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FEDERAL TRADE COMMISSION PROCEDURE-- WITH PARTICULAR REFERENCE TO ADVERTISING OF MEDICINAL AND COSMETIC PREPARATIONS.

Before the 66th Annual Meeting of the

National Wholesale Druggists' Association

at the

Greenbrier Hotel,

White Sulphur Springs, West Virginia,

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By

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Chairman of the Federal Trade Commission.

FEDERAL TRADE COMMISSION PROCEDURE--
WITH PARTICULAR REFERENCE TO ADVERTISING
OF MEDICINAL AND COSMETIC PREPARATIONS.

May I convey to you the appreciation of the Commission and myself personally for the invitation extended to me to address you today. Most ethical business men and the Federal Trade Commission are keenly interested in attaining the same ends, and it is helpful to all concerned that representatives of the Commission and business meet together as we are today and discuss the best means for attaining those ends. At the beginning of these remarks I would like to emphasize one fact and I hope that you will remember it as the underlying theme of this address. The Federal Trade Commission and the organic laws which it administers are not a restraint upon business, but on the contrary seek to free legitimate business from those restraints which are both illegal and uneconomic. Whether or not a particular act or practice is illegal is not determined by the whim or caprice of any individual or individuals, but is determined by the process of applying the principles of the law to the particular act or practice. Insofar as the field of advertising is concerned, the basic principles, enacted into law in the Federal Trade Commission Act, are that unfair methods of competition and unfair and deceptive acts and practices in commerce are unlawful. The procedure for applying these basic principles, as provided by the Federal Trade Commission Act, not only complies with the constitutional guarantee of due process but also guarantees a fair and impartial administration by the Commission and its staff with full protection of all the rights of the respondent, and finally any party dissatisfied with a decision of the Commission has the absolute right of appeal to the courts.

The world today is in a state of chaos and turmoil and much is being said of the threat to freedom and democratic institutions. Now more than ever it is of paramount importance that the citadels of our democracy be manned and defended by those in public and private life who believe in the democratic process and who have devoted their lives and their energies to working out our national destiny in the democratic way. All of us have our appointed task. To those directly connected with the armed forces we entrust the defenses of our country against forces from without. To you and me and many others are entrusted the duty and responsibility of making our great democracy secure against disintegrating influences from within, whatever they may be, by making our democracy function properly and effectively for the greatest good for all of our people. The keystone of our democracy is our free competitive system. Any act or practice which restrains free enterprise weakens our democracy. Most of us will agree that a condition precedent to the free exchange of goods is that the goods be bought and sold on the basis of their

ability to accomplish the purposes for which they are recommended and purchased. The use of any subterfuge or deceit which causes a deviation from this system of commercial transactions is not only unfair to the purchaser and to the legitimate competitor, but is also uneconomic and injures our competitive system. The basic responsibility is on the seller, therefore, to mark and advertise his goods truthfully. The adoption of and adherence to such practice by all sellers of merchandise would redound to the real benefit of buyers and sellers alike.

The word "advertising" is derived from the Latin word advertere, which means to turn the mind to or to notice. The French word is avertir, which means to notify. One form of advertising, that is, self advertising, is as old as man and, I might say, woman. The strut of the peacock suggests an even more ancient origin. Advertising has been defined as the process of disseminating information for commercial purposes. Advertising is beneficial to the seller in that it enables him to bring his merchandise to the attention of millions of people in addition to the comparatively few he could reach by word of mouth. Advertising is beneficial to the consumer in that he is informed of new inventions, new uses for old articles, comparative values and the practical results of the constant march of science. Modern advertising methods had their beginnings after the advent of the printing press and the Industrial Revolution. Tradesmen, however, in ancient times called attention to their wares. A papyrus discovered at Thebes offering a reward for a runaway slave is reputed to be 3,000 years old. Advertising signs and public criers were used in Palestine, Greece and Rome. The public crier was an important institution in the Middle Ages and was also commonly used as late as the Colonial era in this country. A limited type of advertising was in common use by the middle of the Eighteenth Century. In fact, Dr. Samuel Johnson wrote in 1758 that "The trade of advertising is now so near to perfection that it is not easy to propose any improvement." On this subject, at least, the Doctor proved himself to be a very poor prophet.

