THE FEDERAL TRADE COMMISSION AND TRADE ASSOCIATIONS

ADDRESS

By

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FEDERAL TRADE COMMISSION

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It is a pleasure to speak to you at this, your Nineteenth Annual Meeting. I am always delighted to have the opportunity to speak to a group of businessmen and to discuss with them some of the phases of our competitive enterprise system.

I am told your association is composed of more than two hundred members, primarily engaged in purchasing and reselling various types of food service equipment to hotels, restaurants, clubs, institutions and other such classes of business. The nature of the goods sold by you speaks for itself as to your importance in our economic system.

Today, as never before, it is imperative that the economy of our country be sound. Much of the world looks to us for leadership in the struggle against communism. With such leadership goes the responsibility of shouldering the burdens of a substantial portion of the free peoples of the world. Our success in discharging that responsibility in the past has been due in great measure to our sound economy. Our success in the future will be assured only if we are vigilant and see to it that our economy remains free and competitive. Such vigilance is essential on the part of law enforcement agencies such as the Federal Trade Commission whose duty is to protect, maintain, and preserve the free competitive enterprise system. No less important is the part that must be played by businessmen through such mediums as your trade association. This means that business must observe, and the Commission must enforce, the rules that promote fair competition.

The necessity for rules and regulations to govern the conduct of our enterprise system arose during the era of industrial expansion following the Civil War. The rapid rise of mass manufacturing, mass merchandising, and mass advertising, with the accompanying mergers and trusts, resulted in such restraints of trade as price fixing, restricting output, and cornering the supply of goods. Public demand for a free competive enterprise system resulted in the passage of the Sherman Antitrust Act by Congress in 1890. The primary purpose of this Act was to prevent and control industrial combinations which had as their purpose the restraint of competition and trade.

When the Supreme Court held that the Sherman Act prohibited only "unreasonable" restraints of trade, Congress considered the passage of supplemental legislation. In 1914 the Federal Trade Commission Act was enacted. It prohibited unfair methods of competition and created a Commission composed of five members to enforce the Act. The Commission was set up as an independent administrative agency, the second oldest in our Government. It was considered that an independent body of experts could best cope with the problems of preventing monopoly at its inception and checking its expansion.

In the same year, 1914, Congress legislated against specific trade practices that lessened competition and restrained trade in the passage of the Clayton Act. Under this Act the Commission was authorized to proceed against practices such as: (1) discriminations in price; (2) the use of tying contracts; (3) the acquisition of stock by a corporation to gain control of a competitor; and (4) the use of interlocking directorates between normally competing corporations.

With the passage of the years the expansion of our economy focused attention on the need for further legislation to deal with trade practices which threatened our free enterprise system. Price discriminations were given particular attention by the Congress. Among unfair business practices, price discrimination most directly denies to small business an equal opportunity to live and grow on the basis of efficiency. Such opportunity is the very essence of the competitive economic system which our antitrust laws seek to preserve, maintain, and restore. Small business is entitled to compete on a fair basis, without the crippling handicap of discriminatory prices.

In 1936, Congress amended section 2 of the Clayton Act by enacting the Robinson-Patman Anti-Discrimination Act. As amended, this section prohibits sales in commerce at discriminatory prices where the effect may be to substantially lessen competition, tend to create a monopoly, injure, destroy, or prevent competition. It also prohibits trade practices involving the abuse of the legitimate brokerage function for purposes of discriminating in favor of certain buyers; and discriminatory promotional allowances, services, or facilities. The amendment as to these trade practices is unique in that it is directed at specific types of business practices which Congress declared to be illegal irrespective of the competitive effect of such practices in a given case.

The Commission's authority to deal with unfair trade practices was further expanded with the passage of the Wheeler-Lea Act in 1938. This Act amended the Federal Trade Commission Act by adding the words "unfair or deceptive acts or practices in commerce" to the phrase "unfair methods of competition in commerce" of the original Act. A primary purpose of this amendment was to afford consumers the same protection against unfair and deceptive acts and practices that competitors were given against unfair competition.

