Administrative Procedure
in Government Agencies.

Monograph of the
Attorney General's Committee
on Administrative Procedure.

Federal trade Commission.

76TH CONGRESS
3d Session

ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES

MONOGRAPH

OF THE

ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE

EMBODYING THE

RESULTS OF THE INVESTIGATIONS MADE BY THE STAFF OF SAID COMMITTEE RELATIVE TO THE ADMINISTRATIVE PRACTICES AND PROCEDURES OF SEVERAL AGENCIES OF THE GOVERNMENT

IN 13 PARTS

PART 6

FEDERAL TRADE COMMISSION

UNITED STATES
GOVERNMENT PRINTING OFFICE
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SENATE RESOLUTION NO. 248

[Reported by Mr. HAYDEN]

IN THE SENATE OF THE UNITED STATES,
April 22, 1940.

Resolved, That the monographs published by the Attorney General's Committee on Administrative Procedure embodying the results of the investigations made by the staff of said Committee relative to the practices and procedures of the Division of Public Contracts, Department of Labor; the Veterans' Administration; the Federal Communications Commission; the United States Maritime Commission; the Federal Alcohol Administration; the Federal Trade Commission; the Administration of the Grain Standards Act, Department of Agriculture; the Railroad Retirement Board; the Federal Reserve System; the Bureau of Marine Inspection and Navigation, Department of Commerce; the Administration of the Packers and Stockyards Act, Department of Agriculture; the Post Office Department; the Bureau of the Comptroller of the Currency, Treasury Department; and the Federal Deposit Insurance Corporation, be printed as a Senate document; and that one thousand three hundred additional copies be printed for the use of the Joint Committee on Printing.

Attest:

EDWIN A. HALSEY, *Secretary.*

PREFACE

ATTORNEY GENERAL'S COMMITTEE
ON ADMINISTRATIVE PROCEDURE,
DEPARTMENT OF JUSTICE,
Washington, D. C.

This monograph is one of a series of studies submitted to this Committee by the investigating staff working under the Director. The members of the staff are Walter Gellhorn, Director; and Ralph S. Boyd, Kenneth C. Davis, Robert W. Ginnane, William W. Golub, Martin Norr, and Richard S. Salant.

These staff reports represent information and recommendations submitted to the Committee. They are not an expression of committee findings or opinion. The Committee invites professional and lay criticism and discussion of the matter contained in these studies, both by written communications addressed to it at the Department of Justice, Washington, D. C., and by oral presentation at hearings which the Committee will hold in Washington on June 26, 27, and 28, and July 10, 11, and 12, 1940.

The Committee will make its report, setting forth its findings, conclusions, and recommendations after consideration of all the material submitted to it, including these reports of its staff; the record of oral examination of administrative officers; and the briefs, statements, and testimony which may be furnished by members of the bar and the public. These reports are made available in furtherance of this Committee's desire, first, that the information submitted to it by its investigators shall be public and, second, that all persons desiring to do so shall have full opportunity to criticize and supplement these reports.

The members of the Committee are Dean Acheson, Chairman, of the District of Columbia Bar, formerly Under Secretary of the Treasury; Francis Biddle, Solicitor General of the United States; Ralph F. Fuchs, professor of law, Washington University; Lloyd K. Garrison, dean of the University of Wisconsin School of Law; D. Lawrence Groner, chief justice of the Court of Appeals for the District of Columbia; Henry M. Hart, Jr., professor of law, Harvard University; Carl McFarland, of the District of Columbia Bar, formerly Assistant Attorney General; James W. Morris, associate justice of the United States District Court for the District of Columbia; Harry Shulman, Sterling professor of law, Yale University; E. Blythe Stason, dean of the University of Michigan School of Law; and Arthur T. Vanderbilt, of the New Jersey Bar, formerly president of the American Bar Association.

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APPENDIX A

Enforcement and Review

Consideration of the methods of securing observance of Federal Trade Commission orders is complicated by the Wheeler-Lea Act of 1938, amendatory of the Federal Trade Commission Act. As a result of the 1938 amendments, the Commission's orders under the Federal Trade Commission Act are now enforced and reviewed by procedures different from those still operative under the Clayton Act.

The first step in securing compliance with orders and stipulations to cease and desist is the administrative policing provided by Rule XXII of the Rules of Practice. Rule XXII provides that in all cases in which the Commission issues orders to cease and desist or approves and accepts stipulations to cease and desist—

> the respondents named in such orders and parties so stipulating shall file with the Commission, within 60 days of the service of such order and within 60 days of the approval of such stipulation, a report, in writing, setting forth in detail the manner and form in which they have complied with said order or with said stipulation: *Provided, however,* That where the order prevents the use of a false advertisement of a food, drug, device, or cosmetic which may be injurious to health because of results from such use under the conditions prescribed in the advertisement, or under such conditions as are customary or usual, or if the use of such advertisement is with intent to defraud or mislead, an interim report stating whether and how respondents intend to comply shall be filed within 10 days.