The Industrial Revolution and the resulting growth of our urban population, mass production, the countless new articles offered for sale, encouraged and demanded new advertising techniques. The growth of advertising resulted in an increase of newspapers, magazines and other publications and is one of the main factors contributing to the development of the radio industry. In view of the fact that newspapers, magazines, and the radio, receive the bulk of their revenue from advertising, it can truthfully be said that advertising contributes greatly to the dissemination of much of our information. The constantly expanding markets and the growth of nation-wide advertising resulted in new problems both for the seller and the consumer. The sellers and buyers lived great distances apart and the old personal relationship between them ceased to exist. Because of the countless articles which he purchased, the consumer was forced to rely on the advertising claims of sellers. Many sellers took

advantage of this situation by making false claims for their merchandise. The ethical business man therefore was placed in a disadvantageous position for the reason that, as he did not make such false claims himself, trade was thereby diverted to his unethical competitor. Situations such as this and many others demanded an adequate remedy. Such a remedy was not supplied by the common law. A wise democracy is not static but develops new techniques and concepts of government to meet changing conditions and circumstances. In 1914, therefore, Congress enacted the Federal Trade Commission Act. This Act was directed not only at unfair methods of competition in commerce, including false advertising, but monopolistic practices and other restraints of trade in interstate commerce as well. These remarks, however, are limited to comments on the Commission's jurisdiction and procedure in cases of false advertising, with specific reference to medicinal and cosmetic preparations. We all know that the business of selling medicinal and cosmetic preparations is a big business, but a few statistics may help us to visualize it more clearly.

According to a recent report prepared in the Department of Commerce the estimated net sales of retail drug stores in 1939 were $1,410,000,000. Judging from itemized census statistics of previous years and the opinions of those most familiar with the subject, about half of such sales were composed of proprietary medicines and drugs, including prescriptions. This does not include preparations sold by mail order houses and through various other outlets.

So far as I am aware, the only official governmental statistics on the retail sales of cosmetic and other toilet preparations were developed in the Fifteenth Census of the United States and set forth in a special report on Retail Distribution issued by the United States Department of Commerce in 1933. According to this report, the total sales of cosmetic and other toilet preparations in all stores were $412,985,922 and the total sales of such commodities in drug stores were $220,740,250.

The Bureau of the Census undertook to obtain a census of similar figures in 1935. The Bureau advised, however, that the responses to questionnaires from merchants doing less business than $50,000 annually were so incomplete and many of them so inaccurate that the figures were not usable. Consequently, the results of the attempted survey were never published.

The tabulations of the statistics of the last decennial census are not completed and the figures thereof not yet available.

The original Federal Trade Commission Act made unfair methods of competition in commerce illegal. Shortly after its organization, the Commission proceeded in a number of cases on the theory that false advertising was an unfair method of competition. The respondent in one of these cases appealed to the courts from the

Commission's order to cease and desist. In its opinion upholding the Commission's order to cease and desist, the Supreme Court of the United States definitely decided this question when it stated:

> "For when misbranded goods attract customers by means of the fraud which they perpetrate, trade is diverted from the producer of truthfully marked goods. That these honest manufacturers might protect their trade by also resorting to deceptive labels is no defense to this proceeding * * * . The public had an interest in stopping the practice as wrongful; and since the business of its trade rivals who marked their goods truthfully was necessarily affected by that practice, the Commission was justified in its conclusion that the practice constituted an unfair method of competition."
> (F. T. C. v. Winsted Hosiery Company, 258 U. S. 483)

Under the original Federal Trade Commission Act, it was necessary to show that a method of competition was unfair to competitors as well as prejudicial to the public interest in order for the Commission to take corrective action. In March, 1938, the Congress enacted the Wheeler-Lea Act which amended the Federal Trade Commission Act. This amendment made unfair and deceptive acts and practices in commerce illegal. The effect of this amendment in the field of false advertising was to extend direct protection to the consumer as the original Act extended direct protection to competitors of the concern disseminating a false advertisement. An Act or practice of an individual competitor in commerce which is unfair to the public is also unfair to the legitimate competitor. The real effect, therefore, of this amendment was merely to eliminate the necessity for the Commission to prove that an act or practice which is proven to be unfair to the consuming public is also unfair to competitors.

