THE FEDERAL TRADE COMMISSION AND SMALL BUSINESS

Address by

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FEDERAL TRADE COMMISSION

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NATIONAL ELECTRONIC DISTRIBUTORS ASSOCIATION

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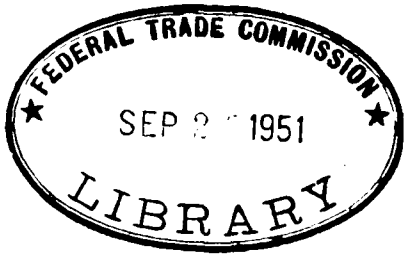

Ladies and gentlemen of the National Electronic Distributors Association, it is a great pleasure for me to accept this opportunity to speak to you at this annual meeting of your Association, because as you know we at the Federal Trade Commission have a keen interest in you, in your business, and in the manner in which your business is conducted, maintained and perpetuated.

Your Association consists of small businessmen located in every State in the Union who account annually for approximately 500 million dollars worth of sales in the electronic field. What is the position in the national economy which small business now occupies? I suppose the average electronic distributor looks upon himself as an independent small businessman. I think, it is well appreciated, more than ever before that small businesses are recognized as being the very heart-beat of our economic body. I think it is generally recognized that unless small businesses can continue to flourish in their individual ways, that body will lose its vitality. We at the Federal Trade Commission charged with the responsibility of maintaining free enterprise are particularly cognizant of the general concern for small business.

President Truman, busy as he is in matters of vast moment to the entire world, in a message on the State of the Union, said:

> "We must curb monopoly and provide aids to individual business so that it may have the credit and capital to compete in a system of free enterprise . . . I hope before this session is over to transmit to the Congress a series of proposals to strengthen the Antimonopoly Laws, to assist small business, and to encourage the growth of new enterprises."

This statement and all that has been written into the so-called Antitrust Laws, to which I shall presently refer, clearly indicate that our whole economic order, and our commerce, are based upon the competitive theory in which each man can take his place and obtain rewards in direct proportion to his industry, capacities, and his contributions to the industry of which he is a part. All antitrust legislation, including the laws administered by the Federal Trade Commission, has in purpose the regulation of business to the end that bad practices and unfair tactics are eliminated from the struggle.

My warrant for now proceeding to acquaint you with some of the laws which are your guarantees against unfair competition, is that in every game all the players should have a knowledge of the rules under which they operate.

That being the case, they not only will know when their rights have been infringed, but so also, that they will not violate the rules to the detriment of those with whom they compete. I am afraid you will, in some degree, find it a dry and uninteresting recital. I will do the best I can, having in mind a story told of the great Bishop Beekman. Some young students of the ministry asked him how long a sermon should be, and his reply was "it should be thirty minutes long, with a leaning to mercy."

Prior to 1890 there were, except for certain common law prohibitions, no laws against restraints of trade. A great deal has been written and said about the creation of huge and predatory monopolies in the last half of the nineteenth century. The names of many are mentioned as examples of the worst types of trade practices and betrayals of the public interest.

While not condoning what was done in those days, I have to concede that the "trusts" of those days were created under the rules of the game as it was then played. In reality, there was but one rule, the rule of might, which, in spite of all that has been done to soften it, remains and must remain in any competitive system, namely, "let him who hath the power take and let him keep who can."

Since the passage of the Sherman Law in 1890, Congress has, from time to time, not changed the basic rules of the game, but has added new rules and refinements of rules which have in purpose the securement to each segment of industry its right, and place, and opportunity to capitalize on its capabilities and ingenuities. It never was intended that the so-called antitrust legislation should serve as a guarantee to any business the assurance of profits or, indeed, even of existence. In any competitive enterprise, be it baseball, other sports, or business, it must be remembered that there are necessarily losers as well as winners; that the only proper and continuing guarantee is that the competition be fair or, as the Federal Trade Commission says, "not unfair."

