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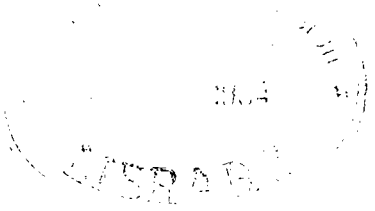

TRADE PRACTICE RULES AND THE COSMETIC INDUSTRY

ADDRESS

by

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TRADE PRACTICE RULES AND THE COSMETIC INDUSTRY

It has not been my custom, in public talks before interested business groups, to discuss particular matters pending before the Commission. There are many reasons for this. Aside from propriety, one of them is that it is always dangerous to deal with a subject about which the audience knows more than the speaker.

However, since every good rule is supposed to have an exception, I propose today to invoke the exception and talk about the Trade Practice Rules for the Cosmetic and Toilet Preparations Industry.

I have been told, by people within the Commission and by persons connected with your industry, that the Federal Trade Commission is at the crossroads insofar as trade practice rules are concerned; that if the Commission fails to make the cosmetic rules work, the whole trade practice conference program may bog down.

While statements like these may serve to needle the Commission - and it sometimes needs needling - they really place the emphasis on the wrong party. It must be apparent to anyone who analyzes the problem that, in the last analysis, the members of the cosmetic industry are the only ones who can make the cosmetic rules work.

Let me say in the same breath, however, that I intend to do everything in my power, as Chairman of the Commission, to help you make them work.

Such misunderstanding as may exist in this connection probably arises from a misapprehension of the nature of the rules. They are not substantive rules, having the force and effect of law, like those of the Food and Drug Administration or those soon to be issued by the Commission under the new Flammable Fabrics Act. They are in the nature of advisory opinions, - an attempt by the Commission, for the guidance of businessmen, to interpret the various statutes administered by the Commission in language applicable to the particular industry.

The rules are not and, under our statutes, cannot be enforced as such. When and if the Commission invokes its formal procedures, it must charge a violation of the law, not merely a violation of the rules. Of course, a violation of the rule may well be a violation of law, providing all the statutory elements are present, such as, for example, under the F.T.C. Act, public interest, interstate commerce, and injury to competition or deception of the public.

In short the trade practice conference is one - probably the most important one - of our voluntary procedures whereby the Commission, through consultation and cooperation, rather than prosecution, tries to help business help itself.

Some knowledge of the origin and history of the cosmetic rules is necessary to an understanding of the present compliance problem. A few years ago the Commission made a field investigation of your industry. Seventy-three individual companies were examined. The investigative reports showed, prima facie, that 12 were granting price discriminations in violation of Section 2(a) of the Robinson-Patman Act; 43 were giving improper advertising allowances in violation of Section 2(d); 38 were using "push money" in violation of Section 2(d); 55 were furnishing varying types of demonstrators in violation of Section 2(e); 26 were engaging in false advertising or misrepresentation in violation of Sections 5 and 12 of the Federal Trade Commission Act; and 3 were violating the Federal Trade Commission Act by means of resale price maintenance in the District of Columbia, Texas, Vermont and Missouri.1/

In other words it appeared that the 73 companies were committing 177 different types of violations.

What was to be done about it? Obviously the Commission, with jurisdiction over our entire multibillion dollar economy, could not turn over all of its resources in time, money and personnel to the investigation and prosecution of

1/Fair trading was not permitted in these jurisdictions.

177 cases in a single industry. The trade practice conference procedure seemed to be the only practical solution.

After much negotiation and hard work, which I need not now recount, trade practice rules were finally promulgated and approved. In both form and content they are, I believe, the best set of rules ever issued by the Commission.

Of the 1,805 manufacturers and wholesalers to whom copies were mailed, 340 sent back signed acceptances in which they stated they would observe the requirements of the rules.

Compliance efforts were first directed to those provisions of Rule 1 which are interpretative of Sections 2(d) and 2(e) of the Robinson-Patman Act. Over 200 firms were requested by "survey" letters to furnish the Commission copies of their sales plans and promotional offers. Eighty-six of these files were soon closed upon the ground that examination disclosed substantial compliance.