Allow me to trace for you briefly the manner in which a case involving an alleged false advertisement of a medicinal or cosmetic preparation is handled by the Commission. Some of you may have heretofore heard the speaker or other representative of the Commission outline the procedure of the Commission in these cases. If you have, please bear in mind that factual explanations in regard to the same subject matter do not afford an opportunity for unique or different treatment with each explanation. However, as the matter is of such prime importance, I hope that a second hearing of it may prove helpful. A questionable advertisement may be brought to the attention of the Commission by means of either a complaint of a competitor or member of the public, or by the observation of advertising by members of the Commission's staff. If the application for complaint originates outside the Commission, the identity of the complainant is kept confidential. The Radio and Periodical Division of the Commission conducts a continuous survey of the advertisements appearing in newspapers, magazines, radio broadcasts, etc. For

example, during the past fiscal year, 315,949 advertisements in newspapers, magazines, mail order catalogues, circulars and almanacs were examined by that Division and 24,104 of these advertisements were noted for further investigation. 684,911 commercial radio broadcast continuities were reviewed by that Division and of these advertisements 22,556 were noted for further investigation.

The Commission duly considers the application for complaint which has been filed or, as the case may be, the advertisement noted by the Radio and Periodical Division. If it appears to the Commission that the matter warrants further action, an investigation is directed. This investigation may be conducted by correspondence, or, if necessary, a field investigation is made. The advertisement in question is called to the attention of the advertiser and he is given full opportunity to submit data in support of his advertisement. This supporting data, if any, submitted by the advertiser and reports by competent experts are thereafter considered by the Commission.

If, after due consideration of the facts, the Commission has reason to believe that the seller has advertised his merchandise falsely in interstate commerce, one of two actions is taken by the Commission. If the preparation is not potentially injurious when used under normal conditions or as directed, or if fraud or unusual conditions are not involved, the privilege of stipulation is extended to the advertiser. The stipulation procedure is a privilege extended at the discretion of the Commission and is not a right of the advertiser. The vast majority of cases, however, are disposed of by the stipulation procedure. A stipulation contains a statement of the facts and an agreement by the advertiser to cease and desist from the unfair act or practice. The stipulation procedure is a very effective and inexpensive method of disposing of these cases. In a great majority of cases, when an advertisement containing a false or misleading statement is called to the attention of the advertiser, the latter states in effect that he will discontinue using such statement and requests that the proceedings be disposed of promptly and with a minimum of expense. If the stipulation procedure is employed, the matter is terminated by the advertiser signing the stipulation and reporting his compliance therewith.

The Commission will not accept a stipulation if the advertiser indicates, either directly or indirectly, that he does not believe he has violated the law or that the stipulation does not reflect the true facts. The advertiser has the right to have the issues of the case tried on their merits by the formal procedure of the issuance of a complaint and filing of an answer, followed by public hearings. The Commission is a fact-finding agency and is solely interested in finding the true facts. If the advertiser, therefore, signs the proffered stipulation but expresses any mental reservation whatsoever to the effect that he believes the same to be incorrect, the Commission will not accept the stipulation.

