted the first judicial approval of a Commission order against buyers under Section 2(f) since the 1953 Supreme Court Decision in Automatic Canteen Co.^{12/} The American Motor Specialties decision^{13/} graphically illustrates that Section 2(f) is not a "dead letter" as many commentators categorically prophesied after the Automatic Canteen decision.

In Alhambra Motor Parts (D. 6887, June 22, 1960), the Commission extended the holdings of earlier automotive parts buying group cases by holding that notwithstanding any actual warehousing of merchandise in a central warehouse owned by the

^{12/} Automatic Canteen Co. v. Federal Trade Commission, 346 U.S. 61 (1953).

^{13/} American Motor Specialties, Inc. v. Federal Trade Commission, 298 F.2d 225 (2d Cir. 1960), cert. denied, 364 U.S. 884 (1960).

buying group, the jobber members of the group are not entitled to receive any warehouse fees or discounts from sellers on the purchase price of warehouse merchandise. The respondents have appealed from this decision to the United States Court of Appeals for the Ninth Circuit.

In August, the Commission issued complaints against Sears Roebuck & Co. (D. 8069) and Universal-Rundel Corp. (D. 8070). These cases arose out of a single investigation involving allegation of the grant of discriminatory prices by Rundel to Sears on bathroom and other plumbing fixtures. The complaint against Universal-Rundel charges a violation of 2(a). The complaint against Sears charges a violation of 2(f). It appears that Sears owns a majority of the stock of Rundel which presents a rather unusual situation in price discrimination matters.

Robinson-Patman Enforcement Problems--And Some Possible Solutions

What will be the future of Robinson-Patman enforcement? An examination of the present program and past record of the Commission suggests one problem which will have to be faced. In fiscal years 1948 through 1953, the Commission issued a total of 120 complaints against Robinson-Patman violations for an average of 20 complaints per year. In fiscal years 1958, 1959, and 1960, the Commission issued 64 complaints, 66 complaints and 130 complaints, an average of 86 complaints per year. The 130 Robinson-Patman complaints

issued in fiscal year 1960 were 10 more than the total issued in the 6 years 1948-1953. During calendar year 1960, the Commission issued more complaints (170) than the total number issued in fiscal years 1945 through 1953 (164). I cite these statistics today not for the purpose of crowing over the recent record, although I am proud of the increased workload which the Commission and its staff have absorbed in recent years with only small increases in personnel, but for the purpose of suggesting to you some questions about where Robinson-Patman enforcement may be going and may have to go.

The Commission now has pending more pre-complaint investigations (487) than the number of orders issued under Section 2 since its amendment in 1936 (473). In January 1958, we had pending 235 investigations of alleged or suspected violations of Section 2 of the Clayton Act. In January 1959, there were 241 such pending investigations. In January 1960, there were 259 such pending investigations. During 1960, as I have mentioned, the Commission issued 170 complaints, more than twice the number issued during the previous calendar year (80). During 1960, the Commission issued orders for compliance with Sections 2(d) and 2(e), the first of their kind in the Commission's history. As a result of these enforcement and educational activities of the Commission, a greater awareness of the requirements of Section 2 of the Clayton Act has developed in the business community and more

violations are being reported to the Commission, even though actual violations may be declining. During 1960, the number of pre-complaint investigations pending from month to month rose from 259 in January to 400 on the first of May and reached 500 at the end of June, a level which has been roughly maintained in the 6 months following.

These statistics suggest to me the necessity of alternative or supplementary informal administrative techniques for achieving compliance with the Robinson-Patman Act without delay. Unfortunately, at the present time, the Commission's Rules provide for no alternative to complaint and order proceedings for Robinson-Patman violations. The Commission now has no technique whatever for securing an immediate end to Robinson-Patman violations even if the violator, with a minimum of encouragement, might be willing to cease and desist. Too often, the formal enforcement proceedings contribute to an adversary atmosphere which may, in some situations, tend to perpetuate the very practices we seek to stop.

