

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 PRO-
CEDURES OF SEVERAL AGENCIES
OF THE GOVERNMENT

IN 13 PARTS
PART 6
FEDERAL TRADE COMMISSION



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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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FEDERAL TRADE COMMISSION¹

INTRODUCTION

The Federal Trade Commission was created by the Federal Trade Commission Act² which became law in 1914. Section 5 of the act provides that—

unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful³—

and empowers and directs the Commission to prevent them.⁴

Section 12 (a) of the act, added in 1938, makes unlawful the dissemination of false advertisements to induce the purchase of drugs, devices, or cosmetics. Section 12 (b) provides that the dissemination of false advertisements within the scope of subsection (a) shall be an unfair or deceptive act or practice in commerce within the meaning of section 5 and, accordingly, subject to preventive action by the Commission. The Commission is empowered by section 13, when it appears to be to the interest of the public, to bring suit in a United States district court to enjoin the dissemination of any advertisement in violation of section 12, pending the issuance by the Commission of a complaint and a final determination under section 5.⁵

The Commission is also charged with the administration of sections 2, 3, 7, and 8 of the Clayton Act,⁶ the extent of the Commission's powers and the nature of its procedures being similar to those provided for the administration of the Federal Trade Commission Act.

¹ This monograph was submitted November 1939, finally revised January 1940.

² 38 Stat. 717; 15 U. S. C., sec. 41, amended by 52 Stat. 111 (1938).

³ Sec. 5 of the original Federal Trade Commission Act merely prohibited "unfair methods of competition in commerce." In *Federal Trade Commission v. Raladam* (283 U. S. 643 (1931)), the Supreme Court held that as a jurisdictional element in a Commission proceeding against "unfair methods of competition," it must be shown that the method in question injures or affects actual or potential competitors. "The effect of this decision was to make the Commission's protection of the consumer merely an incident to the protection of honest competitors, likewise injured by the practices of unethical traders." Commissioner R. E. Freer, Practice Before the Federal Trade Commission (7 Geo. Wash. L. Rev. 287). One of the 1938 amendments (Wheeler-Lea Act) to the Federal Trade Commission Act declares that "unfair or deceptive acts or practices" are unlawful. Since this phrase contains no mention of competition, the jurisdictional requirement of the *Raladam* case is removed, so that the Commission can now act for the direct protection of consumers.

⁴ The prohibition of sec. 5 has been held by the Commission and the courts to include the following practices: (1) combination or conspiracy to fix or control prices; (2) combination or conspiracy between competitors to hamper or obstruct the business of rivals; (3) misbranding, mislabeling, or misrepresenting products as to composition, origin, quality, or source; (4) false and misleading advertising; (5) passing off one's goods as those of another; (6) sale of products by means of lottery or chance devices; (7) concerted refusal to buy where the effect is to suppress competition; (8) monopolization of trade channels; (9) combination and conspiracy to obstruct a competitor's source of supply; (10) white-listing, black-listing, or other forms of concerted boycotting; (11) commercial bribery; (12) threats of litigation not in good faith; (13) disparagement or misrepresentation concerning a competitor; (14) causing breach of contract between competitor and customers; (15) secret control of a supposed competitor; (16) unfair use of patent rights; (17) full line forcing.

⁵ As of date shortly after the close of the fiscal year ended June 30, 1939, the Commission had obtained 10 such preliminary injunctions, all in cases involving medicinal preparations. In each case, the injunction was preceded by a temporary restraining order.

⁶ Sec. 14 (a), also added in 1938, provides further that the dissemination of advertising in violation of sec. 12 (a) shall constitute a misdemeanor, punishable by fine or imprisonment, "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." Under sec. 16, the Commission is required, whenever it has reason to believe that there has been a violation of sec. 14, to certify the facts relating thereto to the Attorney General for appropriate action.

⁷ 38 Stat. 730; 15 U. S. C., sec. 12, amended in 49 Stat. 1536.

Section 2 of the Clayton Act, as amended by the Robinson-Patman Act of June 19, 1936, prohibits in broad terms price discrimination which affects competition, and declares it to be unlawful to induce or receive a discrimination in price prohibited by the section. It also forbids specifically, among other practices, without reference to effect on competition, the payment of brokerage or a commission by one party to a purchase and sale transaction to the other party or to an agent or intermediary acting for or subject to the control of the other party. Paragraph (a) of the section provides that the prohibitions therein contained shall not prevent price differentials which reflect only those differences in the cost of manufacture, sale or delivery attributable to the differing methods or quantities in which a commodity is sold. However, this dispensation is hedged with a provision that the Commission—

where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce—

may, after investigation and a hearing, establish quantity limits for any commodity or class of commodities; the general prohibition will then apply to price differentials based on differences in quantities greater than those fixed by the Commission. Of particular interest from a procedural viewpoint is that provision of section 2 of the Clayton Act which declares that in a proceeding under that section, where it is established that there has been discrimination in price, services, or facilities—

the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination.

Section 3 of the Clayton Act prohibits leases, sales, and contracts for sale of goods, and the fixing of prices, discounts, and rebates, on the condition, agreement, or understanding that the lessee or purchaser shall not use or deal in the goods of a competitor of the seller or lessor, where the effect may be substantially to lessen competition or tend to create a monopoly in any line of commerce. The acquisition by one corporation engaged in interstate commerce of the stock of another corporation engaged in such commerce is prohibited by section 7, where the effect of the acquisition may be substantially to lessen competition between the two corporations, "or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."⁷ The section also forbids the acquisition by a corporation of stocks of two or more corporations engaged in interstate commerce where the effect of the acquisition may be substantially to lessen competition between the corporations whose stock

⁷ The Export Trade Act of 1918 (Webb-Pomerene law) (40 Stat. 516, 15 U. S. C., sec. 61) provides, in part, that sec. 7 of the Clayton Act shall not extend to combinations of corporations engaging only in export trade, "unless the effect of such acquisition or ownership may be to restrain trade or substantially lessen competition within the United States." The Federal Trade Commission is charged with the duty of investigating export trade associations for the purpose of assuring that the conditions of the Webb-Pomerene law are observed; but if it finds a violation, it has no power to prescribe remedial measures, being authorized only to "recommend" a course of conduct to the offender, and, if its recommendations are ignored, to report its findings to the Attorney General for prosecutory action. An export trade association, however, may be ordered to cease and desist from utilizing "unfair methods of competition used in export trade against competitors engaged in export trade, even though the acts constituting such unfair methods are done" outside the United States.

is thus acquired, "or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."⁸ It appears to be settled that section 7 does not cover the acquisition by a corporation of the assets of competing organizations,⁹ and it has further been held by the Supreme Court that section 7 does not authorize the Commission to order divestiture of physical assets which were obtained by means of an illegal acquisition of stock.¹⁰

ADJUDICATION

Section 5 (b) of the Federal Trade Commission Act provides that when the Commission has reason to believe that any person—

has been or is using an unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint.¹¹

At that time, the section continues, the person so complained of may appear and show cause why he should not be ordered to cease and desist from the unlawful conduct with which he is charged; the testimony in the proceeding "shall be reduced to writing," and if the Commission is of the opinion that a violation has been established, "it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served" an order to cease and desist. Upon this modest statutory foundation the Commission has built an elaborate procedure, resembling closely the conventional legal procedure, drawing its power to do so from section 6 (g) of the act, which authorizes it to "make rules and regulations for the purpose of carrying out" the provisions of the act.

The Commission's control over the course of proceedings to enforce the Federal Trade Commission Act is plenary, for no individual can institute a suit under that act, nor can a court give it effect in the absence of prior Commission action. And while there is under the Clayton Act the possibility of individually instituted civil actions,¹² it is nevertheless true that the principal instrument for enforcing the major sections of that statute is the Commission's cease-and-desist order. Under neither act is an individual in a position to do more than request the Commission to commence proceedings; and the Commission, if it chooses to do so, may ignore the request, for its action, when

⁸ Sec. 8 of the Clayton Act further forbids any person from acting simultaneously as a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than \$1,000,000 and is engaged in whole or in part in commerce, where such corporations are or have been, by reason of location and business, competitors, so that the elimination of competition by agreement between them would constitute a violation of the antitrust laws. This section is administered by the Federal Trade Commission only to the extent it does not involve corporations subject to the jurisdiction of the Interstate Commerce Commission, Federal Communications Commission, Civil Aeronautics Authority, or the Federal Reserve Board (Clayton Act, sec. 11, 38 Stat. 734, 15 U. S. C., sec. 21).

⁹ *Federal Trade Commission v. Eastman Kodak Co.* (274 U. S. 819 (1927)).
¹⁰ *Thatcher Mfg. Co. v. Federal Trade Commission* (272 U. S. 554 (1926)); *Arrow-Hart & Hegeman Electric Co. v. Federal Trade Commission* (291 U. S. 587 (1934)).

¹¹ Sec. 11 of the Clayton Act, after vesting in the Commission a restricted authority to enforce compliance with secs. 2, 3, 7, and 8 of the act, provides for the initiation of formal proceedings by the Commission in exactly the same manner as does sec. 5 (b) of the Federal Trade Commission Act, except that under the Clayton Act there is no reference to the "public interest" as a criterion in determining whether formal action should be taken.

¹² Sec. 4 of the Clayton Act provides for the recovery of triple damages by any person injured by a violation of the antitrust laws (including the Clayton Act); and sec. 16 authorizes relief by injunction against a threatened violation of the antitrust laws.

taken, is not for the protection of a particular competitor or consumer, but solely for the "public interest."¹²

INITIATION OF OFFICIAL ACTION

Commission action may be commenced either on the Commission's own motion¹⁴ or, as more frequently happens, by charges made by consumers or competitors adversely and directly affected by the conditions complained of, or by public agencies other than the Commission itself.¹⁵ Since various Federal, State, and municipal agencies are large purchasers of certain commodities, many of the consumer protests come from such governmental bodies. Thus, during the fiscal year ended June 30, 1939, the Commission received from public agencies 71 charges relating to price fixing. The same sources also charged other violations of law, such as false or misleading advertising, misbranding, and misrepresentation as to origin.

The Commission has provided in rule VI of its rules that applications for complaint must be written and signed, and that they must "contain a short and simple statement of the facts constituting the alleged violation of law and the name and address of the applicant and the party complained of." In practice, however, no formality is required in making application for complaint. The Commission has said that "a letter setting forth the facts in detail is sufficient, but it should be accompanied by all evidence in possession of the complaining party in support of the charges made;"¹⁶ and while the Commission prefers that such applications be made in writing, applications made orally in the course of a conference will be considered where the facts presented and the identity of the applicant have been recorded.

INVESTIGATION

The informality of applications for complaints involves no danger of injury or hardship to those against whom the charges are directed; for each application passes through a searching process of official investigation before it eventuates in the issuance of a complaint or in possibly damaging publicity.

Prior to the Commission's taking any action on an application for complaint, an officer of the Chief Examiner's Division considers whether the essential jurisdictional elements are present—for example, whether the facts stated in the application show the use of an unfair method of competition or an unfair deceptive act or practice in commerce, and whether they indicate that action by the Commission "would be to the interest of the public." If these elements seem

¹² Compare p. 22 of the Commission's Rules, Policy, and Acts: "Policy as to private controversies: It is the policy of the Commission not to institute proceedings against alleged unfair methods of competition or unfair or deceptive acts or practices where the alleged violation of law is a private controversy redressable in the courts, except where said practices tend to affect the public. In cases where the alleged injury is one to a competitor only and is redressable in the courts by an action by the aggrieved competitor and the interest of the public is not involved, the proceeding will not be entertained." And cf. *Federal Trade Commission v. Klesmer* (290 U. S. 10 (1929)), affirming the dismissal of a suit to enforce a Commission order on the ground that the proceeding before the Commission was not in the public interest.

¹³ Later, it will be seen that a large percentage of the Commission's cases involving false or misleading advertising originate in the Radio and Periodical Division out of its routine examination of advertising copy and radio continuities.

¹⁴ Such requests for action are called "applications for complaints," while the term "complaint" is used to designate the statement of the Commission's charges which is served upon respondent at the beginning of a formal proceeding.

¹⁵ F. T. C. Ann. Rept., 1938, p. 35. Notwithstanding the terms of rule VI, the Commission also institutes investigations upon the basis of anonymous letters, if specific allegations, rather than mere general denunciations, are contained in them.

fairly suggested by the evidence of violation submitted in the application for complaint, the application is then for the first time docketed as an application for the issuance of a complaint by the Commission;¹⁷ but if the information furnished by the applicant is, upon its face, insufficient to warrant intensive investigation, the application is not even docketed until additional data have been elicited from the complainant through further correspondence or through a preliminary field inquiry. If, however, the application clearly relates to a situation outside the scope of the Commission's jurisdiction, the applicant is so advised and the case is closed without reference to the Commission.