In cases in which a stipulation is not accepted, or in which the respondent declines to sign a stipulation or where the privilege of stipulation is not accorded, and the Commission has reason to believe that the advertiser has violated the law and that corrective action is in the public interest, the Commission issues its formal complaint. The advertiser is referred to in the complaint as the respondent. The complaint, insofar as practicable, is free from legal verbiage and its allegations are stated in simple, understandable terms. The respondent is given twenty days within which to file an answer to the complaint. Thereafter, public hearings are held before a trial examiner of the Commission who has had nothing to do with the investigation or prosecution of the matter in question. At these hearings evidence in support of the allegations of the complaint and, at the option of the respondent, in opposition thereto, is introduced. The respondent may appear in his own behalf or may be represented by counsel. At the close of the taking of testimony briefs may be filed and, upon request of respondent the Commission permits oral argument before the Commission. If the allegations of the complaint are sustained by the record in the case and the Commission determines after due and careful consideration that the respondent's practices violate its organic law, the Commission issues its findings as to the facts, and its order to cease and desist from the acts or practices alleged in the complaint and sustained by the record.

The respondent may at any time within sixty days after the service upon him of the Commission's order to cease and desist appeal from such order to a United States Circuit Court of Appeals. If the respondent does not appeal from such order or if the Court affirms the order on appeal, the order becomes final. If the respondent thereafter violates the order to cease and desist he is liable for a civil penalty of not more than $5,000 for each violation. These civil penalty proceedings are brought by the Department of Justice in the United States District Courts. Respondents have full opportunity to present in court their defense to such proceedings. The sums recovered in these actions accrue to the benefit of the United States.

Relatively few appeals, however, are taken to the courts from the Commission's orders to cease and desist. The Commission is justly proud of its record in the courts for the reason that such record is conclusive evidence of the impartial administration by the Commission of its organic laws. Over a period of a few years the Commission handles thousands of cases. For illustration, from January 1, 1933 to April 30, 1939, the Commission investigated and reviewed 22,038 cases, accepted 3,379 stipulations to cease and desist, and issued 1,220 orders to cease and desist. Of the 3,379 stipulations, 840 related to medicinal products and 344 to cosmetic and other toilet preparations. Of the 1,220 orders, 154 related to medicinal preparations and 69 to cosmetic and toilet preparations. Of the total actions, both orders and stipulations, medicinal products

represented about 21 per cent and cosmetic and toilet preparations represented about 9 per cent.

The record shows that from January 1, 1933, to date, 127 Commission cases, exclusive of injunction and civil penalty proceedings, have been reviewed by the courts. Of these 127 cases the results of 119 were favorable to the Commission. Of the remaining 8 cases, only 5 were reversals of the Commission's orders and of these 5, one is now pending in the Supreme Court on petition for writ of certiorari; in another the reversal was not on the merits, but solely on the question of jurisdiction; and a third was decided on the issue of res judicata, and is to be appealed to the Supreme Court. In other words, the Commission has handled thousands of cases during the past few years but has been reversed by the courts in only two or three. During the past nine years the Commission has been reversed by the Supreme Court of the United States only once and that by a five to four decision in a Clayton Act case, reversing a favorable decision by a United States Circuit Court of Appeals. During this nine year period the Supreme Court has decided five cases in favor of the Commission. The foregoing figures do not embrace a considerable number of cases in which respondents applied to the Supreme Court for certiorari from Circuit Courts' of Appeals decisions favorable to the Commission, but which applications were denied by the Supreme Court.

One of the most important provisions of the Wheeler-Lea Act is the definition of "false advertisement" of foods, drugs, devices and cosmetics. The word "devices" is used therein to refer to those instruments, etc., which affect the structure or function of the body. This provision of the Act provides that a false advertisement may be made not only by making an affirmative representation which is misleading in a material respect, but also by failure to reveal consequences which may result from the use of the food, drug, device or cosmetic to which the advertisement relates under conditions prescribed in the advertisement or under such conditions as are customary or usual. To express this differently, if the advertiser does not reveal to the prospective purchaser that the use of the preparation may be injurious to health, there is an implied representation that the preparation is safe for use and the purchaser is entitled to rely on such representation. It is obvious that manufacturers and sellers of these preparations know the ingredients contained therein and are presumed to know the results which ordinarily may be expected from their use. The consumer, on the other hand, must rely on the advertisement to reveal to him this necessary information. This provision of the Wheeler-Lea Act, therefore, requires the advertiser to inform the consumer of any harm which may result from use of the preparation under ordinary conditions of use.