Incidentally, it is amusingly paradoxical that sometimes in taking the horseshoes out of the gloves of one competitor they turn up in those of another. Records in the Federal Trade Commission disclose incidents where the Commission has valiantly fought the battle of some small business concern and, in a manner of speaking, repeatedly rescued it from the bad purposes of large competitors. In the sanctuary of this protection sometimes the small business becomes big business and presently appears on the records of the Commission as a danger to small business; the object of surveillance to the end that it does not impose on small business.

The Federal Trade Commission operates under several Federal statutes. The primary responsibility of the Commission, under all these statutes, is one of the important guarantees of freedom, that is, the maintenance of competition in business; the preservation of free enterprise. First, and foremost of these statutes, is the organic act by which the Federal Trade Commission was created just thirty-seven years ago this month. It was enacted by Congress in exercise of the authority contained in the commerce clause of the Constitution. By that legislation, there was, in 1914 for the first time, introduced into the laws of our country that short and far reaching clause which reads "Unfair methods of competition in commerce are hereby declared unlawful." This provision against unfair methods of competition was, and still is, the cornerstone of the regulation of competitive practices in interstate commerce. The Commission was set up under this Act as the administrative and enforcing agency of the Government with powers to carry out its provisions; with authority, in the interest of the public, to issue cease and desist orders against persons, partnerships, or corporations found using such unfair methods of competition in interstate commerce. Experience in

the application of this law, since it was signed by President Woodrow Wilson in 1914, has brought to the Commission many cases of administrative and judicial determination. These reveal that the phrase "unfair methods of competition" is not only of comprehensive character, but also is a living organism capable of being applied to new, or as yet unknown practices, which may arise from time to time in the conduct of business and which prove to be unfair.

In the same year 1914, the Clayton Act was passed, by which Congress legislated, among other things, against the practices of lessening competition and restraining trade by certain specific trade practices; such as (1) discrimination in price; (2) the use of tying contracts in the distribution of goods, wares, or merchandise; (3) the practice of one competitor gaining control of another through stock acquisitions or mergers, and (4) the use of interlocking directorates between normally competing corporations. Primary authority to enforce the provisions of the Clayton Act proscribing these several inhibited trade practices was vested in the Commission, with certain concurrent authority conferred upon the Department of Justice.

In 1936, Congress added to the unfair trade practices with which the Commission may deal, by enacting the Robinson-Patman Anti-Discrimination Act. This statute amends section 2 of the Clayton Act of 1914 and prohibits the practice of selling in commerce at discriminatory prices where the effect may be substantially to lessen competition; tend to create a monopoly; or to injure, destroy, or prevent competition. It also catalogues as unfair and illegal trade practices, the granting of certain types of brokerage, commissions, advertising, or promotional allowances, and discriminatory services, or facilities.

In 1938 came the Wheeler-Lea Act by which Congress further expanded the Federal Trade Commission's authority to deal with unfair trade practices. A primary purpose of the Wheeler-Lea Amendment was to afford consumers the same protection against unfair and deceptive acts and practices that competitors had theretofore been given against unfair methods of competition. The Act amends and strengthens the original Federal Trade Commission Act of 1914. By it, the words "unfair or deceptive acts or practices in commerce," were added to the phrase "unfair methods of competition in commerce" as it stood in the original Act. Thus, as this basic statute now stands, the Commission is authorized to act in prevention of all those business practices which the law classifies as "unfair methods of competition in commerce" or "unfair acts or deceptive acts or practices in commerce."

In December 1950, Congress passed an amendment to section 7 of the Clayton Act which will have the effect of remedying a grave defect in the antitrust laws. This defect has been annually, for many years, called to the attention of Congress by the Federal Trade Commission. Under the Clayton Act, is is illegal for a firm to buy stock in a rival concern where the effect is to "substantially lessen competition." But the same end might be, indeed has been, achieved by the completely legal act of buying the physical assets of a rival. The new legislation plugs this gap by forbidding a firm to purchase the assets of business rivals if the transaction results in a reduction in competition or a tendency to create a monopoly "in any line of commerce in any section of the country."

The statutes which I have cited constitute the source of the Commission's authority. They chart its duties with respect to the regulation of business practices in interestate commerce. They are all directed toward the maintenance of free and fair competition; to the control of methods which, in the eyes of the law, are harmful to industry, trade, and the public; which obstruct or interfere with the free flow of merchandise in the channels of distribution under sound and equitable conditions.