After an application for complaint has been docketed, it is then ordinarily assigned by the Chief Examiner to a field office for investigation by a staff member.¹⁸ Applications for complaint are not always investigated in the order in which they were docketed. Frequently, the matters to which the application relates are of sufficient public interest to warrant immediate action. In such a case, the application is moved up, usually by the Chief Examiner upon his own initiative, although sometimes this will be done upon order of the Commission. Again, administrative convenience and economy often make it desirable to investigate docketed applications in other than chronological order. The function of the field investigator is to develop the facts relating to the subject of the proposed complaint.¹⁹ In the course of the investigation, the investigator (who is in most instances an attorney) interviews the party complained against,²⁰ advising him of the nature of the charges and requesting the submission of such facts in defense or justification as will assist the Chief Examiner's Division in formulating a recommendation to the Commission as to the further action, if any, which should be taken. This interview usually gives to the party under investigation his first knowledge that formal proceedings against him are under consideration. But, as a matter of policy, the Commission has instructed its investigators not to disclose the identity of the applicant for a complaint.

Upon completing his inquiries, the field investigator summarizes the record of his investigations and forwards his summarization, his re-

¹⁷ The preliminary determination whether an application merits docketing for intensive investigation is usually made by the Chief Examiner's Division, except in certain cases involving false and misleading radio and periodical advertising which are handled by the Radio and Periodical Division, whose procedure is discussed below, pp. 6-8.

¹⁸ The Commission maintains field offices in New York, Chicago, Seattle, San Francisco, and New Orleans. The field offices are staffed entirely by the Chief Examiner's Division, which is the general investigation division of the Commission. In addition, the Chief Examiner's Division in Washington contains a headquarters investigation staff which operates in the region adjacent to Washington, D. C. The Chief Examiner's Division (including field offices) employs 120 investigators, all of whom are attorneys or accountants.

¹⁹ Efforts are made to secure relevant documentary evidence from the files of all persons connected with or affected by the conditions under investigation. If necessary, competitors of the proposed respondent are interviewed to determine the effect of the practice from a competitive standpoint. Again, it is often desirable to interview consumers with a view to determining whether the alleged conditions constitute a violation of the statute and also to establish that the proposed action will be in the public interest. Information obtained orally by the investigating attorneys is put into the form of written reports. The testimony of the applicant and other witnesses ordinarily is not taken in the form of affidavits, except where the Commission is attempting to establish a case for an injunction under sec. 13 (a) of the Federal Trade Commission Act.

In the investigation of docketed complaints, the Commission has rarely had occasion to employ the subpoena powers conferred by sec. 9 of the Federal Trade Commission Act. That section provides, in part, "That for the purpose of this Act the Commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against and the Commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation." While the language of certain judicial decisions casts some doubt upon the power of the Commission to secure evidence by subpoena prior to the issuance of a complaint, it is doubtful that the statute, fairly interpreted, withholds from the Commission powers of investigation, analogous to those exercised by grand juries.

²⁰ If the investigation is directed against a corporation, an effort is always made to deal directly with one of its superior officers.

ports of interviews, and his recommendations to the head of his field office. There they are reviewed before being forwarded to Washington. Once they have been received in the Chief Examiner's Division, they are yet again reviewed by the Chief Examiner or by one of his assistants, even where the investigator, with the concurrence of his superior, has recommended that the case be closed without further action because of lack of evidence or because the alleged conditions do not constitute a violation of any law which the Commission administers.²¹

But this is not the end. For in every case, following its review and re-review, the completed record of the investigation of a docketed application must be submitted to the Commission for its consideration of the recommendation finally made.²² The investigation files are distributed in rotation among the individual commissioners. The commissioner to whom a given case is assigned for study then reports to the whole Commission in executive session, at which time the Commission determines the disposition to be made of the case.

RADIO AND PERIODICAL DIVISION

In cases involving false and misleading advertising which are handled by the Radio and Periodical Division, the procedure employed is considerably different from that used in cases investigated by the Chief Examiner's Division. False and misleading advertising of commodities sold in interstate commerce has long been held to constitute an unfair method of competition under the Federal Trade Commission Act.²³ By 1929, the false and misleading advertising in newspapers and magazines had reached such a volume that the Commission established a special board of investigation, consisting of three attorneys, to specialize in this type of cases. Since 1929, the board has

²¹ Occasionally, also, termination of proceedings is recommended when there has been a good faith abandonment of the improper course of conduct prior to the Commission's investigation, or when the conduct has been inadvertent, or when it has been ended immediately upon its being called in question.

The fact that the practice in question has been discontinued is not, however, necessarily a bar to action by the Commission. See *Fairfoot Products Co. v. Federal Trade Commission* (80 F. (2d) 684, 686 (C. C. A. 7th, 1935)), and cases cited therein.

²² The Chief Examiner's Division may recommend—(1) that the case be closed without further action because of lack of evidence in support of the charge or for the reason that the practice complained of does not violate any law which the Commission administers; or (2) closing of the case upon the respondent's acceptance of an opportunity to sign a stipulation as to the facts and an agreement to cease and desist from the unlawful practice as charged; or (3) the issuance of a formal complaint.

Because a proceeding by it is in the interest of the public, not of the complainant, the Commission has never allowed a proceeding to be quashed solely because of an attempted withdrawal of the application for complaint by an applicant who has had a change of heart. In a case where the public interest was not readily apparent, however, the fact that the applicant had lost interest might be considered in determining whether the case should be closed without further action.

²³ There is no clear line between the Commission's general jurisdiction over false advertising and the jurisdiction of the Food and Drug Administration (Secretary of Agriculture) over label advertising. Prior to the 1938 amendments which added sec. 12 to the Federal Trade Commission Act, false and misleading advertising had been considered an unfair method of competition under sec. 5 of that act. Sec. 12, also added in 1938, defines "false advertisement" for the purpose of sec. 12 as "an advertisement, other than labeling, which is misleading in a material respect . . .". This specific exception for the purpose of sec. 12 may be construed as evidencing a legislative intention that the Commission's jurisdiction over false and misleading advertising should exclude the label field, over which the Food and Drug Administration is given a sweeping jurisdiction by the Federal Food, Drug, and Cosmetic Act of 1938. While this question as to whether the Commission still possesses jurisdiction over label advertising under sec. 5 has not yet been judicially determined, and although the Commission and the Administration have not formulated a definite working agreement, the Commission is following the policy of not instituting proceedings in cases involving only label advertising. If a case involves both label and other advertising, the Commission clearly has jurisdiction and does not hesitate to act.

The Federal Trade Commission and the Federal Alcohol Administration have concurrent jurisdiction over false and misleading advertising relating to alcoholic beverages. With the approval of the Commission, the Radio and Periodical Division follows the practice of noting and setting aside questionable advertising relating to alcoholic beverages. From time to time a representative of the Federal Alcohol Administration visits the Division and examines the material which has been segregated, with a view to action by the Federal Alcohol Administration. While this informal collaboration has not been authoritatively defined, it has been suggested that false and misleading liquor advertisements should be handled by the Administration where such advertisements relate to the "contents of the bottle."

scrutinized newspaper and magazine advertising and, since 1934, advertising continuities broadcast by radio. In 1938, the Radio and Periodical Division was created to take over this work.

Because it is physically impossible for the Radio and Periodical Division to examine the advertising columns of every magazine and newspaper, the Division in practice makes periodic calls for representative periodicals of various types as determined by such factors as volume and area of circulation and the character of the field of distribution, such as agriculture, fiction, motion picture, trade, etc. In addition, it has been found necessary to examine certain newspapers and magazines on a continuous basis because of the persistently questionable character of the advertisements published. The examination of advertising almanacs is also carried on as a part of the Division's routine. In order to review radio advertising, the Division issues calls to individual radio stations about four times annually.²⁴ The advertising continuity which is received as a result of these calls covers a specified 15-day broadcast period. National and regional networks respond on a continuous weekly basis, submitting copies of commercial continuities for all programs over hook-ups involving two or more affiliated or member stations. Producers of electrical transcription recordings submit monthly returns of typed copies of the commercial portions of all recordings produced by them for radio broadcast.

During the 3-year period ending June 30, 1938, an average of 80.4 percent of the cases handled by the Radio and Periodical Division (or its predecessor, the special board of investigation) originated in the examination of current newspaper, magazine, and radio advertising by the Commission's staff. Other cases arose out of complaints received from the public, from other divisions of the Commission, and from other governmental agencies.

The Radio and Periodical Division has no field investigators and, consequently, when an advertising case requires investigation in the field, the case is referred to the Chief Examiner's Division. Sometimes a case is referred to the Chief Examiner merely for the investigation of a few specific questions, after which the case is referred back to the Radio and Periodical Division; other cases are sometimes referred to the Chief Examiner to be handled by him in the same manner as cases not involving advertising.

If a published or broadcast advertisement coming to its attention appears on its face to be misleading, the Division sends a questionnaire to the advertiser, requesting a sample of his product, if this is practicable, and a quantitative formula if the product is a compound, and also requesting copies of all advertisements published or commercial continuities broadcast (if such continuities are not already on file) during a specified period, together with copies of all booklets, folders, circulars, form letters, and other advertising literature used. During the year ending June 30, 1938, the Division sent such questionnaires to advertisers in 733 cases. Upon receipt of these data,

²⁴ The prohibition of sec. 12 (a) of the Federal Trade Commission Act against the dissemination of false advertisements which are likely to induce the purchase of foods, drugs, devices, or cosmetics is in terms applicable to radio broadcast stations which disseminate such advertisements. While the Commission has not instituted formal proceedings under this section against any radio broadcast stations, the policy of the Commission, or at least of its Radio and Periodical Division, is said to require proceedings against any station which prepares the false advertising material which it broadcasts. However, where the station has merely broadcast advertising matter prepared by others, the Commission would not ordinarily take action. There is no formal arrangement for the exchange of information between the Federal Trade Commission and the Federal Communications Commission although information is frequently made available upon request.

the claims, sample, and formula are referred to an appropriate technical agency of the Government for a scientific opinion. Upon receipt of the opinion, the advertising is carefully scrutinized, and a number of excerpts of the questionable advertising matter are made. A copy of this numbered list, and a copy of the opinion received, are sent to the advertiser, who then has an opportunity to submit evidence which he thinks may substantiate or explain the representations contained in his advertising. He may answer by letter or, upon his request, may confer with the Division in person or through counsel. The Commission disclaims any intention of shifting the burden of proof to the advertiser, but takes the view that this informal procedure enables an advertiser who can substantiate his claim to do so without the expense and publicity incident to a formal proceeding.

If the advertiser convinces the Division that the facts justify the statements contained in his advertising, the Division reports the matter to the Commission and recommends that the data be filed without further action.

If the advertiser fails to substantiate or explain any material statement in his advertising which the Division has reason to believe is false or misleading, the Division refers the matter to the Commission with the recommendation that an application for complaint be docketed and the matter returned to the Division for the drafting and negotiation of a stipulation, provided the advertiser desires to settle the matter through a stipulation to cease and desist from making use of the representations in question. If the Commission approves this recommendation, the Division prepares a stipulation and forwards it to the advertiser for execution. If he objects to any of the provisions in the stipulation, he may argue his objections by mail or in person. When he agrees upon the terms of the stipulation and signs and returns it, the matter is again reported to the Commission with a recommendation that the stipulation be accepted and the case closed without prejudice.

If, in a case where the Division has reason to believe that the advertiser has used false or misleading statements, the advertiser is unwilling to stipulate, or is for some reason denied the opportunity to do so, the Division refers the case to the Commission with a recommendation that a complaint be issued. In fact, however, as the following figures demonstrate, the settlement of cases of this type through stipulations to cease and desist has almost completely supplanted the formal procedure which is initiated by the issuance of a complaint. During the year ending June 30, 1938, according to the Commission's annual report, the Division sent questionnaires to advertisers in 733 cases. During the same period, the Division settled in various ways a total of 625 cases; of this number, 383 cases were disposed of by stipulations to cease and desist. The Division recommended the issuance of only 40 complaints, including 29 cases in which the respondent was unwilling to stipulate or where stipulations were violated, and 11 cases in which the Division recommended that complaints be issued without giving the advertisers an opportunity to stipulate because of the gross deception or danger to the public involved in the practices in which they were alleged to be engaged. In 205 cases, the Division recommended that the assembled data be filed and the cases closed without prejudice to the right of the Commission to reopen them at any time when warranted by the facts.