The rule further provides that the Commission may require the filing of additional compliance reports. Every order to cease and desist concludes with a statement of the applicable requirements for the filing of compliance reports.

This check upon compliance with orders to cease and desist is handled by the Chief Counsel's staff in so far as the question of compliance can be satisfactorily determined through correspondence. The determination of compliance with any particular stipulation to cease and desist is made, however, not by the Chief Counsel, but by the division which prepared the stipulation, that is, by the Chief Trial Examiner's Division of the Radio and Periodical Division. Where the determination whether there has been compliance necessitates a field investigation, the matter is referred to the Chief Examiner's Division.

Section 11 of the Clayton Act provides that if a person against whom a cease and desist order has been issued disobeys such order, the Commission may apply to the Circuit Court of Appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order. The Commission is required to certify and file with its petition for enforcement a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission, but not including the trial examiner's report and the exceptions taken thereto.[54] Upon the

[54] *Rainbow Co. v. Federal Trade Commission* (43 F. (2d) 430, affirmed on other grounds, 283 U. S. 643 (1931)); *Algoma Lumber Co. v. Federal Trade Commission* (56 F. (2d) 774, affirmed on other grounds, 291 U. S. 67 (1934)).

filing of the application and transcript, and after notice to the respondent, the circuit court has jurisdiction of the proceeding and—

shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission.

Section 11 vests in the circuit courts of appeals exclusive jurisdiction to review orders of the Commission. It is provided that any party against whom a cease and desist order has been issued—

may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the Commission be set aside.

It is further provided that in such a proceeding the circuit court shall have the same jurisdiction to affirm, set aside, or modify the Commission's order as in the case of an application by the Commission to enforce its order. Under section 11 of the Clayton Act and under the original section 5 of the Federal Trade Commission Act, no time limit was placed on the exercise of this right to review by a circuit court of appeals. In other words, years after the issuance of an order, the respondent could, and still may, under the Clayton Act, test the validity of the order in a circuit court of appeals. It should be noted that the procedure for enforcement and review outlined above is applicable to the Robinson-Patman Act, which is embodied in section 2 of the Clayton Act.

In addition to the difficulty occasioned by the fact that its orders did not become final and enforceable without an affirming order by a circuit court of appeals, the Commission's enforcement of its orders was further impeded by the distinction drawn by some circuit courts between orders of affirmance and orders or decrees of enforcement. In a case where a circuit court of appeals affirmed the Commission's order and the respondent disobeyed the court's order, the Commission could only petition the court for an order to the respondent to show cause why he should not be adjudged in contempt of the court for violation of the court's order. In one case,[65] it was held that the entry of a general order of affirmance of the Commission's order by the circuit court was not equivalent to a decree of enforcement, for the violation of which the respondent could be held in contempt. It was said that a decree of enforcement should be of the general nature and form of an injunction decree definitely fixing the duties of the party against whom the cease and desist order had been issued.

The 1938 amendments to the Federal Trade Commission Act have changed completely the status and enforcement of orders issued by the Commission under section 5 of that act. Any person against whom a cease and desist order is issued pursuant to section 5 may obtain a review of that order in a circuit court of appeals as under the original act, except that the petition for review must be filed in the court within 60 days from the date of service of the Commission's order, otherwise the order becomes final and unappealable. As under the original act, the judgment and decree of the circuit court of appeals is subject to review by the Supreme Court upon certiorari. Section 5 (c) of the amended act provides that the circuit court shall have power not only to affirm, modify, or set aside the Commission's order, as under the original act and the Clayton Act, but also to enforce—

the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite.

[65] *Federal Trade Commission* v. *Fairyfoot Products Co.* (C. C. A. 7th, 1933), 64 F. (2d) 844).

This amendment is designed to obviate the difficulty caused by the distinction between orders of affirmance and enforcement orders.

Section 5 (g) of the Federal Trade Commission Act provides that a cease and desist order issued under that section shall become final and unappealable:[66]

(1) Upon the expiration of the 60-day period allowed for filing a petition for review where no such petition has been filed within such time; or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the circuit court of appeals, and no petition for certiorari has been filed; or

(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the circuit court of appeals; or

(4) Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such court directs that the order of the Commission be affirmed or the petition for review dismissed.[67]

The amended section 5 throws upon a respondent the necessity of challenging the Commission's order within 60 days or of obeying it. There is no longer provision for the Commission to take the initiative in invoking the aid of the circuit courts in the enforcement of its orders.