Advertisers of medicinal preparations and cosmetics place themselves in the role of advisers to the consuming public in suggesting that they use this or that preparation to accomplish certain

results. In view of such relationship the consumer has the right to be truthfully informed as to the preparation which he purchases and it is to the real interest of the vendors of such preparations that he be so informed.

The Wheeler-Lea Act also conferred upon the Commission the authority to bring suit in the United States District Courts to enjoin the dissemination of false advertisements relative to foods, drugs, devices and cosmetics when such proceedings are in the public interest. This provision authorizes the courts, on proper showing by the Commission, to enjoin the dissemination of the objectionable advertising pending the final disposition of the Commission's complaint. By means of this injunction a further protection is extended to the public in that respondent is prohibited from continuing practices to the injury of the public where intent to defraud is involved, and is also prohibited from offering for sale a preparation or device which is inherently dangerous without apprising the purchaser of the injurious effects which might result from the use of such preparation or device. This is particularly important in cases where appeal is taken from the order of the Commission, since a considerable period of time may elapse between the issuance and final disposition of the Commission's complaint with attendant injury to the public during the interval if no injunction is in force. The Commission, since September 1, 1938, has filed 31 suits to enjoin the dissemination of false advertising. The courts have granted injunctions in all of these cases except one. Most of these cases related to advertisements of medicinal preparations which failed to reveal the harmful potentialities of such preparations. These injunctions were issued by federal district courts in widely separated areas. The issuance of one injunction was challenged by an appeal to the Circuit Court of Appeals, which, by unanimous decision, affirmed the issuance of the injunction by the lower court. A comment on the types of preparations involved in these injunction proceedings and the ingredients contained therein may be of interest. The preparations were: abortifacients, aphrodisiacs and so-called cures for obesity and dipsomania. The drugs were: dinitrophenol, various hydrochlorides, desiccated thyroid, ergot, apiol, black hellebore, oil of savin, aloes, cotton root bark and pilocarpus, or various combinations thereof. There were also two device cases involving electrolysis machines for removal of superfluous hair and electro-diathermy machines.

In investigating questioned advertisements relating to medicinal and cosmetic preparations, the opinions of experts, both within and without the government service, are obtained. Within the government service the Food and Drug Administration, the National Institute of Health and other agencies of government are consulted. Within the Commission there is a Medical Advisory Division consisting of four qualified physicians and a clerical staff. Any competent data submitted by the advertiser in justification of the questioned advertisements receives very careful consideration.

My previous remarks have been largely devoted to an explanation of the affirmative actions taken by the Commission in preventing illegal restraints upon our competitive system. At this time I would like to call to your attention something which may be more effective in preventing such restraints than the efforts of any agency of our government. I refer to the fact that the majority of business men are now and have been for a number of years more and more alert and are policing their own business practices. The foundation of business reform, like religion, comes from the heart and conscience of the individual. In a democracy the business ethics which are written into laws such as in the Federal Trade Commission Act are but the collective judgment of the people themselves.

The Supreme Court of the United States in a recent case stated:

> "The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of caveat emptor should not be relied upon to reward fraud and deception." (F.T.C. v. Standard Education Society, 302 U.S. 112)

I repeat that the great majority of business men are ethical in their business practices and are interested in selling their merchandise solely on its merit without resort to fraud or deception. A few, intentionally, and others, unintentionally, stray from the path of rectitude and engage in objectionable practices. The Commission stands ready to help, or, if necessary, through legal action to order these few back into the well-beaten path of fair play.

Advertising is a very important contribution to our economy. To persist and to be effective advertising must have the confidence of the purchasing public. Deceptive advertising is economic waste and in addition undermines the confidence of the public in the whole field of advertising. As I indicated at the beginning of these remarks, I assume that both the Commission and you are working toward the same end, a free competitive economy based on merit and industry. The Commission sincerely invites your help and cooperation in attaining that end.

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