COMMISSION CONTROL OF THE PRELIMINARIES OF ADJUDICATION

We have noted that the Commission itself determines what further action, if any, should be taken with respect to investigated matters. This means that all cases arising in the Chief Examiner's Division which acquire the status of docketed applications for complaint, and those cases developed in the Radio and Periodical Division which have arisen out of complaints from outside the Commission or in which questionnaires have been used are considered first by a single Commissioner and then by the entire Commission, in order to determine what further action, if any, should be taken. Thus, during the year ended June 30, 1938, the Commission considered an aggregate of 2,015 cases originating in these two divisions.

An agency like the Federal Trade Commission exercises a dual policy-making role in the enforcement of a statute—first, in selecting the cases which are to be the subject of formal proceedings and, second, in disposing of those cases upon the basis of such proceedings. In other words, the initiation of a proceeding may in some instances reflect a determination of policy as truly as does the making of the final decision. Indeed, in at least certain types of business the publicity incident to the mere institution of proceedings may be as harmful as an adverse final decision. Yet, from the point of view of the persons who do or may come in contact with the Commission, the most important single function of that agency, taken by and large, is the deciding of cases upon the basis of formal proceedings—proceedings which involve matters of fully as great consequence as those coming before the judges of United States district courts.

At a later point in the present discussion of the Federal Trade Commission the view is expressed that that agency's decisions are usually (there are some notable exceptions) lacking in precedent value because of the failure to state the bases for decision. Improvements in this respect, as well as in other aspects of the final adjudication of cases, are at present unlikely, because of the Commission's lack of time. The heads of that body have many important duties besides those immediately related to adjudication. They must supervise the conduct of the Commission's litigation in the courts, the formulation and operation of Trade Practice Rules, and the studies of the economic division, as well as consider the many problems of administrative management which are their responsibility. In view of this circumstance, it is important to consider whether the Commission should not delegate to its chief subordinates a limited power to determine the disposition to be made of investigated cases, thus relieving it of a task which is not only time-consuming, but is also often of a routine character.

It must be emphasized that the Commission does not confine its attention to cases presenting novel or difficult problems. Every case, even those in which several subordinates (including one of its most important officials) have concurred in recommending that no further action be taken, still receives the personal consideration of one Commissioner and the at least passing consideration of all. One cannot but wonder whether so considerable a portion of the Commission's energies should be devoted to what are in most instances the purely pedestrian preliminaries of adjudicative action. During the years ended June 30, 1938, the Commission passed upon 1,216 investigated

matters originating in the Chief Examiner's Division. In 74 of these cases, constituting 6.5 percent of the total, the Commission departed in whole or in part from the recommendation of that Division. During the same period, 799 cases arising in the Radio and Periodical Division were considered by the Commission, which in 58 cases, or approximately 7.3 percent of the total, departed in whole or in part from the recommendations of that Division.²⁵

The majority of the cases now passed upon by the Commission fall into established patterns with which the Commission's principal subordinates must be presumed to be familiar. This, it is submitted, is a conclusion having strong inferential support in the figures shown above. Difficult and novel cases there undoubtedly are. Such cases, one may readily agree, should receive the personal consideration of the Commission. Is there, however, good cause for the Commission's withholding from its most responsible officers the power to determine in the first instance whether a case is of sufficient doubt or complexity to call for the Commission's own consideration? In other cases, should not the Commission abide by the judgment of its Chief Examiner or the Director of the Radio and Periodical Division that good cause has been shown for nonaction, for stipulation, or for complaint? Periodic review of a sampling of the decisions of these officers should prove to be an amply adequate check upon their ability to apply accurately and justly the policies of the Commission regarding the initiation of proceedings.²⁶

STIPULATIONS TO CEASE AND DESIST

The disposition of applications for complaint by means of stipulations to cease and desist is a highly significant procedure in view of the fact that many more docketed applications result in such stipulations than in complaints followed by orders to cease and desist.²⁷ A stipulation to cease and desist is an agreement to discontinue specified illegal practices. Such a stipulation differs from a consent decree in that violation of the stipulation is not a basis for the imposition of sanctions. In such a case, the Commission's only recourse is the institution of a formal proceeding looking to the issuance of a cease and desist order. Although the Federal Trade Commission Act makes no specific provision for the settlement of cases by stipulation, the Commission finds legal justification²⁸ for this procedure in subsections

²⁵ The figures here given are drawn from data specially prepared by the Federal Trade Commission for the use of the Attorney General's Committee on Administrative Procedure. The data, which are apparently unique in character, are set forth and explained in appendix B.

²⁶ The Commission justifies its disinclination to lean more confidently on its subordinates' judgment upon the following grounds:

(1) That the practical difficulty in distinguishing between the important and the unimportant makes it unfeasible for the Commission to rely upon its chief officers to refer to it those matters which should be considered by the Commission.

(2) That the statutes administered by the Commission require the same personal consideration prior to the issuance of a complaint as must precede the issuance of an order to cease and desist.

(3) That the damaging publicity incident to the unwarranted issuance of a formal complaint would not be cured by the subsequent dismissal of the complaint after a hearing.

(4) That Commission consideration of all cases at this stage acts as a check upon the zeal and thoroughness of its staff.

(5) That with respect to any agency such as the Federal Trade Commission, the determination of whether a complaint should issue in the first instance is as much a matter of policy as is the ultimate determination of whether a cease and desist order should be issued.

²⁷ During the fiscal year ended June 30, 1938, applications for complaints resulted in the issuance of 310 complaints. During the same period, 564 cases were settled prior to the issuance of complaints by stipulations to cease and desist, of which 187 were negotiated by the Chief Trial Examiner's Division and 377 by the Radio and Periodical Division (F. T. C. Ann. Rept., 1938, p. 94).

²⁸ Its practical justification, as stated by the Commission itself in F. T. C. Ann. Rept., 1938, p. 41, is perfectly clear: "In those classes of cases in which the Commission affords the respondent an opportunity to dispose of a matter by stipulation, that procedure accomplishes economically and expeditiously the same result as a complaint and order to cease and desist. It also simplifies the Commission's legal procedure and saves both the Government and the respondent the expense incident to trial of the complaint."

(a) and (b) of section 5, which empower and direct the Commission to prevent the use of unfair methods of competition and unfair or deceptive acts or practices in commerce, and directs the Commission to institute formal action "if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public." Exercising the discretion thus conferred, the Commission has made a formal declaration of policy as to the settlement of cases by stipulation, as follows:

Settlement of cases by stipulation.—In proceedings prior to the service of complaint by the Commission, the Commission may, in its discretion and in the public interest, permit respondents to dispose of cases by stipulations, in which stipulations the respondent promises and agrees to cease and desist from the unfair methods of competition or unfair or deceptive acts or practices involved, and in which the respondent, after admitting the material facts, agrees that said admissions may be used against him, if thereafter the Commission has reason to believe the respondent is violating his promise and agreement to cease and desist, and issues its complaint against him. All such stipulations shall be altogether for the public records of the Commission. The disposition of a case by stipulation is regarded as a privilege and not a right. It is the policy of the Commission not to accept stipulations in cases where it has reason to believe that the respondents have been guilty of intentional fraud or wrongdoing or violation of section 14 of the Federal Trade Commission Act, or of violations of certain sections of the Clayton Act or of violations of the criminal sections of the Sherman Act or of any other statute, or where, in the opinion of the Commission, the respondents will not keep the agreement. The Commission reserves the right in all cases, for any reasons which it regards as sufficient, to refuse to extend this privilege.²⁹

If the Commission accepts the recommendation of the Chief Examiner's Division (or the Radio and Periodical Division in certain advertising cases) that an effort be made to negotiate a stipulation to cease and desist, the case is referred to the Chief Trial Examiner for the preparation and negotiation of a stipulation.³⁰ The drafting and negotiation of stipulations to cease and desist is handled in the Chief Trial Examiner's Division by a group consisting of the Assistant Chief Trial Examiner and three examiners who have no other function and who have no contact with a case prior to the effort to negotiate, and whose relationship to a case terminates if the effort is unsuccessful. The precise contents of a stipulation to cease and desist are, of course, determined by the facts developed through investigation. Each stipulation, however, always consists of three elements: An admission of certain facts; an agreement to cease and desist from designated unfair methods of competition or unfair or deceptive acts or practice; and a consent that the admissions of fact may be used against respondent if subsequently the Commission has reason to believe that the

²⁹ Rules, Policy and Acts, p. 22. Pursuant to this declared policy the Commission will not allow cases arising under secs. 2, 3, 7, or 8 of the Clayton Act to be settled by stipulations to cease and desist. Nor will it accept stipulations in cases involving a fraudulent business or where a legitimate business is conducted in a fraudulent manner. Stipulations will not be accepted in cases involving conspiracy or combination to fix prices inasmuch as such arrangements are at least potentially violative of the criminal sections of the Sherman Act.

³⁰ As noted previously, however, the drafting and negotiation of stipulations in the advertising cases is left to the Radio and Periodical Division, whence they originated. The reason for differentiating between these cases and those which arose from investigations by the Chief Examiner's Division is not clear. It has been suggested that their familiarity with the cases permits the officers of the Radio and Periodical Division to prepare stipulations more expeditiously than could the Chief Trial Examiner. But this argument, on the face of it, would be equally applicable in connection with cases coming from the Chief Examiner's Division. All things considered, it seems likely that division of the stipulation-drafting function between two branches of the Commission's staff is an organizational accident, rather than the result of reasoned policy; when the problem first arose, no doubt some good cause existed for the diffusion of responsibility; today, the good cause is not remembered, but the diffusion lingers on. There may possibly be merit in the notion that stipulations should be prepared by other individuals than those who have previously served as investigators; if, however, this is a moving consideration in the Commission's judgment, the present arrangement evidences no consistency in its application.

stipulation is being violated and accordingly issues its complaint against him.

When a proposed stipulation has been prepared by the examiner, it is first submitted to the Chief Trial Examiner for approval and then, without further reference to the Commission, is sent in duplicate to the alleged violator. At the same time, the respondent is notified that the privilege of settlement by stipulation, now extended by the Commission, may be rejected by him if he disputes the facts or if for any other reason he prefers that his case be formally heard before an examiner upon issuance of a complaint.³¹ Opportunity to discuss the terms of the stipulation by correspondence or in conference, personally or through counsel, is afforded those who may desire to stipulate, but who wish to propose amendment of the proffered draft. Those who are content to sign the stipulation as it then stands are directed to execute and return both copies, one of which, upon being approved by the Commission and signed by its Chairman and Secretary, is returned to the respondent.³²

Occasionally, the complaint has been voiced that the Commission makes an oppressive use of the stipulation to cease and desist, in that innocent parties have been induced to admit engaging in illegal practices as the alternative to incurring the expense and publicity incident to a formal proceeding.³³ In 1937-38, opportunity to stipulate to cease and desist was offered to and accepted by 564 respondents; it is estimated that fewer than 5 percent of those to whom the choice was made available declined to enter into such stipulations. It is impossible to conclude, on the basis of the material examined in the course of the present inquiry, that there is a practice of overreaching on the part of the Commission's staff in negotiations with respondents; this conclusion is reinforced by the difficulty of conceiving of the considerations which might motivate such a policy or practice. While occasional error or overzealousness is inherent in all legal processes including the disposition of matters by the Federal Trade Commission, it is still apparent that a systematized method for settling certain classes of cases by stipulation and without formal proceedings has everything to commend it; if in fact (which we do not assert) there are instances of abuse, the fault is not in the method but rather in those who may for the moment have utilized it unwisely.

THE INITIATION OF FORMAL PROCEEDINGS: THE COMPLAINT

In those cases where opportunity to stipulate has not been extended or, if extended, has been rejected, the Commission orders the preparation of a complaint by the Chief Counsel's office. In most cases, the

³¹ The opportunity to stipulate is proffered to many parties who have not requested that they be permitted to settle the case by agreeing to cease and desist. While parties familiar with the Commission's procedures sometimes take the initiative in indicating their willingness to stipulate, the Commission requires no application to be made in that regard, but instead itself proposes the possibility of settlement through stipulation.

³² Here again one notes the Commission's conscientious attention to detail and its readiness to engage in time-absorbing review of essentially uncontested matters. Its willingness in that regard might be more unqualifiedly commendable if the Commission were not thereby forced to forego other, and possibly more important, activities. Approval of negotiated stipulations is not a matter of practical moment; according to one informed observer, the Commission has ordered to be redrafted only an "infinitesimally small percentage" of negotiated stipulations submitted for its approval.