I believe that education and self-regulation offers the real frontier area in antitrust and trade regulation. There is a growing awareness of this among trade association and corporate executives. Unfortunately in the recent past, ignorance of basic legal responsibilities has been widespread among American businessmen, but our efforts in recent years

have made an effective dent on this ignorance and indifference. The need for new techniques to deal with Robinson-Patman violations will become more apparent as time goes on.

No matter how often the basic premise may be stated that Commission orders look only to the future and are not punitive, the notion dies hard in some quarters that one must be "tough" on violators and the way to be so is to proceed against them formally. I do not accept this view. The purpose of Commission proceedings should be to prevent further violations as quickly as possible, and wherever the opportunity presents itself to prevent violations without formal proceedings, this opportunity should be seized. This is not to say that we should take the uncertified assurance of anyone that he will abide by the law in the future even though history shows that he has not done so in the past. I am merely trying to suggest the necessity and the value of imaginative thinking about alternatives to the Commission's present one and only habit-hardened method.

Were the Commission to develop some satisfactory informal technique for effective disposition of Robinson-Patman violations, it might make some progress toward achieving the following goals:

1. Bringing an end to the objectionable practice immediately;

2. Saving investigative time and manpower for really tough targets;
3. Clearing up the litigation docket by concentrating on matters where litigation is most necessary;
4. Dealing quickly and sensibly with complaints from competitors;
5. Clearing up simultaneously illegal practices of a number of competitors in one industry; and
6. Permitting intelligent management of the staff's investigation and litigation workload.

The Commission's present statement of policy on stipulations to cease and desist provides that "In order to avoid the expense and time involved in formal legal proceedings, it is the policy of the Commission to afford individuals, partnerships and corporations who have engaged in unlawful acts and practices an opportunity to enter into voluntary agreements to cease and desist therefrom, when it appears to the Commission that such procedure fully safeguards the public interest." Such opportunity is not afforded "when the alleged violation of law involves false advertising of food, drugs, devices or cosmetics which are inherently dangerous, the sale of fabrics and wearing apparel which are so highly flammable as to be dangerous, or the suppression or restraint of competition through conspiracy or discriminatory or monopolistic practices." The Commission

reserves the right in all cases to withhold the privilege of disposition by voluntary agreement.

Stipulations are thus not used to dispose of Robinson-Patman violations. There appear to me to be at least four reasons why this is so:

1. A desire to be "tough" on antitrust violators;
2. Since Section 11 of the Clayton Act provides that the Commission "shall issue" a complaint whenever it has reason to believe that any person is violating the Act, the Commission could not legally do anything but issue a complaint;
3. The detection of later violations of the stipulation would be more difficult in Robinson-Patman situations than in deceptive practice situations where advertisements may be available for all to see and evaluate; and
4. The stipulation procedure provides that respondent must agree to a statement of facts, which, in the case of Clayton Act violations, could result in treble damage liability.

I am not convinced that any of these objections are valid to the selective use of this procedure in appropriate cases. The first two--the necessity to be "tough" and the argument that the statute ties our hands--seem completely erroneous to me.

Thus, under the present practice, if a Robinson-Patman Act violation comes to the Commission's attention, it is added to our already-crowded investigation docket. And, if, after investigation, facts are available to prove the violation, the complaint and order procedure is used. This is not the whole story, though. It may be a carefully kept secret, but I believe you are entitled to know, and certainly some attorneys and respondents do know, that the Commission does not always proceed against every Robinson-Patman violation which comes to its attention. The staff sometimes recommends and the Commission sometimes approves closing investigation files without the issuance of a formal complaint even though some violation of law has occurred or may still be occurring where the judgment can be made that the violations are insignificant or have ceased. It has seemed ironic to me that those most prone to oppose dogmatically any informal disposition of Robinson-Patman violation have nevertheless been willing and sometimes most willing to perpetuate this situation in which actual violations, although not of apparently great significance, are swept quietly under the rug.

Several alternatives to the present dilemma have been suggested during the past year. The Commission could simply extend the use of its stipulation procedure to Robinson-Patman matters. I am not suggesting that this is the best

course. The Commission could, through its staff, in appropriate situations accept mere assurances of discontinuance, as is now done in some deceptive practice investigations. I believe that this course is seriously defective in that it could be too easily abused.