The Federal Trade Commission does not discharge its responsibility by enforcing existing laws. It has the further duty to recommend remedial legislation where investigation shows that existing laws are inadequate. The activities of the Commission with respect to corporate mergers illustrate how these dual functions have been executed. As independent businessmen you should be interested in these activities which are designed to protect you as essential elements in our competitive system.

Section 7 of the Clayton Act, passed in 1914, prohibited one corporation engaged in commerce from acquiring the capital stock of another corporation so engaged, if such acquisition had the reasonably probable effect of lessening competition between the two corporations, or of restraining commerce in any section or community, or of tending to create a monopoly in any line of commerce. Although dissolution was possible under the Sherman Act, as demonstrated in such cases as those involving the Standard Oil Company and the American Tobacco Company, additional legislation was necessary to stop the growth of monopoly before it was sufficiently large to require dissolution. Section 7 of the Clayton Act was designed to prevent one of the first steps taken toward monopoly, namely, the acquisition of capital stock. This practice had played an important part in the great merger movement of the 1890's.

Unfortunately, corporations were able to avoid section 7 by effecting mergers through the acquisition of physical assets. One result was a second major merger movement in the 1920's. Decisions by the Supreme Court made section 7 a nullity for all practical purposes and the Commission was powerless to deal with the situation.

For many years this defect in the law was called to the attention of Congress by the Commission. The Commission noted the wave of mergers that took place prior to, and during and after the last World War. It points out to Congress the rise of economic concentration and the resulting danger to the existence of small business and the preservation of effective competition and free enterprise.

In 1950 Congress amended section 7 of the Clayton Act to cover the acquisition of physical assets as well as capital stock.

I have cited some of the statutes which are the source of the Federal Trade Commission's authority. They are designed to effectuate the purpose of the Commission, namely, the maintenance of free competitive enterprise.

That purpose cannot be achieved by the Commission and other Government agencies alone. The cooperation of business is a necessary factor. Our enterprise system will remain free only so long as competition is fair and unrestrained. Trade associations, such as yours, can do much to insure that vigorous competition remains a fundamental part of our enterprise system.

I should like to state at the outset that I believe that most modern trade associations are interested, not only in promoting the interests of their members consistent with the law and the public interest, but also in encouraging competition and eliminating illegal trade practices. This, unfortunately, has not always been the case in the past.

Trade associations first came into existence almost one hundred years ago, the first one of which we have any record being organized in 1853. Like many of the early associations it departed from its original legitimate purpose and became involved in price-fixing activities. With the advent of the antitrust laws the activities of trade associations became involved in numerous cases before the Courts.

While each case must stand on its own facts, it can be said that certain of such activities have generally been held to be in violation of the antitrust laws. Understandings and agreements, whether formal or informal, among trade association members to fix prices, to restrict production, to allocate customers and markets, and to control both patented and unpatented materials, as part of a general pattern of control of the industry, are illegal. Most of the cases have involved various forms of price fixing and price manipulation. Such practices almost inevitably involve unlawful restraints of trade. It is important to note that it is immaterial whether the practices result in the actual fixing of a price. In its decision in the Socony-Vacuum Oil Company case in 1940 the Supreme Court stated:

"Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered or stabilized prices they would be directly interfering with the free play of market forces. The act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination. If such a shift is to be made, it must be done by the Congress. Certainly Congress has not left us with any such choice."

There is a great variety of activities of trade associations whose legality depends upon the results they produce. For the most part they may be engaged in without adversely affecting competition. On the other hand they may be used in an illegal manner. For that reason the Commission can neither unequivocally condemn nor approve such activities of trade associations.

Such activities include cooperative action of trade associations in connection with production and sales statistics, cost accounting, credit bureaus, and standardization of products. All of these cooperative practices have been used as devices to restrain trade. However, any one of them may be used by other trade associations under other circumstances in a legal manner.