³³ It was at one time the Commission's policy not to disclose the names of persons entering into stipulations to cease and desist. In recent years, however, stipulations have been matters of public record. Furthermore, the published monthly summary of the Commission's work contains the names of those who have entered into stipulations, together with the name of the commodity involved. Digests of stipulations, containing the names of the parties, are published in the volumes of the Commission's decisions.

Commission's order directing the issuance of a complaint provides that the complaint shall be transmitted by the Chief Counsel to the Secretary for execution and service without further reference to the Commission. The complaint is usually prepared by the attorney who has been designated to present the case in the proceeding before a trial examiner, and is issued in the name of the Commission.

Occasionally, however, the Commission, before deciding to issue a complaint, refers a case to the Chief Counsel for an opinion as to the legal questions involved. In such cases, a complaint is drafted and sent to the Commission together with the opinion. In some cases, the attorney drafting the complaint will conclude that there should be a change in the parties or charges as approved by the Commission. The attorney will in such cases seek an amendment to the Commission's order by way of adding or dropping a party or allegation.

Both the Federal Trade Commission Act (sec. 5) and the Clayton Act (sec. 11) require that the complaint contain a statement of the Commission's charges and notify the respondent of the time and place at which he may be heard in defense.³⁴ In a complaint issued under the former statute the first paragraph of the complaint formally recites the Commission's belief that the respondent has violated the act and that a proceeding by it with respect to the charges would be to the interest of the public. The recital with respect to public interest is unnecessary, and is not used, in Clayton Act cases. This prelude is followed by a statement of the charges. In most instances the challenged methods and practices appear to be outlined in sufficient detail to advise the respondent as to those phases of his business activities which are under scrutiny and wherein the Commission considers them to violate the act. A number of attorneys, experienced in Commission proceedings, have stated, however, that some complaints require amplification, and have criticized the Commission for its refusal to grant requests for bills of particulars. In appraising the validity of this criticism one should bear in mind that, in addition to receiving the complaint, the respondent has earlier received from the Commission's field investigator a statement of the charges against him, as well as information concerning much of the evidence bearing on them; in many instances, too, the respondent will have received a proposed stipulation from the Commission and will have been consulted concerning its terms, so that the likelihood of uncertainty concerning the nature of the Commission's case is greatly diminished.

The Commission maintains, moreover, that the refusal to grant motions for bills of particulars does not in any way handicap the respondent because during the presentation of the case in support of the complaint he becomes fully informed as to the scope and details of the charges against him. There is no possibility of "surprise" to the respondent, it is said, because continuances are freely granted if the

³⁴ In satisfaction of this requirement the complaint, under the heading of "Notice," informs the respondent that on a named date and at an indicated place he may "appear and show cause why an order should not be entered by said Commission requiring you to cease and desist from the violations of the law charged in the complaint." Under the same heading the respondent is informed of the Commission's requirements concerning answers to complaint. Since, because of the Commission's backlog of cases, hearings are rarely, if ever, commenced on the day stated in the complaint, the respondent is also advised that he will be further notified of any change in the time designated for hearing; a supplemental notice is thereafter addressed to the respondent when the actual hearing date is determined upon (which, as often happens, may be by agreement between counsel).

Hearings are ordinarily scheduled to be held where the largest number of witnesses may be called with the least amount of travel; frequently they are adjourned to another place, when the convenience of the parties and of the witnesses would be served by doing so.

respondent desires to study the record before proceeding with his case.³⁵

PUBLICATION OF COMPLAINTS

The respondents named in the complaint are the only persons served with the complaint.³⁶ The applicant, or complaining party, is not "served" with a copy of the complaint since he is not a party to the proceeding. In practice however, he is sent a mimeographed copy.³⁷ Upon service of the complaint, the proceeding becomes a matter of public record, and mimeographed copies of all complaints are distributed without charge to any person requesting them.³⁸

ANSWERS

The Commission's rules provide (rule VII) that a respondent who desires to contest the proceeding must, within 20 days after service of complaint (a period which is rather generously extended upon request), file an answer containing "a concise statement of the facts which constitute the ground of defense. Respondent shall specifically admit or deny or explain each of the facts alleged in the complaint, unless respondent is without knowledge, in which case respondent shall so state."³⁹

³⁵ Compare *National Labor Relations Board v. Remington Rand, Inc.* (94 F. (2d) 862, 873 (C. C. A. 2d 1938), cert. den. 304 U. S. 576 (1938)), in which Judge Learned Hand, in considering respondent's claim that it was denied a fair trial in that a bill of particulars was refused, said: "The examiner did deny a bill of particulars, but that could not have seriously prejudiced respondent. Such a bill is important only when a party must meet his adversary's case without opportunity to prepare; it is of slight value in a trial by hearings at intervals. The notion that its absence really handicapped the respondent in its cross-examination seems to us illusory."

³⁶ The Commission is almost unique among Federal administrative agencies in the use which it has made of class suits. In *National Harness Manufacturers' Association v. Federal Trade Commission* (288 Fed. 705 (C. C. A. 8th, 1920)), a trade association, against which a complaint charging unfair methods of competition had been filed, contended that as an unincorporated association it was not subject to sec. 6 prohibiting the use of unfair methods of competition in commerce by "persons, partnerships, or corporations." The Court rejected this contention on the ground that the members of the association had been made parties to the proceeding, and added that "A voluntary association, having many members, may be brought into court by service on its officers and such of its members as are known and can be conveniently served to represent all the diverse interests." In *Chamber of Commerce of Minneapolis v. Federal Trade Commission* (13 F. (2d) 673 (C. C. A. 8th, 1928)), the Commission, in a proceeding under sec. 5 of the Federal Trade Commission Act, named and served as respondents 13 members of an association of 590 members. The complaint also included as respondents all of the members of the association and stated that "said respondent members constitute a class so numerous as to make it impractical to name them all as parties respondent herein, but those designated herein are fairly representative of the whole." In rejecting a contention that the Commission lacked jurisdiction over those members of the association who were not named and served as respondents, and after stating that equity rule 28 (Federal Rules of Civil Procedure, rule 23) did not apply to proceedings before the Commission, the Court said, "When procedure against a class is proper in judicial proceedings, there would seem no reason why the same thing should not be done in less formal hearings, such as this, provided always that the conditions are such as to make the class representations rule applicable. These necessary conditions are (1) a common or general interest and (2) such number of individuals as to make it impracticable to bring all of them before the court." Both cases suggest a third requisite—that those served be representative of the entire membership.

³⁷ Both the Federal Trade Commission Act and the Clayton Act authorize the Commission to permit intervention to such extent and upon such terms as it considers just. It is the practice of the Commission to permit a party to intervene where it appears that such party has a legitimate interest in the proceeding and may be adversely affected by any Commission order which might result from the proceeding. The Commission generally refuses, however, to permit intervention in favor of the complaint, by parties whose interest is in having the charges in the complaint sustained, because the Commission will not permit its proceedings to be conducted as private controversies. Interested parties who are not permitted to intervene may be permitted to submit briefs or to argue orally as amici curiae. Intervention is a relatively rare occurrence in the Commission's practice and, where it does take place, usually consists of the submission of briefs and oral argument, rather than participation in the trial hearings.

³⁸ Immediately following service of a complaint, it is the Commission's practice to issue a press release consisting of a résumé of the allegations of the complaint. This practice is said to serve two purposes: (1) to insure a correct statement of the Commission's action, and (2) to provide equal treatment for all newspapers and press services.

³⁹ There is a measure of doubt that the Commission would have power to enforce a rule that a fact not specifically denied in the answer shall be deemed admitted. This doubt is founded upon statutory provisions to the effect that the respondent shall have the right to appear and show cause why a cease and desist order should not be entered, from which it can be argued that the respondent cannot, by failure to deny specifically in his answer a fact alleged in the complaint, be precluded from controverting that fact at the hearing. At any rate, the Commission does not take the position that respondents are deemed to have admitted those allegations of the complaint which are not specifically denied in the answer.

The Commission's rule VII does not specifically state the consequences attendant upon a failure to answer. It is provided in the rule that the respondent's failure to file answer within the time above provided and his failure to appear at the time and place fixed for hearing "shall be deemed to authorize the Commission, without further notice to respondent, to proceed in regular course on the charges set forth in the complaint." But even when there is both nonanswer and nonappearance the Commission will not issue a cease and desist order in the same fashion as a default judgment is taken at law; instead, the Commission's counsel presents the evidence in support of the complaint at a public hearing before a trial examiner just as if the respondent had filed an answer and had appeared. In such cases, further, the trial examiner prepares a report upon the evidence which is served upon the respondent in the same manner as if the respondent had appeared.⁴⁰ In a case where the respondent fails to file any answer at all, but appears at the hearing, he may, pursuant to the statutory requirement, controvert the allegations of the complaint as though he had filed an answer denying such allegations.

POSSIBILITY OF AVOIDING HEARINGS AFTER ISSUANCE OF COMPLAINT

The Commission's rules of practice contemplate that the respondent may admit the allegations of the complaint, leaving for determination by the Commission only the question whether the facts alleged constitute a violation of law, upon which question the respondent may argue by brief or oral argument or both. Rule VII reads:

If respondent desires to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondent admits all the material allegations of fact charged in the complaint to be true. Respondent by such answer shall be deemed to have waived a hearing on the allegations of fact set forth in said complaint and to have authorized the Commission, without further evidence, or other intervening procedure, to find such facts to be true, and if in the judgment of the Commission such facts admitted constitute a violation of law or laws as charged in the complaint, to make and serve findings as to the facts and an order to cease and desist from such violations. Upon application in writing made simultaneously with the filing of such answer, the respondent, in the discretion of the Commission, may be heard on brief, in oral argument, or both, solely on the question as to whether the facts so admitted constitute the violation or violations of law charged in the complaint.

In practice, such answers are frequently filed, although concurrent requests that respondents be allowed to brief and argue the legal question are less frequently made; where no requests to argue are made, the respondents are doing an act equivalent to signing an administrative consent decree.

⁴⁰ The employment of full-dress procedure in cases in which the respondent has neither filed an answer nor appeared serves no useful purpose. The Commission takes the position that the language of the statute will not permit the omission of formal proceedings in default cases. Thus sec. 5 (b) of the Federal Trade Commission Act provides that the party complained against "shall have the right to appear at the place and time so fixed [in the complaint] and show cause why an order should not be issued by the Commission." Concededly, this opportunity for hearing is not waived by mere failure to file an answer, and, without something else, the Commission is obliged to hold a hearing. The Commission is further of the opinion that its findings of fact must be supported by evidence which has been formally adduced at a hearing. This position is based on that part of sec. 5 (b) which provides that "the testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission," and that "if upon such hearing the Commission shall be of the opinion that the method . . . is prohibited by this act, it shall make a report in writing Again, it is stated in sec. 5 (c) which provides for judicial review of the Commission's orders, that "the findings of the Commission as to the facts, if supported by evidence shall be conclusive." Despite the specificity of this statutory language it is difficult to believe that any reviewing court would construe these provisions as requiring the use of formal procedure in disposing of a case against a respondent who had evinced a complete indifference. Furthermore, it would be difficult for a respondent who had not availed himself of the opportunity to be heard to escape the application of the doctrine that a person who has not exhausted his administrative remedies has no standing in an appellate tribunal.

Not uncommonly, counsel for the Commission and respondent enter into stipulations of fact in order to expedite the proceeding and to shorten the record. Such stipulations of fact need not be approved by the Commission, if they merely support evidence already in the record and are calculated solely to avoid the offering of cumulative evidence. But if the stipulations are intended to supplant completely all other evidentiary material on the issues to which they relate, the Commission requires that they be submitted to it for approval before they are entered into by its counsel. Frequently, stipulations of fact are sufficiently broad to obviate any necessity for a hearing before a trial examiner. In such cases, the Commission's findings of fact are based upon the stipulation.