One imaginative proposal was suggested to the Commission for purposes of discussion by Mr. Robert Parrish, Chairman of the Commission's Robinson-Patman Task Force. This proposal would make use of the Commission's authority to require reports from corporations under Section 6 of the Federal Trade Commission Act and can be adapted to the simultaneous disposition of many matters in a particular industry. Where it appears that a number of competing companies are in violation of the Robinson-Patman Act, a Section 6 report, delving in detail into the practices involved, could be required of each company. Reporting companies would be advised that the report was the first step in an investigation by the Commission looking toward the possible issuance of a formal complaint. The company could be further advised, however, that it need not file the report if, on or before a certain date, it filed with the Commission an agreement not to engage in the questioned practice from that date forward. This agreement might further provide for a statement that the company has taken meaningful steps to familiarize its personnel with provisions of the Robinson-Patman Guides and other sections

of the law not covered by those guides. It should also be further understood that the agreement would in no way preclude the Commission's further investigation at any time of the reporting company's compliance with the law. The reporting company could be given to understand that the matter was not being finally disposed of as a result of the agreement but that a later report would be required at some future date at which time the company's compliance would be evaluated and the previous agreement might be given due weight in deciding whether or not to proceed formally. The reporting company would thus be motivated to eliminate any illegal practices before the later report. In the reporting process, the criminal sanction for filing a false report could be effectively stressed.

I believe that this proposal merits further study and discussion. I would suggest to this group, as I did to the Section of Antitrust Law of the American Bar Association last August, that responsible members of the Bar should address themselves to the problem of assisting the Federal Trade Commission in the development of new techniques for achieving broad and effective compliance with the Robinson-Patman Act. This Act deserves the first real test of its effectiveness which it is now receiving. On the record of enforcement and education made by the Commission in the recent past there can and must be built a broad and meaningful

further program in which the government, the Bar, and the business community each have an important part.

Section 3 of the Clayton Act

In Mytinger & Casselberry, Inc. (D. 6962, September 28, 1960) the Commission stated for the first time that it would follow the court's application of quantitative substantiality in determining competitive effect in exclusive dealing cases. Although the evidence in this case was not limited to quantitative substantiality, the Commission found that "the exclusive dealing requirement affects a substantial share of the market in each of the three lines of commerce. We have no doubt that respondents' exclusive contracts have the probable effect of substantially lessening competition."

A complaint charging Rayco Manufacturing Company with violation of Section 2 and related violations of Section 5 of the Federal Trade Commission Act was terminated by consent on June 30.^{14/}

The complaint in International Staple & Machine Co. (D. 8083) promises to be significant. This is a Section 3 exclusive dealing case which includes a charge that International has violated Section 5 of the Federal Trade Commission Act by preventing its distributors from re-selling outside assigned geographical territories. The Commission has never held that a program of preventing a purchaser

14/ (D. 7734).

of a commodity from re-selling except within an assigned geographical area is, in and of itself, an unfair trade practice. This case could present this issue. Similar charges were contained in a complaint issued at the same time against Container Stapling Corporation (D. 8082).

A Record Year in Antimerger Activity

1960 saw no judicial review of a Commission divestiture order completed, but in all other respects the year was a great leap forward in the enforcement of amended Section 7 by the Commission. Because so many activities took place in this area, only a cursory review is feasible.

Perhaps the most novel action of the year was the Commission's appearance in a private suit between Briggs Manufacturing Company and Crane Company^{15/} as an amicus curiae in support of a preliminary injunction to restrain Crane from soliciting proxies from Briggs stockholders or voting its Briggs stock. Prior to this action the Commission had issued a Section 7 complaint against Crane,^{16/} alleging that the acquisition of Briggs stock by Crane and other corporate acquisitions of Crane were in violation of the Act. Lacking any statutory authority to seek a temporary injunction, the Commission did not hesitate to intercede in this private suit where the issuance of a temporary restraining order was

^{15/} Briggs Mfg. Co. v. Crane Co., 185 F. Supp. 177 (E.D.Mich. 1960), aff'd sub. nom., Crane Co. v. Briggs Mfg. Co., 280 F.2d 747 (6th Cir. 1960).