In the work of the Commission directed toward preventing the use of unfair trade practices in industry and trade, three well defined courses of procedure are followed. One might somewhat descriptively refer to them as the compulsory method, the consent method, and the cooperative method. All three are designed to do just what our Act says; to prevent unfair competition and unfair and deceptive acts and practices in interstate commerce.

The compulsory method is when the Commission, in order to obtain correction and protect the public interest, is required, upon due process, to issue cease and desist orders against the offender. In such cases after a formal complaint is issued, a full opportunity is afforded the respondent for the taking of testimony; thereafter an initial decision upon the pleadings and evidence is filed by a trial examiner; appeals may be taken therefrom, briefs filed, and oral arguments held. Such cease and desist orders may be appealed to the United States Courts of Appeal for review; they may be eventually taken to the Supreme Court upon certiorari. For violation of a final order the offender may be subjected to civil penalties.

The consent method occurs, when an offender desires to agree voluntarily to discontinue the unfair practice which is complained of, the Commission, in its discretion, and subject to certain limitations, may afford him the opportunity to enter into an agreement, called a stipulation, to cease and desist. It is the policy of the Commission to extend the privilege of such informal stipulation only in cases where it is of the opinion, under all the circumstances, that disposition of the case by this method will effect prompt correction and will fully protect and satisfy the public interest. Such stipulation procedure is what I referred to as the consent method of settling cases without the necessity of instituting formal litigation. It does not extend to cases of deliberate fraud or concerted action in restraint of trade.

The cooperative method provided by the Commission is the trade practice conference plan which is available for the elimination of unfair trade practices and the consequent promotion of fair standards of business ethics. Such trade practice conference procedure has for its purpose the wholesale elimination of unfair trade practices by industry-wide cooperation with the Commission, and the collaboration of all groups and interest in the formulation, establishment, and observance of fair trade practice rules governing the conduct of the industry and trade in question.

Conference proceedings are conducted on a basis of voluntary participation; though the Commission may initiate the conference, it cannot compel attendance or participation. Parties in interest are at all times free to advise and consult with the Commission's representative in the matter. Where necessary or desirable, informal meetings or preliminary discussion may be

arranged to formulate tentative drafts of rules or to develop, through an exchange of ideas, a clearer understanding of the problems involved and the assistance which can be rendered by the Commission in their solution. The conference considers and proposes rules for submission to the Commission for its approval. Before rules are finally approved or promulgated by the Commission, they are subjected to public hearings at which all interested or affected parties, are afforded opportunity to present their views. They may submit such in writing or be heard orally as desired. Through such conferences and hearings, all groups in interest have the opportunity to be heard and to consult with us in the matter, even though they may not happen to be classed as members of the particular industry or trade involved.

In passing upon the rules proposed for approval, the Commission applies the test of law. In other words, the rules must not sanction practices which are contrary to law or which, when put into effect, may bring about a result which is illegal or opposed to the public interest. The purpose of this is, of course, obvious. It is not within our province to sanction violations of the law, on the contrary we are directed to promote law observance, to the end that honest business may be liberated from the waste and fetters of unfair practices, and the rights of the public may be protected.

It has been called to my attention that many of your items, in the electronic field, are sold under fair trade laws. You will, therefore, be interested in a few comments on the now celebrated decision of the United States Supreme Court in the Schwegmann Case, in regard to fair trade laws.

As you know, forty-five States have fair trade laws (the only exceptions are Vermont, Texas, Missouri, and the District of Columbia). A very important clause, common to all such statutes, perhaps the keystone of fair trade laws, is the so-called nonsigner clause, which provides that when a manufacturer has obtained the signature of even one retailer to an agreement not to sell the manufacturer's products below the prices he sets, all other retailers in the State, with knowledge, are bound by it.

The Miller-Tydings Act, a Federal enabling law, was passed in 1937, and provided that "nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale" of specified commodities when "contracts or agreements of that description are lawful as applied to intrastate transactions" under the local law. There is no nonsigner provision in the Miller-Tydings Act.