Occasionally, respondents, even though they wish to avoid contesting a case at a hearing, are unwilling either to file an answer admitting the allegations of the complaint or to enter into a stipulation as to the facts unless they can be advised in advance as to the terms of the findings of fact and order to cease and desist which will be made by the Commission on the basis of such an answer or stipulation. Until October 1938 counsel for the Commission, in conference with respondents or their counsel, were authorized to draft proposed findings of fact and orders and to negotiate stipulations subject to the condition that they could be withdrawn if the Commission refused to adopt the proposed findings and orders. Recently, the Commission instructed its attorneys that stipulations must thereafter be filed unconditionally if filed at all.⁴¹ The Commission's attorneys, however, still consult informally with respondents concerning the content of the findings and orders likely to be issued on the basis of the proposed stipulation. But they can go no further than to state that approval of findings and orders agreed upon by the parties will be recommended to the Commission. In many cases, this assurance is sufficient, for the Commission does not ordinarily depart from the recommendation of its Chief Counsel. In close cases, however, respondents may well hesitate to risk filing an unconditional stipulation as to the facts without a definite understanding as to the consequences. Hence, it is apparent, there is in fact a possibility of avoiding the necessity of formal hearings even after issuance of a complaint. Yet, there is no established method of consultation whereby one may discover the Commission's probable intentions regarding a case. The absence of any definitely articulated policy in this aspect may, therefore, prevent the seizing of that possibility by those who are not fully conversant with Federal Trade Commission practice.⁴²

THE TRIAL EXAMINER AND HIS POWERS

The Commission's formal hearings are, almost without exception, presided over by trial examiners regularly employed for that purpose; special trial examiners are never utilized and only rarely has one of the Commissioners served at the initial-hearing stage.

⁴¹ Occasionally, respondents who are concerned over the possible use of such answers or stipulations in civil damage suits are permitted by the Commission to insert a clause to the effect that the admissions of fact contained therein are made solely for the purpose of the present proceeding before the Commission.

⁴² Practice before the Commission is not limited to a specialized bar. While parties may appear on their own behalf (and corporations may appear through authorized officers), approximately 90 percent of respondents are represented by attorneys. The Commission, however, prescribes no conditions for appearing before it professionally other than that the attorney be admitted to practice before Federal or State courts.

The corps of 17 trial examiners, serving under the Chief Trial Examiner's supervision, engages in no activities other than that of conducting the Commission's hearings. In no instances do they engage in investigational work or fill the role of trial counsel.⁴³

Ordinarily, when a trial examiner has been assigned to a particular matter, he conducts all the hearings that may be necessary in order to conclude the proceedings even though the several places of hearing may be widely separated. Occasionally, because of conflicting hearing dates or because a hearing adjourned to a different place will involve the taking of testimony of only a few witnesses, the trial examiner has been replaced by a substitute, who either completes the case after reading the previous testimony, or merely returns to the original examiner the record of the isolated hearing over which the substitute presided.⁴⁴

The powers of trial examiners are rather narrowly, and it may be, unwisely, limited by the Commission. While the examiner acts as presiding officer and is responsible for the orderly progress of the hearing, he has little authority to rule on motions (other than those relating to matters of evidence) as they arise. Motions addressed to the pleadings, such as motions to amend and motions for bills of particulars, must be passed upon by the Commission itself, as must all motions involving "questions of law," such as a motion to dismiss the complaint.⁴⁵

The embarrassment in this situation is obvious. Since complaints and proceedings may be amended only by order of the Commission, efforts to add to or subtract from the allegations prior to the closing of the hearing require recourse to the Commission itself, instead of motions to the examiner. Even routine motions to conform the pleadings to the proofs necessitate the consideration of a distant Commission rather than the instant decision of one who is familiar with the circumstances which gave rise to the motion.

Evident in the whole scheme of the proceedings before the trial examiner, indeed, is the Commission's tendency to withhold dispositive power from its examiner and to intrude its own decisions into the hearing itself. An example is the practice in regard to subpoenas.

Section 9 of the Federal Trade Commission Act empowers the Commission—

to require by subpoena the attendance and testimony of witnesses, and the production of all such documentary evidence relating to any matter under investigation. Any member of the Commission may sign subpoenas, and members and examiners

⁴³ Occasionally, however, the heads of the Commission's field offices on the Pacific coast may be pressed into duty to preside at hearings in the territory of their offices, where the issues are simple, the hearings are to be brief, and the expense of the Commission's assigning a trial examiner would be considerable.

⁴⁴ As has been noted previously, *supra*, p. 13, the Commission's policy is to transfer the situs of hearing whenever necessary to serve the convenience of parties and their witnesses. Where a hearing has been adjourned to a different place, for the purpose of taking the testimony of a handful of isolated witnesses, and when that adjourned hearing is presided over by an examiner other than the one who is primarily responsible for superintending the completion of the proceedings, the examination of the witnesses is in effect similar to the taking of depositions to be incorporated in the record. Rule XVIII of the Commission's rules of practice sets forth a procedure for the taking of depositions, but in fact there has been little occasion to resort to the procedure there set forth, because of the frequency with which the hearings go to the witnesses rather than having the witnesses go to the hearings.

⁴⁵ Motions to dismiss are frequently made by respondents, but even when made prior to or at the outset of the hearing, are formally denied without the Commission's giving the matter real consideration, the respondent then being permitted to renew his motion by brief or upon oral argument at the close of the whole case. The Commission's attitude, in short, is that no complaints issue from it except those which in its judgment state a valid case under the applicable statutes. For this reason, it ordinarily sees no reason to hear argument or even fully to consider a motion to dismiss before the close of hearings. Only where there has been a change in the relevant statutory situation has it pursued a different course—as, for example, when the emergence of state fair trade laws changed the complexion of pending complaints against resale price maintenance agreements.

of the Commission may administer oaths, affirmations, examine witnesses, and receive evidence. Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States at any designated place of hearing.⁴⁸

Applications for the issuance of subpoenas to appear and testify must be made to a Commissioner rather than to the examiner. Such subpoenas are in practice issued without the consideration of the full Commission, though they are ordinarily withheld if they require a witness to travel more than 100 miles to the place of hearing, in the absence of justification for inconveniencing the witnesses. Subpoenas *duces tecum* are, however, considered by the entire Commission, upon verified applications specifying, as exactly as possible, the documents desired and showing their competency, relevancy, and materiality.

But, while a respondent may be subjected to the annoyance and delay of transmitting applications for subpoenas to the Commission in Washington (fortunately, the occasions for use of subpoenas by respondents have been infrequent), the Commission's own trial attorneys are not similarly inconvenienced. When engaged in a hearing elsewhere than in Washington, they are supplied with subpoenas *ad testificandum* in blank, which they may then utilize as occasion arises. No valid reason appears for not furnishing the trial examiner with subpoenas signed by the Commission in blank, to be issued during the progress of the trial by the examiner to either the respondent or the trial attorney upon application therefor, upon the examiner's being satisfied that good cause appears for the use of compulsory process.

The withholding of power from the trial examiner necessarily infects the trial proceedings with a certain measure of indecisiveness and exposes them to the threat of constant interruption. The trial examiner is, for example, authorized to adjourn a hearing to a different time and place, upon consideration of factors of expense and convenience in securing the testimony of witnesses. But, where a request for adjournment to a distant locality has been made, the trial examiner has frequently referred the request to the Commission for formal instructions. And, if the trial examiner refuses to transfer the place of hearing as requested by one of the parties, because in his judgment the transfer would create more inconvenience than it would eliminate, an interlocutory appeal to the Commission is at once available to, though infrequently employed by, the party aggrieved by the examiner's ruling. In fact, interlocutory appeals from the trial examiner's rulings concerning the relevancy or competency of proffered evidence, are also available and are not infrequently utilized. During the very progress of a hearing, therefore, a case may in effect be withdrawn from the trial examiner and remitted to the Commission for consideration at an intermediate point. The wisdom of the Commission's intrusion into the hearing at this stage is open to the most serious doubt. In the long history of the administration of justice there is persuasive evidence that, taken as a whole, time and expense are saved to the parties and to the trial courts and to the appellate courts, by requiring that the trial stage be completed before

⁴⁸ As is customary, the statute further provides that a district court of the United States shall have jurisdiction in case of refusal to obey a subpoena, to issue an order compelling attendance and testimony or the production of documentary evidence. Failure to obey the Court's order may be punished as a contempt, but, where a court order is not issued, refusal to obey the Commission's subpoena does not constitute a contempt of the Commission. Sec. 10 of the Federal Trade Commission Act declares, however, that nonobedience to the Commission's subpoena shall constitute an offense punishable by a fine, or by imprisonment, or both; in practice this section is ignored, for the Commission has never sought a prosecution as a penalty for non-obedience of its commands.

appeals are allowed. While it is obvious that cases will arise from time to time in which the trial examiner's ruling on evidence may be of such critical importance that error would require a complete repetition of the proceedings, yet it is questionable whether interruption of many hearings is not too high a price to pay for securing prompt reversal of the occasional error of a grave nature. And there is a clear measure of inefficiency in having the Commission familiarize itself with a case at several stages, as is necessary if it is itself to rule wisely on questions relating to the relevancy of proffered proofs.

THE PROGRESS OF THE HEARING—EVIDENCE

It is customary that the Commission's trial counsel, a member of the Chief Counsel's staff, presents the evidence in support of the complaint at the outset of the hearing, and that the respondent's case is put forward thereafter. This order is frequently abandoned, however, in proceedings involving hearings in different parts of the country. Where a second trip to a distant point may be thereby avoided, the respondent is often permitted to examine one or more of his witnesses before the Commission's attorney has rested his case. Similarly, the Commission's attorney sometimes rests with the understanding that he may examine one or more witnesses on designated subjects at a later date. Such departures from the customary order of procedure are usually agreed to by the attorneys, although the trial examiner may permit it without agreement.

In still other respects, the hearing procedure is somewhat more flexible than procedure at law. Thus, it is said that examination is often permitted before a sufficient foundation for the witness' testimony has been laid, on the promise of counsel to produce the qualifying evidence at a later date and with the understanding that the testimony will be stricken or the exhibit withdrawn if this is not done. For example, an expert may be allowed to base an opinion on a stated formula which has not yet been introduced in evidence, or a paper may be identified and received before its relevancy has been shown.

Neither the Federal Trade Commission Act nor the Clayton Act makes any provision concerning the kind of evidence the Commission may receive, or what, or how, rules of evidence shall be applied in hearings. Except in one minor respect, none of the Commission's Rules of Practice relates to the admissibility of evidence. Furthermore, the Commission's treatment of the traditional rules of evidence has been the subject of judicial discussion in but one case, *John Bene & Sons, Inc., v. Federal Trade Commission* (299 Fed. 468 (C. C. A. 2d, 1924)). Upon a petition to review the order to cease and desist, the question was raised as to whether the Commission was restricted to the taking of legally competent and relevant testimony.⁴⁷ The court held that it was not. It said:

We incline to think that it is not by the statute, and, having regard to the exigencies of administrative law, that it should not be so restricted. We are of

⁴⁷ The Commission had ordered John Bene & Sons, who made and sold hydrogen peroxide, to desist from circulating statements, found by the Commission to be false, concerning "Daxol," a competing preparation. At the hearing the Commission took the opinion evidence of a lay witness as to the uses of the two solutions; permitted the same witness, who became stockholder and director of the Daxol Corporation after the situation had developed, to testify to antecedent events not within her knowledge; allowed this same witness to testify to correspondence antedating her connection and as to the contents of books never produced; and the Commission took testimony concerning the chemical contents of a solution supposed to be, but not identified as, "Daxol."

the opinion that evidence or testimony, even though legally incompetent, if of the kind that usually affects fair-minded men in the conduct of their daily and more important affairs, should be received and considered; but it should be fairly done.

The Commission's present attitude with respect to the application of the rules of evidence has been described to us as follows:

The rules of evidence as used in judicial tribunals, particularly in equity proceedings, are sought to be applied in the Commission's hearings. However, the application of the rules of evidence is adapted where necessary by the trial examiner to the special requirements of such hearings to permit a fair and complete presentation of the material facts. The fundamental principles of the law of evidence are not departed from, neither are meticulous applications of the rules of evidence allowed for purposes of obstruction or evasion.

It is apparent from the above statement that the Commission does not profess to apply rigidly the same standards of admissibility as are applied in courts of law. Yet, in view of the fact that all the Commission's trial examiners are attorneys long trained in the discipline of the traditional rules of evidence, it would be surprising to find significant deviations from these rules except in regular patterns which may be said to be "of the kind that usually affects fair-minded men in the conduct of their daily and more important affairs."

The very nature of the Commission's work requires, however, a somewhat more hospitable attitude toward the reception of evidence than might be encountered in ordinary civil actions. In general, the relevancy of any particular evidence must be determined in relation to the pleadings. In the conventional lawsuit, the evidence must be related to establishing or disproving one or more of those ultimate facts which constitute the claim of one party against the other. Where the Commission has instituted a proceeding under section 5 of the Federal Trade Commission Act to prevent the use of unfair methods of competition or unfair or deceptive acts or practices, the range of relevant testimony is much broader. As a basis of jurisdiction in any proceeding under section 5, the Commission must find that "a proceeding by it in respect thereof would be to the interest of the public." Since there has been judicial intimation that this phrase is more than mere exhortation to the Commission,⁴⁸ trial examiners may properly admit evidence on many matters which might otherwise be irrelevant, such as comparative prices, distribution, scope of business, method of manufacture, origin of goods, extent of advertising, territory covered, volume of business, effect of oppressive or deceptive methods upon consumers, existence and extent of small losses to a number of consumers, and generally the effects of the method on members of the public.⁴⁹ Even where the complaint does not allege that a product is injurious to users or that a medicine is dangerous when used without expert advice, testimony to this effect may be received to show public interest. Similarly, in a proceeding under sections 2 or 3 of the Clayton Act where the gist of the complaint is injury to competition, a wide range of evidence must be admissible to prove the existence of competition and injury thereto.