Last October the Commission directed that every effort be made to expedite examination of the remaining plans and that the plans of certain major manufacturers be reviewed and additionally processed by the Assistant General Counsel in Charge of Compliance. The previous month I had appointed a committee to survey and recommend improved compliance procedures for all types of cases. Following consultation with this committee a compliance procedure for the cosmetic rules was planned and put into operation.

This procedure contemplated that members of the industry would be plainly advised whether their plans were deemed to be in substantial compliance with the rules or whether further adjustments were needed.

If it appeared that industry members were making little or no effort to comply, or failed and refused to submit sufficient information for proper evaluation, field investigations were to be arranged and the results referred to

the Bureau of Antimonopoly for consideration and recommendation as to whether such matters should be brought to complaint and trial.

Fifteen major companies were selected to initiate the operation of this plan. After careful examination of the plans of the 15, as supplemented and revised, it was the opinion of the staff that the practices and policies of 14, if in operation, constituted substantial compliance with the rules. I stress the word "substantial," because, as Mr. Justice Holmes once said, "Some play must be allowed for the joints of the machine."

In the case of only one of the 15 was it necessary to institute a field investigation to obtain the required information. I think this speaks well for the kind of cooperation your industry is now willing to extend to the Commission.

Those whose sales plans and policies appeared to be in compliance were asked whether the plans were in effect and, if not, when it was proposed to put them into effect. Eleven said their plans were already in operation. Two advised that their plans were being placed in effect but were not yet in full operation. The remaining company's position was complicated by an existing court decree.2/ All were notified that the Commission expected the plans to be in full effect by April 1.

The next step which the Commission has just now undertaken, is to make a spot check in different areas in the country to ascertain whether the sales plans, as reported to us, are in operation, what the effect thereof may be at the retail level, and whether current pricing practices and promotional

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2/Attorneys for this company advised that its plans were in effect except where complete adoption would place it at a severe competitive disadvantage with six firms who were respondents in the companion cases which were dismissed. This was the test case that resulted in a Court of Appeals decree of enforcement, in connection with which it had been agreed by the Commission that no report of compliance would be required until the firms involved in the six dismissed cases were either reported to be in substantial compliance or some definite action taken against any of the six not in compliance. This agreement has not and will not be breached, but the time has come when without breaching the agreement compliance in the case can also be insisted upon.

allowances are in compliance with the rules. This field investigation will not be limited to the 15 companies but is designed to cover the industry as a whole.

A number of major trading areas will be investigated,-in the east, in the middle west, in the far west, and in the south. In each area the investigators will examine several of the large department stores, two or more drug chains, a representative number of independent drug stores, a small number of the leading beauty shops, and a small number of cosmetic wholesalers or jobbers.

The data to be secured will include manufacturers' pricing schedules, discounts, freight allowances, promotional allowances, promotional services or facilities furnished, cooperative advertising allowances, special deals, demonstrator services, and the like.

From these facts the Commission should be able to ascertain whether the various manufacturers are adhering to the sales plans filed with the Commission, the extent, if any, of price discriminations, the availability and proportionality of advertising allowances, and the availability of promotional allowances for demonstrators, push-money paid to sales girls, and shop and counter display space.

When this spot investigation has been completed the Commission will have the whole picture. It can then decide whether the trade practice rules have done the job or whether it must proceed on a wholesale case-by-case basis involving formal complaints. If the rules do not work you can rest assured, "with all the hay that is down," that the Commission will be compelled promptly to invoke its compulsory procedures. However, the fact that a few hard core violations may turn up, requiring formal complaints, will not be enough to discredit the rules as a whole. One of the purposes of trade practice rules is to ferret out and pinpoint the willful violator.

If the rules serve to promote voluntary compliance by major segments of the industry they will be hailed as a great success. And, perhaps more important from my standpoint, they will give impetus and understanding to one of my major objectives, namely, greater compliance with trade regulation statutes through cooperative and consultative procedures.