The issue before the United States Supreme Court in the Schwegmann case was, whether a dealer who did not sign a fair trade contract is required to sell at the prices fixed in a fair trade contract, made between other persons, when the product is sold touches interstate commerce.

The Supreme Court by a 6-3 decision said "no";--that a manufacturer will no longer, by making a fair trade contract with one dealer, be able to fix the uniform price at which his product will be sold if the product

falls within the scope of interstate commerce. The Supreme Court held the nonsigner provision to be outside the protection of the Miller-Tydings Act and that attempts to impose such restrictions on nonsigners in the sale of products touching interstate commerce remain a violation of the Sherman Act. The power of a contracting manufacturer and a contracting retailer to maintain a uniform price by imposing the price on non-contracting parties is a form of price fixing which is expressly excluded from the protection of the Miller-Tydings Act.

This decision was a severe blow to the sponsors of fair trade laws. To get around this decision, certain plans have been advanced and no doubt others will be proposed. However, it is felt that it may be quite difficult to devise a legal and practical and effective plan by which a large interstate, nation-wide business enterprise, can police its customers to insure their abidance by the manufacturer's "suggested" prices.

For all practical purposes, it appears that the Schwegmann decision has seriously impaired resale price maintenance of nationally known trade-marked products.

The remedy, if such be advisable, must come from Congress. In order to bring the nonsigner provision within the scope of the Miller-Tydings amendments, new legislation is required.

Certain additional functions, as a result of the defense emergency, have recently been assigned to the Federal Trade Commission by the Defense Production Act of 1950. These functions are:

A. To consult with defense agencies as to action which such agencies intend to request pursuant to voluntary agreement where there is need for such action to be exempted from the Anti-Trust Laws.

B. To make surveys upon request by the Attorney General for the purpose of determining factors that may tend to eliminate competition, create or strengthen monopolies, injure small business, or otherwise promote undue concentration of economic power in the course of the administration of the Defense Production Act.

The duties of the Commission in the defense mobilization have been further defined in two Presidential memoranda directed to the defense agencies; the first dated September, 1950, requests defense agencies, in performing the functions delegated to them, to consult with the Attorney General and the Chairman of the Federal Trade Commission

"for the purpose of determining and, to the extent consistent with the principal objectives of the Act and without impairing the defense effort, of eliminating any factors which may tend to suppress competition, unduly create or strengthen monopolies, injure small business, or otherwise promote undue concentration of economic power.

"I am requesting the Attorney General and the Chairman of the Federal Trade Commission to consult with you as the occasion requires and to report to me from time to time concerning the progress that is being made in carrying out this policy."

The second memorandum, dated December 20, 1950, transmits the Attorney General's first report concerning the dangers to a competitive enterprise economy which are inherent in mobilization for defense and states that this report will be of assistance to defense agencies in identifying some of the problems about which they should consult with the Attorney General or the Federal Trade Commission, and in carrying out their responsibilities in the defense program.

Every effort is made by the Commission to facilitate the consultation of the defense agencies with the Commission as provided in these directives; and, in addition, the Commission has realigned its entire program of regular functions for the purpose of affording the maximum aid to the defense effort and to bring about, wherever possible, effective safeguards against factors inimical to small business and our free enterprise economy to which the communications of the President refer.

It appears inevitable that a vast mobilization program for defense places a strain upon our free competitive system and brings with it inherent tendencies to concentration of economic powers.

Our solemn aim, during this national emergency, in harmony with the principal functions and responsibilities of the Federal Trade Commission, is to preserve and promote the competitive private enterprise system. Small business must be preserved as well as big business. We must avoid a long-run trend toward even greater concentration of economic power, or we shall jeopardize the survival of our competitive system.

We must use all our national strength -- small business is an important part of that national strength; it must have an equal opportunity to produce and expand; it must have an equitable share of defense contracts; it must be assured of the chance to survive and offer genuine competition.

Everyone -- big business, small business -- all have substantial contributions to make. We must intelligently combine and coordinate all the efforts and resources of our industrial and commercial economy in order to adequately and effectively meet the challenge and preserve our American way of life: -- a vital and important part of which is the maintenance of fair competition in business -- the preservation of free business enterprise.