⁴⁸ *Federal Trade Commission v. Klemer* (290 U. S. 19 (1933)): "To justify filing a complaint, public interest must be specified and substantial. The Commission's action in authorizing the filing of a complaint, like its action in making an order thereon, is subject to judicial review. The specific facts established may show, as a matter of law, that the proceeding which is authorized is not in the public interest, within the meaning of the act. If this appears at any time during the course of the proceeding before it, the Commission should dismiss the complaint."

⁴⁹ The introduction in evidence of a document containing both relevant and irrelevant matter is governed by rule XIX, which provides that "Where relevant and material matter offered in evidence is embraced in a document containing other matter not material or relevant and not intended to be put in evidence, such immaterial or irrelevant parts shall be excluded, and shall be segregated insofar as practicable."

PROCEEDINGS AFTER THE RECORD IS CLOSED

Parties have no opportunity for oral argument upon the completion of the taking of testimony, nor are they permitted to file briefs, before the trial examiner.

Although the trial examiner does not hear oral argument in the usual sense, as a review of the evidence and an argumentative weighing of the evidence and the inferences properly to be drawn therefrom, counsel may make a brief statement upon the record at the opening of the case, or at such other times as the trial examiner deems proper, setting forth his contentions and the theory under which he proposes to try the case.

The Commission's practice does not provide for the submission by the parties, as a matter of right, of proposed or requested findings of fact. However, an analogous procedure is authorized in the discretion of the trial examiner by rule XV. That rule authorizes the trial examiner, when in his opinion the size of the transcript or the complication or importance of the issues involved warrants, either on his own motion or at the request of counsel at the close of the taking of evidence, to announce to all parties that he will receive statements in writing from the respective parties setting forth in concise outline the contentions of each as to the facts proved in the proceeding. The trial examiner fixes a time, which varies from case to case, within which he will receive such statements. The rule specifically provides that the fixing of such a time shall not operate to extend the period for the filing of the trial examiner's report. The sole function of such statements of fact is to assist the trial examiner in preparing his report upon the evidence, and they are not transmitted to the Commission. Such statements are not exchanged between counsel, are not argued before the trial examiner, and are not a part of the record of the proceeding.⁵⁰ Counsel rarely seek permission to file such statements with the trial examiner, although permission is invariably given when it is sought; indeed, the trial examiners frequently request such statements from counsel for both sides.

THE TRIAL EXAMINER'S REPORT

Upon the completion of the taking of testimony and after the filing of statements of fact, where this is done, the trial examiner prepares his report upon the evidence. Rule XIII provides that the trial examiner shall make his report upon the evidence within 15 days after receipt by him of the complete stenographic transcript of all the testimony in the proceeding. Additional time may be allowed by the Commission, however, where necessary because of the length of the record or the nature of the issues involved. Ordinarily, where the trial examiner knows that he will be unable to complete his re-

⁵⁰ A complete stenographic record is made of all proceedings in hearings upon complaints issued by the Commission. A contract for the reporting of all of the Commission's hearings throughout the United States is awarded annually to a public reporting agency. In all cases, the stenographic record is transcribed for the use of the Commission and its staff, and any person may obtain copies of the transcribed record from the official reporter at the rate fixed in the Commission's contract.

The transcript of the testimony includes motions and objections directed to the evidence and a brief statement of the grounds therefor. Argument on motions and objections is not included in the transcribed record.

Attempts are sometimes made by the trial examiner, or by the attorneys for the Commission and the respondent through stipulation, to limit the amount of cumulative testimony or exhibits to be introduced into the record. Transcribed records of unusual length may also be shortened by stipulation of parties or counsel, prior to submission of the case to the Commission for final decision.

port within 15 days, he will defer closing the record for such time after the final hearing as will enable him to complete his report within 15 days from the time when he does close the record. Copies of the trial examiner's report are served upon each attorney for the Commission and for respondents, and upon each respondent not represented by counsel. The status of the trial examiner's report is described by rule XIII as follows:

The trial examiner's report upon the evidence is not a decision, finding, or ruling of the Commission. It is not a part of the formal record in the proceeding, and is not to be included in a transcript of the record.

The trial examiner's report is considered a confidential document and is not available for public inspection.

The functions of the trial examiner's report may be said to be two: First, as to questions of fact, to acquaint the Commission with the conclusions of the person who has conducted the hearing and observed the witnesses; secondly, to sharpen the critical issues so that the Commission's attorney and the respondent may present to the Commission an argument addressed to the points of basic discord. The extent to which these functions are actually performed varies considerably from case to case.

Reports of trial examiners are required to be captioned "Trial Examiner's Report Upon the Evidence." All examiners' reports are commenced by a reference to the charges in the complaint. Sometimes this reference consists only of a brief statement to the effect, say, that the respondent is accused of selling goods upon the condition that the purchaser will not deal in the products of the vendor's competitors, in violation of section 3 of the Clayton Act. In other reports, the reference to the complaint consists of a several page synopsis of the allegations of the complaint. In some examiners' reports, the reference to the charges is followed by an outline of the respondent's answer or a statement of the matters admitted in the answer, while other reports make no such reference to the answer.

The evidence is not ordinarily discussed pro and con the various issues. Usually, the report consists of a narrative statement of the facts found, supported by citations to the transcript of the testimony and exhibits. Frequently, these citations to the record include references under the heading of "Contra"—thus indicating a conflict in evidence. Some trial examiners' reports do not present the factual picture in narrative form, but merely summarize separately the testimony of the various witnesses, without making a specific finding as to the "ultimate" facts in issue. And while some of the reports state the practices found to be followed by the respondent and the effects of these practices upon the respondent's competitors, in others one finds only general conclusions broadly stated, as, for example, that—

the effects of the aforesaid discriminations in the sale of bakers yeast have been, or may be, substantially to lessen competition or to injure, destroy, or prevent competition in the manufacture, sale, and distribution of bread and to tend to create a monopoly in the favored customers receiving the aforesaid discriminatory prices from the respondent.

If the intermediate reports are to be of real utility to the parties, the Commission should promptly look to their more adequate formulation. As indicated, some of them purport to be little more than summarizations of the testimony of the several witnesses. Such

summarizations, if carefully and fairly made, have value for one too busy to read the entire record. But they do not effectively focus the parties' dispute, so that appellate proceedings (as proceedings before the Commission should be in effect, though they are not so in law) may be addressed to narrowed areas of conflict. The trial examiner's report on the facts, it is recommended, should involve an analysis of the component parts of the case, so that findings may be made on each issue which has relevance to the ultimate conclusion. Each finding should, for the sake of the Commission as well as the parties, be followed by a synopsis of, or at least a reference to, the pertinent portions of the record; and, where the examiner's judgment was influenced by his observation of the witnesses, an effort should be made to embody in the report the impressions which cannot be derived from a mere unaided reading of the record.

Even this vitalization of the report on the facts may not be enough. There is at present no instrumentality for presenting to the parties a statement of the conclusions of law to be drawn from the facts as found, for the trial examiners' reports do not include any recommendations as to the disposition of the case nor any discussion of questions of law. Consideration should be given the question whether there should not be added to the intermediate report a responsible indication of the Commission's tentative attitude toward the case. Since demeanor evidence may be of material significance in Federal Trade Commission cases, it is not proposed that the intermediate report be formulated without reliance upon the trial examiner's opinions concerning the weight of testimony. It is submitted, however, that an intermediate report would be of maximum utility if it were to embody a thorough appraisal of the evidence by the trial examiner and a careful statement of the legal implications by his superiors. A report so formulated would furnish a really sturdy framework for argument to and consideration by the Commission at the decisive stage of the case.⁶¹

EXCEPTIONS

Persons served with copies of the trial examiner's report are given the right, pursuant to rule XIV, to file written exceptions to the report within 10 days after its receipt. The form of exceptions is prescribed by rule XIV as follows: "They shall specify the particular part or parts of the report to which exception is made, and the exceptions shall include any additional facts which the person filing the exception may deem proper. Citations to the record shall be made in support of the exceptions."⁶² The "additional facts" which may be included in the exceptions does not refer to evidentiary matter which is not in the record, but rather to findings of fact which the exceptor insists should have been, but were not, made by the trial examiner on the basis of the record.

⁶¹ The Commission has expressed the belief that any such alteration of existing methods would be undesirable because—

1. By issuing a complaint, the Commission has already made known its "tentative attitude."
2. Such a procedure would involve a study of the record and the law by the Commission at an intermediate stage of the proceeding.

3. The expression of such tentative opinions prior to briefing and oral argument would incur the charge that the Commission had prejudged the case.

⁶² The Commission has not rigidly adhered to its rules governing the form of exceptions, but has, where respondents were not represented by counsel, permitted the filing of exceptions in the form of a letter from the respondent.

While nothing in the rules requires that exceptions be exchanged between counsel, this is always done in practice. If exceptions to the trial examiner's report are filed by the Commission's attorney, such exceptions are served by the Commission upon all respondents or their attorneys. The exceptions filed by parties other than the Commission's attorney are made available to the attorney for the Commission even if not "served."

A failure to file exceptions does not limit the issues or the scope of argument before the Commission to those findings in the trial examiner's report to which exceptions have been taken, nor is the Commission in any way bound by findings of the trial examiner acquiesced in by the parties. Hence, where the findings or failures to find are favorable to the respondent, he theoretically may be lulled into a mistaken sense of security. Generally, however, the respondent is, by the exceptions of the Commission's trial attorney, given notice that the examiner's findings are not to go unchallenged; and it is said that the Commission would not ordinarily question the basis for a finding of fact by the trial examiner which was unchallenged by either party.

BRIEFS

Briefs may be filed with the Commission as a matter of right in proceedings contested upon the facts. It will be recalled that under rule VII the respondent may file an answer admitting all the material allegations of fact charged in the complaint and waiving hearing thereon, and at the same time apply to be heard by brief, in oral argument, or both, on the question whether the admitted facts constitute the violation of law charged in the complaint. While under rule VII the opportunity to file briefs and argue before the Commission in this particular class of cases lies in the Commission's discretion, such applications are invariably granted.

All briefs are filed prior to oral argument before the Commission. The rules governing the filing, contents and form of briefs are set forth in rule XX. Briefs must be filed with the Commission's Secretary within the following times: The opening brief in support of the complaint must be filed by the Commission's trial attorney within 20 days after service upon him of a copy of the trial examiner's report; the respondent's brief must be filed within 20 days after service upon respondent or his attorney of a copy of the brief in support of the complaint; reply briefs in support of the complaint, if permitted by the Commission, must be filed within 10 days after the filing of respondent's brief. A brief in support of the complaint is always filed in proceedings in which the facts are contested. Where permitted by the Commission, the Commission's trial attorney may file a reply brief in support of the complaint. The reply brief must be strictly in answer to the respondent's brief. Respondents are not permitted to file reply briefs.

Briefs tendered after the expiration of the designated periods may be filed only by special permission of the Commission. Rule XX specifically states that the appearance of additional counsel in a case will not constitute grounds for extending the time for filing briefs. Under rule XV, the receipt by the trial examiner of statements of fact does not operate to extend the time for filing of briefs.

ORAL ARGUMENT

Oral argument before the Commission is governed by rule XXI, which provides that oral arguments be had only as ordered by the Commission on written application by the Commission's Chief Counsel or by the respondent or his attorney. Application for oral argument must be filed within 15 days after the filing of respondent's brief. It is the Commission's practice to permit oral argument in contested proceedings whenever requested by respondents.

If oral argument is ordered by the Commission, the oral argument in support of the complaint is ordinarily presented by the same trial attorney who handled the Commission's case before the trial examiner, although there is no fixed requirement to this effect or to the effect that the trial attorney should or should not be present at the oral argument before the Commission. Other members of the Commission's staff are permitted to attend the oral argument before the Commission, as is the general public.

Oral argument is customarily made to the full membership of the Commission. If all of the members of the Commission are not present, oral argument is never heard by less than a majority (three) of the Commissioners, except in an exceptional case where, due to unforeseen absence or illness, less than three Commissioners are able to be present at the time set for argument, in which event, upon the request of the respondent but not otherwise, argument may be heard by less than three Commissioners.