Section 5 (1) provides that any person who violates a final cease-and-desist order shall be subject to a civil penalty of not more than $5,000 for each violation "which shall accrue to the United States and may be recovered in a civil action brought by the United States." Under section 16 of the act, whenever the Commission has reason to believe that any person is liable to a penalty under section 5 (1)—

it shall certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought for the enforcement of the provisions of such section or subsection.[68]

Section 16 is construed by both the Commission and the Department of Justice as not requiring the Attorney General to bring suit automatically upon the certification of the Commission, but as permitting the Department of Justice to pass upon the evidence of violation. By agreement, the Commission furnishes to the Department a proposed complaint and a memorandum setting forth the evidence of

[66] Sec. 5 (b) of the Federal Trade Commission Act provides that where an order to cease and desist has become final, as provided in that section, "the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require."

Both sec. 5 of the Federal Trade Commission Act and sec. 11 of the Clayton Act provide that if, while the case is in a circuit court of appeals on a petition for review (or on an application for enforcement under the Clayton Act), "either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence ["testimony" under the Clayton Act] shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence."

[67] Paragraphs (h), (i), and (j) of sec. 5 of the Federal Trade Commission Act contain provisions as to when orders become final where the circuit court or the Supreme Court has modified or set aside the Commission's order or where the case has been remanded to the Commission for a rehearing.

[68] The same enforcement procedure applies to sec. 14 of the Federal Trade Commission Act, which provides a punishment of fine or imprisonment, or both, for any person who disseminates any false advertisement in violation of sec. 12 (a) "if the use of the commodity advertised may be injurious to health because of results from such use under the conditions prescribed in the advertisement thereof, or under such conditions as are customary or usual, or if such violation is with intent to defraud or mislead."

Statement showing nonconcurrence with recommendation of Special Board of Investigation (now Radio and Periodical Division) during fiscal year ended June 30, 1938

Recommendation of Special Board of Investigation	Number of cases reported	Recommendations concurred in by the Commission	Recommendations not concurred in by the Commission	No final action taken
Negotiation of stipulation	411	401	8	2
Reference to Chief Examiner	53	52	1	
Reference to Chief Counsel	4	4		
Reference to Post Office Department	16	16		
Closing by affidavit	39	37	2	
Closing on post-office fraud order	9	9		
Complaint	65	54	9	2
Miscellaneous [1]	202	197	4	1
Total	799	770	24	5

[1] "Miscellaneous" in large part consists of recommendations for closing, together with requests for instructions, and cases in which the advertisers had discontinued the claims in question prior to the issuance of questionnaires.

Statement showing partial concurrence with recommendation of Chief Examiner during fiscal year ended June 30, 1938

Recommendation of Chief Examiner	Number of cases	Action of Commission on such recommendation	Disposition of case
Clayton Act:			
Complaints (10):			
Sec. 2 (f) and 2 (c).	1		1 complaint, sec. 2 (f) Clayton Act.
Sec. 3	1		1 complaint, sec. 3 Clayton Act; sec. 5 Federal Trade Commission Act.
Sec. 2	1		1 closed, sec. 2, Clayton Act, after further investigation.
Sec. 2 (f) and 2 (c).	2		2 pending.
Sec. 2 (d) and 2 (e).	3		3 to suspense.
Suggest suspense.	2		2 closed after suspense.
Closed (1)	1	Further investigation	1 pending.
Federal Trade Commission Act:			
Complaint (5)	1	do	1 party respondent added.
	1	do	1 complaint.
	1	do	Do.
	1	do	1 closed.
	1	Suspended pending further investigation.	1 suspense.
Stipulation (10)	3	To Chief Trial Examiner for stipulation; Chief Trial Examiner recommends closing.	3 closed.
	2	Further investigation	2 stipulation.
	1	Commission directed suspense; Chief Examiner later recommends closing.	1 closed.
	1	To trade practice conference; recommends closing.	1 stipulation.
	1	Further investigation	1 closed.
	2	To chief counsel for complaint; chief counsel recommends suspense.	2 suspense.
	1	Returned for suspense; further investigation directed.	1 suspense.
Closed (11)	4	Further investigation	4 closed.
	3	Referred to basing point committee	3 pending.
	3	Suspense	3 suspense.
Affidavit closing (1)	1	To special board for affidavit	1 closed without prejudice.
Suspense (1)	1	Further investigation	1 suspense.
Total (39)	39		39 cases.

Total number of cases covered by this survey, 1,218.