^{16/} (D. 7833).

wholly compatible with the Commission's proceeding against one of the litigants in the private suit. This action clearly demonstrates that the Commission will make every effort to preserve the status quo in merger cases in which it has an interest.

The Commission issued six orders of divestiture during the year, four of them in contested cases. Of the four perhaps the Reynolds^{17/} and Scott^{18/} decisions are of greatest interest to the general antitrust bar.

Reynolds Metals, a large aluminum producer, achieved a forward vertical integration by acquiring Arrow Brands, a producer of decorative aluminum florist foil. The Commission found that this acquisition caused actual injury to competition in the florist foil market. One careful observer of the antitrust scene has noted that the Commission's opinion in this case emphasizes a number of effects upon competition that could have occurred if the merger had been a conglomerate rather than a forward vertical integration.^{19/} The acquisition by a large and powerful diversified company of a small company in a discrete industry historically shared by a number of small companies competing on equal terms followed by drastic competitive injury to the

^{17/} Reynolds Metals Co., (D. 7009, January 21, 1960).

^{18/} Scott Paper Co., (D. 6559, December 16, 1960).

^{19/} Jacobs, Mergers and the Small Business Man, 16 ABA Antitrust Section 83, 84-85, 88 (1960).

smaller competitors might be a demonstration of anticompetitive effect sufficient to satisfy the statutory requisites even if the acquisition was truly conglomerate. I do not mean to suggest that I am personally or officially wedded to this theory--I mention it only as a possible subject of speculation.

In any event, it would appear that the long-existing dearth of standards by which to judge the effects of conglomerate acquisitions may not exist much longer.

The acquisitions found to be illegal in the Scott case were mixed in the sense that they had both backward vertical and conglomerate overtones. Scott was engaged in the manufacture of toilet tissue, facial tissue, paper napkins and paper towels. The three acquired firms held timber reserves and manufactured wood pulp, paper stock or paper products of types not produced by Scott. The Commission did not dwell on an individual scrutiny of each merger; rather, it measured the cumulative effects of all three acquisitions. The vertical aspects of these mergers were not measured by the traditional tests of foreclosure in the lines of commerce in which the acquired companies were engaged. Instead it was alleged and proved that the assets of the acquired companies were diverted, directly or by modification of facilities, by Scott for use in its production of sanitary paper products. In this manner the acquisitions were instrumental in Scott's success in enhancing its already commanding position in the sanitary paper product lines of commerce. The operative

paragraph of the opinion states that:

"The crucial error in the initial decision is the finding that the record fails to establish any causal relationship between the acquisitions and the respondent's enhanced market position. The acquired properties became stepping stones to expanded production facilities sooner than would have been the case with entirely new construction."^{20/}

An interesting feature of the Commission's decision in Pillsbury^{21/} is the requirement that the acquired properties, Ballard and Ballard and Duff Baking Mix, be divested in such a manner as to effect their restoration as going concerns. Pillsbury had sold the intangible assets received in the Duff acquisition soon after the issuance of the complaint in this matter, and argued that this sale should be treated as a voluntary partial divestiture. Nevertheless, the Commission ordered the restoration of Duff as a going concern. It will be remembered that a restoration issue is presented in the Crown Zellerbach case,^{22/} now pending decision in the Court of Appeals for the Ninth Circuit. The court's opinion could shed new light on this area.

^{20/} Scott Paper Co., *supra*, 7.

^{21/} Pillsbury Mills, Inc. (D. 6000, December 16, 1960).

^{22/} Crown Zellerbach Corp., 54 F.T.C. 769 (1957).

Of particular significance in the Commission's decision in Spalding^{23/} is the holding that a product line, such as baseballs, could be segmented into separate lines of commerce, when the dissection is based on economic reality, to determine probable competitive effects for purposes of Section 7.

In Pillsbury the Commission performed a similar dissection on the section of the country, when it divided the Southeast into urban and rural markets for the sale of family flour.