Argument in support of the complaint is first presented by the Commission's attorney, followed by argument on behalf of the respondent. A brief time is allowed for reply by the Commission's attorney. Further argument by respondents is not generally permitted. The time allotted for argument varies somewhat with the nature of the case and the complexity of the matters in issue, although the Commission ordinarily allows approximately a half hour to each side. If there are two or more respondents, they divide the time as they see fit.

Oral argument before the Commission is limited by the scope of the proceedings before the trial examiner in the sense that such argument may not be based upon facts outside the record. As noted previously, argument is not limited to those issues as to which dissent has been indicated by way of exceptions to the trial examiner's report, but if any party justifiably should claim to be taken by surprise by argument directed to material findings of fact made by the trial examiner to which exceptions had not been taken, the Commission might take such action as would give the surprised party an opportunity to reply. The Commission will consider, on brief and oral argument, alleged error in the conduct of the hearings even though the objecting party did not take exception at the time the alleged error was committed, if it appears that the error was material, that failure to correct it would be prejudicial to the objecting party, and that the raising of the objection before the Commission rather than when the error was committed was not merely for the purpose of delay. The Commission may entertain a motion to strike portions of the record or may, at the request of a party or on its own motion, reopen the hearings to permit the taking of further testimony.

DECISION

After the submission of briefs and oral argument, the Commission reserves its decision until it can consider the record, briefs, and argument. The entire record of the proceeding, together with the trial examiner's report, the exceptions thereto, and briefs, is assigned to one (or sometimes more than one) Commissioner for study. Copies of the trial examiner's report, exceptions, and briefs are distributed to all the Commissioners. In important cases, the record is frequently circulated among all the members of the Commission. The member (or members) of the Commission to whom a case is referred for study reports the case back to the full Commission in executive session with recommendations as to the disposition to be made of the case. The case is decided only after discussion by the full Commission. While exact information is not available, it is said that in "a considerable majority" of the cases the Commission concurs in the single member's recommendation.

The Commission does not, as do some other agencies, call upon an opinion or review section to prepare a report or a draft opinion in cases pending before it for final decision. The Commission does occasionally refer a case to its Chief Counsel for comment on particular questions of law before it makes its decision; but no digest or summary of the evidence (other than the trial examiner's report) is prepared by staff members for the Commission's use at this time, except that individual members of the Commission may, like the judges of appellate courts, utilize the services of personal law clerks. The Chief Counsel, in passing upon such questions of law, does not confer with members of his staff who have previously been connected with the case.

Occasionally, but not as a regular matter, the Commission calls upon the trial examiner to answer questions regarding the facts or the conduct of the hearings. This practice seems defensible inasmuch as the trial examiner has had an opportunity to observe the witnesses and the presentation of the evidence, and, indeed, is intended to serve as the "eyes and ears" of the Commission for that purpose. Since the benefits of observation are not always reflected in the trial examiner's reports, the impressions of the presiding officer are lost unless embodied in a confidential trial examiner's report or related orally to the Commission.

Under both the Federal Trade Commission Act and the Clayton Act, if the Commission decides that the law has been violated, it is required to make a report in writing stating its findings as to the facts and then to issue a cease and desist order. After the Commission has reached such a decision, the case is referred back to the trial examiner who heard the case in the first instance to prepare findings of fact. The trial examiner prepares and submits tentative findings of fact which are referred, together with the record, to the Chief Counsel for the preparation of a tentative order to cease and desist. After the Commission has considered and approved (perhaps with changes) the tentative findings of fact and order, the findings of fact and order are served upon all the parties to the proceeding in the same manner as a complaint. At no time are the tentative findings of fact and order submitted to the parties prior to service in the finally approved form. The final order and findings of fact are matters of public record.

published in the volumes of the Commission's decisions and available, in mimeographed form, to the public upon request.

The practice of having the findings of fact prepared by the same trial examiner who heard the case in the first instance may be objectionable. The trial examiner has not heard the argument before the Commission and ordinarily has not participated in its deliberations. Consequently, much of the utility of the oral argument before the Commission is lost, except in so far as the argument is embodied in the parties' briefs, since no matter how detailed his instructions may be the examiner must depend largely upon his own independent reactions.

The Commission asserts that adequate control is maintained over the draftsman of its findings, by reason of its careful review of his handiwork, when it is presented for final approval. But the effectiveness of this review is open to at least a measure of doubt, for the drafted findings are considered by the Commission only after an elapse of time has blurred the sharpness of the Commissioners' recollection of the case—a factor whose importance is perhaps emphasized by the circumstance that ordinarily no more than one of the Commissioners read the record when the case was first discussed.

With busy tribunals like the Federal Trade Commission it has become fashionable in late years to insist that tasks of adjudication must be largely, if not quite wholly, delegated to subordinates. In the case of the Commission, however, one is tempted to advance the altogether heretical view that the tribunal should, instead of delegating the task, formulate the reasons for its own decisions with the same measure of personal responsibility that attaches to judicial determinations. In the year 1937-38, there came before the Commission 148 cases in which the facts were contested; in addition, 98 cases were considered in which the facts were not in dispute by reason of the filing of answers admitting the allegations of the complaint or because stipulations as to the facts were entered into by respondents and the Commission's attorneys. While in this latter group of cases the legal significance of the admitted or stipulated facts could have been argued before the Commission by brief or in oral argument, this question of law was but infrequently raised before the Commission; consequently, although precise statistics are lacking, most of the 98 cases in which the facts were not contested may be regarded as "consent decrees." During this year, then, a total of 246 cease-and-desist orders were issued; of this number, it may be roughly estimated that not more than 200 cases required the Commission's decision of contested questions. In an additional 13 cases, the Commission ordered that the complaints be dismissed on the merits. If this total of approximately 213 cases had been divided equally among the 5 Commissioners for decision writing, each would have been responsible for the preparation of some forty-odd decisions (exclusive of possible dissents). This total is large when compared statistically with the work of some of the major appellate courts.⁶² But the Commission, unlike the courts, is a tribunal operating within a specialized and limited juris-

⁶² Cf. Frankfurter and Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936* (51 *Harvard Law Review* (February 1938) 577, 606), in which the authors have computed the distribution of opinions among the Justices of the Supreme Court. During a 5-year period (1932-36), none of the Justices delivered in 1 year more than 26 opinions, excluding concurring and dissenting opinions, and the average was far lower. In the year 1936-37, the 9 Justices delivered 149 opinions, exclusive of concurring and dissenting opinions, an average of less than 17 opinions, and 80 cases were disposed of per curiam. During the same period, the Court disposed of 824 petitions for certiorari.

diction. Its familiarity with the problems recurrently presented to it enables it to develop patterns of decision as aids to rendition of judgment. While some cases are indubitably marked by questions of considerable difficulty, there are many other cases, especially in the false advertising field, which are to the Commission's mind the no longer novel reflections of matters which have gone before.

It may, however, be argued that the Commission is called upon to perform so many duties other than judging controverted cases that it must perforce impersonalize its process of decision. As matters now stand, the argument is a compelling one. The Commission is indeed a burdened tribunal, its available working energies absorbed by existing activities. But let it be said flatly that if a choice of activities must be made, if delegation of some functions is necessary to enable work to go on, the Commission should consider abandoning to others some of its present chores, so that it would be free to assume, appropriately, full responsibility for its decision in the disputed cases.

Let us recall some of the activities which now receive the attention first of one Commissioner, then of the full Commission:

1. The Commission passes on every recommendation of its subordinates relative to the disposition of investigated applications for issuance of complaints. No discretion is vested in the Commission's most responsible officers to sift out the cases which should properly receive the consideration of the Commission.

2. Stipulations to cease and desist, prepared by its own staff and accepted by respondents, must be examined and approved by the Commission before formal execution.

3. Stipulations supplanting other proof of the facts alleged in complaints, after they have been prepared and approved both by the respondent and by the Chief Counsel, must be submitted to the Commission for its approval.

4. Requests for subpoenas duces tecum must be passed upon in the first instance by the Commission, which must acquaint itself sufficiently with the case at hand to be able to pass on the materiality of the evidence whose production is sought.

5. Interlocutory appeals from trial examiners' rulings on evidence questions must be heard by the Commission, which must also occasionally consider the wisdom or unwisdom of trial examiners' decisions to adjourn a hearing to a different locality.

6. Cases in which respondents have defaulted and have made no defense, cases in which respondents have (after issuance of complaint) acknowledged their offense and indicated readiness to have an order entered against them, and like uncontested cases must go before the Commission for its formal consideration and decision.

7. After the Commission has discussed a case and has reached a conclusion concerning it, it refers to a trial examiner the task of preparing the findings and conclusions. His draft, when completed, serves as a basis for the preparation of an appropriate order under the General Counsel's supervision. Thereupon, the draft findings and order are referred to the Commission for review.

Many of these activities, concededly, do not by themselves bulk large in the Commission's operations. But, in the aggregate, they fill a considerable portion of the Commission's working time. In addition to the actual demands they make, they no doubt—and understandably enough—serve as a psychological deterrent to the

Commission's assumption of further responsibilities. If these duties, or some of them, were transferred to others who should be competent to discharge them, the possibility of the Commission's preparing its own decisions would be realizable.

With the encompassing of that change, and as an integral part of the contemplated reform, should come a heightened attention to the form and content of the decisions themselves. At the present time the Commission's findings of fact and order to cease and desist are issued as one document. The findings of fact are phrased formalistically in language which closely resembles the language of the complaint itself. In some cases, indeed, where the respondent's answer has admitted the material allegations of the complaint, the findings of fact are in the identical language of the complaint. In the absence of a narrative statement of facts, portraying the history and background of the problem, it is frequently impossible to appreciate just what business methods are involved in the case.⁵⁴ Similarly, the findings of fact ordinarily do not outline or otherwise refer to the respondent's defense or justification. This is not only unfair to the respondent as implying that there was no justification, legal, economic, or otherwise, for the practices in which the respondent is found to have engaged, but still further contributes to the impossibility of discovering the business background of the case.

The nakedness of the Commission's decisions extends not only to the facts, but also to questions of law. Except in a limited number of cases, the decisions contain no discussion of the principles of law under which the conduct in question is held to be illegal; neither is there any reference made to prior decisions of the Commission and the courts. The result is that most of the Commission's decisions are difficult to index usefully, and, except in very simple cases, are of indifferent value as precedents for attorneys and businessmen. In several cases involving the application of the Robinson-Patman Act, the decisions have included, in addition to findings of fact in the usual form, discussion and interpretation of the statute. Thus, one decision⁵⁵ contains a 13-page articulated, argumentative opinion which construes the statute after quoting copiously from the relevant legislative documents. In another case under the Robinson-Patman Act, the findings of fact were followed by a narrative résumé of the evidence, in which the Commission outlined certain principles of general application.⁵⁶ These cases indicate what the Commission could do in the building up of a jurisprudence of unfair competitive practices.⁵⁷

The development of law through the deciding of individual cases is a process both of inclusion and of exclusion. That is, it is important to understand what is permitted by law, as well as to know what is forbidden. Not only, therefore, should the Commission seek to develop a body of precedent based on its holdings that conduct has been improper, but also it should formulate, for their precedent value,

⁵⁴ For exceptions to this statement, see *In the Matter of Vanadium-Alloys Steel Co.* (1934) (18 F. T. C. 194); *In the Matter of Kraft-Phenix Cheese Corporation* (1937) (Docket No. 2935).

⁵⁵ *In the Matter of Atlantic & Pacific Tea Co.* (1938) (Docket No. 3031).

⁵⁶ *In the Matter of Standard Brands, Inc.* (1939) (Docket No. 2968).

⁵⁷ Two cases in which the Commission has written narrative opinions containing both clear statements of the business situation and a discussion of the applicable rules of law are *In the Matter of Vanadium-Alloys Steel Co.* (1934) (18 F. T. C. 194); *In the Matter of Walker's New River Mining Co.* (1934) (18 F. T. C. 176).

those decisions which are "adverse to the complaint."⁵⁸ Such decisions are now published in the bound volumes of the Commission's decisions under the heading of "Orders of Dismissal, Or Closing Case, Etc." Each case contains the name of the respondent, the charges in the complaint, and the Commission's order. Sometimes, the reason for the order is stated, such as that the respondent is no longer doing business or that the case has been settled by stipulation. In other cases, it is merely stated that the complaint is dismissed for failure of proof. A narrative statement of the circumstances in which a cease and desist order will not be issued would not be inappropriate.