The important factors in determining the legality of such activities are their purpose and effect. The members of the trade association are in the best position to know why a plan is being pursued and what results it produces. They are also in a position to develop a lawful, constructive program and see to it that it does not become combined with illegal activities. An example of such a program is trade association activity in connection with standardization of products. The Government has recognized the desirability of eliminating unnecessary or uneconomic styles and sizes of products. The Bureau of Standards, of the Department of Commerce, has devised a procedure for this purpose, under which the Bureau invites recommendations from interested parties. The Bureau then gets the views of members of the industry, dealers, consumers and other affected parties. The findings of the Bureau are then published and each member of the industry invited to agree to abide by them. Of course the standards so established by the Bureau cannot be used in an unlawful manner such as the implementation of a price-fixing agreement.

There are many activities that may be engaged in by trade associations which are extremely unlikely to restrain competition. These include legislative and informational services, research activities, assistance to the Government as sources of information on matters concerning the industry, and representation of an industry in dealings with the Government and with labor,

trade and consumer groups. Another broad field in this category concerns the elimination of ambiguity in descriptive terms used in trade terminology with reference to commodities and their characteristics. The Federal Trade Commission has worked with trade groups in this respect, particularly in working out the definitions of such terms as "shock resistant," "preshrunk," "gold-filled," and the like. Such cooperation enables industry and the Commission to eliminate misrepresentation and protect both the honest businessman and the consumer.

One of the most important services a trade association can render its members is to keep them informed of the status of the law as it relates to their business practices. A trade association counsel, familiar with the antitrust laws, can do much to enable the association to make full use of its lawful potentialities and yet stay within the law. If counsel is familiar with all the activities of the association, he can advise its members when any activity appears to be in conflict with the law. To be of the greatest help counsel should attend the association meetings and be thoroughly familiar with the details of its program.

Of course the advice of counsel is of no benefit unless the members choose to take it. Unless the members believe sincerely in the preservation of the free competitive enterprise system they are not likely to concern themselves with possible violations of the antitrust laws. The trade association executive can do much to influence the thinking of the members in this respect. Usually the program of a trade association reflects the character and personality of its chief paid executive. This is particularly true of the small associations which comprise the majority of trade associations. Unfortunately, there have been some instances in the past of trade association executives whose philosophy was concerned primarily with ways and means to control and fix prices and otherwise restrict competition. I hope and believe that philosophy is far less prevalent today.

Trade associations and the Federal Trade Commission can do much in cooperation to further the maintenance of our free competitive enterprise system. Most of the requests for Commission investigation in cases involving restraint of trade or monopolistic tendencies come from individuals or firms who fear that the successful operation of their businesses may be threatened by the illegal practices of others. Each such request is given careful consideration and preliminary investigation to determine whether a probable violation of law is indicated. If so indicated, the matter is thoroughly investigated by field investigators and, if warranted, the Commission issues a formal complaint. The names of the applicants who request such investigations are not revealed by the Commission. Trade associations are in an excellent position to bring possible violations of law to the attention of the Commission. The members in the course of their businesses daily observe the trade practices of their competitors and other firms with whom they deal. The office of the trade association executive or counsel affords a convenient medium for transmitting such information to the Commission. Some trade associations have used this method to cooperate with the Commission. I have in mind one such association that has filed some 200 requests for investigation of questionable trade practices. This association has also cooperated with the Commission in securing evidence to support some of the complaints that have resulted from such investigations.

I wish to stress that, irrespective of the statutes which now exist or which may be enacted in the future, the Federal Trade Commission and other Government agencies cannot alone insure the preservation and maintenance of free competitive enterprise. The essential element of competition must be supplied by businessmen such as you. Your trade association can be an important asset by actively promoting free and vigorous competition and discouraging practices that restrain trade. The trade association which has such a program truly serves the best interests of its members as well as the public.