The Commission approved two consent settlements of Section 7 cases in 1960. The orders of divestiture in Gulf Oil Corp.^{24/} and Diamond Crystal Salt Co.^{25/} quickly disposed of complex cases in a manner entirely consistent with the public interest.

During the year, initial decisions and orders of divestiture were filed by hearing examiners in Procter & Gamble Co. (D. 6901), and in Foremost Dairies, Inc. (D. 6495).

The 12 complaints issued in addition to Crane evidence both a continued interest in the degree of concentration in industries that had been the subject of earlier Commission scrutiny and the extension of Commission surveillance to new areas of the economy. Thus the complaints in Union Bag-Camp Paper Corp. (D. 7946) and Inland Container Corp. (D. 7993) added to the number of acquisitions that the Commission

^{23/} A. G. Spalding & Bros., Inc. (D. 6478, March 30, 1960).

^{24/} (D. 6689, January 5, 1960).

^{25/} (D. 7323, February 4, 1960).

has challenged in the paper and paper products industry. The Inland Container complaint has a novel aspect: here the Commission has alleged that a merger was contrary to the public interest which was itself a product of a negotiated settlement of a private antitrust action. The complaints in Continental Baking Co. (D. 7880) and Campbell Taggart Associated Bakeries, Inc. (D. 7938) also exhibit a continuing interest in another important area of concern. The complaints in Warner Co. (D. 7770) and Permanente Cement Co. (D. 7939) are new emblems of the serious attention that the Commission has given to concentration trends in the building materials industry.

The Hooker Chemical Corp. complaint (D. 8034) is significant because it is the first post-war attack on a merger in the basic chemical industry. It may well be considered as a signal of Commission interest in an industry where merger activity is exceeded only by that found in the non-electrical machinery and food products industries. The Hooker complaint is double-barrelled in that it is directed against two acquisitions, one a conglomerate, the other a horizontal. The Kaiser Steel Corp. complaint (D. 8027) is the first move by the Commission since the 1950 amendment to challenge an acquisition in the steel industry.

The complaint in Ekco Products Co. (D. 8122) is another challenge to a conglomerate acquisition. The Minnesota

Mining and Mfg. Co. complaint (D. 7973) charges that the respondent's acquisitions of two distributors of electrical installation products violated Section 7. In Leslie Salt Co. (D. 8220), it is alleged that the second largest evaporated salt producer in the United States illegally acquired two salt companies. Respondent had held two-thirds of the capital stock of one of the acquired companies since 1936, but acquired the remaining one-third of the capital stock and merged the assets of the acquired company into its operations subsequent to the 1950 amendment.

The Simpson Timber Co. complaint (D. 7713) is significant in that it is the first amended Section 7 complaint issued by the Commission which seeks to prevent alleged concentration of ownership resulting from an acquisition of a depleting natural resource--here redwood timber.

By any measurement, statistical, conceptual or otherwise, 1960 represents a new pinnacle in the enforcement of amended Section 7 by the Commission. As an example, the 13 new complaints issued represent well over one-quarter of all the Section 7 complaints issued by the Commission since 1950. It now remains for the Commission to demonstrate that in years to come the performance of 1960 will be considered a milestone and not a ceiling.

Legislation

No summary of the highlights of the Commission's 1960 antitrust work would be complete without a brief reference to an objective the Commission has sought during 1960 and other years without success. I refer, of course, to the drive to secure an amendment to the Clayton Act authorizing the Commission to seek preliminary injunctions in Federal district courts against proposed mergers which are likely, if consummated, to violate Section 7 of the amended Clayton Act.^{26/}

It is absolutely necessary for the Commission to have some power to prevent the consummation of mergers and the subsequent scrambling of assets. Achieving effective divestiture on terms that are fair to all concerned is a Herculean task in the best of circumstances. In less favorable circumstances, fairness is completely lost. Unless and until the Commission is granted power to apply for injunctions, Section 7 enforcement will be hobbled and the equities in many cases will be slighted.