The parties, the courts, and the Commission's own employees would be aided in their understanding of the Commission's decisions if the supporting reasoning were fully articulated, instead of merely implied.⁵⁹ Internal dissension and disagreement concerning the meaning of the law may explain the Commission's failure to prepare opinions in its early years. But those considerations are no longer operative; and too many of the Commission's counterparts produce reasoned opinions to permit entertaining the notion that, in the administrative process, there is no room for giving the reasons underlying judgment.

RULE MAKING

Although the Federal Trade Commission is an at least potentially important adjunct of the legislative process as an investigative agency of Congress,⁶⁰ its own substantive rule-making powers are narrowly limited. The Federal Trade Commission issues only two kinds of rules—trade practice rules and rules of practice to govern procedure in formal proceedings before the Commission. The Commission has not yet exercised the power conferred upon it by section 2 (a) of the Clayton Act (Robinson-Patman Act) to fix quantity limits for price differentials.⁶¹

⁵⁸ For two cases in which this has been done, see *In the Matter of Kraft-Phenix Cheese Corporation* (1937) (Docket No. 2935), and *In the Matter of Samuel Sirova, Inc.* (1938) (Docket No. 3210).

⁵⁹ It may be suggested, too, that insofar as there has been in the past a judicial distrust of the Federal Trade Commission, the distrust is at least partially attributable to the inadequate form of the Commission's decisions. Compare McFarland, *Judicial Control of the Federal Trade Commission and the Interstate Commerce Commission* (1933) 178: "Although the courts themselves have not remarked the absence of argumentative opinions and even where findings are made have either ignored them or have subjected them to an almost metaphysical consideration, the absence of an extended administrative report on each case confirms what, in some cases, is a judicial conviction that administrative process is particularly open to the suspicion that careful consideration has not been given the evidence."

A discussion of the enforcement and judicial review of Federal Trade Commission orders may be found in the appendix, *infra*, p. 35.

⁶⁰ Sec. 6 of the Federal Trade Commission Act empowers the Commission among other things—

1. To investigate the organization, business, practices, and management of corporations engaged in interstate commerce.

2. To require the filing of reports by such corporations.

3. To investigate the manner of compliance with decrees entered under the antitrust laws; the Commission must make such investigations if requested by the Attorney General.

4. Upon the direction of the President or pursuant to a concurrent resolution of both Houses of Congress to investigate and report the facts relating to any alleged violations of the antitrust laws by any corporation.

5. To publish such information and to make annual and special reports to Congress and to submit therewith recommendations for additional legislation.

See Handler, *The Constitutionality of Investigations by the Federal Trade Commission* (1928) 28 *Columbia Law Review* 708, 905.

⁶¹ This section prohibits discrimination in price between different purchasers of commodities of like grade and quality where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person, who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. The act provides that the general prohibition against price discrimination shall not extend to differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery, resulting from the differing methods or quantities in which such commodities are sold. At this point, the act empowers the Commission "after due investigation and hearing to all interested parties, to fix and establish limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce, and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established" by the Commission. The Commission has not yet publicly defined the procedure to be used if and when this power is exercised.

RULES OF PRACTICE

Section 6 (g) of the Federal Trade Commission Act authorizes the making of "rules and regulations for the purpose of carrying out the provisions of this act." Pursuant to this authority, the Commission has promulgated Rules of Practice which govern the procedure in formal proceedings instituted by the Commission. Rules of Practice are issued and amended by the Commission with the advice of the Chief Counsel, and without prior notice to the public or opportunity for hearing upon the proposed rules or amendments. The Commission has published its rules of practice in a pamphlet entitled "Rules, Policy and Acts," which is available to the public without charge, and a copy of which is sent to every respondent at the time of service of the complaint. The rules of practice are also published in the Commission's annual reports. Amendments to the rules of practice are published in the Federal Register.

TRADE PRACTICE RULES

If administrative rule making is defined as the promulgation of detailed regulations in furtherance of a statutory policy, pursuant to authority conferred by that statute, the Commission's Trade Practice Rules should be classified perhaps as "Advisory Interpretations" rather than as "Rules." Nothing in the statutes administered by the Commission makes any provision for the promulgation of rules applicable to whole industries. Nevertheless, the legislative history of the Federal Trade Commission Act abounds with indications that the then proposed Commission was expected to do more than institute formal adversary proceedings in the clarification of the law of unfair competition. The Trade Practice Rules represent a partial realization of those expectations. Trade practice rules are drawn up jointly by the Commission and the members of a given industry for that industry, and are divided into group I and group II rules. Group I rules comprise definitions, drawn in terms of the particular industry's problems, of unfair methods of competition and unfair or deceptive acts or practices prohibited by the statutes administered by the Commission as construed in previous decisions of the Commission or the courts. Thus, the Group I Trade Practice Rules for the fur industry relate to such practices as misrepresentation of products, misrepresentation of the geographical origin of furs, deceptive substitution of furs, false invoicing, defamation of competitors, and inducing breach of contract. The group I rules, being merely particularized restatements, are not intended to make unlawful any act which is not unlawful under the Federal Trade Commission Act or the Clayton Act. That is, violation of a group I rule constitutes a violation of law, but solely for the reason that the method, act, or practice declared by the rule to be an unfair trade practice is unlawful under a controlling statute. Accordingly, group I rules have no force or content except in so far as they constitute an accurate statement of the statutory prohibitions; they serve as interpretations of existing law, not as additions to its substantive content. This is evidenced in complaints issued by the Commission in cases arising out of non-observance of a group I rule, in that the complaints make no reference to the rule but charge violations of the applicable statute.

Group II rules are described by the Commission as follows:

The trade practices embraced in these group II rules are considered to be conducive to sound business methods and are to be encouraged and promoted individually or through voluntary cooperation exercised in accordance with existing law. Nonobservance of such rules does not, *per se*, constitute a violation of law. However, the failure to observe them under certain circumstances may result in an unfair method of competition contrary to law.⁶² In such event, a corrective proceeding may be instituted by the Commission as in the case of violation of group I rules.

There are no cases in which the Commission had instituted formal proceedings solely on the basis of a violation of a group II rule.

TRADE PRACTICE CONFERENCE PROCEDURE

The joint formulation of trade practice rules by the Commission and the members of an industry is effected through the trade practice conference procedure, which is outlined in rule XXIV of the Commission's Rules of Practice. Rule XXIV provides that trade practice conference proceedings may be authorized by the Commission upon its own motion or upon application therefor, whenever such proceedings appear to the Commission to be in the interest of the public. Most trade practice conferences originate in requests for such action by members of an industry, either individually or as trade associations.⁶³

The Division of Trade Practice Conference is charged with the conduct of the various activities relating to the formulation of trade practice rules. Applicants for trade practice conference proceedings frequently confer with the Division staff, who also conduct an independent investigation by communicating with members of the industry and collecting data relative to conditions in that industry. If it appears, after consideration, that the promulgation of trade practice rules will be in the public interest, the Division recommends to the Commission that the holding of a trade practice conference be authorized. In most of the cases in which the Commission takes the initiative in instituting trade practice conference proceedings, this action has been preceded by the filing with the Commission of a number of complaints concerning the particular industry; investigation of these complaints has shown the prevalence of the practices complained of and a desire on the part of many members to "clean up" the industry; in such a situation, the trade practice conference procedure offers an opportunity for simultaneous abatement of the illegal practices. In these cases, also, the Division of Trade Practice Conferences conducts a preliminary study prior to the authorization of a trade practice conference.

⁶² For a brief period, some of the group II rules contained a provision known as the Clandestine Rule, in the following terms: "That the clandestine violation of any of said resolutions, those accepted by the Federal Trade Commission merely as expressions of the industry, as well as those approved by said Commission, shall be deemed unfair methods of competition." This rule was short lived, being adopted in October 1923, and rescinded in May 1929. The so-called Clandestine Rule never served as the basis for the institution of formal proceedings by the Commission.

⁶³ Rule XXIV requires that such applications be in writing and contain, so far as possible, the following information:

1. A brief description of the industry, trade, or subject to be treated.
2. The kind and character of the products involved.
3. The size or extent and the divisions of the industry or trade groups concerned.
4. The estimated total annual volume of production or sales of the commodities involved.
5. List of membership of the industry or trade groups concerned in the matter.
6. A brief statement of the acts, practices, methods of competition, or other trade practices desired to be considered, or drafts of suggested trade practice rules.
7. Evidence of authority to so act, where the application is signed by a person or organization acting on behalf of others.

If the Commission authorizes the holding of a trade practice conference, public notice is given of the time and place of the conference. The Division mails a notice of the conference to all members of the industry whose names and addresses are available. This letter of notification invites the members of the industry to attend the conference and outlines briefly the purpose of the conference and some of the subjects suggested for discussion. Assurance is given that at the conference charges will not be brought against particular members of the industry. Trade practice conferences are usually presided over by a member of the Commission, or, more rarely, by the Director of the Division of Trade Practice Conferences. Conferences are held at places which are most convenient to the industry in question, usually outside of Washington; they rarely last longer than 1 day.

Prior to the opening of the conference, a proposed draft of trade practice rules is prepared by the Division. This draft is not sent out with the notice of the conference, but is available in mimeographed form to the members of the industry at the opening of the conference.

The conference is opened by a statement from the presiding Commissioner outlining the method of procedure and the results which may be expected from the conference. The draft rules prepared by the Division serve as a basis for discussion and as general agenda, since the Commission has learned from experience and from its preliminary study what general subjects should be included in the trade practice rules. Every interested person may express his views in support of, or in opposition to, the draft rules, or he may submit amendments to the draft rules, or rules which he has prepared himself (except that price-fixing proposals are taboo). The procedure is parliamentary in nature, rather than adversary. Persons participating in the proceeding are neither under oath, nor subject to cross-examination. Participants may question any speaker or themselves speak in reply. Anyone may submit statistical tables or other data bearing on the problems of the industry. The presiding official often encourages discussion by calling for expressions of opinion from the more intelligent and articulate members present. A stenographic record is made of the conference proceedings.

Upon the closing of the conference, the transcript of the proceedings, together with all resolutions and proposed rules and amendments, is considered by the Division of Trade Practice Conferences. The Division's recommendations are forwarded to the Commission, along with the transcript and other materials. The Commission, after consideration of the matter in the light of the conference proceedings and the Division's recommendations, formulates tentative trade practice rules, including both group I and group II rules. In the course of drafting these tentative rules, the Commission frequently consults with the Director of the Division and his assistant, but does not consult with members of the industry.

Pursuant to rule XXIV, the Commission makes public the tentative rules and provides an opportunity for hearing to interested parties. The text of the tentative rules is made public through the press, including trade journals, and is mailed to those industry members whose names and addresses are available. A hearing is set down for a designated place and time, usually 15 to 30 days after notice. In addition, all interested persons, including consumers, may submit written objections or suggestions, as well as appear at the hearing. Hearings are

held before the Trade Practice Board, which consists of the Director and Assistant Director of the Trade Practice Conference Division. The hearings are usually attended by fewer persons than attend the conference. A stenographic record is kept of the proceedings at the hearing, and is forwarded to the Commission, together with the recommendations of the Division.

In the formulation of trade practice rules, the Commission does not restrict itself to the information obtained during the conference and hearing, but may further inform itself through special inquiries and consultation with members of its staff. Since the rules are regarded as merely interpretations of settled principles of law, there appears to be no reason why the Commission should consider only the information adduced at the conference and at the hearing.

Rule XXIV provides that trade practice rules, as finally approved by the Commission, shall be promulgated by order of the Commission and published in the Federal Register. Copies of the final rules are made available to the public at the Commission's offices. The Commission also mails a copy of the rules to each member of the industry whose name and address is available, together with an acceptance form upon which each member may signify his intention to observe the rules in the conduct of his business. The rules become effective upon promulgation and publication, or at the time specified therein.

The acceptance form reads as follows:

A copy of the trade practice rules, as promulgated by the Commission for the ----- Industry, under date of -----, has been received, and it is our intention to observe such rules in the conduct of our business. Signed.

The acceptance is not binding in a contractual or any other sense, but is thought to carry a certain psychological sanction. It is also regarded as affording a measure of the degree to which the rules are acceptable to the industry as a whole.

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.⁶⁴ Upon the

⁶⁴ *Rulisten Co. v. Federal Trade Commission* (42 F. (2d) 430, affirmed on other grounds, 288 U. S. 643 (1933)); *Algonac 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, 1938), 94 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 nonconcurrency 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 (e).....	1		1 complaint, sec. 3 (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 (e).....	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.
	3	To Chief Trial Examiner for stipulation; Chief Trial Examiner recommends closing.	3 closed.
Stipulation (10).....	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.