It would, indeed, be a highlight to report in some subsequent year when and if the Commission is empowered by the Congress to seek temporary injunctions in Section 7 proceedings. If such legislation were enacted the Commission

^{26/} See, e.g., S. 442, 86th Cong., 1st Sess., favorably reported on May 7, 1959, by the Antitrust and Monopoly Subcommittee of the Senate Judiciary Committee. No further action was taken during the 86th Congress.

would not be remitted to the uncertain and isolated instances where it could intervene in private suits, as it did in the Briggs case, or add to the burdens of the Antitrust Division in other instances where a temporary restraining order is peculiarly appropriate.

Section 5 of the Federal Trade Commission Act

In the Procter & Gamble case (D. 7542), a consent order was entered enjoining the respondent from violation of Section 5 by entering into any contractual agreement with washing machine manufacturers to pack respondent's soap, detergents or bleach products exclusively in their machines with certain limited exceptions. The order also prohibits any representations by respondent in advertising concerning the washing machine manufacturers packing respondent's products in their machines at the factory unless it is disclosed that the packing was done pursuant to an agreement between respondents and the washing machine manufacturers. The order further provided that respondents will disclose on the packages of the products packed in the appliances that the products were supplied free by respondents, and that any person demonstrating the washing machine with respondent's product will disclose that payment was received for using the product in the demonstration.

In Southern Sugar & Molasses Company (D. 7461, August 26, 1960), the Commission ordered nine corporate respondents and nineteen individual respondents to cease and desist from engaging in a wide range of price fixing activities in the sale of blackstrap molasses. It is noteworthy that the order prohibits respondents from individual use of "any single basing-point delivered-pricing system" for a period of five years following the entry of the order.

In the Roberts Company case (D. 6943, June 30, 1960), the Commission found that the respondents had engaged in both a vertical conspiracy to fix minimum resale prices of products used in the installation of wall-to-wall carpeting as well as a horizontal combination to fix prices. The horizontal conspiracy was achieved through the misuse of a patent, the licensor having coerced his licensees into an agreement. This case is one of the few instances where the existence of a price fixing conspiracy was proved through the testimony of co-conspirators. It was also the first Commission case to deal with patent misuse in this context.

The Commission will have to grapple with problems of patent misuse again when the Grand Caillou Packing Company case (D. 7887) comes on for decision. In this complaint issued last year there are allegations of misuse of patents resulting in various restraints of trade as well as allegations of the achievement of illegal patent monopoly. The products involved are shrimp processing machinery and canned shrimp and the case could ultimately affect all members of the industry.

The complaint in General Foods Corp. (D. 8198) charges a violation of Section 5 by importers and sellers of Philippine desiccated coconut. It is alleged that the respondents engaged in a conspiracy to fix the price at which desiccated and sweetened coconut will be sold throughout the United States.

The complaint in R. H. Macy & Company (D. 7869) charges that Macy's extracted money from its vendors without regard to advertising or promotional allowances or any other special treatment for the sellers' products in violation of Section 5.

The Commission's Discovery Processes in the Courts

The Commission's special report and subpoena powers received significant judicial support during 1960. Perhaps the most important opinion of the year in this area was United States v. St. Regis Paper Co., F.2d (2nd Cir. 1960). In this case the Court of Appeals for the Second Circuit reversed the District Court which had refused to enter any penalties for St. Regis' default in not complying with the Commission's order to file a special report under Section 6(b) of the Federal Trade Commission Act. This decision should eliminate any propensity by a corporation to treat lightly an order to file a special report under Section 6. Chief Judge Lumbard, speaking for the court, also held that the Commission properly could require the production of copies of census reports retained in the files of the corporation. The court expressly disagreed with the Seventh Circuit's disposition of this issue in Federal Trade Commission v. Dilger, 276 F.2d 739 (7th Cir. 1960), cert. denied U.S. , 29 U.S. L. Week 3135 (U.S. Nov. 8, 1960). Since there is now a conflict between Circuits on this issue we may reasonably expect that the Supreme Court will pass upon it when it is next presented.

The Commission continued to employ its subpoena power vigorously in 1960 and the United States Court of Appeals for the Ninth Circuit in two instances upheld orders of district courts enforcing Federal Trade Commission subpoenas. In Flotill Products, Inc. v. Federal Trade Commission, 278 F.2d 850 (9th Cir. 1960), the court sustained the power of the Commission to obtain documentary evidence by an "investigative" type of subpoena issued during the course of a formal proceeding wherein the respondent was charged with violations of Sections 2(c) and 2(d) of the amended Clayton Act. In Hunt Foods & Industries, Inc. v. Federal Trade Commission, F.2d (9th Cir. 1960), the court, inter alia, held that the Commission had authority to issue an investigational subpoena prior to the issuance of any formal complaint.

Recent Bureau of Economics Activity

In 1960 the major Bureau of Economics activity was continuation of the "Economic Inquiry into Food Marketing." The first part of this study, entitled Concentration and Integration in Retailing was published as a Staff Report in May. It was based on a survey of food chains, retailer-owned food store cooperatives and grocery wholesalers sponsoring voluntary retail store groups.

Most of the year was occupied in planning the second phase of the Food Inquiry. This part of the study focuses on freezers and canners. Questionnaires were mailed to 447 food freezers late in August and to almost 1,600 canners in October. These questionnaires examine procurement procedures, production, private brand sales, terms of sale and financial results. Questions on pricing practices and the use of promotional allowances reflect the general Commission interest in Robinson-Patman Act matters. Tabulation of the results of the freezer survey was substantially complete at the end of 1960. An Interim Report on the frozen food study is to be issued this week, although it will be several months before the full Part II report, covering both freezers and canners is published in book form.

The plan for the future is to extend the food study successively to major components of the industry--baked goods, cereals, dairy products, fresh fruit and vegetables, and meat and poultry. The exact questions to be addressed to each group will depend in part on the results obtained from prior groups, and in part on Commission interest and policy at the given stage of the inquiry.

* * *

The time is ripe for a re-examination of the operations of the Bureau of Economics, and perhaps for an expansion of its role. In this age, no one can question the practicality

of wide-ranging economic study. And yet in the early history of the Commission its economic studies met with adamant opposition. The present role of the Bureau of Economics is conditioned, in part at least, by this unfortunate history. But the need for study broader and deeper than that needed to alleviate temporary emergencies or satisfy temporary interests is no less great today than it was in the days when Brandeis and Wilson and other prescient men charted the course of the Commission-to-be. The state of the economic art has advanced in this Century beyond question, but our ignorance remains great. The immense value of enterprise and industry history has been recognized only recently. A government that undertakes to preserve free and fair competition can no longer allow important questions of economics to go unanswered.

The Bureau of Economics will never meet the manifest needs of a vital Commission unless it is provided with resources which will enable it to efficiently conduct basic studies, examine specific trade practices, continue to support the formal enforcement program with surveys, analyses and expert testimony and at the same time maintain a reserve for spot inquiries. Its needs must be assessed against the background of a larger role.

VI.

The past year has been full of fruitful innovation. This is as it should be. Bright goals are bootless unless we devote our best efforts to their implementation. But one year's good effort is not enough. If the stream of our commerce

is not to overflow the banks of the public interest, improvement of the regulatory process, consistent with due process, must be unremitting.

The bar can make a great contribution to the quest for improvement. I have already suggested some areas in which analysis and comment or action would be most helpful. Other areas will appear. In this connection, the framework of the Administrative Conference of the United States now being devised by Judge Prettyman and his steering committee provides for continuing participation by private practitioners as well as agency representatives. I sincerely hope that President Kennedy will support the proposal for a permanent Conference. Dean Landis has already recommended support.

The bar has particular qualifications for a central role in times of stress and change. Lawyers deeply appreciate the enduring values inherent in existing methods for the administration of justice. They are not prone to throwing out the baby with the bath water. And yet lawyers, as officers of the courts and as officers of the agencies, have a continuing duty to seek meaningful evolutionary improvement. The bar and the agencies can achieve a meaningful interchange and can achieve lasting evolutionary improvements if both proceed with mutual respect and candor and if all exhibit the courage to re-examine beloved stereotypes, and, if necessary, the courage to butcher one's own sacred cows.